UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

Case No.: IT-95-10-A

Date: 5 July 2001

Original: English

IN THE APPEALS CHAMBER

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

Registrar: **Mr. Hans Holthuis**

Judgement of: **5 July 2001**

PROSECUTOR

v.

GORAN JELISI]

JUDGEMENT

Counsel for the prosecution:

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

Counsel for the defence:

Mr. William Clegg
Mr. Jovan Babi}

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The Appeals Chamber of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 ("the International Tribunal" or "the Tribunal") is seized of two appeals against the judgement rendered by Trial Chamber I orally on 19 October 1999 and in writing on 14 December 1999 in the case of *Prosecutor v. Goran Jelisi}*.[1]

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

HEREBY RENDERS ITS JUDGEMENT.

[1] *Prosecutor v. Goran Jelisi},* Case No.: IT-95-10-A.

I. INTRODUCTION

A. Procedure before the Trial Chamber

1. The initial indictment against Goran Jelisi} alleged crimes of genocide, grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war and crimes against humanity committed in May 1992 in the municipality of Br~ko in the north-eastern part of Bosnia and Herzegovina.[2]

2. Following discussions between the parties at the pre-trial stage, an agreement setting out the factual basis was signed by the parties on 9 September 1998 ("the agreed factual basis").[3] Subsequently, on 20 October 1998, a second amended indictment was filed ("the second amended indictment").[4] On 29 October 1998, Jelisic pleaded not guilty to the genocide count and guilty to thirty-one counts comprising violations of the laws or customs of war and crimes against humanity. Trial proceedings were, therefore, scheduled to deal with the count relating to genocide.

3. The trial commenced on 30 November 1998, but was suspended on 2 December 1998, due to the illness of one of the Trial Judges. The Trial Chamber, accordingly, considered rendering its decision and passing a sentence on the guilty pleas and postponing the genocide trial until a later date. Discussions between the parties on this issue were held at a status conference on 18 March 1999.[5] The prosecution agreed to the proposal.[6] However, the defence objected to the suggestion of separate sentencing procedures on the basis that, *inter alia*, during the forthcoming trial on genocide the witnesses called by the prosecution might present evidence that could be used in mitigation of sentence.[7]

4. The trial resumed on 30 August 1999 and the prosecution completed its presentation of evidence on 22 September 1999. A status conference was held following the examination-in-chief of the last prosecution witness and the matter adjourned to re-start with the defence case on 8 November 1999; the defence was also asked to confirm to the Senior Legal Officer whether it intended to file a motion for judgement of acquittal pursuant to Rule 98*bis* of the Rules of Procedure and Evidence of the International Tribunal ("the Rules").[8] It later replied in the negative

[2] The initial indictment was confirmed on 21 July 1995. At the request of the prosecution, all the charges based on Article 2 of the Statute, grave breaches of the Geneva Conventions of 1949, were withdrawn and an amended indictment was filed on 13 May 1998.
[3] Agreed factual basis for guilty pleas to be entered by Goran Jelisi}, 9 September 1998.
[4] Second amended indictment against Goran Jelisi} and Ranko ^e{i}, 19 October 1998, paras 14-36.
[5] Provisional transcript of the trial proceedings in *Prosecutor v. Goran Jelisi},* Case No.: IT-95-10-T ("the trial transcript"), 18 March 1999, pp. 275-280.
[6] *Ibid.*, p. 280.
[7] *Ibid.*, p. 286.
[8] *Ibid.*, 22 September 1999, p. 2311 (closed session).

by way of fax dated 1 October 1999. However, prior to the commencement of the defence case, the Trial Chamber informed the parties by way of notice from the Registry, on 12 October 1999, that it would render a judgement pursuant to Rule 98*bis*(B) of the Rules. This Rule requires the Trial Chamber to "order the entry of judgement of acquittal [...] if it finds that the evidence is insufficient to sustain a conviction on that or those charges". On 15 October 1999, the prosecution filed a motion to postpone the Trial Chamber's decision until the prosecution had been given the opportunity to present arguments ("the motion to be heard").[9]

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

B. Procedure before the Appeals Chamber

6. Both parties have appealed. Following the Trial Chamber's oral judgement, the prosecution filed an appeal against the acquittal on the count of genocide.[13] Jelisi} ("the cross-appellant" or "the respondent") also filed a notice of appeal against the oral judgement.[14] Following the delivery of the Judgement, the cross-appellant filed a second notice of appeal on 15 December 1999.[15]

7. The prosecution requested clarification of the right of the cross-appellant to file a notice of cross-appeal as well as a notice of appeal to appeal against acquittal.[16] The Appeals Chamber found

[9] Prosecutor's motion to be heard, 15 October 1999.
[10] Trial transcript, 19 October 1999, pp. 2321-2342.
[11] *Ibid*., pp. 2328-2330.
[12] *Prosecutor v. Goran Jelisi},* Case No.: IT-95-10-T, Judgement, 14 December 1999 (English version filed 14 January 2001), para. 139, p. 43.
[13] Prosecution's notice of appeal, 21 October 1999.
[14] Notice of cross-appeal, 26 October 1999.
[15] Notice of appeal, 15 December 1999.
[16] Prosecution motion for clarification of the right of the appellant Goran Jelisi} to file two notices of appeal and for a scheduling order in relation to the appeal, 20 December 2000. On 21 January 2000, the cross-appellant filed: Response to prosecution motion filed 20th December 1999. On 28 January 2000, the prosecution filed Prosecution reply to defence's Response to prosecution motion filed 20th December 1999. The prosecution also requested that the Appeals Chamber classify the time limits with regard to Rule 111 of the Rules. In its scheduling order of 14 January 2000, the Appeals Chamber ordered that the time limit for the filing of the briefs pursuant to Rule 111 should commence from 15 December 1999, the day following the pronouncement of the written Judgement. On 7 March 2000, the Appeals

that the cross-appellant was barred from raising arguments regarding the acquittal on the count of genocide in his appellant's brief, since Article 25 of the Statute does not confer on an accused person the right to appeal from an acquittal. However, the Chamber held that if the prosecution sought to reverse the acquittal, then the cross-appellant in his brief in response would be permitted to support his acquittal. [17]

1. Appellate filings

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

9. Following requests by the cross-appellant, the briefing schedule was extended on several occasions.[21] The submissions relating to the cross-appellant's appeal were filed as follows. The cross-appellant filed his brief on 7 August 2000 ("the cross-appellant's brief").[22] On 6 September 2000, the prosecution filed its respondent's brief ("the prosecution's response").[23] On 6 October

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Chamber ordered that the briefs in relation to the cross-appellant's appeal be filed by 15 May 2000. Following subsequent decisions this deadline was varied.

[17] Order, 21 March 2000.

[18] Prosecutor's appeal brief (public redacted version), 14 July 2000. On the same date a confidential version was filed: Prosecutor's appeal brief (confidential), as well as the book of authorities for the prosecution's appeal brief.

[19] Reply to prosecution appeal brief, 14 August 2000.

[20] Prosecutor's brief in reply (public redacted version), 29 August 2000. On the same date a confidential version was filed: Prosecutor's brief in reply (confidential).

[21] On 3 May 2000, the cross-appellant filed: Motion for extension of time, whereby he requested an extension of time for filing the cross-appellant's brief due to a delay in providing the cross-appellant's counsel with a full set of audiotapes from the Trial Chamber proceedings in a language he could understand. On 11 May 2000, the Appeals Chamber granted an extension of time until 10 July 2000. On 7 July 2000, the cross-appellant requested an extension of time for the filing of his brief until 7 August 2000. On 17 July 2000, the Appeals Chamber issued: Order for provisional extension of time, which provisionally extended the time for filing of the cross-appellant's brief until 21 July 2000, in order to enable the Appeals Chamber to deliberate on the 7 July motion. On 19 July 2000, in: "Decision on urgent motion requesting extension of time," the 7 July motion was granted, as the recently appointed legal assistant needed more time to identify passages of the trial proceedings to be annexed to the appellant's brief. The filing time was extended to 7 August 2000. On 11 September 2000, the cross-appellant requested an extension of time for the filing of the response to the prosecution's brief. On 15 September 2000, in: "Decision on motion requesting extension of time," the Appeals Chamber found that, by themselves, the grounds raised by the cross-appellant did not justify an extension of time. However, with regard to the special circumstances of the case, it found that it was appropriate to allow further time to enable counsel to explain the case to the cross-appellant. Hence, the time limit was extended to 6 October 2000.

[22] Appellant's brief on appeal against sentence (confidential), 7 August 2000. A public redacted version was filed on 2 March 2001, upon the request of the Appeals Chamber in an order dated 30 January 2001, which was reiterated during the hearing on appeal, appeal transcript, 23 February 2001, p. 246.

[23] Respondent's brief of the prosecution (confidential), 6 September 2000. On 15 February 2001, a public redacted version was filed.

2000, the cross-appellant submitted a reply to the prosecution's response ("the cross-appellant's reply").[24]

10. On 16 February 2001, the cross-appellant, now represented by new counsel,[25] filed a document which identified the grounds being advanced by the cross-appellant in his appeal and clarified his position with regard to the prosecution's appeal ("the skeleton argument").[26] Oral argument was heard on 22 and 23 February 2001, during which the cross-appellant requested and obtained leave to add a further ground of appeal and confirmed that certain issues advanced in the cross-appellant's brief would not be pursued.[27]

2. Grounds of appeal and relief requested

a) The prosecution's appeal

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

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

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

3) "The Trial Chamber erred in law to the extent it is proposing that the definition of the requisite mental state for genocide in Article 4 of the Statute include the *dolus specialis* standard, and not the broader notion of general intent; the Trial Chamber erred in law and fact when it decided in paragraphs 88-98 of the Judgement that the evidence did not establish beyond all reasonable doubt that there existed a plan to destroy the Muslim group in Br~ko or elsewhere within which the murders committed by Goran Jelisi} would allegedly fit; and the Trial Chamber erred in law and fact when it decided in paragraphs 99-108 that the acts of Goran Jelisi} were not the physical expression of an

[24] Appellant's reply to prosecutor's respondent's brief (confidential), 6 October 2000. A public redacted version was filed on 2 March 2001.
[25] Decision by the Registrar, 5 February 2001.
[26] Appellant's skeleton submissions, 16 February 2001.
[27] Appeal transcript, 22 February 2001, p. 37 and 23 February 2001, pp. 198-199.
[28] The prosecution's grounds of appeal were set out in the prosecution's brief and prosecution's reply, as well as during the hearing on appeal.
[29] Prosecution's brief, para. 2.1, p. 9.

affirmed resolve to destroy in whole or in part a group as such, but rather, were arbitrary acts of killing resulting from a disturbed personality" ("the prosecution's third ground of appeal").[31]

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

b) The cross-appellant's appeal

13. The cross-appellant states that he "does not seek a retrial, he has been acquitted of all the offences he contested. He seeks only to appeal against his sentence".[34]

14. In support of his appeal against sentence, the cross-appellant in his brief presented arguments under two heads, challenging on several grounds, first, the fairness of the proceedings and, second, the correctness of the judgement.

15. The cross-appellant's first head of argument included allegations challenging the manner in which the presiding Judge conducted the hearing at trial on the count of genocide. However, it is not necessary to consider these arguments. At the hearing on appeal before the Appeals Chamber and as mentioned above, newly retained counsel for the cross-appellant submitted a skeleton argument, stating that the "grounds advanced are those identified in the skeleton".[35] The grounds presented in the skeleton argument did not repeat all the grounds which had been presented in the cross-appellant's brief. In opening the cross-appellant's case, counsel said: "The Court will have observed that the appellant's brief concentrated on the conduct of the Trial Judge both during the course of the trial on genocide, where verdicts were returned in favour of the accused, and also during the protracted sentencing hearings"; but, he added: " I do not press today the criticism of the

[30] Prosecution's brief, para. 3.5, p. 27.
[31] *Ibid.*, para. 4.6, p. 53.
[32] *Ibid.*, para. 5.7, p. 86.
[33] *Ibid.*, para. 5.6(a), p. 85. Appeal transcript, 22 February 2001, p. 9.
[34] Skeleton argument, para. 6.1, p. 6.
[35] Appeal transcript, 23 February 2001, p. 198.

trial Judge during the hearing on the genocide because, of course, that was a trial in which none of the offences for which he was being sentenced were being examined by the Trial Chamber".[36]

16. In the circumstances, the Appeals Chamber will not pass on the complaints originally made, treating them as having been abandoned. It will only observe that, in long and complicated cases, such as most of those which come to the Tribunal, it is necessary for the Trial Chamber to exercise control over the proceedings. That control may well need to be vigorous, provided of course that it does not encroach on the right of a party to a fair hearing. In this case, because of the abandonment of this ground of appeal, it is not necessary to consider whether reasonable limits were exceeded.

17. The second head of argument in the cross-appellant's brief related to matters arising from the Judgement itself.[37] These were refined during the hearing on appeal, where the cross-appellant stated that he did not pursue certain of the sub-grounds previously advanced,[38] and in the skeleton argument. In particular, in the latter, the cross-appellant stated that his appeal would focus on the following seven factors, to be elaborated in oral argument:

> (i) His plea of guilty.
> (ii) His co-operation with the prosecution.
> (iii) The necessity for the I.C.T.Y. to establish a recognised tariff for sentencing.
> (iv) His youth, maturity, the impact of propaganda on him and mental state.
> (v) The agreed factual basis of his plea.
> (vi) Comparison with other sentences passed in the I.C.T.Y and the International Criminal Tribunal for Ruanda [sic].
> (vii) Insufficient account was given of the general practice regarding prison sentences in the courts of the Former Yugoslavia as required by Article 24 of the Statute of the International Tribunal.[39]

18. During the hearing on appeal the cross-appellant requested leave to amend his notice of appeal, in light of the recent *Delali}* appeal judgement,[40] to argue that the Trial Chamber erred by

[36] *Ibid.*, pp. 164-165.
[37] These were as follows: a) the factual basis for the Trial Chamber's conclusion with regard to the nature and seriousness of the offences was based upon a document which the Trial Chamber erroneously concluded had been agreed to between the parties; b) the Trial Chamber's Judgement included an unauthorised double conviction on counts 16-17 - killing of Huso and Smajil Zahirovi} - while the indictment alleged that "he shot and killed one of them"; c) the Trial Chamber reversed the burden of proof; d) the cross-appellant was given no credit for his guilty plea, for having made early admissions to the offences charged and for his co-operation with the prosecution; e) the Trial Chamber failed properly to consider the defence case on sentence; f) the Trial Chamber failed properly to consider the sentencing practice in the former Yugoslavia; g) the Trial Chamber made inappropriate use of medical evidence; h) the 40 years' sentence reflects a disparity between this case and other cases before the Tribunals; and i) the Trial Chamber inappropriately passed a single sentence, cross-appellant's brief, pp. 114-145.
[38] Appeal transcript, 22 February 2001, p. 37, and 23 February 2001, pp. 198-199.
[39] Skeleton argument, para. 6.2, p. 6.
[40] *Prosecutor v. Zejnil Delali} et al*, Case No.: IT-96-21-A, Judgement, 20 February 2001 ("the *Delali}* appeal judgement").

imposing cumulative convictions.[41] Leave was granted orally by the Appeals Chamber, with time limits fixed for the filing of further submissions by the parties in response and reply.[42]

19. Accordingly, the Appeals Chamber views the cross-appellant as raising the following grounds of appeal:

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

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

3. Additional evidence and other evidentiary matters

20. On 8 September 2000, the cross-appellant filed an application for the presentation of additional evidence.[43] In this application, he requested the admission into evidence of reports by an expert witness, Mrs. Ljiljana Mijovic, and the Commanding Officer of the United Nations Detention Unit in the Hague, Mr. Timothy McFadden, concerning respectively the rank of the accused as a member of the reserve police and the overall behaviour of the accused whilst in custody before and after the Judgement. The prosecution submitted that the application should be denied[44] and it was rejected by the Appeals Chamber in its decision dated 15 November 2000.[45]

21. On 7 March 2001, after the close of oral arguments, the cross-appellant filed a report by Dr. Tomi} on the general practice of courts in the former Yugoslavia.[46] The prosecution objected to the filing.[47] Generally speaking, for additional evidence to be admitted at the appeal stage, a motion pursuant to Rule 115 of the Rules must be presented at least fifteen days prior to the hearing of the appeal.[48] Such application can, in exceptional circumstances, be filed later, but should be supported

[41] Appeal transcript, 22 February 2001, pp. 32-35 and 245-246, referring to the *Delali}* appeal judgement.
[42] *Ibid.*, pp. 33-35. The Appeals Chamber decided the prosecution would have 10 days to respond and the cross-appellant would have 10 days from the filing of the response to file his reply, appeal transcript, 22 February 2001, p. 35 and 23 February 2001, pp. 245-246. Subsequently, on 6 March 2001, the "Prosecution response to the oral motion and the additional ground of appeal of Goran Jelisi} regarding cumulative convictions" and the "Appellant's written submission in support of the oral motion to quash cumulative convictions" were filed.
[43] The defence's brief for the presentation of the additional evidence, 8 September 2000.
[44] Prosecution response to the defence's brief for the presentation of the additional evidence, 18 September 2000.
[45] Decision on request to admit additional evidence, 15 November 2000.
[46] General practice of courts in the former Yugoslavia and the newly emerged states on the territory of the former Yugoslavia in determining prison sentences, 7 March 2001.
[47] Prosecution objection to the admission of document filed on 7 March 2001 on behalf of Goran Jelesi} [sic], 9 March 2001.
[48] Evidence may also be admitted in certain circumstances under Rule 89 of the Rules, see for example *Prosecutor v. Zejnil Delali} et al,* Case No.: IT-96-21-A, Order on motion for the extension of the time-limit and admission of additional evidence, 31 May 2000, and Order on motion of Esad Land`o to admit as additional evidence the opinion of

by both a request for an extension of time and a showing of good cause, pursuant to Rule 127 of the Rules. Neither requirement has been met in the circumstances of this case. During the hearing on appeal counsel for the cross-appellant stated that he would be willing to forward the report to the Appeals Chamber.[49] The Appeals Chamber did not accept this offer. No attempt has been made to satisfy the Appeals Chamber that the requirements of Rule 115 have been met or that there is justification for extending the requisite time-limits. The report is therefore not admitted into evidence.

Francisco Villalobos Brenes, 14 February 2000, *Prosecutor v. Zoran Kupre{ki} et al*, Case No.: IT-95-16-A, Redacted Decisions of the Appeals Chamber of 26 February 2001 and 11 April 2001, 30 May 2001. See equivalent, *Jean-Paul Akayesu v. The Prosecutor*, Case No.: ICTR-96-4-A, Decision (on the consolidation or summarization of motions not yet disposed of), 22 August 2000, applying Rule 89 of the ICTR Rules.

[49] Appeal transcript, 23 February 2001, pp. 190-191.

II. PROSECUTION'S APPEAL

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

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

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

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

24. On 19 October 1999, the Trial Chamber joined the decision on the written motion to be heard to the decision on the merits of acquittal (the Judgement) "adjudging that an indissociable link existed between the Motion submitted by the Prosecution and the Decision on the merits".[51]

25. The Appeals Chamber begins with the proposition that a party always has a right to be heard on its motion. But the hearing need not always be oral. In this regard, there is no provision in the Rules which provides for a right of a party to make oral submissions in connection with a written motion. Similarly, the practice of the Tribunal allows for a decision on a written motion without any supplementary oral arguments, the motion itself being regarded as affording to the moving party a sufficient right to be heard. In these circumstances, the Appeals Chamber can find no error in the fact that the Trial Chamber decided against the claim that the prosecution had a right to be heard orally on whether it had a right to be heard on the substantive merits of acquittal under Rule 98*bis,* since all the basic arguments in support of a right to be heard before a substantive decision on acquittal was made were in fact set out in the written motion to be heard and needed no oral supplement. On this point, the impugned decision was therefore right.

[50] Prosecution's brief, para. 2.1, p. 9.
[51] Judgement, para. 16, p. 4.

26. However, as indicated above, the Trial Chamber also decided against the right of the prosecution to be heard on the substantive question of whether its evidence was insufficient to sustain a conviction. The Trial Chamber's decision was rendered orally on 19 October 1999, and then put in writing on 14 December 1999. Taking the two together, it is clear that the Trial Chamber considered that, where it was acting *proprio motu,* the prosecution had no right to be heard at all; such a right was not accorded by the Rules and could not be based upon the principle *audi alteram partem*.[52] Was this decision correct?

27. In the view of the Appeals Chamber, the fact that a Trial Chamber has a right to decide *proprio motu* entitles it to make a decision whether or not invited to do so by a party; but the fact that it can do so does not relieve it of the normal duty of a judicial body first to hear a party whose rights can be affected by the decision to be made.[53] Failure to hear a party against whom the Trial Chamber is provisionally inclined is not consistent with the requirement to hold a fair trial.[54] The Rules must be read on this basis, that is to say, that they include a right of the parties to be heard in accordance with the judicial character of the Trial Chamber. The availability of this right to the prosecution and its exercise of the right can be of importance to the making of a correct decision by the Trial Chamber: the latter could benefit in substantial ways from the analysis of the evidence made by the prosecution and from its argument on the applicable law.[55]

28. The prosecution therefore had a right to be heard on the question of whether the evidence was sufficient to sustain a conviction;[56] it was denied that right. Counsel for the respondent rightly concedes this.[57]

29. The prosecution's first ground of appeal succeeds. The question of remedy is discussed under the prosecution's third ground of appeal.

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[52] Trial transcript, 19 October 1999, p. 2330. (*Audi alteram partem* means to hear the other side.)
[53] See generally *R. v. Barking and Dagenham Justices,* ex parte *Director of Public Prosecutions* [1995] Crim LR 953 ("*Barking* case"), and *Director of Public Prosecution v. Cosier*, Q.B.D., 5 April 2000 ("*Cosier* case").
[54] See *Cosier* case, *supra*.
[55] See *Cosier* case, *supra*. For a more general observation on the importance of not deciding without first hearing counsel's arguments, see Judge *ad hoc* Barwick's dissenting opinion in *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 442.
[56] See *Barking* and *Cosier* cases, *supra*.
[57] Skeleton argument, paras 2.1-2.4, pp. 2-3.

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

30. In the prosecution's second ground of appeal, it submits that "the Trial Chamber erred in law by adopting the standard of guilt beyond a reasonable doubt for the purposes of a Rule 98*bis* determination of the sufficiency of the evidence to sustain a conviction".[58]

31. This ground relies on the fact that, in entering a judgement of acquittal *proprio motu*, the Trial Chamber stated *inter alia*:

> All things considered, the Prosecutor has not established beyond all reasonable doubt that genocide was committed in Brcko during the period covered by the indictment. Furthermore, the behaviour of the accused appears to indicate that, although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group. The Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisic must be found not guilty on this count.[59]

32. On appeal, the prosecution submits that the Trial Chamber, in requiring that the prosecution evidence prove guilt beyond reasonable doubt at the end of the case–in-chief, was applying a different and more exacting test than that required by law. In its view, the correct test, at that stage, was whether, on the evidence (if accepted), a reasonable tribunal of fact *could* (not *should*) make a finding of guilt. It notes that the respondent did not make a "no case" motion, although it was asked by the Trial Chamber whether it proposed to do so. In reply, the respondent contends that the standard under Rule 98*bis*(B) necessarily involves a determination whether the evidence was sufficient to prove guilt beyond reasonable doubt.[60]

33. The Appeals Chamber will first consider whether the references by the Trial Chamber to a test of proof of guilt beyond reasonable doubt were correct. In the view of the Appeals Chamber, the matter turns on an interpretation of Rule 98*bis*(B). The situation was put very well in *Kordic*, in which Trial Chamber III stated:

> Although the Prosecution has referred to the proceedings under this Rule as "no case to answer", using the description to be found in many common law jurisdictions, the Chamber considers that the better approach is not to characterise Rule 98*bis* proceedings in that way, lest it be thought that the Rule must necessarily be applied in the same way as proceedings for "no case to answer" in those jurisdictions. It is true that Rule 98*bis* proceedings, coming as they do at the end of the Prosecution's case, bear a close resemblance to applications for no case to answer in common law jurisdictions. However, that does not necessarily mean that the regime to be applied for Rule 98*bis* proceedings is the same as that which is applicable in the domestic jurisdictions of those countries. Ultimately, the regime to be applied for Rule 98*bis* proceedings is to be determined on the basis of the Statute and the Rules, having in mind, in particular, its construction in the light of the context in which the Statute operates and the purpose it is intended to serve. That

[58] Prosecution's brief, para. 3.5, p. 27.
[59] Judgement, para. 108, pp. 33-34.
[60] Response to prosecution's brief, pp. A-1135-1136 as given by the Registry.

> determination may be influenced by features of the regime in domestic jurisdictions with similar proceedings, but will not be controlled by it; and therefore a proper construction of the Rule may show a modification of some of those features in the transition from its domestic berth.[61]

34. In reading and interpreting the text of Rule 98*bis*(B), it has to be borne in mind that the adversarial aspect of the Tribunal's procedure is an important one but not exclusive of other influences. The Tribunal is an international judicial body. Accused persons come from primarily civil law jurisdictions. Judges of the Tribunal come from different legal cultures, as do counsel appearing before it. The Trial Chamber in this case consisted wholly of non-common law judges; account must be taken of that fact in interpreting the language in which their judgement was cast. To require strict conformity with a common law verbal formula would not be appropriate; it is the substance which is important.

35. In the end, the matter depends on an interpretation of the text of Rule 98*bis*(B), an interpretation aided by reference to particular municipal concepts but not controlled by them. When the Rule is so read, the question becomes: what does its reference to a test of whether "the evidence is insufficient to sustain a conviction" mean? Following the settled jurisprudence of the Tribunal, those words are to be "interpreted in good faith in accordance with the ordinary meaning to be given to [them] in their context and in the light of [their] object and purpose", within the meaning of Article 31(1) of the Vienna Convention on the Law of Treaties 1969. So interpreted, it appears to the Appeals Chamber that those words must of necessity import the concept of guilt beyond reasonable doubt, for it is only if the evidence is not capable of satisfying the reasonable doubt test that it can be described as "insufficient to sustain a conviction" within the meaning of Rule 98*bis*(B). Rule 87(A), confirms this interpretation by providing that a "finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt".

36. Consequently, the notion of proof of guilt beyond reasonable doubt must be retained in the operation of Rule 98*bis*(B). This was recognised by Trial Chamber II's decision in *Kunarac*. The test applied in that case was correctly stated to be "whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* convict - that is to say, evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. If the evidence does not reach that standard, then the evidence is, to use the words of Rule 98*bis*(B), 'insufficient to sustain a conviction'".[62] *Kunarac*'s reference to the necessity of a reasonable tribunal being "satisfied beyond reasonable doubt" should be

[61] *Prosecutor v. Dario Kordi} and Mario ^erkez*, Case No.:IT-95-14/2-T, Decision on defence motions for judgement of acquittal, 6 April 2000, para. 9, p. 5.

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

37. The next question is how should the test of guilt beyond reasonable doubt be applied in this situation. The Appeals Chamber considers that the reference in Rule 98*bis* to a situation in which "the evidence is insufficient to sustain a conviction" means a case in which, in the opinion of the Trial Chamber, the prosecution evidence, if believed,[65] is insufficient for any reasonable trier of fact to find that guilt has been proved beyond reasonable doubt. In this respect, the Appeals Chamber follows its recent holding in the *Delalic* appeal judgement, where it said: "[t]he test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question".[66] The capacity[67] of the prosecution evidence (if accepted) to sustain a conviction beyond reasonable doubt by a reasonable trier of fact is the key concept; thus the test is not whether the trier would in fact arrive at a conviction beyond reasonable doubt on the prosecution evidence (if accepted) but whether it could. At the close of the case for the prosecution, the Chamber may find that the prosecution evidence is sufficient to sustain a conviction beyond reasonable doubt and yet, even if no defence evidence is subsequently adduced, proceed to acquit at the end of the trial, if in its own view of the evidence, the prosecution has not in fact proved guilt beyond reasonable doubt.

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[62] *Prosecutor v. Dragoljub Kunarac et al*, Case Nos.: IT-96-23-T, IT-23-1-T, Decision on motion for acquittal, 3 July 2000 ("the *Kunarac* decision"), para. 3, p. 3 (emphasis in original). And see, *ibid*., paras 7 - 8, pp. 4-5.
[63] *Prosecutor v. Miroslav Kvocka et al*, Case No.: IT-98-30/1-T, Decision on defence motions for acquittal, 15 December 2000, ("the *Kvo~ka* decision") para. 12.
[64] *R. v. Galbraith,* 73 Cr. App. R. 124, at p. 127, C.A., per Lord Lane, C.J.
[65] As to the permissibility of drawing inferences at the close of the case for the prosecution, see *Monteleone v. The Queen* [1987] 2 S.C.R. 154, in which McIntyre J., for the court, said: "It is not for the trial judge to draw inferences of fact from the evidence before him". And see the reference to "inferences" in *Her Majesty v. Al Megrahi and Another*, *infra.* Cf. *Kvocka* decision, para. 12, p. 5, in which the Trial Chamber said: "The Chamber prefers an objective standard, under which it is entitled at this stage to apply any reasonable inferences and presumption or legal theories when reviewing the Prosecution evidence". The issue thus posed is not passed upon here.
[66] *Delali}* appeal judgement, para. 434, p. 148 (emphasis in original). Or, as it was correctly put by Trial Chamber II in the *Kunarac* decision, para. 10, p. 6, the "prosecution needs only to show that there is evidence upon which a reasonable tribunal of fact *could* convict, not that the Trial Chamber itself *should* convict" (emphasis in original).

38. There are indeed elements in the impugned decision that indicate an interpretation that the Trial Chamber itself recognised that its task was not to make a final finding of guilt; but unfortunately these indications are overborne by other passages which seem to point strongly in the opposite direction, i.e., that what the Trial Chamber was in fact doing was making its own decision as to whether the evidence warranted a finding of reasonable doubt as to the accused's guilt.

For example, the Trial Chamber found that:

> in this case, the Prosecutor has not provided sufficient evidence allowing it to be established beyond all reasonable doubt that there existed a plan to destroy the Muslim group in Br~ko or elsewhere within which the murders committed by the accused would allegedly fit.[68]

It also stated:

> [T]he behaviour of the accused appears to indicate that, although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group. The Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisi} must be found not guilty on this count.[69]

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

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

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

40. The prosecution's second ground of appeal succeeds. The question of remedy is discussed under the prosecution's third ground of appeal.

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[67] According to MacKinnon A.C.J.O. in *R. v. Syms* (1979) 47 C.C.C. (2d) 114 at 117, a trial judge should withdraw a case from the jury only where "the evidence was so slight or tenuous that it would be incapable of supporting a verdict of guilty".
[68] Judgement, para. 98, p. 31.
[69] *Ibid.*, para. 108, pp. 33-34.
[70] Skeleton argument, para. 3.1, p. 3.
[71] *Ibid.*, para. 3.2, p. 3.

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

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

1. First part of third ground

42. In the first part, the prosecution submits "that the Trial Chamber erred in law to the extent that it defined the requisite mental state for genocide as limited to the *dolus specialis* standard".[72] In effect, the prosecution submits that the Trial Chamber erred in law by limiting its application of Article 4 of the Statute, which defines the required *mens rea* for genocide as destroying, in whole or in part, a national, ethnical, racial or religious group, to only cases that meet a civil law *dolus specialis* standard. It submits that "[i]t cannot be assumed that the concept of *dolus specialis* has a fixed meaning even within the diverse groups of civil law systems."[73] In referring to *dolus specialis,* the prosecution argues that the Trial Chamber attributed to it a definition as to the degree or quality of intent that exists in certain civil law jurisdictions.[74] It submits that that definition could be that the accused consciously desired the destruction, in whole or in part, of the group, as such.[75] The Appeals Chamber understands the prosecution submission to be that an accused has the required *mens rea* for genocide if: i) he consciously desired the committed acts to result in the destruction, in whole or in part, of the group, as such; or ii) he knew that his acts were destroying, in whole or in part, the group, as such;[76] or iii) he, acting as an aider or abettor, commits acts knowing that there is an ongoing genocide which his acts form part of, and that the likely consequence of his conduct would be to destroy, in whole or in part, the group as such.[77]

43. The respondent disagrees with the prosecution. He submits that the Trial Chamber only once used the phrase *dolus specialis* in its Judgement and that, contrary to the prosecution's position, it was intended as an alternative expression for "specific intent", that is "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" and did not refer to the degree of the requisite intent as alleged by the prosecution.[78] Accordingly, the respondent

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[72] Prosecution's brief, para. 5.5, p. 85.
[73] *Ibid.,* para. 4.22, p. 59.
[74] *Ibid.,* states "[i]n German law, for example, the term 'Absicht' is used to capture what is often being referred to as *dolus specialis* in literature, whilst Norwegian law uses the term 'hensikt'".
[75] *Ibid.,* para. 4.21, p. 58.
[76] This proposition does not contain any element of probability. It refers to knowledge of the actual destruction, in whole or in part. Appeal transcript, 22 February 2001, pp. 68-69.
[77] Prosecution's brief, para. 4.9, p. 54. The specification that category iii) only relates to conduct as an aider or abettor was made during oral argument, see appeal transcript, 22 February 2001, pp. 69 and 77.
[78] Cross-appellant's reply, pp. 1135-1134. The Appeals Chamber notes that the respondent during oral argument addressed this issue more generally and did not elaborate on the degree of intent required. Appeal transcript, 22 February 2001, pp. 119-130.

considers that the Trial Chamber has properly identified the intent required for the crime of genocide.

44. Before discussing the Trial Chamber's interpretation of the term *dolus specialis*, the Appeals Chamber considers it necessary to clarify the requisite *mens rea* under Article 4 of the Statute, which provides:

> 1. The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.
>
> 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) killing members of the group;
> (b) causing serious bodily or mental harm to members of the group;
> (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) imposing measures intended to prevent births within the group;
> (e) forcibly transferring children of the group to another group.
>
> 3. The following acts shall be punishable:
> (a) genocide;
> (b) conspiracy to commit genocide;
> (c) direct and public incitement to commit genocide;
> (d) attempt to commit genocide;
> (e) complicity in genocide.

45. Article 4, paragraphs (2) and (3) of the Statute largely reflect Articles II and III of the Convention on the Prevention and Punishment of the Crime of Genocide.[79] As has been seen, Article 4(2) of the Statute defines genocide to mean any of certain "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The Statute itself defines the intent required: the intent to accomplish certain specified types of destruction. This intent has been referred to as, for example, special intent, specific intent, *dolus specialis,* particular intent and genocidal intent.[80] The Appeals Chamber will use the term "specific intent" to describe the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such.[81]

[79] United Nations Treaty Series, vol. 78, p. 277, General Assembly Resolution 260A (III).
[80] See for example: *Prosecutor v. Alfred Musema,* Case No.: ICTR-96-13-T, Judgement and sentence, 27 January 2000, paras 164-167, p. 56-58, which refer to specific intent and *dolus specialis* interchangeably; *Prosecutor v. Jean-Paul Akayesu,* Case No.: ICTR-96-4-T, 2 September 1998, Judgement, para. 498, which refers to genocidal intent. The International Law Commission refers to specific intent (A/51/10), p. 87.
[81] The Appeals Chamber does not attribute to this term any meaning it might carry in a national jurisdiction.

46. The specific intent requires that the perpetrator, by one of the prohibited acts enumerated in Article 4 of the Statute, seeks to achieve the destruction, in whole or in part, of a national, ethnical, racial or religious group, as such.[82]

47. As to proof of specific intent, it may, in the absence of direct explicit evidence, be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.

48. The Appeals Chamber is of the opinion that the existence of a plan or policy is not a legal ingredient of the crime. However, in the context of proving specific intent, the existence of a plan or policy may become an important factor in most cases. The evidence may be consistent with the existence of a plan or policy, or may even show such existence, and the existence of a plan or policy may facilitate proof of the crime.[83]

49. The Appeals Chamber further recalls the necessity to distinguish specific intent from motive. The personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide. In the *Tadi}* appeal judgement the Appeals Chamber stressed the irrelevance and "inscrutability of motives in criminal law".[84]

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

> All things considered, the Prosecutor has not established beyond reasonable doubt that genocide was committed in Br~ko during the period covered by the indictment. Furthermore, the behaviour of the accused appears to indicate that, although he obviously singled out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group. The Trial Chamber therefore concludes that it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide. The benefit of the doubt must always go to the accused and, consequently, Goran Jelisi} must be found not guilty on this count.[86]

[82] The Appeals Chamber notes it is speaking here solely in the context of the commission of genocide within the meaning of Article 4 of the Statute.
[83] This was also held in the oral decision by the Appeals Chamber for the ICTR in *Obed Ruzindana and Clément Kayishema v. Prosecutor,* Case No.: ICTR-95-1-A, 1 June 2001.
[84] *Prosecutor v. Du{ko Tadi},* Case No.: IT-95-1-A, Judgement, 15 July 1999 ("the *Tadi}* appeal judgement"), para. 269, p. 120.
[85] Prosecution brief, paras 4.6 and 4.8, pp. 53-54.
[86] Judgement, para. 108, pp. 33-34.

51. The Appeals Chamber considers that a question of interpretation of the Trial Chamber's Judgement is involved. Read in context, the question with which the Judgement was concerned in referring to *dolus specialis* was whether destruction of a group was intended. The Appeals Chamber finds that the Trial Chamber only used the Latin phrase to express specific intent as defined above.

52. Accordingly, the Appeals Chamber agrees with the respondent and holds that the prosecution's challenge to the Trial Chamber's finding on this issue is not well founded, being based on a misunderstanding of the Judgement. This part of the prosecution's third ground of appeal therefore fails.

2. Second part of third ground

53. It now remains to consider the second part of the prosecution's third ground of appeal. Assuming the meaning of intent set out above, the prosecution contended that the Trial Chamber was in error in holding that its evidence was insufficient to sustain a conviction for genocide. In particular, it pointed to several items of evidence to which the Trial Chamber had not referred.[87]

54. Counsel for the respondent argues, by reference to the *Tadic* appeal judgement,[88] that on the same set of facts, two reasonable triers of fact could both reach equally reasonable but different conclusions.[89] He submits that the Trial Chamber was not required to refer to every piece of evidence. Rather, it was entitled to select the evidence on which it would rely. In his contention, the question was whether, on the evidence on which the Trial Chamber relied, a reasonable trier of fact could have reached the conclusion reached by the Trial Chamber. He submits that the prosecution had not shown that this was not possible.

55. In the view of the Appeals Chamber, the *Tadic* principle applies to the evaluation of facts, and has no bearing on the principal question here, i.e., whether the Trial Chamber was entitled to make its own evaluation of the relevant evidence. The *Tadi}* principle applies only where the decision in question was one which the trier of fact was authorised to make; if, being authorised to make the decision, he makes it on the basis of material on which a reasonable trier of fact could have reached the same conclusion, his decision will not be overruled because another equally reasonable trier of fact would, on the same material, have reached a different but equally reasonable conclusion. The principle does not apply to issues of whether the Trial Chamber had the authority to make that evaluation of the evidence in the first place. The Appeals Chamber considers that the

[87] Appeal transcript, 22 February 2001, pp. 94-97.
[88] *Tadi}* appeal judgement, para. 64, pp. 27-28.
[89] Appeal transcript, 22 February 2001, p. 144.

Trial Chamber was required to assume that the prosecution's evidence was entitled to credence unless incapable of belief. That is, it was required to take the evidence at its highest and could not pick and choose among parts of that evidence.

56. The remaining issue is whether under the correct standard, that is, upon consideration of all relevant evidence submitted by the prosecution in its case-in-chief, the Trial Chamber was entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction, beyond reasonable doubt, for genocide.

57. Having reviewed the evidence in the appeal record, the Appeals Chamber cannot validate the Trial Chamber's conclusion that it was not sufficient to sustain a conviction. It is not necessary in explaining reasons for this conclusion that the Appeals Chamber evaluates every item of evidence in the record. Rather, the Appeals Chamber can first assess the Trial Chamber's own reasons for its conclusion that acquittal was required in light of the evidence on record which was relevant to those reasons and, secondly, the Appeals Chamber can assess other evidence on the record which was not specifically referred to by the Trial Chamber but to which it has been directed in the course of the appeal.

58. The Trial Chamber found that there were two elements to be considered in the proof of genocide. In paragraph 62 of the Judgement it stated:

> Genocide is characterised by two legal ingredients according to the terms of Article 4 of the Statute:
>
> - the material element of the offence, constituted by one or several acts enumerated in paragraph 2 of Article 4;
>
> - the *mens rea* of the offence, consisting of the special intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

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

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

60. As to the second ingredient or the *mens rea* of the offence, the Trial Chamber acknowledged that the respondent performed the *actus reus*, in this case the murder of Muslims, with a discriminatory intent. In paragraphs 73-77 of its Judgement it pointed out that:

> an individual knowingly acting against the backdrop of the widespread and systematic violence being committed against only one specific group could not reasonably deny that he chose his victims discriminatorily [...]. A great majority of the persons detained in the collection centres and at Luka camp were Muslim [...]. The words and deeds of the accused demonstrate that he was not only perfectly aware of the discriminatory nature of the operation but also that he fully supported it [...]. [A] large majority of the persons whom Goran Jelisi} admitted having beaten and executed were Muslim. Additionally, many of the elements showed how Goran Jelisi} made scornful and discriminatory remarks about the Muslim population [...]. The Trial Chamber concludes that in this case the discriminatory intent has been proved.[90]

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

62. The Trial Chamber admitted in paragraph 102 of its judgement that:

> Goran Jelisi} presented himself as the "Serbian Adolf" and claimed to have gone to Br~ko to kill Muslims [...] [and] allegedly said to the detainees at Luka camp that he held their lives in his hands and that only between 5 to 10 % of them would leave there [...] [and] told the Muslim detainees in Luka camp that 70% of them were to be killed, 30% beaten and that barely 4% of the 30% might not be badly beaten [...] [and] remarked to one witness that he hated the Muslims and wanted to kill them all, whilst the surviving Muslims could be slaves for cleaning the toilets but never have a professional job [...] [and] reportedly added that he wanted "to cleanse" the Muslims and would enjoy doing so, that the "balijas" had proliferated too much and that he had to rid the world of them [...] [and] said that he hated Muslim women, that he found them highly dirty and that he wanted to sterilise them all in order to prevent an increase in the number of Muslims but that before exterminating them he would begin with the men in order [to] prevent any proliferation.

63. It also acknowledged in paragraph 103 that:

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

64. Nonetheless, in succeeding paragraphs 104-108, the Trial Chamber cited other evidence it found convincing to show that "[a]ll things considered, the Prosecutor has not established beyond all reasonable doubt that genocide was committed in Br~ko during the period covered by the indictment [...] the behaviour of the accused appears to indicate that, although he obviously singled

[90] Judgement, paras 73-75 and 77, pp. 23-24 (footnotes excluded).

out Muslims, he killed arbitrarily rather than with the clear intention to destroy a group".[91] This other evidence consisted of testimony that the respondent had a "disturbed personality", "borderline, antisocial and narcissistic characteristic", "immaturity", and "a concern to please superiors". It stated:

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

65. Additionally, the Trial Chamber found that the respondent performed the executions "randomly", citing an episode where the respondent forced a leading Muslim to play Russian roulette in order to obtain a *laissez passer* to leave the camp; at other times the respondent let prisoners go after beating them.[93] On this basis, the Chamber concluded that "the acts of Goran Jelisi} are not the physical expression of an affirmed resolve to destroy in whole or in part a group as such".[94]

66. The Appeals Chamber turns first to evidence on the record that was presented by the prosecution during the appeal to demonstrate both that the respondent believed himself to be following a plan sent down by superiors to eradicate the Muslims in Br~ko and that, regardless of any such plan, he was himself a one-man genocide mission, intent upon personally wiping out the protected group in whole or part. Some of this evidence was specifically cited by the Trial Chamber itself and summarised in its Judgement: threats by the respondent to kill 70%, to beat 30%, and spare only 5-10% of the Muslim detainees, statements by the respondent that he wanted to rid the world of the Muslims, announcements of his quota of daily killings, and his desire to sterilise Muslims in order to prevent proliferation of the group.[95]

67. However, during the appeal the prosecution has also pointed to other material on the record which in its view supplements this evidence considerably, including extended interviews with the respondent himself which, though often contradictory, contained critical evidence as to his state of mind in committing the murders. A lengthy Annex A[96] compiled by the prosecution contains citations from the evidence that the respondent operated from lists designating prominent Muslims to be killed; he referred to a "plan" for eradicating them; he wanted to "cleanse [...] the extremist Muslims and balijas like one cleans the head of lice".[97] Witness I said of him: "[h]e carried out

[91] *Ibid.*, para. 108, p. 33.
[92] *Ibid.*, para. 105, p. 33.
[93] *Ibid.*, para. 106, p. 33.
[94] *Ibid.*, para. 107, p. 33.
[95] *Ibid.*, para. 102, p. 32.
[96] Annex A, filed confidentially as an annex to the confidential version of the prosecution's brief.
[97] Trial transcript, 13 September 1999 (witness M), p. 1462.

orders but he also selected his victims through his own free will" [98] and that "[h]e could have not shot dead someone even if he were told to do so, but he did quite a few things on his own".[99] There is additional evidence of the regular visits of a Bimeks refrigerated truck to the camp to pick up 10-20 dead bodies a day; nightly killings in which the respondent commented after each one "[a]nother balija less";[100] his repeated references to himself as the "Adolf the second" and comments like "I've killed 80 Muslims so far, and I'll finish all of you too" and "as many Muslims as possible had to be killed and that Br~ko should become a Serbian town".[101]

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

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

70. The Trial Chamber essentially relied on the following evidence for its reasonable doubt conclusion: that the respondent had a disturbed personality; that he was immature, narcissistic, desirous of pleasing superiors and that, when placed in a position of authority, those traits manifested themselves in an obsession with power over the lives of those he commanded. This, the Trial Chamber said, was not the same as "an affirmed resolve" to destroy a protected group, in this case the Br~ko Muslims.[102] It bears noting that the psychiatric underpinnings of this conclusion come from expert reports prepared for the purpose of deciding whether the respondent was competent to stand trial (he was found to be) and in particular not for evaluating his mental capacity to commit the crimes with which he was charged. He did not plead a defence of insanity and indeed the Trial Chamber itself found him capable of a discriminatory intent in a separate finding. It is sufficient for our purposes here to point out that there is no *per se* inconsistency between a diagnosis of the kind of immature, narcissistic, disturbed personality on which the Trial Chamber

[98] Annex A, referring to Witness I in trial transcript, 7 September 1999, p. 1112.
[99] *Ibid.*.
[100] Trial transcript, 1 December 1998, p. 81.
[101] Trial transcript, 9 September 1999, p. 1306, 14 September 1999, p. 1556 and exhibit 66 (transcript of interview with the respondent on 4 June 1998), p. 49.
[102] Judgement, para. 107, p. 33.

relied and the ability to form an intent to destroy a particular protected group. Indeed, as the prosecution points out, it is the borderline unbalanced personality who is more likely to be drawn to extreme racial and ethnical hatred than the more balanced modulated individual without personality defects. The Rules visualise, as a defence, a certain degree of mental incapacity and in any event, no such imbalance was found in this case.[103]

71. The Trial Chamber also placed heavy reliance on the randomness of the respondent's killings. It cited examples of where he let some prisoners go, played Russian roulette for the life of another, and picked his victims not just off lists allegedly given to him by others, but according to his own whim. Entitled though it may have been to consider such evidence, the Trial Chamber, in the view of the Appeals Chamber, was not entitled to conclude that these displays of "randomness" negated the plethora of other evidence recounted above as to the respondent's announced intent to kill the majority of Muslims in Br~ko and his quotas and arrangements for so doing. A reasonable trier of fact could have discounted the few incidents where he showed mercy as aberrations in an otherwise relentless campaign against the protected group. Similarly, the fact that he took "pleasure" from the killings does not detract in any way from his intent to perform such killings; as has been mentioned above, the Tribunal has declared in the *Tadi}* appeal judgement the irrelevance and "inscrutability of motives in criminal law" insofar as liability is concerned, where an intent – including a specific intent – is clear.

72. Thus, even if the Trial Chamber's conclusion that there was insufficient evidence to show an intent to destroy the group on the respondent's part is examined on the basis of the evidence specifically referred to by the Trial Chamber itself, it does not pass the approved standard for acquittal under Rule 98*bis*(B) and, consequently, this part of the prosecution's third ground of appeal is sustained.

73. With regard to remedy, counsel for the respondent argues that the Appeals Chamber has a discretion, and that, in all the circumstances of this case, there should be no retrial. The Appeals Chamber agrees that the choice of remedy lies within its discretion. Article 25 of the Statute (relating to appellate proceedings) is wide enough to confer such a faculty; this discretion is recognised as well in the wording of Rule 117(C) of the Rules which provides that in "appropriate circumstances the Appeals Chamber may order that the accused be retried according to law".[104] Similarly, national case law gives discretion to a court to rule that there should be no retrial.[105] The

[103] Rule 67 of the Rules. With regard to diminished mental responsibility, see the Appeals Chamber's finding in *Delali}* appeal judgement, paras 580-590, pp. 200-204.
[104] Cf. *Rigby v. Woodward* [1957] 1 WLR 250, and *Griffith v. Jenkins and another*, (1991) 156 JP 29.
[105] For a solution of this kind, *see inter alia, Cosier* case, *Barking case*. See also *United States v. Hooper*, 432 F.2nd 604, 139 U.S.App.D.C.171 (1970), *United States v. Lindsey*, 47 F.3d 440, 310 U.S. App.D.C.300 (1995).

discretion must of course be exercised on proper judicial grounds, balancing factors such as fairness to the accused, the interests of justice, the nature of the offences, the circumstances of the case in hand and considerations of public interest. These factors (and others) would be determined on a case by case basis. The question arises as to how the Appeals Chamber should exercise its discretion in this case.

74. For the purpose of determining that question, the Appeals Chamber considers the following factors to be of relevance. The respondent pleaded guilty to certain criminal conduct that was set out in the agreed factual basis. On the basis of that criminal conduct he was found guilty of 31 counts of violations of the laws or customs of war and crimes against humanity. The Trial Chamber imposed a sentence of 40 years' imprisonment. A potential retrial would deal with a count of genocide, charging the respondent with genocide by killing.[106] In respect of this count, the prosecution has brought no further charges of killing. The genocide count is therefore based on the killings to which he has already pleaded guilty.[107] Accordingly, a retrial would be limited to the question of whether he possessed the special intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such. The definition of specific intent has been clarified in the context of the prosecution appeal above.

75. Also, it was through no fault of the accused that the Trial Chamber erred in law – it was not the case that arguments advanced by the defence led to the Trial Chamber's decision to enter a judgement of acquittal. Considerable time will have elapsed between the date that the offences were committed in May 1992 and the date of any potential retrial. The *ad hoc* nature of the International Tribunal which, unlike a national legal system, means resources are limited in terms of man-power and the uncertain longevity of the Tribunal.

76. Furthermore, the respondent has been in the detention of the Tribunal since 22 January 1998. The Trial Chamber recommended that the respondent receive "psychological and psychiatric follow-up treatment".[108] Such treatment is currently provided by the United Nations Detention Unit. However, a prison would generally be in a better position to provide long-term consistent treatment.

77. Rule 117(C) of the Rules provides that in "appropriate circumstances the Appeals Chamber may order that the accused be retried according to law". The Appeals Chamber recognizes the

[106] Second amended indictment, para. 14, p. 3 stated: "[…] Goran JELISI] personally killed the victims described in paragraphs 16-25, 30 and 33 [the killings the cross-appellant pleaded guilty to]. By these actions, Goran JELISI] committed or aided and abetted: Count 1: GENOCIDE, a crime recognized by Article 4(2)(a) of the Tribunal Statute."
[107] Prosecutor's pre-trial brief, 19 November 1998, para. 2.2, p. 4 stated: "In perpetrating the acts outlined in the indictment, the accused committed genocide by killing members of the group, contrary to Article 4(2)(a) of the Statute".
[108] Judgement, para. 140, p. 43.

prosecution's right to request a retrial as a remedy on appeal. However, as has been stated above, whether or not such a request is granted, lies within the discretion of the Appeals Chamber based on the facts of the case before it. It is not obliged, having identified an error, to remit for retrial. Considering the exceptional circumstances of the present case, the Appeal Chamber considers that it is not in the interests of justice to grant the prosecution's request and accordingly declines to reverse the acquittal entered by the Trial Chamber and remit the case for further proceedings. In this regard, the Appeals Chamber does not consider that the facts of this case constitute appropriate circumstances, as referred to in Rule 117(C) of the Rules.

III. CROSS-APPELLANT'S APPEAL

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

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

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

79. The Appeals Chamber went on to say:

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

80. In his oral argument on 22 February 2001, counsel for the cross-appellant invited the Appeals Chamber "to formally quash the lesser of each pair of offences for which [the cross-appellant] was sentenced"; but counsel did not say which of each pair he regarded as the lesser offence.[111] His submission referred to the following situation.

81. There were three separate allegations of causing bodily harm and twelve separate allegations of murder. Each of the three allegations of causing bodily harm was charged, first, as a violation of the laws or customs of war (cruel treatment), contrary to Article 3 of the Statute, and, secondly, as a crime against humanity (inhumane acts), contrary to Article 5 of the Statute. Each of the 12 allegations of murder was charged, first, as a violation of the laws or customs of war, contrary to Article 3 of the Statute, and, secondly, as a crime against humanity, contrary to Article 5 of the Statute.

82. The validity of cumulative convictions in relation to the same conduct, charged as a violation of the laws or customs of war under Article 3 and as a crime against humanity under Article 5 of the Statute, is based on the notion that each crime has a special ingredient not possessed by the other. Following the reasoning of the Appeals Chamber in the *Delali}* appeal judgement,[112]

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[109] *Delalic* appeal judgement, para. 412, p. 138.
[110] *Ibid.*, para. 413, p. 138.
[111] Appeal transcript, 22 February 2001, p. 33.
[112] Also applied in *Prosecutor v. Dragoljub Kunarac et al*, Case Nos.: IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para. 556, pp. 198-199.

the Appeals Chamber notes that, Article 3 requires a close link between the acts of the accused and the armed conflict; this element is not required by Article 5. On the other hand, Article 5 requires proof that the act occurred as part of a widespread or systematic attack against a civilian population; that element is not required by Article 3. Thus each Article has an element requiring proof of a fact not required by the other. As a result, cumulative convictions under both Articles 3 and 5 are permissible. In such a situation, it is not possible to hold, as is submitted by the cross-appellant, that either offence is a "lesser included offence" of the other.

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

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

1. Admissibility of evidence at trial on count of genocide

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

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

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

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

[113] Judgement, para. 130, p. 40.
[114] *Ibid.*.
[115] *Ibid.*, paras 131 and 133, p. 40.

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

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

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

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

> **COUNTS 16-17**
>
> Killing of Huso and Smajil Zahirovi}
>
> 22. On about 8 May 1992, at Luka camp, **Goran JELISIC** took two Muslim brothers from Zvornik, Huso and Smajil Zahirovi}, outside of the main hangar building where he shot and killed one of them. By these actions, **Goran JELISIC** committed:

[116] Cross-appellant's reply, p. 12. Appeal transcript, 23 February 2001, p. 241.
[117] Cross-appellant's reply, pp. 17-18.
[118] Cross-appellant's brief, pp. 121-123, skeleton argument, para. 6.2(v), p. 6, appeal transcript, 23 February 2001, p. 241.

> Count 16: a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR** recognized by Article 3 of the Tribunal Statute and Article 3(1)(a) (murder) of the Geneva Conventions;
>
> Count 17: a **CRIME AGAINST HUMANITY** recognized by Article 5(a) (murder) of the Tribunal Statute.

91. Despite its sub-title, it is evident from the text of paragraph 22 of the second amended indictment that the cross-appellant was charged with murdering one brother only. In fact, the Trial Chamber convicted him of murdering both. The prosecution accepts that the double conviction was an error and concedes that the cross-appellant should have been convicted on his guilty plea only for one of the murders. The Appeals Chamber accordingly quashes the conviction of the cross-appellant for the murder of one of the two brothers. The matter is stated that way because the record does not enable the Appeals Chamber to identify the particular brother in respect of whom alone the cross-appellant pleaded guilty. The agreed factual basis was that "on about 08 May 1992, he [Goran Jelisi}] took two Muslim brothers, Huso and Smajil Zahirovi}, outside of the main hangar at Luka Camp and shot and killed one of them."[119]

92. The Appeals Chamber considers that it is unsatisfactory that it has not been established which one of the two brothers the cross-appellant killed. However, as has been indicated above, the cross-appellant is not appealing against the conviction; he emphasises that his appeal is directed to sentence only. His case is that the error in convicting him of murdering both brothers instead of one goes to sentence, the argument being that the sentence passed assumed guilt of the additional murder and was intended to reflect that circumstance. Accordingly, he contends that the sentence should appropriately be reduced.

93. The cross-appellant was convicted of 31 counts of violations of the laws or customs of war and crimes against humanity. The Trial Chamber passed a single sentence of 40 years' imprisonment in respect of convictions on counts of violations of the laws or customs of war and crimes against humanity. Apart from the particular murder in question, these counts involved 12 murders and other crimes. The global sentence passed rested on the view taken by the Trial Chamber of the totality of the criminal conduct of the accused. The question is whether the totality of that conduct is materially affected by the Trial Chamber's error of convicting the cross-appellant of one additional murder. In the *Delalic* appeal judgement, the Appeals Chamber agreed "with the Prosecution submission that a person who is convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes".[120]

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[119] Agreed factual basis, p. 4.
[120] *Delalic* appeal judgement, para. 771, p. 275.

94. The Appeals Chamber, in accordance with Article 25 of the Statute has the mandate to "affirm, reverse or revise the decisions taken by the Trial Chamber". The Trial Chamber held, when discussing the reasons for a single penalty of 40 years' imprisonment, that the crimes "form part of a single set of crimes committed over a brief time span which does not allow for distinctions between their respective criminal intention and motives."[121] A sentence imposed should reflect the inherent gravity of the criminal conduct as stated in Article 24 of the Statute or as put by the Appeals Chamber in the *Aleksovski* case:

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

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

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

3. The absence of a recognised tariff for sentencing

96. The cross-appellant argues that the Trial Chamber failed to have regard to a tariff of sentences discernible in the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("the ICTR"). The Appeals Chamber understands that what is being referred to is not a legally binding tariff of sentences but a pattern which emerges from individual cases, and that the argument is that a Trial Chamber has a duty to take that pattern into account. Whether the practice of the Tribunal is far enough advanced to disclose a pattern is not clear.[123] The Appeals Chamber agrees that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules. But it is difficult and unhelpful to lay down a hard and fast rule on the point; there are a number of variable factors to be considered in each case.

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[121] Judgement, para 137, p. 41.
[122] *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-A, Judgement, 24 March 2000 ("the *Aleksovski* appeal judgement"), para. 182, p. 75.
[123] See generally *Prosecutor v. Anto Furundžija*, Case No.: IT-95-17/1-A, Judgement, 21 July 2000, ("the *Furund`ija* appeal judgement"), paras 236-239, pp. 73-74, and *Delalic* appeal judgement, paras 715-718, pp. 252-253.

97. Further, the cross-appellant argues that a Trial Chamber when imposing a sentence must operate within a certain institutional framework which takes account of the relative situation of the accused compared to other accused convicted of similar crimes, so that consistent sentences are given.[124] The Trial Chamber in this particular case, by imposing a sentence of 40 years, allegedly abused its discretion, as it has to be exercised with reference to discernible principles of law derived from various cases of the ICTR and the Tribunal.[125] Counsel for the cross-appellant compares the sentence imposed in the present case with those imposed in other judgements of the International Tribunals, in particular the *Tadi}* and *Erdemovi}* cases. [126]

98. The cross-appellant raises several interrelated issues which in his submission show that the Trial Chamber erred when imposing sentence:[127] a) the Trial Chamber's failure to accept the remorse shown by the cross-appellant as genuine;[128] b) the fact that the cross-appellant was not a commander;[129] and c) the Trial Chamber's failure to adequately consider the role of the cross-appellant in the broader context of the conflict in the former Yugoslavia.[130] Even though there is a slight difference between the argument of a recognised tariff of sentencing and errors relating to the Trial Chamber's discretion, the Appeals Chamber has found it suitable to deal with the cross-appellant's submissions relating to errors of discretion under this ground.

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

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

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[124] Appeal transcript, 23 February 2001, pp. 165-168.
[125] *Ibid.*, pp. 165, 178-180.
[126] *Ibid.*, pp. 165-168. Cross-appellant's reply pp. 24-29.
[127] The Appeals Chamber understands, from the skeleton argument and the oral hearing, the cross-appellant to be advancing these factors.
[128] Appeal transcript, 23 February 2001, pp. 176-177, 183-185.
[129] Cross-appellant's reply, pp. 23-24. Appeal transcript, 23 February 2001, pp. 173-175, 189-190.
[130] Appeal transcript, 23 February 2001, p. 166.
[131] *Delali}* appeal judgement, para. 725, p. 256. See also *Furund`ija* appeal judgement, para. 239, p. 74, *Prosecutor v. Serushago,* Case No.: ICTR-98-39-S, Sentence, 5 February 1999, para. 32, *Aleksovski* appeal judgement, para. 187, pp. 77-78 and *Prosecutor v. Du{ko Tadi},* Case No.: IT-94-1-A and IT-94-1-A*bis*, Judgement in sentencing appeals, 26 January 2000 ("the *Tadi}* sentencing appeal"), paras 20-22, pp. 12-13.
[132] *Furund`ija* appeal judgement, para. 250, p. 77, also referred to in *Delali}* appeal judgement, para. 720, p 254.

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

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

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

102. As to the alleged failure to consider the remorse of the cross-appellant as genuine, the Trial Chamber was not convinced that "the remorse which Goran Jelisi} allegedly expressed to the expert psychiatrist was sincere" and therefore did not consider it a mitigating factor.[136] Counsel for the cross-appellant submits that the Trial Chamber "misdirected itself as to the burden that the accused had to discharge in order to convince them that he [the cross-appellant] had remorse". He submits that it was not for the cross-appellant to have to satisfy the Court that the remorse was genuine and the Trial Chamber should have accepted expressions of remorse that were accepted by an expert

[133] *Delali}* appeal judgement, para. 731, pp. 258-259.
[134] *Aleksovski* appeal judgement, para. 182, p. 75.
[135] *Prosecutor v. Zoran Kupre{ki} et al.,* Case No.: IT-95-16-T, Judgement, 14 January 2000, ("the *Kupre{ki}* trial judgement"), para. 852, p. 318.
[136] Judgement, para. 127, p. 39.

psychiatrist.[137] The prosecution disagrees and submits that the report referred to in the Judgement did not state that the cross-appellant showed remorse but rather that he "would appear more than in the past to demonstrate remorse".[138]

103. The Trial Chamber's finding must be interpreted in two steps. First, the content of the report has to be examined as the Trial Chamber found that the cross-appellant "allegedly expressed remorse." The Appeals Chamber is of the opinion that the report clearly states that the psychiatrist believed that the cross-appellant was expressing remorse.[139] Therefore, the only reasonable conclusion that could be drawn from the report is that the cross-appellant did express remorse and the Trial Chamber erred in finding that the cross-appellant "allegedly" expressed remorse. The second question is whether the Trial Chamber's finding as to the sincerity of the remorse expressed was erroneous. On this point, counsel for the cross-appellant submitted that the Trial Chamber could not reject expressions of remorse as insincere "unless it was convinced that the expressions of remorse were false".[140] The Trial Chamber has the discretion to give little or no weight to a particular piece of evidence. Having considered the evidence which was presented to the Trial Chamber, the Appeals Chamber is satisfied that the Trial Chamber's finding that the remorse was not sincere is not unreasonable. Therefore, the Trial Chamber did not err in the exercise of its discretion.

104. The cross-appellant has also submitted that the Trial Chamber erred in finding in paragraph 95 of the Judgement that he was a commander and that the Tribunal has recognised a distinction for sentencing purposes between those in command and those who are not.[141]

105. In paragraph 95 of the Judgement the Trial Chamber found:

> It has also not been established beyond reasonable doubt whether the accused killed at Luka camp under orders. Goran Jelisi} allegedly presented himself to the detainees as the Luka camp commander. The detainees believed that he was the chief or at least a person in authority because he gave orders to the soldiers at the camp who appeared to be afraid of him. The Trial Chamber does not doubt that the accused exercised a *de facto* authority over the staff and detainees at the camp.[142]

[137] Appeal transcript, 23 February 2001, pp. 176-177.
[138] *Ibid.*, pp. 219-220, citing the Report by Doctor van den Bussche of 8 November 1999 ("the report"), p. 17. Notice of filing, 15 November 1999, included the report.
[139] Report, pp. 10, 17. The Trial Chamber referred to p. 22 of the French translation. It corresponds to p. 17 of the English translation, which has not been properly reflected in the English translation of the Judgement.
[140] Appeal transcript, 23 February 2001, pp. 176-177.
[141] *Ibid.*, pp. 173-175.
[142] Judgement, para. 95 (footnotes omitted).

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

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

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

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

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

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

110. The Trial Chamber in this case found:

> One of the missions of the International Criminal Tribunal is to contribute to the restoration of peace in the former Yugoslavia. To do so, it must identify, prosecute and punish the principal political and military officials responsible for the atrocities committed since 1991 in the territories concerned. However, where need be, it must also recall that although the crimes perpetrated during armed conflicts may be more specifically ascribed to one or other of these officials, they could not achieve their ends without the enthusiastic help or contribution, direct or indirect, of individuals like Goran Jelisi}.[146]

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

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[143] Appeal transcript, 23 February 2001, pp. 216-217.
[144] *Ibid*., p. 217.
[145] *Tadi}* sentencing appeal, paras 55-56, pp. 24-25.
[146] Judgement, para. 133, p. 40.

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

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

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

113. Article 24(1) of the Statute, on which the cross-appellant relies, states:

> The penalty imposed by the Tribunal shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.

114. Two sub-issues are involved. First, does the provision require a Trial Chamber to have recourse to the general practice regarding prison sentences of the courts in entities emerging from the dissolution of the former Yugoslavia? It appears to the Appeals Chamber that the answer is no, because courts in entities emerging from the dissolution of the former Yugoslavia are not "courts of the former Yugoslavia" within the meaning of Article 24(1) of the Statute.

115. The second sub-issue is whether paragraph 1 of Article 24 of the Statute requires the Trial Chamber to consider the position in each of the constituent republics of the former Yugoslavia. As has been seen, that provision provides that "the Trial Chambers shall have regard to the general practice regarding prison sentences in the courts of the former Yugoslavia".[148] The state representing the former Yugoslavia was the Socialist Federal Republic of Yugoslavia ("the SFRY"). The courts of the former Yugoslavia were bound by the law of the SFRY. In the *Delalic* appeal judgement, it was to that law that the Appeals Chamber looked.[149]

116. No doubt, the Tribunal may be informed in an appropriate case by the sentencing practices of the courts of one or more of the constituent republics of the former Yugoslavia where it has reason to believe that such specific consideration would aid it in appreciating "the general practice [...] in the courts of the former Yugoslavia". The latter phrase is obviously to be taken as a whole;

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[147] Cross-appellant's brief, pp. 139-141 (emphasis in original).
[148] Aleksovski appeal judgement, para. 178, p. 73. See also *inter alia*, *Kupre{ki}* trial judgement, 14 January 2000, para. 841, p. 314, *Prosecutor v. Anto Furund`ija*, Case No.: IT-95-17/1-T, Judgement, 10 December 1998 ("the *Furund`ija* trial judgement"), para. 240, pp. 91-92, *Prosecutor v. Tihomir Bla{ki}*, Case No.: IT-95-14-T, 3 March 2000 ("the *Bla{ki}* trial judgement"), para. 760, pp. 248-249.
[149] *Delalic* appeal judgement, para. 814, p. 292.

individual divergences from the norm in particular republics do not show the "general practice". There was no reason in this case to undertake a full-scale consideration of the position in each of the several republics which constituted the former Yugoslavia.

117. In passing, the Appeals Chamber notes that, in keeping with the settled jurisprudence, the cross-appellant correctly recognised that "general practice" provides general guidance and does not bind a Trial Chamber to act exactly as a court of the former Yugoslavia would. For example, even if the general practice were otherwise, this would not prohibit the imposition of a sentence of life imprisonment; *a fortiori,* it would not stand in the way of a sentence of 40 years' imprisonment.

118. The Appeals Chamber finds that this part of the cross-appellant's second ground of appeal fails.

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

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

120. Under the heading of mitigating circumstances, the Trial Chamber stated that:

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

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

122. In this case the Appeals Chamber notes that the Trial Chamber did consider the guilty plea in mitigation. The weight to be attached to it is at the discretion of the Trial Chamber and it falls on

[150] Cross-appellant's brief, pp. 129-138. He refers specifically to *Prosecutor v. Drazen Erdemovi},* Case No.: IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998, and *Prosecutor v. Georges Ruggiu,* Case No.: ICTR-97-32-I, Judgement and Sentence, 1 June 2000.
[151] Appeal transcript, 23 February 2001, p. 175.
[152] *Ibid.*.
[153] Judgement, para. 127, p. 39 (footnote omitted).

the cross-appellant to convince the Appeals Chamber that the Trial Chamber erred in the exercise of its discretion resulting in a sentence outside the discretionary framework provided in the Statute and the Rules.

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

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

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

125. The Trial Chamber found:

> Furthermore, his [Goran Jelisi}'s] co-operation with the Office of the Prosecutor in this case does not seem to constitute a mitigating circumstance within the meaning of Sub-rule 101(B)(ii) of the Rules.[155]

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

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

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

128. In the skeleton argument, a ground of appeal was advanced concerning "[h]is youth, maturity, the impact of propaganda on him and [his] mental state".[156] Subsequently during the hearing on appeal, counsel for the cross-appellant addressed the Appeals Chamber on the cross-appellant's youth and immaturity, but advanced no argument specifically on the impact of

[154] Appeal transcript, 23 February 2001, pp. 193-195 (closed session).
[155] Judgement, para. 127, p. 39.
[156] Skeleton argument, para. 6.2(iv), p. 6.

propaganda on him and his mental state.[157] The cross-appellant submits that he was only 23 years old when he committed the crimes and that the Tribunal has consistently accepted youth as a mitigating factor.[158]

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

130. The Trial Chamber found:

> Among the mitigating circumstances set out by the Defence, the Trial Chamber will consider the age of the accused. He is now 31 years old and, at the time of the crimes, was 23.[159]

131. The Appeals Chamber notes that the Trial Chamber did consider the age of the accused. The weight to be attached to that circumstance is within the discretion of the Trial Chamber to determine and it falls on the cross-appellant to demonstrate to the Appeals Chamber that the Trial Chamber erred in the exercise of its discretion. The cross-appellant has failed to discharge the burden.

132. The Appeals Chamber therefore finds that this part of the cross-appellant's second ground of appeal fails.

133. The cross-appellant's second ground of appeal succeeds to the extent that the Trial Chamber erred in finding the cross-appellant guilty of two murders under counts 16 and 17 of the second amended indictment when he in fact pleaded guilty to only one of the murders, but otherwise fails.

[157] Appeal transcript, 23 February 2001, p. 177.
[158] *Ibid.*. Counsel cited *Land`o* (aged 19), *Erdemovi}* (aged 23) and *Furund`ija* (aged 23) in support as well as *Bla{ki}* trial judgement, para. 778, p. 255, and *Furund`ija* trial judgement, para. 284, p. 107.
[159] Judgement, para. 124, p. 38.

IV. DISPOSITION

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

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

(3) In respect of the prosecution's third ground of appeal -

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

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

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

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

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

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

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

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

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

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

Mohamed Shahabuddeen
Presiding

Lal Chand Vohrah

Rafael Nieto-Navia

Patricia M. Wald

Fausto Pocar

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

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

[**Seal of the Tribunal**]

V. SEPARATE OPINION OF JUDGE NIETO-NAVIA

1. I agree with the decision on the Prosecution's first ground of appeal that in the circumstances of this case, the Prosecution had a right to be heard on the question of whether the evidence was sufficient to sustain a conviction. I differ somewhat in the reasons.

2. Rule 98*bis*(B) provides that prior to the presentation of evidence by the defence, that is, at the close of the Prosecution case, "[t]he Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges." Three aspects of this provision deserve attention. First, the fact that the Trial Chamber may act *proprio motu*, means that the Trial Chamber has a right to act on its own volition and without the need for a motion to be filed requesting that it so act. Second, the provision is expressed in the imperative, in that the Chamber *shall* act once it finds that the evidence is insufficient to sustain a conviction – that is, it ensures that in these circumstances (either following a motion or *proprio motu*), the Chamber is *obliged* to order the entry of judgement of acquittal. At this point, it has no discretion not to do so. Third, the Rule does *not* expressly provide that, before ordering the entry of judgement of acquittal the parties have a right to be heard by the Trial Chamber.

3. My question is, whether pursuant to general principles of law, primarily that of *audi alteram partem*, a Trial Chamber is *always* obliged to hear from the Prosecution before reaching a decision under Rule 98*bis*. I agree with the finding in the Judgement that a party always has a right to be heard on its motion, whether in writing, orally or, subject to the discretion of the Trial Chamber, both[1] - but what if no motion is filed? I am not convinced by the Prosecution's absolute proposition, as confirmed in the Judgement that a Trial Chamber's right to make a decision *proprio motu* on this question (that is, without having been asked by either party), "does not relieve it of the normal duty of a judicial body first [in all circumstances] to hear a party whose rights can be affected by the decision to be made."[2] What were the circumstances of this case such that the Appeals Chamber reached this conclusion? What did the Trial Chamber find?

4. During the hearing held on 19 October 1999, the Trial Chamber stated:

> *Après discussion, les Juges ont fixé, au cours de cette conférence de mise en état* [which was held on 22 September 1999]*, au 8 novembre prochain la date pour le début de la présentation des éléments de preuve de la défense [….] Les Juges ont ensuite examiné l'ensemble des éléments de preuve avancés par l'accusation. De leur deliberé, ils ont conclu que, sans même qu'il soit besoin*

[1] Majority Judgement, para. 25.
[2] Majority Judgement, para. 27.

> *d'entendre les arguments éventuels de la défense, l'accusé ne pouvait pas être reconnu coupable du crime de génocide*.[3]

5. The Trial Chamber acknowledged that the Prosecution had filed its motion to be heard but decided to join it to the merits of the case.[4] In doing so, it considered that the Prosecution did not have an absolute right to present closing argument in the context of a decision entered under Rule 98*bis*. On the contrary, as the Trial Chamber had reached a decision *proprio motu* that the evidence was not sufficient to sustain a conviction, it found that it was obliged by that provision to enter a judgement of acquittal and was not required to hear submissions from the Prosecution. The Trial Chamber held that the principle *audi alteram partem* was inapplicable in the circumstances of this case, on the basis that it was not an absolute principle (finding that an exception applies in the case of motions filed *ex parte*) and because its decision did not originate in a motion filed by the defence, but rather was a decision taken *proprio motu*.[5] It found that:

> *[c]e caractère imperatif* [of Rule 98*bis*(B) of the Rules] *exclut toute possibilité d'intervention de la partie accusatrice, sauf l'appel naturellement, après que les Juges ont formé leur décision sur la base de l'ensemble des preuves que cette même partie a choisi de présenter. Par définition, il exclut que le Procureur puisse présenter des arguments finaux tels que ceux visaient à l'article 86 du Règlement.*[6]

6. The Trial Chamber stated that the Prosecution should not be given "*une chance supplémentaire*" other than the right to appeal its decision[7] and added that,

> *[l]e Procureur ne peut pas non plus s'abstenir de présenter en temps voulu tous les éléments de preuve susceptible, selon lui, de convaincre la Chambre pour attendre que la défense ait présenté ses propres éléments de preuve. Enfin, il appartient au Procureur, qui ne peut pas ignorer les dispositions de l'article 98bis du Règlement, de se prémunir contre leurs conséquences éventuelles en soumettant, le moment voulu, à la Chambre les conclusions, notamment juridiques, qu'il estimerait nécessaire d'apporter à l'appui de sa thèse*.[8]

Was this reasoning correct?

7. The Trial Chamber reached its decision after the Prosecution had decided to close its case and had presented all of its evidence.[9] It is at this point in the trial that the Trial Chamber is under an absolute obligation, if the evidence brought by the Prosecution is insufficient to sustain a conviction on some or all counts on the indictment, to "order the entry of judgement of acquittal." The Trial Chamber rightly found as such. However, is it the case that the mandatory nature of the

[3] T, 19 October 1999, p. 1705.
[4] T, 19 October 1999, p. 1706.
[5] Majority Judgement, para. 26.
[6] T, 19 October 1999, p. 1708.
[7] *Ibid.*
[8] T, 19 October 1999, p. 1709.
[9] Save for one possible witness who it stated it would perhaps call in the future.

Rule, "*?pgar définition…exclut que le Procureur puisse présenter des arguments finaux tels que ceux visaient à l'article 86 du Règlement*"?[10]

8. If the latter proposition is understood as meaning that the Prosecution may never intervene in the context of a *proprio motu* decision by the Trial Chamber under Rule 98*bis*, for the reasons set out below, I believe it is incorrect. In fact, I believe that neither the absolute position taken by the Appeals Chamber, nor the contrary taken by the Trial Chamber, correctly reflect the obligation on the Trial Chamber to strike a balance between protection of the rights of the accused and the Prosecution (as a party to the proceedings) and the need to ensure that trial proceedings are fairly and expeditiously conducted.

9. I do not dispute in principle, the Prosecution's proposition, that "[s]ubmissions to the Trial Chamber by the Prosecution as to the case presented, would have enabled the Trial Chamber to appreciate precisely what the Prosecution's theory of the case was and how each of the various elements of a crime were supported by the evidence."[11] Nor, as stated, do I dispute the contention that the Prosecution would have a right to respond if the defence filed a motion under Rule 98*bis*. It also may be accepted that in practice, for a Trial Chamber to terminate proceedings at this stage of the trial *proprio motu* is a somewhat "extraordinary step" for it to take.[12] Nevertheless, I do not agree that there could never be a "justifiable reason"[13] for a Trial Chamber to decide to do so, without first hearing from the Prosecution – that is, I do not agree that there is an absolute obligation on the Trial Chamber to hear from the Prosecution.

10. A criminal trial is essentially a fact-finding process during which the Judges both hear the evidence and (in the case of the Tribunal) based on this evidence reach a decision. At this stage of the trial process, they are entitled to conclude that the evidence so far presented is insufficient to sustain a conviction on one or more counts on the indictment, such that the trial on that particular count concludes. It may arise that a Trial Chamber is totally convinced, having read the parties' pre-trial briefs (Rule 65*ter*), heard the parties' opening statements (Rule 84) and the Prosecution witnesses and evidence (Rule 85), that there is insufficient evidence to sustain a conviction on one or more counts. It may also be that it reaches this decision in the certainty that there is no need to hear further argument from the parties, being satisfied that this would add nothing to its decision. If so, why should it be obliged to go through the motions of doing so? It is my view that an

[10] T, 19 October 1999, p. 1708.
[11] Prosecution Brief para. 2.4.
[12] The Prosecution stated that it was an "extraordinary step" for the Trial Chamber to "summarily terminate[] the proceedings." Prosecution Brief, para. 2.3. It is noted that this was the first time since Rule 98*bis* was adopted by the Tribunal at the eighteenth Plenary Session on 9-10 July 1998, that such a decision was entered *proprio motu*, while all subsequent decisions by Trial Chambers have been rendered pursuant to motions filed by the defence.
[13] Prosecution Brief, para. 2.4.

interpretation of the Rules accords with a view that a decision under Rule 98*bis* lies within the discretion of the Trial Chamber and that it may reach it with or without the assistance of submissions from the Prosecution. Accordingly, if it is totally convinced, based on the evidence so far presented, that there is no need to hear further argument, it is within its competence to make that decision.[14] The Judgement decides that the Prosecution could assist in this decision-making process. As stated, I do not dispute this as a general proposition. However, whether or not in a particular case a Trial Chamber is more comfortable making this decision with the benefit of a form of closing argument from the Prosecution is a matter solely within its discretion - it may equally reach this decision without further assistance from the parties.

11. This interpretation is supported by the express wording of the relevant provisions of the Rules. In this regard, the Prosecution submits that the phrase "after the close of the Prosecutor's case" (in Rule 98*bis*), should be construed as including an absolute right for the Prosecution to present closing argument pursuant to Rule 86(A), prior to deliberation by the Trial Chamber on the sufficiency of the evidence after the close of the Prosecution case. However, Rule 86(A) expressly provides for such a right to the Prosecution, "[a]fter the presentation of *all* the evidence."[15] The totality of the evidence in a trial includes that provided by the Prosecution and the defence, together with evidence ordered by the Trial Chamber pursuant to Rule 98.[16] Consequently it does not necessarily follow that this express provision in Rule 86(A), for a right to present a closing argument after the presentation of all the evidence, necessarily guarantees its application at this point in the trial - clearly all of the evidence has not yet been presented. Similarly this analogy fails if one considers the following possibility. At the end of a trial, the decision as to whether or not the Prosecution wishes to present a closing argument lies within its discretion ("the Prosecutor may present a closing argument"). It is accepted that generally the Prosecution will exercise this right - equally however, a Trial Chamber may find itself in the position whereby it must decide the case without the assistance of the Prosecution, if the Prosecution decides not to exercise its right. The possibility therefore exists even at this stage of the trial that the Trial Chamber may have to deliberate on the case unassisted by closing argument from the Prosecution.

[14] In the decision in *R. v. Barking and Dagenham Justices, ex parte Director of Public Prosecutions*, [1995] Crim LR 953, the court found "*desirable* that the Magistrates, in such circumstances, should call upon the party that they are *provisionally* against, in this case the Prosecution, before making a ruling" (emphasis added). This is however distinct from the situation to which I allude. That is, not a situation in which the justices are "provisionally" against a party, but rather are already convinced. In any event, I believe that the jurisprudence supports my contention that a decision by the court is discretionary, that is, it is "desirable" and not mandatory to hear the party.
[15] Emphasis added.
[16] Rule 85(A) of the Rules.

12. It is a general rule of interpretation that the law must be interpreted in such a way that it has useful effect (the principle of effectiveness, or *ut res magis valeat quam pereat*).[17] Similarly "[i]n interpreting a particular Rule, a Trial Chamber should ensure that it is interpreted in accordance with its 'ordinary meaning.'"[18] Although in many circumstances it is likely that a Trial Chamber will seek assistance from the parties prior to entering a decision under Rule 98*bis proprio motu*, it is my view that, based on the ordinary and effective meaning of the Rules, it is equally within the discretion of the Trial Chamber in limited and defined circumstances as outlined above, to proceed without doing so.

13. Finally, the majority cites the dissenting opinion of Judge Barwick in the *Nuclear Tests Case* as support for "a more general observation on the importance of not deciding without first hearing counsel's arguments."[19] It is however noteworthy that in that case the majority of the International Court of Justice in fact decided not to hear from the parties concerned. In this regard, the Court stated:

> It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties.[20]

14. In my view, this reasoning applies *mutatis mutandis* to the issue in point, such that only if it is considered in the interests of justice should argument be invited.

15. Turning now to the instant case, the following factors distinguish it. First, the appellant in this case has conceded that the Prosecution was denied the right to be heard on the question of whether the evidence was sufficient to sustain a conviction, while he himself did not file a motion to acquit at the conclusion of the case.[21] Second, on 22 September 1999, I believe it is clear that the Trial Chamber in the course of the Status Conference and at its conclusion, gave rise to a legitimate expectation on behalf of the parties that the matter would return on 8 November 1999 to commence the defence case. In doing so, it ordered that the defence should notify the court as soon as possible, if it intended to file a motion under Rule 98*bis*. There does not appear to have been any indication to the parties that the Trial Chamber was thinking in terms of Rule 98*bis*(B) and that it intended to make such a ruling *proprio motu*. The Prosecution filed a motion to be heard on 15 October 1999.

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[17] *See, Prosecutor v. Dario Kordic and Mario Cerkez*, Decision on appeal regarding the admission into evidence of seven affidavits and one formal statement, Case No. IT-95-14/2-AR73.6, 18 September 2000, paras. 23 *et seq*.
[18] *Ibid.,* para. 22, referring to Article 31(1) of the Vienna Convention on the Law of Treaties (1969).
[19] Majority Judgement, footnote 55.
[20] *Nuclear Tests (Australia v. France),* I.C.J. Reports 1974, p. 253, at para. 33.
[21] Majority Judgement, para. 28.

The Trial Chamber decided to join this motion to the merits four days later, on 19 October 1999, finding that there was "*un lien indissociable*" between the motion to be heard and the decision on the merits.[22] It gave no detailed reasons as to what this "*lien*" was, why this decision was taken nor why it could not have first rendered a decision on the motion to be heard thereby perhaps providing for a right of interlocutory appeal to the Prosecution. Finally, in its oral decision on the motion to be heard, as set out above, the Trial Chamber appears to have based its decision partly, on an understanding that the Rules in question excluded the possibility of intervention by the parties when a decision under Rule 98*bis* was entered *proprio motu*. As stated above, this is not my interpretation.

16. For these reasons and despite my views on the substance of the issue in point, I believe that the Trial Chamber erred in finding that the Prosecution could not have a right to be heard on the question of whether the evidence was sufficient to sustain a conviction. Consequently, it is not necessary for me to dissent from the Appeals Chamber's conclusions on this point, although I do not agree with the general statement that the Prosecution has an absolute right to be heard in the case of a *proprio motu* decision under Rule 98*bis*.

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

_____
Rafael Nieto-Navia

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

[**Seal of the Tribunal**]

[22] T, 19 October 1999, p. 1706. The Trial Chamber stated: "*Il y a donc lieu de joindre cette requête, qu'on appellera l'incident, au fond*."

VI. PARTIAL DISSENTING OPINION OF JUDGE SHAHABUDDEEN

1. With respect to the appeal by the prosecution, I agree with the judgement of the Appeals Chamber that the Trial Chamber erred in acquitting the respondent at the close of the case for the prosecution on the ground that the evidence was insufficient to sustain a conviction ("mid-trial acquittal"), but dissent in so far as, having so held, it declined to reverse the acquittal and to remit the case for a continuation of the proceedings, including a fresh hearing by a recomposed bench if the previous bench could not be brought together. With respect to the cross-appeal, I agree with the judgement of the Appeals Chamber but propose to state my views on an aspect of it which concerns the subject of cumulative convictions.

THE PROSECUTION'S APPEAL

2. Was the decision of the Trial Chamber to make a mid-trial acquittal erroneous? If it was, should the case be remitted for further proceedings? There are four points which I would like to notice.

3. The first point is this: As is recalled in the judgement of the Appeals Chamber, the question of the correct test to be applied under Rule 98*bis*(B) of the Tribunal's Rules of Procedure and Evidence was settled by the Appeals Chamber in *Delalic* [1]. In that case, a ground of appeal was "that the evidence was not what was described as *legally* sufficient to sustain the convictions"[2]; thus, the question what was the correct test to be applied was a matter that fell for determination. The Appeals Chamber is not legally bound by its previous decisions (including one as to following its previous decisions) but will in practice follow them unless there is cause for a departure. I do not think that this is at variance with the essence of the established position, but, if it is, it is my view and I adhere to it in this individual opinion. The question then is whether *Delalic* should now be departed from on the ground that it overlooked a consideration that the jurisprudence on which it relied developed largely, though not wholly, in jury systems, whereas Judges of the Tribunal decide both fact and law.

4. A submission to similar effect was made in relation to magistrates by the learned editors of *Archbold, Criminal Pleading, Evidence and Practice.* I refer to that and other material from a particular jurisdiction only because it appears to me that they reflect an experience of the law which

[1] IT-96-21-A, of 20 February 2001, paras. 433-434.
[2] Ibid., para. 433.

is helpful to this analysis. The relevant text, as carried forward in paragraph 4-296 of the issue of that work for the year 2000, ran:

> In their summary jurisdiction magistrates are judges both of facts and law. It is therefore submitted that even where at the close of the prosecution case, or later, there is some evidence which, *if accepted*, would entitle a reasonable tribunal to convict, they nevertheless have the same right as a jury to acquit if they do not accept the evidence, whether because it is conflicting, or has been contradicted or for any other reason. It is submitted that the *Practice Note* [1962] 1 All E.R.448 must be read in this light. It is submitted that the test set out therein equates with what was said in *Galbraith*, expressed in terms appropriate to summary proceedings.

5. That text was before a court in the year 1994. Referring to the rule that questions of credibility are normally not for the court when determining a no case submission, a judge in that case observed that the rule is "also applicable to situations arising at the close of the prosecution case in summary proceedings, where the court has to consider whether there is a case to answer".[3] This would seem to leave intact the general rule prohibiting magistrates from deciding a no case issue as if they were making definitive findings of guilt or innocence.

6. The general rule on this point, as set out in the 1962 *Practice Note* (referred to in the *Archbold* text), reads:[4]

> A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it.
>
> Apart from these two situations a tribunal should not in general be called upon to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If however a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer.

7. This direction was given to magistrates who, of course, do not sit with juries, and so, in that respect, are, like Trial Chambers of the Tribunal, triers of both fact and law. Presumably it was followed by them. The direction has since been qualified in some respects[5], particularly as regards trials before judge and jury, but I agree with a view that its broad thrust remains.

8. To be sure, there are plain cases in which the members of the bench might say "that there is nothing in the case and that they do not want to hear any more of it".[6] In such cases the court is indeed making a decision as to the credit to be given to the testimony, but, as indicated in the 1962

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[3] *R. v. Barking and Dagenham Justices,* Ex parte *Director of Public Prosecutions* [1995] Crim LR 953, per Scott Baker J.

[4] [1962] 1 All ER 448.

[5] See *R. v. Galbraith* [1981] 1 WLR 1039, phrased in terms appropriate to a trial by judge and jury.

[6] Per Lord Merriman P., in *Ramsden v. Ramsden* [1954] 2 All ER 623.

Practice Note, it may do so only where the testimony has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. Apart from such exceptions, it would appear that magistrates are generally prohibited from deciding on guilt or innocence on a no case submission.

9. There is, however, merit in the view that, since "[m]agistrates are judges of both fact and law",

> in borderline cases, it may be thought pedantic to require them to go through the motions of hearing defence evidence if they have found the prosecution evidence so unconvincing that they will not convict on it in any event.[7]

10. It is thought that magistrates do in fact act in this way[8]. Indeed, the possibility that they could do so would seem to have been envisaged by the 1962 *Practice Note.* On its terms, it is arguable that this did not absolutely prohibit a mid-trial acquittal where the prosecution evidence disclosed evidence which, if accepted, would entitle a reasonable tribunal to convict. As has been observed, what it said was that "the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict". The words "not so much" would be noted and their implications recognised; so too with the words "in general", as referred to in another part of the *Practice Note.* In addition, it may be observed that the latter does not require magistrates to take the prosecution evidence "at its highest"; this requirement, as it occurs in *Galbraith*[9], would seem to oblige a bench, where it sits with a jury, to abstain more strictly from evaluating the evidence and to leave this to the jury.

11. These considerations support the argument that, at the close of the case for the prosecution, a Trial Chamber has a right, in borderline cases, to make a definitive judgement that guilt has not been established by the evidence, even accepting that a reasonable tribunal could convict on the evidence (if accepted).

12. However, in non-borderline cases, the view which I accept as being right is that, "assuming the necessary minimum amount of prosecution evidence has been adduced so as to raise a case on which a reasonable tribunal *could* convict, the magistrates should allow the trial to run its course

[7] *Blackstone's Criminal Practice 2001* (London, 2001), p. 1562, paragraph D19.8.
[8] See *Emmins on Criminal Procedure*, 5th ed. (London, 1992), p. 194, para. 12.8.3, and Seabrooke and Sprack, *Criminal Evidence and Procedure: The Statutory Framework* (London, 1996), p. 303, para. 22.3.
[9] *R. v. Galbraith, supra.*

rather than acquitting on a submission".[10] In effect, in such cases the general rule applies to prohibit magistrates from proceeding as if they were making definitive findings of guilt or innocence.

13. Correctly, the Trial Chamber did not treat the present case as one of plain insufficiency of evidence; nor do I have the impression that it treated the case as a borderline one. So the general rule applied to prohibit it from passing on matters of credit as if it were making definitive findings of guilt or innocence. In a case such as the present one, I do not think it could do that.

14. In particular, it seems to me that (excepting clear cases of insufficiency of evidence, in which the decision goes in favour of the defence) the danger of deciding a no case issue by attempting to adjudicate on guilt at the mid-trial stage is that, if the no case decision went against the accused, he would understandably feel that the Trial Chamber had made a definitive finding of guilt, so that, in his mind, subsequent defence evidence and submissions would be addressed to a court which had already come to a conclusion as to the result of the case. It could not be correct to engender such lack of confidence in the judicial process.

15. For these reasons, while I appreciate the force of the argument that *Delalic* overlooked the course of jurisprudential development, I do not consider that the argument is sufficiently strong to furnish justification for not following that case in this particular matter.

16. Second, there is the question of the application of the correct test. The Trial Chamber did refer to elements of the prosecution evidence. However, although it sought to make a definitive assessment of the evidence, and assuming that it could do so, it did not refer to possible inferences which a trier of fact might eventually be able reasonably to draw from those elements. For example, in footnote 125 of its judgement, it stated: "Allegedly, these bodies were then loaded into a refrigerated lorry ...while others were thrown into the Sava River...". The first part of that short footnoted statement referred to evidence that a Bimeks refrigerated lorry was regularly engaged in removing 10 to 20 bodies a day. If that evidence was accepted, its implications had to be taken in conjunction with evidence that the bulk of the people killed belonged to a particular ethnic group against whom there was overwhelming evidence that (as the Trial Chamber in fact found) the respondent had a discriminatory intent on grounds of ethnicity. It would then be open to a reasonable tribunal to find, on the evidence, that lives were being destroyed in a systematic and organised way; that the basis of the system and organisation was that people would be destroyed because they were members of a particular ethnic group; that the respondent, though not proved to be the actual commander of the camp, had *de facto* authority over prisoners in matters of life and death; that he was seen by them to have such authority; that he understood that they regarded his

[10] *Blackstone*, *supra*, p. 1562, para. D19.8.

authority as unquestionable and in fact feared him; that he exercised that authority to implement the liquidation arrangements; and that accordingly his intention was to destroy people as members of an ethnic group. It is not necessary to consider whether he acted alone and what are the legal implications if he did. There was evidence that he was associated with other military personnel, and it was open to a reasonable tribunal to draw an inference that the camp, which was of some size, had been established by others and was being operated by them, and that the accused could not have done what he was alleged to have been doing over a period of time without the sanction of authorities above him.

17. The foregoing relates to elements of the prosecution evidence to which the Trial Chamber referred. However, as today's judgement makes clear, there were pertinent elements of that evidence to which the Trial Chamber did not refer. Was the Trial Chamber entitled not to refer to this evidence? It did not take the position that the evidence not referred to had been completely destroyed in cross-examination or was manifestly unreliable, and so it is not necessary to examine that view if it had been put forward. The Trial Chamber did not refer to the prosecution evidence in its full extent because it adopted the wrong test. It used only such material as it considered relevant to that test and deprived itself of the benefit of being able to make recourse to a larger pool of material which the right test would have put at its disposal. Had all the available material been used, a reasonable tribunal could not have found that the prosecution evidence (if accepted) was insufficient to sustain a conviction within the meaning of Rule 98*bis*(B) of the Tribunal's Rules of Procedure and Evidence.

18. For these reasons and for others given in the judgement of the Appeals Chamber, I agree with the majority holding that the Trial Chamber erred in finding, at the close of the case for the prosecution, that the evidence was insufficient to sustain a conviction and in acquitting on that ground.

19. The third point is whether, notwithstanding its finding that the acquittal was erroneous, the Appeals Chamber has power not to remit the case for a continuation of the proceedings. I think that the power exists.

20. The Prosecutor is of course independent, and consideration has to be given to the question whether her functions are unlawfully compromised by an appellate decision which holds that the case was erroneously stopped by the Trial Chamber but that it is nevertheless not to be remitted for further proceedings. That could be an interesting argument. However, its force is diminished by the circumstance that the Prosecutor's entitlement to continue with the case depends on whether it is remitted. Whether the case is remitted depends in turn on the way in which the Appeals Chamber

exercises the powers conferred on it by Article 25(2) of the Statute to "affirm, reverse or revise the decisions taken by the Trial Chambers". I respectfully agree with the Appeals Chamber that these powers are wide enough to give a discretion not to remit in a proper case – a discretion which is of course to be judicially and not arbitrarily exercised. In this respect, I would follow jurisprudence which suggests that, even where the appellate court holds that the lower court erred in making a mid-trial acquittal, the appellate court is competent to decide not to remit the case for further proceedings.[11] A decision to remit is based on a finding of error, but does not necessarily follow on such a finding; the justice of the case may well admit of other considerations which the Appeals Chamber has to take into account.

21. Some assistance may be had from a perusal of the decision of the Appeals Chamber in *Aleksovski.*[12] True, the prosecution's appeal was, in part, from a judgement of acquittal made at the end of the whole case and not from a mid-trial acquittal. Nevertheless, the approach taken by the Appeals Chamber may be of use. The prosecution appealed from an acquittal on counts 8 and 9 of the indictment, arguing that the Trial Chamber had applied the wrong test in making certain holdings. The Appeals Chamber agreed with the prosecution on the point but, in view of certain considerations, declined to reverse the acquittal, thus also declining to remit the case to the Trial Chamber for findings to be made on the correct test. In paragraph 154 of the judgement, it said:

> This ground of appeal succeeds to the extent that the Appeals Chamber finds that the Trial Chamber applied the wrong test for determining the nature of the armed conflict and the status of protected persons within the meaning of Article 2 of the Statute. However, the Appeals Chamber declines to reverse the acquittals on Counts 8 and 9.

22. It seems to me that, in that case, it could equally have been said that a failure to remit the case interfered with the functions of the Prosecutor. It appears however that the Appeals Chamber acted on considerations of justice which went beyond the discharge by the Prosecutor of her statutory functions. A similar course seems admissible here. The Appeals Chamber has power not to remit.

23. The fourth point is this: For the reasons given, I agree with the Appeals Chamber that it has power not to remit. However, I consider that the power has not been correctly exercised in this case. It appears to me that, where the Appeals Chamber upholds the substance of a prosecution appeal from a mid-trial acquittal (as it has done in this case), the logical course would be to remit for a continuation of the hearing; a decision that the acquittal was erroneous but that the case should

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[11] See, *inter alia*, *Botton v. Secretary of State for the Environment* [1992] 1 PLR 1; *Griffith v. Jenkins* [1992] 2 A.C. 76, H.L.; *Director of Public Prosecution v. Cosier*, Q.B.D., 5 April 2000; and *R. v. Barking and Dagenham Justices, ex parte Director of Public Prosecution* [1995] Crim LR 953. Particularities are not, it is submitted, relevant to the general thinking.

[12] IT-95-14/1-A, of 24 March 2000.

nevertheless not be remitted for a continuation of the hearing has to be based on exceptional grounds. In paragraph 77 of its judgement, the Appeals Chamber indeed says that it is acting on the basis of "exceptional circumstances", but I am not persuaded that circumstances of that calibre exist.

24. The respondent has been three and a half years in detention; but it cannot be convincingly argued that, in a case of this kind, there would be any unfairness in continuing the proceedings after normal recourse to the appellate process. The fact that the respondent did not contribute to the error of the Trial Chamber is not decisive. A main point in the argument that the case should not be remitted for further proceedings is the circumstance that, as recalled by the Appeals Chamber in paragraph 76 of its judgement, the Trial Chamber recommended that the respondent should receive "psychological and psychiatric follow-up treatment". But, as the Appeals Chamber notes in paragraph 70 of its judgement, the Trial Chamber had also rejected a contention by him, resting on "psychiatric underpinnings", that he was not competent to stand trial. The Appeals Chamber further observed that, at the subsequent trial, he "did not plead a defence of insanity", and that no mental "imbalance was found in this case". Thus, there is no proven illness which justifies a decision not to resume the proceedings.

25. True, the respondent has been convicted of other crimes in relation to the same facts, but that is not dispositive; nor is it a mere academic point of clarifying the law on the meaning of intent. The question is one of recording the true extent of his criminal conduct on allegations of gravity. The proceedings of the Trial Chamber on the particular charge were not an unimportant incident in contested proceedings relating to other matters as well; they were the only contested proceedings in the whole case. In my opinion, the factors advanced by the majority, while influential, do not afford sufficient purchase on which to rest a decision not to remit. If on a continuation of the proceedings the respondent is found guilty, the matters now relied upon for not remitting can be taken into account in fixing penalty.

26. The Statute prescribes no hierarchy of penalties for the various crimes with which it deals, and so it would not be correct to proceed on the basis that any one crime is intended to be mechanically visited with greater punishment than another. However, in fixing the penalty for genocide, a Trial Chamber would have to pay regard to the character of the offence and in particular to the fact that it is generally considered to be "the crime of crimes". It is indeed very grave. There is no reason to suppose that, if the respondent was found guilty of genocide, he could not receive a sentence of imprisonment in excess of that for 40 years handed down in respect of other crimes to which he pleaded guilty. Even if no greater sentence was imposed, the need to describe the true extent of his criminal conduct on that specially important charge would justify a decision to remit.

What course the Prosecutor chooses to take if the case is remitted is another matter.

27. In paragraph 75 of its judgement, the Appeals Chamber refers to the "*ad hoc* nature of the International Tribunal", to its "uncertain longevity", and to its "resources [being] limited in terms of manpower". These are references to matters other than the merits of the case; I believe that the appeal which they make is to the concept of judicial economy. It appears to me that no considerations of judicial economy, in the sense of motivating a decision on a sufficient ground or grounds rather than on unnecessary ones as well, are involved. Judicial economy, in the sense of ensuring efficiency in the operation of the judicial system of the Tribunal, is no doubt an admissible consideration in determining the allocation of scarce judicial resources; but, in the circumstances of the Tribunal, it seems to me that the power of courts to act on such considerations in bringing proceedings to an end has to be sparingly confined to cases in which the particular prosecution can fairly be described as superfluous or as not exhibiting a need for judicial action.[13] I do not think that that can be said here.

28. In paragraph 77 of its judgement, the Appeals Chamber says that its decision declining to reverse the acquittal and to remit is "in the interests of justice". What is "in the interests of justice" must also be "in the public interest", a phrase used in paragraph 73 of the judgement. It is accepted that the public interest can require the discontinuance of proceedings which (even if otherwise justified) are oppressive. The Appeals Chamber has not found that it would be oppressive for the proceedings to continue. Further, a distinction has to be drawn between considerations which merely go to penalty and considerations which, although they go to penalty, rise to the level of a public interest in discontinuing the proceedings. It is hard to see how any process of weighing the interest of the individual against the general interest can come out in favour of the individual. Public policy, or the policy of the law, has been often used to justify various decisions, particularly in civil cases. But some circumspection is appropriate in the case of a criminal court. As it was said in one case:

> The interests of justice are not confined to the interests of the prosecutor and the accused in the particular case. They include the interests of the public … that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge in the conduct of the trial.[14]

29. A court of law ought not to be astute to use the public interest to stop a case on grounds which can be adequately accommodated through penalty in the ordinary way. In this case, there is nothing in the considerations advanced which enables me to discern how the interest of the

[13] See, generally, *United States of America v. Hooper,* (1970) 139 U.S. App. D.C. 171, and *United States of America v. Lindsey,* (1995) 310 U.S. App. D.C. 300.

[14] *Au Pui-Kuen v. Attorney-General of Hong Kong* [1979] 1 All ER 769, PC.

international community in the judicial examination of an allegation of a serious breach of international humanitarian law is served by a finding that, although the proceedings on as grave a charge as one of genocide were erroneously terminated by the Trial Chamber, they should nevertheless not continue. I would remit.

THE CROSS-APPEAL

30. The point here concerns the subject of cumulative convictions. The cross-appellant (the "respondent" previously mentioned) was convicted, *inter alia,* in respect of the same conduct, of a war crime under Article 3 of the Statute and of a crime against humanity under Article 5. Without saying which, he submits that one of the two crimes was a lesser included crime of the other, and that therefore cumulative convictions were barred. The Appeals Chamber has overruled the submission. It holds that each crime has a unique element, the unique element in the case of the Article 3 crime being a requirement for proof that there was a close link between the act of the accused and the armed conflict, and the unique element in the case of the Article 5 crime being a requirement that the act of the accused was part of a widespread or systematic attack against a civilian population. Therefore, neither offence was included in the other.

31. Was this approach the correct one? In particular, was the Appeals Chamber right in treating the close link requirement as an element to be compared? In holding as it did, the Appeals Chamber followed the majority view in *Delalic* [15]*.* However, I consider it to be my duty to take account of the minority view in that case, to say whether I agree with it, and, if I do, to opine whether there are convincing reasons why this bench should prefer it to the majority view then expressed.

32. The reasoned view[16] of the minority in *Delalic* (which was not of course directed to the close link requirement) accepts the "different elements" test used by the majority in that case, but with an important qualification: it considers that, in applying the test, "only those elements relating to the conduct and mental state of the accused would be taken into account". Except in a secondary sense (which need not be examined here), there should be excluded from the elements to be compared requirements which state "the legal prerequisites relating to the circumstances of the relevant offences" or which "provide the *context* in which the offence takes place" ("the prerequisite view"). Such requirements are "elements" of the offence and they have to be proved, but they "are in practice not relevant to the conduct and state of mind of the accused" and would therefore be excluded from the comparison between the elements of one crime and those of another.

[15] IT-96-21-A, of 20 February 2001.
[16] Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna in *Delalic,* IT-96-21-A, of 20 February 2001, paras. 25ff.

On the majority view, all elements would be included in the comparison. That, it seems to me, represents a substantial difference. The question then is which of these two diverging points of view is correct.

33. In answering that question, it is helpful to consider the proposition that the accused cannot be punished more than once for the same conduct. Argument can be made that that view is not necessarily correct; that the permissibility of multiple punishment for the same conduct is one of interpretation of the legislative intent; that there is a presumption that such punishment is not the legislative intent; but that the presumption can be overcome by clear language; and that, where the presumption is overcome, multiple punishment for the same conduct is permissible[17]. It is however difficult to find room for such an intent in the Statute of the Tribunal. Consequently, while I am inclined to the view that the proposition in question is not universally correct, I agree that the Tribunal may not punish more than once for the same conduct.

34. At any rate, the accused is to be punished not for his conduct *simpliciter,* but only for his criminal conduct.[18] It may be said that no notable judicial effort is required to establish something so elementary. It is nevertheless important to emphasise the principle, if only because it warns of the need to ensure that the judgement is not affected by factually influential but legally irrelevant considerations. For, manifest as the principle may appear to be, there can be difficulty in applying it. Difficulties are prone to arise where the same conduct of an accused presents different aspects. Some aspects may be relevant to one crime, some to a different crime, while of course some may be common to two or more crimes. To record the full criminality of his conduct**,** it may be necessary to convict of all the crimes, overlapping in convictions being adjusted through penalty. But penalty is one thing, conviction another; even if no material penalty is imposed, as is well known, a conviction can have certain consequences for the accused.

35. Obviously, therefore, cumulative convictions should be permitted only where there are genuine differences between the crimes; duplication has to be avoided. How? By comparing the elements of the crimes concerned with a view to determining whether, in substance, they relate to the same criminal conduct. Yet, since the object is to determine whether the same criminal conduct is involved, if an element is not relevant to the criminal conduct of the accused, the quest for justice requires its exclusion from the comparison. The question then is whether it is indeed possible that

[17] See *Missouri v. Hunter*, 459 U.S. 359 (1983), At pp. 368-369, in which Chief Justice Burger, delivering the opinion of the Supreme Court of the United States, said that "[w]here a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the 'same' conduct under *Blockburger,* a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial".
[18] See Separate and Dissenting Opinion, *supra*, para. 26; italics as in the original. And see paragraph 27, ibid.

an admitted element of a crime is not relevant to the criminal conduct of the accused. These considerations come to mind.

36. First, there is the question of authority. It is not my impression that any specific decided case, whether domestic or international, has so far been advanced, or can persuasively be[19], in support of the view that an admitted element of a crime may not be relevant to the criminal conduct of the accused.

37. Second, the matter may be considered in relation to a suggested example. This concerns a requirement for proof that the victim of a grave breach was a "protected" person within the meaning of Article 2 of the Statute of the Tribunal. It may be said that the status of the victim as a "protected" person is a technical requirement of the operation of the provision, that that status might not have mattered to the accused in perpetrating the act, and that therefore it is not relevant to his criminal conduct. That way of looking at the matter is attractive. Is it also correct?

38. It is not in doubt that the requirement in question is an element of the crime. But perhaps a word on this may be said, if only because of the implications for the criminal conduct of the accused. It seems reasonable to suppose that a requirement which the lawgiver considered necessary for the definition of conduct from which he sought to protect society is an element of the crime, and regardless of its place in the text. In the case of an Article 2 crime, it is not possible to define the forbidden conduct except with reference to the class of persons sought to be safeguarded from it. In this respect, the provision requires proof that the victim was a "protected" person. The requirement was set out in the *chapeau* of the provision. Nothing turned on that: it is ordinary drafting practice for elements which are common to a number of particularly enumerated provisions to be collected in the *chapeau.* What is important is that the requirement does not lie outside of the crime; it is an integral part of the crime itself. It is consistent with customary international law to say that, unless facts are proved to show that the victim was in the position of a "protected" person, there simply was no crime under that provision. Such a requirement is therefore an element of the crime.

39. If that requirement is an element of an Article 2 crime relating to a grave breach, can it be disregarded in considering the *criminal conduct* of an accused who commits the crime? I think not. If the accused is charged with a grave breach, then, no matter what he has actually done and how outrageous it may be, he cannot be said to have engaged in *criminal conduct* under that provision

[19] See and compare *Grady v. Corbin*, 495 U.S. 508 (1990), favouring the "same conduct" test, and *United States v. Dixon*, (1993) 113 S. Ct. 2849, overruling the former and restoring the "same elements" test of *Blockburger v. United States,* 284 U.S. 299 (1932). That the double jeopardy principle was involved does not affect the

unless that element, concerning the status of the victim as a "protected" person, is proved. His only defence might well be a challenge to the establishment of that element. In effect, he could confess his acts but say that, so far as concerns the law under which he is charged, they were not criminal because of non-proof of that element. So the question whether his conduct was criminal depends, *inter alia,* on that element.

40. The matter may also be approached from the standpoint of the intention with which the accused acted: something which forms part of his intention has to be relevant to his criminal conduct. Article 2 of the Statute prohibits "acts against persons ... protected...". The prosecution has to prove that the act of the accused was one which was "against persons ... protected...". That cannot be proved unless there is evidence that the victim had that status and that the accused was aware that the victim had it. This awareness would seem to be an inseparable element of the intention with which the accused acted. But, even in the absence of a confession, no insoluble evidential problems need arise: from the objective facts a court could, in the customary way, infer both that the victim had that status and that the accused knew[20] that the victim had it. If the proof is made, the intention of the accused to injure a victim who, to his knowledge, possessed that status was relevant to his criminal conduct. This approach may be taken to, for example, Article 2(h) of the Statute, which speaks of "taking civilians as hostages". If the evidence proves that an accused has engaged in "taking civilians as hostages", very little more, if anything, is required to show that he did so precisely because he knew that they were protected persons. It will be difficult to appreciate why his intention to take them as hostages in the knowledge that they were protected persons is not relevant to his criminal conduct.

41. The elements of a crime do not of course embrace jurisdictional and procedural requirements; these delimit and regulate the power of the forum to deal with the crime and presuppose the existence of the crime. But, shutting out such requirements, it seems obvious that, in creating a crime, the legislator uses certain elements to define the conduct from which he wishes to defend society (including the victim). The crime cannot be understood without reference to all of its component elements: it is made up of its elements and is in turn defined by them. An accused whose conduct involves the commission of a crime has committed the crime as defined by all of its elements. Each element of the crime is relevant to the determination of the criminality of his

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applicability of the fundamental underlying principle, although, as the literature shows, it is recognised that there is room for discussion.

[20] See in this respect Report of the Preparatory Commission for the International Criminal Court, PCNICC/2000/INF/ Add.2, UN General 6 July 2000, stating, under Article 8(2)(a) at p. 18, that the "perpetrator was aware of the factual circumstances that established that protected status", a formula which, it is believed, avoids a purely subjective approach to the question of knowledge while respecting the usual requirements of *mens rea.*

conduct. It is difficult to disaggregate the elements of a crime and to say that some are relevant to the criminal conduct of the accused and others not. Leaving alone the problems of subjectivity which that would involve, it appears to me that, once something is accepted to be an element of the crime as defined by the legislation, that element has to be dutifully taken into account by the courts in making any comparison of elements for the purpose of determining whether cumulative convictions are possible.

42. It seems to me that it is only by proceeding in this way that a criminal justice system can take account of all of the public interests which are intended to be protected. Even though the actual conduct may be the same, it could injure different public interests; the existence of these differences in public interests may well be signalled by the presence of the unique elements. Thus, the requirement under Article 2 of the Statute for proof that the victim was a "protected" person evidences the legitimate interest of international society to afford protection to persons in that situation. But international society may have an equally legitimate interest in securing the welfare of the same victim in another situation. The different situations may overlap in relation to the particular victim; but they overlap and are not the same, even though they may both be injured by the same act. An accused who is guilty of the "wilful killing" of a person "protected" within the meaning of Article 2 has injured a different interest of international society from the interest of that society which is injured if the "wilful killing" (where it is considered as "murder") is also committed as part of a widespread or systematic attack against a civilian population as contemplated by Article 5. The full protection of these distinct societal interests requires cumulative convictions. To convict of one offence only is to leave unnoticed the injury to the other interest of international society and to fail to describe the true extent of the criminal conduct of the accused. Penalty is of course a different matter.

43. Third, there could be a problem of attempting to reconcile ideas which are not easily harmonised. It is appreciated that the argument is that an element can be in the nature of a prerequisite of the formation of the *mens rea* and the execution of the *actus reus,* and not a prerequisite of the crime as a whole. Thus, on its own terms - and it is proper to acknowledge this - the prerequisite view does not involve an inconsistency of speaking of a requirement which is both a prerequisite of the crime while being at the same time an element of the crime. However, it is believed that international humanitarian law looks to the substance, and so the matter may be regarded from this point of view.

44. As noted above, the prerequisite view is concerned not with the accused's conduct *simpliciter,* but with his "*criminal conduct*"[21]. The view which I have offered is that whether his conduct is *criminal* can only be determined by reference to each and every element of the crime. On this view, there would be difficulty in holding that a requirement can be both a prerequisite of a crime while it is at the same time an element of the crime; *ex hypothesi,* that cannot be. To hold that that is possible collides with the view that, as it is said in the jurisprudence, a thing cannot at one and the same time be and not be.[22]

45. These difficulties do not bar recognition that the matter to which the prerequisite view relates is important to the accomplishment of the mission of the Tribunal to do justice. If I considered that it was clearly the better view, I should, for myself, have little hesitation in opining that this bench of the Appeals Chamber should prefer it to the approach taken by the majority in *Delalic.* However, for the foregoing reasons, I am not able to say that I find it persuasive; in my opinion, the task of the Tribunal to do justice is better fulfilled by following the majority approach.[23]

46. For these reasons, I consider that this bench of the Appeals Chamber is correct in taking the position that the close link requirement, as an element of a crime under Article 3 of the Statute, has to be taken into account in comparing the elements of that crime with the elements of a crime under Article 5 of the Statute for the purpose of determining whether cumulative convictions are permissible in respect of both crimes.

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[21] See Separate and Dissenting Opinion, *supra*, para. 26; italics as in the original. And see para. 27, ibid.

[22] For example, "An institution … cannot at one and the same time be and not be". See *Namibia, I.C.J. Reports 1971*, at p. 73, per Judge Ammoun, concurring. Whatever might be the position in other fields of thought, that, I think, represents the standard jurisprudential view. Thus, as it was put, it "is not usual to advance at one and the same time an argument and its opposite". See *Nuclear Tests, Interim Measures (Australia v. France), I.C.J. Reports 1973*, 99 at 153, per Judge Gros, dissenting.

[23] This is not to say that, individually, I would not wish to reserve my thinking on other aspects of the reasoning in *Delalic.* I am not sure that paragraphs 419-423 of the judgement in that case proceeded on the premise that Article 3 of the Statute of the Tribunal is confined to cases involving injury to persons taking no active part in the hostilities. If so, it is to be observed that, in paragraph (a), the provision provides for prosecution of cases involving the "employment of poisonous weapons or other weapons calculated to cause unnecessary suffering". Injury to active members of opposing fighting forces would appear to be contemplated. Also, I do not have the impression that paragraphs 412-413 of the *Delalic* judgement deal with a case in which all the elements of one crime are the same as all the elements of the other crime or crimes. It is possible that the omission was due to a view that that could not happen under the Statute of the Tribunal. But that would be a matter for argument in a proper case.

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

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Mohamed Shahabuddeen

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

[**Seal of the Tribunal**]

VII. PARTIAL DISSENTING OPINION OF JUDGE WALD

1. I agree with the majority that trial on the genocide count was erroneously cut off by the Trial Chamber's ruling, *proprio motu,* under Rule 98 *bis,* that there was insufficient evidence to sustain a conviction on that count. I believe the Appeals Chamber Judgement amply supports that conclusion and demonstrates that both an improper standard was used by the Trial Chamber and that use of the proper standard would have made it clear that a reasonable trier might have found Jelisic guilty of genocide beyond a reasonable doubt. However, in such circumstances, I cannot see that the Appeals Chamber has any choice but to remand the case to a Trial Chamber for further proceedings there. I cannot discern any authority in the Tribunal's Statute or in the Rules of Procedure and Evidence for the Appeals Chamber, on its own, to decide that the genocide count should be rejected, even though there is sufficient evidence to support it.

2. This is not to say that I do not empathise with many of my colleagues' motives for wishing to end the case now. The 40-year sentence the Trial Chamber pronounced for violations of the laws or customs of war and crimes against humanity, to which Jelisic entered a plea of guilty, is, in effect, a life sentence for a man of his age. That sentence has now been upheld by this Chamber. Further, the resources of the Tribunal are stretched thin and there may well be reason to prioritise cases involving allegations of State-planned and executed crimes, rather than individualistic or opportunistic crimes. Some learned commentators on genocide stress that the currency of this "crime of all crimes" should not be diminished by use in other than large scale state-sponsored campaigns to destroy minority groups, even if the detailed definition of genocide in our Statute would allow broader coverage.[1] In this case, the erratic pattern of Jelisic's killings and his personality disturbances, make the precedential value of a genocide charge problematic. Finally, there is the reality that the members of the original Trial Chamber will no longer be available to conduct a new trial; a new panel would have to be designated to rehear evidence already taken and witnesses from afar put through the trauma of reliving their terrible experiences again.

3. Many of these factors, in my view, suggest that a reasonable Prosecutor might well choose to drop the genocide prosecution at this point. Thus, I would not order the accused to be retried under Rule 117(C). I would remand the case to the Trial Chamber so that the Prosecutor could, if she chose, move under Rule 73 to withdraw the genocide count in light of subsequent events. If she persisted, however, the charge would proceed to trial. For reasons discussed below, I do not believe the Appeals Chamber, either pursuant to the ICTY Statute (hereafter "Statute") and Rules of Procedure and Evidence (hereafter "Rules"), or principles discerned from national jurisdictions, has

[1] See e.g. W. Schabas, *Genocide in International Law* (2000) at 9.

the authority to "decline…to reverse the acquittal"[2] of an alleged crime as serious as genocide, after it has, itself, authoritatively decided that the trial was aborted by a mistaken acquittal under Rule 98 *bis*.

4. The Statute provides for an independent Prosecutor as one of three co-ordinate branches of the Tribunal. Article 16 says "[t]he Prosecutor shall act independently as a separate organ of the International Tribunal" and shall be "responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law …". Article 19 provides that when the Prosecutor has prepared an indictment, it shall be transmitted to a Judge of the Trial Chamber who "shall" confirm it if satisfied that a *prima facie* case has been established. The trial Judges are not given any power to reject the indictment because they do not think it is a wise use of the Tribunal's resources or for any other reason other than the lack of a *prima facie* case. Nowhere in the Statute is any Chamber of the ICTY given authority to dismiss an indictment or any count therein because it disagrees with the wisdom of the Prosecutor's decision to bring the case.

5. Furthermore, Article 25 of the Statute confines the Appeals Chamber's function to hearing appeals based on two grounds:

1. An error on a question of law invalidating the decision; or
2. An error of fact which has occasioned a miscarriage of justice.

No mention is made of any power to veto a prosecution in the interests of justice, judicial economy or otherwise. To the contrary, pursuant to Rule 117(A), the appeals judgement shall be pronounced "on the basis of the record on appeal", suggesting just the opposite.

6. My colleagues rely on Rule 117(C) which says that "[i]n appropriate circumstances the Appeals Chamber may order that the accused may be retried according to law" as conferring broad discretion on that Chamber to decide whether or not a retrial should be had in circumstances like these, where the Chamber has already ruled that the Trial Chamber committed serious errors of law in halting the trial. This Rule, in my view, is designed for a far more limited purpose: to make explicit the power virtually every appellate tribunal has, in both common law and civil law countries, to decide whether to reverse a conviction outright and let the prisoner go free (in cases where the evidence is not sufficient to convict) or to retry the prisoner (in cases where a procedural or other error has tainted the original proceedings but the evidence is sufficient to sustain a conviction). Such a rule is a wise and necessary supplement to the Statute's laconic description of the Appeal Chamber's power to "affirm, reverse, or revise" the decisions of the Trial Chamber.[3] It

[2] Majority Judgement at para 77.
[3] Statute, Article 25(2).

merely provides for the garden-variety situation where the Appeals Chamber reverses the Trial Chamber and the choice of remedy is between vacating the conviction altogether or requiring a new trial. It does not seem to have relevance to the novel situation we have here where the appeal by the Prosecutor is from a Trial Chamber decision not to continue a trial and that appeal succeeds. Indeed, the Rule literally may not apply to this situation at all since this defendant on remand would not be retried; he was never fully tried to begin with due to the intervention of the Trial Chamber.

7. Needless to say, the Rules cannot confer power on the Chambers greater than that provided by the Statute, unless it is power recognised universally as essential to the functioning of a court of law.[4] I cannot agree with my colleagues that "national case law gives discretion to a court to rule that there should be no retrial" in circumstances like this.[5] The American cases cited by the majority in support of this proposition, deal with what is known as the "concurrent sentence doctrine." Pursuant to this doctrine, "where a defendant received concurrent sentences on each of several counts of an indictment and the appellate court finds no error in the conviction on any one count carrying a sentence at least equal to the others, the validity of the convictions on the remaining counts will not be reviewed."[6] Instead, the appellate court may, in its discretion, choose to vacate the disputed conviction(s) without considering the merits of the challenge. This discretion is grounded on the notion that scarce appellate judicial resources should not be squandered unnecessarily in determining difficult legal questions that will not affect the overall sentence imposed upon the defendant.

8. The American cases applying the concurrent sentences doctrine, nonetheless, acknowledge that the government is the primary arbiter of whether it is in the public interest to pursue a particular conviction or not. In *Lindsey*, the Court of Appeals specifically noted that the government did not oppose its decision to vacate the disputed conviction without considering the merits.[7] The American cases also recognise that the concurrent sentences discretion should not be exercised where it would "impair any need of the government".[8] To ensure the interests of the government are not impaired, the procedure adopted by the appellate courts is to vacate the judgement of conviction on the challenged count, but to leave the jury verdict itself intact.[9] If the government subsequently determines the interests of justice so require, the conviction can be reactivated, and

[4] See *e.g. Prosecutor* v *Tadic*, Case No.: IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000, paras. 12-29.
[5] Majority Judgement at para 73.
[6] W. LaFave & H. Israel, *Criminal Procedure* (2nd ed., 1992) at 1157-1158.
[7] *United States* v *Lindsey*, 47 F.3d 440, 310 U.S. App. D.C. 300 (1995) at 306.
[8] *E.g. United States* v *Hooper*, 432 F.2d 604, 139 U.S. App. D.C. 171 (1970) at 173; *Lindsey*, *ibid*, at 306.
[9] *E.g. Hooper*, *ibid* at 173 FN8; *United States* v *Butera*, 677 F.2d 1376 (11th Cir. 1982) at 1385; *United States* v *Cardona*, 650 F.2d 54 (5th Cir. 1981) at 57; *United States* v *Dorsey*, 865 F.2d 1275, 275 U.S. App. D.C.176 (1989) at 181 FN4.

subjected to appellate review. Therefore, the effect of this doctrine is simply to work a suspension of sentence.

9. In contrast to the concurrent sentences cases, it cannot be maintained that a decision by the Appeals Chamber not to order a retrial in this case could not affect the sentence ultimately imposed upon the accused. Although the sentence of 40 years imprisonment for crimes against humanity and violations of the laws or customs of war determined by the Trial Chamber is substantial, it might have been even more substantial had the accused also been convicted of genocide. Further, in this case, the Prosecutor has specifically requested that the Appeals Chamber order a new trial on the genocide count before a differently constituted Trial Chamber.[10]

10. The only other authorities cited by my colleagues in support of the proposition that the Appeals Chamber may, in its discretion, halt the proceedings in the interests of judicial economy, are two English cases. In *Barking* the Court held that the trial court erred in finding there was no case for the defendant to answer on a charge of inflicting grievous bodily harm and in failing to allow the prosecution to make a submission on this matter.[11] However, noting that the prosecution did not ask for the trial to be remitted for further hearing, the court saw no reason to make such a ruling. In *Cosier,*[12] applying *Barking*, the Court found the Trial Court erred in failing to hear the Prosecution prior to deciding that the defendant had no case to answer on a charge of assaulting a police officer in the execution of his duty. The Court held that, given the passage of two years since the offence occurred and the further delay likely in obtaining a new trial date, it would be unfair to order a retrial. However, the Court cited no authority in support of this proposition, nor does the Judgement reveal the attitude of the Prosecution to the question of retrial. I am also mindful that the offence concerned was of a far less serious nature than genocide. In addition, unlike some domestic jurisdictions,[13] our Rules allow for prosecution and defence appeals from trial judgements, including acquittals rendered under Rule 98 *bis*. Presumably then, they must envisage new trials, with their attendant problems of delay and repetition when acquittals are overturned on appeal.

11. In sum, I do not find that national jurisprudence reveals any generally recognised inherent power in appellate bodies to prevent the prosecution of a crime in the interests of judicial economy, or that such a power is essential to a court of law's functioning.

[10] Prosecution's Appeal Brief, 14 July 2000, para 5.1.
[11] *R* v *Barking and Dagenham Justices*, [1995] Crim LR 953.
[12] *R* v *Cosier*, Q.B.D., 5 April 2000.
[13] *E.g.* in the US Federal system, no appeal may be taken by the prosecution from the grant of a judgement of acquittal made after trial has begun but before it has been completed and a final verdict rendered. See 18 U.S.C. Section 3731; Rule 29, F.R. Cr P. The rationale for this rule is to avoid infringing the principle of double jeopardy.

12. The discovery of a power in the Appeals Chamber to refuse to allow the Prosecutor discretion whether to proceed with a trial mistakenly cut off midway has serious implications for the relationship between the Prosecutor and the Judges. Had the Trial Chamber in this case proceeded correctly, the trial would have continued to its natural end. The majority has not suggested the Trial Chamber could simply have said "enough" because it did not think the genocide trial was worthy in terms of allocation of Tribunal resources.

13. Now, solely because of the fortuitous circumstance of an erroneous use of Rule 98 *bis* by which the Trial Chamber stopped the trial in mid-course, the Appeals Chamber asserts such a power. But if such a power can be exerted in this case, why would it not be equally valid in others where there was no guilty plea or conviction on other counts? At least one of the reasons given by the majority for justifying its termination of the genocide prosecution must also give pause in view of its effect on other parts of the Tribunal's jurisprudence. As the majority point out in paragraph 74 of the Judgement, Jelisic entered a guilty plea to counts alleging crimes against humanity and violations of the laws or customs of war based on the same murders that formed the core of the genocide prosecution. The majority reasons that, primarily, it is the special intent "to destroy a group, in whole or in part" that distinguishes genocide from other crimes against humanity and that, since the content of that special intent has been clarified in this Judgement, there is no need for a new trial. This approach seems, as a matter of principle, to run counter to the rationale that has been laid down by this Tribunal in its decisions on cumulative convictions. In the *Delalic* case, the Appeals Chamber, in formulating a rule for determining when cumulative convictions are permissible, said that, in cases where the Trial Chamber is required to choose between two offences that do not have mutually distinct elements, it must select the offence that is more specifically defined. In the words of the Appeals Chamber, "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."[14] Accordingly, when faced with a choice between offences under Article 2 and Article 3 of the Statute, a Chamber must opt for Article 2 offences on the basis that they require a materially distinct element, namely that the victim was a "protected person", in accordance with the 1949 Geneva Conventions.[15] Moreover, some commentators have expressed the view that the chapeau elements of the crimes under the Statute establish a hierarchy of "seriousness" among the crimes.[16] Indisputably, genocide is at the apex of this hierarchy.[17] Thus,

[14] *Prosecutor* v *Delalic et al*, Case No.: IT-96-21-A, Judgement, 20 February 2001 (hereafter *Delalic*), para 413. The Trial Chamber in the Kunarac case subsequently adopted this approach. See *Prosecutor* v *Kunarac et al*, Case Nos.: IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001, para 549-550.
[15] *Delalic,* para 423.
[16] A. Danner, "Constructing a Hierarchy of Crimes in International Criminal Law Sentencing", 87(3) Virginia Law Review (2001), 101 at 170.

the view that there is no additional public interest in determining a genocide charge simply because the underlying killings have already been dealt with as crimes against humanity and violations of the laws or customs of war may be problematic in the development of international criminal law.

14. In sum, although there may indeed be strong reasons, apart from the legal sufficiency of the evidence, why a Prosecutor might choose not to proceed with a retrial, I do not believe it falls within the judicial function to veto a retrial on "practical" or "policy" grounds. Any such decision based on "judicial economy" inevitably reflects judges' views as to which cases are "worthy" and which are not. That, however, is the job of the Prosecutor who must calibrate legal and policy considerations in making her choices on how to utilise limited resources. To recognise a parallel power in judges to accept or reject cases on extra-legal grounds invites challenges to their impartiality as exclusively definers and interpreters of the law. I fear the Appeals Chamber is entering into strange and uncharted terrain today by announcing a power to declare that prosecution of a crime as serious as genocide may not go forward because of extra-record considerations.

15. To reiterate, I would not order a retrial, but I would remit the case to a Trial Chamber (designated by the President) for the Prosecutor to choose her course of action in light of the developments that have occurred since the original indictment was issued in 1995 and the actions taken by the Appeals Chamber in this case. For these reasons, I respectfully desist from the declination to reverse the acquittal on the genocide count and the denial of a remand.

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

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Patricia M. Wald

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

[**Seal of the Tribunal**]

[17] *Prosecutor* v *Musema*, Case No.: ICTR-96-13-T, Judgement and Sentence, at para 981; *Prosecutor* v *Rutaganda*, Case No.: ICTR-96-3-T, Judgement and Sentence, at para 451; *Prosecutor* v *Kayishema et al*, Case No.: ICTR-95-1-T, Sentence, at para 9.

VIII. PARTIAL DISSENTING OPINION OF JUDGE POCAR

1. I cannot agree with the view expressed by the majority of the Appeals Chamber on the second ground of appeal of the Prosecution, concerning the consequences of the test to be applied under Rule 98*bis*(B) of the Rules of Procedure and Evidence, which establishes that "the Trial Chamber shall order the entry of judgement of acquittal… if it finds that the evidence is insufficient to sustain a conviction on that or those charges". According to the majority view, the test to be applied to the evaluation of the evidence under this provision, is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question. The consequences of the test as applied by the Appeals Chamber to the Rule 98*bis*(B) situation are, on the one hand, that if a Trial Chamber comes to the conclusion that no reasonable tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the charge at issue, then the Chamber must acquit on that charge. On the other hand, if a Trial Chamber's conclusion is that a reasonable trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused, then the Chamber must continue the proceedings and hear the Defence case.

2. While I agree with the majority as far as the first consequence is concerned, my views diverge on the scope of the second consequence drawn from the above mentioned test.

3. It is undisputed that, in requiring the Trial Chamber to assess whether a reasonable trier of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused, the test envisages a situation, whereby different reasonable triers of fact at that stage could reach different conclusions concerning the guilt or innocence of the accused. It is also undisputed that at that stage a Trial Chamber is not required to reach its final conclusions as to whether it would be satisfied beyond a reasonable doubt of the guilt of the accused,[1] and that the Trial Chamber may reserve its position as to whether, on the basis of the prosecution's evidence, it would convict or acquit.

4. However, such considerations do not imply that a Trial Chamber is under the obligation not to reach its own final conclusions, and to continue the proceedings, even if it has concluded that, on the face of the evidence heard, that Chamber itself would not be satisfied beyond reasonable doubt of the guilt of the accused. In my view, if a Trial Chamber employing the above articulated test finds that, while a different trier of fact could be satisfied beyond reasonable doubt of the guilt of the accused, that Chamber itself would not, then it should enter an acquittal and put an end to the proceedings.

[1] *See* para. 37, note 66, of this judgement, where the *Delalic* appeal judgement, para. 434, p. 148, and the *Kunarac* decision on motion for acquittal, 3 July 2000, para. 10, p. 6, are cited.

5. It should be noted that the conclusion reached by the majority of the Appeals Chamber is certainly suited to a system in which cases are eventually sent to a jury or to a trier of fact other than the judge who evaluates the evidence at that stage.[2] In such a system, if a judge finds that, while he himself cannot be satisfied of the guilt of the accused, a different trier of fact could come to a conclusion of guilt, he cannot stop the proceedings. Should he apply a higher standard of evaluation of the evidence, he would try the facts himself, instead of leaving the task of doing so to the jury.

6. In this International Tribunal however, there is no jury; the judges are the final arbiters of the evidence. There is no point in leaving open the possibility that another trier of fact could come to a different conclusion if the Trial Chamber itself is convinced of its own assessment of the case. Therefore, if at the close of the prosecution case, the judges themselves are convinced that the evidence is insufficient, then the Chamber must acquit. Such an approach is not only consistent with the text of Rule 98*bis*(B), which obliges the Chamber to acquit if it finds that the evidence is insufficient to sustain a conviction. It also preserves the fundamental rights of the accused, who is entitled not only to be presumed innocent during the trial, but also not to undergo a trial when his innocence has already been established. Further, the principle of judicial economy is also preserved, in that proceedings are not unnecessarily prolonged: for what is the point in continuing the proceedings if the same judges have already reached the conclusion that they will ultimately adopt at a later stage?

7. In the present case, the Trial Chamber concluded that "it has not been proved beyond all reasonable doubt that the accused was motivated by the *dolus specialis* of the crime of genocide", and acquitted Goran Jelisic on this count. On this basis, the majority of the Appeals Chamber has found that the Trial Chamber applied the wrong standard under Rule 98*bis*(B) at the close of the prosecution case in chief - indeed, a higher standard than was warranted at that stage - and in so doing, wrongly assessed the evidence pertaining to the genocide count. However, for the reasons stated above, I believe that the Trial Chamber did not err in this regard. Consequently, I cannot join the majority in its evaluation of the evidence in light of the standard that it considers should have been applied. As to the conclusions drawn by the Trial Chamber in light of the higher standard it applied, there is no indication that it made any error in its application; therefore, I am of the view

[2] The authorities cited in the judgement to sustain the majority's position refer largely to cases which are eventually sent to a jury, and even if a few do not, it is my view that the issue should be approached prudently, avoiding the application, in a mechanical fashion, of national solutions without assessing whether they may require adaptations to the needs of the procedure before this Tribunal, and taking into account also the fact that they may result in disregarding the fundamental rights of the accused as applicable under the Statute of this Tribunal.

that the Appeals Chamber should not disturb the factual findings made by the Trial Chamber[3] in this case.

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

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Fausto Pocar

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

[**Seal of the Tribunal**]

[3] It has been constantly affirmed by the Appeals Chamber that a Trial Chamber is best placed to hear, assess, and weigh the evidence, and that the Appeals Chamber has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial. It has also been affirmed that the Appeals Chamber "may overturn the Trial Chamber's finding of fact only where the evidence relied on could not have been accepted by any reasonable tribunal or where the evaluation of the evidence is wholly erroneous." *See Aleksovski* appeal judgement, para. 63. *See also Tadic* appeal judgement, para. 64, and *Delalic* appeal judgement, para. 506.

IX. ANNEX A - GLOSSARY OF TERMS

agreed factual basis	*Prosecutor v. Goran Jelisi},* Case No.: IT-95-10-T, Agreed factual basis for guilty pleas to be entered by Goran Jelisi}, 9 September 1998
Aleksovski appeal judgement	*Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-A, Judgement, 24 March 2000
appeal transcript	Transcript of hearing on appeal in the present case. All transcript page numbers referred to in the course of this judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.
Bla{ki} trial judgement	*Prosecutor v. Tihomir Bla{ki},* Case No.: IT-95-14-T, 3 March 2000
cross-appellant	Goran Jelisi}
cross-appellant's brief	Appellant's brief on appeal against sentence, public redacted version, 2 March 2001 (the confidential version, 7 August 2000)
cross-appellant's reply	Appellant's reply to prosecution respondent's brief, public redacted version, 2 March 2001 (the confidential version, 6 October 2000)
cross-appellant's response	Appellant's reply to prosecution appeal brief, 14 August 2000
Delali} appeal judgement	*Prosecutor v. Zejnil Delalic et al,* Case No.: IT-96-21-A, Judgement, 20 February 2001 (*^elebi}i*)
Furund`ija appeal judgement	*Prosecutor v. Anto Furund`ija*, Case No.: IT-95-17/1-A, Judgement, 21 July 2000
Furund`ija trial judgement	*Prosecutor v. Anto Furund`ija*, Case No.: IT-95-17/1-T, Judgement, 10 December 1998
hearing on appeal	Oral argument in the present case held on 22 and 23 February 2001
ICTR	International criminal tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
International Tribunal	International tribunal for the prosecution of persons responsible for serious violations of international

	humanitarian law committed in the territory of the former Yugoslavia since 1991
Judgement	*Prosecutor v. Goran Jelisic,* Case No.: IT-95-10-T, Judgement, 14 December 1999
Kunarac decision	*Prosecutor v. Dragoljub Kunarac et al*, Case No.: IT-96-23-T, IT-23-1-T, Decision on motion for acquittal, 3 July 2000
Kupre{ki} trial judgement	*Prosecutor v. Zoran Kupre{ki} et al.,* Case No.: IT-95-16-T, Judgement, 14 January 2000
Kvo~ka decision	*Prosecutor v. Miroslav Kvocka et al*, Case No.: IT-98-30/1-T, Decision on defence motions for acquittal, 15 December 2000
motion to be heard	Prosecutor's motion to be heard, 15 October 1999
oral judgement	*Prosecutor v Goran Jelisic*, Case No.: IT-95-10-T, 19 October 1999
prosecution	Office of the Prosecutor
prosecution's brief	Prosecution's appeal brief, public redacted version, 14 July 2000
prosecution's reply	Prosecution's brief in reply, public redacted version, 29 August 2000
prosecution's response	Respondent's brief of the prosecution, public redacted version, 15 February 2001
respondent	Goran Jelisi}
response to prosecution's brief	Reply to prosecution appeal brief, 14 August 2000
Rules	Rules of procedure and evidence of the International Tribunal
second amended indictment	*The Prosecutor v. Goran Jelisic and Ranko Cešic*, "Br~ko", Case No.: IT-95-10, second amended indictment, 19 October 1998
SFRY	Socialist Federal Republic of Yugoslavia
skeleton argument	Appellant's skeleton submissions, 16 February 2001
Statute	Statute of the International Tribunal
Tadi} appeal judgement	*Prosecutor v. Du{ko Tadi},* Case No.: IT-95-1-A, Judgement, 15 July 1999
Tadi} sentencing appeal	*Prosecutor v. Du{ko Tadi},* Case No.: IT-94-1-A and IT-94-1-A*bis*, Judgement in sentencing appeals, 26 January 2000

trial transcript	Trial transcript of the proceedings in *Prosecutor v. Goran Jelisi},* Case No.: IT-95-10-T. All transcript page numbers referred to in the course of this judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public
Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991