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:** **IT-98-32-T** **Date:** **29 November 2002** **Original:** **English**

IN TRIAL CHAMBER II

Before: **Judge David Hunt, Presiding**
Judge Ivana Janu
Judge Chikako Taya

Registrar: **Mr Hans Holthuis**

Judgment of: **29 November 2002**

PROSECUTOR

v

Mitar VASILJEVIC

JUDGMENT

Counsel for the Prosecution:

Mr Dermot Groome
Mr Frédéric Ossogo
Ms Sabine Bauer

Counsel for the Accused:

Mr Vladimir Domazet
Mr RadomirTanaskovic

I. SUMMARY OF THE CHARGES

1. Mitar Vasiljevic (the "Accused") is charged under the second amended Indictment ("the Indictment"), dated 12 July 2001, with ten Counts of crimes against humanity under Article 5 of the Statute and violations of the laws or customs of war under Article 3 of the Statute.

2. The Prosecution alleges that, during the Spring of 1992, Milan Lukic, a former inhabitant of Višegrad, returned to this town where he organized a small paramilitary unit. This paramilitary unit operated with the police and various military units stationed in Višegrad and was responsible for crimes against the local Muslim civilian population. This paramilitary organisation was often referred to by locals as the White Eagles, and it included Milan Lukic's cousin, Sredoje Lukic.

3. The Prosecution alleges that the Accused, a well-known waiter who worked for the Panos company which had several restaurants and coffee houses in the Višegrad area, joined Milan Lukic's group of paramilitaries and took part in the ethnic cleansing of the Višegrad area.

4. The Prosecution alleges that the Accused incurred individual criminal responsibility for the crimes charged against him in accordance with Article 7(1) of the Statute of the Tribunal ("Statute"). It is alleged that, acting in concert with Milan and Sredoje Lukic and other unknown individuals, the Accused planned, instigated, ordered, committed and otherwise aided and abetted in the planning, preparation and execution of the crimes charged in the Indictment.

5. There are two specific incidents pleaded in the Indictment:

a) The Drina River incident: It is alleged that, on or about 7 June 1992, the Accused together with his two co-accused (Milan Lukic and Sredoje Lukic) and other unidentified individuals, led seven Bosnian Muslim men to the bank of the Drina River. There, they forced the seven men to line up on the bank of the river, facing the river, and they opened fire at them. It is alleged that five of the seven men died as a result of the shooting while the other two escaped without serious physical injury.

b) The Pionirska Street incident: It is alleged that, on or about 14 June 1992, the Accused directed 65 Bosnian Muslim women, children and elderly men to a house on Pionirska Street in Nova Mahala in the Višegrad municipality. Later the same day, it is alleged, the Accused, in concert with the co-accused and other individuals, forcibly moved the group to a nearby house also on Pionirska Street, where he participated in barricading the people in one room, placed an incendiary device in the house and setting it on fire. It is further alleged that the Accused shone a light on people who tried to escape through

the windows while the co-accused fired upon them with automatic weapons. Approximately 70 people died as a result of this incident, and a number of them survived, some with serious physical injuries.

6. The Accused is charged under Count 1 with extermination as a crime against humanity, punishable under Article 5(b) of the Statute. This Count is based on his alleged participation, sometime in May and July 1992, in concert with the co-accused and other unknown individuals, in committing, planning, instigating, ordering and otherwise aiding and abetting the planning, preparation and execution of the crime of the extermination of a significant number of Bosnian Muslim civilians, including women, children and the elderly. This Count applies only to the Pionirska Street incident.[1]

7. The Accused is charged under Count 3 with persecution on political, racial or religious grounds as a crime against humanity, punishable under Article 5(h) of the Statute. The Accused is alleged to have participated, in concert with the other two co-accused and other individuals, during the period of May and July 1992, in the persecution of Bosnian Muslim civilians throughout the municipality of Višegrad and elsewhere in the territory of the Republic of Bosnia and Herzegovina. The Prosecution alleges that the crime of persecution was perpetrated, executed and carried out by and through: (a) the murder of Bosnian Muslim and other non-Serb civilians; (b) the harassment, humiliation, terrorisation and psychological abuse of Bosnian Muslim and other non-Serb civilians; and (c) the theft and destruction of personal property of Bosnian Muslim and other non-Serb civilians. This Count applies to both the Drina River and the Pionirska Street incidents and to those two incidents only.[2]

8. The Accused is charged under Count 4 with murder as a crime against humanity, punishable under Article 5(a) of the Statute and, under Count 5, for murder as a violation of the laws or customs of war, punishable under Article 3(1)(a) of the Geneva Conventions. The Accused is also charged under Count 6 with inhumane acts as a crime against humanity, punishable under Article 5(i) of the Statute, and under Count 7 with violence to life and person as a violation of the laws or customs of war, punishable under Article 3(1)(a) of the Geneva Conventions. These four Counts relate to the Drina River incident.

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1 Pre-Trial Conference, 20 July 2001 (T 89).
2 Pre-Trial Conference, 20 July 2001 (T 88-89).

9. In addition, the Accused is charged under Count 10 with murder as a crime against humanity, punishable under Article 5(a) of the Statute, and under Count 11 for murder as a violation of the laws or customs of war, punishable under Article 3(1)(a) of the Geneva Conventions. The Accused is also charged under Count 12 with inhumane acts as a crime against humanity, punishable under Article 5(i) of the Statute and under Count 13 with violence to life and person as a violation of the laws or customs of war, punishable under Article 3(1)(a) of the Geneva Conventions. These counts relate to the Pionirska Street incident.

10. Several Counts relate to charges against the two co-accused, Milan Lukic (Counts 1, 4 to 7, and 10 to 13) and Sredoje Lukic (Counts 1 and 10 to 13), who have not yet been transferred into the custody of the Tribunal and whose trial has been ordered to be heard separately.

II. GENERAL CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

11. The evidence in this case has been assessed by the Trial Chamber in accordance with the Tribunal's Statute and its Rules of Procedure and Evidence ("Rules") and, where no guidance is given by those sources, in such a way as will best favour a fair determination of the case and which is consistent with the essence of the Statute and the general principles of law.[3]

12. The Accused is entitled by Article 21(3) of the Statute to a presumption of innocence. This presumption places the burden of establishing the guilt of the Accused upon the Prosecution. In accordance with Rule 87(A), the Prosecution must establish the Accused's guilt beyond reasonable doubt. In determining whether the guilt of the Accused has been established to this standard with respect to each particular count in the Indictment, the Trial Chamber has been careful to consider whether there is any other reasonable explanation of the evidence accepted by it than the guilt of the Accused.[4] As stated by the Appeals Chamber, if there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.[5]

13. Article 21(4)(g) of the Statute provides that no accused shall be compelled to testify against himself. In this case, the Accused did choose to testify and the Trial Chamber has been careful to take the evidence given by the Accused into account in determining whether or not the Prosecution case should be accepted. His election to give evidence does not mean that he accepted any onus to prove his innocence. Nor does it mean that a choice must be made between his evidence and that of the Prosecution witnesses. The approach taken by the Trial Chamber has been to determine whether the evidence of the Prosecution witnesses should be accepted as establishing beyond reasonable doubt the facts alleged, notwithstanding the evidence which the Accused and other Defence witnesses gave. The Trial Chamber notes that in this case the Accused chose to give evidence prior to the calling of other Defence witnesses, and thus did so without the benefit of knowing what those witnesses would say in their evidence. The Trial Chamber has taken this factor into account in favour of the Accused in considering the weight to be accorded to the evidence which he gave.

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3 Rule 89(B).
4 *Prosecutor v Delalic et al*, IT-96-21-A, Judgment, 20 Feb 2001, ("*Delalic* Appeal Judgment"), par 458.
5 *Delalic* Appeal Judgment, par 458.

14. In general, the Trial Chamber has been careful to assess the evidence of all witnesses for the Prosecution and for the Defence in conjunction with the evidence of the Accused. This has been particularly so in considering the "defence" of alibi presented by the Accused to rebut the Prosecution's allegation that he participated in the Pionirska Street incident.

15. When a "defence" of alibi is raised by an accused person, the accused bears no onus of establishing that alibi. The onus is on the Prosecution to eliminate any reasonable possibility that the evidence of alibi is true.[6] In the circumstances of the present case, if the Trial Chamber is satisfied that there is a reasonable possibility that the Accused was at a place other than in Pionirska Street (where the Prosecution alleges that he was), then the Prosecution has failed to establish beyond reasonable doubt that he participated in the Pionirska Street incident.[7]

16. Of particular importance to the Accused's "defence" of alibi was the evidence of Prosecution witnesses who claimed to have seen the Accused at the scene of the Pionirska Street incident at the relevant time, and in the days following that incident. In assessing the identification evidence in general, the Trial Chamber has taken account of the circumstances in which each witness claimed to have observed the Accused, the length of that observation, the familiarity of the witness with the Accused prior to the identification and the description given by the witness of their identification of the Accused. The Trial Chamber has accepted that identification evidence involves inherent uncertainties due to the vagaries of human perception and recollection. The fact that a witness gives their evidence honestly is insufficient to establish the reliability of that evidence. The issue is not merely whether the evidence of an identification witness is honest; it is also whether the evidence is objectively reliable.[8]

17. The Prosecution sought to bolster the identification evidence of its witnesses by having those witnesses identify the Accused from a photo array. That array placed a photo of the Accused amongst photographs of 11 other men. The photo of the Accused shown to witnesses was taken after the arrest of the Accused, that is eight years after the alleged events. It was not established by the Prosecution that the appearance of the Accused at the time when the photograph was taken was

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6 *Delalic* Appeal Judgment, par 581; *Prosecutor v Kunarac et al*, IT-96-23-T & IT-96-23/1-T, Judgment, 22 Feb 2001, ("*Kunarac* Trial Judgment"), par 625. There was no challenge to this ruling in the Appeals Chamber: *Prosecutor v Kunarac et al*, IT-96-23 & IT-96-23/1-A, Judgment, 12 June 2002 ("*Kunarac* Appeal Judgment").

7 It is not sufficient for the Prosecution merely to establish beyond reasonable doubt that the alibi is false in order to conclude that his guilt has been established beyond reasonable doubt. Acceptance by the Trial Chamber of the falsity of an alibi cannot establish the opposite to what it asserts. The Prosecution must also establish that the facts alleged in the Indictment are true beyond a reasonable doubt before a finding of guilt can be made against the accused.

8 As to identification evidence generally, *see Prosecutor v Kupreškic et al,* Case IT-95-16-A, Judgment, 23 Oct 2001 ("*Kupreškic* Appeal Judgment"), pars 34-40, and footnoted references; *Delalic* Appeal Judgment, pars 491, 506; *Prosecutor v Kunarac et al*, IT-96-23 & 23/1-T, Decision on Motion for Acquittal, 3July 2000 ("*Kunarac* Decision"), par 8; *Kunarac* Trial Judgment, pars 561-562.

the same as it was eight years earlier. Most witnesses were asked to identify the Accused from this photo array at the time of giving their witness statement to the Prosecution investigators. In most instances, this was many years after the events in which the Accused was alleged to have been involved. Some of the witnesses had by that time become aware that the Accused had been charged in relation to the activities of Milan Lukic's paramilitary group, and may have seen a photograph of the Accused in the media. Some of those witnesses were not able to identify the Accused on the photo array shown to them at the time of giving their statement to the Prosecution.

18. It would be unfair to the Accused for the Trial Chamber to attach any significant weight to the identifications of him from the photo array. Having seen the photo array for itself, the Trial Chamber is not satisfied that the photographs included in the array were of persons who shared similar characteristics to the Accused such as to make an identification of him from that array reliable. Only one other man could possibly have been identified from a description based upon a sighting of the Accused over a short period by a person to whom he was not previously known. The other men bore little if any similarity to the Accused. In any event, identification from a photograph is usually inherently unreliable where the witness was not previously familiar with the Accused. A photograph is only two dimensional, and it records what a person looks like in the one split second when that person may have been moving his or her features, and which may not therefore always provide a safe impression of what that person really looks like.

19. The Prosecution attempted to bolster the identification of the Accused further by having its witnesses identify the Accused in court. Because of the circumstances in which they are made, which almost inevitably lead to an identification of the person standing trial, no positive probative weight can be given to "in court" identifications.[9]

20. The Trial Chamber has also made a careful evaluation of the expert evidence adduced in this case by both the Prosecution and the Defence with respect to the authenticity of medical records purporting to relate to the Accused and relevant to the "defence" of alibi. In evaluating the probative value of this evidence, the Trial Chamber has considered the professional competence of the expert, the methodologies used by the expert and the credibility of the findings made in light of these factors and other evidence accepted by the Trial Chamber.

21. The Trial Chamber has also taken into account the extent of the consistency between the oral evidence of the witnesses at trial and statements given prior to trial. The Trial Chamber accepts that in most instances a witness's oral evidence will not be identical with the evidence given

[9] *Kunarac* Decision, par 19; *Kunarac* Trial Judgment, par 562.

in such statement. The reason for this is that a witness may be asked questions at the trial not asked previously or may through questioning remember details previously forgotten. In general, the Trial Chamber has not treated minor discrepancies between the evidence of various witnesses, or between the evidence of a particular witness and a statement previously made by that witness, as discrediting their evidence where that witness had nevertheless recounted the essence of the incident charged in acceptable detail.[10] For these reasons, the Trial Chamber has not treated minor discrepancies between previous statements and oral testimony as discrediting the evidence of the witness as a whole, provided that the witness has been able to recount the essence of their previous evidence in reasonable detail. In determining whether any minor discrepancies should be treated as discrediting their evidence as a whole, the Trial Chamber has taken into account the fact that these events took place almost ten years before the witnesses gave evidence. Although the absence of a detailed memory on the part of these witnesses did make the task of the Prosecution more difficult, the lack of detail in relation to peripheral matters was in general not regarded as necessarily discrediting their evidence.[11]

22. In some cases, only one witness has given evidence of an incident with which the Accused is charged or otherwise involving the Accused. The Appeals Chamber has held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration.[12] In such a situation, the Trial Chamber has scrutinised the evidence of the Prosecution witness with great care before accepting it as sufficient to make a finding of guilt against the Accused.[13]

23. The findings by the Trial Chamber in relation to other individuals named in the evidence have been based on the evidence given in this trial, and they were made for the purposes of this trial. They have not been made for the purpose of entering criminal convictions against those other individuals. In particular, the two co-accused who have not yet been arrested, Milan Lukic and Sredoje Lukic, have not been found guilty beyond reasonable doubt in this trial of any of the crimes charged against them in the Indictment. They are not in any way bound by the findings made in this trial, and they will be able to challenge fully any evidence given in this trial which implicates them if it is given against them in their own trial before this Tribunal.

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[10] *Prosecutor v Krnojelac*, IT-97-25-T, Judgment, 15 Mar 2002, par 69 ("*Krnojelac* Trial Judgment").
[11] *Ibid*. *See* also *Kunarac* Trial Judgment, par 564.
[12] *Prosecutor v Aleksovski,* Case IT-95-14/1-A, Judgment, 24 Mar 2000 ("*Aleksovski* Appeal Judgment"), par 62; *Krnojelac* Trial Judgment, par 71.
[13] *Krnojelac* Trial Judgment, par 71.

III. GENERAL REQUIREMENTS OF ARTICLE 3 AND ARTICLE 5 OF THE STATUTE

A. General requirements of Article 3 of the Statute

24. There are two general conditions for the applicability of Article 3 of the Statute: first, there must be an armed conflict; secondly, the acts of the accused must be closely related to the armed conflict.[14]

25. The requirement that the acts of the accused be closely related to the armed conflict does not require that the offence be committed whilst fighting is actually taking place, or at the scene of combat.[15] The laws of war apply and continue to apply to the whole of the territory under the control of one of the parties to the conflict, whether or not actual combat takes place there, until a general conclusion of peace or a peaceful settlement is achieved.[16] As stated by the *Kunarac* Appeals Chamber:[17]

> ?Theg armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.

That requirement would be satisfied if the crime were committed either during or in the aftermath of the fighting, provided that it is committed in furtherance of, or at least under the guise of, the situation created by the fighting.[18]

26. In addition, there are four conditions which must be fulfilled before an offence may be prosecuted under Article 3 of the Statute:[19]

(i) the violation must constitute an infringement of a rule of international humanitarian law;

(ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met*;*

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[14] *Prosecutor v Tadic*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995("*Tadic* Jurisdiction Decision"), pars 67 and 70; *Kunarac* Appeals Judgment, par 55.
[15] *Kunarac* Appeals Judgment, par 57; *Kunarac* Trial Judgment, par 568.
[16] *Tadic* Jurisdiction Decision, par 70; *Kunarac* Appeals Judgment, par 57.
[17] *Kunarac* Appeals Judgment, par 58.
[18] *Kunarac* Appeals Judgment, par 58; *Kunarac* Trial Judgment, par 568.
[19] *Tadic* Jurisdiction Decision, par 94*; Aleksovski* Appeal Judgment, par 20; *Kunarac* Appeals Judgment, par 66.

(iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and

(iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

27. Common Article 3 of the 1949 Geneva Conventions is now part of customary international law,[20] and a serious violation thereof would at once satisfy the four requirements mentioned above.[21]

B. General requirements of Article 5 of the Statute

28. Article 5 of the Statute provides a list of offences which, if committed in an armed conflict and as part of "an attack directed against any civilian population", will amount to crimes against humanity. The expression "an attack directed against any civilian population" encompasses the following five sub-elements:[22]

(i) There must be an attack.[23]

(ii) The acts of the offender must be part of the attack.[24]

(iii) The attack must be "directed against any civilian population".[25]

(iv) The attack must be "widespread or systematic".[26]

(v) The offender must know of the wider context in which his acts occur and know that his acts are part of the attack.[27]

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[20] *Tadic* Jurisdiction Decision, par 70; *Kunarac* Trial Judgment, par 408.
[21] *Tadic* Jurisdiction Decision, par 134; *Kunarac* Appeals Judgment, par 68.
[22] *Kunarac* Appeals Judgment, par 85. *See* also *Kunarac* Trial Judgment, par 410; *Prosecutor v Radislav Krsti},* Case IT-98-33-T, Judgment, 2 Aug 2001 ("*Krstic* Trial Judgment"), par 482; *Prosecutor v Kvocka et al*, Case IT-98-30/1-T, Judgment, 2 Nov 2001 ("*Kvocka* Trial Judgment"), par 127; *Krnojelac* Trial Judgment, par 53.
[23] *Tadic* Appeal Judgment, par 251; *Kunarac* Appeals Judgment, pars 85-89.
[24] *Ibid,* par 248; *Kunarac* Appeals Judgment, pars 85, 99-100.
[25] Art 5 of the Statute expressly uses the expression "directed against any civilian population". *See Kunarac* Appeals Judgment"), pars 85, 90-92, and *Prosecutor v Tadic,* Case IT-94-1-T, Judgment 14 July 1997 ("*Tadic* Trial Judgment, pars 635-644.
[26] *Tadic* Appeals Judgment, par 248; *Kunarac* Appeals Judgment, pars 85, 93-97; *Prosecutor v Mrkšic and Others,* Case IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 Apr 1996 ("*Mrkšic and Others* Rule 61 Decision"), par 30.
[27] *Kunarac* Appeals Judgment, pars 85, 102-104; *Tadic* Appeals Judgment, par 248.

29. An "attack" may be described as a course of conduct involving the commission of acts of violence.[28] In the context of a crime against humanity, the phrase "attack" is not limited to the use of armed force;[29] it also encompasses any mistreatment of the civilian population.[30]

30. The concepts of "attack" and "armed conflict" are distinct and independent. As the *Tadic* Appeals Chamber stated:[31]

> The two – the "attack on the civilian population" and the "armed conflict" – must be separate notions, although of course under Article 5 of the Statute the attack on "any civilian population" may be part of an "armed conflict".

The attack could precede, outlast or continue during the armed conflict, without necessarily being a part of it.[32]

31. As stated by the Appeals Chamber:[33]

> ?Wheng establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population.
>
> ?…g
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> The existence of an attack from one side against the other side's civilian population would neither legitimize the attack against the civilian population nor displace the conclusion that those forces were in fact targeting a civilian population as such. Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.

32. The acts of the accused must be part of the attack.[34] In effect, as stated by the Appeals Chamber, the nexus between the acts of the accused and the attack consists of the following two elements:[35]

(i) the commission of an act which, by its nature or consequences, is objectively part of the attack*;* coupled with

(ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.

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[28] *Kunarac* Trial Judgment, par 415*; Krnojelac* Trial Judgment, par 54. *See* also *Kunarac* Appeals Judgment, pars 86 and 89.
[29] *Kunarac* Appeals Judgment, par 86.
[30] *Kunarac* Appeals Judgment par 86*; Kunarac* Trial Judgment, par 416.
[31] *Tadic* Appeal Judgment, par 251.
[32] *Kunarac* Appeals Judgment, par 86; *Tadic* Appeal Judgment, par 251*; Krnojelac* Trial Judgment, par 54.
[33] *Kunarac* Appeals Judgment par 87. *See* also *Kunarac* Trial Judgment, par 580.
[34] *Tadic* Appeal Judgment, pars 248 and 255; *Kunarac* Appeals Judgment, par 100.
[35] *Kunarac* Appeals Judgment, par 99. *See* also *Kunarac* Trial Judgment, par 418*; Tadic* Appeal Judgment, pars 248, 251 and 271*; Tadic* Trial Judgment, par 659*; Mrkšic and Others* Rule 61 Decision, par 30.

33. The expression "directed against any civilian population" specifies that, in the context of a crime against humanity, a civilian population is the primary object of the attack.[36] The protection of Article 5 extends to "any" civilian population including, if a state takes part in the attack, that state's own population.[37] It is therefore unnecessary to demonstrate that the victims were linked to any particular side of the conflict.[38]

34. The phrase "population" does not mean that the entire population of the geographical entity in which the attack is taking place must be subject to the attack.[39] As stated by the Appeals Chamber:[40]

> It is sufficient to show that enough individuals were targeted, or that they were targeted in such a way, so that the court is satisfied that the attack was in fact directed at the civilian "population", rather than at a number of selected individuals.

35. In addition, the attack must either be "widespread" or "systematic", thereby excluding isolated or random acts from the scope of crimes against humanity.[41] The phrase "widespread" connotes the large-scale nature of the attack and the number of victims, whist the phrase "systematic" connotes the organised nature of the acts of violence and the improbability of their random occurrence.[42] As stated by the Appeals Chamber:[43]

> Patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.

36. The Appeals Chamber has stated that neither the attack nor the acts of the accused need to be supported by any form of "policy" or "plan".[44] There is nothing under customary international law which requires the imposition of an additional requirement that the acts be connected to a policy or plan.[45] At most, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.[46]

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36 *Kunarac* Appeals Judgment, par 91; *Kunarac* Trial Judgment, par 421.
37 *Kunarac* Trial Judgment, par 423*; Tadic* Trial Judgment, par 635.
38 *Kunarac* Trial Judgment, par 423.
39 *Kunarac* Appeals Judgment, par 90; *Tadic* Trial Judgment, par 644*; Kunarac* Trial Judgment, par 424.
40 *Kunarac* Appeals Judgment, par 90.
41 *Kunarac* Trial Judgment, par 427*; Tadic* Trial Judgment, par 648.
42 *Kunarac* Appeals Judgment, par 94; *Kunarac* Trial Judgment, pars 428-429*; Krnojelac* Trial Judgment, par 57*; Tadic* Trial Judgment, par 648*; Prosecutor v Blaškic*, Case IT-95-14-T, Judgment, 3 Mar 2000 ("*Blaškic* Trial Judgment"), pars 203 and 206.
43 *Kunarac* Trial Judgment, par 429.
44 *Kunarac* Appeals Judgment, par 98; *see* also *Krnojelac* Trial Judgment, par 58.
45 *Kunarac* Appeals Judgment, par 98.
46 *Kunarac* Appeals Judgment, par 98; *see* also *Krnojelac* Trial Judgment, par 58*; Prosecutor v Kordic and Cerkez*, Case IT-95-14/2-T, Judgment, 26 Feb 2001 ("*Kordic and Cerkez* Trial Judgment"), par 182*; Kunarac* Trial Judgment, par 432.

37. Concerning the required state of mind, the accused[47] -

> ?…g must have had the intent to commit the underlying offence or offences with which he is charged, and ?…g he must know "that there is an attack on the civilian population and that his acts comprise part of that attack, or at least ?that he tookg the risk that his acts were part of the attack".

Furthermore, when it comes to his criminal liability, the motives of the accused for taking part in the attack are irrelevant, and a crime against humanity may be committed for purely personal reasons.[48]

38. In addition to these five requirements, the Statute provides that a crime against humanity may only be committed, pursuant to Article 5, "when committed in armed conflict". This jurisdictional requirement requires the existence of an armed conflict at the time and place relevant to the indictment, but it does not necessitate any material nexus between the acts of the accused and the armed conflict.[49]

C. Findings of facts relevant to the general requirements of Article 3 and Article 5 of the Statute

39. The municipality of Višegrad is located in south-eastern Bosnia and Herzegovina, bordered on its eastern side by the Republic of Serbia. Its main town, Višegrad, is located on the eastern bank of the Drina River. In 1991, about 21,000 people lived in the municipality, about 9,000 in the town of Višegrad. Approximately 63% of the population was of Muslim ethnicity, while about 33% was of Serb ethnicity.[50]

40. In November 1990, multi-party elections were held in this municipality. Two parties, the primarily Muslim SDA (Party for Democratic Action) and the primarily Serb SDS (Serbian Democratic Party), shared the majority of the votes. The results closely matched the ethnic composition of the municipality, with 27 of the 50 seats that composed the municipal assembly being allocated to the SDA and 13 to the SDS.[51] Serb politicians were dissatisfied with the

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47 *Kunarac* Appeals Judgment, par 102; *see* also *Krnojelac* Trial Judgment, par 59*; Kunarac* Trial Judgment, par 434*; Blaškic* Trial Judgment, pars 247 and 251.

48 *Kunarac* Appeals Judgment, par 103 and *Kunarac* Trial Judgment, par 433. *See* also *Prosecutor v Tadic*, Case IT-94-1-A, Judgment, 15 July 1999 ("*Tadic* Appeal Judgment"), pars 248 and 252.

49 *Kunarac* Appeals Judgment, par 83; *Tadic* Appeals Judgment, pars 249 and 251*; Kunarac* Trial Judgment, par 413*; Kupreškic* Trial Judgment, par 71.

50 Admissions by the Parties and Matters which are not in Dispute, Ex P 36.1, let (3)(d), (e) and (f). *See* also Ex P 41.1, *Changes in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001.

51 VG-22 (T 134-135, 165-169); VG-14 (T 417); Omer Brankovic (Ex P143, p 548789-91); Mehmed Tvrtkovic (Ex P 143, p 584584); Snezana Neskovic (T 3616).

distribution of power, feeling that they were under-represented in positions of authority. Ethnic tensions soon flared up.[52]

41. From early 1992, Muslim citizens were disarmed or requested to surrender their weapons.[53] In the meantime, Serbs started arming themselves and organised military training.[54] Muslims also attempted to organise themselves, although they were much less successful in doing so.[55]

42. From 4 April 1992, Serb politicians repeatedly requested that the police be divided along ethnic lines.[56] Soon thereafter, both of the opposing groups raised barricades around Višegrad,[57] which was followed by random acts of violence including shooting and shelling.[58] In the course of one such incident, mortars were fired at Muslim neighbourhoods.[59] As a result, many civilians fearing for their lives fled from their villages.[60] In early April 1992, a Muslim citizen of Višegrad, Murat Sabanovic, took control of the local dam and threatened to release water. On about 13 April 1992, Sabanovic released some of the water, damaging properties downstream.[61] The following day, the Užice Corps of the Yugoslav National Army ("JNA") intervened, took over the dam and entered Višegrad.[62]

43. Even though many Muslims left Višegrad fearing the arrival of the U`ice Corps of the JNA,[63] the actual arrival of the Corps had, at first, a calming effect.[64] After securing the town, JNA

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[52] Mehmed Tvrtkovic (Ex P 143, p 584584); Snezana Neskovic (T 3504-3605, 3610-3612); VG-14 (T 417); Omer Brankovic (Ex P 143, p 548791).

[53] Companies which were controlled by Muslims were also required to surrender their weapons. The Muslim majority through its control of the municipal assembly controlled the Territorial Defence ("TO"), which in turn controlled the weapons handed to companies which were part of the TO. *See* VG-22 (T 136-138, 161, 173); VG-116 (T 599-600); VG-21 (T 910-912); Omer Brankovic (Ex P 143, p 548793); *see* also, Ex P 47, which is a telegram signed by the President of the Serbian Republic of Bosnia and Herzegovina, Radovan Karadžic, requesting that "?a gll villages in which the Croatian and Muslim inhabitants hand over their weapons and do not intend to fight against us must enjoy the full protection of our Serbian state of Bosnia Herzegovina." The message was sent to several municipalities, including to the municipality of Višegrad by radio (*see* Ex P 47).

[54] VG-22 (T 136-138, 173); Omer Brankovic (Ex P 143, p 548791-3); Fikret Cocalic (Ex P 143, p 547043); Mehmed Tvrtkovic (Ex P 143, p 584586); Muharem Samardic (Ex P 143, p 584977); Dragan Simic (T 2521); VGD-24 (T 4681-4682).

[55] Muharem Samardic (Ex P 143, p 584979); Dragan Simic (T 2521); VGD-23 (T 2656); VGD-24 (T 4682).

[56] Omer Brankovic (Ex P 143, p 548791); Fikret Cocalic (Ex P 143, p 547044).

[57] Fehrid Spahic (T 351); VG-14 (T 419); VG-21 (T 909-910); Mevsud Poljo (T 616); Mehmet Tabakovic (Ex P 143, p 912758); Simeun Vasic (Ex P 143, p 645514); Muharem Samardic (Ex P 143, p 584977); Petar Mitrovic (T 2770).

[58] VG-22 (T 137-183); VG-32 (T 212-213); Mevsud Poljo (T 616-617); VG-87 (T 1086); VG-38 (T 1339-1343); Omer Brankovic (Ex P 143, p 548794).

[59] VG-22 (T 137-183); Muharem Samardic (Ex P 143, p 584977); Omer Brankovic (Ex P 143, p 548794).

[60] VG-38 (T1340); VG-87 (T 1086); VG-77 (T 690); VG-84 (T 1647).

[61] VG-22 (T 140-141, 179-181); Fehrid Spahic (T 355); VG-59 (T 1041-1042); VG-61 (T 869); Snedzana Neskovic (T 3623); Fikret Cocalic (Ex P 143, p 547044); Muharem Samardzic (Ex P143, p 584977). Mirsad Tokaca gave evidence that the dam incident was not the key factor which caused the population to flee. People had already begun to flee from Višegrad earlier (T 857).

[62] VG-115 (T 1041-1042); Fehrid Spahic (T 355); VG-61 (871); VG-14 (T 417); Muharem Samardi} (Ex P 143, p 584977); Fikret Cocalic (Ex P 143, p 547044).

[63] Mirsad Tokaca (T 846, T 856); VG-14 (417-419); Mehmed Tvrtkovic (Ex P 143, p 584586).

[64] Dragan Simic (T 2495); VG-22 (T 193).

officers and Muslim leaders jointly led a media campaign to encourage people to return to their homes.[65] Many actually did so in the later part of April 1992.[66] The JNA also set up negotiations between the two sides to try to defuse ethnic tension.[67] Some Muslims, however, were concerned by the fact that the U`ice Corps was composed exclusively of Serbs.[68]

44. Soon thereafter, convoys were organised, emptying many villages of their non-Serb population.[69] On one occasion, thousands of non-Serbs from villages on both sides of the Drina River from the area around the town of Višegrad were taken to the football stadium in Višegrad.[70] There, they were searched for weapons and were addressed by a JNA commander. He told them that the people living on the left side of the Drina River could return to their villages, which had been cleansed of "reactionary forces", whereas the people from the right side of the Drina River were not allowed to go back. As a consequence, many people living on the right side of the Drina River either stayed in the town of Višegrad, went into hiding or fled.[71]

45. On 19 May 1992, the JNA withdrew from Višegrad.[72] Paramilitary units stayed behind,[73] and other paramilitaries arrived as soon as the army had left town.[74] Some local Serbs joined them.[75] The Accused admitted that he knew that some of those paramilitaries killed or robbed Muslim civilians and that they were committing such crimes only because the victims were of Muslim ethnicity.[76]

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65 Admissions by the parties and Matters which are not in Dispute, Ex P 36.1, let (3)(k). *See* also VG-22 (T 142-143); Fikret Cocalic (Ex P 143, pp 547045-547046); Mirsad Tokaca (T 846, T 856); Ex P 49, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III. A – Special Forces, par 543.

66 VG-21 (T 910); Muharem Samarði} (Ex P 143, p 584977); VG-14 (T 423).

67 VG-22 (T 142-143); Fikret Cocalic (Ex P 143, p 547045-6).

68 VG-22 (T 187-188).

69 Fehrid Spahi} (T 394-396); VGD-23 (T 2661-2664); *see* also incident charged in the Indictment under pars 16-20 (Counts 10 through 13).

70 VG-116 (T 582-596); VG-22 (T 153-161); VG-38 (T 1339-1343); VG-84 (T 1649-1651); Mehmed Tvrtkovi} (Ex P 143, p 584588).

71 VG-84 (T 1649-1653); VG38 (T 1341-1342, 1399); VG-22 (T 163); VG-32 (T 231); VG-79 (T 315-317, 320-321); VG-116 (T 582); VG-115 (T 1012); VG-14 (T 423); VG-77 (T 690). VG-22 gave evidence that he overheard a discussion of two JNA soldiers discussing the *cleaning* taking place in the area of Višegrad and saw them pointing at the right bank of the river on a map of the municipality of Višegrad (T 148-150).

72 Admissions by the Parties and Matters which are not in Dispute, Ex P 36.1, let (3)(l).

73 VG-84 (T 1646-1649); VG-32 (T 221-222); VGD-24 (T 4691-4692). *See* also Ex P 49, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III A – Special Forces, par 543.

74 VG-22 (T 159, 196); VG-32 (T 216-223); Fehrid Spahic (T 356); VG-14 (T 420-421); VG-80 (T 725); VG-21 (T 911-915); VG-59 (T 656); Zivorad Savic (T 2891); Zoran Djuric (T 4609-4610). *See* also Ex P 49, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III A – Special Forces, pars 246-250, 540-556.

75 VG-14 (T 420-421); VG-38 (T 1399).

76 The Accused (T 2007-2008).

46. A particularly violent and feared group of Serb paramilitaries was led by the co-accused Milan Lukic.[77] In the course of a few weeks, this group committed many crimes, ranging from looting to murders.[78] The Accused knew Milan Luki} well. The Accused was in a *kum* relationship – a strong Serbian family bond – with Milan Lukic. In 1995 or 1996, he was Milan Lukic's best man at his wedding, and since 1998 he has been the godfather of Milan Lukic's child.[79] He also knew the other men who were associated with Milan Lukic,[80] and he knew that they and Milan Luki} had committed serious crimes.[81] Despite that knowledge, the Accused was seen together with these men on several occasions during the period relevant to the Indictment.[82]

47. Those non-Serbs who remained in the area of Višegrad, or those who returned to their homes, found themselves trapped, disarmed and at the mercy of paramilitaries which operated with the complicity, or at least with the acquiescence, of the Serb authorities, in particular by the then Serb-only police force.[83]

48. Sometime in May 1992, the Accused was present when Milan Luki} and his men searched the village of Musi}i for weapons.[84] During this search, money and other valuables disappeared from some of the houses that had been searched.[85] The Accused stood guard while the search was undertaken.[86]

49. As early as June 1992, non-Serb civilians were arbitrarily killed.[87] In one such incident, on or about 7 June 1992, Milan Lukic, the Accused and two other men, took seven Muslim men to the

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77 *See*, Ex P 49, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III. A – Special Forces, pars 246-250, 543-553.

78 *See*, for instance, VG-55 (T 566-576); VG-59 (T 661-663, 671-675); VG-80 (T 726-728); VG-115 (T 1011-1019, 1030-1037); VG-81 (T 1225-1227, 1231-1233); VG-13 (T 1426); VG-84 (T 1654-1655); Simeun Vasi} (Ex P 143, p 645515). *See* also, Ex P 49, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III. A – Special Forces, pars 246-250, 543-553.

79 Admissions by the Parties and Matters which are not in Dispute, Ex P 36.1, let (3)(y); the Accused (T 1852-1854; T 1950-1951, 1962). In 1999, the Accused attended another wedding together with Milan Lukic (The Accused, T 1969).

80 The Accused (T 1985, 1994). *See* below, pars 72 *et seq*, section "The Accused's Relationship with the Paramilitary Group led by Milan Lukic".

81 The Accused (T 1942, 1979, 1988, 1994, 1998); *see* also below, incident charged in the Indictment under pars 12 and 13 (Counts 4 through 7).

82 VG-59 (T 660-661, T 669); VG-55 (T 563-566); VG-14 (T 445); VG-32 (T 268).

83 The Accused testified that, for a while, Milan Lukic and his group dressed as and operated with the police (see, T 1977-1978, 1985-1986, 1994-1996). VG-22 (T 159, T 162); VG-84 (T 1647-1649); VG-32 (T 231); Simeun Vasi} (Ex P 143, p 645516); Mehmed Tvrtkovi} (Ex 143, p 584584); VGD-23 (T 2661-2664); VG-14 (T 427, 469); Mirsad Tokaca (T 852-853); Zivorad Savic (T 2891); VG-117 (T 4530-4535); VG-38 (1357). *See* also Ex P 15, in which the Accused gave evidence that "the party armed the people".

84 VG-55 (T 563-566); VG-59 (T 660-674); the Accused (2042-2043, T 2065).

85 VG-59 (T 669); VG 55 (T 563-566).

86 *See* finding at pars 80-83 *infra*.

87 *See*, for instance, Ex P 49, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III A – Special Forces, par 544.

bank of the Drina River where they were shot.[88] Five of them were killed.[89] This incident will be referred to as the Drina River Incident.[90]

50. On 14 June 1992, more than 60 Muslim civilians of all ages fleeing from Koritnik and Sase were locked up in a Muslim house in Pionirska Street, Višegrad, by local Serb paramilitaries, led by Milan Lukic. The house was then set on fire. Those who tried to escape through one of the windows were shot at and all but six were burned alive.[91] This incident will be referred to as the Pionirska Street Incident.[92]

51. Many other incidents of arbitrary killings of civilians took place in Višegrad during this period.[93] From early April 1992 onwards, non-Serb citizens also began to disappear.[94] For the next few months, hundreds of non-Serbs, mostly Muslim, men and women, children and elderly people, were killed.

52. Many of those who were killed were simply thrown into the Drina River, where many bodies were found floating.[95] Of all the bodies pulled out of the water, only one appeared to be that of a Serb.[96] Hundreds of other Muslim civilians of all ages and of both sexes were exhumed from mass graves in and around Višegrad municipality.[97]

53. The number of disappearances peaked in June and July 1992.[98] Sixty-two percent of those who went missing in the municipality of Višegrad in 1992 disappeared during those two months. Most if not all of those who disappeared were civilians.[99] The pattern and intensity of

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88 *See* below, par 111 .

89 *See* below, incident charged in the Indictment under pars 12 and 13 (Counts 4 through 7). *See* also the Interview of the Accused, Ex P 15, p 53-84.

90 *See* below, pars 96 *et seq*.

91 *See* incident charged in the Indictment under pars 16-20 (Counts 10 through 13). Two other "survivors" managed to escape before the group was locked up in the house (VG-78 and VG-101).

92 *See* below, pars 116 *et seq*.

93 *See*, for instance, Fehrid Spahic (T 357-360, 394-396). On the manner in which many of these civilians were killed, *see* John Clark (T 1528-1550). *See* also Ex P 60.

94 Mirsad Tokaca (T 853-854); VG-14 (T 420, 427); VG-59 (T 656); VG-38 (T 1399); VG-32 (T 219-220); VG-55 (T 566, T 573); VG-116 (T 591-594); VG-80 (T 727-729).

95 VG-79 (T 328); Mevsud Poljo (T 617-646); VG-21 (T 920-930); Amor Masovic (T 947, 997-998); VG-81 (T 1224, 1233); Zivorad Savic (T 2892-2894); Mehmed Tabakovic (EX P143, p 912758-60); Simeun Vasic (Ex P 143, p 645514-16).

96 VG-21 (T 925-926).

97 Amor Masovic (T 937-997); John Clark (T 1528-1550). *See* also Ex P 54, 54.1-7, Ex P 60 and Ex P 140. Amor Masovic said that, out of hundreds of individuals who were found in mass graves and identified, only one Serb was found, while all others were Muslims (T 969).

98 According to the ICRC list of missing persons, almost 200 persons disappeared in May while almost 300 disappeared in June 1992 in and around Višegrad (*see*, Ex P41.1, *Change in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001, p 17-21, Annex B and Appendix A-B). The study states in particular that, from all places within the municipality of Višegrad, most people – 57% - who disappeared came from the town of Višegrad itself (p 19). It also states that the vast majority of persons missing in Višegrad were Muslim men, mainly aged 15 to 44 years (p 19). *See* also Mevsud Poljo (T 618); Mirsad Tokaca (T 848-849); VG-21 (T 920), VG-87 (T 1086).

99 Amor Masovic (T 996); John Clark (T 1548).

disappearances in Višegrad paralleled that of neighbouring municipalities which now form part of Republika Srpska.[100] Disappearances in those various neighbouring municipalities occurred at approximately the same time.[101]

54. Non-Serb citizens were subjected to other forms of mistreatment and humiliation, such as rapes or beatings.[102] Many were deprived of their valuables, by Milan Lukic and his men amongst others.[103] Injured or sick non-Serb civilians were denied access to medical treatment. On one occasion, a Muslim woman who was severely burned was denied proper and adequate medical treatment and, in place of a medical prescription, was advised by a local Serb doctor to cross the mountains and the frontline in order to find a hospital on the other side where they would be prepared to treat her.[104] Two Serb witnesses testified that it would not have been safe for them to provide Muslims with medical assistance.[105]

55. Many non-Serb civilians who had not yet fled were systematically expelled in an orderly fashion.[106] Convoys of buses were organised to drive them away, and the police force sometimes escorted them.[107] In the process of their transfer, identification documents and valuables were often taken away.[108] Some of these people were exchanged, whilst others were killed. In one incident, Muslim men who had been told that they would be exchanged were taken off a bus, lined up and

[100] *See* Ewa Tabeau (T 771-775); *See*, Ex P 41.1, *Change in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001, p 19.
[101] *See*, Ex P 41.1, *Change in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001, p 19.
[102] VG-55 (T 572); VG-13 (T 1426, 1440-1442); VG-101 (T 1167); VG-18 (1587-1589); VG-80 (T 728); Fehrid Spahic (T 378-392); VG-55 (T 572); Mevsud Poljo (T 621); Zoran Djuric (T 4606-4608, 4611-4614).
[103] VG-32 (T 224-236, 250-252); VG-14 (T 419); VG-55 (T 568); VG-59 (T 663, 675); VG-77 (690-691); VG-21 (T 914).
[104] Radomir Vasiljevic (T 3164-3179); Zivorad Savic (T 2907-2911).
[105] *Ibid*. In an effort to establish that Muslims continued to have equal access to medical treatment after June 1992, the Defence pointed at the name of *one* Muslim woman who, on three successive occasions, was treated for her cancer. Her name appears in the medical centre log-book among *hundreds* of Serb names (*see* entry 5558, 5622 and 5709 on Ex D 26.1).
[106] VG-32 (T 228); VG-55 (T 572); *see* also *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III A – Special Forces, par 544.
[107] VG-23 (T 2661-2663); Fehrid Spahic (T 361-378); VG-116 (T 582-596); VG-84 (T 1646-1649); Mirsad Tokaca (T 846-848); VG-105 (T 1121-1122); VGD-23 (T 2661-1664, T 1668-1685); VG-117 (T 4533); *see also* incident charged in the Indictment under pars 16-20 (Counts 10 through 13).
[108] VG-22 (T 148-152, 153-161); VG-55 (T 572); Fehrid Spahic (T 361-378); Mirsad Tokaca (T 846-848); VG-105 (T 1121-1122); VG-13 (T 1463).

executed.[109] Muslim homes were looted and often burnt down.[110] The two mosques located in the town of Višegrad were destroyed.[111]

56. As a result of this process, by the end of 1992, there were very few non-Serbs left in Višegrad.[112] Hundreds had been killed arbitrarily, while thousands of others had been forcibly expelled or forcibly transferred through violence and fear. Today, most of the people living in Višegrad are of Serb ethnicity.[113] Such dramatic changes in ethnic composition occurred systematically throughout what is now the Republika Srpska, but proportionally the changes in Višegrad were second only to those which occurred in Srebrenica.[114]

D. Conclusions relevant to the general requirements of Article 3 and Article 5 of the Statute

57. The parties agreed, and the Trial Chamber is satisfied, that, at all times relevant to the Indictment, there was an armed conflict in the municipality of Višegrad.[115] The Trial Chamber is also satisfied that the acts of the Accused were closely related to the armed conflict. Although he did not take part in any fighting, the Accused was closely associated with Serb paramilitaries, his acts were all committed in furtherance of the armed conflict, and he acted under the guise of the armed conflict to commit the crimes which the Trial Chamber accepted that he committed.[116]

58. The Trial Chamber is satisfied upon the evidence before it that there was a widespread and systematic attack against the non-Serb civilian population of the municipality of Višegrad at the time relevant to the Indictment.[117] The attack took many forms, starting with the Serb take-over of the town and the systematic and large-scale criminal campaign of murders, rapes and mistreatment of the non-Serb population of this municipality, particularly the Muslims, which eventually culminated in one of the most comprehensive and ruthless campaigns of ethnic cleansing in the

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[109] Fehrid Spahic (T 357-360, 394-396). *See* Ex P 41.1, *Changes in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001.

[110] VG-32 (T 215-216); Fehrid Spahic (T 360); VG-14 (T 419); VG-55 (T 568); VG-59 (T 663); VG-77 (T690-691); VG-21 (T 914); VG-116 (T 605); VG-84 (T 1653); Zivorad Savic (T 2897); the Accused (T 2007-2008); Muharem Samardic (Ex P 143, p 584979); Mehmed Tvrtkovic (Ex P 143, p 584586).

[111] Admissions by the Parties and Matters which are not in Dispute, Ex P 36.1, let (3)(p). *See* also VG-32 (T 229, 255). *See* also, Ex P 1, *A Report on the Devastation of Cultural, Historical and Natural Heritage of the Republic/Federation of Bosnia and Herzegovina*, 5 Apr 1992 – 5 Sept 1995, p 12, No 102.

[112] EX P 41, a study on changes in the ethnic composition in the municipality of Višegrad between 1991 and 1997 states that, during the war, Muslims entirely disappeared from the municipality, and the post-war ethnic structure of the municipality is 95.9% Serb (*see* Ex P 41.1, *Changes in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001). In addition, the parties have agreed that "?today most of the people living in Višegrad are of Serb origin" (*see* Admissions by the Parties and Matters which are not in Dispute, Ex P 36.1, let (3)(g)).

[113] Admissions by the Parties and Matters which are not in Dispute, Ex P 36.1, let (3)(g). *See*, Ex P 41.1, *Change in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001.

[114] Ewa Tabeau (T 770-771); *see* also, Ex P 41.1, p 14-15.

[115] Admissions by the Parties and Matters which are not in Dispute, Ex P 36.1, let (3)(a).

[116] *See* also pars 72 *et seq*, "The Accused's relationship with the Paramilitary Group led by Milan Lukic".

[117] The Defence conceded that there was an attack upon the Muslim civilian population at the relevant time (Closing Arguments, 14 Mar 2002, T 4935-4936).

Bosnian conflict. Within a few weeks, the municipality of Višegrad was almost completely cleansed of its non-Serb citizens, and the municipality was eventually integrated into what is now Republika Srpska.[118]

59. Although the Trial Chamber is not satisfied that the Accused was a member of any paramilitary group, the Trial Chamber is satisfied that he acted as an informant to a paramilitary group led by Milan Lukic, by providing that group with local information about Muslims. The Trial Chamber is satisfied that he did so in the knowledge that Lukic and his men committed crimes against non-Serb civilians.[119]

60. Finally, the Trial Chamber is satisfied that the acts of the Accused comprised part of the widespread and systematic attack against the non-Serb civilian population of the municipality of Višegrad. The Trial Chamber is satisfied that the Accused knew of the attack, as he knew of the situation of non-Serb civilians in Višegrad and he was told about the commission of crimes committed against non-Serb civilians, by, *inter alia*, Milan Lukic with whom he was associated.[120] Also, in view of the sheer scale and systematic nature of the attack, the Accused must have noticed the consequences of this campaign upon the non-Serb civilian population of the Višegrad municipality. With that knowledge, the Accused decided to pursue the goals of this attack and to perpetuate it by committing very serious criminal offences, which objectively formed a part of that attack. In so doing, the Accused willingly and consciously took an active part in the attack upon the non-Serb civilian population of the municipality of Višegrad.

[118] *See* pars 53-56 above.
[119] *See* The Accused, T 1882, 2103-2105 and pars 72 *et seq*, "The Accused's Relationship with the Paramilitary Group led by Milan Lukic".
[120] *See* The Accused, T 1882, 2103-2105. As stated under the incident charged in the Indictment under pars 12 and 13 (Counts 4 through 7), the Accused gained that knowledge not later than 7 June 1992, prior to the moment when the first acts charged in the Indictment were committed.

IV. INDIVIDUAL CRIMINAL RESPONSIBILITY

61. The Prosecution alleges that the Accused is criminally responsible for his participation in the crimes alleged in the Indictment pursuant to Article 7(1) of the Tribunal's Statute. Article 7(1) provides that:

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

The Prosecution pleaded Article 7(1) in its entirety. Article 7(1) includes within its terms the criminal responsibility of the Accused as a participant in a joint criminal enterprise.[121]

A. Committing

62. The Accused will only incur individual criminal responsibility for committing a crime under Article 7(1) where it is proved that he personally physically perpetrated the criminal act in question or personally omitted to do something in violation of international humanitarian law.[122]

B. Joint Criminal Enterprise

63. In the Indictment, the Prosecution alleges that the Accused "acted in concert" with Milan Lukic, Sredoje Lukic and other unknown individuals with respect to acts of extermination, persecution, murder, inhumane acts and violence to life and person. At the Pre-Trial Conference on 20 July 2001, the Prosecution was asked to state clearly what it meant by the use of the term "in concert".[123] The Prosecution initially stated that all it was trying to convey was that the Accused was not acting alone and that he did not commit the crimes by himself, but it was eventually agreed that the Prosecution was relying upon a joint criminal enterprise. The Prosecution did not plead the extended form of joint criminal enterprise, by which a member of that enterprise who did not physically perpetrate the crimes charged himself is nevertheless criminally responsible for a crime which went beyond the agreed object of that enterprise, if (i) the crime was a natural and foreseeable consequence of the execution of that enterprise, and (ii) the accused was aware that such a crime was a possible consequence of the execution of that enterprise, and, with that awareness, he participated in that enterprise.[124] Indeed, when asked, counsel for the Prosecution

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[121] *Tadic* Appeal Judgment, pars 191-192; *Krnojelac* Trial Judgment, par 73.
[122] *Tadic* Appeal Judgment, par 188; *Kunarac* Trial Judgment, par 390; *Krstic* Trial Judgment, par 601; *Krnojelac* Trial Judgment, par 73.
[123] Pre-Trial Conference, 20 July 2001, T 52-56.
[124] *Prosecutor v Brđanin and Talic*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, ("*Brdanin and Talic* Decision on Form of Further Amended Indictment"), par 30.

expressly disclaimed any intention to rely upon such a case.[125] The Trial Chamber will therefore consider only the first and second categories of joint criminal enterprise.

64. The first and second categories are basic forms of a joint criminal enterprise.[126] Both require proof that the accused shared the intent of the principal offenders of the crime.[127] The distinction drawn between the two categories relates to subject matter only, the second category being associated with the concentration camp cases or like situations.[128]

65. For individual criminal liability to arise under a joint criminal enterprise, the Prosecution must establish the existence of a joint criminal enterprise and the participation of the accused in that enterprise.[129]

66. The Prosecution must establish the existence of an arrangement or understanding amounting to an agreement between two or more persons that a particular crime will be committed. The arrangement or understanding need not be express, and it may be inferred from all the circumstances. The fact that two or more persons are participating together in the commission of a particular crime may itself establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that particular criminal act.[130]

67. A person participates in a joint criminal enterprise by personally committing the agreed crime as a principal offender, or by assisting the principal offender in committing the agreed crime as a co-perpetrator (by undertaking acts that facilitate the commission of the offence by the principal offender),[131] or by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the nature of that system and intent to further that system.[132] If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of

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[125] Pre-Trial Conference, 20 July 2001, T 52-55. *See* also Prosecution Final Trial Brief, pars 336-337, 341, 344-345, 350, 360, and Trial Transcript, pp 4824-4825.
[126] *Tadic* Appeal Judgment, par 190-206; *Delalic* Appeal Judgment, pars 365-366.
[127] *Krnojelac* Trial Judgment, par 78; *Brdanin and Talic* Decision on Form of Further Amended Indictment, par 26.
[128] *Krnojelac* Trial Judgment, par 78.
[129] *Tadic* Appeal Judgment, par 227.
[130] *Prosecutor v Brdanin and Talic*, IT-99-36-PT, Decision on Form of the Second Indictment, 11 May 2000 ("*Brdanin and Talic* Form of the Second Indictment Decision"), par 15; *see* also *Tadic* Appeal Judgment, par 227(ii); *Prosecutor v Furund`ija*, Case IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundžija* Appeal Judgment"), par 119.
[131] The Trial Chamber understands the term "co-perpetrator" as referring to a participant in a joint criminal enterprise who was not the principal offender. The co-perpetrator shares the intent of the joint criminal enterprise and is distinguishable from a person who merely aids and abets a joint criminal enterprise; *see Krnojelac* Trial Judgment, par 77.
[132] *Brdanin and Talic* Form of the Second Indictment Decision, par 15; *Krnojelac* Trial Judgment, par 81. The second part of that proposition is inapplicable in the present case.

the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.[133]

68. The Prosecution must also establish that the person charged shared a common state of mind with the person who personally perpetrated the crime charged (the "principal offender") that the crime charged should be carried out, the state of mind required for that crime.[134] Where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.[135]

69. If the Trial Chamber is not satisfied that the Prosecution has proved that the Accused shared the state of mind required for the commission of any of the crimes in which he is alleged to have participated pursuant to a joint criminal enterprise, it may then consider whether it has nevertheless been proved that the Accused incurred criminal responsibility for any of those crimes as an aider and abettor to their commission.

C. Aiding and Abetting

70. An accused will incur individual criminal responsibility for aiding and abetting a crime under Article 7(1) where it is demonstrated that the accused carried out an act which consisted of practical assistance, encouragement or moral support to the principal offender of the crime.[136] The act of assistance need not have caused the act of the principal offender, but it must have had a substantial effect on the commission of the crime by the principal offender.[137] The act of assistance may be either an act or omission, and it may occur before or during the act of the principal offender.[138] Mere presence at the scene of the crime is not conclusive of aiding and abetting unless it is demonstrated to have a significant encouraging effect on the principal offender.[139]

71. To establish the *mens rea* of aiding and abetting, it must be demonstrated that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.[140] The aider and abettor must be aware of the

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[133] *Brdanin and Talic* Form of the Second Indictment Decision, par 15; *Krnojelac* Trial Judgment, par 82.
[134] *Krnojelac* Trial Judgment, par 83; *Brdanin and Talic* Decision on Form of Further Amended Indictment, par 26.
[135] *Krnojelac* Trial Judgment, par 83.
[136] *Furundžija* Trial Judgment, pars 235, 249.
[137] *Furundžija* Trial Judgment pars 223, 224, 249; *Prosecutor v Aleksovski,* Case IT-95-14/1-T, Judgment, 25 June 1999 ("*Aleksovski* Trial Judgment"), par 61; *Kunarac* Trial Judgment, par 391; *Kordic and Cerkez* Trial Judgment, par 399.
[138] *Aleksovski* Appeal Judgment, 24 Mar 2000 par 162; *Kunarac* Trial Judgment, par 391.
[139] *Prosecutor v Furund`ija*, Case IT-95-17/1-T, Judgment, 10 Dec 1998 ("*Furundžija* Trial Judgment"), par 232; *Tadic* Appeal Judgment 7 May 1997, par 689; *Kunarac* Trial Judgment par 393.
[140] *Aleksovski* Appeal Judgment par 162; *Tadic* Appeal Judgment par 229; *Kunarac* Trial Judgment, par 392.

essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, the aider and abettor need not share the intent of the principal offender.[141] The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability from that of an accused acting pursuant to a joint criminal enterprise who does share the intent of the principal offender.

[141] *Aleksovski* Appeal Judgment 24 Mar 2000 par 162; *Kunarac* Trial Judgment, par 392.

V. THE ACCUSED'S RELATIONSHIP WITH THE PARAMILITARY GROUP LED BY MILAN LUKIC

72. Soon after the withdrawal of the Užice Corps of the JNA from Višegrad on 19 May 1992, several paramilitary organisations carried out widespread criminal activity within the territory of the municipality of Višegrad. A particularly violent and feared group of Serb paramilitaries was led by Milan Lukic, one of the co-Accused in the Indictment against the Accused (hereinafter "the paramilitary group").[142] Milan Lukic, who originates from the municipality of Višegrad, left the area about five years prior to the outbreak of the conflict in Bosnia and Herzegovina and worked in Switzerland and in Obrenovac, Serbia. Sometime in early May 1992, he returned to Višegrad together with about 10 men who were at the time living in Obrenovac.[143] With these men and other individuals from the area of Vi{egrad, Milan Lukic formed a paramilitary group which in the course of a few weeks committed dozens of crimes, ranging from looting to rape and murder.[144]

73. The existence of this group and its involvement in criminal activities against the non-Serb civilian population of Vi{egrad was not disputed by the Defence.[145] The Prosecution alleges that the Accused was a member of or was closely associated with the paramilitary group and participated in the crimes committed by them. The Prosecution alleges that the Accused carried out the crimes charged in the Indictment in concert with Milan Lukic and other members of the paramilitary group.[146]

74. It was not in dispute that the Accused was present on 7 June 1992 during the incident on the bank of the Drina River, or that in the afternoon of 14 June 1992 he was in Pionirska Street where he had some interaction with at least one person from the group which was killed in the house burning incident later that day.[147] However, as the Prosecution placed great emphasis in support of its case upon the assertion that the Accused was a member of, or was closely associated with, Milan Lukic's paramilitary group, this issue is important to the determination of the Accused's responsibility for the crimes charged in the Indictment. In order to avoid the circularity which

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[142] *See* above, par 46.
[143] The Accused (T 1853-1855, T 1988); VG-32 (T 297-298); VG-55 (T 565).
[144] *See*, for instance, VG-55 (T 566-576); VG-59 (T 661-663, 671-675); VG-115 (T 1011-1019, 1030-1037); VG-13 (T 1426); VG-84 (T 1654-1655); Simeun Vasic (Ex P 143, p 645515). *See* also, Ex P 49, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III. A – Special Forces, pars 246-250, 543-553.
[145] *See*, Defence Final Trial Brief, 28 Feb 2002, p 15.
[146] *See*, Prosecution Final Trial Brief, 28 Feb 2002, pp 21-30.
[147] *See*, Defence Final Trial Brief, 28 Feb 2002, pp 19-2 0, 30-37.

determining that issue would entail, the Trial Chamber has not considered the Drina River or Pionirska Street incidents in identifying the existence of that relationship.

75. The Trial Chamber is satisfied that the Accused did have some association with Milan Lukic's paramilitary group, but it is not satisfied that he was a member of that group or that (except as otherwise stated) he participated directly in the crimes which that group committed in Višegrad. The Trial Chamber is satisfied that Milan Lukic and most of his associates had not lived in Višegrad for some time, and that they sought the assistance of local Serbs to help them identify the targets of their crimes. The Trial Chamber is satisfied that the Accused was acquainted with many members of the group prior to the events of 1992 and that, because of his close relationship with Milan Lukic, the Accused was a ready source of local information for the group about the location of Muslims in the area of Višegrad, and that he gave that information to the group with the full realisation that it would be used to persecute Muslims.[148] The Trial Chamber is not satisfied that that association is a sufficient basis by itself for any finding that the Accused shared the general homicidal intentions of that group.

76. The Trial Chamber is satisfied that the Accused was able during his evidence to provide many details about the paramilitary group, the timing of its arrival in Višegrad and its members' identity and whereabouts,[149] its structure and composition,[150] the attire of its members,[151] and the group's relationship with the police,[152] than were commonly known within Višegrad.[153] The Accused claimed that he knew these details because during the second half of May 1992 he saw the

[148] The Trial Chamber accepts the evidence of one of the two survivors of the shooting at the Drina River gave evidence that, while he was in the hands of the Accused and Milan Lukic in the red VW Passat, the Accused pointed out a nearby house and told Milan Lukic that this house belonged to a Muslim family: VG-14 (T 436).

[149] The Accused (T 1975, 1981, 1988).

[150] The Accused (T 1979, 1982-1984, 1970-1997, 2044); *see* also Ex D 22 (under seal).

[151] The Accused (T 1977-1978, 1985).

[152] The Accused (T 1986, 1994, 1996).

[153] Goran Loncarevi}, a doctor from Vi{egrad gave evidence that out of VGD-3 to VGD-10 he only knew two individuals. He could not tell with certainty whether they were members of a paramilitary group (T 3021-3022). Dragisa Diki}, a car mechanic from Vi{egrad, gave evidence that during the war there were some paramilitary organizations called the White Eagles in Vi{egrad. However, he did not know any of them, and thought that they were from Serbia (T 2294, 2303-2305, 2314-1315). Dragisa Lindo, a carpenter from Tresevine, a village close to Vi{egrad, gave evidence that at the beginning of the war there were some paramilitaries in Višegrad, but he did not know who they were. He presumed they were from Serbia. He also gave evidence that amongst VGD-3 to VGD-10 he only knew VGD-10 (Sredoje Lukic), who was a policeman from Vi{egrad (T 2401-2402, 2430-2431, 2443). Dragan Simi}, a teacher from Vi{egrad, gave evidence that amongst VGD-3 to VGD-10 he only knew VGD-10 (Sredoje Luki}), who was a policeman in Vi{egrad and that he did not know whether any of them or Mitar Kneževi} was a member of a paramilitary group (T 2493, 2511-2512). VGD-23, a policeman from Vi{egrad, gave evidence that he did not know whether anyone among VGD-3 to VGD-10 was a member of a paramilitary group (T 2643, 2679). Zivorad Savi}, an ambulance driver from Vi{egrad, gave evidence that, when the JNA left, there were many paramilitaries in the area of Vi{egrad who committed all kind of crimes. He also gave evidence that he knew that, in Summer 1992 over a period of two months, Milan Luki} would pick up people in his red VW Passat and kill them. However, he was convinced that about half the people from Vi{egrad had no knowledge about that fact (T 2861, 2890-2891, 2914-2917). Snezana Neskovic, a Serbian citizen of Vi{egrad, who was elected to the municipal council on behalf of the SDS and who was 30 years old at the time relevant to the indictment, gave evidence that as

paramilitary group around town.[154] Moreover, he was present when in late May 1992 some of the members of the group searched the houses in the village of Musici and on 7 June 1992 during the incident at the bank of the Drina River.[155] The Trial Chamber is satisfied that the Accused, by reason of his *kum* relationship with the family of Milan Lukic, has a particularly close relationship with Milan Lukic.[156] The Trial Chamber is satisfied that the Accused could not have gained all this information merely from those circumstances, although it is satisfied that he may have gained some of it in that way.[157] Moreover, had he gained all the information by seeing members of the group around the streets of Višegrad, the Trial Chamber would expect some of the citizens of Višegrad giving evidence to be able to provide similar information, which was not the case.[158] On the other hand, the Trial Chamber is not satisfied that the Accused's knowledge of the group, or the fact that the Accused was in a *kum* relationship with Milan Lukic, is sufficient to establish that the Accused was a member of the group. For that evidence to be capable of establishing that fact, it was necessary for the Prosecution to eliminate any reasonable possibility that the Accused gained his knowledge of the members of the group merely from the role played by him as an informant to the group, his involvement with them in the Musici incident (discussed below) and by virtue of his *kum* relationship with the family of Milan Lukic. The Trial Chamber is not satisfied that the Prosecution has done so.

77. The Accused claimed that after the events at the Drina River he had tried to avoid the company of Milan Lukic.[159] However, he admitted that in 1995 or 1996 he was best man for Milan Lukic at his wedding,[160] and that in 1997 or 1998 he was the godfather at the baptism of Milan Lukic's child.[161] The Trial Chamber accepts the evidence that there were four other men who also had the same *kum* relationship to Milan Lukic who could have been best man to Milan Lukic and the godfather of his child.[162] Even if these men had lived some distance away, the Accused gave evidence that a *kum* would travel great distances to christen a child or to be the best

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a woman she did not know anything about the paramilitaries in Vi{egrad. Moreover, the issue of security with respect of the paramilitaries was never discussed in the municipal council (T 3602-3603, 3672-3673).

[154] The Accused (T 1984).

[155] As to the incident in Musici, *see* pars 80-83; as to the Drina River incident, *see* pars 96-115.

[156] The Accused did not dispute that he had a particularly close relationship with Milan Lukic or that they were in a *kum* relationship. The Trial Chamber heard extensive evidence on the cultural phenomenon of *kum* relationships in Serbian culture (The Accused, T 1949-1950, 1954, 1957).

[157] According to the Accused's account relative to an incident in Music in late May 1992, which will be discussed below, the Accused did not have any contact with those persons whom the Accused believed were members of the paramilitary group other than with Milan Lukic. As to the incident on the Drina River, there is no evidence from the Accused or from the two survivors of the incident that there was any kind of interaction between the Accused and the two unidentified co-perpetrators, who were known to the Accused (The Accused, T 2114; VG-32, T 286, 303).

[158] *See*, par 76 and in particular footnote 153.

[159] The Accused (T 1961-1962).

[160] The Accused (T 1951).

[161] The Accused (T 1950).

[162] The Accused (T 1959).

man.[163] The Trial Chamber also heard evidence that certain extreme circumstances may justify severing a *kum* relationship.[164] The Trial Chamber is satisfied that the incident on the Drina River, discussed later,[165] would qualify as such extreme circumstances. However, the fact that the Accused failed to sever his *kum* relationship with Milan Lukic after this incident does no more than raise a suspicion of a closer relationship with the paramilitary group, and then only because the Accused allowed it to continue despite his knowledge of Milan Lukic's very serious criminal activity.

78. To establish the Accused's membership or close association with the group, the Prosecution also relied upon a number of incidents in which it alleges that the Accused participated with the paramilitary group in the commission of crimes in the Vi{egrad area. The incidents specifically relied upon in the Prosecution Final Trial Brief are (a) the searching of the house of VG-59's father in Musici, (b) the confiscation of VG-81's identity card, (c) the abduction of Rasim Torohan, (d) the "black flag" incident, (e) the killing of the elderly Kurspahic couple, and (f) the evidence of VG-80 of two other occasions where the Accused was seen to act suspiciously.[166] As discussed immediately below, the Trial Chamber is satisfied that, with respect to the first of those incidents - (a) the searching of the house of VG-59's father in Musici - the Accused's participation with Milan Lukic and others has been established. However, the Trial Chamber is not satisfied that the Prosecution has sufficiently established any of the other incidents relied upon. In relation to each of those other incidents in which the Accused is alleged to have been involved, evidence of that alleged participation was given by one witness only,[167] and either the identification of the Accused or the credibility of the witness giving that evidence is of such poor quality that the evidence is insufficient for a finding that those incidents occurred.

79. The Prosecution also adduced evidence of other incidents in which the Accused is alleged to have participated with Milan Lukic and others in the commission of criminal acts in the Prosecution Final Trial Brief.[168] These incidents are specifically relied upon as rebutting the alibi "defence" raised by the Accused, and they are discussed later in that section of the Judgment.[169] They are (g) the threats issued to VG-77, (h) the confinement of the Zljeb group in the fire station, (i) the killing of Kahriman, (j) the killing of Kupus, and (k) the killing of Nurka Kos in Kosovo Polje and of four other men in Sase.[170] For present purposes, it is sufficient to state that the Trial Chamber

[163] The Accused (T 1950-1952).
[164] Dragisa Dikic (T 2106, 2335).
[165] *See*, pars 96-115.
[166] *See*, Prosecution Final Trial Brief, pars 54-69.
[167] *See* par 22 above concerning corroboration evidence.
[168] *See*, Prosecution Final Trial Brief, pars 233-249.
[169] *See* below, pars 157-164.
[170] *See* pars 157-160, and 164.

does not accept that the evidence of any of those other alleged incidents established the Accused's membership of Milan Lukic's group, or an association from which it can be inferred that the Accused shared the general homicidal intentions of that group.

(a) Searching of the house of VG-59's father in Musici

80. The Trial Chamber is satisfied that the Accused participated with Milan Lukic and others in the searching of the house of VG-59's father in Musici in late May 1992. The Accused admitted that he was present during this incident and that he was armed.[171] The Trial Chamber accepts the version of events given of that incident by witnesses VG-59 and VG-55, notwithstanding the different account given by the Accused, which the Trial Chamber rejects as an untruthful attempt to exculpate himself. The evidence of the Accused did not cause the Trial Chamber to have any doubt as to the truth of the evidence of these two witnesses. Both VG-59 and VG-55 knew the Accused from childhood, and neither had any bias against him which would cause them to colour their testimony.[172] In fact, had they wanted to give false evidence against the Accused, they could have exaggerated his role in the crimes committed against the people of Musici, which they did not. They did not suggest that he was otherwise involved in any criminal conduct. Indeed, the Accused gave evidence that, in his view, VG-59's and VG-55's evidence was accurate, despite the discrepancies between their account and his own.[173]

81. VG-55 and VG-59 gave evidence that, one evening towards the end of May 1992, about seven to ten armed men came to their village, Musi}i. Amongst them were Milan Lukic and the Accused, who walked into the house of VG-59's father. In the meantime, the other paramilitaries took money and other valuables from other houses in that village.[174] The Accused stood in the doorway with his automatic rifle, preventing anyone in the house from leaving. At the same time, Milan Lukic searched the house.[175] There was no doubt in VG-59's mind that the role of the Accused was to guard the entrance of the house.[176] During the search, VG-55 feared that she might be killed, and she attempted to start a conversation with the Accused, whose wife had been her

[171] The Accused (T 1873, 2045, 2052).
[172] VG-59 (T 657-658, T 668); VG-55 (T 562-563).
[173] The Accused (T 2060): "?Prosecution's questiong There's no reason that you're aware of that VG59 would say anything false about you, is there? ?The Accused's answerg No. I mean, that's exactly what I'm trying to say. Of course, the witnesses didn't enjoy the situation, I mean the fact that I was there, but I feel thankful because they could have said all kinds of things about me, that I had come there on the second or third occasion, that I had taken those women to be raped, and so on and so forth. I think that they were rather correct in their testimonies."
[174] VG-55 (T 566, 563); VG-59 (T 660-661, T 669).
[175] VG-59 (T 657, T 671, T 678); VG-55 (T 563).
[176] VG-59 (T 671).

school friend. She held this fear even though neither the Accused nor Milan Lukic expressly threatened anyone in the house or acted aggressively.[177]

82. VG-59 gave evidence that he believed that the Accused was a member of the paramilitary group because of his involvement in the incident described above.[178] VG-59 also believed that the Accused was present in the village when the paramilitary group came back on the following day, and once again at the beginning of June. However, he conceded that he did not see the Accused during those incidents, and his belief that the Accused would have been present because VG-59 had assumed that he was a member of the group is an insufficient basis for the establishment of either of those facts.[179]

83. The Accused sought to give an innocent explanation for his participation in the Musi}i incident which the Trial Chamber rejects as an untruthful fabrication. He claimed that, at the time of the incident, he was working in Prelovo. In the late afternoon of the day in question, he was hitchhiking from Prelovo to Višegrad and he accepted a ride home with Milan Lukic. At the time, as he would usually do during his service in Prelovo, he was carrying an automatic rifle which had been issued to him by the Territorial Defense ("TO").[180] He claimed that on the way to Višegrad Milan Lukic, along with several other cars carrying members of the paramilitary group, stopped in the village of Musici in order to check if anyone in the village had weapons. Milan Lukic, a blond woman and the Accused went to the house of VG-59's father, whilst the other members of the paramilitary group went to other homes in the village.[181] He claimed that during this incident he repeatedly begged Milan Lukic to take it easy and not to provoke anyone,[182] and that he told VG-59 not to worry and that everything would be alright.[183] He said that he felt awkward about the situation because he went to school with the brother of VG-55 and VG-59 was a school friend of his wife, and he added that he had urged Milan Lukic to leave. As Milan Lukic searched the house, he waited near the door as he was too embarrassed to enter because he knew the family very well.[184] He said that, when Milan Lukic asked if there were weapons in the attic, he repeated the request to one of the people in the house and then assured Milan Lukic that he knew all of the people and that they were good people. He claimed that in this way he prevented the searching of the attic.[185] After

[177] VG-55 (T 565, T 574).
[178] VG-59 called the group led by Milan Luki} the White Eagles, since they introduced themselves as such (T 656).
[179] VG-59 (661-662, T 680); *see* also VG-55 (T 566).
[180] The Accused (T 1873, 2045, 2052); *see* also: *Agreed fact by the parties to the effect that* "sometimes during May 1992 the Accused carried an automatic rifle that he was issued with in Prelovo. He was issued with a "smajser" rifle": Ex P 36-1 (x). The fact that the Accused was armed is corroborated by the witnesses giving evidence in respect of this incident (VG-55, T 657; VG-59, T 663, 665).
[181] The Accused (T 1869, 1873, 2042-2046, 2052); Ex P 15.1, pp 43-44.
[182] The Accused (T 2052).
[183] The Accused (T 2054).
[184] The Accused (T 2058-2062, 2067).
[185] The Accused (T 1875, 2046, 2057).

the house of VG-59's father was searched, he left Musici together with Milan Lukic and the other armed men.[186] As already stated, the Trial Chamber rejects that version of the events.

(b) Confiscation of VG-81's identity card

84. VG-81 gave evidence that, at around the 19th of May 1992, she walked past the Accused's house on her way from her own home in Kosovo Polje. She saw the Accused in the company of three armed soldiers and his wife. The Accused was dressed in his black waiter's uniform and was holding a gun. He demanded to see her identity card and, when she produced it, he confiscated it and asked her when she would be returning to Kosovo Polje. She told him that she expected to return around 6.00 pm. To this the Accused replied: "Don't let me look for you". VG-81 said that, without her identity card, it would be very difficult for her to leave the town or to pass through its several checkpoints.[187] When asked about this incident, the Accused denied that it had occurred and said that VG-81 had fabricated the allegation.[188]

85. On the basis of the evidence given by VG-81, the Trial Chamber is satisfied that she was sufficiently associated with the Accused to be able to readily identify him.[189] However, the Trial Chamber is not satisfied that her evidence was credible,[190] and it does not accept her evidence in relation to this incident. Further, the evidence does not suggest that the soldiers alleged to have been with the Accused at the time were members of Milan Lukic's paramilitary group. VG-81 was only able to say that they were not from Vi{egrad.

(c) Abduction of Professor Rasim Torohan

86. VG-81 gave evidence that, on 9 June 1992, she saw Milan Lukic, the Accused and another person whom she did not recognise stop in a red Passat on the road in front of Kosovo Polje. They began arguing with Professor Rasim Torohan, a Muslim. VG-81 claimed that she saw them push

[186] The Accused (T 1876, T 2067).
[187] VG-81 (T 1220-1222).
[188] The Accused (T 2260-2261).
[189] VG-81 (T 1223). Her evidence was, however, exaggerated, in that she claimed that she would see the Accused up to ten times a day. The Accused said that he knew the witness well (T 1945-1946, 2241-2242).
[190] VG-81 was a very unsatisfactory witness in many respects. Her evidence covered five separate incidents in which the Accused is alleged to have participated. When she was called in the Prosecution's case in reply, she volunteered a sixth such incident, in which the Accused was alleged to have confined a number of people in his house, including her half brother. She was obliged to admit that she had not herself witnessed this incident, and she said that she had been prompted by others to testify in relation to it (T 3913, 3963-3965). She also gave evidence in relation to an audio tape which she had made of a meeting with a Defence witness. (This is referred to later in relation to the alibi, see par 145). She gave as her reason for recording the conversation that she needed the information to assist others to locate the graves of their loved ones, yet she turned the tape recorder off as soon as the Defence witness commenced to discuss the fate of those people (T 3922-3965). Her evidence on many issues was inconsistent, and she appeared to have considerable animus against the Accused. The Trial Chamber is of the view that it is unsafe to accept any of her evidence unless it is corroborated in a material aspect by independent evidence.

him into the red Passat of Milan Lukic. She said that he has not been seen since.[191] A man of the same name is registered with the ICRC as missing since June 1992.[192] The Accused was not asked to comment on this allegation. For the reasons already given, the Trial Chamber is not satisfied that the evidence of witness VG-81 is of sufficient credibility to establish that the Accused participated in this incident.[193]

(d) Black flag incident

87. VG-81 gave evidence that, on 10 June 1992, one day before the Muslim holiday of Kurban Bajram, she saw the Accused as a passenger in a green Zastava car in the area of Gajic. He was holding a black flag out of the window which bore an insignia of a skull and cross bones on it. He called out to a number of Muslims working in their fields: "Muslims, we are distributing Kurban meat tomorrow". The witness interpreted this as a reference to the Muslim custom of slaughtering a lamb to commemorate the death of relatives.[194] It was the Prosecution case that the black flag was similar to the one which VG-59 described as hanging in the lobby of the Vilina Vlas Hotel in early June, which the Prosecution asserts was the headquarters of Milan Lukic's paramilitary group.[195] When asked about this incident, the Accused denied that it had occurred, and he said that VG-81 had fabricated it.[196]

88. In the Prosecution case in rebuttal, VG-81 said that she had also seen the Accused carrying a black flag with a skull on it and calling for the residents of Kosovo Polje to surrender on 17 June 1992.[197] The Accused's alibi "defence" is discussed below, but regardless of the Trial Chamber's findings on that issue, it is not satisfied that the evidence of VG-81 is credible and it does not accept her evidence of the Accused's participation in these incidents, for the reasons already given.[198]

(e) The killing of the elderly Kurspahic couple

89. VG-115, who lived in Pionirska Street, gave evidence that, in the early summer, Milan Lukic, the Accused and another man arrived in the street at dusk one day in a Red Passat.[199] Milan Lukic asked VG-115 where her husband was and also whether there were any Muslims around. The three of them went into the Kurspahic house. VG-115 said that she could see the Kurspahic

[191] VG-81 (T 1222).
[192] Ex P 41.1; Ex P 41.2.
[193] *See* above, par 85.
[194] VG-81 (T 1222-1223, 1270).
[195] *See,* Prosecution Final Trial Brief, 28 Feb 2002, p 25.
[196] The Accused (T 2071).
[197] VG-81 (T 3951).
[198] *See*, pars 129-166.
[199] VG-115 knew the Accused before the war as a waiter in the Panos Restaurant (T 1013-1014). The Accused gave evidence that he had known VG-115 by sight for at least five years (The Accused, T 1947-1948, 1573).

house because on that particular evening she was staying in a house very close by and she noticed that the lights were off. The red Passat was parked below the Kurspahic house. She said that Milan Lukic, the Accused and another person searched the house with flashlights. They found the old people on the first floor. The old people begged for their lives. The witness then heard a burst of gunfire and the screams of the old woman. The old man was killed first and the old woman afterwards. The next morning, the witness saw the door of the Kurspahic house open and the legs of the old people sticking out. The bodies were lying there for five or six days before they were taken away.[200] The Accused was not asked to comment on this incident.

90. VG-115's evidence of identification was nevertheless unsatisfactory.[201] So was her evidence of what she claimed to have seen both on this occasion and in relation to the Pionirska Street incident.[202] The Trial Chamber is not satisfied that her evidence is sufficiently reliable for it to establish satisfactorily the participation of the Accused in the killing of this elderly couple and finds, accordingly, that the Prosecution has failed to establish his participation in the killing.

(f) The evidence of other relevant behaviour

91. VG-80 gave evidence that, during the month of June, she saw the Accused from her apartment window in Višegrad. She said that he was armed and in the company of other armed men in the vicinity of a garage outside her window. It appeared to her that they were looking for people or property in the garage. The Accused was dressed in dark clothing, wore a cowboy hat and had a red coloured ribbon around his arm.[203] She also claimed to have seen the Accused shortly before 3 July 1992.[204] On this occasion, she saw him come out of her building dragging one leg. She was unable to tell whether he was wearing a cast.[205] VG-80 claimed to have known the

[200] VG-115 (T 1015-1016).

[201] In her statement to the OTP, VG-115 had said that there were two persons named Mitar Vasiljevic. In her evidence she admitted that she had made a mistake – there was Mitar Vasiljevic the waiter, and Mitar Knezevic who was older and had an eye missing (VG-115, T 1046). A photograph of Mitar Knezevic was tendered before the Trial Chamber which demonstrated that Mitar Knezevic and the Accused did not share any similar characteristics.

[202] The circumstances in which VG-115 claimed to have witnessed the killing of the elderly couple were confused, and her description of the bodies lying in the doorway for five days is inconsistent with the hearsay evidence of other witnesses who confirmed the fact that the couple had been killed (VG-101, T 1163; VG-38, T 1030; VG-18, T 1573-1574). The Trial Chamber's decision not to rely upon VG-115's evidence was also influenced by the unacceptability of evidence given by the witness in relation to the Pionirksa Street incident, which was in many respects completely inconsistent with the evidence of other witnesses. She also gave evidence of a continued association of the Accused with Milan Lukic in the killing of a number of people after the Pionirska Street incident, which the Trial Chamber finds, for reasons there given, to be unreliable.

[203] VG-80 (T 732-734).

[204] VG-80 gave evidence that she saw the Accused at a distance of between 9 feet 10 inches and 16 feet 1 inch (the estimate in imperial measurements results from the use of a plan of the courtroom in the construction of which the United Kingdom had been involved, as she estimated the distance by reference to the courtroom; the metric equivalent is between about 3 and 5 metres) (VG-80, T 735; Ex P 57).

[205] VG-80 (T 734).

Accused by sight before the war. She identified him in the photo array,[206] the probative value of which has already been discussed.[207] Her evidence appears to have been coloured by subsequent knowledge that the accused was alleging that he injured his leg at about this time, so to give it greater verisimilitude. The Trial Chamber is not satisfied that her identification of the Accused on either occasion is sufficiently reliable to establish the Accused's association with Milan Lukic's group.

92. Although the Trial Chamber is not satisfied that the Prosecution has established that the Accused was a member of a paramilitary group, it does not accept the arguments put forward by the Defence in support of this finding. First, the Defence said that the Accused's commitments from the date of his mobilisation by the TO until the date of his admission to the Užice Hospital excluded the possibility of him acting with the paramilitary group. On 19 May 1992, the Accused was mobilised by the TO and deployed in the field kitchen in Prelovo, where he served until 29 May 1992. On that day, he was arrested and kept in the detention facilities of the Užamnica barracks until about 1 June 1992. It was submitted that, if the Accused had really been a member of any paramilitary group, he would never have been arrested.[208] Upon his release, he was assigned by the TO to organise the cleaning of the streets of Višegrad, which he did until he broke his leg on 14 June 1992. The Defence argued that it was absolutely impossible that one of the members of Milan Lukic's group would accept the humiliating task of cleaning the town.[209] Secondly, the Accused claimed that he could not have been a member of Milan Lukic's paramilitary group because he had nothing in common with the other members. They were all from Serbia and were much younger than he was. Moreover, they would not have accepted him, because he was a drunk.[210] Finally, the Defence argued that another indicator that the Accused was not a member of the paramilitary group is the fact that Milan Lukic as well as his paramilitary soldiers wore camouflage military, or police uniforms which were mostly blue, whilst the Accused wore a dark single-coloured SMB uniform which was used by the former JNA.[211]

93. The Trial Chamber is satisfied that the Accused's commitments during the period from mid-May until mid-June 1992 did not prevent him from being associated with the paramilitary group to the limited extent already accepted. The Accused admitted that in late May, while he was deployed by the TO in the field kitchen in Prelovo, he was with Milan Lukic and other members of the

[206] VG-80 (T 728).
[207] *See* above, pars 17-18.
[208] Defence Final Trial Brief, 28 Feb 2002, p. 18.
[209] The Accused (T 2266-2267); *see* also, Defence Final Trial Brief, 28 Feb 2002, p. 18.
[210] The Accused (T 1978, T 1985).
[211] The Accused (T 1873, T 2045, T 2052); VG-14 (T 425); VG-32 (T 217, 238-239, 260-261); VG-14 (T 453-455, 431-432); VG-13 (T 1428-1429). The parties further agreed that the Accused would wear an

paramilitary group when they searched the houses in the village of Musici.[212] Moreover, the Trial Chamber is satisfied that the fact that the Accused spent around three days in the detention facility in the Užamnica barracks, for a reason which was not made clear during trial,[213] does not exclude the Accused's association with the paramilitary group before and after this short period. Also, the task of cleaning the street did not prevent the Accused from acting together with Milan Lukic and his men to the extent already accepted. The Accused gave evidence that he would carry out this task for only one hour per day, that no one set his timetable, that he was not supervised and that he was not required to report back to anyone.[214]

94. The Trial Chamber rejects the Defence argument that the Accused could not have been a member of the paramilitary group because the other members were outsiders and much younger than he was or because he was a drunk. This was mere speculation by the Accused, not evidence. Moreover, the Accused gave evidence that Mitar Kneževic was, within the paramilitary group, the right hand of Milan Lukic.[215] It has been established that Mitar Kneževic, who was from the area of Višegrad, was even older than the Accused and was also prone to alcohol abuse.[216] The Trial Chamber also rejects the argument of the Defence that the fact that the Accused wore another type of uniform to that worn by the other members of the paramilitary group implies that he was not associated with them.[217] The SMB uniform the Accused wore was a uniform of the former JNA, which had been issued to him about ten years earlier as a member of the reserve forces. The Accused had worn this uniform since his mobilisation by the TO in mid-May 1992.[218]

95. To conclude, and as already stated, the Trial Chamber is not satisfied that the Accused was a member of Milan Lukic's paramilitary group, or that his association with that group was such that it is possible to draw an inference beyond reasonable doubt that the Accused shared the general homicidal intentions of that group. The Trial Chamber is satisfied that he had some association with that group, in that he willingly acted as an informant to that group, and that this willingness arose from his close relationship with Milan Lukic.

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olive grey (SMB) JNA type uniform with a double-headed eagle insignia. Occasionally he also wore a black military hat with the same insignia, *see*, Ex P 36-1 (w).

[212] *See,* pars 80-83.

[213] The Accused gave different explanations as to the reason why he was kept in the detention facility in the Užamnica barracks. During his examination in chief, he suggested that he was arrested because he refused to carry out the dangerous task of bringing food to the frontline. During cross-examination, he gave evidence that the arrest might also have been a result of his drinking habits while on duty (T 1877, 2018).

[214] The Accused (T 2079-2082).

[215] The Accused gave evidence that Mitar Kneževi} was the right hand of Milan Luki} (T 1989). *See* also Zivorad Savi} (T 2974).

[216] VG-115 (T 1059-1061); The Accused (T 1931); Milojka Vasiljevic (T 2567-2568); Ratomir Vasiljevic (T 3101); *see* also, Ex D 26, *Medical record from the Health Centre of Višegrad*, Entry 5461.

[217] The Accused (T 1873, 2045, 2052).

[218] The Accused (T1863-1864).

VI. DRINA RIVER INCIDENT

A. The Events

96. Counts 4 and 5 of the Indictment charge the Accused with murder as a crime against humanity, punishable under Article 5(a) of the Statute, and as a violation of the laws or customs of war, punishable under Article 3 of the Statute and recognised as punishable under Article 3(1)(a) of the Geneva Conventions. Count 6 charges the Accused with inhumane acts as a crime against humanity, punishable under Article 5(i) of the Statute, and Count 7 charges the accused with violence to life and person as a violation of the laws or customs of war, punishable under Article 3 of the Statute and recognised as punishable under Article 3(1)(a) of the Geneva Conventions. Each of these counts relates to the Drina River incident. In addition, Count 2 of the Indictment charges the Accused with persecution on political, racial and religious grounds as a crime against humanity, punishable under Article 5(h) of the Statute. The persecution charge is based, *inter alia*, upon the Accused's participation in the Drina River incident, but it will be dealt with in a separate section of this Judgment.[219]

97. The Prosecution alleges that, on 7 June 1992, the Accused, together with his co-accused Milan Luki} and two other unidentified individuals, forcibly transported seven Bosnian Muslim civilians to the eastern bank of the Drina River. There, they are alleged to have forced the seven men to line up on the bank of the river and to have opened fire at them. Five of the seven men died as a result of the shooting, two escaped without physical injury.[220]

98. The Trial Chamber is satisfied that the Prosecution has established that this incident occurred, and that the shooting resulted in the death of Meho Džafic, Ekrem Džafic, Hasan Kustura, Hasan Mutapcic and Amir Kurtalic.[221] The other two men, VG-14 and VG-32, survived the shooting without physical injury.[222] They did so by falling into the water when the shooting started and by pretending to be dead.[223] The Trial Chamber is satisfied that it has been established beyond reasonable doubt that the Accused participated in the shooting and that he did so sharing the intention of the others in the group that the seven Bosnian men be killed.

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[219] *See* below, pars 251-262.
[220] *See,* Prosecution Final Trial Brief, 28 Feb 2002, pp 30-45.
[221] VG-32 (T 279-284, 287); VG-14 (T 443). The Defence did not dispute this fact; *see* Defence Final Trial Brief, 28 Feb 2002, p 20.
[222] VG-32 (T 282); VG-14 (T 441, 448).
[223] VG-32 (T 279-280, 283); VG-14 (T 440).

99. The Trial Chamber is satisfied that, on the afternoon of 7 June 1992,[224] Milan Lukic, and two other unidentified men[225] forcibly detained seven Muslim male civilians (VG-14, VG-32, Meho Džafic, Ekrem Džafic, Hasan Kustura, Hasan Mutapcic and Amir Kurtalic)[226] and took them to a house near the Bikavac Hotel in Višegrad.[227] A short time later, they directed these seven Muslim men into two cars, a red VW Passat, known to be in the possession of Milan Lukic, and a green Yugo, and drove them to the Vilina Vlas Hotel, in Višegradska Banja.[228] It was accepted by the parties that the Vilina Vlas Hotel was the headquarters of the paramilitary group led by Milan Lukic,[229] and that it had previously been used to detain Muslim civilians.[230] The Trial Chamber is satisfied that throughout the entire incident Milan Lukic carried a sniper rifle with a silencer, and that the other two men each carried an automatic rifle.[231]

100. The Trial Chamber is satisfied that, once at the Vilina Vlas Hotel, the seven men were taken into the reception area, where the Accused, already present at the hotel, was standing near the hotel counter.[232] The Trial Chamber is satisfied that, while Milan Lukic began to search for some keys, the seven unarmed men stood in a semi-circle inside the lobby of the hotel. One of the unidentified armed men guarded them, pointing his automatic rifle at them, preventing any of them from leaving the lobby of the hotel.[233] When one of the Muslims asked about their fate, this unidentified man answered that they were to be exchanged for some Serb captives.[234]

101. The Trial Chamber rejects the Accused's evidence that, while Milan Lukic was searching for the keys, he took Meho D'afic outside for a cigarette and that Meho D'afic had told him that the men were to be exchanged and requested the Accused to accompany them. As already stated, it accepts the evidence of VG-32 that the seven victims were standing in a semi-circle inside the lobby of the hotel, and that one of the armed men was guarding them.[235] The Trial Chamber further accepts the evidence of VG-32 that there was no conversation between Meho D'afic and the Accused whilst at the hotel.[236] There was no occasion when such a conversation could have taken place as alleged by the Accused.

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[224] VG-32 (T 233); VG-14 (T 423); VG-79 (T 321-322); The Accused (T 2047, 2087).
[225] VG-32 (T 238-239, 241-242); VG-14 (T 423-424).
[226] VG-32 (T 230, 247-249, 253); VG-14 (T 427, 429).
[227] VG-32 (T 230, 237-240, 242-245, 247-249); VG-14 (T 423-428).
[228] VG-32 (T 254-258, 268, 274, 286-287); VG-14 (T 429, 433, 436).
[229] The Defence during its closing arguments accepted this fact to be true (T 4848).
[230] VG-59 (T 663-666); VG-32 (T 260); The Accused (T 1890).
[231] VG-32 (T 226, 241, 256, 268, 274, 286-287); VG-14 (T 433, 440).
[232] VG-32 (T 260); VG-14 (T 431, 445). Both witnesses clearly identified the Accused VG-32 (T 260-264, 266, 268); VG-14 (T 432). *See* also, Ex P 101/32.
[233] VG-32 (T 268-270); VG-14 (T 431).
[234] VG-32 (T 268).
[235] VG-32 (T 268-270).
[236] VG-32 (T 303, 268-70).

102. The Trial Chamber is satisfied that Milan Lukic, who could not find the keys he was looking for, ordered the Muslim men to go back to the cars, whereupon the seven Muslim men, Milan Lukic, the Accused and the two unidentified men entered the two cars and drove away.[237] The Muslim men travelling in the green Yugo were told once again by one of the paramilitaries travelling with them that they would be taken to an exchange.[238]

103. The Trial Chamber rejects the Accused's evidence that he was unarmed at the hotel.[239] The Trial Chamber is satisfied that, when the Accused left the Vilina Vlas Hotel with Milan Lukic, the two unidentified armed men, and the seven Muslim men, he was in possession of an automatic weapon, which he carried to the Drina River. VG-32 gave evidence that he first saw the Accused carrying a weapon when he left the Vilina Vlas Hotel, and VG-14 gave evidence that he saw the Accused with an automatic rifle inside the lobby of the hotel.[240] When giving evidence in Court, both witnesses identified the weapon of the Accused as an automatic rifle.[241]

104. The Trial Chamber is satisfied that once they reached Sase, instead of continuing towards Višegrad, the cars carrying the seven Muslim men turned right towards Višegradska Zupa, stopping about one kilometre later.[242] The Trial Chamber is satisfied that the seven Muslim men were instructed to get out of the cars and ordered by Milan Lukic to walk through a field towards the bank of the Drina River, which was about 100 metres away. The Trial Chamber is satisfied that they were forced to walk at gunpoint towards the River. The Trial Chamber is satisfied that the seven Muslim men were told that they would be killed if they tried to escape. [243]

105. The Trial Chamber is satisfied that, when the Accused left the Vilina Vlas Hotel, he knew that the men were not to be exchanged but were to be killed. The evidence of the Accused himself was that he knew that Milan Lukic had committed serious crimes, including killings, in the area of Višegrad shortly prior to the Drina River incident. On the afternoon of 7 June 1992, during the drive from Višegrad to the Vilina Vlas Hotel, he had been told by the man who had driven him

[237] VG-32 (T 270-271); VG-14 (T 435).
[238] VG-32 (T 271-272).
[239] VG-14 gave evidence that he saw the Accused with an automatic rifle inside the lobby of the hotel (VG-14, T 433, 440, 457), while VG-32, although he did not see him with a weapon before they left the hotel, did not suggest that he did not have one at an earlier stage. All he said was that he did not see him with a weapon inside the hotel (VG-32, T 261, 271, 275). The Accused claimed that he returned the weapon issued to him by the TO when he was arrested at Bikavac on 29 May 1992 and, after his release on 1 June 1992, he was not issued with any weapon (The Accused, T 1878, 1888); Ex P 15.1, p 77.
[240] VG-32 (T 261, 271, 275); VG-14 (T 433, 440, 457). VG-79 gave evidence that the three and sometimes four people walking towards the Drina River behind the seven Muslim men were all armed (T 324).
[241] VG-14 (T 467). The Trial Chamber does not attach significance to the fact that one of the two witnesses during a prior statement given to the investigators of the Prosecution identified the weapon of the Accused as a semi-automatic rifle.
[242] VG-32 (T 273); VG-14 (T 436).
[243] VG-32 (T 275, 277); VG-14 (T 436).

there that Milan Lukic had, on several occasions, taken out Muslim employees from the Varda Factory in order to mistreat or kill them. [244] The Trial Chamber rejects the Accused's evidence that it was only when Milan Lukic stopped the cars near Sase and ordered the seven men to walk towards the bank of the Drina River that he understood that these men were not to be exchanged, but that they were to be killed.[245]

106. The Trial Chamber rejects as wholly untrue the evidence of the Accused that he tried to persuade Milan Lukic to spare the life of Meho Džafic or any other man in that group.[246] The Trial Chamber accepts the evidence of VG-32 that the Accused said nothing in response to the pleas of Meho Džafic as the men were marched towards the bank of the Drina River.[247]

107. The Trial Chamber also rejects the evidence of the Accused that, in any event, he was powerless to stop Milan Lukic from killing the Muslim men. VG-32 and VG-14 gave evidence of their impression that throughout the entire incident there was no one around Milan Lukic who could have affected him or his decisions and orders in a meaningful way. However, the Accused's claim of duress is inconsistent with the evidence that, one week prior to the shooting at the Drina River and during the Musici incident,[248] he had successfully pleaded with Milan Lukic not to mistreat and harass the people in that house. He asserted that he was the only person who could help on that occasion, and that he had prevented the people living in that house from being mistreated and harassed by Milan Lukic.[249] The Trial Chamber has already rejected that claim,[250] but the inconsistent claims by the Accused as to his relationship with Milan Lukic has persuaded the Trial Chamber that the Accused is prepared to give false versions of that relationship according to the benefit he seeks to obtain at the time each version is given. There was no other acceptable evidence that the Accused was under duress vis-à-vis Milan Lukic. The Trial Chamber is satisfied that the Accused willingly accompanied Milan Lukic and his group with the seven Muslim men to the Drina River.

108. The Trial Chamber is satisfied that Milan Lukic, the Accused and the other two unidentified men pointed their guns, which had their safety catches off, at the Muslim men, as they walked towards the bank of the Drina River.[251] The Trial Chamber is satisfied that the Accused followed the men to the banks of the Drina River, and it rejects as untruthful the Accused's evidence that,

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[244] The Accused (T 1882, 2103-2105); *see* also Ex P 15.1, p 87.
[245] The Accused (T 1892-1893, 2124-2125); Ex P 15.1, pp 71-72.
[246] The Accused (T 1892-1893, 2125-2126); Ex P 15.1, pp 55, 71-72. VG-32 (T 278); VG-14 (T 439, 463).
[247] VG-32 (T 286). Defence Final Trial Brief, 28 Feb 2002, p. 26; Defence Closing Arguments (T 4913). VG-32 (T 301); VG-14 (T 460); The Accused (T 2047-2048, 2060).
[248] *See* pars 80-83.
[249] The Accused (T 2047-2048, 2060).
[250] *See* above, par 83.
[251] VG-32 (T 274-278); VG-14 (T 437, 461).

when he realised that he could not persuade Milan Lukic to spare the men, he turned away from the group and stopped some 10 to 15 metres away from the river.[252]

109. The Trial Chamber is satisfied that, when they reached the bank of the river, the seven Muslim men were lined up facing the river,[253] and that Milan Lukic, the Accused and the other two unidentified men lined up approximately five to six metres behind the Muslim men.[254]

110. The Trial Chamber is satisfied that the evidence of VG-79, who observed the scene from the opposite bank of the Drina River, is not inconsistent with this finding. VG-79's evidence was that he saw three and sometimes four armed men walking towards the bank of the Drina River behind the seven unarmed men.[255] He said that, when the seven unarmed men lined up along the river, he saw only three of the armed men standing behind them. However, he also said that a fourth person was partially covered by a tree,[256] and that his focus when watching the scene was on two of the Muslim victims who were his friends rather than upon the four men who were armed.[257] Accordingly, the Trial Chamber is satisfied that all four men stood behind the seven Muslims and that the Accused was one of them.

111. The Trial Chamber is satisfied that some of the Muslim men begged for their lives and that their pleas were ignored.[258] The Trial Chamber is satisfied that, following a brief discussion on the manner in which to shoot them,[259] the armed men opened fire shooting at the seven Muslims.[260] The Trial Chamber is satisfied that, after two sequences of gunshots, one of the armed men remarked that someone was still alive. Two of the armed men then approached the river and fired more gunshots towards the Muslim men lying in the water.[261] Satisfied that all seven Muslim men were dead, the armed men walked back to the cars and drove away.[262]

B. The Factual Findings

112. The Trial Chamber is not satisfied that the Prosecution has established beyond reasonable doubt that the Accused fired his weapon at the same time as the other three, or that he personally

[252] The Accused (T 1893, 1895); Ex P 15.1, p. 74. The Trial Chamber rejects the Accused's evidence that, as he did so, Milan Lukic and the two other armed men shot at the Muslim men. The Accused (T 1894-1895); Ex P 15.1, p 74.
[253] VG-32 (T 277-278); VG-14 (T 437-439); VG-79 (T 338).
[254] VG-14 (T 437-439); VG-32 (T 275, 293-295); VG-79 (T 334).
[255] VG-79 (T 323,325).
[256] VG-79(T 334).
[257] VG-79 (T 325-328, 336).
[258] VG-32 (T 278); VG-14 (T 439, 463).
[259] VG-32 gave evidence that when they were lined up by the Drina River, one of the four armed men asked whether they should shoot individually or in bursts of gunfire (T 279); VG-14 (T 439).
[260] VG-32 (T 279-281); VG-14 (T 440-441); VG-79 (T 325-326).
[261] VG-32 (T 280 – 281); VG-14 (T 441); VG-79 (T 326).
[262] VG-32 (T 281, 284); VG-14 (T 441); VG-79 (T 326).

killed anyone or more of the victims. VG-32 gave evidence that, immediately before the shooting started, he heard three clicks, which were produced by the specific devices of the automatic rifles of the Accused and the two other unidentified men. VG-32 said that, by adjusting those devices, the method of shooting was adjusted from bursts of gunfire to individual shots.[263] Milan Lukic's sniper rifle did not have such device. VG-14 gave evidence that the first sequence of shots consisted of three loud shots and one "bluff" or muted shot. He specified that the three loud shots came from the automatic rifles of the Accused and of the other two unidentified men, and that the "bluff" shot came from Milan Lukic's sniper rifle, which had a silencer.[264] Because of the extraordinarily tense situation in which they were at the time, the evidence given by VG-32 and VG-14 that they remembered the number of shots fired is not sufficiently reliable to base a finding beyond reasonable doubt on that evidence only that the Accused actually pulled the trigger. Even the most honest witnesses can convince themselves of what must have happened by a perfectly natural process of unconscious reconstruction. The Trial Chamber accepts that these two witnesses honestly believed that this is what happened, but it cannot exclude the very understandable and natural possibility that they have unconsciously reconstructed it.

113. Although the Trial Chamber is not satisfied that it has been established that the Accused actually killed anyone or more of the victims, it is nevertheless satisfied that the only reasonable inference available on the evidence is that the Accused, by his actions, intended that the seven Muslim men be killed, whether or not he actually carried out any of those killings himself. One member of the Trial Chamber accepts the evidence relating the number of clicks, although this evidence is not regarded by that Judge as essential or necessary to the determination of the accused's intention. The majority has no doubt that VG-32 honestly believed that he heard three clicks, but the majority is not satisfied that there is no element of perfectly natural reconstruction involved in that belief. The majority of the Trial Chamber makes an identical finding in relation to the evidence of VG-14 concerning the number of shots and the nature of the noise produced by the weapons being fired. The conclusion of all three members of the Trial Chamber in relation to the intent of the Accused that those seven men be killed is thus identical.

114. The Prosecution made it clear in its Pre-Trial Brief that the Accused was charged with inhumane acts in relation to that incident only in relation to the two survivors, and not the five

[263] VG-32 (T 279, 286-287). VG-32 did not mention this detail in the statement he gave to the investigators, even though he stated that still today he is sometimes woken up from his sleep by the sound of those three clicks. VG-32 (T 306, 279).

[264] VG-14 (T 440); VG-14 gave evidence that, following the brief discussion about the manner in which to shoot, "a click" was heard, which was produced by the weapons when being adjusted from bursts of gunfire to individual shots (T 439-440). VG-32 gave evidence that he did not count the number of shots (T 279-281, 307).

murdered men.[265] The Trial Chamber is satisfied that the Accused intended that the two survivors of the shooting, VG-32 and VG-14, were also to be killed. The Trial Chamber is satisfied that the participation of the Accused in the attempted murder of VG-32 and VG-14 constitutes a serious attack on their human dignity, and that it caused VG-32 and VG-14 immeasurable mental suffering. The Trial Chamber is satisfied that the Accused, by his acts, intended to seriously attack the human dignity of VG-32 and VG-14 and to inflict serious physical and mental suffering upon them.

115. The persecution charge as far as it relates to this incident is dealt with below in a separate section of the Judgment.[266]

[265] Prosecution Pre-Trial Brief, par 12.
[266] *See* above, pars 251-255.

VII. PIONIRSKA STREET INCIDENT

A. The Events

116. Count 1 of the Indictment charges the Accused with extermination as a crime against humanity, punishable under Article 5(b) of the Statute, in relation to the Pionirska Street incident. Count 10 and Count 11 of the Indictment charge the Accused with murder as a crime against humanity, punishable under Article 5(a) of the Statute, and as a violation of the laws or customs of war punishable under Article 3 of the Statute, recognised as punishable by common Article 3(1)(a) of the Geneva Conventions. Count 12 of the Indictment charges the Accused with inhumane acts as a crime against humanity, punishable under Article 5(i) of the Statute, while Count 13 charges the Accused with violence to life and person as a violation of the laws and customs of war punishable under Article 3 of the Statute, recognised as punishable by common Article 3(1)(a) of the Geneva Conventions. These counts also relate to the Pionirska Street incident. In addition, Count 2 of the Indictment charges the Accused with persecution on political, racial or religious grounds as a crime against humanity, punishable under Article 5(h) of the Statute. The persecution charge is based, *inter alia*, upon the Accused's participation in the Pionirska Street incident, but it will be dealt with below, in a separate section of this Judgment.[267]

117. The Prosecution alleges that, on 14 June 1992, the Accused directed a group of Bosnian Muslim women, children and elderly men to a house in Pionirska Street in the Mahala neighbourhood of Višegrad municipality.[268] It alleges that the Accused, in concert with his co-accused and other individuals, robbed the group from its money and valuables.[269] The Prosecution alleges that, later that same day, the Accused in concert with his co-accused and other individuals forcibly moved the group to a nearby house also on Pionirska Street and barricaded the group into one room of that house.[270] A number of other people were already present in that room. The Prosecution then alleges that, in concert with his co-accused and others, the Accused placed an incendiary device in the room which set the house on fire. It alleges that the room had been prepared for the fire earlier by the spread of flammable substances and that, as a result, the fire spread quickly. It further alleges that the Accused shone a flashlight on the people who tried to escape the fire through the windows of the room, whilst the co-accused fired upon them with

[267] *See* below, pars 256-261.
[268] Indictment, par 17; *See* also Prosecution Pre-Trial Brief, par 36.
[269] Indictment, par 18; *See* also Prosecution Final Brief, par 149.
[270] Indictment, par 19; *See* also Prosecution Final Brief, par 154.

automatic weapons.[271] The Prosecution claims that approximately 65 to 70 people died as a result of this incident, while a small number survived, some with serious physical injuries.[272]

118. The Trial Chamber is satisfied that on Sunday, 14 June 1992,[273] the fourth day of Kurban-Bajram, a group of about 60 Muslim civilians[274] were forced to leave the village of Koritnik as part of the ongoing campaign of "ethnic cleansing".[275] This group, comprising mainly women, children and the elderly,[276] was joined by about five other individuals from the area of Sase ("Koritnik group"),[277] and they travelled on foot to the town of Višegrad in search of a convoy which would take them to Muslim-held territory.[278] The Trial Chamber is satisfied that, in its search for the convoy, the group inquired at the police station and was directed onwards to the Višegrad Hotel where the Red Cross was alleged to have been situated.[279]

119. The Trial Chamber is satisfied that the group reached the Višegrad Hotel sometime between 12.15 and 1.00 pm on 14 June 1992.[280] Once there, they were told that the buses had already left for that day but that there would be another convoy the following day.[281] The Trial Chamber is satisfied that the group were instructed to spend the night in the houses vacated by the fleeing Muslim population in the Mahala neighbourhood.[282]

120. The Trial Chamber is satisfied that the group departed from the hotel to Pionirska Street in the Mahala neighbourhood. There, the group at first settled in two houses belonging to the Memic family, which were situated next to each other.[283] Later they moved into a single house, the house belonging to Jusuf Memic ("the Memic house").[284]

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[271] Indictment, par 20; *see* also Prosecution Pre-Trial Brief, par 41.
[272] Prosecution Pre-Trial Brief, par 10. *See* also Indictment, par 20 and Prosecution Final Brief, par 176.
[273] VG-78 (T 1279-80); VG-13 (T 1424); VG-18 (T 1559); VG-84 (T 1655); VG-101 (T 1146); VG-38 (T 1398); Ex P 148, p 9. The parties do not dispute the date (T 1805).
[274] VG-87 (T 1093); Ex P 145 (T 892); VG-61 (T 788); VG-101 (T 1146); VG-78 (T 1278); VG-18 (T 1566); VG-38 (T 1349). VG-13 gave evidence that the group was composed of 70 people (VG-13, T 1426).
[275] VG-13 (T 1423); VG-18 (T 1605).
[276] Ex P 145 (T 892); VG-61 (T 788); VG-87 (T 1093); VG-38 (T 1353); VG-18 (T 1566); VG-13 (T 1426).
[277] Ex P 145 (T 894); VG-101 (T 1151); VG-13 (T 1426); VG-18 (T 1568-1569); VG-78 (T 1280); VG-84 (T 1657). VG-38 gave evidence that between 10 to 13 people joined them (T 1354).
[278] Ex P 145 (T 891); VG-101 (T 1144); VG-78 (T 1278); VG-38 (T 1345); VG-13 (T 1423); VG-18 (T 1557, 1567, 1605); VG-84 (T 1656).
[279] VG-101 (T 1152); VG-18 (T 1569); VG-84 (T 1657); Ex P 145 (T 893); VG-13 (T 1427).
[280] VG-78 (T 1280); VG-84 (T 1657); VG-38 (T 1357). Other witnesses testified that the group reached the centre of Višegrad and the new hotel between 3.00 and 4.00 pm: Ex P 145 (T 893); VG-13 (T 1427).
[281] VG-18 (T 1571); VG-38 (T 1364); VG-78 (T 1280); VG-84 (T 1658); Ferid Spahic (T 367).
[282] ExP145 (T 893-894); VG-13 (T 1429, 1572); VG-18 (T 1571-1572); VG-84 (T 1658); VG-101 (T 1157).
[283] VG-13 (T 1431); VG-38 (T 1366); Ex P 145 (T 894); VG-78 (T 1285-1287).
[284] *See* below, par 186.

121. The Trial Chamber is satisfied that about one hour later,[285] sometime between 4.30 and 6.00 pm,[286] a group of armed men arrived at the Memic house. Amongst the armed men were Milan Lukic, Sredoje Lukic and Milan Sušnjar (also known as "Laco").[287] Some of the armed men entered the house whilst others remained outside.[288] Inside the house, the armed men ordered the people in the group to hand over their money and valuables, and subjected them to a strip search.[289] The search and collection of money and valuables took between one hour and two and a half hours.[290]

122. The Trial Chamber is satisfied that the armed men left the house at around 7.00 to 7.30 pm,[291] and that they instructed the Koritnik group to remain in the house for the night.[292] The Trial Chamber is satisfied that, before they left, some of the armed men took out Jasmina Vila and another woman and raped them.[293]

123. The Trial Chamber is satisfied that, sometime later, a car of armed men returned to the house and ordered the group to move to another house.[294] There was some issue as to the time when they returned.[295] The Trial Chamber is satisfied that it was dark when the armed men returned,[296] and therefore that it must have been between 8.30 and 9.00 pm at the earliest.[297]

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[285] VG-78 (T 1288); VG-13 (T 1580); VG-38 (T 1371); VG-84 (T 1664); VG-18 (T 1580). Witnesses gave evidence that it took them between 15 to 30 minutes to reach Pionirska street (VG-38, T 1366; VG-101, T 1159); VG-13 T 1431). Other witnesses on the other hand gave evidence that it took them between 45 minutes to an hour (VG-78, T 1286; VG-18, T 1573).

[286] VG-38 (T 1370); Ex P 145 (T 895).

[287] VG-13 gave evidence that Bosko Djuric was present. VG-13 and VG-38 gave evidence that the Accused was also present. For the Accused's participation, *see* par 147. VG-18, VG-13, VG-84 and VG-38 gave evidence that Milan Sušnjar was also present. VG-18, VG-84 and VG-38 testified that Sredoje Lukic was also present. VG-101, VG-78, VG-38, VG-18, VG-84 and VG-13 gave evidence that Milan Lukic was present (VG-101, T 1164; VG-78, T 1287; VG-38, T 1369-1370; VG-13, T 1438; VG-18, T 1582-1583; VG-84, T 1666). VG-61 gave evidence that Milan Lukic, Sredoje Lukic and the Accused were involved in the looting (VG-61, T 791). VG-61 was not present but was relying upon what his father, now deceased, told him, but there is no mention of this in his father's statement (Ex P 145).

[288] VG-18 (T 1582, 1586); VG-84 (T 1666); VG-38 (T 1374).

[289] Ex P 145 (Ex P 146) (T 895); VG-13 (T 1438-1440); VG-38 (T 1373-1374); VG-18; (T 1583-1585); VG-84 (T 1667-1668); VG-101 (T 1165); VG-78 (T 1288).

[290] VG-38 (T 1373, 1376); VG-18 (T 1585); (Ex P 145) (T 896); VG-84 (T 1669). VG-13 (T 1440).

[291] VG-38 (T 1373, 1376). VG-101 said it was dusk and VG-84 and VG-18 said it was not dark yet (VG-101, T 1167; VG-84, T 1669; VG-18, T 1623).

[292] Ex P 145 (T 895); VG-18 (T 1621).

[293] VG-18 (T 1587-1589); VG-101 (T 1167). VG-13 mentioned that three women had been taken out (VG-13, T 1440-1442). VG-78 only mentioned one (VG-78, T 1288). VG-84 did not specify (VG-84, T 1699).

[294] VG-101 (T 4168); VG-18 (T 1590); VG-84 (T 1670).

[295] *See* par 155 and footnote 410.

[296] VG-101 (T 1168, T 1200); VG-78 (T 1290); VG-18 (T 1590); VG-84 (T 1670); VG-38 (T 1377).

[297] Ex D 44 established that, on 14 June 1992, the sunset in Visegrad was at 8.24 pm. The reliability of this exhibit was seriously called into question by the Trial Chamber (Defence closing arguments, T 4936-4937). Ex P 148, the Muslim calendar for the year 1992, established that sunset was at 8.36 pm. The difficulty with this exhibit lies in that it is not known where the measurements were taken from (Defence closing arguments, T 4938). Moreover, it reflects the time of sunset, not necessarily the time when it gets dark, bearing in mind the longer Summer twilight (T 4938-9). In any case, it would appear that what is clear from the evidence is that the armed men returned to transfer the group in the dark, so that it would have necessarily been sometime after 8.30pm.

124. The Trial Chamber is satisfied that the men who had been at the house earlier were amongst those who returned, including Milan Lukic, Sredoje Lukic and Milan Sušnjar.[298] The Trial Chamber is satisfied that the Kortinik group was told that the "Green Berets" were attacking and that they were to be moved to a safe place.[299] The group was then transferred to the house of Adem Omeragic ("the Omeragic house"),[300] situated about 20 to 50 metres away from the Memic house and next to the creek.[301] The Trial Chamber is satisfied that, as the group was being transferred, the armed men, carrying flashlights, moved between the two houses guarding the group.[302] Despite this, during the transfer, two members of the group managed to break away from the group and hid behind a shed and then escaped.[303]

125. The Trial Chamber is satisfied that the Koritnik group was crowded into a single room in the ground floor of the Omeragic house, and that there were a number of other people already in there.[304] The group was then locked inside the house.[305] The Trial Chamber is satisfied that, sometime later,[306] the door of the room was opened and armed men introduced an incendiary or explosive device into the overcrowded room.[307] This device ignited a fire near the door.[308]

126. The Trial Chamber is satisfied that the house had been prepared in advance for the fire. The carpet in the room was wet and smelt like glue,[309] and the smoke from the fire was of unusual thickness.[310] The fire was high and it spread quickly, demonstrating that some type of flammable substance had been used.[311] Apart from the entrance door, two windows to the side of the room facing the creek provided the only escape routes.[312]

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[298] VG-38 gave evidence that Milan Lukic, Sredoje Lukic, Milan Sušnjar and the Accused arrived (VG-38, T 1377). VG-101, VG-78 and VG-13 gave evidence that they saw Milan Lukic and the Accused (VG-101, T 1168; VG-78, T 1290; VG-13, T 1443). For the Accused's participation, *see* pars 148-153. VG-84 gave evidence that he saw Sredoje Lukic (VG-84, T 1673). VG-18 spoke simply of several men (VG-18, T 1595). VG-61 claimed that the Accused was there with Milan Lukic, Sredoje Lukic, Zoran Joksimovic and another (VG-61, T 795). VG-61 was not present but was relying upon what his father, now deceased, told him, but there is no mention of this in his father's statement (Ex P 145).

[299] Ex P 145 (T 896); VG-61 (T 793); VG-38 (T 1377); VG-13 (T1443, 1494); VG-18 (T 1591); VG-84 (T 1671).

[300] Ex P 145 (T 896); VG-101 (T 1171); VG-78 (T 1290, 1294); VG-13 (T 1443-4).

[301] VG-18 (T1593); VG-101 (T 1169). VG-38 gave evidence that it was 150 metres away from the Memic house (VG-38, T 1379).

[302] VG-78 (T 1290); VG-38 (T 1378); VG-13 (T 1443); VG-18 (T 1592-1593); VG-84 (T 1674); VG-101 (T 1169).

[303] VG-78 (T 1295); VG-101 (T 1172).

[304] VG-18 (T 1594-1595); VG-13 (T 1446); VG-87 (T 1101).

[305] Ex P 145 (T 896); VG-18 (T 1597); VG-84 (T 1675).

[306] VG-13 (T 1449); VG-38 (T 1383); VG-18 (T 1597).

[307] VG-13 (T 1449-1450).

[308] VG-18 (T 1597); VG-13 (T 1453-1454); VG-84 (T 1754); VG-38 (T 1382, 1384).

[309] VG-13 (T 1446). VG-38 remarked that the smoke smelled of dye or paint (VG-38, T 1384).

[310] VG-84 (T 1754); VG-38 (T 1383).

[311] VG-18 (T 1597); VG-84 (T 1754); VG-13 (T 1453).

[312] VG-38 (T 1379-1380); VG-13 (T 1448).

127. The Trial Chamber is satisfied that, as the flames spread, the armed men hurled more explosives into the house.[313] Some of the people in the house attempted to get out by breaking the glass of the window and jumping out. The Trial Chamber is satisfied that some of the armed men stood outside underneath the windows to shoot at those who were attempting to flee. With the aid of flashlights they shot at those who were jumping out of the window or who had already done so.[314]

128. The Trial Chamber is satisfied that approximately sixty six (66) people died as a result of the fire. A number of the victims managed to escape the fire. VG-61's father ran through the flames and escaped through the front door when the explosion which caused the fire blasted the door open.[315] VG-18 managed to secure an opening in the reinforced glass of the window and was pushed outside by VG-84, who jumped out after her.[316] VG-38 followed suit.[317] VG-13 also jumped out of the window. As she attempted to flee, she was shot at and injured in the arm.[318] Edhem Kurspahic also managed to escape.

B. The "defence" of alibi and identification of the Accused

129. In response to the Prosecution's allegations that the Accused personally participated in the looting, the transfer of the group to the Omeragi} house, and the setting on fire of that house, the Accused raised a "defence" of alibi. He claimed that, at the time of these events, he was either on his way to, or present in, the General Hospital in Užice ("the Užice Hospital"). The Trial Chamber does not accept all of the evidence of the Accused in relation to the alibi. However, the Trial Chamber is not satisfied that the evidence of Prosecution witnesses who claimed to have seen the Accused participating in the different stages of the Pionirska Street incident establishes beyond reasonable doubt that the Accused was not on the way to, or present in, the U`ice Hospital at the relevant time, when that evidence was considered in light of the alibi raised by the Accused.[319]

130. The Trial Chamber is not satisfied that the Prosecution has eliminated the reasonable possibility that the Accused was elsewhere at the time of the looting, transfer of the Kortinik group and setting on fire of the house.

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[313] Ex P 145 (T 896); VG-38 (T 1383); VG-18 (T 1598); VG-84 (T 1754).
[314] VG-18 (T 1598, 1601); VG-84 (T 1755-1756, 1764); VG-13 (T 1454); VG-38 (T 1386).
[315] Ex P 145 (T 897).
[316] VG-18 (T 1598); VG-13 (T 1454).
[317] VG-38 (T 1358); VG-13 (T 1454).
[318] VG-13 (T 1455-1456).
[319] The Trial Chamber is satisfied that the Accused was present, as he admitted, in the region of Pionirksa Street prior to this incident (VG-87, T 1090, 1105). Given the admission of the Accused that he was present in Pionirksa Street, and that he did meet with the Kortinik group, it is unnecessary for the Trial Chamber to consider in detail the evidence of witnesses that claimed to have seen the Accused in that vicinity on the day in question. However, to the

131. The Accused gave evidence that he met his acquaintance Mujo Halilovic and the group from Koritnik on his way to the Vucine neighbourhood, where he intended to collect a horse belonging to a Muslim who had left the area.[320] After speaking with Mujo Halilovic,[321] he continued on his way to the Vucine neighbourhood.[322] He claimed that he arrived there at about 4.30 or 5.00 pm, and that once there he collected the horse and then returned riding the horse bareback through Pionirska Street.[323] He gave evidence that, when he arrived in the centre of Višegrad, the horse slipped in front of the Višegrad Hotel, that he fell from the horse and that the horse then fell on top of him. As a result, his lower left leg was broken. His evidence was that this occurred at about 5.00 pm.[324]

132. The Accused said that an ambulance arrived some ten to fifteen minutes after his fall, and that he was then driven to the Višegrad Health Centre.[325] He said that the ambulance then drove him for further treatment to the Užice Hospital, and that it left Višegrad at about 7.00 or 8.00 pm.[326] He claimed that the ambulance stopped for about 20 minutes in the village of Vardište on the way to Užice, at the coffee bar of his uncle.[327]

133. There was considerable evidence given in support of the alibi, by Petar Mitrovic, Ratomir Simsic, Zivorad Savic, Dr Loncarevic, Miloje Novakovic and Dobrivoje Sikiric, all of whom corroborated the evidence of the Accused to differing degrees. Ratomir Simsic and Petar Mitrovic said that they saw the Accused fall from the horse, and that the horse fall on the Accused's leg between 3.40 and 5.15 pm.[328] Zivorad Savic, the ambulance driver, said that he arrived at the scene at about 5.00 pm and drove the Accused to the Višegrad Health Centre.[329] Dr Goran Loncarevic said that he treated the Accused when he was admitted at the Višegrad Health Centre sometime between 4.00 and 6.00 pm.[330] Zivorad Savic said that he transported the Accused from the Višegrad Health Centre to the Užice Hospital, leaving the Health Centre between 6.00 and 7.00 pm.[331] Miloje Novakovic said that he accompanied the Accused and Zivorad Savic to Užice

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extent that the evidence of those witnesses impacts upon other issues in the Prosecution case, the Trial Chamber will make some findings with respect to its reliability. *See* pars 168-178.

[320] The Accused (T 2146-2147, 2197-2198).
[321] The Accused (T 1905, 2190).
[322] The Accused (T 1905–1910, 2190).
[323] The Accused (T 1910, 2199).
[324] The Accused (T 1910-1911, 2146).
[325] The Accused (T 1911).
[326] The Accused (T 1912).
[327] The Accused (T 1912).
[328] Petar Mitrovic (T 2771-2772); Ratomir Simsic (T 2818, 2831).
[329] Zivorad Savic (T 2870, 2873).
[330] Dr Loncarevic (T 2991). Zivorad Savic gave evidence that when he arrived to the Health Centre with the Accused it was about 5.15 pm (T 2870, 2873).
[331] Zivorad Savic (T 2875, 2924).

Hospital, and he corroborated the times given in evidence.[332] Dobrivoje Sikiric, the uncle of the Accused, said that the Accused, Miloje Novakovic and Zivorad Savic stopped at his coffee bar in Vardiste on their way to Užice Hospital.[333] Zivorad Savic and Miloje Novakovic said that they arrived at the Užice Hospital between 8.40 and 9.00 pm.[334]

134. The Trial Chamber does not accept a great deal of the evidence of these witnesses which was given in support of the alibi.[335] All of the defence witnesses who gave such evidence were friends or acquaintances of the Accused, and the Trial Chamber believes that there was a degree of fabrication on their part in an endeavour to assist him.

135. In particular, the Trial Chamber is not satisfied that the records of the Višegrad Health Centre are reliable.[336] To establish the presence of the Accused at the Višegrad Health Centre, the protocol of registration of patients for the relevant period was produced.[337] These records were incomplete, and it appeared that there had been little attempt made to ensure that they were accurate. There exists an entry in those records bearing the name of Sredoje Lukic for 14 June 1992. The surname Lukic had been overwritten by the name Bogic.[338] Although that alteration in itself is not overly significant in relation to this Accused, it did add to the suspicion already felt by the Trial Chamber as to the reliability of the records of the Višegrad Health Centre.

136. The Trial Chamber does, however, accept the accuracy of the medical records from the Užice hospital, of which some had been seized from Dr Aleksandar Moljevic on 1 November 2000 pursuant to an order of the Tribunal,[339] and that these records give rise, at the least, to the reasonable possibility that the Accused was present at the Užice hospital as stated in those

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[332] Miloje Novakovic (T 3037-3038).

[333] Dobrivoje Sikiric gave evidence that he saw them in the late afternoon, and that the ambulance stopped at the coffee bar for at least 20 minutes (Dobrivoje Sikiric, 3055-3057). *See* also Zivorad Savic (T 2876, 2932); Miloje Navakovic, T 3038-3039).

[334] Zivorad Savic (T 2876, 2879); Miloje Navakovic (T 3039).

[335] The majority of these witnesses for the Defence claimed to be certain or fairly certain that the date on which the Accused fractured his leg was 14 July 1992 because that day, the Holy Trinity, was of special religious significance for them (The Accused, T 2150; Milojka Vasiljevic, T 2549, 2550; Ratomir Simsic, T 2819-20; Zivorad Savic, T 2882; Miloje Novakovic, T 3045-3046); Ex D 53. Other witnesses for the Defence gave evidence that they could not recall the exact date upon which the Accused was admitted to hospital outside the information which was contained in the medical records, but they could ascertain that he was in fact in hospital (Dr Loncarevic, T 3000; Milena Tomsevic, T 3207-3209; Dr Simic, T 3269; Slavica Pavlovic, T 3408; Dr Jovanovic, T 3631-2).

[336] Ex D 26, Ex D 27, and Ex D 28.

[337] Ex D 26. Witnesses identified Ex D 26 as the protocol book for registration of patients treated in the Višegrad Health Centre from 20 April 1992 until 4 July 1992 (Dr Loncarevic, T 3005; Dr Vasiljevic, T 3097).

[338] The Trial Chamber accepts that this overwriting is not overly significant as proof that Sredoje Lukic, who is indicted together with the Accused as an alleged co-perpetrator of the fire burning on Pionirska Street, prepared an alibi defence, given that the year of birth that accompanies it does not even remotely correspond with Sredoje Lukic's year of birth. *See* further Ex D 54.

[339] Order granting Prosecutor's application for an order authorising the seizure of evidence *(under seal)*, 30 Oct 2000. *See* Annex I, par 3. The investigators seized, *inter alia*, the following: Ex P 136, Ex P 137 and Ex P 138.

records.[340] Amongst the records which were seized were two ledgers, and a four-page medical history.[341] The first of the four pages of the case history bore the name and surname of the Accused, and recorded the date of his admission to Užice hospital as 14 June 1992.[342] The two ledgers - the protocol of patients admitted to Užice Hospital,[343] and the protocol of patients from the war zone admitted to Užice hospital[344] - both had entries bearing the name of Mitar Vasiljevic and showed the admission date to the orthopaedic ward in Užice hospital as 14 June 1992. The later protocol recorded the time of admission as 9.35 pm.[345] These ledgers appeared to have been stored for quite a long time. They were covered in dust and dirt and smelt unpleasant.[346]

137. In addition to the admission records, the nurses' shift book from the orthopaedic ward at Užice Hospital bore the Accused's name under the heading of persons admitted during the third duty shift on 14/15 June 1992.[347] The third shift extended from 8.00 pm on 14 June 1992 until 6.00 am on 15 June 1992.[348] The time of the Accused's admission to the orthopaedic ward is thus consistent with the time recorded in the protocol of patients from the war zone admitted to Užice hospital and with the alibi raised by the Accused.

138. The Trial Chamber is satisfied that there was no evidence to suggest that these hospital records had been interfered with. The Prosecution conceded that, after subjecting them to extensive and repeated forensic analysis, the protocol of patients admitted to Užice Hospital, the protocol of patients from the war zone admitted to Užice hospital, and the four pages that made up the case history showed no sign of forgery.[349] The Prosecution also subjected the protocol of registration of patients to the Višegrad Health Centre for the relevant period to forensic analysis, and conceded again that, aside from an evident overwriting in one of the entries, bearing the name of a co-accused, there was nothing to suggest this record had been tampered with.[350]

139. The Trial Chamber rejects the Prosecution's contention that alleged inconsistencies in the medical records showed that the records did not relate to the Accused. The second page of the

[340] Ex P 136; Ex P 137; Ex P 138; Ex D 29; Ex D 30; Ex D 31; Ex D 32.
[341] Ex P 136; Ex P 137; Ex P 138.
[342] Witness identified Ex P 138 as the case history (Milena Tomasevic, T 3213-3214; Dr Simic, T 3270; Slavica Pavlovic, T 3400; Dr Martinovic, T 3494; Dr Jovanovic, T 3634; Dr Moljevic, T 3728).
[343] Dr Moljevic identified Ex P 136 as the protocol of patients admitted to Užice hospital in 1992 (Dr Moljevic, T 3698).
[344] Dr Moljevic identified Ex P 137 as the protocol of patients admitted to Užice hospital from the war zone from 6 April 1992 onwards (Dr Moljevic, T 3706).
[345] Ex P 137.
[346] Ib Jul Hansen (T 3737-3738).
[347] Slavica Pavlovic identified ExD31 as the nurses' notebook from the orthopaedic department of Užice Hospital, covering the period from 9 January 1992 until 10 July 1992 (Slavica Pavlovic, T 3381).
[348] Slavica Pavlovic (T 3383).
[349] Ex P 136; Ex P 137; Ex P 138. An expert report was admitted into evidence (Ex D 52).
[350] Ex D 26. Its reliability has been addressed elsewhere (*see* par 135).

Accused's case history in the Užice Hospital described the cause of the fracture as a fall on the flat surface of the battlefield. The Accused was never at a battlefield, and he was never claimed to have been.[351] The Trial Chamber is not satisfied that this inconsistency establishes that these medical records did not refer to the Accused. Any reference to the horse's role in causing the fracture to the Accused's leg was, as one defence witness put it, not material to the diagnosis.[352] Moreover, the Trial Chamber heard evidence that the term "battlefield" (*ratište*) was employed to designate the geographical area affected by war, which, in the context of June 1992 in the Užice Hospital in Serbia, primarily referred to the whole of Bosnia-Herzegovina.[353] Further, this use of the term "battlefield" also explained why the Accused's name was entered into the protocol of patients admitted from the war zone. The status of the Accused as a reservist of the Territorial Defence would also sufficiently explain why it is recorded in that protocol and also why the case history notes that the military post of the SUP was notified of the Accused's injury.[354]

140. The Trial Chamber rejects the Prosecution's contentions that inconsistencies in the medical record of the diagnosis suggested that the records were not that of the Accused. The Trial Chamber is satisfied that the Latin term *fractura cruris*, namely fracture of the lower leg, could refer to both fracture of the tibia only, and a fracture of the tibia and the fibula.[355] In this sense, the referral diagnosis recorded in the case history and in the protocol of patients admitted from the war zone - *fracture of the fibia and the tibula* - is not inconsistent with *fractura cruris* as the final diagnosis in the case history and in the operations protocol.[356] In this respect, the protocol of registration of patients to the Višegrad Health Centre recorded the diagnosis for the Accused on 14 June 1992 solely as *fractura*, which is an incomplete diagnosis rather than an inconsistent one.[357] The Trial Chamber is satisfied that the alleged inconsistencies in the medical records, which could have gone some way to supporting the idea that someone else was using the Accused's name, were also to a large extent convincingly explained by witnesses. [358]

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[351] The Accused (T 2022).
[352] Dr Jovanovic (T 3657).
[353] Dr Jovanovic (T 3637); Dr Moljevic (T 3712); Dr Simic (T 3292-3293).
[354] Dr Moljevic (T 3759); Ex P 138; Ex P 137.
[355] Dr Vucetic (T 4065).
[356] Furthermore, the referral diagnosis is the diagnosis on the basis of which the patient would have been referred to Užice Hospital, and which would have appeared in the referral paper pursuant to which the patient would have been received in the Užice Hospital from the Višegrad Health Centre (Dr Loncarevic, T 3014; Zivorad Savic, T2874; Dr Moljevic T 3731-2).
[357] Its reliability has been addressed elsewhere. *See* par 135.
[358] Moreover, the blood group of the Accused coincided with the blood group that appeared under the Accused's name in the records that were seized from Dr Moljevic. The Trial Chamber finds this last circumstance to be of limited significance insofar as the parties agreed that the frequency of the blood type of the Accused is 32.3 per cent of the population (T 4647-4649).

141. The Trial Chamber is satisfied that the consistency of the medical records from different wards of the Užice hospital with each other further reinforced not just their reliability, but also their authenticity, insofar as it further demonstrated the absence of forgery.[359]

142. The Trial Chamber accepts that the x-ray which was seised by the Prosecution from Dr Moljevic was probably not an x-ray of the Accused. The Trial Chamber accepts the view of Dr Raby that the x-ray is not of the Accused's leg.[360] However, the Trial Chamber is satisfied that the authenticity of this x-ray does not affect its acceptance of the medical records, and that it does not eliminate the reasonable possibility that the Accused was on his way to or at the Užice hospital at the time when the transfer of the Koritnik group occurred in Višegrad. The Trial Chamber is not satisfied that it has been established beyond reasonable doubt that there was deliberate interference with the labelling of the x-ray, rather than a negligent but innocent mix-up of the x-rays of different patients.[361] It may also be the result of a deliberate attempt by someone to provide a false case in support of the Accused, but there has been no evidence that Dr Moljevic, from whom it was seised, was involved in any way in tampering with these x-rays. The Trial Chamber accepts the evidence

[359] The records from the Užice Hospital were largely consistent with each other, in terms of the patients' personal identification number, date of admission, the Accused's date of transfer to the psychiatric ward and date of release, and they also corresponded with the practice of the staff from the Užice Hospital which witnesses testified to (Ex P 136, Ex P 137, Ex P 138, Ex D 29, Ex D 30, Ex D 31 and Ex D 32).

[360] The evidence suggests that that the *palafond* - a specific point at the distal tibia - is common to the x-ray labelled with the name of the Accused and bearing the name of 14 June 1992 ("the 1992 x-ray" – Ex P 1151.1) and the x-rays of the Accused's lower left leg taken in 2001 ("the 2001 x-ray" – Ex P 21.1; Ex P 21.2; Ex P 21.4). This point is therefore ideal for the purpose of comparing the length of the fracture (Dr Raby, T 4230-4231; Dr De Grave, T 1702; Dr Vucetic, T 4072). The Trial Chamber accepts that a comparison of the distance from the *palafond* to the highest and to the lowest point of the fracture as depicted on the two x-rays, both on the frontal aspect and on the lateral aspect, clearly shows a significant difference between the fractures depicted on the 1992 x-ray and the 2001 x-ray (Ex D 39, p 6). Dr Raby identified the upper and the lower fracture points on the basis of a telltale mark which is a legacy of the healing process. Dr Raby said that, following a fracture, the remodelling of the bone will result in the formation of new bone tissue along the fracture site, which will be visible as a certain thickening of the healed bone along the original fracture site (Dr Raby, T 4232, 4236-4237; *see* also T 3237-3238, 4259-4261). The fractures depicted on both the 1992 x-ray and the 2001 x-ray are so called spiral fractures (Dr Raby, T 4241-4243; Dr Vucetic, T 4007, 4015; Dr De Grave, T 1706; Dr Moljevic, T 3741). Given the special feature of a spiral fracture, the measurements of the lower and the upper fracture points taken on the frontal view are different from the same measurements taken from the lateral view (Dr Raby, T 4257-4258, 4275. *See* also Ex P 192, Ex D 40). This is the reason why the upper and the lower fracture points as measured by most expert witnesses on the lateral views are different from the upper and the lower fracture points determined by the same witnesses on the frontal views. The Trial Chamber accepts Dr Raby's evidence that it would be quite unusual for a spiral fracture to produce the same measurements from two different angles (T 4272, 4275). The Trial Chamber is satisfied that both the differences in the measurements of the fractures on the 1992 x-ray and the 2001 x-ray and the different appearance of the fracture plane cannot be the result of a re-fracture along the same fracture site or a second fracture close to the original fracture site (Dr Raby, T 4255-4256, 4262-4264). Nor can it be the result of morphological or structural changes of the bone, due to the passing of time (Dr Raby T 4276-4277). The Trial Chamber accepts the view of Dr Raby that the only conclusion is that the 1992 x-ray is not of the Accused's leg. The *calcaneum* bone is the heal bone: Ex P 167. The Trial Chamber is satisfied that a comparison of the *calcaneum* bone on the 1992 x-ray and on the 2001 x-ray also shows significant structural differences between the two (Dr Raby, T 4248-4253; Dr De Grave, T 1681, 1708-1711. *See* also Ex P 21.4). These differences cannot be due to the deterioration and regeneration process during a considerable period of time (Dr Raby, T 4249). These findings support the view of Dr Raby.

[361] Dr Vucetic (T 4052-4053, 4093-4095); Dr De Grave (T 1716-1719).

that the usual safeguards of identifying the patient by name on the x-ray itself were not always followed during the conflict.[362]

143. The Trial Chamber accepts the evidence of Dr Moljevic that the Accused was in hospital on the date and at the time recorded in the protocol of patients from the war zone admitted to the Užice hospital,[363] which corroborates that the Accused was in hospital at that time. Dr Moljevic, a doctor at the orthopaedic ward and a member of the triage team at Užice admissions during the relevant period, knew the Accused well, and he was notified of the imminent arrival of the Accused at the hospital because of his friendship with him, and he followed up that notification.[364] The Trial Chamber notes that Dr Moljevic relied upon the protocol of patients from the war zone admitted to the Užice hospital to determine the date and time that the Accused was admitted into the Užice Hospital.[365] The protocol, despite repeated and extensive forensic examinations at the behest of the Prosecution, showed no evidence to suggest that it had been interfered with.[366] Outside the time and date of the Accused's admission, Dr Moljevic had a clear recollection of the events of that day. Dr Moljevic was able to recall that Dragan Filipovic, another patient from Višegrad whom he knew, was admitted earlier on the same day as the Accused.[367] The name of Dragan Filipovic appears before the name of the Accused in the protocol of patients admitted from the war zone.[368]

144. The Prosecution led evidence that a fake identity card had been used by a person who is a defendant in other proceedings before the Tribunal for the purposes of obtaining free health care, and it relied upon that evidence as demonstrating that the alibi was unreliable. The Trial Chamber is satisfied that such evidence is of very little significance to this case, if any at all.[369] In that other case, three fake identity cards had been found on Dragan Nikolic at the time of his arrest. The fake identity cards showed his picture but with the names of two other individuals.[370] He had utilised one of the cards, which depicted him as a refugee, with the stated aim of securing access to free health care to which he would have been entitled as a refugee.[371] The date of issue of the refugee card was

[362] Dr Moljevic (T 3768-3769).
[363] Ex P 137.
[364] Dr Moljevic (T 3695-3696, 3769-37670, 3702-3703). The witness knew the Accused because he was a waiter in the catering company Panos of Višegrad. He usually worked in the terrace of the Višegrad hotel. The witness would frequent this place particularly after he had graduated from university and started work in Višegrad. The witness, until he went to Užice, had lived his entire life in Višegrad, and his parents still live there. Other than as a waiter, the witness had no further contact with the Accused or his family (Dr Moljevic, T 3693-3694).
[365] Dr Moljevic (T 3750).
[366] *See* Ex D 52.
[367] Dr Moljevic (T 3769-3770).
[368] Ex P 137. The name of Dragan Filipovic also appears in other records of the U'ice Hospital, and of the Višegrad Health Centre (Ex P 136, Ex D 32, Ex D 26). Witnesses gave evidence that they saw Dragan Filipovic in Hospital around that period of time (Milojka Vasiljevic, T 2593; Dr Loncarevic, T 3003).
[369] Ex P 138.
[370] Ex P 111.1; Ex P 111.2; Ex P 111.3.
[371] Gary Selsky (T 3980-3981); Ex P 144; Ex P 114.1.

September 1998.[372] At the time of his arrest, Dragan Nikolic was living in Serbia,[373] and it appears that the refugee card had been issued in Republika Srpska.[374]

145. The Prosecution relied upon evidence given of a subsequent statement alleged to have been made by the ambulance driver that he had taken the Accused to the Užice Hospital on 27 June or 28 June 1992, some two weeks after the Pionirska Street fire.[375] The ambulance driver denied that it was his voice on the tape recording produced by a Prosecution witness (VG-81), whose evidence in relation to other issues has already been criticised by the Trial Chamber.[376] The Prosecution's expert witness was unable to establish that there was more than a possibility that it was his voice.[377] The whole of the circumstances in which VG-81 said that she recorded the ambulance driver were highly suspect.[378] However, the Trial Chamber is satisfied that this evidence in no way impinges upon the credibility of the records of the Užice hospital already accepted by it as raising the reasonable possibility that the Accused was at, or on his way to the Užice hospital, at the time of the events in Pionirska Street.

146. The Trial Chamber in any event has serious doubts as to the reliability of the evidence of the witnesses who claimed to have seen or identified the Accused during the looting, transfer and fire. In expressing these doubts, the Trial Chamber has assessed the identification evidence of these witnesses in accordance with the principles set out earlier.[379] This finding is largely independent of the alibi evidence, but it is very substantially reinforced by that alibi evidence.

147. **Looting** - The Trial Chamber is not satisfied that the Prosecution has established beyond reasonable doubt the presence of the Accused during the looting of the Koritnik group. Three witnesses claimed that the Accused was involved in the looting; of these, two witnesses said that they observed the Accused during the looting of the group. VG-61 said that the Accused was involved,[380] but VG-61 was not present and, insofar as he may have been relying upon what his father told him, there is no mention of this in his father's statement.[381] VG-13 said that the Accused

[372] Gary Selsky (T 3992).
[373] Gary Selsky (T 3994).
[374] Gary Selsky (T 3994-6).
[375] Ex P 109; Ex P 109.1; Ex P 109.2; Ex P 109.3.
[376] VGD-30 (T 2947, 2953). *See* VG-81 (T 3878, 3881, 3894) and VG-97 (T 4483). *See* also pars 84-88.
[377] Tom Broeders (T 4339-4340).
[378] The tape was allegedly recorded surreptitiously by Prosecution witness VG-81 during a conversation that she and VG-97 amongst others purportedly held with the ambulance driver (VG-81, T 3876). The Prosecution expert witness found a discontinuity within the relevant excerpt of the tape which he could not account for (Tom Broeders, T 4302-4305).
[379] Par 16.
[380] VG-61 (T 791).
[381] Ex P 145. VG-61's father died before the trial took place.

was standing in the doorway during the looting,[382] but this was not mentioned in her 1998 statement to the Prosecution.[383] VG-38 said that the Accused was standing outside when the looting occurred.[384] The evidence of identification of those witnesses is not sufficiently reliable as to warrant the conclusion that the Accused was present at the time when the Kortnik group was being looted.

148. **Transfer** - The Trial Chamber is not satisfied that the Prosecution has established beyond reasonable doubt the presence of the Accused during the transfer of the Kortinik group from the Memic house to the Omeragic house. VG-61 said that the Accused was involved in the transfer of the group to the house which was later set on fire,[385] but VG-61 was not present and, again insofar as he may be relying upon what his father told him, there is no mention of this in his father's statement.[386] The evidence of the four witnesses who purported to identify the Accused during the transfer (VG-101, VG-78, VG-13, VG-38) is insufficiently reliable to establish this fact when considered in conjunction with the evidence of the alibi raised by the Defence.[387]

149. VG-101 and VG-78 are sisters, both of whom escaped during the transfer of the group from the Memic house to the Omeragic house.[388] VG-101 gave evidence that as she was walking towards the Omeragic from the Memic house she saw the Accused, Milan Lukic, a man with a moustache and a fair and tall man.[389] She said that she faced the Accused in front of the Memic

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[382] VG-13 (T 1494). VG-13 gave evidence that she knew the Accused as a waiter in the Panos Hotel, and in the new Hotel. VG-13 affirmed that she had known him for a long time, even as a young man, as they would attend the same parties, and that he had gone to school with one of the witness's relatives (VG-13, T 1432-1433). VG-13 identified the Accused in the photo array (Ex P 55-VG-13). The Accused maintained that he did not known VG-13 (The Accused, T 1945, 2169).

[383] Ex D 4.

[384] VG-38 (T 1371-1374). VG-38 said that he knew the Accused as a waiter in the Panos Hotel and in the Višegrad Hotel, and that he had a relative who was a trainee at one of the establishments where the Accused worked. VG-38 was thirteen and a half at the time of the Pionirska Street incident. VG-38 identified the Accused in the photo array at a time after the Accused had been arrested. He had learned about the arrest of the Accused from the media, and had seen his picture there (VG-38, T 1339, 1359-1360, 1413, 1416; Ex P 20-38). The witness identified the Accused as being present in the Višegrad Hotel and as escorting the group from there to Pionirska Street, evidence which the Trial Chamber rejects (*see* par 172). The Accused maintained that he did not known VG-38 (The Accused, T 1945, 2169).

[385] VG-61 (T 793).

[386] Ex P 145.

[387] VG-101 (T 1169-1173); VG-78 (T 1307); VG-13 (T 1443-5, 1496); VG-38 (T 1377-8).

[388] VG-78 (T 1295).

[389] VG-101 (T 1171). **VG-101** said that she had seen the Accused pass through Prelovo, that his wife's name was Milojka, that his wife had a shop in Prelovo, and that she had seen the two of them walking together (VG-101, T 1155-1156, 1195). The wife of the Accused said that she had worked in Prelovo (Milojka Vašiljevic, T 2559). VG-101 identified the Accused in the photo array (Ex P 55-101). The Accused said that he did not know VG-101 (The Accused, T 1945, 2169). During the time they earlier travelled from Kortinik to Vi{egrad, **VG-101 and VG-78** who were sisters were never separated, and VG-78 agreed that they would have seen the same things during the course of their travels (VG-78, T 1298). However, their evidence did differ in relation to significant details (*see* VG-101, T1153-1154, 1157, 1160, 1194, 1197, 1199; VG-78, T 1284-1286). *See* also **VG-13** (T 1443-1445, 1496), whose evidence is discussed at par 151, and **VG-38** (T1377-1378), whose evidence is discussed at par 152.

house, at a touching distance.[390] Her sister was with her at the time.[391] As the group were being transferred, VG-101 and her sister managed to escape and hid behind a shed. [392] From this position VG-101 said that she could see the Accused standing in a spot which was lit with what appeared to her as floodlights.[393]

150. VG-78 gave evidence that she saw Milan Lukic and the Accused walking between the two houses, next to the Omeragic house, and that the Accused was paying more attention to the Omeragic house than to the Memi} house.[394] She said that a man with a moustache was standing with a rifle in front of the door of the house from which she was leaving (the Memi} house).[395] When she hid behind the shed, and as she was standing at the edge of the shed ready to flee for the woods, she cast a glance in the direction of the Accused and saw his profile for a moment. VG-78 claimed that the Accused was 10 to 20 steps away.[396] She acknowledged that she did not see him very well, though she said that she had recognised him as he was walking up and down.[397] She said that there was no light inside the Omeragic house, only outside, where it was lit up.[398]

151. VG-13 gave evidence that she saw the Accused walking ahead of the group carrying a rifle and a flashlight during the transfer, and that the Accused brought the first group to the Omeragic house, and held the door. She claimed that he yelled at them to hurry up and that he had shoved the witness's mother-in-law.[399] Her failure to refer to the Accused has having been present in the transfer in a previous account which he had given to the Prosecution of these events casts doubt upon her claim. [400]

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[390] VG-101 (T 1169-1170).
[391] VG-101 (T 1171).
[392] VG-101 (T 1173).
[393] VG-101 (T 1173-1134).
[394] VG-78 (T 1290-1291; Ex D 3). VG-78 gave evidence that she saw the Accused several times as a passenger in the bus to Prelovo. She also said that she knew his wife by sight, and that his wife used to work in a shop at Banja (VG-78, T 1280-1281). The wife of the Accused said that she worked in various places in Vi{egrad, Prelovo, Sase and elsewhere (Milojka Vasiljevic, T 2558-2259). VG-78 identified the Accused in the photo array (Ex P 55-78). The Accused said that he did not know VG-78 (The Accused, T 1945, 2169). In her statement to the MUP in 1995, VG-78 was able to refer only to "A certain Mitar, whose surname I do not know" as having been in front of the Hotel and in Pionirska Street during the afternoon when, as she put it, he gave a "safety certificate", but did not mention his presence in the evening during the transfer of the Koritnik group (VG-78, T 1300, 1307).
[395] VG-78 (T 1307).
[396] VG-78 (T 1294).
[397] VG-78 (T 1294).
[398] VG-78 (T 1290-1294).
[399] VG-13 (T 1443-1445, 1496).
[400] Ex D 4. *See* however Ex P 59.1 and Ex P 59.2.

152. VG-38 gave evidence that the Accused and three other men were present during the transfer, but he gave no further details and he was unable to indicate the position which any of them took at the time of the transfer.[401]

153. The Trial Chamber notes that two survivors of the fire, VG-18 and VG-84, did not mention the Accused as having been present at the time of the transfer. This could, of course, be explicable by the circumstances in which the transfer took place, the darkness at the time, and their lack of any particular familiarity with the Accused previously. VG-18 did not recognise any of the men there,[402] although she did say in her statement to the Prosecution that Stredoje Luki} was one of them.[403] Although she had not known the Accused previously, she gave evidence that he had introduced himself by his own name during that afternoon when he was attempting to have the group from Kortinik stay together.[404]

154. **The fire** - As already stated, the Trial Chamber is not satisfied that the Prosecution has established beyond reasonable doubt that the Accused was present at the time of the setting on fire of the Pionirska Street house. Only one of the survivors (VG-13) gave evidence that the Accused was present when the Omeragic house was set on fire, and that he participated in the shooting of those attempting to escape the fire through the windows.[405] VG-13 said that she saw the Accused and Milan Lukic when they opened the door to the room in the Omeragic house, and that the Accused assisted Milan Lukic by lighting the area up with a flashlight whilst the latter placed an incendiary device on the floor. [406] VG-13 said that, when she jumped from the window, she landed in front of the Accused and Milan Lukic, and that the Accused shone a light on her whilst Milan Lukic shot and wounded her.[407] The Trial Chamber accepts that VG-13 knew the Accused from before the war, and that she believes that it was the Accused whom she saw. But, in view of the stressful situation under which her identification of the Accused is said to have taken place and the strength of the alibi evidence, the Trial Chamber is not satisfied that her identification is sufficiently reliable to rebut the alibi.

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[401] VG-38 (T 1377-1378).
[402] VG-18 (T 1592-1593).
[403] VG-18 (T 1628). She had not known Sredoje Lukic before that day, but he had introduced himself at the time of the looting (VG-13, T 1581).
[404] VG-18 (T 1622). *See* further pars 177 and 180. There was an issue at the trial as to whether the Accused had worked with VG-18's brother, but the Trial Chamber finds that this issue led to nothing of assistance.
[405] VG-13 (T 1455-1456). VG-61 gave evidence that the Accused was present during the shooting, but VG-61 was not present, and, insofar as he may be relying upon what his father told him, there is no mention of this in his father's statement (VG-61, T 795; Ex P 145).
[406] VG-13 (T 1449-1450).
[407] VG-13 (T 1455-1456).

155. The Trial Chamber is satisfied that sufficient doubt is cast upon the evidence which suggests that the Accused was present in Pionirska Street during the transfer of the group to the Omeragic house, and the fire, by the evidence which suggests that the Accused was either in or on the way to the U`ice Hospital at that time. It is the alibi evidence which ultimately leads the Trial Chamber to reject the Prosecution case that he was in Pionirska Street at the relevant times. The Trial Chamber is satisfied that this evidence establishes a reasonable possibility that, from approximately 8.00 pm on 14 June 1992, the Accused was not in Pionirska Street. The Trial Chamber is satisfied that the medical records do establish that the Accused was admitted to Užice Hospital on 14 June 1992 at 9.35 pm. The Trial Chamber accepts that it takes at least one hour to drive from Višegrad, where he suffered his injury, to Užice.[408] The distance between these two towns is about 70 km.[409] Taking these facts into consideration, as well as the time necessary for the admission procedures, the Prosecution must eliminate the reasonable possibility that the Accused was not in Pionirska Street from approximately 8.00 pm onwards. It has not succeeded in doing so. The Trial Chamber is satisfied that the transfer did not take place before 9.30 pm.[410] Accordingly, the Trial Chamber is not satisfied beyond reasonable doubt that the Accused was present during the transfer of the Koritnik group from the Memic house to the Omeragic house and during the setting on fire of that house.[411]

156. The Trial Chamber is satisfied that the evidence of Prosecution witnesses who claimed to have seen the Accused after 14 June 1992 cannot establish, beyond reasonable doubt, the falsity of the alibi raised by the Accused.[412] The Defence case was that the Accused remained in hospital until 28 June 1992 when he was released upon his wife's request, and this is consistent with the records of the Užice hospital already accepted by the Trial Chamber.[413] The Trial Chamber is not

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[408] Zivorad Savic (T 1936); Dobrivoje Sikiric (T 3066).

[409] Dobrivoje Sikiric explained that Vardište, where the Accused stopped on his way to Užice hospital, was 20 km away from Višegrad and 55 km from Užice (Dobrivoje Sikiric, T 3054-3055).

[410] The Trial Chamber is satisfied that it was dark when the armed men returned to the Memic house to transfer the Koritnik group to the Omeragic house, and therefore that it must have been between 8.30 and 9.00 pm at the very earliest (*see* par 123 and footnote 297). Witnesses gave evidence that the armed men returned to the Memic house to transfer the group sometime between 9.30 and 12.00 pm. VG-13, VG-18 and VG-38 gave times between 9.30-10.30 pm (VG-13, T 1443; VG-18, T 1590; VG-38, T 1376). VG-38 was able to calculate the time because he was still wearing his watch (VG-38, T 1376). VG-101 and VG-61's father said that it was midnight (VG-101, T 1200; Ex P 145, T 896). VG-84 said it happened two and a half hours after sunset (VG-84, T 1670; *see* also Ex P 148 and footnote 297). The Prosecution contested the witnesses' evidence as to the time when the armed men returned, and argued that it had been earlier (Prosecution Final Brief, par 302-6). The Prosecution argued that the witnesses' perception of time was distorted because their watches had been looted and because of the apprehension they felt after having been looted. Instead, the Prosecution sought to rely on VG-87's evidence that the first time he was aware that something was burning was between 8.00 and 9.00 pm. However, VG-87 estimated that it must have been about 11.00 pm when he last heard his wife, and there has been evidence that she was already inside the house which was set on fire when the Koritnik group were brought inside (VG-87, T 1096, 1114; VG-18, T 1592; VG-13, T 1446, 1449). The evidence of VG-87 does not assist. The best evidence is that of VG-38, who was wearing his watch.

[411] *Ibid*.

[412] *See* par 15.

[413] The Accused (T 1920); Milojka Vasiljevic (T 2554); Ex P 138. *See* further Ex D 30.

satisfied that the evidence of any of these Prosecution witnesses is sufficiently reliable to establish that the Accused was not in Užice Hospital at the times recorded in the Užice Hospital records.

157. VG-77 claimed that, on 18 June 1992, the Accused threatened to kill her and the group with whom she was leaving Višegrad.[414] VG-77 admitted that she did not see the face of the man who was threatening them, but concluded that he was the Accused because some men from the SUP addressed this man as "Mitar".[415] The witness did not mention this incident in either of her two prior statements to the Prosecution, and she was unable to identify the Accused from the photo array.[416] In these circumstances, the Trial Chamber is not satisfied that her identification of the Accused is reliable in any way.

158. VG-105 said that she saw an individual whom she identified as "Vasiljevic" comfort the daughter of a man whom he and Lukic were taking out of the fire station. The witness was present at the fire station with other inhabitants of Zljeb who had been confined there.[417] The witness gave inconsistent statements with respect to the date when she claimed to have sighted "Vasiljevic".[418] She claimed that it would have been after 14 June 1992. She said that she knew the man she identified as "Vasiljevic" by sight, but she did not know his name until she saw him at the fire station. She learnt his name and the name of "Lukic" from others at the fire station.[419] She identified the Accused in the photo array, but she did not identify him as the man whom she calls "Vasiljevic".[420] In cross-examination, she claimed that "Vasiljevic" had a moustache.[421] The Trial Chamber is not satisfied that the identification of the Accused by VG-105 is reliable in any way.

159. The Trial Chamber is not satisfied that the evidence of two separate identifications given by VG-115 can be accepted as reliable. VG-115's reliability as a witness has been dealt with earlier.[422] VG-115 said that she knew the Accused before the events in 1992, and that she saw him often.[423] The Accused acknowledged that he had known the witness by sight for at least five years.[424]

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[414] VG-77 (T 719-720).
[415] VG-77 (T 747-748, 750). There is evidence that another person by the same first name, Mitar Kneževic (also known as "Chetnik"), participated in the crimes in Višegrad in 1992, but VG-77 gave evidence she had not heard about him (VG-77, T 749).
[416] VG-77 (T 757).
[417] VG-105 (T 1132-1134).
[418] VG-105 (T 1121, 1133).
[419] VG-105 (T 1121).
[420] Exhibit P 55-105. VG-105 (T 1139-1140).
[421] VG-105 (T 1137).
[422] *See* pars 89-90.
[423] VG-115 (T 1013). No photo array has been tendered into evidence.
[424] The Accused (T 1947, 1948, 2169).

However, in her statement to the Prosecution, VG-115 said that there were two individuals by the name of Mitar Vasiljevic. She claimed to have made a mistake in her statement.[425]

160. VG-115 claimed that she saw the Accused on two different occasions after the date of the house burning. During the first of these, she saw the Accused, Milan Lukic, Slobodan Roncevic and others,[426] wound an elderly man by the name of Kahriman. She claims she observed this as she was crossing the new bridge in Višegrad. It was broad daylight, and she said that it was at the end of June or the beginning of July.[427] The second occasion she claimed to have seen the Accused was towards the end of July. This time she observed him with Milan Lukic and others beating and stabbing a man called "Kupus".[428] She claimed that she was approximately 15 to 20 steps away. She said that the Accused had addressed her, telling her to move on lest she should end up like "Kupus".[429]

161. The Trial Chamber is not satisfied that the evidence of VG-117 who claimed to have seen the Accused on 22 June 1992 is reliable. VG-117 gave evidence that she saw the Accused record the names of the Muslims who had been gathered in the Vuk Karadžic School in Višegrad. They had gathered there to join a convoy leaving the municipality.[430] She said that the Accused explained that he worked for the Red Cross, and that he took down their names as they entered the school.[431] She claimed to have had the Accused within her sight during that day for about half an hour. She said that she was a short distance away from him and that it was daylight.[432]

162. The Trial Chamber is satisfied that VG-117 knew the Accused sufficiently well to be able to recognise him. VG-117 said that she knew the Accused when they were children. Although she was six years older than the Accused, a whole group of them from neighbouring villages would play together and they would also tend to the cattle.[433] She also said that he would wait on her frequently in the Panos Hotel and, less frequently, in the Vilina Vlas Hotel.[434] She would also see him in the bus on his way to his father's house.[435] She identified the Accused in the photo array.[436] The Accused denied that VG-117 knew him as she claimed.[437]

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[425] VG-115 (T (T 1061, 1073). *See* further footnote 201 and Ex D 2; Ex P 56.1. No other witness saw him there.
[426] VG-115 (T 1032).
[427] VG-115 (T 1030, 1032).
[428] VG-115 (T 1037).
[429] VG-115 (T 1037).
[430] VG-117 (T 4505-4507, 4517, 4516-4517).
[431] VG-117 (T 4504-4506).
[432] VG-117 (T 4507-4508, 4511-4514).
[433] VG-117 (T 4499-4501).
[434] VG-117 (T 4500, 4527).
[435] VG-117 (T 4500, 4554).
[436] VG-117 (T 4553).
[437] The Accused (T 4706-4711, 4724).

163. Although the Trial Chamber accepts that VG-117 believes that she saw the Accused on 22 June 1992, which was after the Piorniska Street incident, so strong is the alibi evidence provided by the medical records that the Trial Chamber does not accept that her evidence, either alone or together with similar evidence upon which the Prosecution relies, establishes beyond reasonable doubt that the alibi was untrue. Because the evidence of VG-117 directly conflicts with the medical records and the evidence of other witnesses, her evidence is insufficient to establish the Accused's presence at the Vuk Karadžic School on 22 June 1992.[438]

164. The Trial Chamber is satisfied that the credibility of VG-81 was so undermined during the course of the trial that her evidence of identifications of the Accused should not be relied upon.[439] VG-81 claimed to have seen the Accused on three different occasions after the date of the house burning on Pionirska Street. The first time was on 18 June in Sase, when she claimed to have seen the Accused and Milan Lukic arrive at Kosovo Polje, and saw Milan Lukic kill a person named Nurka Kos. Later the same day, she travelled to Sase and saw the Accused, Milan Lukic and another man standing behind four unknown men who were lined up along the river. She claimed that she observed them shoot the four men, who fell into the river.[440] She said that she was standing 150-200 metres away when she witnessed these events.[441] The second time was on 21 June 1992 when the witness claims to have seen a tipsy Mitar Vasiljevic with Veljko Planinic (also known as "Razonda") coming from Sase, armed, singing songs about Bosniaks. The witness claimed to have been hiding 15 metres away.[442] The witness also claimed to have seen the Accused again on 25 June 1992 coming again from the direction of Sase, alone this time. She said she was between 10 to 30 metres away.[443] VG-81 also claimed that, up to 25 June 1992, she and others would see Mitar Vasiljevic coming from the direction of Sase and going towards Višegrad through Kosovo Polje.[444]

165. Finally, the Trial Chamber is not satisfied that the identification made by VG-80 shortly before 3 July 1992 is sufficiently reliable, for the reasons given earlier.[445]

166. In summary, as stated earlier,[446] the Trial Chamber is not satisfied that the Prosecution has eliminated the reasonable possibility that the Accused was not at the scene of the crime at the time

[438] Defence witnesses gave evidence that they did not see the Accused in the Vuk Karadžic school on 22 June 1992: Zoran Djuric (T 4587, 4590, 4599-4560); VGD-24 (T 4658-4659, 4653).
[439] *See* pars 84-88 where the reliability of her evidence is discussed.
[440] VG-81 (T 1232).
[441] VG-81 (T 1233).
[442] VG-81 (T 1235).
[443] VG-81 (T 1235).
[444] VG-81 (T 1233, 1235).
[445] *See* par 91.
[446] *See* par 130.

of the looting, transfer and fire, nor is it satisfied in any case that the identifications made by the witnesses are sufficiently reliable to establish that the Accused was present at the time of the looting, of the transfer or at the time of the fire.[447]

C. Events Earlier on 14 June 1992

167. The Trial Chamber has found that the Prosecution has failed to establish that the Accused participated in the burning of the house in Pionirska Street or in the events which immediately preceded the killing of the Kortinik group. However, the Trial Chamber is satisfied that the Accused did earlier on that day seek to ensure that the Kortinik group remained together. The Prosecution relies upon these earlier events so as to include the Accused in a joint criminal enterprise to kill the Koritnik group in the burning of the house in Pionirska Street. Fundamental to any finding that the Accused participated in such a joint criminal enterprise, or even that he merely aided and abetted that joint criminal enterprise, is proof beyond reasonable doubt that the Accused knew that the Koritnik group were to be killed – not necessarily by having them burnt in a house, but killed in some way.

168. The Trial Chamber is satisfied, with some reservations as to his timing and as to his powers of observation, that VG-87, whilst he was hiding in the attic on Pionirska Street, had the Accused within his sight for an extensive period in the early part of the afternoon of 14 June 1992. [448] VG-87 gave evidence that he had been hiding in this or other attics because of the large scale killings of Muslims in Višegrad at that time and because he was fearful that he would also be killed.[449] He had been there for about a week at this time. The Trial Chamber is satisfied that VG-87 knew the Accused well enough to have made a reliable identification of him.[450] It is not satisfied, however, that VG-87 had the Accused in his sight for the four hours from mid-day until 4.00 pm as he claimed, but it is satisfied that he was watching the Accused for a substantial part of that time.

169. VG-87 said that the Accused was alone, and walked around Pionirska Street in the direction of Vuk Karad'ic School. Between the hours of 1.00 and 2.00 pm, he saw the Accused calling out to the residents of the street to come out and clean the street.[451] He said that the Accused was wearing a camouflage uniform with turned up trousers, that he was carrying a megaphone and a bottle but

[447] *See* par 146.
[448] VG-87 (T 1090, 1105).
[449] VG-87 (T 1086).
[450] The witness had known the Accused before this day, since the Accused was a child. The witness frequented the Panos' restaurant, and knew the Accused quite well (VG-87, T 1082-1083, 1107). The witness identified the Accused in the photo array (Ex P 55-87). The Accused confirmed that he knew VG-87 well, and that they had spoken a number of times (The Accused, T 1947, 2169).
[451] VG-87 (T 1090, 1105, 1092).

that he was not armed with a rifle.[452] VG-87 claimed that he heard the Accused speak into a megaphone when calling out for residents to clean the street.[453] VG-87 said that the street was relatively clean at the time, and he formed the view that the Accused was trying to discover how many Muslims remained in the area.[454] The Accused denied that he was engaged in cleaning the streets at that time or that he had a megaphone. He said that he had only ever used a megaphone once during the first day that he organised the cleaning of the town.[455] The Trial Chamber is of the view that whether or not the Accused was in possession of a megaphone is of little significance, and that the particular activities in which VG-87 said that the Accused was engaged at the time are not of great importance. What is of importance here is that VG-87 placed the Accused in Pionirska Street for a substantial part of the afternoon, for about four hours from midday, on 14 June 1992.

170. The Trial Chamber accepts the evidence of VG-87 that the Kortinik group arrived in Pionirksa Street at about 2.00 pm.[456] That evidence, and the evidence of VG-87 that the Accused was in Pionirska Street for a substantial part of the early afternoon, leads the Trial Chamber to reject the evidence that the Accused was present at the Višegrad Hotel when the Kortinik group first arrived there and that he escorted the group to the Muslim houses in the Mahala neighbourhood.[457] The Prosecution in its Final Trial Brief relies upon the evidence of VG-38, VG-78 and VG-101 as establishing the presence of the Accused at the Višegrad Hotel. The Prosecution claims that, on the basis of this evidence, the Accused, dressed in dark uniform and a black hat, told the group that there were no more buses that day and that there would be one the following day.[458] Its case is that the Accused then told the group that they should go up to Pionirska Street in the Mahala section of town where there were some abandoned houses which belonged to Muslims.[459] It claims that the Accused led the group to Pionirska Street with a few armed soldiers at the side of the group. The group walked in a long column two by two.[460]

171. VG-78 gave evidence that the Accused and others were in front of the hotel looking after those who missed the convoy. She said that, at the time she observed the Accused, he was ten steps

[452] VG-87 (T 1107).
[453] VG-87 (T 1091, 1107).
[454] VG-87 (T 1082, 1090-1094).
[455] The Accused (T 1898, 1904, 2147, 2154-2155, 2157).
[456] *See* par 119-120 and footnote 286.
[457] Further evidence strongly suggests that members of the Koritnik group were familiar with the Mahala settlement: VG-101 (T 1158); VG-38 (T 1365, 1339); VG-84 (T 1659); VG-18 (T 1574).
[458] Prosecution Final Trial Brief, par 136.
[459] Prosecution Final Trial Brief, par 137.
[460] Prosecution Final Brief, par 138. However, VG-18, who was at the back of the column, gave evidence that the group had walked unaccompanied to Pionirska Street (VG-18, T 1573, 1609). *See* further VG-101 (T 1198); VG-18 (T 1573, 1609); VG-87 (T 1105). The Prosecution argued that this evidence was erroneous (Prosecution Final Trial Brief, par 138).

away from her.[461] The Accused is said to have told them that the buses had left and that they should go to Mahala to spend the night. She observed the Accused slap a mentally handicapped woman.[462] The Accused, along with two or three others whom she only knew by sight accompanied the column of people from Kortinik.[463] It took them 45 minutes to reach Pionirska Street.[464] The sister of the witness (VG-101) was with her at the time, but VG-101 said that the group went alone and there was no one accompanying them.[465] In her January 2001 statement to the Prosecution, VG-78 said that no-one had taken them to the Mahala settlement, but they all knew where it was and they had hurried along. She explained this inconsistency in her evidence by saying that she had since recollected what had happened.[466] Reference has already been made earlier to the extent of the familiarity which VG-78 and VG-101 had with the Accused before these events.[467]

172. VG-38 stated that the Accused spoke to Milorad Lipovac, who had accompanied them to Vi{egrad. The Accused told them that there would be no more buses on that day but that there would be some on the following day.[468] The Accused was no more than five metres away. The Accused was wearing a large black hat and a black uniform. He was not armed.[469] VG-38 saw the Accused alone, accompanying the group and walking ahead of them. It took 20 minutes for the witness to reach the Mahala settlement.[470] When they reached the settlement, they went first into Mujo Memic's house and then moved to Jusuf Memic's house. The Accused was in front of the house when they arrived.[471] Reference has already been made earlier to the weight to be given to his evidence.[472]

173. VG-101 said that she saw the Accused get out of the driver's seat of a car before the Vi{egrad Hotel, and that he told them to go to the abandoned houses in Pionirska Street.[473] Both the Accused and his wife gave evidence that the Accused did not drive.[474] No-one else gave evidence of having seen the Accused drive a vehicle. VG-101 said that, when she saw the Accused,

[461] VG-78 (T 1284).
[462] VG-78 (T 1280, 1283-4, 1322).
[463] VG-78 (T 1284, 1318).
[464] VG-78 (T 1285); VG-101 (T 1197).
[465] VG-78 (T 1320).
[466] VG-78 (T 1484, 1363-4).
[467] *See* footnotes 389 and 394.
[468] VG-38 (T 1359, 1360-4).
[469] VG-38 (T 1484, 1363-4)
[470] VG-38 (T 1365, 1405, 1366).
[471] VG-38 (T 1367).
[472] *See* footnote 384.
[473] VG-101 (T 1155).
[474] Milojka Va{iljevic (T 2537).

he was wearing a former JNA uniform and a large black hat and a black raincoat. He was wearing a large chain and cross over his uniform,[475] which no-one else has described.

174. VG-115 gave evidence that she saw the Accused, together with Milan Lukic and Sredoje Lukic amongst others, escorting a group of people through Pionirska Street and urging them forward.[476] Her unreliability as a witness has already been referred to, and the Trial Chamber does not accept her evidence of identification of the Accused.[477]

175. VG-61 said that the Accused was involved in escorting the Koritnik group,[478] but VG-61 was not present, and, insofar as he may be relying upon what his now deceased father told him, there is no mention of this in his father's statement.[479]

176. VG-13, who had not seen the Accused accompanying the group, gave evidence that, by the time she saw him standing in front of the door, she had already gone to Mujo Memic's house, had a cup of coffee and changed her wet clothes.[480] He was wearing a black suit and a hat. He was barefoot and had ribbons on his hat.[481] He was not carrying a weapon.[482]

177. VG-18 did not see the Accused accompanying the group to Pionirska Street to the Mahala settlement in Pionirska Street.[483] She said that the Accused appeared when the group stopped at the house of Jusuf Memic in Pionirska Street, when they were standing around pondering what to do. He told them that they should stay in one group and not disperse. It was VG-18's belief that none of the group had gone into the house of Jusuf Memic at this stage.[484] VG-18 said that the Accused was wearing a black suit and a hat and a black coat. He had a feather on his hat.[485]

178. VG-84 gave evidence that he could not remember whether the group had or not been escorted to Pionirska Street,[486] and he said that he saw the Accused when the group arrived at the house of Jusuf Memic. He gave evidence that the Accused was wearing a black suit and a hat, and that he was not armed.[487]

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[475] VG-101 (T 1155-1157, 1164, 1194-1195).
[476] VG-115 (T 1020, 1046). VG-115 estimated that it must have been about 7 pm (VG-115, T 1052).
[477] *See* above, pars 90-90.
[478] VG-61 (T 790, 876).
[479] Ex P 145.
[480] VG-13 (T 1432-1435, 1484).
[481] VG-13 (T 1433, 1502).
[482] VG-13 (T 1433).
[483] VG-18 (T 1573, 1609).
[484] VG-18 (T 1574, 1578).
[485] VG-18 (T 1577).
[486] VG-84 (T 1659).
[487] VG-84 (T 1761). VG-77, who gave evidence that she had spoken to the Koritnik group before the Memics' houses, also said that she later saw the Accused, together with another man, in the area (VG-77, T 697, 709). He was

179. In its Final Trial Brief, the Prosecution places great emphasis upon the allegation that, when talking to the group from Kortinik in Pionirska Street, the Accused held himself out to be a representative of, or associated with, the Red Cross, both orally and in writing.[488]

180. Only two witnesses (VG-18 and VG-84) of a possible seven who were present at the time gave evidence that the Accused orally described himself as a representative of the Red Cross. The Trial Chamber is not satisfied that the quality of their evidence is sufficient to establish that the Accused did in fact hold himself out in that way. VG-18 and VG-84 are mother and son, both of whom survived the Pionirska Street fire. It is not suprising therefore that their evidence on the point coincides, and the fact that it does coincide does not give it any greater weight. Neither of these witnesses knew the Accused prior to the day of the house burning, and both are alleged to have learnt of his identity only when he introduced himself by name. The Trial Chamber is not satisfied that the Prosecution has established that the Accused held himself out as being associated with the Red Cross, but it is satisfied that the Accused did seek to ensure that the group stayed together because he knew that some evil was to befall them.

181. The Trial Chamber is satisfied that the Accused did address the group and that he did hand a piece of paper to Mujo Halilovic which he suggested was as a guarantee of their safety. VG-38,[489] VG-13,[490] VG-18[491] and VG-84[492] all gave evidence that they saw the Accused give Mujo Halilovic a piece of paper. VG-101 saw the Accused give the piece of paper to one of the men.[493] In his statement, VG-61's father stated that Mujo Halilovic showed him the "safety guarantee" given to him by "Naka Mitar".[494] VG-78 gave evidence that he had been told that the Accused was calling people to come out in order to give out some certificate which someone subsequently picked up.[495] She did not see the document.

182. The Prosecution asserts that VG-13 saw the reference to the Red Cross on that piece of paper. That assertion is not borne out by her evidence. She said that she was next to Mujo Halilovic and he showed the document to her. It was handwritten and signed by the Accused, but

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wearing a big yellow straw hat (VG-77, T 711). The reliability of her identification evidence has already been discussed. *See* par 157.

488 This is said to be evidence of his participation in a joint criminal enterprise to kill the victims of the Pionirska Street incident because he was keen to ensure that they stayed together, and inside a house, in Pionirska Street, where they were to be killed (Prosecution Final Brief, par 310).

489 VG-38 (T 1405).

490 VG-13 (T 1432).

491 VG-18 (T 1578).

492 VG-84 (T 1664).

493 VG-101 (T 1160).

494 VG-61 (T 895).

495 VG-78 (T 1287).

she described it as having said only "Do not be afraid. Nobody is going to harm you", and then her evidence proceeded: "And Mr Vašiljevic, my neighbour, he explicitly told us that the following morning we would be taken over by the Red Cross".[496] VG-13 did not mention the Accused handing out the document in her 1998 statement to the Prosecution,[497] but even if her evidence may be correct it does not establish that the Accused held himself out to be a representative of the Red Cross.

183. The Trial Chamber rejects as untrue the Accused's evidence that, if he did give Mujo Halilovic a piece of paper, it would only have recorded his address on the paper. The Accused said in his evidence that he could not remember giving a piece of paper to Mujo Halilovic but that, if he did so, it would only have contained his name and address. The Trial Chamber accepts the evidence that Mujo Halilovic walked past the house of the Accused nearly every day and as such it may reasonably be expected that Mujo Halilovic would already have known the Accused's address.[498] The Accused gave evidence that he was inebriated at the time to such an extent as to cloud his recollection of events. Even if that were true, it does not deny the fact that he did give Mujo Halilovic the piece of paper. The only evidence apart from that of the Accused himself which suggests that he was inebriated at that time was that of VG-87, the man who was hiding in the attic. He said that the Accused appeared to be under the influence of alcohol because he was barefoot and behaving in a childish manner.[499] He gave evidence that he was carrying a bottle.[500] VG-13 also gave evidence that the Accused was barefoot when he met with the group, and that he was holding a half-litre bottle of brandy.[501] There is some evidence that Mujo Halilovic had some brandy with him,[502] but this does not detract from the evidence that the Accused did hand him a piece of paper which gave a guarantee of their safety.

184. The Trial Chamber is not satisfied that the Accused misled the Koritnik group by wearing an armband with a red cross on it, thereby suggesting that he was working for the Red Cross. The evidence on that point is confused and contradictory, and the Trial Chamber is of the opinion that no safe finding could be made on the basis of that evidence.[503]

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[496] VG-13 (T 1436).
[497] Ex D 4.
[498] The Accused (T 2182-2183).
[499] VG-87 (T 1091, 1107).
[500] VG-87 (T 1091).
[501] VG-13 (T 1487). VG-13 also said that the Accused was wearing ribbons on his hat (VG-13, T 1502).
[502] VG-13 (T 1486); VG-18 (T 1579).
[503] A number of Defence witnesses, including the Accused himself, gave evidence that he was wearing a red ribbon when he fell off the horse. *See* Ratomir Simsic (T 2816); Zivorad Savic (T 2920); Miloje Novakovic (T 3034); Petar Mitrovic (T 2759-2760). The Accused testified that he was wearing a red ribbon to note that he was working in the task of cleaning the town (The Accused, T1897-1898, 2081). The Accused denied ever wearing the Red Cross insignia (The Accused, T 2184-2186). Other Defence witnesses gave evidence that the red ribbon that the

185. The Trial Chamber rejects the Defence argument that the Accused was not seeking to keep the group together, and that they kept together because they had no other alternative accommodation. The Trial Chamber is satisfied that the Accused intended to ensure that the group remained together, regardless of whether the representations made by the Accused were the sole reason of the group staying together. VG-18 claimed that she and her relatives were standing in front of Jusuf Memic's house still pondering where to go when the Accused addressed the group and told them to remain together.[504] VG-18 said that, had it not been for the instructions of the Accused and for his assurances, the group would have otherwise dispersed both as a security measure, and because some members of the group had relatives living elsewhere in town and were planning to stay with them. She claimed that the group believed the Accused when he told them that he was responsible for refugees and that they would be safe.[505] She also maintained, however, that one of her neighbours said they should spread out and that this neighbour had left to look for her aunt and uncle who had a house in the vicinity. This neighbour returned when she found them dead inside the house.[506] VG-101 said that she had already started out for a different house when the Accused called out from in front of Jusuf Memic's house for them to return and to remain together.[507] She said that, although they were a large group and would have needed two or three houses, the Accused told them to go into a single house.[508] VG-78, her sister, said that the Accused told them to go into the Memics' houses and to spend the night there.[509] VG-61's father stated that his sons owned houses in the vicinity, but that he had been unable to find a neighbour willing to protect them there, so that he and his relatives did not dare go and stay in these houses but settled with the rest of the group.[510]

186. The evidence before the Trial Chamber is inconsistent in relation to the house into which the Koritnik group went. There was some evidence that the group settled in the two Memic houses,

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Accused regularly wore at the time had some white in it and was reminiscent of the Red Cross emblem (VGD-22, T 2361; Dragisa Lindo, T 2433). Miloje Novakovic mentioned the sign of the Red Cross in his statement to the Defence but not during his testimony (Miloje Novakovic, T 3042-3045). Other witnesses were asked what the Accused was wearing and they did not mention any armband, although they were not specifically asked about it (VG-61, VG-101, VG-78, VG-38, VG-13, VG-18, VG-77, VG-115). None of the Prosecution witnesses relevant to this incident mentioned the red arm band in their testimonies. Only VG-80, who purported to identify the Accused in the month of June, said that she saw him with a red-coloured ribbon around his arm (VG-80, T 732-734). For a discussion of the reliability of this identification evidence, *see* par 91. VG-87 and VG-84 were expressly asked about it; the former denied having seen a red ribbon on the Accused, and the latter could not remember (VG-87, T 1107; VG-84, T 1762).

[504] VG-18 (T 1610-1611).
[505] VG-18 (T 1609).
[506] VG-18 (T 1574).
[507] VG-101 (T 1197-99).
[508] VG-101 (T 1159).
[509] VG-78 (T 1285-1286). However she had also given evidence that he had, together with others, accompanied the group there (VG-78, T 1285). *See* par 171.
[510] Ex P 145 (T 894).

which were next to each other, but it remains unclear when exactly the group were gathered into a single house, the house of Jusuf Memic.[511] VG-61's father claimed that the group was gathered into one house when the looters arrived,[512] VG-13 claimed that it was after the Accused had given them the written safety guarantee,[513] while VG-38 said that it was before that event.[514] VG-78 claimed that the group was placed in both of the Memic houses, and that the majority of them went into the house of Jusuf Memic.[515] VG-101, VG-84 and VG-18 stated that they just went into the house of Jusuf Memic. VG-101 and VG-18 claimed that at the time they went in, no one else had yet gone into the house.[516]

187. Although the Trial Chamber is not satisfied that the Prosecution has established that the Accused forced the group into a single house, the Trial Chamber is satisfied from all the evidence that the Accused did seek to ensure that the group stayed together. He did this by his insistence that they do so and also by his assurances that they would be safe if they stayed together because the guarantee he had given Mujo Halilovic would ensure they would not be harmed. The Trial Chamber is also satisfied that the Accused did so because he knew that some evil was to befall them.

D. Factual Findings

188. The Prosecution alleges that the Accused incurred individual criminal responsibility for the murder and mistreatment of the Muslim civilians locked in the house as a participant in a joint criminal enterprise to kill or mistreat them, as charged in the Indictment them pursuant to Article 7(1) of the Statute. To establish the Accused's responsibility on this basis, the Prosecution must establish that the Accused entered into an agreement with the group led by Milan Lukic to murder or mistreat these people, and that each of the participants, including the Accused, shared the intent of this crime.[517] The Trial Chamber is not satisfied that the Prosecution has established that the Accused either entered into such an agreement or had the intent to kill these persons or to inflict inhumane acts against them.

189. The Trial Chamber does not accept the Prosecution's assertion that the plan to kill or mistreat the group as charged in the Indictment was first conceived when the Accused approached the group and sought to persuade them to remain together in the Memics' houses in Pionirska

[511] VG-13 (T 1431); VG-38 (T 1366); Ex P 145 (Ex P 146) (T 894); VG-78 (T 1285-1286).
[512] Ex P 145 (T 895).
[513] VG-13 (T 1435).
[514] VG-38 (T 1367).
[515] VG-78 (T 1287).
[516] VG-18 (T 1580); VG-84 (T 1661); VG-101 (T 1160-1161).
[517] *See* pars 63-69.

Street.[518] Such a submission appears to suggest that the plan was conceived by the Accused, rather than by Milan Lukic. There is no basis in the evidence for that submission. It is pure speculation. The Prosecution's case is that everything said by the Accused to the group was intended to trick the group into remaining at the Memics' houses so that he could go and find Milan Lukic and his accomplices to commit the crimes against the victims he identified and selected.[519] The Prosecution submits that the Accused's criminal intent is obvious from the fact that it was the Accused who wanted the group to remain together and that there can be no other reason for that fact other than the Accused had murder in mind.[520] Again, this is pure speculation on the Prosecution's part.

190. The Prosecution alternatively says (for the purposes of showing that the Accused aided and abetted those who did burn the house down) that the Accused knew that the group from Kortinik were to be killed or otherwise mistreated as pleaded in the Indictment. However, the evil which was to befall on them which the Accused had in mind may well have been, for instance, the forcible transfer of the victims to a non-Serb area. The Trial Chamber does not accept that the knowledge which the Prosecution must establish would be the only reasonable inference from the evidence. The fact that the Accused had recently taken part in shooting seven Muslim men in the Drina River incident is not a sufficient basis for a conclusion that the eventual death of these particular Muslims was the intent of the Accused in what he did.

191. In the present case, the Trial Chamber is satisfied that the Accused deliberately tried to keep the Koritnik group together. The Trial Chamber is also satisfied that the Accused knew that, for lack of a better expression, some evil would befall on them. The Prosecution has failed, however, to identify that evil and to establish what the Accused knew was to happen. As already stated, the Trial Chamber can only make a finding of guilt if its conclusion is the only reasonable conclusion available. The Trial Chamber does not accept that the only reasonable conclusion in this case is that the Koritnik group would be subjected to murder, extermination or inhumane acts as defined above.[521] To give just one reason why it cannot draw such a conclusion, the Trial Chamber points out that, at the relevant time, ethnic cleansing of non-Serb residents in the form of forced transfer and deportation was widespread in the Višegrad area, the Accused may well have thought that those people would likewise be forcibly transferred or deported, rather than being killed or subjected to inhumane acts as charged in the Indictment. Furthermore, and for the sake of completeness, had the Trial Chamber been satisfied that the Accused knew that those people would be mistreated, there was no evidence that he contributed thereto otherwise than by convincing them to stay together.

[518] Prosecution Closing Arguments (T 4778).
[519] Prosecution Closing Arguments (T 4825).
[520] Prosecution Closing Arguments (T 4819-4825).
[521] "Persecution" will be discussed in a separate section below, pars 244 *et seq*.

There is no evidence that the Accused went to Milan Lukic to tell him of the whereabouts of the Koritnik group, as the Prosecution has suggested.[522] It is certainly not the only reasonable inference available.

192. The Trial Chamber is not satisfied that the only inference available on the evidence is that the Accused knew that the members of the Koritnik group were to be killed or otherwise mistreated in the manner described in the Indictment.[523]

[522] *See* above, par 189.
[523] *See* above, par 191.

VIII. VIOLENCE TO LIFE AND PERSON

A. The Law

193. The Accused is charged pursuant to Article 3 of the Statute with "violence to life and person".[524] Common Article 3 of the 1949 Geneva Conventions lists "violence to life and person" as one of the acts which must be prohibited at any time and in any place in the case of an armed conflict not of an international character.[525] The Appeals Chamber in *Tadic* stated that "customary international law imposes criminal liability for all serious violations of common Article 3".[526] This statement satisfies at once the first two requirements which must be met before a Trial Chamber may convict an accused for committing an offence under customary international law, namely, that the conduct in question is regarded as criminal under that body of law and that individual criminal responsibility may be imposed in case of breach. It may also be accepted that "violence to life and person" generally constitutes a "serious" violation of common Article 3.[527] However, the Trial Chamber must further satisfy itself that the criminal conduct in question was sufficiently defined and was sufficiently accessible at the relevant time for it to warrant a criminal conviction and sentencing under the criminal heading chosen by the Prosecution, in this case "violence to life and person". From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.[528]

194. The *Blaškic* Trial Chamber defined "violence to life and person" as "a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences".[529] The Trial Chamber added that the *mens rea* for this offence is "characterised once it has been established that

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[524] Counts 7 and 13 of the Indictment.
[525] *See*, Common Article 3(1)(a) of the Geneva Conventions of 12 August 1949. *See*, also, Article 4(2)(a) of Additional Protocol II to the Geneva Conventions of 12 August 1949 and Article 75(2)(a) of Additional Protocol I to the Geneva Conventions of 12 August 1949.
[526] *Tadic* Appeal Jurisdiction Decision par 134.
[527] The Trial Chamber makes no definite finding in that respect.
[528] *See*, eg, *SW v. United Kingdom*, Judgment of 22 Nov 1995, Ser A 335-B, p. 42; *G v France*, Judgment of 27 Sept 1995, Ser A 325-B, p 38; *Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), p 22. Those three decisions are from the ECHR.
[529] *Blaškic* Trial Judgment par 182.

the accused intended to commit violence to life or person of the victims deliberately or through recklessness".[530] Unfortunately, the *Blaškic* Trial Chamber omitted to identify the source of these propositions – in particular, relevant instances of state practice – upon which it relied to state them. The Prosecution did not provide any assistance on this point, despite the Trial Chamber's request for assistance.[531] The Trial Chamber itself has been unable to find any conclusive evidence of state practice – prior to 1992 – which would point towards the definition of that crime, despite the parties' submissions in this present case.

195. Both "life" and the "person" are protected in various ways by international humanitarian law. Some infringements upon each of these protected interests are regarded as criminal under customary international law. It is so, for instance, of murder, cruel treatment, and torture. But not every violation of those protected interests has been criminalised, and those that have, as with the three offences just mentioned, have usually been given a definition so that both the individual who commits the act and the court called upon to judge his conduct are able to determine the nature and consequences of his acts. The residual character of a criminal prohibition such as Article 3 of the Statute does not by itself provide for the criminalisation by analogy to any act which is even vaguely or potentially criminal,[532] and the statement by the Appeals Chamber in *Tadic* already quoted does not repair the absence of any definition of the crime at the time of the acts charged in the particular case.

196. The principle of *nullum crimen sine lege* "does not prevent a court from interpreting and clarifying the elements of a particular crime".[533] Nor does it preclude the progressive development of the law by the court.[534] But under no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal.

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[530] *Blaškic* Trial Judgment par 182.

[531] On 1 February 2002, the parties were requested by the Trial Chamber to provide assistance in respect of a number of issues, including the definition of "violence to life and person" under customary international law (Notice addressed to the Parties, *Issues Upon Which the Assistance of the parties is Sought*). It was subsequently made clear to the Prosecution that this request of assistance in relation to "violence to life and person" was directed to the identification of relevant state practice which would support the definition of that crime under customary international law as given in the *Blaškic* Trial Judgment (*see*, T 4827-4829). As a result of the Trial Chamber's request, the Prosecution filed its "Submission by the Prosecution on the Law with Respect to 'Violence to Life and Person", 28 Mar 2002, and the Defence filed its "Submission by the Defence on the Law with Respect to 'Violence to Life and Person'" on 12 Apr 2002.

[532] *See*, Submission by the Prosecution on the Law with Respect to 'Violence to Life and Person', 28 Mar 2002, pars 9 and 13, citing Pictet (ed), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), pp 38-39.

[533] *Aleksovski* Appeal Judgment, pars 126-127; *Delalic* Appeal Judgment, par 173.

[534] *See*, *eg, Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), pars 36 and 40 (*ECHR*); *EV v Turkey*, Judgment, 7 Feb 2002, par 52; *SW v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-B (1995), pars 35-36 (*ECHR*); *C.R v United Kingdom*, Judgment, 22 Nov 1995, Ser A 335-C (1995), par 34 (*ECHR*).

197. The scope of the Tribunal's jurisdiction *ratione materiae* is determined by customary international law as it existed at the time when the acts charged in the indictment were allegedly committed.[535] This limitation placed upon the jurisdiction of the Tribunal is justified by concerns for the principle of legality.[536] As stated by the Secretary-General,[537]

> ?…g in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to *legislate* that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.

198. Accordingly, the Tribunal's Statute was not intended to create new criminal offences.[538] Instead, as stated by the Appeals Chamber, in establishing the Tribunal, the Security Council "simply created an international mechanism for the prosecution of crimes which were already the subject of individual criminal responsibility".[539] The fact that an offence is listed in the Statute, or comes within Article 3 of the Statute through common article 3 of the Geneva Conventions, does not therefore create new law, and the Tribunal only has jurisdiction over any listed crime if it was recognised as such by customary international law at the time the crime is alleged to have been committed. Each Trial Chamber is thus obliged to ensure that the law which it applies to a given criminal offence is indeed customary.[540] The Trial Chamber must further be satisfied that this offence was defined with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law.[541]

199. The Trial Chamber must be satisfied that a given act is criminal under customary international law, because, for instance, a vast number of national jurisdictions have criminalised it or a treaty provision which provides for its criminal punishment has come to represent customary

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[535] *See Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-PT, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, 2 Mar 1999, pars 20 and 22. In order to determine the content of customary international law at the relevant time, the Trial Chamber cannot rely upon instances of state practice which are posterior to the acts under consideration other than to confirm the existence of the rule as it existed at the time of the acts. *See* also *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), pars 34-35.

[536] *See Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), pars 34-35.

[537] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), par 29.

[538] The Appeals Chamber clearly distinguished between the question of "criminalisation" of an act and that of its jurisdiction over it (*see*, *Delalic* Appeal Judgment, par 163).

[539] *Delalic* Appeal Judgment, par 170.

[540] *See*, *eg, Delalic* Appeal Judgment, par 170, where the Appeals Chamber said that the Tribunal has jurisdiction over crimes which were already subject to individual criminal responsibility prior to its establishment. *See* also, *Tadic Jurisdiction Decision*, par 94, in respect of Article 3 of the Statute.

[541] The Trial Chamber rejects the submission by the Prosecution that a distinction must be drawn between the principle of legality on the one hand and a so-called principle of specificity on the other, whereby the former would only be concerned with the existence of a criminal offence, while the latter would be concerned with the definition or elements of that offence (Submission by the Prosecution on the Law with respect to 'Violence to Life and Person', 28 Mar 2002, par 5).

international law.[542] On the other hand, as stated by the *Delalic* Appeals Chamber, "a finding of individual criminal responsibility is not barred by the absence of treaty provision on punishment of breaches".[543] The Trial Chamber may also, as suggested by the Appeals Chamber, be satisfied that, in the language of the ICCPR, those acts were "criminal according to the general principles of law recognized by the community of nations".[544] For criminal liability to attach, it is not sufficient, however, merely to establish that the act in question was *illegal* under international law, in the sense of being liable to engage the responsibility of a state which breaches that prohibition,[545] nor is it enough to establish that the act in question was a crime under the domestic law of the person who committed the act.

200. It is important to underline that, when it comes to sources of international law, Draft Codes of the International Law Commission merely represent a subsidiary means for the determination of rules of law. They may reflect legal considerations largely shared by the international community, and they may expertly identify rules of international law, but they do *not* constitute state practice relevant to the determination of a rule of customary international law.

201. Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible. When making that assessment, the Trial Chamber takes into account the specificity of international law, in particular that of customary international law.[546] The requirement of sufficient

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[542] For an example of the first scenario, *see Furundžija* Trial Judgment, pars 177-186 and *Kunarac* Trial Judgment pars 438-460 in respect of the offence of rape. For an example of the second scenario, *see Delalic* Appeals Judgment, pars 163-167 in respect of serious violations of Common Article 3 of the Geneva Conventions.

[543] *Delalic* Appeal Judgment, par 162. Some treaty provisions do provide expressly for criminal sanctions, while some others have acquired such a criminal character over time, and some of those have even crystallised into a rule of customary law the breach of which entails the criminal liability of the person who committed the act. This is the case, for instance, of serious violations of common Article 3 of the 1949 Geneva Conventions (*see*, *Tadic* Jurisdiction Decision pars 128-137).

[544] Article 15(2) of the ICCPR. *See Delalic* Appeals Judgment, par 173, which mistakenly quotes the text of Article 7(2) of the ECHR instead of Article 15(2) of the ICCPR. Although the wording of those two articles are different, their function is essentially identical. *See* also Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No 10 ("*High Command* case"), Vol 11, 509. *See* also Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No 10, Vol 3 ("*Justice* case"), 966.

[545] A finding to the effect that a given norm is binding *upon a state – qua* custom or treaty law – does not entail that its breach may also engage the criminal liability of the individual who committed the act, let alone that it may have that effect under customary international law. *See Kunarac* Trial Judgment par 489.

[546] *See*, *eg,* Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No 10, Vol 3 ("*Justice* case"), pp 974-975. *See* also, *Groppera Radio AG and Others v Switzerland*, Judgment, 28 Mar 1990, Ser A 173, par 68.

clarity of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context.[547]

202. If customary international law does not provide for a sufficiently precise definition of a crime listed in the Statute, the Trial Chamber would have no choice but to refrain from exercising its jurisdiction over it, regardless of the fact that the crime is listed as a punishable offence in the Statute. This is so because, to borrow the language of a US military tribunal in Nuremberg, anything contained in the statute of the court in excess of existing customary international law would be a utilisation of power and not of law.[548]

203. In the absence of any clear indication in the practice of states as to what the definition of the offence of "violence to life and person" identified in the Statute may be under customary law, the Trial Chamber is not satisfied that such an offence giving rise to individual criminal responsibility exists under that body of law.[549]

204. The Trial Chamber therefore acquits the Accused of the charge of violence to life and person pleaded in Counts 7 (Drina River incident) and 13 (Pionirska Street incident) of the Indictment.[550]

[547] *See*, for instance, *Sunday Times v United Kingdom*, Judgment, 26 Apr 1979, Ser A 20 (1979), par 49 (*ECHR*); *Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), par 52 (*ECHR*); *EK v Turkey*, Judgment, 7 Feb 2002, par 51 (*ECHR*); *X v Austria*, Appl No 8490/79, 12 Mar 1981, 22 DR 140 (1081) (*EComHR*).

[548] For a similar reasoning and similar wording in respect of Control Council Law No 10*, see* Trials of War Criminals Before The Nuremberg Military Tribunals Under Control Council Law No 10 (" *Hostage* case"), Vol 11, 1240.

[549] The Prosecution, which was requested to assist the Chamber in that respect, also failed to find any instances of state practice which would be indicative of what the definition of "violence to life and person" might be under customary international law. As useful as the *Commentaries* to the 1949 Geneva Conventions may be *to interpret* the Conventions, they do not constitute state practice (*see*, Submission by the Prosecution on the Law with Respect to 'Violence to Life and Person', 28 Mar 2002, par 14). The Trial Chamber need not and does not make any finding as to whether the prohibition against "violence to life and person" is binding upon states (as opposed to individuals) *qua* customary international law.

[550] The Trial Chamber is satisfied that the other criminal offences charged in the Indictment are firmly established as crimes under customary international law.

IX. MURDER

A. The Law

205. Counts 4, 5, 10 and 11 charge the Accused with murder, a well-defined crime under customary international law.[551] The elements of the definition of "murder" under customary international law are as follows:[552]

1. The victim is dead.
2. The death was caused by an act or omission of the accused, or of a person or persons for whose acts or omissions the accused bears criminal responsibility.
3. That act was done, or that omission was made, by the accused, or a person or persons for whose acts or omissions he bears criminal responsibility, with an intention:

   to kill, or

   to inflict grievous bodily harm, or

   to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death.

B. Conclusions based upon factual findings relevant to these counts and responsibility of the Accused

1. Drina River incident

206. The Indictment charges the Accused with individual criminal upon the basis that he personally perpetrated the crime of murder of the Muslim men. The Prosecution has never suggested that he killed all five men who died in this incident. The Trial Chamber's finding that it was not satisfied that the Accused fired his weapon at the same time as the other three men with weapons would prevent a finding that the Accused personally perpetrated the crime of murder in

[551] Many individuals were convicted for murder, either as a war crime or a crime against humanity, for their actions during the Second World War. Further, every domestic legal system provides for the criminalisation, the punishment and the definition of such a crime. *See*, *eg, Krnojelac* Trial Judgment, par 324; *Kvocka* Trial Judgment, par 132; *Krstic* Trial Judgment, par 485; *Kordic and Cerkez* Trial Judgment, par 235-236; *Kupreškic* Trial Judgment, pars 560-561; *Blaškic* Trial Judgment, par 217; *Jelisic* Trial Judgment, par 35; *Delalic* Trial Judgment, pars 422 and 439; *Prosecutor v Akayesu*, Case ICTR-96-4-T, Judgment, 2 Sept 1998 ("*Akayesu* Trial Judgment"), pars 587-589; *Prosecution v Rutaganda,* Case ICTR –96-3-T, Judgment, 6 Dec 1999 ("*Rutaganda* Trial Judgment"), par 79.

[552] *Ibid*.

relation to one or more of those five men. But the Prosecution case has, since at least the Pre-Trial Conference, always been that the Accused participated in a joint criminal enterprise to murder the seven Muslim men. That is the way in which the trial was conducted.

207. To attach criminal responsibility to the Accused for the joint criminal enterprise of murder, the Prosecution must establish that there was an agreement among the Accused, Milan Lukic and the other two unidentified men that the seven Muslim men would be murdered, and that each of those persons, including the Accused, shared the intent that they would be murdered.

208. The Trial Chamber is satisfied that the only reasonable inference to be drawn from the evidence is that there was an understanding amounting to an agreement between Milan Lukic, the Accused and the two unidentified men to kill the seven Muslim men. The Trial Chamber is satisfied that the only reasonable inference available on the evidence is that the Accused, by his actions, intended that the seven Muslim men be killed, whether or not he actually carried out any of those killings himself.[553]

209. The Trial Chamber is satisfied that the Accused personally participated in this joint criminal enterprise by preventing the seven Muslim men from fleeing by pointing a gun at them while they were detained at the Vilina Vlas Hotel, by escorting them to the bank of the Drina River and pointing a gun at them to prevent their escape, and by standing behind the Muslim men with his gun together with the other three offenders shortly before the shooting started.[554]

210. As pointed out above, if the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.[555] The Trial Chamber is therefore satisfied that the Accused incurs individual criminal responsibility for the murder of the five Muslim men as a participant in a joint criminal enterprise to murder. In those circumstances, it is unnecessary to deal with the further alternative basis of criminal responsibility upon which the Prosecution relies – that of aiding and abetting.

211. Accordingly, the Trial Chamber finds that the Accused incurred individual criminal responsibility for the crime of murder (as a crime against humanity) under Count 4 of the Indictment, and of the crime of murder (as a violation of the laws or customs of war) under Count 5 of the Indictment in respect of Meho Džafic, Ekrem Džafic, Hasan Kustura, Hasan Mutapcic and Amir Kurtalic.

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[553] *See* above, par 66.
[554] *See* above, pars 112-114.
[555] *See* above, par 67.

2. Pionirska Street Incident

212. The Prosecution alleges that the Accused incurred individual criminal responsibility for the murder of about 70 Muslims as a participant in a joint criminal enterprise to kill this group of people pursuant to Article 7(1) of the Statute.[556] To establish the Accused's responsibility on this basis, the Prosecution must establish that the Accused entered into an agreement with the Milan Lukic group to murder these people and that each of the participants, including the Accused, shared the intent of this crime.[557] The Trial Chamber is not satisfied that the Prosecution has established that the Accused either entered into such an agreement or had the intent to murder these people.

213. As pointed out above,[558] the Prosecution did not rely upon the extended form of joint criminal enterprise, so that the Accused cannot be held responsible for the natural and foreseeable consequences of effecting any joint criminal enterprise he may have agreed to commit a lesser crime. The Prosecution has therefore failed to establish that the Accused was part of a joint criminal enterprise to kill the Muslims locked in the house on Pionirska Street.

214. The Prosecution has also alleged that the Accused incurred individual criminal responsibility for the murder of about 70 people as an aider and abettor to the principal offenders of those murders. To establish the Accused's responsibility as an aider and abettor to the principal offenders, the Prosecution must establish that he was aware of the intent of the principal offenders, and that he carried out acts which rendered a substantial contribution to the commission of the intended crime by the principal offenders.[559] The Trial Chamber is satisfied that the acts of the Accused in seeking to ensure that the group stayed together contributed to the commission of the crime by the principal offenders, but it is not satisfied, however, that the Accused was aware that the intent of the principal offenders was to murder members of the Kortinik group. The Accused cannot therefore be found to have incurred individual criminal responsibility as an aider and abettor to the murder of the members of the Kortinik group.

215. The Accused is therefore acquitted of the charge of murder (as a crime against humanity) in Count 10 of the Indictment and of the charge of murder (as a violation of the laws or customs of war) in Count 11 of the Indictment.

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[556] *See* above, pars 116-117.
[557] *See* above, pars 65-68.
[558] *See* above, par 63.
[559] *See* above, pars 70-71.

X. EXTERMINATION

A. The Law

216. The Indictment charges the Accused with "extermination" as a crime against humanity (Article 5(b) of the Statute), in relation to the Pionirksa Street incident only.[560]

217. In the discussions leading up to the adoption of the Nuremberg Charter, "extermination" was considered for the first time as an independent criminal offence rather than as a descriptive device encapsulating the commission of killings on a vast scale.[561] The phrase first appeared in Nuremberg in an American draft text for the Nuremberg Charter submitted to the other Allied delegations on 25 July 1945.[562] The phrase disappeared in three subsequent drafts only to re-appear on 31 July 1945 in a revised version of a draft once again submitted by the American delegation headed by Mr Justice Robert H Jackson. The crime of "extermination" was later included in Article 6(c) of the Nuremberg Charter as well as in the Nuremberg Indictment as a crime against humanity,[563] but its definition was apparently not discussed or commented upon in the course of the debates between the representatives of the four Allied Powers nor, it appears, at any other point before the adoption of the Charter.[564]

218. The meaning and function of that phrase was clarified to some extent in the pronouncements made by the then US Chief Prosecutor, Mr Justice Jackson. In his Opening Speech, Mr Justice Jackson stated that "?tghe Nazi conspiracy ?…g always contemplated not merely overcoming current

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[560] Prosecution's Pre-Trial Brief, pars 7 and 145. The charges against this Accused in relation to the *Bikavac* incident have been withdrawn on the Prosecutor's motion of 12 July 2001 (*see* Prosecutor's Pre-Trial Brief, par 43).

[561] Earlier references to "extermination" as a factual descriptive device may be found, for instance, in one of the so-called *Leipzig* cases rendered by the German Supreme Court in Leipzig immediately following the First World War; in the case against Hans von Schack and Benno Kruska, the Supreme Court referred to an intentional typhus epidemic in a prisoners-of-war camp as a "weapon of extermination" (Transactions of the Reichstag, First Legislature, Vol 368, Nos 2254-2628, *In re* Hans von Schack and Benno Kruska, 7 July 1921 (printed text of the verdicts issued by the Supreme Court of the German Reich on the basis of the laws of 18 December 1919 and 24 Mar 1920, p 90).

[562] Redraft of Definitions of "Crimes", Submitted by American Delegation, 25 July 1945, in *Report of Robert H Jackson, United States Representative to the International Conference on Military Trials*, London, 1945.

[563] Count 4 of the Nuremberg Indictment (*Crimes against Humanity*) provided that "?since the 1st September 1939, the persecution of the Jews was redoubled; millions of Jews from Germany and from the occupied Western Countries were sent to the Eastern Countries for extermination". It went on to list Jewish victims of mass murders and stated that "?many concentration camps and ghettos were set up in which Jews were incarcerated and tortured, starved, subjected to merciless atrocities and finally exterminated. About 70,000 Jews were exterminated in Yugoslavia".

[564] Egon Schwelb, legal officer for the United Nations War Crimes Commission, suggested that the drafters of the Nuremberg Charter may have included the crime of extermination in order to "bring the earlier stages in the organization of a policy of extermination under the action of law, and that steps which are too remote from an individual act of homicide to constitute complicity in that act may be punishable as complicity in the crime of extermination" (E. Schwelb, "Crimes against humanity", 1946 *British Yearbook of International Law,* 178, 192).

opposition, but exterminating elements which could not be reconciled with its philosophy of the State".[565] Further, Mr Justice Jackson referred to the Nazi plan "to exterminate peoples and institutions", in particular the Jews, the Poles, the Serbs and the Greeks.[566] After describing various German military campaigns, Mr Justice Jackson added that the Nazis targeting of Jews "never was limited to extermination in Germany; always it contemplated extinguishing the Jews in Europe and often in the world. ?…g I shall refer only to enough of the evidence of these to show the extent of the Nazi design for killing Jews".[567] When addressing the issue of Nazi "scientific" experiments, Mr Justice Jackson also referred to the extermination of "undesirables".[568] Finally, in relation to criminal intent, Mr Justice Jackson warned the court that, although "a few defendants may show efforts to make specific exceptions to the policy of Jewish extermination", he was unaware of any instance "in which any defendant opposed the policy itself or sought to revoke or even modify it".[569]

219. The Judgment of the International Military Tribunal at Nuremberg contains many references to the concept of "extermination". In essence, the phrase refers to a wide scale enterprise directed against members of large groups of individuals – such as the Jews, the Poles, mentally retarded, the Communists – which leads or has the potential to lead to large scale killing of such individuals, regardless of the means or methods used to kill them.[570]

220. This interpretation of "extermination" as killings committed on a mass scale is further supported by the 1948 *History of the United Nations War Crime Commission*, which stated that the phrase "extermination" as it appeared in Article 6(c) of the Nuremberg Charter "is apparently to be interpreted as murder on a large scale – mass murder".[571] The Commission went on to add that -

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[565] *Opening Speeches of the Chief Prosecutors*, The Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg, Germany, 20 November 1945, p 13.

[566] *Ibid*, pp 14 and 18: "The persecution policy against the Jews commenced with non-violent measures, such as disfranchisement and discriminations against their religion, and the placing of impediments in the way of success in economic life. It moved rapidly to organised mass violence against them, physical isolation in ghettos, deportation, forced labour, mass starvation, and extermination. ?…g The conspiracy or common plan to exterminate the Jew was so methodically thoroughly pursued, that despite the German defeat and Nazi prostration this Nazi aim largely succeeded. Only remnants of the European Jewish population remain in Germany, in the countries which Germany occupied, and in those which were her satellites or collaborators."

[567] *Ibid*, pp 21-22.

[568] *Ibid*, p 26.

[569] *Ibid*, p 25.

[570] *See*, *eg,* pars 49, 51, 58, 60-61 and 72-73 of the Judgment of the International Military Tribunal in Nuremberg ("IMT"). The expression is sometimes also used to describe a factual situation – the execution and liquidation of large numbers of people (*see*, *eg,* par 75) – or a means to an end – the elimination of Jews in the course of a genocidal enterprise, for instance (*see*, *eg,* pars 60, 76-77). Extermination through shooting, gas chambers, extermination through work or through starvation were all considered, non-exhaustively, in the context of the extermination of large numbers of individuals.

[571] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, Compiled by the United Nations War Crimes Commission, 1948, p 194.

> The inclusion of both "extermination" and "murder" may be taken to mean that implication in the policy of extermination, without any direct connection with actual criminal acts of murder, may be punished as complicity in the crime of extermination.[572]

221. In addition, the Charter of the International Military Tribunal for the Far East ("Tokyo Charter"), the *Control Council Law No 10* and the *Nuremberg Principles* again listed "extermination" as one of the crimes which, all other conditions being met, could amount to a crime against humanity.[573]

222. Later decisions used the phrase "extermination" in the same manner and with essentially a similar meaning.[574] However, none of these courts made any real attempt at defining precisely this offence or at distinguishing it from other crimes against humanity.[575] It is worth noting that in none of the reviewed cases were minor figures charged with "extermination" as a crime against humanity. Those who were charged with that criminal offence did in fact exercise authority or power over many other individuals or did otherwise have the capacity to be instrumental in the killing of a large number of individuals. Those, such as executioners, who were not in such position but who had participated in the killing of one or a number of individuals were generally charged with murder or related offences whilst the charge of "extermination" seems to have been limited to individuals who, by reason of either their position or authority, could decide upon the fate or had control over a large number of individuals.[576]

223. Other international or national instruments contain references to "extermination". Thus, for instance, Article 32 of the IV Geneva Convention of 1949 provides that:

> The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or *extermination* of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents. (emphasis added)

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[572] *Ibid*.

[573] Article 5(c) of the *Tokyo Charter*; Article II (1)(c) of *Control Council Law No 10.* Principle VI(c) of the *Principles of International Law Recognised in the Charter of Nuremberg and in the Judgment of the Tribunal*, 1950; *see* also Article I(b) of the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, adopted by General-Assembly on 26 November 1968, which makes a renvoi to the definition of crimes against humanity in the Nuremberg Charter.

[574] *See*, *inter alia*, *United States v Ohlendorf and others* ("*Einsatzgruppen* case"), IV Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10, *eg,* p 411, 412, 420, 432, 439, 441, 448, 451, 453, 476-477, 511; *United States v Alstoetter and others* ("*Justice* case"), III Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10, *eg,* p 1063; *United States v Brandt and others* ("*Medical* case"), II Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10, *eg,* p 188-189; *see* also references in footnote 1132 of *Krstic* Trial Judgment, page 175.

[575] *Krstic* Trial Judgment, par 492: "?Aglthough the crime of extermination was alleged, the judgments ?of earlier World War II courtsg generally relied on the broader notion of crimes against humanity and did not provide any specific definition of the term 'extermination'."

[576] *See*, *eg,* IMT Judgment, in respect of Goering par 83; Ribbentrop par 87-88; Kaltenbrunner, par 91; Frank, par 95; Julius Streicher, par 99. *See* also, *United States v Ohlendorf and others* ("*Einsatzgruppen* case"), IV Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10.

The Commentary of that provision, which distinguishes between "murder" and "extermination", insists on the latter's collective character and states that:

> The idea of "murder" may be compared with that of "extermination", in the first sentence of this Article. While murder is the denial of the right of an individual to exist, extermination refuses the same right to whole groups of human beings; it is a collective crime consisting of a number of individual murders.[577]

224. In May 1960, Israeli forces transferred Adolph Eichmann from Argentina to Israel to put him on trial for various criminal offences, including for extermination as a crime against humanity and for crimes against the Jewish people, a variant of the crime of genocide. At no time before Eichmann's trial had so many references to "extermination" been made. The phrase is variously and extensively used in the judgment of the District Court of Jerusalem as a synonym for killing on a vast scale, annihilation, extinction, death, elimination.[578] The difficulty in determining what the court meant when using the phrase "extermination" stems in part from the fact that in its Judgment the court referred to the crime of extermination as a crime against humanity but also to the extermination of the Jewish people, that is, to killing on a vast scale for the purpose of committing a genocide.[579] The intermingling in the Judgment of the factual basis relevant to both "extermination" as a crime against humanity and "extermination" as a means to a genocidal end, as well as the descriptive function of that phrase in the Judgment, makes it difficult to identify the precise elements of the definition of "extermination" as a crime against humanity which the Israeli court adopted. The following factors may, however, be identified in this judgment: "extermination" refers to killing on a vast scale; it is directed towards members of a collection of individuals (*eg*, the Jews); the method used to carry out the killing is irrelevant; knowledge of the vast murderous enterprise is required.

225. In addition to the criminalisation of the act of "extermination" as described above, the Trial Chamber notes that various other forms of arbitrary deprivation of life have been criminalised under

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[577] Pictet (ed), *Commentary on IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1958), p 223.

[578] *See*, *eg, Attorney-general v Adolph Eichmann*, District Court of Jerusalem, Criminal Case No. 40/61, translated and re-printed in 36 *ILR* 5ff, pars 11, 33, 35, 38, 79, 93, 110, 111, 117, 120, 122, 126, 127, 155, 162-165, 167, 169, 182, 186, 190-191, 194, 195 and 201. In relation to the appeal in this case, *see*, *inter alia*, pars 15-16 of the Israeli Supreme Court Decision, (1962) 16 Piske Din, 2033 *et seq*., translated and re-printed in 36 *International Law Report* ("ILR"), pp 277ff.

[579] The 1950 Israeli *Law on the Doing of Justice to Nazis and their Collaborators* lists "extermination" as a crime against humanity. In the discussions leading up to the adoption of this law, Justice Minister Rosen appearing before the Israeli Parliament alluded to the "extermination" of the Jewish people in the following terms: "The law regarding Nazis and Nazi Collaborators (Punishment), like the law currently discussed in the Knesset, regarding the crime of genocide, the prevention and punishment thereof, of which the Knesset has begun its second reading but has not completed its legislation, has again brought before the Knesset the tragic episode, the most tragic episode in the history of our nation, the episode of the campaign of destruction and annihilation, in which six million of our people were exterminated." (27-28 Mar 1950)

customary international law.[580] Depending on the gravity of the act, the manner, context and state of mind in which the act is committed, customary international law provides for several criminal offences which cover various forms of arbitrary deprivation of life, such as, "wilful killing" as a grave breach of the Geneva Conventions,[581] "murder" as a crime against humanity[582] or "killing members of the group" as an act of genocide.[583] All of them could, all other conditions being met, apply to the arbitrary killing of large numbers of civilians.

226. The Trial Chamber is satisfied that the legal meaning of "extermination" as a crime against humanity may be established on the basis accepted by those decisions and instruments adopted prior to 1992, and by the instruments and decisions referred to which have drawn out the elements and principles which underlie that basis. The Trial Chamber notes that several Trial Chambers have now defined the crime of "extermination" and, at times, entered convictions under that heading.[584] This Trial Chamber accepts that the definition laid in those cases is largely consistent with the principles which this Trial Chamber has adopted.[585]

227. This Trial Chamber concludes from the material which it has reviewed that criminal responsibility for "extermination" only attaches to those individuals responsible for a large number of deaths, even if their part therein was remote or indirect.[586] Responsibility for one or for a limited

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[580] "The killing of a human being has always been a potential crime which called for explanation. The person standing with drawn dagger over a fresh corpse must, by the very nature of justice, exonerate himself" (*United States v Ohlendorf and others* ("*Einsatzgruppen* case"), IV Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10, p 459).

[581] *See* Articles 50, 51, 130 and 147 of the respective I-IV Geneva Conventions of 1949. *See* also Article 2(a) of the Tribunal's Statute.

[582] *See* above, par 205.

[583] *See* Article II(a) of the *Genocide Convention*, which is reflected in Article 4(2)(a) of the Tribunal's Statute.

[584] Accused persons were convicted for "extermination" in the following cases: *Akayesu* Trial Judgment, pars 591-592 and 735-744; *Rutaganda* Trial Judgment, pars 82-84 and 403-418; *Prosecutor v Musema,* Case ICTR-96-13-T, Judgment, 27 Jan 2000 ("*Musema* Trial Judgment"), pars 217-219 and 942-951. The convictions for "extermination" were upheld on appeal in all three cases. In addition, the *Krstic* and *Kaysihema* Trial Chambers gave a definition of the offence of "extermination", although neither accused in those cases was convicted on that basis; the prohibition against double conviction precluded the Trial Chamber from doing so (*see*, *Krstic* Trial Judgment, pars 490-505 and 684-686; *Prosecutor v Kayishema and Ruzindana*, Case ICTR-95-1-T, Judgment, 21 May 1999 ("*Kaysihema and Ruzindana* Trial Judgment"), pars 141-147 and 576-579).

[585] *See*, however, next paragraph, par 227.

[586] The Trial Chamber notes that the definition of "extermination" in the "elements of crimes" which supplement the Statute of the ICC does not contain such a requirement. It was thought during the discussions of these "elements" that such a requirement would be over-burdensome for the Prosecution, and that it was therefore undesirable (*see*, eg, R. Lee *et al* (eds), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, p 83). Such concern must remain, for the purpose of *this* Tribunal, beyond the scope of its consideration, particularly when, as in the present case, the adoption of a more lenient definition would be prejudicial to the accused. The International Tribunal must apply the law as it finds it, not as it would wish it to be. Furthermore, the definition eventually adopted in the elements of crimes for the ICC is directly inspired by the definition of "extermination" given in the *Kayishema and Ruzindana* Trial Chamber Judgment, where it is stated that a limited number of killings or even one single killing could qualify as extermination if it forms part of a mass killing event (*Kayishema and Ruzindana* Trial Judgment, par 147). This Trial Chamber notes that the *Kayishema and Ruzindana* Trial Chamber omitted to provide any state practice in support of its ruling on that point, thereby very much weakening the value of its ruling as a precedent. No state practice has been found by this Trial Chamber which would support the finding of the *Kayishema and Ruzindana* Trial Chamber. Although the *Kayishema and*

number of such killings is insufficient. The Trial Chamber also concludes that the act of extermination must be collective in nature rather than directed towards singled out individuals.[587] However, contrary to genocide, the offender need not have intended to destroy the *group* or part of the group to which the victims belong.

228. It is also apparent from the material reviewed that it is not sufficient to establish extermination for the offender to have intended to kill a large number of individuals, or to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission was likely to cause death as in the case of murder. He must also have known of the vast scheme of collective murder and have been willing to take part therein.[588] As opposed to persecution pursuant to Article 5(h) of the Statute, it need not be established that he acted on any discriminatory grounds. Also, the ultimate reason or motives – political or ideological – for which the offender carried out the acts are not part of the required *mens rea* and are, therefore, legally irrelevant.[589]

229. The Trial Chamber therefore finds that the elements of the crime of "extermination" are as follows:

1. The material element of extermination consists of any one act or combination of acts which contributes to the killing of a large number of individuals (*actus reus*).
2. The offender must intend to kill, to inflict grievous bodily harm, or to inflict serious injury, in the reasonable knowledge that such act or omission is likely to cause death, or otherwise intends to participate in the elimination of a number of individuals, in the knowledge that his action is part of a vast murderous enterprise in which a large number of individuals are systematically marked for killing or killed (*mens rea*).

Ruzindana Trial Judgment went on appeal, the definition of "extermination" was not the subject of an appeal nor was it dealt with by the Appeals Chamber in any way (*Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-A, Judgment (Reasons), 1 June 2001).

[587] Most cases from the Second World War address thousands of death when using the term "extermination"; in one case, the court used the expression "extermination" when referring to the killing of 733 civilians (*United States v Ohlendorf and others* ("*Einsatzgruppen* case"), IV Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No 10, 421). The Trial Chamber is not aware of cases which, prior to 1992, used the phrase "extermination" to describe the killing of less than 733 persons. The Trial Chamber does not suggest, however, that a lower number of victims would disqualify that act as "extermination" as a crime against humanity, nor does it suggest that such a threshold must necessarily be met.

[588] *See*, *eg,* the IMT Judgment in respect of Saukel, p 114 and in respect of Fritzsche, p 126.

[589] In Nuremberg, the International Military Tribunal made reference to "extermination", *inter alia*, in relation to mass murders committed for ideological reasons (Jews), political reasons (political opponents, communists and intelligentsia in occupied territories), economic reasons (creation of a *lebensraum*), military reasons (resistance members).

B. Conclusions based upon factual findings relevant to this count and responsibility of the Accused

230. As already stated in relation to the murder charges, the Trial Chamber is not satisfied that the plan to kill the group was first conceived when the Accused approached the group and sought to persuade them to remain together in the Memics' houses in Pionirska Street.[590] Nor is the Trial Chamber satisfied that the only inference available on the evidence is that the Accused knew that the members of the these people were to be killed or mistreated in the way charged in the Indictment.[591] And, as pointed out above,[592] the Prosecution did not rely upon the extended form of joint criminal enterprise, so that the Accused cannot be held responsible for the natural and foreseeable consequences of effecting any joint criminal enterprise he may have agreed to commit a lesser crime. The Prosecution has therefore failed to establish that the Accused was part of a joint criminal enterprise to exterminate the Muslims locked in the house on Pionirska Street, even had such a crime been established in the present case.

231. Concerning the Prosecution's allegation that the Accused may be held criminally liable as an aider and abettor to the crime of extermination, the Trial Chamber reaches the same conclusion as in relation to the murder counts, namely, that it is not satisfied that the Accused was aware that the intent of the principal offenders was to exterminate members of the Kortinik group.[593] The Accused cannot therefore be found to have incurred individual criminal responsibility as an aider and abettor to the extermination of the members of this group.

232. In addition, as pointed out above,[594] "extermination" supposes the taking of a large number of lives. It is unnecessary in the present case to determine whether sixty or seventy deaths alone satisfy this requirement of scale. The Prosecution has in any event failed to establish that the Accused knew that his acts were part of a vast collective murder in which a large number of individuals were systematically marked for extermination or were in fact exterminated. As far as the evidence in this case is concerned, the Accused is showed to have intended to kill only the seven Muslim men who were the victims of the Drina River incident.

233. The Accused is therefore acquitted of the charge of extermination (as a crime against humanity) in Count 1 of the Indictment.

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590 *See* above, par 189.
591 *See* above, par 190.
592 *See* above, par 63.
593 *See* above, pars 190-191.
594 *See* above, pars 225, 227 and 229.

XI. INHUMANE ACTS

A. The Law

234. The Accused is charged under Counts 6 and 12 of the Indictment with inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute. The crime of inhumane acts, like inhumane treatment under Article 3, and cruel treatment under Article 2, functions as a residual category for serious charges which are not otherwise enumerated under Article 5. All of these offences require proof of the same elements.[595] The elements to be proved are:[596]

(i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article;

(ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and

(iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility.

235. To assess the seriousness of an act, consideration must be given to all the factual circumstances. These circumstances may include the nature of the act or omission, the context in which it occurred, the personal circumstances of the victim including age, sex and health, as well as the physical, mental and moral effects of the act upon the victim.[597] While there is no requirement that the suffering imposed by the act have long term effects on the victim, the fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.[598]

236. The *mens rea* of inhumane acts is satisfied where the offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to

[595] *Delalic* Appeal Judgment, par 426; *Tadic* Trial Judgment, par 723; *Prosecutor v Jelisi}*, Case IT-95-10-T, Judgment, 14 Dec 1999 ("*Jelisic* Trial Judgment"), par 52; *Delalic* Trial Judgment, par 552; *Kordic and Cerkez* Trial Judgment par 265; *Krnojelac* Trial Judgment, par 130.
[596] *Krnojelac* Trial Judgment, par 130 and references given therein.
[597] *Delalic* Trial Judgment, par 536; *Jelisic* Trial Judgment par 57; *Kunarac* Trial Judgment, par 501; *Krnojelac* Trial Judgment, par 132.
[598] *Kunarac* Trial Judgment, par 501; *Krnojelac* Trial Judgment, par 144.

cause serious physical or mental suffering or a serious attack upon human dignity and was reckless thereto.[599]

237. In the Indictment (as interpreted in the Prosecution Pre-Trial Brief), the Prosecution charged inhumane acts in relation to the two survivors of the Drina River shooting and the survivors of the Pionirska Street fire.[600]

B. Conclusions based upon factual findings relevant to these counts and responsibility of the Accused

1. Drina River Incident

238. As stated above, the Prosecution made it clear that the Accused was charged with inhumane acts in relation to that incident only in relation to the two survivors, not the five murdered men.[601] The Trial Chamber is satisfied that there was an understanding amounting to an agreement between Milan Lukic, the Accused and the two unidentified men that the seven Muslim be killed, including the two survivors of the shooting, VG-32 and VG-14.[602] The Trial Chamber is also satisfied that the Accused personally participated in this joint criminal enterprise in the manner described above.[603]

239. The Trial Chamber is further satisfied that the attempted murder of VG-32 and VG-14 constitutes a serious attack on their human dignity, and that it caused VG-32 and VG-14 immeasurable mental suffering, and that the Accused, by his acts, intended to seriously attack the human dignity of VG-32 and VG-14 and to inflict serious physical and mental suffering upon them.[604] The Trial Chamber is thus satisfied that the Accused incurred individual criminal responsibility for the attempted murder of these two Muslim men as inhumane acts pursuant to his participation in a joint criminal enterprise to murder them.[605]

240. Accordingly, the Trial Chamber finds that the Accused incurred individual criminal responsibility for the crime of inhumane acts (as a crime against humanity) under Count 6 of the Indictment in respect of VG-32 and VG-14.

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[599] *Kayishema and Ruzindana* Trial Judgment, par 153; *Aleksovski* Trial Judgment, par 56; *Krnojelac* Trial Judgment, par 132.
[600] Prosecution Final Trial Brief, par 428. *See* also Prosecution Pre-Trial Brief, par 12.
[601] Prosecution Pre-Trial Brief, par 12.
[602] *See* above, par 208.
[603] *See* above, par 209.
[604] *Ibid*.
[605] *Ibid*.

2. Pionirska Street Incident

241. The Trial Chamber re-iterates the finding made above, namely, that it is not satisfied that the plan to kill or mistreat the group as charged in the Indictment was first conceived when the Accused approached the group and sought to persuade them to remain together in the Memics' houses in Pionirska Street,[606] or that the only inference available on the evidence is that the Accused knew that the group from Koritnik were to be subjected to any inhumane acts as charged in the Indictment.[607] And, as pointed out in relation to the murder charges,[608] the Prosecution did not rely upon the extended form of joint criminal enterprise, so that the Accused cannot be held responsible for the natural and foreseeable consequences of effecting any joint criminal enterprise he may have agreed to commit a lesser crime. The Prosecution has therefore failed to establish that the Accused was part of a joint criminal enterprise to commit inhumane acts upon the Muslims locked in the house in Pionirska Street.

242. Concerning the Prosecution's allegation that the Accused may be held criminally liable as an aider and abettor to the crime of inhumane acts, the Trial Chamber reaches the same conclusion as in relation to the murder and extermination counts, namely, that it is not satisfied that the Accused was aware that the intent of the principal offenders was to cause serious mental or physical suffering or injury or constitutes a serious attack on human dignity to the victims of the fire.[609] The Accused cannot therefore be found to have incurred individual criminal responsibility as an aider and abettor to the inhumane acts inflicted upon these people. The activity of the Accused in seeking to convince the Koritnik group to stay together in one place does not, on its own, amount to an inhumane act in the context of this case.

243. The Trial Chamber therefore acquits the Accused of the charge of inhumane acts (as a crime against humanity) in Count 12 of the Indictment.

[606] *See* above, pars 189 and 230.
[607] *See* above, pars 190 and 230.
[608] *See* above, pars 63 and 230.
[609] *See* above, pars 190-191 and 231.

XII. PERSECUTION

A. The Law

244. Count 3 charges the accused with persecution on political, racial and religious grounds pursuant to Article 5(h) of the Statute. The crime of persecution consists of an act or omission which:[610]

1. discriminates in fact and which denies or infringes upon a fundamental right laid down in international customary or treaty law (the *actus reus*); and

2. was carried out deliberately with the intention to discriminate on one of the listed grounds, specifically race, religion or politics (the *mens rea*).

245. Although the Statute does not explicitly require that the discrimination take place against a member of a targeted group, the act or omission must in fact have discriminatory consequences rather than merely be done with discriminatory intention.[611] Discriminatory intent by itself is not sufficient. Without this requirement an accused could be convicted of persecution without anyone having actually been persecuted. This possibility would render the distinction between the crime of persecution and other crimes (such as murder and torture) virtually meaningless.[612]

246. The act or omission constituting the crime of persecution may assume various forms, and there is no comprehensive list of what acts can amount to persecution.[613] It may encompass acts that are listed in the Statute[614] as well as acts that are not listed in the Statute.[615] The persecutory act or omission may encompass physical or mental harm or infringements upon individual freedom.[616] It may refer to a series of acts, or a single act may be sufficient.[617] In charging persecution, the principle of legality requires the Prosecutor to identify particular acts amounting to persecution rather than persecution in general.[618]

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[610] *Krnojelac* Trial Judgment par 431.
[611] *Krnojelac* Trial Judgment par 432.
[612] *Krnojelac* Trial Judgment par 432.
[613] *Tadic* Trial Judgment, par 694; *Kupreškic* Trial Judgment, pars 567-568; *Blaškic* Trial Judgment, pars 218-219; *Kordic and Cerkez* Trial Judgment, par 192; *Krnojelac* Trial Judgment par 433;
[614] *Kupreškic* Trial Judgment, par 605; *Kvocka* Trial Judgment, par 185; *Krnojelac* Trial Judgment par 433;
[615] *Tadic* Trial Judgment par 703; *Kupreškic* Trial Judgment pars 581, 614; *Blaškic* Trial Judgment par 233; *Kordic and Cerkez* Trial Judgment, pars 193-194; Kvo*cka* Trial Judgment, par 185; *Krnojelac* Trial Judgment, par 433.
[616] *Blaškic* Trial Judgment, par 233; *Krnojelac* Trial Judgment par 433.
[617] *Kupreškic* Trial Judgment, par, 624; *Krnojelac* Trial Judgment par 432;
[618] *Kupreškic and Others* Trial Judgment, par 626; *Krnojelac* Trial Judgment par 433;

247. In order to qualify as persecution, the act or omission must reach a level of gravity at least equal to that of other offences listed in the Statute.[619] When considering whether an act or omission satisfies this threshold, acts should not be considered in isolation but should be examined in their context and with consideration of their cumulative effect.[620] Although it is not required that each underlying act constitute a violation of international law, the acts must, either separately or in combination, amount to persecution.[621]

248. The requirement of a specific discriminatory intent is unique to the crime of persecution.[622] The accused must consciously intend to discriminate for persecution to be established. It is not sufficient that the accused was merely aware that he is in fact acting in a discriminatory way.[623] The requirement that an accused consciously intends to discriminate does not require the existence of a discriminatory policy or, where such a policy is shown to exist, participation by the accused in the formulation of that discriminatory policy or practice by an authority.

249. The definition of persecution requires an act or omission that is in fact persecutory. Accordingly, the discriminatory intent must relate to the specific act charged as persecution. It is not sufficient that the act merely occurs within an attack which has a discriminatory aspect.[624] Occasionally, the law has been applied by this Tribunal on the basis that a discriminatory attack is a sufficient basis from which to infer the discriminatory intent of acts carried out within that attack. This approach may lead to the correct conclusion with respect to most of the acts carried out within the context of an discriminatory attack, but there may be acts committed within the context that were committed either on discriminatory grounds not listed in the Statute, or for purely personal reasons. Accordingly, this approach does not necessarily allow for an accurate inference regarding intent to be drawn with respect to all acts that occur within that context.

250. In the Indictment the Prosecution alleges that the crime of persecution was carried out through:[625]

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[619] *Kupreškic* Trial Judgment, pars 618 and 621; *Kordic and Cerkez* Trial Judgment, par 198; *Kvocka* Trial Judgment, par 185; *Krnojelac* Trial Judgment, par 434.
[620] *Kupreškic* Trial Judgment, pars 615, 622; *Krnojelac* Trial Judgment, par 434.
[621] *Kvocka* Trial Judgment, par 186; *Kupreškic* Trial Judgment 622; *Krnojelac* Trial Judgment, par 434.
[622] *Kordic and Cerkez* Trial Judgment, par 217; *Blaškic* Trial Judgment, par 235; *Tadic* Appeal Judgment, par 305; *Krnojelac* Trial Judgment, par 435.
[623] *Kordic and Cerkez* Trial Judgment, par 217; *Krnojelac* Trial Judgment, par 435.
[624] *Krnojelac* Trial Judgment, par 436.
[625] Indictment, par 9.

(a) the murder of Bosnian Muslims and other non-Serb civilians;

(b) the harrassment, humiliation, terrorisation and psychological abuse of Bosnian Muslims and other non-Serb civilians; and

(c) the theft and destruction of personal property of Bosnian Muslims and other non-Serb civilians.

At the Pre-Trial Conference, it was agreed by the Prosecution that the persecution charge was based upon the Drina River incident and the Pionirska Street incident only.[626] The Trial Chamber's consideration of the crime of persecution is accordingly limited to those two incidents and, because the cumulative effect of the Accused's conduct must be considered, the ultimate finding of the Trial Chamber relates to that cumulative effect.

B. Conclusions based upon factual findings relevant to this count and responsibility of the Accused

251. The Trial Chamber has already found that the Accused acted as an informant to Milan Lukic's group, assisting that group in locating the Muslim population of Višegrad.[627] The Trial Chamber has already satisfied itself that the Accused did so with full awareness that the intent of Milan Lukic's group was to persecute the local Muslim population of Višegrad through the commission of the underlying crimes.[628] The Trial Chamber is satisfied that, in providing information to the group led by Milan Lukic, the Accused shared the intention of that group to persecute the local Muslim civilians on religious or political grounds. In order to convict the Accused for the crime of persecution, however, the Prosecution must also establish that the Accused participated in the commission of a persecutory act with a discriminatory intention. It is not sufficient to merely establish an intention to persecute. Where that act is not one of the offences enumerated in the Statute, it must be an act of equal gravity to those enumerated acts in order to form the basis of a charge of persecution.

252. There is no basis in the evidence for a finding beyond reasonable doubt what specific crimes were committed by the Milan Lukic's group which resulted from the assistance given by the Accused, or that the Accused was sufficiently aware of the circumstances in which Milan Lukic's group would use the information he gave them so as to constitute him as an aider and abettor of the crimes which they committed. Indeed, the Prosecution case, as limited at the Pre-Trial Conference,

[626] Pre-Trial Conference, 20 July 2001 (T 88-89)
[627] *See* above, pars 75 and 95.
[628] *See* above, par 75.

would exclude any reliance upon such crimes even if they had been identified sufficiently in the evidence.

253. The Prosecution charges the murder of Bosnian Muslim and other non-Serb civilians as persecution. These killings are separately charged as murder (a crime against humanity pursuant to Article 5 (a) and a violation of the laws or customs of war pursuant to Article 3 of the Statute). Those acts amounting to murder under Article 5 of the Statute are as such of sufficient gravity to constitute persecution.

254. The Trial Chamber has already found that the Accused has individual criminal responsibility for murder punishable under Article 5 of the Statute in relation to five victims, pursuant to a joint criminal enterprise to kill the seven Bosnian Muslim men on the banks of the Drina River. The Trial Chamber is satisfied that the only reasonable inference available on the evidence is that these seven Muslim men were singled out for religious or political reasons, and that the killing of five of them were acts carried out on discriminatory grounds, namely, religious or political. The Trial Chamber is also satisfied that the acts of the Accused were *in fact* discriminatory, in that the men were killed only because they were Muslims. Accordingly, the Accused incurs individual criminal responsibility for the crime of persecution on the basis of the underlying crime of murder of five of the Bosnian Muslim civilians.

255. In addition, the Trial Chamber has already found that the Accused committed the offence of inhumane acts, a crime against humanity pursuant to Article 5(i) of the Statute in relation to the two survivors of the Drina River shooting.[629] Those acts amounting to inhumane acts under Article 5 of the Statute are of sufficient gravity to constitute persecution. The Trial Chamber is satisfied that the only reasonable inference available on the evidence is that the intention to kill these two men, and the attempt to do so, were acts carried out on one of the prohibited discriminatory grounds and that these two men, like the five who were killed, were singled out for religious or political reasons. As stated in the previous paragraph, the Trial Chamber is satisfied that the acts of the Accused were *in fact* discriminatory in that inhumane acts were inflicted against these men only because they were Muslims.

256. The Trial Chamber has already stated that it was satisfied that the Accused knew that some evil would befall the Koritnik group when they were being encouraged to stay together in Pionirska Street.[630] The Trial Chamber is satisfied that the Accused in doing so acted with the intent to discriminate on religious or political grounds. As already stated, the Trial Chamber has not been

[629] *See* above, pars 238-240.
[630] *See* above, pars 180, 187 and 191.

satisfied that the Accused shared the intent of Milan Lukic's group that the Koritnik group be killed.[631]

257. Count 3 of the Indictment charges the Accused with the "harassment, humiliation, terrorisation and psychological abuse of Bosnian Muslim and other non-Serb civilians". In its Pre-Trial Brief, the Prosecution submitted that "harassment, humiliation, terrorisation and psychological abuse" could be characterised as "cruel treatment" under common article 3(1)(a) or as "humiliating and degrading treatment" under common article 3(1)(c) of the Geneva Conventions.[632] The Prosecution submitted that the Accused was responsible for such crimes by virtue of the especially cruel methods which he is alleged to have employed to persecute the Bosnian Muslim population of Višegrad, in particular by herding approximately 140 civilians into buildings treated with flammable substance and burning them alive.[633]

258. The Trial Chamber has already stated its conclusion that the Accused has not been shown beyond reasonable doubt to have intended or known that such cruel, humiliating or degrading treatment would be inflicted to the group of Muslims which he persuaded to stay together in the house in Pionirska Street.[634] Nor is the manner in which the Accused acted in ensuring that the group stayed together "especially cruel", as the Prosecution has claimed. Nor was there any evidence that the Accused went to Milan Lukic to tell him of the whereabouts of the Koritnik group. That is mere speculation on the Prosecution's part. There are competing inferences available that the Accused had in mind that the Koritnik group would be forcibly transferred, looted and robbed or physically harmed. However, the very strong possibility that he had forcible transfer in mind (which has not been charged) prevents the Trial Chamber from concluding, for the purposes of the crime of persecution, that the only reasonable inference is that he had in mind those crimes which have been charged. In addition and as already pointed out above, the activity of the Accused in seeking to convince the Koritnik group to stay together in one place does not, on its own, amount to inhumane acts in the context of this case.[635]

259. Count 3 of the Indictment provides finally that persecution took the form of the "theft and destruction of personal property of Bosnian Muslims and other non-Serb civilians". The Prosecution Pre-Trial Brief does not contain any indication as to what role the Accused is alleged to have performed in that respect. As stated above, there is no satisfactory evidence that the Accused

631 *See* above, par 214.
632 Prosecution Pre-Trial Brief, par 165.
633 *Ibid*., par 166. As stated above, the scope of the charges was subsequently narrowed down by the Prosecution (*see* footnote 560).
634 *See* above, pars 190, 230 and 241.
635 *See* above, par 242.

was present at the time of the looting.[636] Nor was there any evidence that he was part of a joint criminal enterprise to loot those people or destroy their property. For the reasons already given above,[637] it is not the only reasonable inference available that, when directing them into the Memic house, the Accused intended or knew that they would be robbed of their property or looted.

260. In summary, the Trial Chamber has not been satisfied that the Accused intended or knew of the intent of the principal offenders to either kill, harass, humiliate, psychologically abuse or loot the Kortinik group. The Trial Chamber is satisfied, however, that the Accused intended that the group be discriminated against in some way, and that he may have contributed in some way to the commission of the offences by the principal offenders by ensuring that the group stayed together. But, without the establishment of knowledge on his part that the intent was to kill, harass, humiliate, psychologically abuse or loot the group on discriminatory grounds, and in the absence of evidence that he made a substantial contribution to those crimes, the Accused's responsibility as a participant in a joint criminal enterprise or as an aider and abettor to that persecution has not been established. As already stated,[638] the Prosecution did not rely upon the extended form of joint criminal enterprise, so that the Accused cannot be held responsible for the natural and foreseeable consequences of effecting any joint criminal enterprise he may have agreed to commit a lesser crime. The Prosecution has therefore failed to establish that the Accused was part of a joint criminal enterprise to persecute the Muslims locked in the house on Pionirska Street.

261. Accordingly, the Trial Chamber is satisfied that the Accused incurs individual criminal responsibility under Article 7(1) of the Statute for the crime of persecutions pursuant to Article 5(h) of the Statute for his participation in the underlying crimes of murder (a crime against humanity) and inhumane acts (a crime against humanity) in relation to the shooting of the seven Bosnian men, including the killing of five of them, at the Drina River on 7 June 1992 as described above.[639] However, the Prosecution failed to establish that he was also liable for persecution in relation to the Pionirska Street incident.

262. The Trial Chamber finds that the Accused incurred individual criminal responsibility for the crime of persecution (as a crime against humanity) charged in Count 3 of the Indictment in relation to the murder of Meho Džafic, Ekrem Džafic, Hasan Kustura, Hasan Mutapcic and Amir Kurtalic and for the inhumane acts against VG-32 and VG-14.

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[636] *See* above, pars 147.
[637] *See* above, pars 190 and 258.
[638] *See* above, pars 63, 230 and 241.
[639] *See* above, pars 96 *et seq*.

XIII. CONVICTIONS ENTERED

263. The Accused has been found individually criminally responsible pursuant to Article 7(1) for:

a) Count 3, persecution as a crime against humanity pursuant to Article 5(h) of the Statute;

b) Count 4, murder as a crime against humanity pursuant to Article 5(a) of the Statute;

c) Count 5, murder as a violation of the laws or customs of war pursuant to Article 3 of the Statute;

d) Count 6, inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute;

264. The Accused has been acquitted of the offences charged in:

a) Count 1, extermination as a crime against humanity pursuant to Article 5(b) of the Statute;

b) Count 7, violence to life and person as a violation of the laws or customs of war pursuant to Article 3 of the Statute.

c) Count 10, murder as a crime against humanity pursuant to Article 5(a) of the Statute;

d) Count 11, murder as a violation of the laws or customs of war pursuant to Article 3 of the Statute;

e) Count 12, inhumane acts as a crime against humanity pursuant to Article 5(i) of the Statute;

f) Count 13, violence to life and person as a violation of the laws and customs of war pursuant to Article 3 of the Statute;

265. Each of the offences for which the Accused has been found to have incurred individual criminal responsibility relate to his participation in the Drina River incident. Cumulative convictions (convictions for different crimes charged in the indictment based on the same conduct) are permissible only if each crime involved has a materially distinct element not contained in the

other.[640] An element is materially distinct from another if it requires proof of a fact not required by the other.[641] Where this test is not met, the Chamber must enter the conviction for the more specific crime, being the crime with an additional materially distinct element.[642]

266. Convictions for the crimes enumerated under Articles 3 and 5 of the Statute based on the same conduct are permissible, as each contains a materially distinct element.[643] The materially distinct element required by Article 3 is the requirement that there be a close link between the acts of the accused and the armed conflict.[644] That required by Article 5 offences is that the offence be committed within the context of a widespread or systematic attack directed against a civilian population.[645] Applying this test to the present case, convictions for murder as a violation of the laws or customs of war and any other crime charged under Article 5 of the Statute based on the same conduct are permissible. Whenever cumulative conviction under both Article 3 and Article 5 of the Statute is based on the same conduct, the Trial Chamber must ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender.[646] The prejudice that an offender will or may suffer because of cumulative convictions based on the same conduct has to be taken into account when imposing the sentence.[647] With respect to convictions for the other charges within Article 5 of the Statute in relation to the Drina River incident, the Accused has been charged with murder (as a crime against humanity – Count 4) in relation to the five men who were killed and with inhumane acts (as a crime against humanity – Count 6) in relation of the two survivors and the two survivors only.[648] There is, therefore, no issue of cumulative conviction arising in relation to those two Counts as they are not based upon the same facts.

267. Persecution on political, racial or religious grounds pursuant to Article 5(h) of the Statute requires the materially distinct elements of a discriminatory act and discriminatory intent.[649] It is therefore the more specific provision vis-à-vis both murder as a crime against humanity and inhumane acts as a crime against humanity. The Trial Chamber is satisfied that the crimes committed by the Accused at the Drina River were committed on political or religious grounds.[650] As a consequence, a conviction is to be entered for persecution pursuant to Article 5(h) of the

[640] *Delali}* Appeal Judgment, par 421.
[641] *Ibid*.
[642] *Delali}* Appeal Judgment, pars 412-413.
[643] *Prosecutor v Jelisi},* Case IT-95-10-A, Judgment, 5 July 2001, ("*Jelisi}* Appeal Judgment"), par 82.
[644] *Kunarac* Appeal Judgment, pars 55-57.
[645] *See Kunarac* Appeal Judgment, par 85.
[646] *Delalic* Appeal Judgment, pars 429-430; *Kunarac* Trial Judgment, par 551.
[647] *Kunarac* Trial Judgment, par 551.
[648] *See* above par 238.
[649] *See Krnojelac* Trial Judgment pars 431-432 and references cited therein.
[650] *See* above pars 251 and 254.

Statute, but not for murder and inhumane acts pursuant to Article 5 of the Statute, with respect to the relevant conduct found to constitute the persecution charge.

268. Accordingly, in relation to the Drina River incident, the Accused is convicted for the crimes of:

(i) Persecution (as a crime against humanity) under Count 3 – which conviction incorporates his individual criminal responsibility for:

(a) the murder of the five men (as a crime against humanity) charged in Count 4, and

(b) the inhumane acts (as a crime against humanity) in relation to the two survivors, charged in Count 6.

(ii) Murder (as a violation of the laws or customs of war) in relation to five men, charged in Count 5.

XIV. SENTENCING CONSIDERATIONS

269. The Trial Chamber imposes a single sentence of imprisonment reflecting the totality of the criminal conduct of the Accused, and in accordance with Articles 23(1)[651] and 24(1)[652] of the Statute and with Rules 101(A)[653] and 87(C).[654] The fact that the Accused was convicted cumulatively in relation to the same facts has been taken into account when determining the appropriate sentence, to ensure that he was not punished twice for the same act. The sentence which reflects the totality of the Accused's criminal conduct and his overall culpability is imprisonment for 20 years. This section of the Judgment explains the considerations which led the Trial Chamber to impose that sentence.

270. As a preliminary matter, Article 24(1) of the Statute provides, *inter alia,* that in determining the term of imprisonment the Trial Chamber "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".[655] Although the Trial Chamber is not bound to follow the sentencing practice of the former Yugoslavia,[656] recourse must be made to that sentencing practice as an aid in determining the sentence to be imposed.[657] What is required must go beyond merely reciting the relevant criminal code provisions of the former Yugoslavia; the general sentencing practice of the former Yugoslavia must be considered.[658]

271. Article 41(1) of the SFRY Code requires that consideration be given to:[659]

> (…) all the circumstances bearing on the magnitude of the punishment (extenuating and aggravating circumstances), and in particular, the degree of criminal responsibility, the motives from which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender.

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[651] Article 23(1) provides: "The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law."

[652] Article 24(1) provides: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. ?…?"

[653] Rule 101(A) provides: "A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life."

[654] Rule 87(C) provides: "If the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

[655] *See* Rule 101(B).

[656] Article 24(1) of the Statute and Rule 101(B); *Prosecutor v Tadi}*, Case IT-94-1-A & IT-94-1-A*bis*, Judgment in Sentencing Appeals, 26 Jan 2000 ("*Tadi}* Appeal Sentencing Judgment"), par 21; *Delali}* Appeal Judgment, par 813; *Jelisi}* Appeal Judgment, par 117.

[657] *Delali}* Appeal Judgment, par 820.

[658] *Kupre{ki}* Appeal Judgment, par 418.

[659] Article 41(1) of the SFRY Criminal Code (adopted on 28 Sept 1976, entered into force on 1 July 1977 (unofficial translation)).

This Article is generally similar to the sentencing provisions of Article 24(2) of the Statute and Rule 101(B).[660] Article 24(2) of the Statute directs the Trial Chamber to take into account the gravity of the offence and the individual circumstances of the convicted person, while Rule 101(B) directs the Trial Chamber to consider any aggravating circumstances or any mitigating circumstances.

272. All of the above factors have been taken into account in determining the sentence, but the overriding sentencing obligation considered by the Trial Chamber has been that of fitting the penalty to the individual circumstances of the Accused and the gravity of the offences for which he has been found responsible.[661] This obligation has been formulated as follows:[662]

> ?Tghe sentences 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.

Only those matters which were proved beyond reasonable doubt against the Accused have been considered against him in sentencing, including the aggravating factors.[663] The mitigating circumstances taken into account are those which have been established by the Accused on a balance of probabilities.[664]

273. The Trial Chamber has taken cognisance of retribution – interpreted as punishment of an offender for his specific criminal conduct – and general deterrence.[665] Both of these general sentencing factors form the backdrop against which the Accused's sentence has been determined.[666]

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[660] Rule 101 largely repeats Arts 23 and 24 of the Statute; it provides in relevant part: "?…? (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10, paragraph 3, of the Statute. (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal."

[661] *Kupre{ki}* Appeal Judgment, par 442, *Delali}* Appeal Judgment, par 717; and Art 24(2) of the Statute, which states that the Trial Chamber in imposing the sentences "should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person." *See* also *Aleksovski* Appeal Judgment, par 182; *Jelisi}* Appeal Judgment, par 94.

[662] *Kupre{ki}* Trial Judgment, par 852; *See* also *Jelisi}* Appeal Judgment, par 94, *Delali}* Appeal Judgment, par 731; *Aleksovski* Appeal Judgment, par 182; *Furund`ija* Appeal Judgment, par 249; and *Prosecutor v Kambanda*, Judgment, 19 Oct 2000, par 125.

[663] *Delali}* Appeal Judgment, par 763.

[664] *Kunarac* Trial Judgment, par 847; *Prosecutor v Sikirica et al*, Case IT-95-8-S, Sentencing Judgment, 13 Nov 2001 ("*Sikirica* Sentencing Judgment"), par 110.

[665] The Trial Chamber has applied the principle of public deterrence in determining the sentence to be imposed, but it has taken care that it has not been accorded undue prominence in that process: *Tadi}* Sentencing Appeal Judgment, par 48; *Prosecutor v Todorovi}*, Case IT-95-9/1-S, Sentencing Judgment, 31 July 2001 ("*Todorovi}* Sentencing Judgment"), pars 29-30; *Krnojelac* Trial Judgment, par 508. *See* also, *Aleksovski* Appeals Judgment, par 185; *Delali}* Appeal Judgment, par 806; *Kunarac* Trial Judgment, pars 840-841;.

[666] The Appeals Chamber views deterrence and retribution as the main general sentencing factors (for example, *Aleksovski* Appeal Judgment, par 185; *Delali}* Appeal Judgment, par 806). With respect to the former factor, it appears to focus on general deterrence only (*Kunarac* Trial Judgment, par 839).

274. The punishment which could have been imposed on the Accused in the former Yugoslavia at the relevant time is dealt with in Article 142(1) ("War crimes against the civilian population") of the SFRY Criminal Code.[667] It gives effect to the provisions of Geneva Convention IV and the two Additional Protocols, which are incorporated into the jurisdiction of the Tribunal by Article 2 of the Statute.[668] There appears to be no provision of the SFRY Criminal Code giving specific effect to the crimes against humanity enumerated in Article 5 of the Statute, although genocide (a specific category of crimes against humanity) is dealt with in Article 141 of the SFRY Criminal Code.[669]

275. In line with recent Appeals Chamber Judgments, the Trial Chamber has not considered that crimes against humanity should in principle attract a higher sentence than war crimes.[670]

Aggravating factors

276. The Accused has been found criminally responsible as a participant in a joint criminal enterprise to persecute the seven Bosnian Muslim men at the Drina River by killing or attempting to

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[667] Article 142(1) provides: "Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture; inhuman treatment ?…?, immense suffering or violation of bodily integrity or health ?…?, forcible prostitution or rape; application of measures of intimidation and terror, ?…? other illegal arrests and detention ?…?, forcible labour ?…? or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty."

[668] *Prosecutor v Tadi},* Case IT-94-1-T, Sentencing Judgment, 14 July 1997, par 8.

[669] Both Article 142(1) and Article 141 of the SFRY Criminal Code prescribe imprisonment for not less than five years or the death penalty upon conviction. Capital punishment was abolished by constitutional amendment in some of the republics of the SFRY, other than Bosnia and Herzegovina, in 1977, the new maximum sentence being 20 years imprisonment for the most serious offences Article 38 of the SFRY Criminal Code concerns prison sentences, and reads in part: "(1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years. (2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty. (3) For criminal acts committed with intent for which the punishment of fifteen years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute. ?…?" Official Gazette of the FRY, No 37, 16 July 1993, p 817. *Delali}* Trial Judgment, par 1206. From Nov 1998 the law in Bosnia and Herzegovina prescribes the death penalty only in exceptional circumstances: Art 34 of the Criminal Code of the Federation of Bosnia and Herzegovina, which came into force on 28 Nov 1998, provides: "?…? (2) On an exceptional basis, for the more severe forms of criminal offences punished with long term imprisonment which were committed during the state of war or of imminent war danger, the law may exceptionally prescribe capital punishment. (3) In the case defined in paragraph 2 of this Article, the capital punishment may be pronounced and executed only during the state of war or imminent war danger." (Criminal Code of the Federation of Bosnia and Herzegovina published by "Official Gazette of Federation of Bosnia and Herzegovina", No 43-98, Nov 20, 1998). That Criminal Code also now provides for the imposition of "long term imprisonment" ranging from 20 to 40 years for the "the gravest forms of criminal offences ?...? committed with intention". (Art 38).

[670] *Tadi}* Appeal Sentencing Judgment, par 69 ("The Appeals Chamber has taken account of the arguments of the parties and the authorities to which they refer, inclusive of previous judgments of the Trial Chambers and the Appeals Chamber of the International Tribunal. After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case. The position is similar under the Statute of the International Criminal Court, Article 8(1) of the Statute, in the opinion of the Appeals Chamber, not importing a difference. ?…?."); and *Furund`ija* Appeal Judgment, pars 243 and 247.

kill them. The Prosecution submits that there are several factors that aggravate the Accused's participation in this crime. It identifies the fact that there were multiple victims involved, who were killed "efficiently" by the side of the Drina River to avoid the problem of having to bury them, the fact that the victims were verbally abused before being killed, and the trauma still suffered by the survivors of the shooting.[671] The Trial Chamber accepts that each of these factors constitutes an aggravation of the crime.

277. The Prosecution also argued that the discriminatory purpose of the crimes and the selection of victims based on their ethnicity constitute an aggravating factor.[672] This can only be so where the crime for which an accused is convicted does not include a discriminatory state of mind as an element. The crime of persecution in Article 5(h) of the Statute already includes such an element. Such a discriminatory state of mind goes to the seriousness of the offence, but it may not additionally aggravate that offence.

278. A discriminatory state of mind may however be regarded as an aggravating factor in relation to offences for which such a state of mind is not an element. No violation of Article 3 charged in this Indictment requires such a state of mind. The Trial Chamber therefore accepts that, in relation to the murder conviction pursuant to Article 3 of the Statute, the Accused's discriminatory state of mind constitutes an aggravating factor. During the Bosnian conflict, ethnicity has variedly been exploited to gain political prominence or to retain power, to justify criminal deeds, or for the purpose of obtaining moral absolution for any act coloured by the ethnic cause. No such absolution is to be expected from this Tribunal. The Trial Chamber considers that crimes based upon ethnic grounds are particularly reprehensible, and the existence of such a state of mind is relevant to the sentence to be imposed either as an ingredient of that crime or as a matter of aggravation where it is not such an ingredient.

279. The Trial Chamber also considers as aggravation the fact that the pleas by the men for their lives were completely ignored by the Accused, and the cold-blooded nature of the killing and, to perhaps a lesser extent, the fact that one of the victims was well known to the Accused.[673]

Mitigating factors

280. The Accused maintained throughout the trial that he had not participated in the killing of the seven Bosnian Muslim men. However, he submitted that, if the Trial Chamber found him to be

[671] Prosecution Final Trial Brief, pars 476-478.
[672] Prosecution Final Trial Brief, par 478.
[673] The seven defenceless men were forced at gunpoint to march to their deaths towards the bank of the Drina River and to stand at the edge of the River as their executioners discussed whether to shoot them with single shots or rounds.

criminally responsible for the killing, any sentence to be imposed should be mitigated on the basis that at the time of the Drina River incident he had a diminished mental responsibility.

281. Rule 67(A) (i) of the Rules of Procedure and Evidence provides that:

> As early as is reasonably practicable and in any event prior to the commencement of the trial:
>
> ?…g the defence shall notify the Prosecutor of its intention to offer:
>
> (b) any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

In raising this issue, the Accused failed to comply with the provisions of Rule 67(A)(ii) by notifying the Prosecution prior to the commencement of the trial.[674] Rather, this issue evolved throughout the trial. The Trial Chamber considers that, notwithstanding the failure to so comply with Rule 67(A)(ii), the issue is one which should be considered. The Prosecution was given sufficient opportunity to meet this issue, so that no prejudice has been caused.

282. As was established in the *Delalic* Appeal Judgment, and conceded by the defence at the trial, the issue of diminished mental responsibility is relevant only to the sentence to be imposed. It is not a defence that if established would lead to the acquittal of the Accused.[675] The Accused bears the onus of establishing this defence on the balance of probabilities. In the *Delalic* Appeal Judgment the Appeals Chamber stated that:[676]

> As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.

283. The Trial Chamber is satisfied that an accused suffers from a diminished mental responsibility where there is an impairment to his capacity to appreciate the unlawfulness of or the nature of his conduct or to control his conduct so as to conform to the requirements of the law.[677]

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[674] Prosecution Final Trial Brief, par 480.
[675] *Delalic* Appeal Judgment, par 590.
[676] *Delalic* Appeal Judgment, par 590.
[677] The same principle has been adopted in Article 31(1)(a) of the ICC Statute (which talks about the "destruction" of criminal responsibility), which reflects the general intent of the "partial defence" of diminished responsibility adopted in some common law countries, as discussed in the Appeals Chamber's Judgment in *Delalic et al* (pars 586-590) The formulation also reflects the concept of diminished responsibility leading to mitigation in sentencing in some civil law countries, identified in the same Judgment: In France: *Penal Code* (1992), Article 122-1. In Germany: *Penal Code*, Sections 20-21. In Italy: *Penal Code* (1930), Articles 88-89. In the Russian Federation: *Criminal Code* (1996) (translated by W Butler, *Criminal Code of the Russian Federation*, Simmonds and Hill Publishing, London, 1997), Articles 21-22. In Turkey: *Penal Code* (International Encyclopaedia of Law, ed Prof Blancpain, Kluwer, vol 3), Articles 46-47. In Japan: *Penal Code* (1907), Article 39(2). In South Africa:

284. The defence case was that, at the time the Drina River incident occurred, the Accused's mental responsibility was significantly diminished by the chronic alcoholism of the Accused and his reaction to the death of his cousin. There was no acceptable evidence to support that case. The Trial Chamber rejects the evidence of Dr Vasiljevic that, upon his observations of the Accused at the beginning of June, he formed the view that the Accused was psychotic at that time. Dr Vasiljevic claimed that, in May or early June 1992, he was summoned to the Užamnica barracks by Captain Kovacevic to attend to the Accused, who (it was alleged) was undergoing a psychological crisis.[678] It was alleged that the Accused was refusing to eat, was behaving in a strange way and was in need of medical assistance. The Accused had been present at the Užamnica barracks for several days and was being held there as a prisoner for differences he had had with his superiors. Dr Vasiljevic said that he went to the barracks and, after talking to the Accused, he advised Captain Kovacevic that it would be better that the Accused were released. His evidence was that the Accused was released either that evening or the following day, and that the next time he saw him was seven to eight days later.[679] At this time, Dr Vasiljevic saw the Accused in the street with a group of men, and he had the impression that he was organising these people to work in cleaning the streets.[680] Dr Vasiljevic said that, at the time he saw the Accused, he did not note down the exact diagnosis anywhere, but he said that, if he had entered the diagnosis, it would have been a reactive psychoneurosis, a condition following intoxication and exhaustion. His evidence was that the Accused was visibly agitated, the fingers of his hands were trembling and he was disinterested and indifferent and did not feel like talking. The doctor, who is related to the Accused and who has known him since he was born, found this behaviour to be unusual. When asked what treatment he gave the Accused at that time, he said that he was put on a drip of 5 percent glucose solution, a sedative and some vitamins. He could not recall whether he was treated in any other way.[681] He did not refer the Accused to a neuropsychiatrist for further treatment.[682]

285. The Trial Chamber accepts the evidence of Dr Folnegovic-Smalc (who was called by the Prosecution) that, if Dr Vasiljevic had diagnosed the Accused as suffering from a reactive psychoneurosis, the mandatory course of action for a doctor diagnosing such a condition would be

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Criminal Procedure Act, 1977, Section 78(7). In the former Yugoslavia: *Criminal Code* (1976) of the SFRY, Article 12; Croatian *Penal Code* (1997). The specific extent of the impairment required before mitigation becomes available in some countries in both systems (for example, "substantial") has been ignored for the sake of identifying the relevant *general* principles, as has the requirement in some common law countries that the impairment result from an abnormality of mind.

[678] Dr Vasiljevic (T 3081).
[679] Dr Vasiljevic (T 3083-3084).
[680] Dr Vasiljevic (T 3085).
[681] Dr Vasiljevic (T 3118-3120).
[682] Dr Vasiljevic (T 3123).

to ensure hospitalisation of the patient. This action is necessary because, by definition, a psychotic patient is one who is not able to take care of themselves or to control his or her actions.[683] Furthermore, she said that it is very unlikely that a patient in such a condition would be released without some follow-up, or that a reasonable doctor would have made such a recommendation.[684] Accordingly, the Trial Chamber rejects the evidence of Dr Vasiljevic that the Accused was suffering from such a disorder at the relevant time.

286. The Trial Chamber is not satisfied that the evidence of forensic psychiatrist Dr Zorka Lopicic (who was called by the Defence) established that the Accused suffered from any diminishment of responsibility at the time of the Drina River incident on 7 June 1992. The Trial Chamber rejects the evidence of Dr Lopicic that, prior to his hospitalisation in July 1992, the Accused had been suffering from a prodromal psychosis for a number of weeks. Dr Lopicic attributed this to a pre-disposition to depressive psychosis, combined with chronic alcohol abuse. In her view, this pre-psychotic stage significantly reduced the responsibility of the Accused for his acts due to his impaired capacity to comprehend the possible consequences of his deeds. She based her conclusion upon what she had been told by the Accused was a hereditary tendency in the female side of his family to depressive psychosis, his reaction to the death of his cousin, and his constant fear.[685] The conclusion drawn by Dr Lopicic is a highly speculative one, and it does not assist the Trial Chamber to reach a reasonable conclusion as the mental state of the Accused at the relevant time. The Trial Chamber accepts the view of Dr Folnegovic-Smalc that there were deficiencies in the analysis and conclusions of Dr Lopicic, primarily the failure of Dr Lopicic to identify a specific diagnosis of the Accused or to list the symptoms upon which her conclusion had been based.[686]

287. The Trial Chamber is not satisfied that the evidence of the other witnesses for the defence establishes that the Accused suffered from any diminished mental responsibility at the time of the Drina River incident on 7 June 1992. Trainee doctor, Dr Slobodan Simic, gave evidence that he was present when the Accused was transferred to the psychiatric ward of the Užice hospital on 7 July 1992 and that he was very agitated at the time.[687] His evidence was that, at the date of the transfer, the Accused had manifestations of an acute psychotic disorder, could not control his behaviour and had to be tied.[688] His view was that it was highly probable that the mental disorder

[683] Dr Folnegovic-Smalc (T 4414).
[684] Dr Folnegovic-Smalc (T 4413-4417).
[685] Dr Lopicic (T 4134-4155, 4167-4171, 4181-4199).
[686] Dr Folnegovic-Smalc (T 4430-4431).
[687] Concerning the date of his transfer to the psychiatric ward, *see* Borislav Martinovic (T 3497), Slavica Jevtovic (T3554-3555), Milena Tomasevic (T3200-3201), and Ex D 29.
[688] Dr Simi} (T 3170-3171).

of the Accused was caused by his alcohol abuse, coupled with the high level of stress due to the war and the loss of his cousin.[689] This is inconsistent with the evidence of Dr Folnegovic-Smalc, whose evidence the Trial Chamber prefers.

288. Dr Martinovic, the head of the psychiatric department of the Užice hospital, gave evidence, based upon his examination of the medical records of the Accused, that the Accused suffered from an acute psychotic episode from the beginning of July 1992.[690] He stated, however, that additional evidence was needed before a conclusion could be reached that the Accused had a diminished capacity at the time of the commission of any crime prior to that time.[691]

289. As stated above,[692] the Trial Chamber accepts the evidence of Prosecution witness, Dr Folnegovic-Smalc, as excluding any finding that the Accused suffered from any form of significant mental diminishment prior to 4 or 5 July 1992.

290. Dr Folnegovic-Smalc gave evidence with respect to the concept of criminal accountability as it existed in the former Yugoslavia at the time. A person is accountable if he or she is able to understand the meaning of his/her actions and to control those actions. She identified four degrees of accountability recognised by Yugoslavian law: (1) fully accountable; (2) insignificant diminishment of accountability; (3) significant diminishment of accountability; and (4) incompetent. Her evidence was that "fully accountable" included people with minor psychological conditions such as mild or moderate depression and alcoholism. "Insignificant diminishment" included those people who understood the consequences of their acts but who commit those acts in circumstances which reduce their accountability to a minor degree. In this group she included persons inflicted with alcoholism, inebriation, degrees of mental retardation, dementia, and post-traumatic stress disorders. Persons falling within this category are responsible for their acts, but if one of the above circumstances is present this may be taken into account in mitigation.

291. Dr Folnegovic-Smalc made a thorough consideration of whether the Accused was suffering from a number of mental defects which may mitigate his accountability for the crimes charged. Her opinion was based upon her interviews with, and observations of, the Accused over several days and upon the medical records of the Accused. The only defects which she could find from which

[689] Dr Simic (T 3285-3287, 3349).
[690] As stated in the previous par, the Accused was admitted in the psychiatric ward of the hospital on 7 July 2002.
[691] Dr Martinovic (T 3516, 3518-3520).
[692] *See* above, par 285.

the Accused had suffered were delirium or alcoholic psychosis. Her opinion was that it was most probable that the Accused suffered from delirium in 1992. Her evidence was that this could have been caused by alcohol deprivation or physical trauma. One of the important characteristics of delirium which she identified is that it appears suddenly. Her evidence was that, if delirium were caused by alcohol deprivation, the period which it would take from the last consumption of alcohol to the onset of delirium would be from several hours to several days, and as a rule less than seven days. If it were caused by physical trauma, it would be expected to commence within several hours to several days, and last up to several days. With respect to the Accused, she concluded that pre-delirium or delirium commenced on the 4 or 5 of July 1992.[693]

292. Dr Folnegovic-Smalc also said that, at the time of his admission to hospital on the 14 June 1992, the Accused was not suffering from any mental disease or defect which would have affected his accountability for the crimes charged. She drew attention to the hospital records of the Accused's admission, which stated that the Accused was "conscious, oriented, does not have fever, actively mobile". She rejected the proposition that the admitting doctor, Dr Jovicevic, could have failed to diagnosis delirum if the Accused had at that time been suffering from such a defect. One of the basic symptoms of delirum is disorientation, and the admitting doctor had clearly recorded that the Accused was orientated. In her view, this excluded the possibility that the Accused was at that time suffering from delirium.[694]

293. Dr Folnegovic-Smalc concluded that, according to the accountability standards applied in the former Yugoslavia, the Accused would have been found to be fully accountable or to have an insignificant diminishment of accountability for his actions prior to his transfer to the psychiatric ward on 7 July 1992.[695] She further gave evidence that the Accused's interview with her, in which he described the incident of the Drina River, was "a description given by a man who was not mentally ill at the time".[696]

294. The two survivors of the Drina River incident did not mention any sign which would suggest that the Accused was suffering from any diminished mental responsibility at the time. The Accused never suggested in the course of his evidence that he was intoxicated on that day or that he was suffering from any other mental impairment which could have reduced his mental responsibility. The Accused did not make any suggestion to Dr Folnegovic-Smalc during their

[693] Dr Folnegovic-Smalc (T 4396-4404).
[694] Dr Folnegovic-Smalc (T 4405-4407).
[695] Dr Folnegovic-Smalc (T 4409-4410, 4465).
[696] Dr Folnegovic-Smalc (T 4444).

meetings,[697] nor to the Prosecution when he gave his statement, that he was intoxicated on the relevant day or that he was suffering from any other mental impairment which could have reduced his mental responsibility.

295. The Trial Chamber is not satisfied that the Accused has established on the balance of probabilities that, at the time of his participation in the Drina River incident, he was suffering from a diminished mental responsibility. The Trial Chamber accepts the evidence that, upon the admission of the Accused to the Užice hospital on 14 June 1992, the Accused was conscious and coherent and showed no signs of psychosis or any other mental defect.[698] The Defence did not otherwise establish on the balance of probabilities that, *at the time of the incident*, the Accused was suffering from diminished mental responsibility. The Trial Chamber is therefore not satisfied that the Accused comes within the definition of the categories of insignificantly or significantly diminished mental responsibility provided by Yugoslav law. Nevertheless, the Trial Chamber stresses that, however helpful they may be, the classes of degrees of accountability pursuant to Yugoslav law are not binding upon this Tribunal, but may only serve as guidance. The Trial Chamber prefers the definition of diminished responsibility which it formulated earlier.[699]

296. The Defence also put forward a number of other factors which, he claimed, should mitigate his sentence if convicted:[700] his family situation; his attitude towards the court; his repentance; his "earlier life and other circumstances that the court should ?…g regard as mitigat?ingg in the concrete case".[701] In its Final Brief, the Prosecution pointed out that the Accused had shown no remorse towards the victims, that he did not plead guilty and that he did not surrender voluntarily to the Tribunal.[702]

297. The Trial Chamber is not satisfied that the Accused showed any remorse for his participation in the deaths of the five men, even though one of the victims was a person well known to him. Nor does the Trial Chamber accept the Accused's evidence that, on the day after the Drina River incident, he went to the police to report the killing. The Trial Chamber has accepted in mitigation the general spirit of co-operation very properly shown by lead counsel for the Accused,

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[697] As pointed out above, Dr Folnegovic-Smalc gave evidence that the Accused's interview with her in which he described the incident of the Drina River was "a description given by a man who was not mentally ill at the time" (T 4444).

[698] *See* above, par 292.

[699] *See* above, par 283.

[700] Defence Final Brief, page 122.

[701] It was somewhat unclear what those "other circumstances" and "earlier life" referred to, although the Defence stated during its closing argument that this referred to the accused's "life and conduct prior to the arrest" (Defence Closing Argument, Hearing of 14 Mar 2002, T 4931).

[702] It must be said that, ever since Rule 85 was amended in July 1998 to require an accused person to give evidence in relation to sentence during the trial itself, it is from a practical point of view impossible for him to give evidence of remorse unless he pleads guilty.

who trod a careful path in assisting the Trial Chamber without in any way compromising his obligations to the Accused, conduct for which the Accused himself should be given credit.

298. The fact that the Accused did not surrender to the Tribunal has not been given any weight either as mitigating or aggravating factor, since the Indictment relating to the Accused remained confidential until the day of his arrest. The Accused did not therefore have any opportunity to surrender if he had wanted to do so. Nor has the Trial Chamber regarded the fact that the Accused did not plead guilty as an aggravating factor, since an accused person has no obligation to do so and he has the right to remain silent should he choose that course.

299. The Prosecution submitted that the fact that the Accused gave a statement to the prosecution did not amount to "substantial co-operation" pursuant to Rule 101(B)(ii), as his statement "was self-serving and does not rise to the level of 'substantial co-operation'".[703] The Trial Chamber does not accept the Prosecution's argument insofar as it suggests that only a self-incriminatory statement could justify granting some mitigation to the accused for making a statement. It is true that the statement given by the Accused did not disclose anything which was not already known, or very little. But the actual content of such a statement is relevant to the amount of mitigation to give to the Accused for making it. The fact that he did give such a statement may in itself in some cases be a sign of co-operation, however modest. The Trial Chamber is not satisfied that the statement given by the Accused in the present case represented "substantial" co-operation pursuant to Rule 101(B)(ii), but it does not interpret Rule 101(B)(ii) as excluding the fact that a statement was made from the matters which may be taken into account in mitigation unless such co-operation is "substantial". Nevertheless, the co-operation which was given by the Accused was indeed modest, and it has been given very little weight.

300. The personal circumstances of the Accused, in particular the fact that he is married and has two children, have also been taken into account by the Trial Chamber as a mitigating factor in accordance with the decision of the Appeals Chamber in *Kunarac*.[704] The Defence did not put forward any other factor relevant to the Accused's life and conduct prior to the arrest which would otherwise mitigate his sentence, and no other factor has been established in the evidence on the balance of probabilities.

301. The Trial Chamber has considered the relative significance of the Accused in the broader context of the conflict in the former Yugoslavia, and it has taken into account the fact that the

[703] Prosecution Final Brief, footnote 723, page 150.
[704] *Kunarac* Appeals Judgment, par 362.

position of the Accused in the hierarchy was a low one.[705] The Trial Chamber does not accept that the Accused played any particularly significant role in the broader context of this conflict, but it notes that an accused's level in the overall hierarchy in the conflict is not ultimately decisive of the sentence given:[706]

> Establishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime which "requires consideration of the particular circumstances of the cases, as well as the form and degrees of the participation of the accused in the crime." In certain circumstances, the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless justified.

302. This Accused was not a commander, his crimes were geographically very limited, and there is no evidence that his acts encouraged other offenders (other than as found in relation to the Drina River incident) or affected other victims of such crimes within the broader context of the conflict.

303. But his crimes were particularly serious in terms of the protected interests which he violated – the life as well as the physical and mental integrity of the victims, the consequences for the victims (death for five of them and great suffering for the other two), and the reasons for which these crimes were committed (that is, no reason other than sheer ethnic hatred).

304. The Accused has been found responsible for participating in the cold-blooded execution of five Bosnian Muslim civilians and the attempted murder of two others constituting the crimes of persecution (incorporating murder and inhumane acts) and murder as a violation of the laws or customs of war. The fact that he was a low-level offender in terms of the overall conflict in the former Yugoslavia cannot alter the seriousness of the offences for which he has been convicted or the circumstances in which he committed them.[707]

305. The Trial Chamber is satisfied that the Accused took part in the commission of those crimes voluntarily. There is no acceptable evidence that he was influenced in any significant way by reason of his relationship with Milan Lukic. There was no suggestion made in relation to sentence that he was acting under duress, nor was there any evidence to that effect. The Accused may have been a weak-willed person, but he was one who was happy to be led. There are, however, degrees of culpability within the concept of intention, and the Trial Chamber has taken into account the fact that the Accused did not appear to take part in the planning of the execution of the five Muslim men, but only became involved at the time when these men were brought to the Vilina Vlas Hotel a short time before they were killed.

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[705] *Tadi}* Appeal Sentencing Judgment, pars 55-56; *Delali}* Appeal Judgment, par 847.
[706] *Delali}* Appeal Judgment, par 847 (footnote omitted).
[707] *Delali}* Appeal Judgment, par 847; *Kunarac* Trial Judgment, par 858.

306. For the purpose of determining an appropriate sentence, the Trial Chamber has considered sentences given to other accused before this Tribunal.[708] Because of the particular specificity of this case, it has found little assistance in those sentences. A sentence is, however, based primarily upon the circumstances of each case, and it must be individualised to the particular accused.[709]

[708] *Kupreškic* Appeals Judgment, par 443.
[709] *Delali}* Appeals Judgment, par 721; *Furund`ija* Appeals Judgment, par 237; *Krnojelac* Trial Judgment, pars 526-532.

XV. DISPOSITION

A. Sentence

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments of the parties, the Statute and the Rules, the Trial Chamber imposes sentence as follows.

307. Mitar Vasiljevic is convicted upon the following counts:

- Count 3: Persecution as a crime against humanity for the murder of five Muslim men and the inhumane acts inflicted on two other Muslim men in relation to the Drina River incident
- Count 5: Murder as a violation of the laws or customs of war for the murder of five Muslim men in relation to the Drina River incident

308. Mitar Vasiljevic is acquitted upon the following counts:

- Count 1 : Extermination as a crime against humanity
- Count 4: Murder as a crime against humanity
- Count 6: Inhumane acts as a crime against humanity
- Count 7: Violence to life and person as a violation of the laws or customs of war
- Count 10: Murder as a crime against humanity
- Count 11: Murder as a violation of the laws or customs of war
- Count 12: Inhumane acts as a crime against humanity
- Count 13: Violence to life and person as a violation of the laws or customs of war

309. The Trial Chamber sentences Mitar Vasiljevic to a single sentence of imprisonment for 20 years.

B. Credit for Time Served

310. Mitar Vasiljevic was arrested on 25 January 2000, and he has accordingly been in custody now for 2 years, 10 months and 4 days. He is entitled to credit for that period towards service of the sentence imposed, together with the period he will serve in custody pending a determination by the President pursuant to Rule 103(1) as to the State where the sentence is to be served. He is to remain in custody until such determination is made.

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

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Judge David Hunt
Presiding

_____ _____

Judge Ivana Janu **Judge Chikako Taya**

Dated this the 29th day of November 2002,
At The Hague,
The Netherlands.

?**Seal of the Tribunal**?

ANNEX I – PROCEDURAL BACKGROUND

A. Pre–trial phase

1. On 26 October 1998, a Judge of the Tribunal reviewed and confirmed a sealed Indictment against the Accused and two co-accused, and issued a warrant of arrest and an order for surrender.[710]

2. The Accused was detained by SFOR and transferred to the Tribunal on 25 January 2000. The sealed Indictment was partially unsealed the same day.[711] On 26 January 2000, the President assigned the case to Trial Chamber II, then composed of Judge Cassese, Judge Mumba and Judge Hunt.[712] The Accused pleaded not guilty to all counts at his initial appearance on 28 January 2000, and he was remanded in custody.[713]

3. The Prosecution submitted an amended Indictment on 6 January 2000.[714] On 1 February 2000, Judge Pocar was assigned to the case, replacing Judge Cassesse.[715] Judge Liu was assigned on 3 April 2000, replacing Judge Pocar.[716] The Accused raised his "defence" of alibi on 22 September 2000. On 30 October 2000, the Trial Chamber issued an order, under seal, which authorised the seizure of potential evidence relevant to the defence of alibi raised by the Accused.[717] Subsequently, two orders authorising the forensic examination of documents were issued, as well as orders authorising the medical and psychiatric examination of the Accused.[718]

4. The Prosecution submitted a second amended indictment ("Indictment") on 12 July 2001.[719] The Accused pleaded not guilty in relation to all the counts in the Indictment.[720] On 24 July 2001, the Trial Chamber, pursuant to Rule 82 (B) of the Rules, ordered that the Accused be tried

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[710] Confidential Review of the Indictment, 26 Oct 1998; Confidential Order for Non-disclosure, 26 Oct 1998; Warrant of Arrest, Order for Surrender, 26 Oct 1998. *Prosecutor v Milan Luki}, Sredoje Luki}, Mitar Vasiljevic*, Indictment, Case IT-98-32-PT, 21 Oct 1998.
[711] Confidential and Ex Parte Order to Partially Unseal an Indictment, 25 Jan 2000.
[712] Order of the President Assigning Case *Prosecutor v Mitar Vasiljevic* to Trial Chamber II, 26 Jan 2000; Corrigendum, 27 Jan 2000.
[713] T 3-5. Order for Detention on Remand, 28 Jan 2000.
[714] *Prosecutor v Mitar Vasiljevi}*, Indictment, Case IT-98-32-I, 27 Jan 2000.
[715] Order of the President Assigning a Judge to a Trial Chamber, 1 Feb 2000.
[716] Order of the President Assigning a Judge to a Trial Chamber, 3 Apr 2000.
[717] Order Granting Prosecutor's Application for an Order Authorising the Seizure of Evidence (Under Seal), 30 Oct 2000; Seizure Order, 30 Oct 2000.
[718] Confidential Order authorising the Forensic Examination of Documents, 17 Nov 2000; Confidential Second Order Authorising the Forensic Examination of Documents, 22 Feb 2001. Confidential Order for Medical Examination of the Accused, 24 Jan 2001; Order Authorising the Medical Examination of the Accused, 24 July 2001.
[719] Decision to Vacate in full the Order for non-disclosure of 26 October 1998, 30 Oct 2000. Prosecution's Motion to Amend Indictment, 12 July 2001. *Prosecutor v Milan Luki}, Sredoje Luki}, Mitar Vasiljevic*, Amended Indictment, Case IT-98-32-I, 12 July 2001.
[720] T 97.

separately on the Indictment.[721] Pre-trial briefs were filed by the Prosecution and by the Defence on 24 July 2001 and on 5 July 2001 respectively.[722] On 7 September 2001, Judge Janu and Judge Taya were assigned to the case, replacing Judge Mumba and Judge Liu.[723]

5. Pursuant to Rule 75, various protective measures for witnesses were ordered by the Trial Chamber, including the use of pseudonyms, screening from the public, and facial and voice distortion.[724]

B. Trial phase

6. The trial commenced on 10 September 2001. The Prosecution case lasted until 9 October 2001;[725] the Defence case started on 23 October 2001 and lasted until 10 January 2002. The Prosecution case in reply started on 10 December 2001 and finished on 15 January 2002. The Trial Chamber sat for 54 days in total. Thirty-six Prosecution witnesses and twenty-eight Defence witnesses gave evidence orally before the Trial Chamber. The Accused gave evidence on 23 October, 25-26 October, 12-13 November, 5 December 2001 and 14-15 February 2002. Upon an application by the Prosecution, six written statements were admitted into evidence pursuant to Rule 92 *bis*.[726] The Prosecution was given leave to reopen its case on 11 January 2002, and it called one witness.[727] The Defence called witnesses in further response on 14 and 15 February 2002.

7. The closing briefs were submitted on 28 February 2002, and closing arguments were heard on 6, 8 and 14 March 2002.

8. In some instances, the Trial Chamber heard testimony via video conference–link.[728] On 18 September 2001, upon an application by the Prosecution, the Trial Chamber acting pursuant to Rule 54 of the Rules issued two orders for subpoenae to give evidence.[729]

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[721] Order, 24 July 2001.
[722] Prosecution Revised Pre-Trial Brief pursuant to Rule 65 *ter*, 24 July 2001; Defence Pre-Trial Brief pursuant to Rule 65 *ter*, 5 July 2001; Explanation of the Defence Pre-Trial Brief pursuant to Trial Chamber's Order Dated 28 Aug 2001, 3 Sept 2001; Prosecution's Response to the Defence's Explanation of its Pre-Trial Brief, 13 Sept 2001.
[723] Order of the President Assigning Two *Ad Litem* Judges to a Trial, 7 Sept 2001.
[724] Decision on Motion by Prosecution for Protective Measures, 8 Sept 2000; Order, 26 Sept 2000; Oral Order on Amended Protective Measures, 18 May 2001 (T 36); Order on Protective Measures for Witnesses at Trial, 24 July 2001.
[725] T 1803.
[726] T 1796; Ex P 143,
[727] Oral Decision Allowing the Prosecution to Re-open its Case, 11 Jan 2002, T 4219-4225.
[728] Confidential Order for Testimony via Video-Conference Link, 24 July 2001; Confidential Order for Testimony via Video-Conference Link, 18 Sept 2001.
[729] Confidential Subpoena(s) to Give Evidence, 18 Sept 2001.

ANNEX II : GLOSSARY OF TERMS

ABiH	Army of the Republic of Bosnia and Herzegovina
Accused	Mitar Vasiljevic
Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977
Akayesu Trial Judgment	*Prosecutor v Akayesu*, Case ICTR-96-4-T, Judgment, 2 September 1998
Aleksovski Trial Judgment	*Prosecutor v Aleksovski,* Case IT-95-14/1-T, Judgment, 25 June 1999
Aleksovski Appeal Judgment	*Prosecutor v Aleksovski,* Case IT-95-14/1-A, Judgment, 24 March 2000
Bosnia and Herzegovina	Republic of Bosnia and Herzegovina
Blaškic Trial Judgment	*Prosecutor v Blaškic*, Case IT-95-14-T, Judgment, 3 March 2000
Delali} Trial Judgment	*Prosecutor v Delali} et al,* Case IT-96-21-T, Judgment, 16 November 1998
Delali} Appeal Judgment	*Prosecutor v Delali} et al,* Case IT-96-21-A, Judgment, 20 February 2001
Common Article 3	Article 3 common to the four Geneva Conventions of 1949
Defence	Counsel for Mitar Vasiljevic
Defence Pre-Trial Brief	*Prosecutor v Vasiljevic*, Case IT 98-32-PT, Defence Pre-Trial Brief, 5 July 2001
Defence Final Trial Brief	*Prosecutor v Vasiljevic*, Case IT 98-32-T,Defence Final Trial Brief, 28 February 2002
Drina River incident	The shooting of seven Muslim civilians on the bank of the Drina River on 7 June 1992, in which five of the Muslim men were killed

European Commission	European Commission of Human Rights
European Court	European Court of Human Rights
Ex	Exhibit
Federal Commission for Missing Persons	Federal Commission for the Search of Missing Persons in the Federation of Bosnia-Herzegovina
FRY	Federal Republic of Yugoslavia
Furund`ija Trial Judgment	*Prosecutor v Furund`ija*, Case IT-95-17/1-T, Judgment, 10 December 1998
Furund`ija Appeal Judgment	*Prosecutor v Furund`ija*, Case IT-95-17/1-A, Judgment, 21 July 2000
Geneva Convention III	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
ICC Statute	Statute of the International Criminal Court, adopted at Rome on 17 July 1998, UN Doc A/CONF. 183/9
ICCPR	International Covenant on Civil and Political Rights, 16 December 1966
ICRC Commentary to Geneva Convention IV	Pictet (ed), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1958
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
ICTY, International Tribunal or 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
Indictment	Amended Indictment, *Prosecutor v Vasiljevic*, Case IT-98-32-PT, 12 July 2001
Jelisic Trial Judgment	*Prosecutor v Jelisi},* Case IT-95-10-T, Judgment, 14 December 1999
JNA	Yugoslav National Army

Kayishema and Ruzindana Trial Judgment	*Prosecutor v Kayishema and Ruzindana*, Case ICTR-95-1-T, Judgment, 21 May 1999
Kordic and ^erkez Trial Judgment	*Prosecutor v Kordic and Cerkez*, Case IT-95-14/2-T, Judgment, 26 February 2001
Koritnik	The village of Koritnik
Koritnik group	Approximately 60 Muslim civilians from the village of Koritnik, together with five from the area of Sase, who were involved in the Pionirska Street incident
Krnojelac Trial Judgment	*Prosecutor v Krnojelac*, IT-97-25-T, Judgment, 15 March 2002
Krstic Trial Judgment	*Prosecutor v Krsti},* Case IT-98-33-T, Judgment, 2 August 2001
Kum	Serbian word which describes a very close relationship between two families or men
Kunarac Trial Judgment	*Prosecutor v Kunarac et al*, Case IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001
Kupreški} Trial Judgment	*Prosecutor v Kupreški} et al*, Case IT-95-16-T, Judgment, 14 January 2000
Kvocka Trial Judgment	*Prosecutor v Kvocka et al*, Case IT-98-30/1-T, Judgment, 2 November 2001
Marti} Rule 61 Decision	*Prosecutor v Martic*, Case IT-95-11-R61, Decision on the Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 8 March 1996
Mrkšic and Others Rule 61 Decision	*Prosecutor v Mrkšic and Others,* Case IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996
MUP	Ministry of the Interior
Musema Trial Judgment	*Prosecutor v Musema,* Case ICTR-96-13-T, Judgment, 27 January 2000
Nikoli} Rule 61 Decision	*Prosecutor v Nikolic a/k/a "Jenki"*, Case IT-94-2-R61, Decision on the Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995
Nuremberg Charter	Charter of the International Military Tribunal for the Prosecution and Punishment of the German Major War Criminals, Berlin, 6 October 1945

Nuremberg Judgment	*Trial of Major War Criminals Before the International Military Tribunal*, Nuremberg, 14 Nov 1945 – 1 Oct 1946
OTP	Office of the Prosecutor
Panos	Catering company in Višegrad where the Accused worked before the war
Pionirska Street incident	The killing of many members of the Koritnik group in a house in Pionirska Street, Višegrad, which was set on fire on 14 June 1992
Prosecution	Office of the Prosecutor
Prosecution Pre-Trial Brief	*Prosecutor v Vasiljevic*, Case IT-98-32-PT, Prosecutor's Pre-Trial Brief, 24 July 2001
Prosecution Final Trial Brief	*Prosecutor v Vasiljevic,* Case IT-98-32-T, Prosecutor's Final Trial Brief, 28 February 2002
Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993
Rules	Rules of Procedure and Evidence of the International Tribunal
Rutaganda Trial Judgment	*Prosecution v Rutaganda,* Case ICTR-96-3-T, Judgment, 6 December 1999
Sase	The village of Sase
SDA	Party for Democratic Action
SDS	Serbian Democratic Party
SFRY	Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal
SUP	Secretariat of the Interior
T	Transcript of hearing in *Prosecutor v Vasiljevic*, Case IT-98-32-T
Tadi} Appeal Judgment	*Prosecutor v Tadic*, Case IT-94-1-A, Judgment, 15 July 1999
Tadi} Jurisdiction Decision	*Prosecutor v Tadic*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995

Tadic Trial Judgment	*Prosecutor v Tadic,* Case IT-94-1-T, Judgment 14 July 1997
Tokyo Charter	Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946
TO	Territorial Defense
Torture Convention	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984
U'ice Corps	U'ice Corps of the Yugoslav People's Army
VG	Witness in *Prosecutor v Vasiljevic* – Case IT-98-32-T
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska
White Eagles	Serbian paramilitary organisation