117

SCSL-2003-08-PT
(3865-6410)

3865

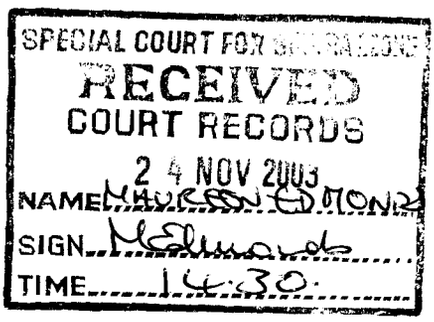
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Judge Geoffrey Robertson, QC, President
Judge Emmanuel O. Ayoola
Judge Gelaga King
Judge Renate Winter

Registrar: Mr Robin Vincent

Date filed: 24 November 2003



THE PROSECUTOR

Against

SAM HINGA NORMAN

CASE NO. SCSL – 2003 – 08 – PT

ADDITIONAL WRITTEN SUBMISSIONS OF THE PROSECUTION— RECRUITMENT AND USE OF CHILD SOLDIERS

Office of the Prosecutor:
Mr Desmond de Silva, QC
Mr Walter Marcus-Jones
Mr Christopher Staker
Mr Abdul Tejan-Cole

Counsel for the Accused:
Mr Timothy Owen, QC
Ms Quincy Whitaker
Mr Sulaiman Banja Tejan-Sie II

Counsel for Moinina Fofana (Intervening):
Mr Michiel Pestman
Mr Arrow A. Bockarie

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
FREETOWN – SIERRA LEONE

THE PROSECUTOR

Against

SAM HINGA NORMAN

CASE NO. SCSL – 2003 – 08 – PT

ADDITIONAL WRITTEN SUBMISSIONS OF THE PROSECUTION— RECRUITMENT AND USE OF CHILD SOLDIERS

I. INTRODUCTION

1. Pursuant to Article 4(c) of the Statute of the Special Court (the "**Statute**"), the Special Court has the power to prosecute persons for the crime of "Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities".

2. Pursuant to Article 1(1) of the Statute, the Special Court may only prosecute such crimes if the crime was committed after 30 November 1996, the date on which the temporal jurisdiction of the Special Court commences.

3. The Prosecution submission is that by 30 November 1996, "conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities" had become established as a crime under customary international law.

4. Perhaps the clearest and most direct statement of this (at least in relation to the *use* of child soldiers) can be found in resolution 1659 (LXIV) of the Council of Ministers of the Organization of African Unity, adopted at a session held from 1-5 July 1996 (that

is, some 4 months before the date on which the temporal jurisdiction of the Special Court commences). In paragraph 7 of that resolution, the Council of Ministers ***reaffirmed*** "that the use of child soldiers in armed conflicts constitutes a violation of their rights and should be considered as war crimes".[1] Sierra Leone was at the time a member State of the Organization of African Unity.

5. The Prosecution submits that if a competent and informed legal adviser had been asked on 30 November 1996 whether it was a crime under international law to conscript or enlist children under the age of 15 years into armed forces or groups or to use them to participate actively in hostilities, the legal adviser should have answered yes. That answer would have been based on the following factors, all of which need to be considered ***cumulatively*** as a series of steps in a chain of reasoning:

   (1) In international law, unlike in a national legal system, there is no Parliament with legislative power in respect of the world as a whole. Therefore, there will never be a statute, applying with legal force to the world as a whole, declaring the conduct to be criminal under customary international law as from a specified date. Where certain conduct is criminalised by customary international law, the existence of that rule of customary international law needs to be ascertained through a consideration of a variety of different sources and authorities. (See Section II below.)

   (2) By 1996, it was clearly established that customary international law criminalised certain conduct committed in internal armed conflicts, even though there had never previously been any instrument which stated expressly that conduct committed in an internal armed conflict could be criminal under customary international law. (See Section III below.)

   (3) The Statute of the International Criminal Tribunal for Rwanda (the "**ICTR Statute**") was adopted in **1994** (that is, some two years prior to the

---

[1] Resolution of the Plight of African Children in Situation of Armed Conflicts, operative para. 7 (CM/RES.1659 (LXIV) REV. 1, adopted by the Council of Ministers of the Organization of African Unity at its 64th Ordinary Session from 1-5 July 1996, downloaded from http://www.africa-union.org/official_documents/council%20of%20ministers%20meetings/com/46CoM_1996b.pdf).

commencement of the temporal jurisdiction of the Special Court). The title of Article 4 of the ICTR Statute is "**Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II**". The crimes expressly listed in Article 4 of the ICTR Statute include the conduct prohibited by Article 4(2) of Additional Protocol II. (See Section IV below.)

(4) The opening words of Article 4 of the ICTR Statute state clearly that the jurisdiction of the ICTR "shall not be limited to" the crimes enumerated in that Article. This means that the conduct which is recognised by that provision to be criminal is not limited to the conduct referred to in ***Article 4(2)*** of Additional Protocol II. This is a clear recognition that Article 4 of the ICTR Statute, which was adopted in 1994, conferred criminal jurisdiction over certain other (unspecified) violations of common Article 3 and Additional Protocol II. The question in this case is whether those other (unspecified) violations included, by 30 November 1996, the recruitment or use of child soldiers, which was prohibited by Article 4(3)(c) of Additional Protocol II. (See Section V below.)

(5) The recruitment or use of child soldiers was by 30 November 1996 contrary to international law in the sense that violations of the rule by a State entailed State responsibility under international law. The question is whether by 30 November 1996 violations of the rule also entailed *individual criminal responsibility*. The prohibition on the recruitment or use of child soldiers is contained in Article 4 of Additional Protocol II entitled "Fundamental Guarantees", that is, the very same Article of Additional Protocol II containing the conduct recognised by Article 4 of the ICTR Statute to be criminal. In the years immediately prior to 30 November 1996, there was a clearly evident shift in the "dictates of public conscience" (to adopt the language of the Martens clause) in relation to the rights of children in general, and the plight of children in armed conflict in particular, including in relation to the recruitment and use of child soldiers. Prior to 30

the recruitment or use of child soldiers should be regarded as criminal. The Prosecution submits that the cumulative effect of all of these factors is that a rule of customary international law criminalising the recruitment or use of child soldiers in internal armed conflicts had crystallised by 30 November 1996. (See Section VI below.)

II. THE PRINCIPLE OF LEGALITY IN CUSTOMARY INTERNATIONAL LAW

6. The Prosecution does not take issue with the proposition that it is a fundamental principle of international criminal law that a person is not to be held criminally responsible unless the conduct in question constitutes a crime at the time it is committed. This principle is reflected, for instance, in Article 15(2) of the International Covenant on Civil and Political Rights, Article 22(1) of the Statute of the International Criminal Court (the "**ICC**"), and in the case law of the International Criminal Tribunal for the Former Yugoslavia (the "**ICTY**")[2] and the ICTR.[3] However, the case law of the ICTY and ICTR have expounded in more detail the content of this principle in the context of international criminal law. In particular:

   (1) The purpose of the principle of *nullum crimen sine lege* (that is, the principle against retrospective criminal laws) is to prevent the prosecution and punishment of an individual for acts which he or she reasonably believed to be ***lawful*** at the time of their commission. The fact that an

---

[2] See, for example, *Prosecutor v. Kunarac et al., Judgement*, Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber, 12 June 2002, para. 67 ("The determination of what constitutes a war crime is therefore dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed") and para. 372 (noting that the principle of "*nullum crimen sine lege*" [that is, the principle against retrospective criminal laws] is not in dispute, following the pronouncements of the ICTY Appeals Chamber in *Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995 ("***Tadic Jurisdiction Appeal Decision***"), filed as Annex 13 *Prosecutor v Norman*, Prosecution Response to the Fourth Defence Preliminary Motion on Lack of Jurisdiction Child Recruitment (Registry page nos. 1038-1417) (**"Prosecution Response"**) and *Prosecutor v. Aleksovski, Judgement*, Case No. IT-95-14/1-A, Appeals Chamber, 24 March 2000 (the "***Aleksovski Appeal Judgement***").

[3] E.g., *Prosecutor v. Rutaganda, Judgement and Sentence*, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999 ("***Rutaganda Trial Judgement***"), para. 86.

accused could not foresee the creation of an international tribunal which would be the forum for prosecution is of no consequence.[4]

(2) It has been said by one Trial Chamber of the ICTY that the principle of *nullum crimen sine lege* (that is, the principle against retrospective criminal laws) requires that the *underlying conduct* at the time of its commission was punishable. It is only necessary that it was foreseeable and accessible to a possible perpetrator that his or her concrete conduct was punishable at the time of its commission, and it is not of material importance whether the accused could foresee the specific description of the offence in substantive criminal law, or whether the conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions.[5]

(3) It has been said by another Trial Chamber of the ICTY that the principle of *nullum crimen sine lege* requires that a criminal conviction must not be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and that this norm must make it sufficiently clear what act or omission could engage his or her criminal responsibility.[6] That principle does not prevent a court from interpreting and clarifying the elements of a particular crime,[7] or from determining an issue through a process of interpretation and clarification as to the elements of a particular crime.[8]

---

4 See *Prosecutor v. Delalic et al. (Celebici case), Judgment*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001 (the "***Celebici Appeal Judgement***"), paras. 179-180.

5 *Prosecutor v Hadzihasanovic et al., Decision on Joint Challenge to Jurisdiction*, Case No. IT-01-47-PT, T. Ch., 12 November 2002 (the "***Hadzihasanovic Jurisdiction Decision***"), filed as Annex 14 Prosecution Response para. 62.

6 *Prosecutor v. Valiljevic, Judgement*, Case No. IT-98-30-T, Trial Chamber, 29 November 2002, para. 193.

7 *Celebici Appeal Judgement*, para. 173.

8 *Aleksovski Appeal Judgement*, para. 127. See also *Hadzihasanovic Jurisdiction Decision*, para. 58 (observing that under the European Convention on Human Rights, "It is not necessary that the elements of an offence are defined, but rather that general description of the prohibited conduct be provided") and para. 61.

7. It cannot be disputed that certain conduct is rendered criminal by customary international law—this has now been established beyond any doubt (see Section III below). However, customary international law, by its very nature, is not created by an international treaty. Much less is it created by international statute enacted by an international parliament with the power to enact legislation binding on the whole world, since there simply does not exist any such international parliament. Rather, customary international law crystallises by means of a process in which new legal norms are created by the cumulative effect of various instances of State practice, expressions of opinions of States, decisions of international tribunals, and the adoption of international treaties (which may, in addition to creating treaty law, reflect or contribute to the crystallisation of rules of customary international law). Thus, the existence of crimes under customary international law cannot be established with the same degree of simplicity or certainty as in the case of a crime under the national law of a State. In particular, it is not possible to determine the date on which a crime came to be part of customary international law with the same degree of certainty as the date on which a statute came into force in the national law of a State. In many cases, it may be impossible to fix a precise date. In the present case, the question is whether the recruitment and use of child soldiers was recognised as a crime under customary international law by 30 November 1996. If so, it is unnecessary in the present case to determine the precise date on which it became so recognised.

8. It cannot be suggested that if it is uncertain whether conduct was criminal or not on a given date that the principle against retrospective criminal legislation necessarily requires an acquittal. Such an argument would be analogous to an argument that an accused cannot be convicted by a majority judgement of a Trial Chamber, because if one of three judge votes to acquit there must by definition be a reasonable doubt as to the guilt of an accused. This latter argument has been rejected by the Appeals Chamber of the ICTY.[9] Similarly, the mere fact that reasonable minds may differ as to whether or not particular conduct was criminal under customary international law

[9] *Prosecutor v. Kupreskic et al., Appeal Judgement*, Case No. IT-95-16-A, Appeals Chamber, 23 October 2001, para. 30.

on a given date does not preclude an international court from finding that it was. The mere fact that it is *arguable* that conduct was not criminal on a certain date does not mean that the argument is necessarily correct.

9. As a matter of customary international law, conduct may be:

   (1) lawful, even if considered to be undesirable or immoral (**Stage 1**);

   (2) unlawful, in the sense that the conduct will entail the responsibility under customary international law of the State in question (**Stage 2**);

   (3) unlawful, in the sense that the conduct will entail not only the responsibility under customary international law of the State in question, but also the individual criminal responsibility of any person engaging in that conduct (**Stage 3**).

10. The Prosecution submits that in order to determine whether particular conduct has progressed from Stage 1 to Stage 2, it is necessary to apply the ordinary rules governing the creation of rules of customary international law, which are found in any standard textbook on international law. However, the Prosecution submits that in determining whether particular conduct has progressed from Stage 2 to Stage 3, certain considerations may be particularly pertinent. Conduct at Stage 2 is already universally condemned by the international community as illegal under international law. Any individual committing Stage 2 conduct cannot in any sense consider the conduct to be legitimate or lawful. The progression from Stage 2 to Stage 3 is a development by which conduct, that has already for some time been considered as unlawful, is recognised as also entailing individual criminal liability. In the Prosecution's submission, this a smaller step than that from Stage 1 to Stage 2. Accordingly, it should be easier to establish that conduct has progressed from Stage 2 to Stage 3 than it is to establish that conduct has progressed from Stage 1 to Stage 2.

11. The Prosecution submits that one factor in determining whether conduct has progressed from Stage 2 to Stage 3 is the "Martens clause". The Martens clause,

which was initially included in the 1899 Hague law,[10] is reflected also in the preamble to the 1977 Additional Protocol II to the Geneva Conventions, which states that:

> "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates or the public conscience".

As elaborated by a Trial Chamber of the ICTY:

> "International humanitarian law has, as its primary purpose, to regulate the means and methods of warfare and to protect persons not actively participating in armed conflict from harm. As the Trial Chamber held in *Furundžija* the general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law. While international humanitarian law is largely derived from treaties and conventions, it also consists of a number of principles that have not been explicitly laid down in legal instruments, but are still considered fundamental to this body of law. Of fundamental importance in this respect is the so-called Martens clause, which can be found in numerous conventions in the field of international humanitarian law, ranging from the Hague Regulations to the Additional Protocols to the Geneva Conventions. According to this clause:
>
> > Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.
>
> Although this formulation was first used in the context of a convention applicable to international armed conflicts, this clause has since been considered generally applicable to all types of armed conflicts. As such, it can also be found in the preamble to Additional Protocol II.

---

[10] The "Martens Clause" was first set forth in the preambular provisions of the 1899 Hague Convention concerning the Laws or customs of War on Land which states: "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience": see *Prosecutor v. Kupreskic et al., Judgement*, Case No. IT-95-16-T, Trial Chamber, 14 January 2000 (the "***Kupreskic Trial Judgement***"), footnote 779. The International Court of Justice has referred to "the Martens Clause, whose continuing existence and applicability is not to be doubted" (*Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996,* para. 87).

> ... One of these fundamental principles underlying international humanitarian law is the principle of criminal responsibility for violations of such law. Although such responsibility is not always explicitly laid down in international humanitarian conventional instruments, it has been applied by national and international judicial organs in the course of the last century."[11]

12. As another Trial Chamber of the ICTY has observed:

> "More specifically, recourse might be had to the celebrated Martens Clause which, in the authoritative view of the International Court of Justice, has by now become part of customary international law. True, this Clause may not be taken to mean that the "principles of humanity" and the "dictates of public conscience" have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles and dictates.
>
> ...
>
> Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* [that is, the "State practice" element of rules of customary international law] has taken shape. This is however an area where *opinio iuris sive necessitatis* [that is, the "State opinion" element of rules of customary international law] may play a much greater role than *usus,* as a result of the aforementioned Martens Clause. ***In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent.*** The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law."[12]

13. The Prosecution does not suggest that all acts which are sufficiently "abhorrent" or which frustrate "the primary purpose of international humanitarian law" are for that

---

[11] *Hadzihasanovic Jurisdiction Decision*, paras. 64-65 (footnotes omitted).

[12] *Kupreskic Trial Judgement*, paras. 525, 527 (footnotes omitted, emphasis added), citing the advisory opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996,* at p. 259, para. 84.

reason alone necessarily crimes under international law.[13] However, the dictates of public conscience may be a crucial element in determining that a violation of a prohibition under general international law entails individual criminal responsibility (see paragraphs 11-12 above). It is also evident that the "dictates of public conscience" will evolve over time, and such evolutions may result in the criminalisation of breaches of increasing numbers of rules of international humanitarian law. As the Appeals Chamber of the ICTY has said: "Principles and rules of humanitarian law reflect 'elementary considerations of humanity' widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition."[14]

III. THE EXISTENCE OF CRIMES UNDER INTERNATIONAL LAW IN THE ABSENCE OF ANY INTERNATIONAL INSTRUMENT EXPRESSLY CRIMINALISING THE CONDUCT IN QUESTION

14. Rules of customary international law, by their very nature, may evolve independently of changes in treaty law. Contrary to what the Defence Reply suggests,[15] it is not the case that violations of an international law prohibition can only become criminal offences where the international community takes some express action to declare the conduct criminal. The fact that certain international humanitarian law treaties do not *expressly* criminalise violations of their provisions at the time of an alleged offence does not necessarily mean that violations of their provisions do not entail individual criminal responsibility under international law.

15. For instance, in 1995 (that is, about a year before the commencement of the temporal jurisdiction of the Special Court), the Appeals Chamber of the ICTY has held that a person is individually criminally liable for violations of common Article 3 of the Geneva Conventions, dealing with minimum standards in non-international armed

---

13 *Cf.* Defence Reply, para. 9.

14 *Tadic Jurisdiction Appeal Decision*, para. 129.

15 "Defence Reply—Preliminary Motion Based on Lack of Jurisdiction: Lawfulness of the Court's Establishment", filed on behalf of Sam Hinga Norman on 14 July 2003 (Registry page nos. 1549-1582) ("**Defence Reply**"), para. 9.

conflicts.[16] The Appeals Chamber so held, notwithstanding that common Article 3 contains no explicit reference to criminal liability for violation of its provisions, and notwithstanding that it had previously been widely believed that serious violations of humanitarian law during internal armed conflicts were not criminal under international law.[17]

16. Similarly, on 8 November 1994 (that is, about two years before the commencement of the temporal jurisdiction of the Special Court), the Statute of the ICTR was adopted by the United Nations Security Council, and the ICTR was brought into existence.[18] Article 4 of the ICTR Statute provides:

> **Article 4**
> **Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II**
>
> The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:
>
> (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
> (b) Collective punishments;
> (c) Taking of hostages;
> (d) Acts of terrorism;
> (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
> (f) Pillage;
> (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
> (h) Threats to commit any of the foregoing acts.

---

[16] *Tadic Jurisdiction Appeal Decision*, paras. 128-136.

[17] R. Boed, "Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda" (2002) 13 *Criminal Law Forum* 293 ("**Boed**"), at pp. 299-300 (citing other authors).

[18] Security Council Resolution 955 (1994), 8 November 1994.

17. The crimes enumerated in paragraphs (a) to (f) and (h) of Article 4 of the ICTR Statute reflect the wording of the prohibitions found in Article 4(2) of Additional Protocol II. Article 4 of Additional Protocol II provides:

Article 4 - Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:
(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) collective punishments;
(c) taking of hostages;
(d) acts of terrorism;
(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form or indecent assault;
(f) slavery and the slave trade in all their forms;
(g) pillage;
(h) threats to commit any or the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:
(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;
(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are

> primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

18. Article 4 of the ICTR Statute is not a provision of substantive law but a jurisdictional provision—that is, it does not make the conduct to which it refers criminal, but rather, it recognises that the conduct to which it refers is criminal under international law, and confers jurisdiction on the ICTR to prosecute violations of that law.[19] The Statute of the ICTR was the first international instrument which expressly attributed individual criminal responsibility to serious violations of common Article 3 to the Geneva Conventions and Additional Protocol II.[20] As noted in paragraph 15 above, prior to the adoption of the ICTR Statute, it was widely believed that the concept of war crimes in non-international armed conflicts did not exist. However, the Statute of the ICTR clearly recognised that certain violations of Additional Protocol II entailed individual criminal responsibility, and the adoption of the ICTR Statute "may serve as evidence of the *opinion juris* of states in respect of individual criminal responsibility for serious violations of common Article 3 or Additional Protocol II".[21]

19. At the time that the ICTR Statute was adopted by the United Nations Security Council, the United Nations Secretary-General appears to have considered that there was some uncertainty whether violations of Article 4(2) of Additional Protocol II entailed individual criminal responsibility.[22] However, this does not of itself mean

---

[19] See, e.g., *Prosecutor v. Delalic et al. (Celebici case), Judgement*, Case No. IT-96-21-T, Trial Chamber IIqtr, 16 November 1998, filed as Annex 15 Prosecution Response, para. 310 ("...the United Nations cannot 'criminalize' any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above, this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the statute of the ICTR").

[20] Boed, p. 300.

[21] Boed, p. 300.

[22] See Report of the Secretary-General pursuant to paragraph 5 of Security Council resolution 955 (1994), U.N. Doc. S/1995/134, 13 February 1995, paras. 11-12 ("Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international humanitarian law which may either be committed in both international and internal armed conflicts, such as the crime of genocide and crimes against humanity, or may be committed only in internal armed conflict, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in article 4 of Additional Protocol II ... In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the

that the Security Council or its members shared such a doubt. In any event, the ICTR has subsequently held, relying on the decision of the ICTY Appeals Chamber in the *Tadic Jurisdiction Appeal Decision*, that in 1994 (that is, during the temporal jurisdiction of the ICTR and some two years prior to the commencement of the temporal jurisdiction of the Special Court), the provisions of Article 4(2) of Additional Protocol II reflected customary international law (even if Additional Protocol II as a whole did not), and that violations thereof entailed individual criminal responsibility.[23]

20. In view of the general principles of public international law relating to the formation of rules of customary international law, and the established case law of the ICTY and the ICTR referred to above, it is not possible to argue that conduct cannot be criminal under customary international law unless there is at the time an express provision in an international instrument declaring it to be so. The Prosecution accepts that it must establish that the recruitment and use of child soldiers was a crime under customary international law by 30 November 1996. However, the Prosecution submits that it is not required, in order to establish this, to point to a specific provision of an international instrument to that effect.

IV. VIOLATIONS OF ARTICLE 4(2) OF ADDITIONAL PROTOCOL II WERE CRIMES UNDER CUSTOMARY INTERNATIONAL LAW AT THE RELEVANT TIME

21. For the reasons given in paragraphs 16-20 above, the Prosecution submits that by 30 November 1996, violations of Article 4(2) of Additional Protocol II entailed individual criminal responsibility, regardless of whether or not Additional Protocol II

---

one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common article 3 of the four Geneva Conventions." (footnotes omitted)).

[23] *Prosecutor v. Akayesu, Judgement*, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998 ("*Akayesu Trial Judgement*"), para. 609, paras. 606-615; see also *Prosecutor v. Musema, Judgement*, Case No. ICTR-96-13-T, Trial Chamber I, 27 January 2000 ("***Musema Trial Judgement***"), paras. 236-243.

as a whole reflected customary international law. It is therefore unnecessary to consider whether or not Additional Protocol II as a whole reflected customary international law at the time (or indeed, whether it does so today). It may, however, be noted that over 150 States are now parties to Additional Protocol II,[24] almost all of which ratified or acceded prior to 30 November 1996. Sierra Leone acceded to Additional Protocol II without reservation on 21 October 1986.

V. ARTICLE 4(2) WAS NOT THE ONLY PROVISION OF ADDITIONAL PROTOCOL II ENTAILING INDIVIDUAL CRIMINAL RESPONSIBILITY

22. The opening words of Article 4 of the ICTR Statute state clearly that the jurisdiction of the ICTR "shall not be limited to" those crimes enumerated in Article 4(2) of Additional Protocol II. This is a clear recognition that at the time, international law criminalised certain conduct in internal armed conflicts in addition to the conduct specified in Article 4(2) of Additional Protocol II.

23. The question in this case is whether that other conduct in internal armed conflicts that was criminalised by customary international law included, by 30 November 1996, the recruitment or use of child soldiers.

VI. VIOLATIONS OF ARTICLE 4(3)(C) ENTAILED INDIVIDUAL CRIMINAL RESPONSIBILITY AT THE MATERIAL TIME

24. Article 4(3)(c) of Additional Protocol II provides that "children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

25. This provision expresses two separate prohibitions, separated by the word "nor". In other words, it is a violation of this provision for children who have not attained the age of fifteen years to be recruited in the armed forces or groups; it is also a separate and distinct violation of this provision for children who have not attained the age of fifteen years to be allowed to take part in hostilities.

---

[24] See Annex 24.

26. In the light of the matters referred to above, the Prosecution submits that, for the reasons given below, it must be concluded that by 30 November 1996, violations of this prohibition entailed individual criminal responsibility. The relevant factors and circumstances are as follows:

27. **First**, the recruitment and use of child soldiers was at the material time clearly already a breach of international law, in the sense that violations of the prohibition entailed State responsibility under international law of the State concerned. In other words, the prohibition had already clearly reached Stage 2 referred to in paragraph 9 above. This is conceded in this case by the Defence. By 30 November 1996, this prohibition had been expressed in both Additional Protocols of 1977 to the Geneva Conventions,[25] and the prohibition had thus by then existed in international law (at least as a matter of treaty law), in respect of both international and non-international armed conflicts, for almost 20 years. The prohibition was also contained in the 1989 United Nations Convention on the Rights of the Child,[26] and the 1990 African Charter on the Rights and Welfare of the Child,[27] and by 30 November 1996 clearly had acquired the status of customary international law. Thus, by 30 November 1996, the

---

[25] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, filed as Annex 7, Prosecution Response. Sierra Leone ratified both on 21 October 1986. Article 77(2) of Protocol I states "The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest." Article 4(3)(c) of Protocol II which is applicable to non-international armed conflicts, is quoted in paragraph 19 above.

[26] Convention on the Rights of the Child (U.N.T.S. Vol. 1577, p 3, entry into force 2 September 1990), filed as Annex 2 Prosecution Response, Article 38 (1-4): "States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years to not take a direct part in hostilities. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces .... In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."

[27] African Charter on the Rights and Welfare of the Child adopted by the Organisation of African Unity in 1990, filed as Annex 8 Prosecution Response, states in Article 22(2) that "States parties to the present Charter shall take all necessary measures to ensure that no child shall take direct part in hostilities and refrain in particular from recruiting any child." A "child" is defined in the Charter as anyone below 18 years of age without exception.

recruitment or use of child soldiers could in no way be considered legitimate conduct—on the contrary, it was a clear violation of customary international law rules of humanitarian law. The only question was whether the rule had by then progressed from Stage 2 to Stage 3 referred to in paragraph 9 above—that is, whether by 30 November 1996 violations of the prohibition entailed individual criminal responsibility.

28. **Secondly**, if it is accepted that by 30 November 1996 Article 4(2) was not the only provision of Additional Protocol II that entailed individual criminal responsibility (see paragraphs 22-23 above), the question arises what are the other such provisions. It is submitted that Article 4(3)(c), prohibiting the recruitment or use of child soldiers, must be considered a very obvious candidate. Article 4(3)(c) is contained in the very same Article of Additional Protocol II that contains the conduct recognised by Article 4 of the ICTR Statute to be criminal under customary international law (see paragraphs 16-17 above). The title of Article 4 of Additional Protocol II is **"Fundamental Guarantees"**. The wording of Article 4(3)(c) contains a clear and unequivocal prohibition which, like the other crimes enumerated in Article 4(2) of Additional Protocol II, is eminently suitable to being enforced by criminal sanctions.[28] If violations of an express prohibition in the "fundamental guarantees" provision of Additional Protocol II do not entail individual criminal responsibility, it is difficult to see what other provisions would do so.[29]

---

[28] The Prosecution acknowledges that the position might be different in relation to the fundamental guarantees in Article 4(3)(a), (b) and (e) of Additional Protocol II, because these provisions impose a positive obligation to take certain types of measures without specifying which individuals will be responsible for a failure to take those measures and without specifying precisely what types of measures would be sufficient to satisfy this obligation. It is therefore possible that these provisions lack the requisite certainty to be capable of giving rise to a crime of omission in the event that the obligations imposed by these provisions are not met. However, it is unnecessary to determine this for the purposes of this case. The Defence Reply, at para. 6, suggests that the wording of Article 38(3) of the Convention on the Rights of the Child, which requires States to take "all feasible measures" to prohibit child recruitment are too vague to give rise to individual criminal responsibility, but this is immaterial in view of the very clear language of Article 4(3)(c) of Additional Protocol II.

[29] Article 4 of the ICTR Statute would no doubt equally recognize the criminality of breaches of the fundamental guarantee in Article 4(1) of Additional Protocol II, containing a prohibition against ordering that there shall be no survivors, although it is unnecessary to decide this for the purposes of this case. By way of further example, a Trial Chamber of the ICTY has said that Article 13(2) of Additional Protocol II, which concerns unlawful attacks on civilians or civilian objects, to the extent it echoes the Hague Regulations, entails individual criminal responsibility: *Prosecutor v. Kordic and Cerkez, Decision on the*

29. **Thirdly,** in the years immediately prior to 30 November 1996, there was an evolution in the "dictates of public conscience" (to adopt the language of the Martens clause)[30] in relation to individual criminal accountability of violators of international humanitarian law. In particular, the period between the conclusion of the Additional Protocols (8 June 1977) and the date of commencement of the Special Court's temporal jurisdiction (30 November 1996) was a period in which the international community displayed increasing concern to ensure that perpetrators of serious violations of international humanitarian law were held individually criminally liable. During this period, the General Assembly requested the International Law Commission ("**ILC**") to consider the question of the establishment of an international criminal court,[31] the ILC completed its work on the topic and produced a draft Statute of an international criminal court, and the General Assembly decided to establish an *ad hoc* committee of Member States, and subsequently a preparatory committee, to review the major issues arising out of the draft statute and to consider arrangements for the convening of an international conference.[32] During this period, the United Nations Security Council established the ICTY and the ICTR. Additionally, during this period, the Security Council adopted a number of resolutions relating to a number of different armed conflicts, affirming that perpetrators of serious violations of international humanitarian law would be individually responsible.[33] Furthermore, in

---

Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, Case No. IT-95-14/2-PT, Trial Chamber III, 2 March 1999, paras. 30-34.

[30] See paragraphs 11-14 above.

[31] General Assembly resolution 45/41, 28 November 1990, operative para. 3 ("Invites the International Law Commission, as it continues its work on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report concerning the question of an international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism"). See also General Assembly resolution 47/33, 9 February 1992, operative para. 6.

[32] See General Assembly resolution 49/53, 17 February 1995, operative para. 2; General Assembly resolution 50/46, 18 December 1995, operative para. 2.

[33] See Security Council resolution 935 (1994), 1 July 1994 (relating to the situation in Rwanda, and recalling at preambular para. 3 an earlier statement by which the Security Council "condemned all breaches of international humanitarian law in Rwanda, particularly those perpetrated against the civilian population, and recalled that persons who instigate or participate in such acts are individually responsible"); Security Council resolution 1072 (1996), 30 August 1996 (relating to the situation in Burundi, and recalling at preambular para. 6 that "all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for such violations and should be held accountable, and reaffirming the need to put an end to impunity for such acts and the climate that fosters

this period there was a renewed activity in national legal systems relating to prosecutions of war crimes committed during the Second World War.[34]

30. **Fourthly,** in the years immediately prior to 30 November 1996, there was an evolution in the "dictates of public conscience" in relation to the rights of children in general. This increasing concern was manifested, for instance, in the conclusion in 1989 of the Convention on the Rights of the Child,[35] and in 1990 in the African Charter of the Rights and Welfare of the Child.[36]

31. **Fourthly,** in the years immediately prior to 30 November 1996, there was an evolution in the "dictates of public conscience" in relation to the situation of children in armed conflict in particular. This was evidenced for instance in **1989** by the inclusion of Article 38 in the Convention on the Rights of the Child. Subsequently, in its resolution 48/157 of **20 December 1993**,[37] the General Assembly stated that it was "Profoundly concerned about the grievous deterioration in the situation of children in many parts of the world as a result of armed conflicts, and convinced that immediate and concerted action is called for".[38] It added that it was "Convinced that children affected by armed conflicts require the special protection of the international community ...".[39] In that resolution, the General Assembly requested the Secretary-General to appoint an expert to undertake a comprehensive study of this question.[40] On **26 August 1996**, the Secretary-General of the United Nations transmitted to the General Assembly the study prepared by the expert appointed pursuant to that resolution.[41] In that report, the expert (Ms. Graça Machel) stated, *inter alia*:

---

them"). See also Security Council resolution 865 (1993), 22 September 1993, relating to the situation in Somalia, and stating at operative para. 3 that the Security Council "Condemns all attacks on UNOSOM II personnel and reaffirms that those who have committed or have ordered the commission of such criminal acts will be held individually responsible for them".

[34] Australia: see War Crimes Amendment Act 1988; *Polyukhovich v. Commonwealth* (1991) 172 CLR 501. Canada: see *R v. Finta* [1994] 1 SCR 701. United Kingdom: War Crimes Act 1991.

[35] Reproduced as Annex 2 to the Prosecution Response.

[36] Reproduced as Annex 8 to the Prosecution Response.

[37] Reproduced as Annex 19 to the Prosecution Response.

[38] *Ibid.*, preambular para. 7.

[39] *Ibid.*, preambular para. 8.

[40] *Ibid.*, operative para. 8.

[41] "Promotion and Protection of the Rights of Children—Impact of Armed Conflict on Children—Note by the Secretary-General", U.N. Doc. A/51/306, 26 August 1996, to which was annexed the Report of

> "Whatever the causes of modern-day brutality towards children, the time has come to call a halt. The present report exposes the extent of the problem and proposes many practical ways to pullback from the brink. Its most fundamental demand is that children simply have no part in warfare. The international community must denounce this attack on children for what it is—intolerable and unacceptable."[42]

The Machel Report then went on to deal with the specific issue of recruitment and use of child soldiers,[43] in addition to a variety of other issues.[44] It subsequently stated that:

> "It is difficult, if not impossible, to achieve reconciliation without justice. The expert believes that the international community should develop more systematic methods for apprehending and punishing individuals guilty of child rights abuses. Unless those at every level of political and military command fear that they will be held accountable for crimes and subject to prosecution, there will be little prospect of restraining their behaviour during armed conflicts. Allowing perpetrators to benefit from impunity can only lead to contempt for the law and to renewed cycles of violence."[45]

32. On **27 November 1996**, shortly after the Machel Report, and several days before the date on which the Special Court's temporal jurisdiction commences, the Security Council adopted its resolution 1083 (1996),[46] in which it "*Condemn[ed]* in the strongest possible terms the practice of recruiting, training, and deploying children for combat, and *demand[ed]* that the warring parties immediately cease this inhumane and abhorrent activity and release all child soldiers for demobilization".[47] A resolution of the Council of Ministers of the Organization of African Unity adopted in

---

the expert of the Secretary General, Ms. Graça Machel, submitted pursuant to General Assembly Resolution 48/157, "Impact of Armed Conflict on Children" (the "**Machel Report**").

42 Machel Report, para. 5.

43 Machel Report, paras. 34-62.

44 Refugees and internally displaced children, sexual exploitation and gender-based violence, landmines and unexploded ordnance, sanctions, health and nutrition, promoting psychological recovery and social reintegration.

45 Machel Report, para. 248 (adding, at para. 249, that "In the case of the gravest abuses, including but not limited to genocide, international law can be more appropriate than national action").

46 Reproduced as Annex 21 to the Prosecution Response.

47 *Ibid.*, operative paragraph 6. See also the earlier Security Council resolution 1071 (1996), 30 August 1996 (reproduced as Annex 22 to the Prosecution Response), operative para. 9.

July 1996, reaffirmed "that the use of children in armed conflicts constitutes a violation of their rights and should be considered as war crimes".[48]

33. The Prosecution notes that the Report of the Secretary-General of the United Nations to the Security Council on the establishment of the Special Court[49] referred to the "doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or voluntary".[50] The draft Statute of the Special Court that was included in the Secretary-General's Report therefore defined this crime more narrowly as "Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities".[51] However, the President of the Security Council advised the Secretary-General that "The members [of the Security Council] suggest the following further adjustments of a technical or drafting nature to the Agreement: ... to article 4 (c) of the Statute of the Court, modifying it so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community".[52] The amendment proposed by the Security Council was to adopt the wording of the current text of Article 4(c) of the Statute, that is, "Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities". The Secretary-General subsequently advised the President of the Security Council that the Government of Sierra Leone had been consulted on the amendments proposed by the Security Council and had expressed its willingness to accept the texts.[53] Thus, it must be concluded that not only the members of the Security Council, but ultimately also the Secretary-General and the Government of Sierra Leone, accepted that the text of Article 4(c) of the Statute of the Special Court reflected international law as it existed by 30 November 1996.

---

48 See paragraph 4 above.

49 Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000 (the "**Secretary-General's Report**").

50 Secretary-General's Report, para. 18.

51 *Ibid.*, p. 22, Article 4(c) of the draft Statute of the Special Court.

52 Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000, para. 3 alinéa 2.

53 Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/2001/693, 13 July 2001, first paragraph.

34. In any event, the original Report of the Secretary-General did not suggest that there was no prohibition on the recruitment or use of child soldiers, but merely suggested that there were doubts as to the scope of the crime under customary international law. Even if these doubts were justified (and the members of the Security Council, the Secretary-General and the Government of Sierra Leone ultimately found that they were not), the mere fact that the precise scope of a crime is uncertain at the time of its commission does not mean that prosecutions for that crime would violate the principle against retrospective criminal laws.[54]

35. Accordingly, the Prosecution submits that Article 4(c) of the Statute reflects customary international law as it existed at 30 November 1996.[55]

36. The Defence Reply argues that in determining whether a person is individually criminally liable for violations of the prohibition on the recruitment and use of child soldiers under the age of 15 years, it would be misplaced to rely on the *Tadic Jurisdiction Appeal Decision*. In that case, the ICTY Appeals Chamber held that violations of common Article 3 to the Geneva Conventions entail individual criminal responsibility, even though common Article 3 did not itself expressly so provide.[56] The Defence argues that the factors leading to this conclusion were the similarity between common Article 3 (which applies in non-international armed conflicts) and the grave breaches provisions of the Geneva Conventions (which apply in international armed conflicts, and which are expressed to be criminally punishable). The Defence also argues that in the *Tadic Jurisdiction Appeal Decision*, the ICTY Appeals Chamber formulated a test that requires (1) "the clear and unequivocal recognition of the laws of warfare in international law"; (2) "State practice indicating an intention to criminalize the prohibition"; and (3) "punishment of violations by national courts and military tribunals". The Defence maintains that if this test is

---

[54] See paragraph 6 above.

[55] The Prosecution adds, for completeness, that even if it were not established that the prohibition under Article 4(3)(c) was a crime under customary international law, persons could be prosecuted for breaches thereof on the basis that Sierra Leone was at all material times a party to the Geneva Conventions and their Additional Protocols: *Rutaganda Trial Judgement*, paras. 88-89; *Prosecutor v. Kayishema and Ruzindana, Judgement*, Case No. ICTR-95-1-T, Trial Chamber II, 21 May 1999, paras. 156-158; *Akayesu Trial Judgement*, paras. 616.

[56] Defence Reply, paras. 7-8.

applicable, it is not satisfied in the case of the prohibition on the recruitment or use of child soldiers. In particular, the Defence states that there is no evidence of national courts or military tribunals meting out punishment for child recruitment.

37. However, the Prosecution submits that this is not a test which *must* be met in order for an international law rule to be one which will entail individual criminal responsibility for its violation. Rather, as is indicated in paragraph 128 of the *Tadic Jurisdiction Appeal Decision*, these were merely "a number of factors" considered by the Nuremberg Tribunal which were "relevant to its conclusion that the authors of particular prohibitions incur individual responsibility". The Prosecution submits that other factors which exist in the case of other international law prohibitions might be equally sufficient to lead to the same conclusion. As indicated in paragraphs 11-13 above, international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The Prosecution relies on the *Tadic Jurisdiction Appeal Decision* only for the proposition that violations of certain provisions of international humanitarian law treaties may entail individual criminal responsibility under international law, even though the treaty provision itself does not so provide.

VII. FIRST ALTERNATIVE PROSECUTION ARGUMENT: THE CRIME WAS ESTABLISHED IN CUSTOMARY INTERNATIONAL LAW BY 30 APRIL 1997

38. As an alternative argument only, in the event that the Appeals Chamber were to find that individual criminal responsibility for violations of Article 4(c) of the Statute had not become established in customary international by 30 November 1996, the Prosecution submits that it had become established at a later date before the end of the period material to the Indictment in the present case, so that individual criminal responsibility for violations of this prohibition existed in international law if not for the whole, then at least for a part, of the period relevant to this Indictment.

39. On **30 April 1997**, the "Capetown Principles" were adopted by the Symposium on the Prevention of Recruitment of Children into the Armed Forces and Demobilisation and Social Reintegration of Child Soldiers in Africa, organised by UNICEF in cooperation with the NGO Sub-group of the NGO Working Group on the Rights of the Child.[57] Paragraph 4 of the Capetown Principles contained an express provision that "Those responsible for illegally recruiting children should be brought to justice". The Prosecution submits that the Capetown Principles, considered cumulatively with all of the matters referred to above, are sufficient to conclude that violations of the prohibition even on the mere recruitment of child soldiers gave rise to individual criminal responsibility under customary international law by 30 April 1997.

VIII. SECOND ALTERNATIVE PROSECUTION ARGUMENT: THE CRIME WAS ESTABLISHED IN CUSTOMARY INTERNATIONAL LAW BY 29 JUNE 1998

40. On **29 June 1998**, the President of the Security Council made a statement in which he announced that:

> "The Security Council expresses its grave concern at the harmful impact of armed conflict on children ... The Security Council strongly condemns the targeting of children in armed conflicts, including their humiliation, brutalization, sexual abuse, abduction and forced displacement, as well as their recruitment and use in hostilities in violation of international law ... The Security Council calls upon all parties concerned to comply strictly with their obligations under international law ... The Council stresses the obligation of all States to prosecute those responsible for grave breaches of international humanitarian law".[58]

This is evidence that violations on the recruitment and use of child soldiers gave rise to individual criminal responsibility under customary international law by 29 June 1998.

---

57 Reproduced as Annex 28 to the Prosecution Response.

58 U.N. Doc. S/PRST/1998/18, 29 June 1998, reproduced as Annex 18 to the Prosecution Response.

IX. THIRD ALTERNATIVE PROSECUTION ARGUMENT: THE CRIME WAS ESTABLISHED IN CUSTOMARY INTERNATIONAL LAW BY 17 JULY 1998

41. On **17 July 1998**, the Statute of the International Criminal Court (the "**ICC Statute**") was adopted, with 122 States voting in favour. Article 8(2)(e)(vii) of the ICC Statute is in terms materially identical to Article 4(c) of the Statute of the Special Court. The Prosecution submits that *at the absolute latest*, this was the date on which the prohibition on the recruitment and use of child soldiers came to be regarded as criminal under customary international law.

42. The Defence Reply argues that "the key date with respect to the crystallization of the principle of international law at issue is not the date on which texts were finalized but the date on which the treaty in question entered into force".[59] The Prosecution submits that this is not the case in relation to the issue at hand. It is of course a basic principle of international law that the provisions of a treaty are not legally binding until the treaty enters into force, and that even when it enters into force, it is binding only as a matter of treaty law, and therefore only binding on the parties to the treaty. However, the conclusion of treaties by States constitutes also State practice for the purposes of the principles governing the formation of new rules of customary international law. This may occur in three different alternative ways:

(1) In some cases, a treaty provision may only amount to a treaty obligation at the time that the treaty enters into force, but may contribute to the crystallisation of a new rule of customary international law some time thereafter (**Situation 1**).[60] Some provisions of the ICC Statute may well fall into this category. The Prosecution does not contend (although it is unnecessary to decide the point in these proceedings) that all of the provisions of the ICC Statute are currently rules of customary international law.

---

59 Defence Reply, para. 14.

60 Brownlie, *Principles of Public International Law* (5th edn., 1998), pp. 12-13.

(2) In some cases, a treaty provision may be a statement of an emerging norm of customary international law that has previously been in the process of formation but has not yet crystallised. The adoption by a large number of States of the text of a treaty containing that provision may be the very act which completes the crystallisation of that customary norm (**Situation 2**). In such situations, a treaty provision may be quoted as evidence of customary law even before the treaty has come into force.[61]

(3) In some cases, a treaty provision may, even at the time that the treaty is concluded, merely be a statement of a rule that was previously already part of customary international law (**Situation 3**). Various provisions of the ICC Statute (such as those dealing with the prohibition on genocide) undoubtedly fall into this category.

43. For all of the reasons given in paragraphs 1 to 40 above, the Prosecution submits that Article 8(2)(e)(vii) of the ICC Statute falls into Situation 3 referred to in the previous paragraph, and that the recruitment or use of child soldiers in internal armed conflicts was a crime under customary international law even before the ICC Statute was concluded. However, as a third alternative argument, the Prosecution submits that even if, contrary to the Prosecution's submissions, the prohibition on the recruitment and use of child soldiers did not previously give rise to individual criminal responsibility, in all of the circumstances referred to above, the agreement of 122 States on the adoption of Article 8(2)(e)(vii) of the ICC Statute must be regarded as an acknowledgement by a large number of States of the customary international law status of that particular provision, and the provision therefore fell into Situation 2 referred to in the previous paragraph.

---

61 *Akehurst's Modern Introduction to International Law* (7th edn Malanczuk (ed.), 1997), p. 40.

CONCLUSION

44. For the reasons given in paragraphs 1 to 41 above, the Appeals Chamber should therefore dismiss this preliminary motion in its entirety.

Freetown, 24/11/ 2003.

For the Prosecution,

Desmond de Silva, QC

Walter Marcus-Jones

pp Christopher Staker

Christopher Staker

Abdul Tejan-Cole

INDEX OF AUTHORITIES

Cases

1. *Prosecutor v Kunarac et al., Judgement*, Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber, 12 June 2002.

2. *Prosecutor v Rutaganda, Judgement and Sentence*, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999.

3. *Prosecutor v Delalic et al. (Celebici case), Judgement*, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001.

4. *Prosecutor v Aleksovski, Judgement*, Case No. IT-95-14/1-A, Appeals Chamber, 24 March 2000.

5. *Prosecutor v Vasiljevic, Judgement*, Case No. IT-98-30-T, Trial Chamber, 29 November 2002.

6. *Prosecutor v Kupreskic et al., Judgement*, Case No. IT-95-16-T, Trial Chamber, 14 January 2000.

7. *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports* 1996, at p.259.

8. *Prosecutor v Akayesu, Judgement*, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998.

9. *Prosecutor v Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3*, Case No. IT-95-14/2-PT, Trial Chamber III, 2 March 1999.

10. *Prosecutor v Kayishema and Ruzindana, Judgement*, Case No. ICTR-95-1-T, Trial Chamber II, 21 May 1999.

11. *Prosecutor v. Musema, Judgement*, Case No. ICTR-96-13-T, Trial Chamber I, 27 January 2000.

12. *Polyukhovich v. Commonwealth* (1991) 172 CLR 501.

13. *R v. Finta* [1994] 1 SCR 701.

Reports, Statements, Declarations, Resolutions

14. "Promotion and Protection of the Rights of Children-Impact of Armed Conflict on Children-Note by the Secretary-General", U.N. Doc. A/51/306, 26 August 1996, to which was annexed the Report of the expert of the Secretary General, Ms. Graça Machel, submitted pursuant to General Assembly Resolution 48/157, "Impact of Armed Conflict on Children".

15. Security Council Resolution 955 (1994), 8 November 1994.

16. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000.

17. Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000.

18. Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc.S/2001/693, 13 July 2001.

19. Resolution of the Plight of African Children in Situation of Armed Conflicts (CM/Res.1659 (LXIV) REV.1, adopted by the Council of Ministers of the Organization of African Unity at its 64th Ordinary Session from 1-5 July 1996.

20. General Assembly Resolution 935 (1994), 1 July 1994.

21. General Assembly Resolution 50/46, 18 December 1995.

22. Security Coucil Resolution 1072 (1996).

23. Security Council Resolution 865 (1993).

24. List of State parties to Additional Protocol II.

Doctrine

25. R.Boed, "Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda" (2002) 13 *Criminal Law Forum* p. 293.

26. *Akehurst's Modern Introduction to International Law* (7th edn Malanczuk (ed.), 1997) [Extract].

ANNEX 1:

Prosecutor v Kunarac et al., Judgement, Case No. IT-96-23, IT-96-23/1-A, Appeals Chamber, 12 June 2002.

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-96-23& IT-96-23/1-A
		Date:	12 June 2002
		Original:	French

IN THE APPEALS CHAMBER

Before: **Judge Claude Jorda, Presiding**
Judge Mohamed Shahabuddeen
Judge Wolfgang Schomburg
Judge Mehmet Güney
Judge Theodor Meron

Registrar: **Mr. Hans Holthuis**

Judgement of: **12 June 2002**

PROSECUTOR
V
DRAGOLJUB KUNARAC
RADOMIR KOVAČ
AND
ZORAN VUKOVIĆ

JUDGEMENT

Counsel for the Prosecutor:

Mr. Anthony Carmona
Ms. Norul Rashid
Ms. Susan Lamb
Ms. Helen Brady

Counsel for the Accused:

Mr. Slavi{a Prodanović and Mr. Dejan Savatić for the accused Dragoljub Kunarac
Mr. Momir Kolesar and Mr. Vladimir Rajić for the accused Radomir Kovač
Mr. Goran Jovanović and Ms. Jelena Lopičić for the accused Zoran Vuković

I. INTRODUCTION 2
A. FINDINGS 2
1. Dragoljub Kunarac 2
2. Radomir Kova~ 4
3. Zoran Vukovi} 5
B. APPEAL 6
1. Dragoljub Kunarac 6
(a) Convictions 6
(b) Sentencing 7
1. Radomir Kova~ 7
(a) Convictions 7
(a) Sentencing 7
1. Zoran Vukovi} 8
(a) Convictions 8
(a) Sentencing 8
C. FINDINGS OF THE APPEALS CHAMBER 8
1. Convictions 8
2. Sentencing 8
II. STANDARD OF REVIEW 10
III. COMMON GROUNDS OF APPEAL RELATING TO ARTICLE 3 OF THE STATUTE 16
A. SUBMISSIONS OF THE PARTIES 16
1. The Appellants 16
2. The Respondent 17
B. DISCUSSION 18
1. The Existence of an Armed Conflict and Nexus therewith 18
2. Material Scope of Article 3 of the Statute and Common Article 3 of the Geneva Conventions 22
IV. COMMON GROUNDS OF APPEAL RELATING TO ARTICLE 5 OF THE STATUTE 24
A. SUBMISSIONS OF THE PARTIES 24
1. The Appellants 24
2. The Respondent 25
B. DISCUSSION 27
1. Nexus with the Armed Conflict under Article 5 of the Statute 27
2. Legal Requirement of an "attack" 28
3. The Attack must be Directed against any Civilian Population 30
4. The Attack must be Widespread *or* Systematic 31
5. The Requirement of a Policy or Plan and Nexus with the Attack 32
6. *Mens rea* for Crimes against Humanity 34
V. GROUNDS OF APPEAL RELATING TO THE TRIAL CHAMBER'S DEFINITION OF THE OFFENCES 36
A. DEFINITION OF THE CRIME OF ENSLAVEMENT (DRAGOLJUB KUNARAC AND RADOMIR KOVA^) 36

1. Submissions of the Parties
(a) The Appellants (Kunarac and Kova~) 36
(b) The Respondent 37
2. Discussion 38
B. Definition of the Crime of Rape 41
1. Submissions of the Parties 41
(a) The Appellants 41
(b) The Respondent 41
2. Discussion 42
C. Definition of the Crime of Torture (Dragoljub Kunarac and Zoran Vukovi]) 44
1. Submissions of the Parties 44
(a) The Appellants (Kunarac and Vukovi}) 44
(b) The Respondent 46
2. Discussion 47
(a) The Definition of Torture by the Trial Chamber 47
(b) The Requirement of Pain and Suffering 49
(c) Subjective Elements 50
D. Definition of Outrages upon Personal Dignity (Radomir Kova^) 52
1. Submissions of the Parties 52
(a) The Appellant (Kovač) 52
(b) The Respondent 52
2. Discussion 53
(a) Definition of the Acts which may Constitute Outrages upon Personal Dignity 53
(b) *Mens rea* for the Crime of Outrages upon Personal Dignity 53

VI. CUMULATIVE CHARGING 54

VII. CUMULATIVE CONVICTIONS 55

A. General Principles 55
B. The Instant Convictions 57
1. Inter-Article Convictions under Articles 3 and 5 of the Statute 57
2. Intra-Article Convictions under Article 5 of the Statute 58
(a) Rape and Torture 58
(b) Rape and Enslavement 61
3. Article 3 of the Statute 61
(a) Scope of Article 3 of the Statute 61
(b) Intra-Article Convictions under Article 3 of the Statute 61
4. The Appellant Kovač's Separate Ground of Appeal 65

VIII. ALLEGED ERRORS OF FACT (DRAGOLJUB KUNARAC) 66

A. Alibi 66
1. Submissions of the Parties 66
(a) The Appellant (Kunarac) 66
(b) The Respondent 67
2. Discussion 67
B. Convictions under Counts 1 to 4 68
1. Rapes of FWS-75 and D.B 68
(a) Submissions of the Parties 68
(i) The Appellant (Kunarac) 68
(ii) The Respondent 69
(b) Discussion 70
2. Rape of FWS-95 72

(a) Submissions of the Parties
(i) The Appellant (Kunarac) ... 72
(ii) The Respondent ... 72
(b) Discussion ... 73
C. CONVICTIONS UNDER COUNTS 9 AND 10 - RAPE OF FWS-87 ... 75
1. Submissions of the Parties ... 75
(a) The Appellant (Kunarac) ... 75
(b) The Respondent ... 75
2. Discussion ... 76
D. CONVICTIONS UNDER COUNTS 11 AND 12 - RAPE AND TORTURE OF FWS-183 ... 77
1. Submissions of the Parties ... 77
(a) The Appellant (Kunarac) ... 77
(b) The Respondent ... 78
2. Discussion ... 78
E. CONVICTIONS UNDER COUNTS 18 TO 20 - RAPES AND ENSLAVEMENT OF FWS-186 AND FWS-191 ... 79
1. Submissions of the Parties ... 79
(a) The Appellant (Kunarac) ... 79
(b) The Respondent ... 80
2. Discussion ... 81
F. CONCLUSION ... 82
IX. ALLEGED ERRORS OF FACT (RADOMIR KOVA^) ... 83
A. IDENTIFICATION ... 83
1. Submissions of the Parties ... 83
(a) The Appellant (Kovač) ... 83
(b) The Respondent ... 83
2. Discussion ... 84
B. CONDITIONS IN RADOMIR KOVA^'S APARTMENT ... 84
1. Submissions of the Parties ... 84
(a) The Appellant (Kovač) ... 84
(b) The Respondent ... 85
2. Discussion ... 85
C. OFFENCES COMMITTED AGAINST FWS-75 AND A.B. ... 86
1. Submissions of the Parties ... 86
(a) The Appellant (Kovač) ... 86
(b) The Respondent ... 86
2. Discussion ... 87
D. OFFENCES COMMITTED AGAINST FWS-87 AND A.S. ... 88
1. Submissions of the Parties ... 88
(a) The Appellant (Kovač) ... 88
(b) The Respondent ... 89
2. Discussion ... 90
E. OUTRAGES UPON PERSONAL DIGNITY ... 90
1. Submissions of the Parties ... 90
(a) The Appellant (Kovač) ... 90
(b) The Respondent ... 91
2. Discussion ... 91
F. SALE OF FWS-87 AND A.S. ... 91
1. Submissions of the Parties ... 91
(a) The Appellant (Kovač) ... 91

(b) The Respondent
2. Discussion 92
G. The Rape Convictions 92
H. Conclusion 92

X. ALLEGED ERRORS OF FACT (ZORAN VUKOVIĆ) 93

A. Alleged Omissions in Indictment IT-96-23/1 93
1. Submissions of the Parties 93
(a) The Appellant (Vuković) 93
(b) The Respondent 93
2. Discussion 94
B. Rape of FWS-50 95
1. Submissions of the Parties 95
(a) The Appellant (Vuković) 95
(b) The Respondent 96
2. Discussion 97
C. Issue of Identification 98
1. Submissions of the Parties 98
(a) The Appellant (Vuković) 98
(b) The Respondent 99
2. Discussion 99
D. Discussion of Exculpatory Evidence 101
1. Submissions of the Parties 101
(a) The Appellant (Vuković) 101
(b) The Respondent 102
2. Discussion 102
E. Conclusion 103

XI. GROUNDS OF APPEAL RELATING TO SENTENCING 104

A. The Appellant Dragoljub Kunarac's Appeal against Sentence 104
1. Whether the Single Sentence is in Conformity with the Rules 104
(a) Submissions of the Parties 104
(i) The Appellant (Kunarac) 104
(ii) The Respondent 105
(b) Discussion 105
2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia 107
(a) Submissions of the Parties 107
(i) The Appellant (Kunarac) 107
(ii) The Respondent 107
(b) Discussion 108
3. Aggravating Factors 109
(a) Submissions of the Parties 109
(i) The Appellant (Kunarac) 109
(ii) The Respondent 109
(b) Discussion 110
4. Mitigating Factors 112
(a) Submissions of the Parties 112
(i) The Appellant (Kunarac) 112
(ii) The Respondent 112
(b) Discussion 113
5. Credit for Time Served 114
(a) Submissions of the Parties 114

(i) The Appellant (Kunarac) .....
(ii) The Respondent 114
(b) Discussion 115
6. Conclusion 115
B. THE APPELLANT RADOMIR KOVA^'S APPEAL AGAINST SENTENCE 115
1. The Issue of a Single Sentence and the Severity of the Sentence 116
(a) Submissions of the Parties 116
(i) The Appellant (Kova~) 116
(ii) The Respondent 116
(b) Discussion 117
2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia 118
(a) Submissions of the Parties 118
(i) The Appellant (Kova~) 118
(ii) The Respondent 118
(b) Discussion 118
3. Aggravating Factors 119
(a) Submissions of the Parties 119
(i) The Appellant (Kova~) 119
(ii) The Respondent 120
(b) Discussion 120
4. Mitigating Factors 121
(a) Submissions of the Parties 121
(i) The Appellant (Kova~) 121
(ii) The Respondent 121
(b) Discussion 122
5. Credit for Time Served 122
(a) Submissions of the Parties 122
(i) The Appellant (Kova~) 122
(ii) The Respondent 123
(b) Discussion 123
6. Conclusion 123
C. THE APPELLANT ZORAN VUKOVI]'S APPEAL AGAINST SENTENCE 123
1. Retroactive Application of the Rules that Resulted in a Single Sentence 124
(a) Submissions of the Parties 124
(i) The Appellant (Vukovi}) 124
(ii) The Respondent 124
(b) Discussion 124
2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia 125
(a) Submissions of the Parties 125
(i) The Appellant (Vukovi}) 125
(ii) The Respondent 125
(b) Discussion 126
3. Aggravating Factor 126
(a) Submissions of the Parties 126
(i) The Appellant (Vukovi}) 126
(ii) The Respondent 126
(b) Discussion 127
4. Mitigating Factors 127
(a) Submissions of the Parties 127
(i) The Appellant (Vukovi}) 127
(ii) The Respondent 128
(b) Discussion 128

5. Credit for Time Served
(a) Submissions of the Parties 129
(i) The Appellant (Vukovi}) 129
(ii) The Respondent 129
(b) Discussion 129
6. Conclusion 129
D. CONCLUSION 130

XII. DISPOSITION 131

A. THE APPEALS OF DRAGOLJUB KUNARAC AGAINST CONVICTIONS AND SENTENCE 131
1. Convictions 131
2. Sentence 131
B. THE APPEALS OF RADOMIR KOVA^ AGAINST CONVICTIONS AND SENTENCE 131
1. Convictions 131
2. Sentence 132
C. THE APPEALS OF ZORAN VUKOVI] AGAINST CONVICTIONS AND SENTENCE 132
1. Convictions 132
2. Sentence 132
D. ENFORCEMENT OF SENTENCES 133

ANNEX A: PROCEDURAL BACKGROUND 135

ANNEX B: GLOSSARY 140

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 is seised of appeals against the Trial Judgement rendered by Trial Chamber II on 22 February 2001 in the case of *Prosecutor* v *Dragoljub Kunarac, Radomir Kova~ and Zoran Vukovi}*.

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

HEREBY RENDERS ITS JUDGEMENT.

I. INTRODUCTION

A. Findings

1. The Appeals Chamber endorses the following findings of the Trial Chamber in general.

2. From April 1992 until at least February 1993, there was an armed conflict between Bosnian Serbs and Bosnian Muslims in the area of Foča. Non-Serb civilians were killed, raped or otherwise abused as a direct result of the armed conflict. The Appellants, in their capacity as soldiers, took an active part in carrying out military tasks during the armed conflict, fighting on behalf of one of the parties to that conflict, namely, the Bosnian Serb side, whereas none of the victims of the crimes of which the Appellants were convicted took any part in the hostilities.

3. The armed conflict involved a systematic attack by the Bosnian Serb Army and paramilitary groups on the non-Serb civilian population in the wider area of the municipality of Fo~a. The campaign was successful in its aim of "cleansing" the Fo~a area of non-Serbs. One specific target of the attack was Muslim women, who were detained in intolerably unhygienic conditions in places like the Kalinovik School, Foča High School and the Partizan Sports Hall, where they were mistreated in many ways, including being raped repeatedly. The Appellants were aware of the military conflict in the Fo~a region. They also knew that a systematic attack against the non-Serb civilian population was taking place and that their criminal conduct was part of this attack.

4. The Appeals Chamber now turns to the findings of the Trial Chamber in relation to each individual Appellant.

1. Dragoljub Kunarac

5. Dragoljub Kunarac was born on 15 May 1960 in Fo~a. The Trial Chamber found that, during the relevant period, Kunarac was the leader of a reconnaissance unit which formed part of the local Fo~a Tactical Group. Kunarac was a well-informed soldier with access to the highest military command in the area and was responsible for collecting information about the enemy.[1] In rejecting Kunarac's alibi for certain specific periods, the Trial Chamber found him guilty on eleven counts for crimes under Articles 3 and 5 of the Statute, violations of the laws or customs of war

[1] Trial Judgement, para 582.

(torture and rape) and crimes against humanity (torture, rape and enslavement).[2] The Chamber found the following to have been established beyond reasonable doubt.[3]

6. As to Counts 1 to 4 (crimes against humanity (torture and rape) and violations of the laws or customs of war (torture and rape)), Kunarac, sometime towards the end of July 1992, took FWS-75 and D.B. to his headquarters at Ulica Osmana Đikića no 16, where Kunarac raped D.B. and aided and abetted the gang-rape of FWS-75 by several of his soldiers. On 2 August 1992, Kunarac took FWS-87, FWS-75, FWS-50 and D.B. to Ulica Osmana \iki}a no 16, where he raped FWS-87 and aided and abetted the torture and rapes of FWS-87, FWS-75 and FWS-50 at the hands of other soldiers. Furthermore, between 20 July and 2 August 1992, Kunarac transferred FWS-95 from the Partizan Sports Hall to Ulica Osmana \iki}a no 16, where he raped her.[4]

7. With regard to Counts 9 and 10 (crime against humanity (rape) and violation of the laws or customs of war (rape)), Kunarac took FWS-87 to a room on the upper floor of Karaman's house in Miljevina, where he forced her to have sexual intercourse with him, in the knowledge that she did not consent.[5]

8. As to Counts 11 and 12 (violations of the laws or customs of war (torture and rape)), Kunarac, together with two other soldiers, took FWS-183 to the banks of the Cehotina river in Foča near Velečevo one evening in mid-July 1992. Once there, Kunarac threatened to kill FWS-183 and her son while he tried to obtain information or a confession from FWS-183 concerning her alleged sending of messages to the Muslim forces and information about the whereabouts of her valuables. On that occasion, Kunarac raped FWS-183.[6]

9. Finally, with regard to Counts 18 to 20 (crimes against humanity (enslavement and rape) and violation of the laws or customs of war (rape)), on 2 August 1992, Kunarac raped FWS-191 and aided and abetted the rape of FWS-186 by the soldier DP 6 in an abandoned house in Trnova~e. FWS-186 and FWS-191 were kept in the Trnova~e house for a period of about six months, during

---

[2] Kunarac was found guilty of the following counts in Indictment IT-96-23: Count 1 (crime against humanity (torture)); Count 2 (crime against humanity (rape)); Count 3 (violation of the laws or customs of war (torture)); Count 4 (violations of the laws or customs of war (rape)); Count 9 (crime against humanity (rape)); Count 10 (violation of the laws or customs of war (rape)); Count 11 (violation of the laws or customs of war (torture)); Count 12 (violation of the laws or customs of war (rape)); Count 18 (crime against humanity (enslavement)); Count 19 (crime against humanity (rape)); Count 20 (violation of the laws or customs of war (rape)).

[3] Trial Judgement, paras 630-745.

[4] *Ibid.*, paras 630-687.

[5] *Ibid.*, paras 699-704.

[6] *Ibid.*, paras 705-715.

which time Kunarac visited the house occasionally and raped FWS-191. While FWS-19 FWS-186 were kept at the Trnova~e house, Kunarac and DP 6 deprived the women of any control over their lives and treated them as their property. Kunarac established these living conditions for FWS-191 and FWS-186 in concert with DP 6, and both Kunarac and DP 6 personally committed the act of enslavement. By assisting in setting up the conditions at the house, Kunarac also aided and abetted DP 6 with respect to his enslavement of FWS-186.[7]

10. The Trial Chamber sentenced Kunarac to a single sentence of 28 years' imprisonment.

2. Radomir Kova~

11. Radomir Kova~ was born on 31 March 1961 in Fo~a. The Trial Chamber found that Kova~ fought on the Bosnian Serb side during the armed conflict in the Fo~a region and was a member of a military unit formerly known as the "Dragan Nikoli} unit" and led by DP 2. The Trial Chamber found Kova~ guilty on four counts for crimes under Articles 3 and 5 of the Statute (violations of the laws or customs of war (rape and outrages upon personal dignity) and crimes against humanity (rape and enslavement)). The Trial Chamber found the following to have been proven beyond reasonable doubt.[8]

12. As general background, the Trial Chamber held that, on or about 30 October 1992, FWS-75, FWS-87, A.S. and A.B. were transferred to Kovač's apartment in the Lepa Brena building block, where a man named Jagos Kosti} also lived. While kept in the apartment, these girls were raped, humiliated and degraded. They were required to take care of the household chores, the cooking and the cleaning and could not leave the apartment without Kova~ or Kosti} accompanying them. Kovač completely neglected the girls' diet and hygiene.

13. As to Count 22 (crime against humanity (enslavement)), FWS-75 and A.B. were detained in Kovač's apartment for about a week, starting sometime at the end of October or early November 1992, while FWS-87 and A.S. were held for a period of about four months. Kova~ imprisoned the four girls and exercised his *de facto* power of ownership as it pleased him. It was Kova~'s intention to treat FWS-75, FWS-87, A.S. and A.B. as his property.

14. With regard to Counts 23 and 24 (crime against humanity (rape) and violation of the laws or customs of war (rape)), throughout their detention, FWS-75 and A.B. were raped by Kova~ and by

[7] *Ibid.*, paras 716-745.

other soldiers. During the period that FWS-87 and A.S. were kept in Kova~'s apartment, raped FWS-87, while Kosti} raped A.S..

15. Kovač had sexual intercourse with FWS-75, FWS-87 and A.B. in the knowledge that they did not consent and he substantially assisted other soldiers in raping those girls and A.S.. He did this by allowing other soldiers to visit or stay in his apartment and to rape the girls or by encouraging the soldiers to do so, and by handing the girls over to other men in the knowledge that they would rape them.

16. As to Count 25 (violation of the laws or customs of war (outrages upon personal dignity)), whilst kept in Kova~'s apartment, FWS-75, FWS-87, A.S. and A.B. were constantly humiliated and degraded. On an unknown date between about 31 October 1992 and about 7 November 1992, Kova~ forced FWS-87, A.S. and A.B. to dance naked on a table while he watched them. The Trial Chamber found that Kova~ knew that this was a painful and humiliating experience for the three girls, particularly because of their young age.

17. In December 1992, Kova~ sold A.B. to a man called "Dragec" for 200 deutschmarks and handed FWS-75 over to DP 1 and Dragan "Zelja" Zelenovic. On or about 25 February 1993, Kova~ sold FWS-87 and A.S. for 500 deutschmarks each to some Montenegrin soldiers. The Trial Chamber found that the sales of the girls constituted a particularly degrading attack on their dignity.

18. The Trial Chamber sentenced Kova~ to a single sentence of 20 years' imprisonment.

3. Zoran Vukovi}

19. Zoran Vukovi} was born on 6 September 1955 in Brusna, a village in the municipality of Fo~a. The Trial Chamber found that, during the armed conflict, Vukovi} was a member of the Bosnian Serb forces fighting against the Bosnian Muslim forces in the Fo~a region. Vukovi} was a member of the same military unit as the Appellant Kova~. The Trial Chamber found Vukovi} guilty on four counts for crimes under Articles 3 and 5 of the Statute (violations of the laws or customs of war (torture and rape) and crimes against humanity (torture and rape)). The Trial Chamber found the following to have been established beyond reasonable doubt.

20. With regard to Vukovi}'s defence in relation to exculpatory evidence, there was no reasonable possibility that any damage to Vukovi}'s testis or scrotum rendered him impotent during

[8] *Ibid.*, paras 745-782.

the time material to the charges against him. Accordingly, the suggestion that Vuković was u to have sexual intercourse at the relevant time was rejected.

21. As to Counts 33 to 36 (crimes against humanity (torture and rape) and violations of the laws or customs of war (torture and rape)), sometime in mid-July 1992, Vukovi} and another soldier took FWS-50 from the Partizan Sports Hall to an apartment near Partizan where Vuković raped her. Vukovi} had full knowledge that FWS-50 was only 15 years old and did not consent when he forced her to have sexual intercourse with him.[9]

22. The Trial Chamber sentenced Vukovi} to a single sentence of 12 years' imprisonment.

B. Appeal

23. All of the Appellants are now appealing from their convictions and from the sentences imposed by the Trial Chamber. The Appeals Chamber has identified certain grounds of appeal that are common to two or all three of the Appellants. These common grounds are dealt with in sections III-VII of the Judgement. Where there are separate grounds of appeal relating to one of the Appellants, these are addressed in individual sections of the Judgement.

24. Dragoljub Kunarac, Radomir Kova~ and Zoran Vukovi} have five common grounds of appeal. They allege errors by the Trial Chamber with respect to: (i) its finding that Article 3 of the Statute applies to their conduct; (ii) its finding that Article 5 of the Statute applies to their conduct; (iii) its definitions of the offences charged; (iv) cumulative charging; and (v) cumulative convictions.

25. The Appeals Chamber now turns to the individual grounds of appeal of each Appellant against his convictions and sentence.

1. Dragoljub Kunarac

(a) Convictions

26. The Appellant Kunarac appeals from his convictions on five separate grounds. He alleges errors by the Trial Chamber with respect to: (i) its rejection of his alibi defence; (ii) its evaluation of evidence and findings relating to Counts 1 to 4; (iii) its findings in relation to Counts 9 and 10; (iv)

its evaluation of the evidence and its reliance on the testimony of certain witnesses in relati Counts 11 and 12; and (v) its findings relating to Counts 18 to 20.

(b) Sentencing

27. The Appellant Kunarac appeals from his sentence on five separate grounds. He alleges that the Trial Chamber: (i) should have pronounced an individual sentence for each criminal offence for which he was convicted, in accordance with the Rules; (ii) erred in imposing a sentence which exceeded the maximum possible sentence prescribed by the sentencing practice in the former Yugoslavia; (iii) failed to assess properly various aggravating factors; (iv) erred in overlooking certain mitigating factors; and (v) was ambiguous in its application of Rule 101 of the Rules with respect to credit for time served.

2. Radomir Kova~

(a) Convictions

28. The Appellant Kova~ appeals from his convictions on eight separate grounds. He alleges errors by the Trial Chamber with respect to: (i) its reliance on certain identification evidence; (ii) its findings relating to the conditions in his apartment; (iii) its findings relating to offences committed against FWS-75 and A.B.; (iv) its findings relating to offences committed against FWS-87 and A.S.; (v) its findings relating to outrages upon personal dignity; (vi) its finding that he sold FWS-87 and A.S.; (vii) its findings as regards force used in the commission of the crime of rape; and (viii) his cumulative convictions for both rape and outrages upon personal dignity under Article 3 of the Statute.

(b) Sentencing

29. The Appellant Kova~ appeals from his sentence on five separate grounds. He alleges that the Trial Chamber: (i) prejudiced his rights through its retroactive application of Rule 101 of the Rules; (ii) erred in disregarding the sentencing practice in the former Yugoslavia; (iii) failed to assess properly various aggravating factors; (iv) erred in overlooking certain mitigating factors; and (v) would infringe his rights if it did not allow credit for time served.

[9] *Ibid.*, paras 811-817.

3. Zoran Vukovi}

(a) Convictions

30. The Appellant Vukovi} appeals from his convictions on four separate grounds. He alleges errors by the Trial Chamber with respect to: (i) alleged omissions in Indictment IT-96-23/1; (ii) its acceptance of the unreliable evidence of FWS-50 as a basis upon which to find him guilty of the charges of her rape and torture; (iii) its acceptance of certain identification evidence; and (iv) its rejection of his exculpatory evidence relating to the rape of FWS-50.

(b) Sentencing

31. The Appellant Vukovi} appeals from his sentence on five separate grounds. He alleges that the Trial Chamber: (i) erred in its retroactive application of Rule 101 of the Rules; (ii) erred in disregarding the sentencing practice in the former Yugoslavia; (iii) failed to assess properly various aggravating factors; (iv) erred in overlooking certain mitigating factors; and (v) was not clear as to whether there would be credit for time served.

C. Findings of the Appeals Chamber

1. Convictions

32. The Appeals Chamber finds that it is unable to discern any error in the Trial Chamber's assessment of the evidence or its findings in relation to any of the grounds of appeal set out above. Therefore, the Appeals Chamber dismisses the appeals of each of the Appellants on their convictions, as well as all common grounds of appeal.

2. Sentencing

33. The Appeals Chamber finds that the Trial Chamber should have considered the family situations of the Appellants Kunarac and Vukovi} as mitigating factors. However, the Appeals Chamber finds that these errors are not weighty enough to vary the sentences imposed by the Trial Chamber. The Appeals Chamber rejects the other grounds of appeal against sentence of the Appellants Kunarac and Vukovi} and all those of the Appellant Kova~, on the basis that the Trial Chamber came to reasonable conclusions and that no discernible errors have been identified.

34. For the reasons given in the parts of the Judgement that follow, the Appeals Chamber has

decided in terms of the disposition set out in section XII below.

3911

II. STANDARD OF REVIEW

3912

35. Article 25 of the Statute sets out the circumstances in which a party may appeal from a decision of the Trial Chamber. The party invoking a specific ground of appeal must identify an alleged error within the scope of this provision, which states:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice [...]

36. The overall standard of review was summarised as follows by the Appeals Chamber in the *Kupre{ki}* Appeal Judgement:[10]

> As has been held by the Appeals Chamber on numerous occasions, an appeal is not an opportunity for the parties to reargue their cases. It does not involve a trial *de novo*. On appeal, parties must limit their arguments to matters that fall within the scope of Article 25 of the Statute. The general rule is that the Appeals Chamber will not entertain arguments that do not allege legal errors invalidating the judgement, or factual errors occasioning a miscarriage of justice, apart from the exceptional situation where a party has raised a legal issue that is of general significance to the Tribunal's jurisprudence. Only in such a rare case may the Appeals Chamber consider it appropriate to make an exception to the general rule.

37. The Statute and settled jurisprudence of the Tribunal provide different standards of review with respect to errors of law and errors of fact.

38. Where a party contends that a Trial Chamber has made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether such an error of substantive or procedural law was in fact made. However, the Appeals Chamber is empowered only to reverse or revise a Trial Chamber's decision when there is an error of law "invalidating the decision". Therefore, not every error of law leads to a reversal or revision of a decision of a Trial Chamber.

39. Similarly, only errors of fact which have "occasioned a miscarriage of justice" will result in the Appeals Chamber overturning the Trial Chamber's decision.[11] The appealing party alleging an error of fact must, therefore, demonstrate precisely not only the alleged error of fact but also that the

---

[10] *Kupre{ki}* Appeal Judgement, para 22 (footnotes omitted).

error caused a miscarriage of justice,[12] which has been defined as "[a] grossly unfair outcon 39-13 judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[13] The responsibility for the findings of facts and the evaluation of evidence resides primarily with the Trial Chamber. As the Appeals Chamber in the *Kupre{ki}* Appeal Judgement held:[14]

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is "wholly erroneous" may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

40. In the *Kupre{ki}* Appeal Judgement it was further held that:[15]

> The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points.

41. Pursuant to Article 23(2) of the Statute, the Trial Chamber has an obligation to set out a reasoned opinion. In the *Furund`ija* Appeal Judgement, the Appeals Chamber held that Article 23 of the Statute gives the right of an accused to a reasoned opinion as one of the elements of the fair trial requirement embodied in Articles 20 and 21 of the Statute. This element, *inter alia*, enables a useful exercise of the right of appeal available to the person convicted.[16] Additionally, only a reasoned opinion allows the Appeals Chamber to understand and review the findings of the Trial Chamber as well as its evaluation of evidence.

42. The *rationale* of a judgement of the Appeals Chamber must be clearly explained. There is a significant difference from the standard of reasoning before a Trial Chamber. Article 25 of the Statute does not require the Appeals Chamber to provide a reasoned opinion such as that required of the Trial Chamber. Only Rule 117(B) of the Rules calls for a "reasoned opinion in writing." The

---

[11] *Ibid.*, para 29.
[12] *Ibid.*
[13] *Furund`ija* Appeal Judgement, para 37, quoting Black's Law Dictionary (7th ed., St. Paul, Minn. 1999). See additionally the 6th edition of 1990.
[14] *Kupre{ki}* Appeal Judgement, para 30.
[15] *Ibid.*, para 32.
[16] See *Hadjianastassiou* v *Greece*, European Court of Human Rights, no. 69/1991/321/393, [1992] ECHR 12945/87, Judgement of 16 December 1992, para 33.

purpose of a reasoned opinion under Rule 117(B) of the Rules is not to provide access to all deliberations of the Appeals Chamber in order to enable a review of its ultimate findings and conclusions. The Appeals Chamber must indicate with sufficient clarity the grounds on which a decision has been based.[17] However, this obligation cannot be understood as requiring a detailed response to every argument.[18]

43. As set out in Article 25 of the Statute, the Appeals Chamber's mandate cannot be effectively and efficiently carried out without focused contributions by the parties.[19] In a primarily adversarial system,[20] like that of the International Tribunal, the deciding body considers its case on the basis of the arguments advanced by the parties. It thus falls to the parties appearing before the Appeals Chamber to present their case clearly, logically and exhaustively so that the Appeals Chamber may fulfil its mandate in an efficient and expeditious manner. One cannot expect the Appeals Chamber to give detailed consideration to submissions of the parties if they are obscure, contradictory, vague,

---

[17] *Ibid.*

[18] See *García Ruiz* v *Spain*, European Court of Human Rights, no. 30544/96, ECHR, Judgement of 21 January 1999, para 26.

[19] As held by the Appeals Chamber in the *Kupreškić* Appeal Judgement, at para 27: "[A] party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake. If the party is unable to at least identify the alleged legal error, he should not raise the argument on appeal. It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber."

[20] This is also true in continental legal systems, see, e.g., § 344 II of the German Code of Criminal Procedure (*Strafprozessordnung*) containing a strict obligation on appellants to demonstrate the alleged miscarriage of justice. Under German law, a procedural objection is inadmissible if it cannot be understood from the appellant's briefs alone; only one reference in a brief renders an objection inadmissible. This has been established jurisprudence of the German Federal Supreme Court of Justice in criminal matters (*Bundesgerichtshof*) since 1952, e.g. BGHSt., Volume 3, pp 213-214.

or if they suffer from other formal and obvious insufficiencies.[21] Nonetheless, the Ap 3915
Chamber has the obligation to ensure that the accused receives a fair trial.[22]

[21] See *Kayishema* Appeal Judgement, para 137. The second part of this paragraph reads: "One aspect of such burden [showing that the Trial Chamber's findings were unreasonable] is that it is up to the Appellant to draw the attention of the Appeals Chamber to the part of the record on appeal which in his view supports the claim he is making. From a practical standpoint, it is the responsibility of the Appellant to indicate clearly which particular evidentiary material he relies upon. Claims that are not supported by such precise references to the relevant parts of the record on appeal will normally fail, on the ground that the Appellant has not discharged the applicable burden." This burden to demonstrate is now explicitly set out in Rule 108 of the Rules. Furthermore, the "Practice Direction on Formal Requirements for Appeals from Judgement" (IT/201) of 7 March 2002 provides for appropriate sanctions in cases where a party has failed to meet the standard set out: "17. Where a party fails to comply with the requirements laid down in this Practice Direction, or where the wording of a filing is unclear or ambiguous, a designated Pre-Appeal Judge or the Appeals Chamber may, within its discretion, decide upon an appropriate sanction, which can include an order for clarification or re-filing. The Appeals Chamber may also reject a filing or dismiss submissions therein."

[22] As regards the impact of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms to an appeal decision, see *Hirvisaari* v *Finland,* European Court of Human Rights, no. 49684/99, ECHR, Judgement of 27 September 2001, paras 30-32.

44. An appellant must therefore clearly set out his grounds of appeal as well as the argument 3916 support of each ground. Furthermore, depending on the finding challenged, he must set out the arguments supporting the contention that the alleged error has invalidated the decision or occasioned a miscarriage of justice. Moreover, the appellant must provide the Appeals Chamber with exact references to the parts of the records on appeal invoked in its support. The Appeals Chamber must be given references to paragraphs in judgements, transcript pages, exhibits or other authorities, indicating precisely the date and exhibit page number or paragraph number of the text to which reference is made.

45. Similarly, the respondent must clearly and exhaustively set out the arguments in support of its contentions. The obligation to provide the Appeals Chamber with exact references to all records on appeal applies equally to the respondent. Also, the respondent must prepare the appeal proceedings in such a way as to enable the Appeals Chamber to decide the issue before it in principle without searching, for example, for supporting material or authorities.

46. In the light of the aforementioned settled jurisprudence, the procedural consequence of Article 25(1)(b) of the Statute is that the Appeals Chamber ought to consider in writing only those challenges to the findings of facts which demonstrate a possible error of fact resulting in a miscarriage of justice. The Appeals Chamber will in general, therefore, address only those issues for which the aforementioned prerequisites have been demonstrated precisely.

47. Consonant with the settled practice, the Appeals Chamber exercises its inherent discretion in selecting which submissions of the parties merit a "reasoned opinion" in writing. The Appeals Chamber cannot be expected to provide comprehensive reasoned opinions on evidently unfounded submissions. Only this approach allows the Appeals Chamber to concentrate on the core issues of an appeal.

48. In principle, therefore, the Appeals Chamber will dismiss, without providing detailed reasons, those Appellants' submissions in the briefs or the replies or presented orally during the Appeal Hearing which are evidently unfounded. Objections will be dismissed without detailed reasoning where:

1. the argument of the appellant is clearly irrelevant;

2. it is evident that a reasonable trier of fact could have come to the conclusion challeng the appellant; or

3917

3. the appellant's argument unacceptably seeks to substitute his own evaluation of the evidence for that of the Trial Chamber. [23]

[23] The test set out, *inter alia*, in the *Kupre{ki}* Appeal Judgement (para 30) states the following: "Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber."

III. COMMON GROUNDS OF APPEAL RELATING TO ARTICLE 3 OF THE STATUTE

A. Submissions of the Parties

1. The Appellants

49. The Appellants' first contention in respect of Article 3 of the Statute is that the Trial Chamber erred in establishing that there was an armed conflict in two municipalities bordering the municipality of Foča, namely, the municipalities of Ga~ko and Kalinovik.[24] The Appellants concede that there was an armed conflict in the area of Foča at the relevant time, that they knew about it and that all three actively participated in carrying out military tasks as soldiers of the army of the Republika Srpska.[25] The Appellants submit, however, that no evidence was adduced before the Trial Chamber which would demonstrate that such an armed conflict was taking place in the municipalities of Ga~ko and Kalinovik at the relevant time and that, when they attempted to show the Trial Chamber that no armed conflict existed in those municipalities, they were prevented from presenting the matter.[26] As a result, the Appellants claim, they regarded this issue as being outside the scope of matters being litigated between the parties.[27] The Appellants submit that this was crucial, because, under Article 3 of the Statute, an armed conflict must exist in the location where the crime has allegedly been committed.[28]

50. Secondly, the Appellants argue that, even if the allegations against them were established, their acts were not sufficiently connected to the armed conflict to be regarded, for the purpose of Article 3 of the Statute, as being "closely related to the armed conflict."[29] According to the Appellants, this requirement implies that the crimes could not have been committed but for the existence of an armed conflict, and this must be established in respect of every crime with which

---

[24] *Kunarac* Appeal Brief, paras 5-7 and 11-15; *Vukovi}* Appeal Brief, paras 17 and 46 and *Kova~* Appeal Brief, paras 9 and 33-34. See also Appeal Transcript, T 46-48, 65 and 68.
[25] Appeal Transcript, T 47.
[26] *Kunarac* Appeal Brief, para 13 and *Vukovi}* Appeal Brief, paras 61-65. See also Appeal Transcript, T 46-48.
[27] Appeal Transcript, T 48. See, e.g., *Kova~* Appeal Brief, para 22.
[28] Appeal Transcript, T 64-68.
[29] *Kunarac* Appeal Brief, paras 8-10 and *Vukovi}* Appeal Brief, paras 50-53. See also Appeal Transcript, T 48 and 61-68 and *Kova~* Appeal Brief, paras 35-37.

they were charged.[30] The Appellants contend that it is not sufficient that there was an armed conflict, that they took part therein as soldiers and that the alleged victims were civilians.[31] 3919

51. Finally, the Appellants claim that Article 3 of the Statute is only concerned with a limited set of protected interests, namely, "the property and proper use of permitted weapons", and only protects the rights of warring parties as opposed to the rights and interests of private individuals.[32] Furthermore, the Appellants contend that this Article of the Statute does not encompass violations of Common article 3 of the Geneva Conventions.[33]

2. The Respondent

52. The Respondent argues that the Trial Chamber correctly held that it was sufficient that an armed conflict occurred at the time and place relevant to the Indictments and that it is immaterial whether the armed conflict existed only in Foča or whether it extended throughout the neighbouring municipalities of Ga~ko and Kalinovik.[34] The Respondent points out that, in any case, a state of armed conflict existed throughout Bosnia and Herzegovina at the time, and that the Appellants conceded before trial that an armed conflict existed in the area of Foča.[35] Once it is established that there is an armed conflict, the Respondent asserts, international humanitarian law applies to the entire territory under the control of a party to the conflict, whether or not fighting takes place at a certain location, and it continues to apply beyond the cessation of hostilities up until the general conclusion of peace.[36] The Respondent also points out that the municipalities of Ga~ko and Kalinovik are contiguous and neighbouring to that of Foča, and that the stipulation made between the parties refers to the area of Foča, not merely to its municipality.[37] The Respondent adds that no suggestion was made during trial that the geographical scope of the armed conflict was not envisaged by both parties to extend to all three municipalities and that an objection to that effect is raised for the first time in this appeal.[38]

---

[30] *Kunarac* Appeal Brief, para 8 and *Vukovi}* Appeal Brief, para 51. See also Appeal Transcript, T 61-63.
[31] *Kunarac* Appeal Brief, para 10 and *Vukovi}* Appeal Brief, para 53.
[32] Appeal Transcript, T 88.
[33] See, e.g., *Kova~* Appeal Brief, paras 131-133 and Prosecution Consolidated Respondent's Brief, paras 2.2-2.4.
[34] Prosecution Consolidated Respondent's Brief, para 3.6.
[35] *Ibid.*, paras 3.5-3.6. See also Appeal Transcript, T 214-215.
[36] Appeal Transcript, T 216.
[37] Prosecution Submission Regarding Admissions and Contested Matters, 1 February 2000, p 4. See also Appeal Transcript, T 215.
[38] *Ibid.*

53. The Respondent submits that the Trial Chamber's conclusion in respect of the requirec between the acts of the accused and the armed conflict was irreproachable. The Respondent argues that such close nexus could be established, as was done by the Trial Chamber, by demonstrating that the crimes were closely related to the armed conflict as a whole.[39] The Respondent argues that the test propounded by the Appellants is unacceptable and wholly unsupported by any practice.[40] It is unacceptable, the Respondent claims, because each and every crime capable of being committed outside of a wartime context would be excluded from the realm of Article 3 of the Statute and it would render Common article 3 of the Geneva Conventions completely inoperative.[41]

54. Finally, the Respondent submits that the scope of Article 3 of the Statute is much broader than the Appellants are suggesting.[42] The Respondent asserts that the Appeals Chamber in the *Tadić* Jurisdiction Decision held that Article 3 of the Statute is a residual clause covering all violations of international humanitarian law not falling under Articles 2, 4 or 5 of the Statute, including offences against a person. The Respondent also refers to the finding of the Appeals Chamber in the *Čelebići* case, in which it was decided that violations of Common article 3 of the Geneva Conventions are within the realm of Article 3 of the Statute.[43]

B. Discussion

1. The Existence of an Armed Conflict and Nexus therewith

55. There are two general conditions for the applicability of Article 3 of the Statute: first, there must be an armed conflict; second, the acts of the accused must be closely related to the armed conflict.[44]

56. An "armed conflict" is said to exist "whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State".[45]

57. There is no necessary correlation between the area where the actual fighting is taking place and the geographical reach of the laws of war. The laws of war apply in the whole territory of the

---

[39] Prosecution Consolidated Respondent's Brief, para 3.31. See also Appeal Transcript, T 218.
[40] *Ibid.*, paras 3.33-3.35. See also Appeal Transcript, T 221-222.
[41] *Ibid.*
[42] Prosecution Consolidated Respondent's Brief, paras 2.2-2.5. See also Appeal Transcript, T 213-214.
[43] Appeal Transcript, T 213-214.
[44] *Tadić* Jurisdiction Decision, paras 67 and 70.
[45] *Ibid.*, para 70.

warring states or, in the case of internal armed conflicts, the whole territory under the contro. party to the conflict, whether or not actual combat takes place there, and continue to apply until a general conclusion of peace or, in the case of internal armed conflicts, until a peaceful settlement is achieved.[46] A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place. As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting.[47] It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.[48]

58. What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can be established, as in the present case, that the perpetrator acted in furtherance of or under the guise of the armed conflict, it would be sufficient to conclude that his acts were closely related to the armed conflict. The Trial Chamber's finding on that point is unimpeachable.

59. In determining whether or not the act in question is sufficiently related to the armed conflict, the Trial Chamber may take into account, *inter alia*, the following factors: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator's official duties.

60. The Appellants' proposition that the laws of war only prohibit those acts which are specific to an actual wartime situation is not right. The laws of war may frequently encompass acts which,

---

[46] *Ibid.*
[47] See Trial Judgement, para 568.
[48] *Tadić* Jurisdiction Decision, para 70.

though they are not committed in the theatre of conflict, are substantially related to it. The law of war can apply to both types of acts. The Appeals Chamber understands the Appellants' argument to be that if an act can be prosecuted in peacetime, it cannot be prosecuted in wartime. This betrays a misconception about the relationship between the laws of war and the laws regulating a peacetime situation. The laws of war do not necessarily displace the laws regulating a peacetime situation; the former may add elements requisite to the protection which needs to be afforded to victims in a wartime situation.

3922

61. Concerning the Appellants' argument that they were prevented from disproving that there was an armed conflict in the municipalities of Ga~ko and Kalinovik, the Appeals Chamber makes the following remarks: a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and raise it only in the event of a finding against the party.[49] If a party fails to raise any objection to a particular issue before the Trial Chamber, in the absence of special circumstances, the Appeals Chamber will find that the party has waived its right to adduce the issue as a valid ground of appeal.[50] Likewise, a party should not be permitted to raise an issue which it considers to be of significance to its case at a stage when the issue can no longer be fully litigated by the opposing party.

62. In the present instance, the Appellants raised the question of the existence of an armed conflict in the municipalities of Ga~ko and Kalinovik for the first time in their Defence Final Trial Brief without substantiating their argument, thereby depriving the Prosecutor of her ability to fully litigate the issue.[51] The Appeals Chamber finds this to be unacceptable. If, as the Appellants suggest, the issue was of such importance to their case, the Appellants should have raised it at an earlier stage, thus giving fair notice to the Prosecutor and allowing her to fully and properly litigate the matter in the course of which she could put this issue to her witnesses. This the Appellants failed to do. This ground of appeal could be rejected for that reason alone.

63. In addition, and contrary to what is alleged by the Appellants, the Appeals Chamber finds that the Appellants were never prevented by the Trial Chamber from raising any issue relevant to their case. In support of their argument on that point, the Appellants refer to an incident which occurred on 4 May 2000. According to the Appellants, on that day, the Trial Chamber prevented

---

[49] *Čelebići* Appeal Judgement, para 640 and *Kayishema* Appeal Judgement, para 91. See also *Kambanda* Appeal Judgement, para 25 and *Akayesu* Appeal Judgement, para 361.

[50] *Ibid.*

[51] See Trial Judgement, para 12, footnote 27.

them from raising issues pertaining to the existence of an armed conflict in the municipalitie Ga~ko and Kalinovik.[52] It is clear from the record of the trial that the Appellants did not attempt to challenge the existence of an armed conflict in Ga~ko and Kalinovik as they alleged in their appeal, nor that they were in any way prevented from asking questions about that issue in the course of the trial.[53]

64. Finally, the Appellants conceded that there was an armed conflict "in the area of Foča" at the relevant time and that they knew about that conflict and took part therein.[54] Referring to that armed conflict, the Appellants later said that it existed only in the territory of the "Fmğunicipality of Foča".[55] The Appeals Chamber notes that the municipalities of Ga~ko and Kalinovik are contiguous and neighbouring municipalities of Foča. Furthermore, the Appeals Chamber considers that the Prosecutor did not have to prove that there was an armed conflict in each and every square inch of the general area. The state of armed conflict is not limited to the areas of actual military combat but exists across the entire territory under the control of the warring parties. The Appeals Chamber finds that ample evidence was adduced before the Trial Chamber to demonstrate that an armed conflict was taking place in the municipalities of Ga~ko and Kalinovik at the relevant time.[56] The Trial Chamber did not err in concluding that an armed conflict existed in all three municipalities, nor did it err in concluding that the acts of the Appellants were closely related to this armed conflict.[57]

65. The Trial Chamber was therefore correct in finding that there was an armed conflict at the time and place relevant to the Indictments, and that the acts of the Appellants were closely related to that conflict pursuant to Article 3 of the Statute. The Appeals Chamber does not accept the Appellants' contention that the laws of war are limited to those acts which could only be committed

---

[52] See Appeal Transcript, T 47-48.

[53] The relevant transcript pages of the hearing show that, when counsel for Kunarac was interrupted by the Presiding Judge who was enquiring about the relevancy of her questions, she was cross-examining a witness about the number of cafés in Ga~ko. When asked what the relevance of her line of questioning was, counsel responded that she was merely testing the credibility of the witness. On the same occasion, counsel was also reminded by one of the Judges that her questions had to be directed to issues relevant to the case, that is, either relevant to a fact that is in issue between the parties or relevant as to the credit of the witness. Counsel responded that she was attempting to determine whether, as the witness claimed in her earlier statement, "nationalistic feelings on the Serb side were burgeoning" in Ga~ko. Despite her failure to explain the relevancy of her line of questioning, counsel was allowed by the Presiding Judge to pursue her line of questioning *as she wished* (Trial Transcript, T 2985-2990).

[54] Appeal Transcript, T 46-47. See also Prosecution Submission Regarding Admissions and Contested Matters, 1 February 2000 and Prosecution Submission Regarding Admissions and Contested Matters Regarding the Accused Zoran Vuković, 8 March 2000.

[55] Defence Final Trial Brief, paras L.c.1-L.c.3.

[56] See, e.g., Trial Judgement, paras 22, 23, 31, 33 and 44.

[57] *Ibid.*, para 567.

in actual combat. Instead, it is sufficient for an act to be shown to have been closely related armed conflict, as the Trial Chamber correctly found. This part of the Appellants' common grounds of appeal therefore fails. 3924

2. Material Scope of Article 3 of the Statute and Common Article 3 of the Geneva Conventions

66. Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute:[58] (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

67. The determination of what constitutes a war crime is therefore dependent on the development of the laws and customs of war at the time when an act charged in an indictment was committed. As was once noted, the laws of war "are not static, but by continual adaptation follow the needs of a changing world".[59] There is no question that acts such as rape (as explained in paragraph 195), torture and outrages upon personal dignity are prohibited and regarded as criminal under the laws of war and that they were already regarded as such at the time relevant to these Indictments.

68. Article 3 of the Statute is a general and residual clause covering all serious violations of international humanitarian law not falling under Articles 2, 4 or 5 of the Statute.[60] It includes, *inter alia*, serious violations of Common article 3. This provision is indeed regarded as being part of customary international law,[61] and serious violations thereof would at once satisfy the four requirements mentioned above.[62]

69. For the reasons given above, the Appeals Chamber does not accept the Appellants' unsupported assertion that Article 3 of the Statute is restricted in such a way as to be limited to the protection of property and the proper use of permitted weapons, that it does not cover serious

---

[58] *Tadić* Jurisdiction Decision, para 94 and *Aleksovski* Appeal Judgement, para 20.
[59] *Trial of the Major War Criminals before the International Military Tribunal*, Nüremberg, 14 November 1945-1 October 1946, vol 1, p 221.
[60] *Tadić* Jurisdiction Decision, paras 89-91 and *Čelebići* Appeal Judgement, para 125.
[61] *Tadić* Jurisdiction Decision, para 98 and Trial Judgement, para 408.
[62] *Tadić* Jurisdiction Decision, para 134; *Čelebići* Appeal Judgement, para 125 and Trial Judgement, para 408.

violations of Common article 3 and that it is only concerned with the rights of warring parti... opposed to the protection of private individuals. This does not represent the state of the law. Accordingly, this part of the Appellants' common grounds of appeal relating to Article 3 of the Statute is rejected.

70. All three aspects of the common grounds of appeal relating to Article 3 of the Statute are therefore rejected and the appeal related to that provision consequently fails.

IV. COMMON GROUNDS OF APPEAL RELATING TO ARTICLE 5 OF THE STATUTE

A. Submissions of the Parties

1. The Appellants

71. The Appellants raise a number of complaints in respect of the *chapeau* elements of Article 5 of the Statute as established by the Trial Chamber. First, the Appellants reiterate their contention that their acts, even if established, were not sufficiently connected to the armed conflict to qualify as having been "committed in armed conflict" pursuant to Article 5 of the Statute. The Appellants contend that, pursuant to Article 5 of the Statute, such a link supposes the need for a substantive nexus to be established between the acts of an accused and the armed conflict, and for the acts and the conflict to coincide temporally.[63]

72. Secondly, the Appellants contend that the Trial Chamber erred in establishing that there was an attack against the non-Serb civilian population of Foča, as opposed to a purely military confrontation between armed groups, and that, in coming to its conclusion in that respect, the Trial Chamber took into account inappropriate or irrelevant factors or erred when assessing the evidence relating to the alleged attack.[64] The Appellants further claim that the Trial Chamber failed to give due consideration to their argument concerning what they regard as the Muslims' responsibility for starting the conflict and the existence of a Muslim attack upon the Serb population.[65]

73. The third aspect of the Appellants' ground of appeal in respect of Article 5 of the Statute is the contention that the regrettable consequences which may have been borne by non-Serb citizens of the municipality of Foča were not the consequence of an attack directed against the civilian population as such, but the unfortunate result of a legitimate military operation. In other words, these were "collateral damages".[66] The Appellants also challenge the Trial Chamber's conclusion that an attack may be said to have been "directed against" the non-Serb civilian population of Foča

---

[63] See, e.g., Appeal Transcript, T 64-65 and 68.
[64] *Kunarac* Appeal Brief, paras 16-24; Appeal Transcript, T 45, 54-58 and 167-168; *Vukovi}* Appeal Brief, paras 18-38 and 54-99 and *Kova~* Appeal Brief, paras 10-31 and 41.
[65] *Kunarac* Appeal Brief, paras 16-17 and 24; *Vukovi}* Appeal Brief, paras 61-65 and *Kova~* Appeal Brief, para 40.
[66] Appeal Transcript, T 58. See also *Kunarac* Appeal Brief, para 19.

and, in view of their limited number, contest that the victims identified by the Trial Chamber be said to have constituted a "population" pursuant to Article 5 of the Statute.[67]

74. Fourthly, the Appellants argue that the evidence of crimes committed against non-Serb civilians, even if accepted, would not be sufficient for the Tribunal to conclude that the attack was either widespread or systematic.[68] In particular, the Appellants claim that the incidents mentioned by the Trial Chamber are too isolated both in scope and number to amount to a fully fledged widespread and systematic attack against the civilian population.[69] In addition, the Appellants argue that, in law, the attack must be both widespread *and* systematic.[70]

75. Finally, in their fifth and sixth complaints, the Appellants claim that the Trial Chamber erred in concluding that the acts of the Appellants were linked to the attack of which, they assert, they did not even know.[71] The Appellants contend that their acts and activities during the relevant time were limited to and purely of a military sort and that they did not in any manner take part in an attack against the civilian population.[72] In particular, the Appellants contend that the required nexus between the acts with which they were charged and the attack requires that there be a plan or a policy to commit those crimes, as well as knowledge on the part of the Appellants of that plan or policy and a demonstrated willingness to participate therein.[73] The Appellants underline the fact that they did not interact during the war, that they were not related by any common plan or common purpose, and that the Prosecutor failed to establish that there was any plan to commit sexual crimes against Muslim women.[74]

2. The Respondent

76. The Respondent submits that the requirement contained in Article 5 of the Statute, that the crimes be "committed in armed conflict", implies a link between the acts of the accused and the armed conflict of a different and lesser sort than that under Article 3 of the Statute.[75] According to the Respondent, there is no requirement under Article 5 of the Statute for a substantial connection

---

[67] See, e.g., Appeal Transcript, T 55.
[68] *Ibid.*, T 58-59 and 142-144. See also *Kunarac* Appeal Brief, paras 16-26.
[69] See, e.g., *Vuković* Appeal Brief, paras 65 and 70. See also Appeal Transcript, T 58-59 and 143-144.
[70] Appeal Transcript, T 58-59.
[71] *Ibid.*, T 57. See also *Kunarac* Appeal Brief, paras 23-26; *Vuković* Appeal Brief, paras 100-102 and 106-109 and *Kovač* Appeal Brief, paras 43-45.
[72] Appeal Transcript, T 57.
[73] *Ibid.*, T 45, 50-53, 65-66, 68-70 and 168-171. See, e.g., *Vuković* Appeal Brief, para 100.
[74] Appeal Transcript, T 45, 50-52 and 168-171.
[75] Prosecution Consolidated Respondent's Brief, para 3.38. See also Appeal Transcript, T 222.

between the acts of the Appellants and the armed conflict; they must merely co-exist in eitl geographical or temporal sense.[76] This requirement is, the Respondent argues, squarely met in the present case.

77. The Respondent further claims that the Appellants' submission that the Muslims should be blamed for causing the attack demonstrates a fundamental misapprehension of the notion of "attack against the civilian population", confusing the legitimacy of resort to armed hostilities with the prohibitions which apply in all types of armed conflicts once under way.[77] According to the Respondent, far from being a device for the attribution of legal responsibility for the outbreak of hostilities, the concept of "attack" is instead an objective contextual element for crimes against humanity.[78] Consequently, the Respondent argues, the issue of which party provoked the attack and the alleged blameworthiness of the Muslims forces in that respect is irrelevant.[79]

78. The Respondent also submits that the Trial Chamber was correct in finding that the notion of "attack against a civilian population" is not negated by the mere fact that a parallel military campaign against the Muslim armed forces might have co-existed alongside the attack against the civilian population.[80] In addition, concerning the Appellants' claim that the victims do not constitute a "population" pursuant to Article 5 of the Statute, the Respondent notes that there is no legal requirement that the population as a whole be subjected to the attack, but merely that the crimes be of a collective nature.[81]

79. The Respondent is of the view that the requirements of "widespreadedness" and "systematicity" apply to the attack and not to the armed conflict or the acts of the accused, and that these requirements are disjunctive in that either or both need to be satisfied.[82] The systematic character of an attack may be inferred, the Respondent claims, from the way in which it was carried out, and from discernible patterns of criminal conduct such as those identified by the Trial Chamber.[83] In the present case, the Respondent submits that the conduct of the Appellants

---

[76] *Ibid.*
[77] Prosecution Consolidated Respondent's Brief, paras 3.8-3.9. See also Appeal Transcript, T 223.
[78] Prosecution Consolidated Respondent's Brief, para 3.9.
[79] *Ibid.*
[80] *Ibid.*, para 3.11. See also Appeal Transcript, T 223-224.
[81] Appeal Transcript, T 224.
[82] Prosecution Consolidated Respondent's Brief, para 3.21. See also Appeal Transcript, T 226-228.
[83] Prosecution Consolidated Respondent's Brief, para 3.27.

comprised criminal acts on a very large scale and the repeated and continuous commiss... associated inhumane acts against civilians.[84]

80. In addition, the Respondent contends that the Trial Chamber correctly stated that the nexus between the acts of the accused and the attack requires proof that the acts comprised part of a pattern of widespread or systematic crimes directed against a civilian population.[85] Furthermore, she asserts that, as the Trial Chamber ascertained, the notion of a plan is arguably not an independent requirement for crimes against humanity. [86]

81. Finally, concerning the required *mens rea* for crimes against humanity, the Respondent first points out that the Appellants adduced no credible proof to rebut the factual findings of the Trial Chamber that they knew of the attack and that they were aware that their acts were a part thereof.[87] The Respondent further contends that the alleged perpetrator of a crime against humanity need not approve of a plan to target the civilian population, or personally desire its outcome.[88] According to the Respondent, it was sufficient for the Trial Chamber to establish that the Appellants intentionally carried out the prohibited acts within the context of a widespread or systematic attack against a civilian population, with knowledge of the context into which these crimes fitted and in full awareness that their actions would contribute to the attack.[89]

B. Discussion

1. Nexus with the Armed Conflict under Article 5 of the Statute

82. A crime listed in Article 5 of the Statute constitutes a crime against humanity only when "committed in armed conflict."

83. As pointed out by the Trial Chamber, this requirement is not equivalent to Article 3 of the Statute's exigency that the acts be closely related to the armed conflict.[90] As stated by the Trial Chamber, the requirement contained in Article 5 of the Statute is a purely jurisdictional prerequisite

---

[84] *Ibid.*
[85] *Ibid.*, para 3.13.
[86] *Ibid.*, para 3.26. See also Appeal Transcript, T 222. Further, even if such a requirement existed, the Respondent asserts that the policy or plan would not need to be conceived at the highest level of the State machinery, nor would it need to be formalised or even stated precisely. The climate of acquiescence and official condonation of large-scale crimes would satisfy the notion of a plan or policy.
[87] Prosecution Consolidated Respondent's Brief, paras 3.41 and 3.46.
[88] Appeal Transcript, T 222.
[89] Prosecution Consolidated Respondent's Brief, paras 3.44-3.45. See also Appeal Transcript, T 228-230.
[90] See discussion above at paras 57-60.

which is satisfied by proof that there was an armed conflict and that objectively the acts of the accused are linked geographically as well as temporally with the armed conflict.[91]

84. The Appeals Chamber agrees with the Trial Chamber's conclusions that there was an armed conflict at the time and place relevant to the Indictments and finds that the Appellants' challenge to the Trial Chamber's finding is not well founded. This part of the Appellants' common grounds of appeal therefore fails.

2. Legal Requirement of an "attack"

85. In order to amount to a crime against humanity, the acts of an accused must be part of a widespread or systematic attack "directed against any civilian population". This phrase has been interpreted by the Trial Chamber, and the Appeals Chamber agrees, as encompassing five elements:[92]

(i) There must be an attack.[93]

(ii) The acts of the perpetrator must be part of the attack.[94]

(iii) The attack must be directed against any civilian population.[95]

(iv) The attack must be widespread or systematic.[96]

(v) The perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.[97]

86. The concepts of "attack" and "armed conflict" are not identical.[98] As the Appeals Chamber has already noted when comparing the content of customary international law to the Tribunal's Statute, "the two – the 'attack on the civilian population' and the 'armed conflict' – must be separate

---

[91] Trial Judgement para 413. See also *Tadić* Appeal Judgement, paras 249 and 251; *Kupreškić* Trial Judgement, para 546 and *Tadić* Trial Judgement, para 632.
[92] Trial Judgement, para 410.
[93] See *Tadić* Appeal Judgement, paras 248 and 251.
[94] *Ibid.*, para 248.
[95] Article 5 of the Statute expressly uses the expression "directed against any civilian population." See also *Tadić* Trial Judgement, paras 635-644.
[96] *Tadić* Appeal Judgement, para 248 and *Mrkšić* Rule 61 Decision, para 30.
[97] *Tadić* Appeal Judgement, para 248.
[98] *Ibid.*, para 251.

notions, although of course under Article 5 of the Statute the attack on 'any civilian population' must be part of an 'armed conflict'".[99] Under customary international law, the attack could precede, outlast, or continue during the armed conflict, but it need not be a part of it.[100] Also, the attack in the context of a crime against humanity is not limited to the use of armed force; it encompasses any mistreatment of the civilian population. The Appeals Chamber recognises, however, that the Tribunal will only have jurisdiction over the acts of an accused pursuant to Article 5 of the Statute where the latter are committed "in armed conflict".

87. As noted by the Trial Chamber, when establishing whether there was an attack upon a particular civilian population, it is not relevant that the other side also committed atrocities against its opponent's civilian population.[101] The existence of an attack from one side against the other side's civilian population would neither justify the attack by that other side against the civilian population of its opponent nor displace the conclusion that the other side's forces were in fact targeting a civilian population as such.[102] Each attack against the other's civilian population would be equally illegitimate and crimes committed as part of this attack could, all other conditions being met, amount to crimes against humanity.

88. Evidence of an attack by the other party on the accused's civilian population may not be introduced unless it tends "to prove or disprove any of the allegations made in the indictment",[103] notably to refute the Prosecutor's contention that there was a widespread or systematic attack against a civilian population. A submission that the other side is responsible for starting the hostilities would not, for instance, disprove that there was an attack against a particular civilian population.[104]

89. The Appeals Chamber is satisfied that the Trial Chamber correctly defined and interpreted the concept of "attack" and that it properly identified the elements and factors relevant to the attack. The Appellants have failed to establish that they were in any way prejudiced by the Trial Chamber's limitations on their ability to litigate issues which were irrelevant to the charges against them and which did not tend to disprove any of the allegations made against them in the

---

[99] *Ibid.* The Appeals Chamber notes that the *Kunarac* Trial Chamber stated as follows: "although the attack must be part of the armed conflict, it can also outlast it" (*Kunarac* Trial Judgement, para 420).
[100] See *Tadić* Appeal Judgement, para 251.
[101] Trial Judgement, para 580.
[102] *Kupreškić* Trial Judgement, para 765.
[103] *Kupreškić* Evidence Decision.

Indictments. All of the Trial Chamber's legal as well as factual findings in relation to the atta unimpeachable and the Appeals Chamber therefore rejects this part of the Appellants' common grounds of appeal.

3. The Attack must be Directed against any Civilian Population

90. As was correctly stated by the Trial Chamber, the use of the word "population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack.[105] It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian "population", rather than against a limited and randomly selected number of individuals.

91. As stated by the Trial Chamber, the expression "directed against" is an expression which "specifies that in the context of a crime against humanity the civilian population is the primary object of the attack".[106] In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst.

92. The Appeals Chamber is satisfied that the Trial Chamber correctly defined and identified the "population" which was being attacked and that it correctly interpreted the phrase "directed against" as requiring that the civilian population which is subjected to the attack must be the primary rather than an incidental target of the attack. The Appeals Chamber is further satisfied that the Trial Chamber did not err in concluding that the attack in this case was directed against the non-Serb

---

[104] The *Kupreškić* Trial Chamber held that, before adducing such evidence, counsel must explain to the Trial Chamber the purpose for which it is submitted and satisfy the court that it goes to prove or disprove one of the allegations contained in the indictment (*Kupreškić* Evidence Decision).
[105] Trial Judgement, para 424. See also *Tadić* Trial Judgement, para 644.
[106] Trial Judgement, para 421.

civilian population of Foča. This part of the Appellants' common grounds of appeal is therefore rejected. 3933

4. The Attack must be Widespread *or* Systematic

93. The requirement that the attack be "widespread" or "systematic" comes in the alternative.[107] Once it is convinced that either requirement is met, the Trial Chamber is not obliged to consider whether the alternative qualifier is also satisfied. Nor is it the role or responsibility of the Appeals Chamber to make supplementary findings in that respect.

94. As stated by the Trial Chamber, the phrase "widespread" refers to the large-scale nature of the attack and the number of victims,[108] while the phrase "systematic" refers to "the organised nature of the acts of violence and the improbability of their random occurrence".[109] The Trial Chamber correctly noted that "patterns of crimes – that is the non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence".[110]

95. As stated by the Trial Chamber, the assessment of what constitutes a "widespread" or "systematic" attack is essentially a relative exercise in that it depends upon the civilian population which, allegedly, was being attacked.[111] A Trial Chamber must therefore "first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon the population, ascertain whether the attack was indeed widespread or systematic".[112] The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a "widespread" or "systematic" attack vis-à-vis this civilian population.

96. As correctly stated by the Trial Chamber, "only the attack, not the individual acts of the accused, must be widespread or systematic".[113] In addition, the acts of the accused need only be a part of this attack and, all other conditions being met, a single or relatively limited number of acts

[107] *Tadić* Appeal Judgement, para 248 and *Tadić* Trial Judgement, para 648.
[108] *Tadić* Trial Judgement, para 648.
[109] Trial Judgement, para 429. See also *Tadić* Trial Judgement, para 648.
[110] Trial Judgement, para 429.
[111] *Ibid.*, para 430.
[112] See *Ibid.*
[113] *Ibid.*, para 431.

on his or her part would qualify as a crime against humanity, unless those acts may be said to be isolated or random.

97. The Trial Chamber thus correctly found that the attack must be either "widespread" or "systematic", that is, that the requirement is disjunctive rather than cumulative. It also correctly stated that the existence of an attack upon one side's civilian population would not disprove or cancel out that side's attack upon the other's civilian population. In relation to the circumstances of this case, the Appeals Chamber is satisfied that the Trial Chamber did not err in concluding that the attack against the non-Serb civilian population of Foča was systematic in character. The Appellants' arguments on those points are all rejected and this part of their common grounds of appeal accordingly fails.

5. The Requirement of a Policy or Plan and Nexus with the Attack

98. Contrary to the Appellants' submissions, neither the attack nor the acts of the accused needs to be supported by any form of "policy" or "plan". There was nothing in the Statute or in customary international law at the time of the alleged acts which required proof of the existence of a plan or policy to commit these crimes.[114] As indicated above, proof that the attack was directed

[114] There has been some debate in the jurisprudence of this Tribunal as to whether a policy or plan constitutes an element of the definition of crimes against humanity. The practice reviewed by the Appeals Chamber overwhelmingly supports the contention that no such requirement exists under customary international law. See, for instance, Article 6(c) of the Nuremberg Charter; Nuremberg Judgement, Trial of the Major War Criminals before the International Military Tribunal, Nüremberg, 14 November 1945 – 1 October 1945, in particular, pp 84, 254, 304 (*Streicher*) and 318-319 (*von Schirach*); Article II(1)(c) of Control Council Law No 10; *In re Ahlbrecht*, ILR 16/1949, 396; *Ivan Timofeyevich Polyukhovich* v *The Commonwealth of Australia and Anor*, (1991) 172 CLR 501; Case FC 91/026; *Attorney-General* v *Adolph Eichmann*, District Court of Jerusalem, Criminal Case No. 40/61; *Mugesera et al.* v *Minister of Citizenship and Immigration*, IMM-5946-98, 10 May 2001, Federal Court of Canada, Trial Division; *In re Trajkovic*, District Court of Gjilan (Kosovo, Federal Republic of Yugoslavia), P Nr 68/2000, 6 March 2001; *Moreno* v *Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, Ғ1994ğ 1 F.C. 298, 14 September 1993; *Sivakumar* v *Canada* (Minister of Employment and Immigration), Federal Court of Canada, Court of Appeal, Ғ1994ğ 1 F.C. 433, 4 November 1993. See also Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), S/25704, 3 May 1993, paras 47-48; Yearbook of the International Law Commission (ILC), 1954, vol. II, 150; Report of the ILC on the work of its 43rd session, 29 April – 19 July 1991, Supplement No 10 (UN Doc No A/46/10), 265-266; its 46th session, 2 May – 22 July 1994, Supplement No 10 (UN Doc No A/49/10), 75-76; its 47th session, 2 May – 21 July 1995, 47, 49 and 50; its 48th session, 6 May – 26 July 1996, Supplement No 10 (UN Doc No A/51/10), 93 and 95-96. The Appeals Chamber reached the same conclusion in relation to the crime of genocide (*Jelisi}* Appeal Judgement, para 48). Some of the decisions which suggest that a plan or policy is required in law went, in that respect, clearly beyond the text of the statute to be applied (see e.g., *Public Prosecutor* v *Menten*, Supreme Court of the Netherlands, 13 January 1981, reprinted in 75 *ILR* 331, 362-363). Other references to a plan or policy which have sometimes been used to support this additional requirement in fact merely highlight the *factual* circumstances of the case at hand, rather than impose an independent constitutive element (see, e.g., Supreme Court of the British Zone, OGH br. Z., vol. I, 19). Finally, another decision, which has often been quoted in support of the plan or policy requirement, has been shown not to constitute an authoritative statement of customary international law (see *In re Altstötter*, ILR

against a civilian population and that it was widespread or systematic, are legal elements of the crime. But to prove these elements, it is not necessary to show that they were the result of the existence of a policy or plan. It may be useful in establishing that the attack was directed against a civilian population and that it was widespread or systematic (especially the latter) to show that there was in fact a policy or plan, but it may be possible to prove these things by reference to other matters. Thus, the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.

99. The acts of the accused must constitute part of the attack.[115] In effect, as properly identified by the Trial Chamber, the required nexus between the acts of the accused and the attack consists of two elements:[116]

> (i) the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
> (ii) knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof.[117]

100. The acts of the accused must be part of the "attack" against the civilian population, but they need not be committed in the midst of that attack. A crime which is committed before or after the main attack against the civilian population or away from it could still, if sufficiently connected, be part of that attack. The crime must not, however, be an isolated act.[118] A crime would be regarded as an "isolated act" when it is so far removed from that attack that, having considered the context and circumstances in which it was committed, it cannot reasonably be said to have been part of the attack.[119]

14/1947, 278 and 284 and comment thereupon in *Ivan Timofeyevich Polyukhovich* v *The Commonwealth of Australia and Anor*, (1991) 172 CLR 501, pp 586-587).

[115] See *Tadić* Appeal Judgement, para 248.

[116] Trial Judgement, para 418; *Tadić* Appeal Judgement, paras 248, 251 and 271; *Tadić* Trial Judgement, para 659 and *Mrkšić* Rule 61 Decision, para 30.

[117] The issue of *mens rea* is dealt with below, see paras 102-105.

[118] *Kupreškić* Trial Judgement, para 550.

[119] *Ibid.*; *Tadić* Trial Judgement, para 649 and *Mrkšić* Rule 61 Decision, para 30. On 30 May 1946, the Legal Committee of the United Nations War Crime Commission held that: "Isolated offences did not fall within the notion of crimes against humanity. As a rule systematic mass action, particularly if it was authoritative, was necessary to transform a common crime, punishable only under municipal law, into a crime against humanity, which thus became also the concern of international law. Only crimes which either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied at different times and places, endangered the

101. The Appeals Chamber is satisfied that the Trial Chamber identified and applied the proper test for establishing the required nexus between the acts of the accused and the attack and that the Trial Chamber was correct in concluding that there is no requirement in the Statute or in customary international law that crimes against humanity must be supported by a policy or plan to carry them out. The Appeals Chamber is also satisfied that the acts of the Appellants were not merely of a military sort as was claimed, but that they were criminal in kind, and that the Trial Chamber did not err in concluding that these acts comprised part of the attack against the non-Serb civilian population of Foča. This part of the Appellants' common grounds of appeal therefore fails.

6. *Mens rea* for Crimes against Humanity

102. Concerning the required *mens rea* for crimes against humanity, the Trial Chamber correctly held that the accused must have had the intent to commit the underlying offence or offences with which he is charged, and that he must have known "that there is an attack on the civilian population and that his acts comprise part of that attack, or at least [that he took] the risk that his acts were part of the attack."[120] This requirement, as pointed out by the Trial Chamber, does not entail knowledge of the details of the attack.[121]

103. For criminal liability pursuant to Article 5 of the Statute, "the motives of the accused for taking part in the attack are irrelevant and a crime against humanity may be committed for purely personal reasons."[122] Furthermore, the accused need not share the purpose or goal behind the attack.[123] It is also irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the accused, which must be directed against the target population and the accused need only know that his acts are part thereof. At most, evidence that he committed the acts for purely personal reasons could be indicative of a rebuttable assumption that he was not aware that his acts were part of that attack.

104. The Appellants' contention that a perpetrator committing crimes against humanity needs to know about a plan or policy to commit such acts and that he needs to know of the details of the

---

international community or shocked the conscience of mankind, warranted intervention by States other than that on whose territory the crimes had been committed, or whose subjects had become their victims" (see, *History of the United Nations War Crimes Commission and the Development of the Laws of War*, Compiled by the United Nations War Crimes Commission, 1948, p 179).

[120] Trial Judgement, para 434.

[121] *Ibid.*

[122] *Ibid.*, para 433. See also *Tadić* Appeal Judgement, paras 248 and 252.

[123] See, for a telling illustration of that rule, *Attorney-General of the State of Israel* v *Yehezkel Ben Alish Enigster*, District Court of Tel-Aviv, 4 January 1952, para 13.

attack is not well founded. Accordingly, the Appeals Chamber rejects this part of the common grounds of appeal.

105. In conclusion, the Appeals Chamber is satisfied that the Trial Chamber correctly identified all five elements which constitute the *chapeau* elements or general requirements of crimes against humanity under customary international law, as well as the jurisdictional requirement that the acts be committed in armed conflict, and that it interpreted and applied these various elements correctly in the present instance. The Appellants' common grounds of appeal relating to Article 5 of the Statute are therefore rejected.

V. GROUNDS OF APPEAL RELATING TO THE TRIAL CHAMBER'S DEFINITION OF THE OFFENCES

A. Definition of the Crime of Enslavement (Dragoljub Kunarac and Radomir Kova~)

1. Submissions of the Parties

(a) The Appellants (Kunarac and Kova~)

106. The Appellants Kunarac and Kova~ contend that the Trial Chamber's definition of the crime of enslavement is too broad and does not define clearly the elements of this crime.[124] In particular, the Appellants believe that a clear distinction should be made "between the notion of enslavement (slavery) as interpreted in all the legal sources (...) and the detention as listed in the Indictment".[125] The Appellants put forward the following alternative elements for the crime of enslavement.

107. First, for a person to be found guilty of the crime of enslavement, it must be established that the accused treated the victim "as its own ownership".[126] The Appellants contend that the Prosecutor failed to prove that any of the accused charged with the crime of enslavement behaved in such a way to any of the victims.

108. Secondly, another constitutive element of the crime of enslavement is the constant and clear lack of consent of the victims during the entire time of the detention or the transfer.[127] The Appellants submit that this element has not been proven as the victims testified that they had freedom of movement within and outside the apartment and could therefore have escaped or attempted to change their situation.[128] Similarly, the Appellants contend that the victims were not forced to do household chores but undertook them willingly.[129]

109. Thirdly, the victim must be enslaved for an indefinite or at least for a prolonged period of time.[130] According to the Appellants, the time period must "indicate a clear intention to keep the

---

[124] *Kunarac* Appeal Brief, para 130.
[125] *Kova~* Appeal Brief, para 160 and Appeal Transcript, T 118.
[126] Appeal Transcript, T 120. See also *Kunarac* and *Kova~* Reply Brief, para 6.39.
[127] Appeal Transcript, T 119 and 125.
[128] *Ibid.*, T 119; *Kova~* Appeal Brief, para 164; *Kunarac* Appeal Brief, para 131 and *Kunarac* and *Kova~* Reply Brief, paras 5.64-5.65 and 6.39.
[129] *Kova~* Appeal Brief, para 164 and *Kunarac* and *Kova~* Reply Brief, paras 5.65 and 6.39.
[130] Appeal Transcript, T 120, 122 and 126 and *Kova~* Appeal Brief, para 165.

victim in that situation for an indefinite period of time. Any other shorter period of time could not support the crime of enslavement".[131]

110. Lastly, as far as the mental element of the crime of enslavement is concerned, the Appellants submit that the required *mens rea* is the intent to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts.[132] The Appellants contend that such an intent has not been proven beyond reasonable doubt by the Prosecutor in respect of any of the Appellants. The Appellant Kova~ argues that such an intent was not proved and did not exist, as he accepted the victims[133] in his apartment in order to organise their transfer outside of the theatre of the armed conflict.[134]

111. The Appellants therefore conclude that the Trial Chamber, by defining enslavement as the exercise of any or all of the powers attaching to the right of ownership, has committed an error of law which renders the decision invalid. They further contend that the Prosecutor has not proved beyond reasonable doubt that the conduct of the Appellants Kunarac and Kova~ satisfied any of the elements of the crime of enslavement as defined in their submission.[135]

(b) The Respondent

112. The Respondent submits that the Trial Chamber has not committed any error of law which would invalidate the decision. She contends that the Trial Chamber's definition of enslavement correctly reflects customary international law at the time relevant to the Indictments.[136] She asserts that, even if some treaties have defined the concept of slavery narrowly, today "enslavement as a crime against humanity must be given a much broader definition because of its diverse contemporary manifestations".[137] The crime of enslavement is "closely tied to the crime of slavery in terms of its basic definition (...) but encompasses other contemporary forms of slavery not contemplated under the 1926 Slavery Convention and similar or subsequent conventions".[138]

---

[131] Appeal Transcript, T 120.
[132] *Ibid.*, T 118-119; *Kunarac* Appeal Brief, paras 129 and 133 and *Kova~* Appeal Brief, paras 163 and 165.
[133] The victims concerned are FWS-75, FWS-87, A.S. and A.B.
[134] *Kova~* Appeal Brief, para 165.
[135] Appeal Transcript, T 120 and Appellants' Reply on Prosecution's Consolidated Respondent's Brief, paras 5.67 and 6.39.
[136] Appeal Transcript, T 246 and Prosecution Consolidated Respondent's Brief, paras 5.164- 5.169.
[137] Appeal Transcript, T 246.
[138] *Ibid.*

113. The Respondent further contends that the Trial Chamber correctly identified the indicia of enslavement to include, among other factors, the absence of consent or free will of the victims. Such consent is often rendered impossible or irrelevant by a series of influences such as detention, captivity or psychological oppression.[139] She further submits that this series of influences rendered the victims "unable to exert ftheirğ freedom and autonomy".[140]

114. In response to the argument put forward by the Appellants that the victim must be enslaved for an indefinite or at least a prolonged period of time, the Respondent contends that duration is only one of the many factors that the Tribunal can look at and that it generally needs to be viewed in the context of other elements.[141]

115. Lastly, the Respondent submits that the *mens rea* element identified by the Trial Chamber is correct and that customary international law does not require any specific intent to enslave but rather the intent to exercise a power attaching to the right of ownership.[142]

2. Discussion

116. After a survey of various sources, the Trial Chamber concluded "that, at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person".[143] It found that "the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person", and the "*mens rea* of the violation consists in the intentional exercise of such powers".[144]

117. The Appeals Chamber accepts the chief thesis of the Trial Chamber that the traditional concept of slavery, as defined in the 1926 Slavery Convention and often referred to as "chattel slavery",[145] has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with "chattel slavery", but in all cases, as a result of the exercise of

[139] *Ibid.*, T 256.
[140] *Ibid.*, T 257. See also Prosecution Consolidated Respondent's Brief, para 5.178.
[141] Appeal Transcript, T 254-255 and 272-273.
[142] *Ibid.*, T 254 and Prosecution Consolidated Respondent's Brief, paras 5.180- 5.183.
[143] Trial Judgement, para 539.
[144] *Ibid.*, para 540.
[145] "Chattel slavery" is used to describe slave-like conditions. To be reduced to "chattel" generally refers to a form of movable property as opposed to property in land.

any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality;[146] the destruction is greater in the case of "chattel slavery" but the difference is one of degree. The Appeals Chamber considers that, at the time relevant to the alleged crimes, these contemporary forms of slavery formed part of enslavement as a crime against humanity under customary international law.

118. The Appeals Chamber will however observe that the law does not know of a "right of ownership over a person".[147] Article 1(1) of the 1926 Slavery Convention speaks more guardedly "of a person over whom any or all of the powers attaching to the right of ownership are exercised." That language is to be preferred.

119. The Appeals Chamber considers that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour".[148] Consequently, it is not possible exhaustively to enumerate all of the contemporary forms of slavery which are comprehended in the expansion of the original idea; this Judgement is limited to the case in hand. In this respect, the Appeals Chamber would also like to refer to the finding of the Trial Chamber in paragraph 543 of the Trial Judgement stating:

> The Prosecutor also submitted that the mere ability to buy, sell, trade or inherit a person or his or her labours or services could be a relevant factor. The Trial Chamber considers that the *mere ability* to do so is insufficient, such actions actually occurring could be a relevant factor.

However, this particular aspect of the Trial Chamber's Judgement not having been the subject of argument, the Appeals Chamber does not consider it necessary to determine the point involved.

120. In these respects, the Appeals Chamber rejects the Appellants' contention that lack of resistance or the absence of a clear and constant lack of consent during the entire time of the

---

[146] It is not suggested that every case in which the juridical personality is destroyed amounts to enslavement; the concern here is only with cases in which the destruction of the victim's juridical personality is the result of the exercise of any of the powers attaching to the right of ownership.

[147] Trial Judgement, para 539. See also Article 7(2)(c) of the Rome Statute of the International Criminal Court, adopted in Rome on 17 July 1998 (PCNICC/1999/INF.3, 17 August 1999), which defines enslavement as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children."

[148] Trial Judgement, para 543. See also Trial Judgement, para 542.

detention can be interpreted as a sign of consent. Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from claimed rights of ownership; accordingly, lack of consent does not have to be proved by the Prosecutor as an element of the crime. However, consent may be relevant from an evidential point of view as going to the question whether the Prosecutor has established the element of the crime relating to the exercise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that circumstances which render it impossible to express consent may be sufficient to presume the absence of consent. In the view of the Appeals Chamber, the circumstances in this case were of this kind.

121. The Appellants contend that another element of the crime of enslavement requires the victims to be enslaved for an indefinite or at least for a prolonged period of time. The Trial Chamber found that the duration of the detention is another factor that can be considered but that its importance will depend on the existence of other indications of enslavement.[149] The Appeals Chamber upholds this finding and observes that the duration of the enslavement is not an element of the crime. The question turns on the quality of the relationship between the accused and the victim. A number of factors determine that quality. One of them is the duration of the relationship. The Appeals Chamber considers that the period of time, which is appropriate, will depend on the particular circumstances of each case.

122. Lastly, as far as the *mens rea* of the crime of enslavement is concerned, the Appeals Chamber concurs with the Trial Chamber that the required *mens rea* consists of the intentional exercise of a power attaching to the right of ownership.[150] It is not required to prove that the accused intended to detain the victims under constant control for a prolonged period of time in order to use them for sexual acts.

123. Aside from the foregoing, the Appeals Chamber considers it appropriate in the circumstances of this case to emphasise the citation by the Trial Chamber of the following excerpt from the *Pohl* case: [151]

> Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by

[149] *Ibid.*, para 542.
[150] *Ibid.*, para 540.
[151] *US* v *Oswald Pohl and Others*, Judgement of 3 November 1947, reprinted in *Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council No. 10,* Vol 5, (1997), p 958 at p 970.

> forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - compulsory uncompensated labour - would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.

The passage speaks of slavery; it applies equally to enslavement.

124. For the foregoing reasons, the Appeals Chamber is of the opinion that the Trial Chamber's definition of the crime of enslavement is not too broad and reflects customary international law at the time when the alleged crimes were committed. The Appellants' contentions are therefore rejected; the appeal relating to the definition of the crime of enslavement fails.

B. Definition of the Crime of Rape

1. Submissions of the Parties

(a) The Appellants

125. The Appellants challenge the Trial Chamber's definition of rape. With negligible differences in diction, they propose instead definitions requiring, in addition to penetration, a showing of two additional elements: force or threat of force and the victim's "continuous" or "genuine" resistance.[152] The Appellant Kovač, for example, contends that the latter requirement provides notice to the perpetrator that the sexual intercourse is unwelcome. He argues that "[r]esistance must be real throughout the duration of the sexual intercourse because otherwise it may be concluded that the alleged victim consented to the sexual intercourse".[153]

(b) The Respondent

126. In contrast, the Respondent dismisses the Appellants' resistance requirement and largely accepts the Trial Chamber's definition. In so doing, however, the Respondent emphasises an important principle distilled from the Trial Chamber's survey of international law: "serious violations of sexual autonomy are to be penalised".[154] And she further notes that "force, threats of force, or coercion" nullifies "true consent".[155]

---

[152] *Kunarac* Appeal Brief, para 99; *Vuković* Appeal Brief, para 169 and *Kovač* Appeal Brief, para 105.
[153] *Kovač* Appeal Brief, para 107.
[154] Prosecution Consolidated Respondent's Brief, para 4.15 (quoting Trial Judgement, para 457). Indeed, it is worth noting that the part of the German Criminal Code penalizing rape and other forms of sexual abuse is entitled "Crimes Against Sexual Self-Determination" (German Criminal Code (*Strafgesetzbuch*), Chapter 13, amended by law of 23 November 1973).
[155] Prosecution Consolidated Respondent's Brief, para 4.19.

2. Discussion

127. After an extensive review of the Tribunal's jurisprudence and domestic laws from multiple jurisdictions, the Trial Chamber concluded: [156]

> the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.[157]

128. The Appeals Chamber concurs with the Trial Chamber's definition of rape. Nonetheless, the Appeals Chamber believes that it is worth emphasising two points. First, it rejects the Appellants' "resistance" requirement, an addition for which they have offered no basis in customary international law. The Appellants' bald assertion that nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted is wrong on the law and absurd on the facts.

129. Secondly, with regard to the role of force in the definition of rape, the Appeals Chamber notes that the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape.[158] However, in explaining its focus on the absence of consent as the *conditio sine qua non* of rape, the Trial Chamber did not disavow the Tribunal's earlier jurisprudence, but instead sought to explain the relationship between force and consent. Force or threat of force provides clear evidence of non-consent, but force is not an element *per se* of rape.[159] In particular, the Trial Chamber wished to explain that there are "factors [other than force] which would render an act of sexual penetration *non-consensual or non-voluntary* on the part of the victim".[160] A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.

---

[156] Trial Judgement, paras 447-456.
[157] *Ibid.*, para 460.
[158] See, e.g., *Furund'ija* Trial Judgement, para 185. Prior attention has focused on force as the defining characteristic of rape. Under this line of reasoning, force or threat of force either nullifies the possibility of resistance through physical violence or renders the context so coercive that consent is impossible.
[159] Trial Judgement, para 458.
[160] *Ibid.*, para 438.

130. The Appeals Chamber notes, for example, that in some domestic jurisdictions, neither the use of a weapon nor the physical overpowering of a victim is necessary to demonstrate force. A threat to retaliate "in the future against the victim or any other person" is a sufficient *indicium* of force so long as "there is a reasonable possibility that the perpetrator will execute the threat".[161] While it is true that a focus on one aspect gives a different shading to the offence, it is worth observing that the circumstances giving rise to the instant appeal and that prevail in most cases charged as either war crimes or crimes against humanity will be almost universally coercive. That is to say, true consent will not be possible.

131. Under the chapter entitled "Crimes Against Sexual Self-Determination," German substantive law contains a section penalising sexual acts with prisoners and persons in custody of public authority.[162] The absence of consent is not an element of the crime. Increasingly, the state and national laws of the United States — designed for circumstances far removed from war contexts — support this line of reasoning. For example, it is a federal offence for a prison guard to have sex with an inmate, whether or not the inmate consents. Most states have similar prohibitions in their criminal codes.[163] In *State of New Jersey* v *Martin*, the Appellate Division of the New Jersey Superior Court commented on the purpose of such protections: "[the legislature] reasonably recognised the unequal positions of power and the inherent coerciveness of the situation which could not be overcome by evidence of apparent consent".[164] And, in some jurisdictions, spurred by revelations of pervasive sexual abuse of women prisoners, sexual contact between a correctional officer and an inmate is a felony.[165] That such jurisdictions have established these strict liability

---

[161] California Penal Code 1999, Title 9, Section 261(a)(6). The section also lists, among the circumstances transforming an act of sexual intercourse into rape, "where it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another" (Section 261(a)(2)). Consent is defined as "positive cooperation in act or attitude pursuant to an exercise of free will" (Section 261.6).

[162] Indeed, a more recently enacted German Criminal Code (*Strafgesetzbuch*), Chapter 13, Section 177, which defines sexual coercion and rape, recognizes the special vulnerability of victims in certain situations. It was amended in April 1998 to explicitly add "exploiting a situation in which the victim is unprotected and at the mercy of the perpetrator's influence" as equivalent to "force" or "threat of imminent danger to life or limb".

[163] See, e.g., N.J. Stat. Section 2C: 14-2 (2001) (An actor is guilty of, respectively, aggravated and simple sexual assault...[if] "[t]he actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status" or if "[t]he victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status.").

[164] *State of New Jersey* v *Martin*, 235 N.J. Super. 47, 56, 561 A.2d, 631, 636 (1989). Chapter 13 of the German Criminal Code has similar provisions. Section 174a imposes criminal liability for committing "sexual acts on a prisoner or person in custody upon order of a public authority." Section 174b punishes sexual abuse by means of exploiting a position in public office. In neither instance is the absence of consent an element.

[165] See *Women Prisoners of the District of Columbia Department of Corrections* v *District of Columbia*, 877 F. Supp. 634, 640 (D.D.C. 1994), *rev'd* on other grounds, 93 F.3d 910 (D.C. Cir. 1996) and Prison Litigation Reform Act of 1996, Pub. L. 105-119, 18 U.S.C. Section 3626.

provisions to protect prisoners who enjoy substantive legal protections, including access to counsel and the expectation of release after a specified period, highlights the need to presume non-consent here.

132. For the most part, the Appellants in this case were convicted of raping women held in *de facto* military headquarters, detention centres and apartments maintained as soldiers' residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality). Such detentions amount to circumstances that were so coercive as to negate any possibility of consent.

133. In conclusion, the Appeals Chamber agrees with the Trial Chamber's determination that the coercive circumstances present in this case made consent to the instant sexual acts by the Appellants impossible. The Appellants' grounds of appeal relating to the definition of the crime of rape therefore fail.

C. Definition of the Crime of Torture (Dragoljub Kunarac and Zoran Vukovi})

1. Submissions of the Parties

(a) The Appellants (Kunarac and Vukovi})

134. Neither Appellant challenges the Trial Chamber's definition of torture.[166] Indeed, the Appellants seem to accept the conclusions of the Trial Chamber identifying the crime of torture on the basis of three elements, these being respectively an intentional act, inflicting suffering, and the existence of a prohibited purpose. Nonetheless, they assert that these three constitutive elements of the crime of torture have not been proven beyond reasonable doubt in relation to either Kunarac[167] or Vukovi}[168] and that their convictions were thus ill-founded.[169]

135. With regard to the first element of the crime of torture, the Appellant Kunarac contends that he committed no act which could inflict severe physical or mental pain or suffering and that the

[166] *Kunarac* Appeal Brief, para 120 and *Vuković* Appeal Brief, para 163.
[167] *Kunarac* Appeal Brief, paras 120-121.
[168] *Vuković* Appeal Brief, paras 159 and 164-167.
[169] *Kunarac* Appeal Brief, paras 120-121 and *Vuković* Appeal Brief, paras 159 and 164-167.

arguments raised by the Prosecutor,[170] as well as the case-law to which she refers, are not sufficient to justify the findings of the Trial Chamber that some of Kunarac's victims experienced such mental pain or suffering.[171] Kunarac states that he never asserted that rape victims, in general, could not suffer, but rather that, in the instant case, no witness showed the effects of physical or mental pain or suffering.[172] In Kunarac's view, therefore, the first element of the crime of torture – the infliction of severe pain or suffering – is not met in his case.

136. The Appellant Vukovi}, referring to paragraph 7.11 of Indictment IT-96-23-/1, asserts that he was not charged with any act inflicting severe physical or mental pain or suffering.[173] The Appellant Vukovi} further challenges his conviction for torture through rape in the form of vaginal penetration on the basis that FWS-50, who was allegedly raped by Vukovi}, did not mention the use of force or threats.[174] The Appellant appears to conclude from the absence of evidence of the use of physical force that the alleged rape of FWS-50 could not have resulted in severe *physical* pain or suffering on the part of FWS-50.[175] The Appellant thus asserts that the first element of the crime of torture will only be satisfied if there is evidence that the alleged rape resulted in severe *mental* pain or suffering on the part of FWS-50.[176] In this regard, the Appellant first contends that FWS-50 did not claim to have been inflicted with severe mental pain or suffering. Secondly, the Appellant seems to argue that, objectively, FWS-50 would not have experienced severe mental pain or suffering as a result of the alleged rape, as she had been raped on previous occasions by other perpetrators. Thirdly, the Appellant notes that two Defence expert witnesses testified that they did not find that the victims of the alleged rapes had suffered severe consequences. Finally, the Appellant states that the Prosecutor failed to prove beyond reasonable doubt that FWS-50 was inflicted with severe physical or mental pain or suffering. For these reasons, the Appellant Vukovi} contends that the first element of the crime of torture – the infliction of severe pain or suffering – is not met in his case and that the Trial Chamber erred in its application of the law and in finding him guilty of the crime of torture.[177]

---

[170] Prosecution Consolidated Respondent's Brief, paras 6.42-6.45.
[171] *Kunarac* and *Kovač* Reply Brief, para 6.23.
[172] *Ibid.*, para 6.25.
[173] *Vuković* Appeal Brief, para 164.
[174] *Ibid.*, para 160.
[175] *Ibid.*, para 164.
[176] *Ibid.*
[177] *Ibid.*

137. The Appellants submit that they did not intend to inflict pain or suffering, rather that their aims were purely sexual in nature.[178] The Appellants, therefore, argue that the second element of the crime of torture – the deliberate nature of the act or omission – has not been proven in either of their cases.[179]

138. Both Appellants deny having pursued any of the prohibited purposes listed in the definition of the crime of torture, in particular, the discriminatory purpose.[180] Kunarac further states that he did not have sexual relations with any of the victims in order to obtain information or a confession or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground whatsoever.[181] Vukovi} seeks to demonstrate that the Trial Chamber erred when it established that his acts were committed for a discriminatory purpose because the victim was Muslim.[182] Both Appellants thus conclude that the third constitutive element of the crime of torture – the pursuance of a prohibited purpose – was not established in their cases and that the Trial Chamber erroneously applied the law and committed an error in finding each guilty of the crime of torture.[183]

(b) The Respondent

139. The Respondent claims that the pain and suffering inflicted on FWS-50 through the Appellant Vukovi}'s sexual acts was established.[184] She asserts that, after leaving Fo~a, FWS-50 went to a physician who noted physiological and psychological symptoms resulting from rape,[185] that she felt the need to go to a psychiatrist,[186] and that she testified to having experienced suffering and pain when orally raped by Vukovi} in Buk Bijela.[187]

140. The Respondent asserts that the crime of torture, as defined by customary international law, does not require that the perpetrator committed the act in question with the intent to inflict severe physical or mental suffering, but rather that the perpetrator committed an intentional act for the purpose of obtaining information or a confession, or to punish, intimidate or coerce the victim or a third person, or to discriminate on any ground whatsoever, and that, as a consequence, the victim

[178] *Kunarac* Appeal Brief, para 122 and *Vuković* Appeal Brief, para 166.
[179] *Vuković* Appeal Brief, para 165 and *Kunarac* Appeal Brief, para 122.
[180] *Kunarac* Appeal Brief, para 123 and *Vuković* Appeal Brief, para 166.
[181] *Kunarac* Appeal Brief, para 123.
[182] *Vuković* Appeal Brief, para 166.
[183] *Ibid.*, para 167.
[184] Prosecution Respondent's Brief, para 3.5.
[185] *Ibid.*, para 3.6.
[186] *Ibid.*, para 3.7.
[187] Trial Transcript, T 1294, quoted in Prosecution Respondent's Brief, para 3.8.

suffered. There is thus no need to establish that the Appellants committed such acts with the knowledge or intention that those acts would cause severe pain or suffering.[188]

141. According to the Respondent and as noted by the Trial Chamber,[189] there is no requirement under customary international law for the act of the perpetrator to be committed *solely* for one of the prohibited purposes listed in the definition of torture.[190] The Respondent also claims that the Trial Chamber reasonably concluded that the Appellant Vuković intended to discriminate against his victim because she was Muslim.[191] She further submits that, in this case, all the acts of torture could be considered to be discriminatory, based on religion, ethnicity or sex.[192] Moreover, all the acts of sexual torture perpetrated on the victims resulted in their intimidation or humiliation.[193]

2. Discussion

(a) The Definition of Torture by the Trial Chamber

142. With reference to the Torture Convention [194] and the case-law of the Tribunal and the ICTR, the Trial Chamber adopted a definition based on the following constitutive elements: [195]

> (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
>
> (ii) The act or omission must be intentional.
>
> (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.

---

[188] Prosecution Respondent's Brief, para 3.10.
[189] Trial Judgement, para 816.
[190] Prosecution Respondent's Brief, para 3.13.
[191] *Ibid.*
[192] Prosecution Consolidated Respondent's Brief, para 6.145. According to the Prosecutor, the evidence, in particular the discriminatory statements, establish that FWS-75 was tortured with the purpose of humiliating her because she was a Muslim woman: see Prosecution Consolidated Respondent's Brief, para 6.146.
[193] Prosecution Consolidated Respondent's Brief, para 6.145.
[194] Article 1 of the Torture Convention: "For the purposes of this Convention, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."
[195] Trial Judgement, para 497.

143. The Trial Chamber undertook a comprehensive study of the crime of torture, including the definition which other Chambers had previously given,[196] and found the Appellant Kunarac[197] and the Appellant Vukovi}[198] guilty of the crime of torture. The Trial Chamber did not, however, have recourse to a decision of the Appeals Chamber rendered seven months earlier[199] which addressed the definition of torture.[200]

144. The Appeals Chamber largely concurs with the Trial Chamber's definition but wishes to hold the following.

145. First, the Appeals Chamber wishes to provide further clarification as to the nature of the definition of torture in customary international law as it appears in the Torture Convention, in particular with regard to the participation of a public official or any other person acting in a non-private capacity. Although this point was not raised by the parties, the Appeals Chamber finds that it is important to address this issue in order that no controversy remains about this appeal or its consistency with the jurisprudence of the Tribunal.

146. The definition of the crime of torture, as set out in the Torture Convention, may be considered to reflect customary international law.[201] The Torture Convention was addressed to States and sought to regulate their conduct, and it is only for that purpose and to that extent that the Torture Convention deals with the acts of individuals acting in an official capacity. Consequently, the requirement set out by the Torture Convention that the crime of torture be committed by an individual acting in an official capacity may be considered as a limitation of the engagement of States; they need prosecute acts of torture only when those acts are committed by "a public official...or any other person acting in a non-private capacity." So the Appeals Chamber in the

---

[196] *Ibid.*, paras 465-497. The Chamber concurs with, in particular, the quite complete review carried out in the *^elebi}i* and *Furund`ija* cases where torture was not prosecuted as a crime against humanity.

[197] Counts 1 (crime against humanity), 3 and 11 (violation of the laws or customs of war), Trial Judgement, para 883.

[198] Counts 33 (crime against humanity) and 35 (violation of the laws or customs of war), Trial Judgement, para 888.

[199] *Furund`ija* Appeal Judgement.

[200] In the *Aleksovski* Appeal Judgement at para 113 it was stated "that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers."

[201] See *Furund`ija* Appeal Judgement, para 111; *^elebi}i* Trial Judgement, para 459; *Furund`ija* Trial Judgement, para 161 and Trial Judgement, para 472. The ICTR comes to the same conclusion: see *Akayesu* Trial Judgement, para 593. It is interesting to note that a similar decision was rendered very recently by the German Supreme Court (BGH St volume 46, p 292, p 303).

Furund`ija case was correct when it said that the definition of torture in the Torture Convention, inclusive of the public official requirement, reflected customary international law.[202]

147. Furthermore, in the *Furund`ija* Trial Judgement, the Trial Chamber noted that the definition provided in the Torture Convention related to "the purposes of [the] Convention".[203] The accused in that case had not acted in a private capacity, but as a member of armed forces during an armed conflict, and he did not question that the definition of torture in the Torture Convention reflected customary international law. In this context, and with the objectives of the Torture Convention in mind, the Appeals Chamber in the *Furund`ija* case was in a legitimate position to assert that "at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, *e.g.*, as a de facto organ of a State or any other authority-wielding entity".[204] This assertion, which is tantamount to a statement that the definition of torture in the Torture Convention reflects customary international law as far as the obligation of States is concerned, must be distinguished from an assertion that this definition wholly reflects customary international law regarding the meaning of the crime of torture generally.

148. The Trial Chamber in the present case was therefore right in taking the position that the public official requirement is not a requirement under customary international law in relation to the criminal responsibility of an individual for torture outside of the framework of the Torture Convention. However, the Appeals Chamber notes that the Appellants in the present case did not raise the issue as to whether a person acting in a private capacity could be found guilty of the crime of torture; nor did the Trial Chamber have the benefit of argument on the issue of whether that question was the subject of previous consideration by the Appeals Chamber.

(b) The Requirement of Pain and Suffering

149. Torture is constituted by an act or an omission giving rise to "severe pain or suffering, whether physical or mental", but there are no more specific requirements which allow an exhaustive classification and enumeration of acts which may constitute torture. Existing case-law has not determined the absolute degree of pain required for an act to amount to torture.

---

[202] *Furund`ija* Appeal Judgement, para 111: "The Appeals Chamber supports the conclusion of the Trial Chamber that "there is now general acceptance of the main elements contained in the definition set out in Article 1 of the Torture Convention ŦFurund`ija Trial Judgement, para 161ğ and takes the view that the definition given in Article 1 Ŧof the said Conventionğ reflects customary international law."

[203] *Furund`ija* Trial Judgement, para 160, quoting Article 1 of the Torture Convention.

[204] *Furund`ija* Appeal Judgement, para 111, citing *Furund`ija* Trial Judgement, para 162.

150. The Appeals Chamber holds that the assumption of the Appellants that suffering must be visible, even long after the commission of the crimes in question, is erroneous. Generally speaking, some acts establish *per se* the suffering of those upon whom they were inflicted. Rape is obviously such an act. The Trial Chamber could only conclude that such suffering occurred even without a medical certificate. Sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture.[205]

151. Severe pain or suffering, as required by the definition of the crime of torture, can thus be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering.[206] The Appeals Chamber thus holds that the severe pain or suffering, whether physical or mental, of the victims cannot be challenged and that the Trial Chamber reasonably concluded that that pain or suffering was sufficient to characterise the acts of the Appellants as acts of torture. The Appellants' grounds of appeal in this respect are unfounded and, therefore, rejected.

152. The argument that the Appellant Vuković has not been charged with any act inflicting severe pain or suffering, whether physical or mental, is erroneous since he is charged, in paragraph 7.11 of Indictment IT-96-23/1, with the crime of torture arising from rape. Moreover, the fact alleged in the Appeal Brief, that Indictment IT-96-23/1 does not refer to the use of physical force, does not mean that there was none.

(c) Subjective Elements

153. The Appellants argue that the intention of the perpetrator was of a sexual nature, which, in their view, is inconsistent with an intent to commit the crime of torture.[207] In this respect, the Appeals Chamber wishes to assert the important distinction between "intent" and "motivation". The Appeals Chamber holds that, even if the perpetrator's motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause severe pain or suffering, whether physical or mental, since such pain or suffering is a

---

[205] See Commission on Human Rights, Forty-eighth session, Summary Record of the 21st Meeting, 11 February 1992, Doc. E/CN.4/1992/SR.21, 21 February 1992, para 35: "Since it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture." Other Chambers of this Tribunal have also noted that in some circumstances rape may constitute an act of torture: *Furund`ija* Trial Judgement, paras 163 and 171 and *^elebi}i* Trial Judgement, paras 475-493.

[206] See *^elebi}i* Trial Judgement, paras 480 and following, which quotes in this sense reports and decisions of organs of the UN and regional bodies, in particular, the Inter-American Commission on Human Rights and the European Court of Human Rights, stating that rape may be a form of torture.

[207] Kunarac Appeal Brief para 122 and Vuković Appeal Brief, para 165.

likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims. The Appeals Chamber concurs with the findings of the Trial Chamber that the Appellants did intend to act in such a way as to cause severe pain or suffering, whether physical or mental, to their victims, in pursuance of one of the purposes prohibited by the definition of the crime of torture, in particular the purpose of discrimination.

154. The Appellant Kunarac claims that the requisite intent for torture, alleged by the Prosecutor,[208] has not been proven.[209] Vukovi} also challenges the discriminatory purpose ascribed to his acts.[210] The Appeals Chamber finds that the Appellants have not demonstrated why the conclusions of the Trial Chamber on this point are unreasonable or erroneous. The Appeals Chamber considers that the Trial Chamber rightly concluded that the Appellants deliberately committed the acts of which they were accused and did so with the intent of discriminating against their victims because they were Muslim. Moreover, the Appeals Chamber notes that in addition to a discriminatory purpose, the acts were committed against one of the victims with the purpose of obtaining information.[211] The Appeals Chamber further finds that, in any case, all acts were committed for the purpose of intimidating or coercing the victims.

155. Furthermore, in response to the argument that the Appellant's avowed purpose of sexual gratification is not listed in the definition of torture, the Appeals Chamber restates the conclusions of the Trial Chamber[212] that acts need not have been perpetrated solely for one of the purposes prohibited by international law. If one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial.

156. The Appeals Chamber thus finds that the legal conclusions and findings of the Trial Chamber are well-founded and rejects all grounds of appeal relating to the crime of torture.

---

[208] Prosecution Consolidated Respondent's Brief, para 6.145.
[209] *Kunarac* and *Kova~* Reply Brief, paras 6.47-6.48. According to the Appellant Kunarac, it is not because the victim is Muslim or because she is a woman that discrimination was proved in general: see *Kunarac* Appeal Brief, para 123 and *Kunarac* and *Kova}* Reply Brief, para 6.49.
[210] *Vuković* Appeal Brief, para 166.
[211] In the case of FWS-183: see Trial Judgement, paras 341 and 705-715.
[212] Trial Judgement, paras 486 and 654.

D. Definition of Outrages upon Personal Dignity (Radomir Kova~)

1. Submissions of the Parties

(a) The Appellant (Kovač)

157. The Appellant Kovač submits that, since every humiliating or degrading act is not necessarily an outrage upon personal dignity, the acts likely to be outrages upon personal dignity must be defined, and he further argues that the Trial Chamber did not do so.[213]

158. Moreover, the Appellant asserts that to find a person guilty of outrages upon personal dignity, a specific intent to humiliate or degrade the victim must be established.[214] In his opinion, the Trial Chamber did not prove beyond any reasonable doubt that he acted with the intention to humiliate his victims, as his objective was of an exclusively sexual nature.[215]

(b) The Respondent

159. In response to the Appellant's claim that the Trial Chamber did not state which acts constituted outrages upon personal dignity, the Respondent recalls that the Trial Chamber considered that it had been proved beyond any reasonable doubt that, during their detention in Kova~'s apartment, the victims were repeatedly raped, humiliated and degraded.[216] That the victims were made to dance naked on a table, that they were "lent" and sold to other men and that FWS-75 and FWS-87 were raped by Kova~ while he was playing "Swan Lake" were all correctly characterised by the Trial Chamber as outrages upon personal dignity.

160. As to the requirement of specific intent, the Respondent, relying on the case-law of the Tribunal, asserts that the perpetrator of the crime of outrages upon personal dignity must only be aware that his act or omission could be perceived by the victim as humiliating or degrading. The perpetrator need not know the actual consequences of his act, merely the "possible" consequences of the act or omission in question. Therefore, the Respondent submits that the Trial Chamber correctly concluded that it was sufficient that Kova~ knew that his act or omission might have been perceived by his victims as humiliating or degrading.

---

[213] *Kovač* Appeal Brief, paras 145 and 150.
[214] *Ibid.*, para 145.
[215] *Ibid.*, para 146.
[216] Prosecution Consolidated Respondent's Brief, para 5.141.

2. Discussion

161. The Trial Chamber ruled that the crime of outrages upon personal dignity requires:[217]

> (i) that the accused intentionally committed or participated in an act or an omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and (ii) that he knew that the act or omission could have that effect.

(a) Definition of the Acts which may Constitute Outrages upon Personal Dignity

162. Contrary to the claims of the Appellant, the Appeals Chamber considers that the Trial Chamber was not obliged to define the specific acts which may constitute outrages upon personal dignity. Instead it properly presented the criteria which it used as a basis for measuring the humiliating or degrading character of an act or omission. The Trial Chamber, referring to the *Aleksovski* case, stated that the humiliation of the victim must be so intense that any reasonable person would be outraged.[218] In coming to its conclusion, the Trial Chamber did not rely only on the victim's purely subjective evaluation of the act to establish whether there had been an outrage upon personal dignity, but used objective criteria to determine when an act constitutes a crime of outrages upon personal dignity.

163. In explaining that outrages upon personal dignity are constituted by "any act or omission which would be *generally* considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity",[219] the Trial Chamber correctly defined the objective threshold for an act to constitute an outrage upon personal dignity. It was not obliged to list the acts which constitute outrages upon personal dignity. For this reason, this ground of appeal is dismissed.

(b) *Mens rea* for the Crime of Outrages upon Personal Dignity

164. According to the Trial Chamber, the crime of outrages upon personal dignity requires that the accused knew that his act or omission *could* cause serious humiliation, degradation or otherwise be a serious attack on human dignity.[220] The Appellant, however, asserts that this crime requires that the accused knew that his act or omission *would have* such an effect.[221]

---

[217] Trial Judgement, para 514.
[218] *Aleksovski* Trial Judgement, para 56, quoted in Trial Judgement, para 504.
[219] Trial Judgement, para 507 (emphasis added).
[220] *Ibid.*, para 514.
[221] *Kovač* Appeal Brief, para 145.

165. The Trial Chamber carried out a detailed review of the case-law relating to the *mens rea* of the crime of outrages upon personal dignity.[222] The Trial Chamber was never directly confronted with the specific question of whether the crime of outrages upon personal dignity requires a specific intent to humiliate or degrade or otherwise seriously attack human dignity. However, after reviewing the case-law, the Trial Chamber properly demonstrated that the crime of outrages upon personal dignity requires only a knowledge of the "possible" consequences of the charged act or omission. The relevant paragraph of the Trial Judgement reads as follows:[223]

> As the relevant act or omission for an outrage upon personal dignity is an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, an accused must know that his act or omission is of that character – i.e., that it could cause serious humiliation, degradation or affront to human dignity. This is not the same as requiring that the accused knew of the *actual* consequences of the act.

166. Since the nature of the acts committed by the Appellant against FWS-75, FWS-87, A.S. and A.B. undeniably reaches the objective threshold for the crime of outrages upon personal dignity set out in the Trial Judgement, the Trial Chamber correctly concluded that any reasonable person would have perceived his acts "to cause serious humiliation, degradation or otherwise be a serious attack on human dignity".[224] Therefore, it appears highly improbable that the Appellant was not, at the very least, aware that his acts could have such an effect. Consequently this ground of appeal is rejected.

VI. CUMULATIVE CHARGING

167. The Appellants argue that they were inappropriately cumulatively charged. The Appeals Chamber has consistently rejected this argument and it is not necessary to rehearse this settled jurisprudence here.[225] These grounds of appeal are, hereby, rejected.

---

[222] Trial Judgement, paras 508-514.
[223] *Ibid.*, para 512.
[224] *Ibid.*
[225] *^elebi}i* Appeal Judgement, para 400.

VII. CUMULATIVE CONVICTIONS

A. General Principles

168. The Appeals Chamber accepts the approach articulated in the *Čelebići* Appeal Judgement, an approach heavily indebted to the *Blockburger* decision of the Supreme Court of the United States.[226] The Appeals Chamber held that: [227]

> fairness to the accused and the consideration that only distinct crimes justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.
>
> Where this test is not met, the Chamber must decide on the basis of the principle that the conviction under the more specific provision should be upheld.

169. Care, however, is needed in applying the *Čelebići* test for, as Judges Hunt and Bennouna observed in their separate and dissenting opinion in the same case, cumulative convictions create "a very real risk of ... prejudice" to the accused.[228] At the very least, such persons suffer the stigma inherent in being convicted of an additional crime for the same conduct. In a more tangible sense, there may be such consequences as losing eligibility for early release under the law of the state enforcing the sentence.[229] Nor is such prejudice cured, as the U.S. Supreme Court warned in *Rutledge* v *U.S.*,[230] by the fact that the second conviction's concomitant sentence is served concurrently.[231] On the other hand, multiple convictions serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct.[232]

170. Typically, the issue of multiple convictions or cumulative convictions arises in legal systems with a hierarchy of offences in which the more serious offences within a category require proof of an additional element or even require a specific *mens rea.* It is, however, an established principle of

---

[226] *Blockburger* v *United States*, 284 U.S. 299, 304 (1931) ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.").

[227] *^elebi}i* Appeal Judgement, paras 412-13. Hereinafter referred to as the *^elebići* test.

[228] Separate and Dissenting Opinion of Judge David Hunt and Judge Mohamed Bennouna, *^elebići* Appeal Judgement, para 23.

[229] *Ibid.*

[230] *Rutledge* v *United States*, 517 U.S. 292, 116 S. Ct. 1241, 1248 (1996).

[231] *Ibid.*, citing *Ball* v *United States*, 470 U.S. 856, 865 (1985).

[232] See, e.g., Partial Dissenting Opinion of Judge Shahabuddeen, *Jelisi}* Appeal Judgement, para 34: "To record the full criminality of his conduct, it may be necessary to convict of all the crimes, overlapping in convictions being adjusted through penalty".

both the civil and common law that punishment should not be imposed for both a greater offence and a lesser included offence. Instead, the more serious crime subsumes the less serious (*lex consumens derogat legi consumptae*). The rationale here, of course, is that the greater and the lesser included offence constitute the same core offence, without sufficient distinction between them, even when the same act or transaction violates two distinct statutory provisions.[233] Indeed, it is not possible to commit the more serious offence without also committing the lesser included offence.[234]

171. In national laws, this principle is easier to apply because the relative gravity of a crime can normally be ascertained by the penalty imposed by the law. The Statute, however, does not provide a scale of penalties for the various crimes it proscribes. Nor does the Statute give other indications as to the relative gravity of the crimes. Indeed, the Tribunal has explicitly rejected a hierarchy of crimes, concluding instead that crimes against humanity are not inherently graver than war crimes.[235]

172. The *^elebi}i/Blockburger* test serves to identify distinct offences within this constellation of statutory provisions.[236] While subscribing to this test, the Appeals Chamber is aware that it is deceptively simple. In practice, it is difficult to apply in a way that is conceptually coherent and promotes the interests of justice.

173. For this reason, the Appeals Chamber will scrutinise with the greatest caution multiple or cumulative convictions. In so doing, it will be guided by the considerations of justice for the accused: the Appeals Chamber will permit multiple convictions only in cases where the same act or transaction clearly violates two distinct provisions of the Statute and where each statutory provision requires proof of an additional fact which the other does not.

---

[233] See *supra* n 226.

[234] Black's Law Dictionary, s.v. *lesser included offense*: "One which is composed of some, but not all elements of a greater offense and which does not have any element not included in greater offense so that it is impossible to commit greater offense without necessarily committing the lesser offense." (6th ed., St. Paul, Minn. 1990)

[235] *Tadi}* Sentencing Appeal Judgement, para 69: "After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case".

[236] With regard to Articles 3 and 5 of the Statute, the Appeals Chamber held in the *Jelisić* Appeal Judgement that, as each has an element of proof of fact not required by the other, neither was a lesser included offence of the other (para 82).

174. The Appeals Chamber wishes to emphasise that whether the same conduct violates two distinct statutory provisions is a question of law. Nevertheless, the Chamber must take into account the entire situation so as to avoid a mechanical or blind application of its guiding principles.

B. The Instant Convictions

1. Inter-Article Convictions under Articles 3 and 5 of the Statute

175. The Appeals Chamber will now consider the argument of the Appellants that the Trial Chamber erred in convicting them for the same conduct under Articles 3 and 5 of the Statute.

176. The Appeals Chamber agrees with the Trial Chamber that convictions for the same conduct under Article 3 of the Statute (violations of the laws or customs of war) and Article 5 of the Statute (crimes against humanity) are permissible and dismisses the appeals on this point.[237] Applying the *^elebi}i* test, subsequent judgements of the Appeals Chamber have consistently held that crimes against humanity constitute crimes distinct from crimes against the laws or customs of war in that each contains an element that does not appear in the other.[238] The Appeals Chamber sees no reason to depart from this settled jurisprudence.

177. As a part of this analysis, the Appeals Chamber reaffirms that the legal prerequisites describing the circumstances of the relevant offences as stated in the *chapeaux* of the relevant Articles of the Statute constitute elements which enter the calculus of permissibility of cumulative convictions.[239] The contrary view would permit anomalous results not intended by the Statute.[240]

178. The Appeals Chamber notes that the permissibility of multiple convictions ultimately turns on the intentions of the lawmakers.[241] The Appeals Chamber believes that the Security Council

---

[237] Trial Judgement, para 556.

[238] See, e.g., *Kupre{ki}* Appeal Judgement, para 388 (holding that Trial Chamber erred in acquitting defendants on counts under Article 5 of the Statute) and *Jelisi}* Appeal Judgement, para 82 (noting that each of Articles 3 and 5 of the Statute "has a special ingredient not possessed by the other").

[239] The Appeals Chamber notes that the International Criminal Court's Preparatory Committee's Elements of Crimes incorporates the *chapeaux* into the substantive definitions of the criminal offences. Although the Appeals Chamber does not rely on statutory schemes created after the events underlying this case, the Appeals Chamber observes that the ICC definitions were intended to restate customary international law.

[240] For example, were the Appeals Chamber to disregard the *chapeaux*, the murder of prisoners of war charged under Article 2 of the Statute could not also, in special circumstances, be considered a genocidal killing under Article 4 of the Statute. The same is true of convictions for crimes against humanity (Article 5 of the Statute) and convictions for crimes against the laws or customs of war (Article 3 of the Statute). In all of the above, different *chapeaux*-type requirements constitute distinct elements which may permit the Trial Chamber to enter multiple convictions.

[241] See *Blockburger* v *United States*, *supra* n 226. See also *Rutledge* v *United States*, *supra* n 230 (courts assume, absent specific legislative directive, that lawmakers did not intend to impose two punishments for the same offence);

intended that convictions for the same conduct constituting distinct offences under several of the Articles of the Statute be entered. Surely the Security Council, in promulgating the Statute and listing in it the principal offences against International Humanitarian Law, did not intend these offences to be mutually exclusive. Rather, the *chapeaux* elements disclose the animating desire that all species of such crimes be adequately described and punished.

2. Intra-Article Convictions under Article 5 of the Statute

(a) Rape and Torture

179. The Appeals Chamber will now consider the Appellants' arguments regarding intra-Article convictions. The Appellants contend that the Trial Chamber erred by entering convictions for both torture under Article 5(f) and rape under Article 5(g) of the Statute on the theory that neither the law nor the facts can reasonably be interpreted to establish distinct crimes. The Trial Chamber found that the crimes of rape and torture each contain one materially distinct element not contained in the other, making convictions under both crimes permissible.[242] As its earlier discussion of the offences of rape and torture make clear, the Appeals Chamber agrees. The issue of cumulative convictions hinges on the definitions of distinct offences under the Statute which are amplified in the jurisprudence of the Tribunal. That torture and rape each contain a materially distinct element not contained by the other disposes of this ground of appeal. That is, that an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime.

180. Nonetheless, the Appeals Chamber is bound to ascertain that each conviction fits the crime on the facts of the case as found by the Trial Chamber.[243] The Appellants contend that their object was sexual satisfaction, not infliction of pain or any other prohibited purpose as defined in the offence of torture. As has been discussed,[244] the Appeals Chamber does not agree with the

---

Missouri v *Hunter*, 459 U.S. 359, 366 (1983); *Whalen* v *United States*, 445 U.S. 684, 691-2 (1980) and *Ball* v *United States*, *supra* n 231.

[242] See Trial Judgement, para 557.

[243] The Appeals Chamber defers to the Trial Chamber's findings of fact. The Appeals Chamber will disturb these findings only if no reasonable trier of fact could have so found. See *Kupre{ki}* Appeal Judgement, para 41; *Tadi}* Appeal Judgement, para 64 and *Aleksovski* Appeal Judgement, para 63. The Appeals Chamber in the *Kupre{ki}* case recently clarified the burden on those contesting a Trial Chamber's factual findings: "The appellant must establish that the error of fact was critical to the verdict reached by the Trial Chamber, thereby resulting in a 'grossly unfair outcome'" (para 29).

[244] See *supra* 'Definition of the Crime of Torture (Dragoljub Kunarac and Zoran Vukovi})'.

Appellants' limited vision of the crime of torture. It has rejected the argument that a species of specific intent is required.

181. In the *^elebići* Trial Judgement, the Trial Chamber considered the issue of torture through rape.[245] The Appeals Chamber overturned the Appellant's convictions under Article 3 of the Statute as improperly cumulative in relation to Article 2 of the Statute, but the Trial Chamber's extensive analysis of torture and rape remains persuasive. Grounding its analysis in a thorough survey of the jurisprudence of international bodies, the Trial Chamber concluded that rape may constitute torture. Both the Inter-American Commission on Human Rights and the European Court of Human Rights have found that torture may be committed through rape. And the United Nations Special Rapporteur on Torture listed forms of sexual assault as methods of torture.[246]

182. For rape to be categorised as torture, both the elements of rape and the elements of torture must be present. Summarising the international case-law, the Trial Chamber in the *^elebići* case concluded that "rape involves the infliction of suffering at a requisite level of severity to place it in the category of torture".[247] By way of illustration, the Trial Chamber discussed the facts of two central cases, *Fernando and Raquel Mejía* v *Peru* from the Inter-American Commission and *Aydin* v *Turkey* from the European Commission for Human Rights.[248]

183. *Mejía* v *Peru* involved the rape of a woman shortly after her husband was abducted by soldiers. Peruvian soldiers entered the Mejías' home and abducted Fernando Mejía.[249] One soldier then re-entered the house, demanded that Raquel Mejía find her husband's identity documents, accused her of being a subversive and then raped her.[250] The Inter-American Commission held that Mejía's rape constituted torture. In analysing the case, the Trial Chamber in the *^elebići* case

---

[245] *^elebi}i* Trial Judgement, paras 475-496.

[246] *Ibid.*, para 491, quoting *supra* n 205, para 35. The United Nations Special Rapporteur on Torture introduced his 1992 Report to the Commission on Human Rights by stating: "Since it was clear that rape or other forms of sexual assault against women held in detention were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture." (para 35).

[247] *^elebi}i* Trial Judgement, para 489.

[248] *Fernando and Raquel Mejía* v *Peru*, Case No. 10,970, Judgement of 1 March 1996, Report No. 5/96, Inter-American Yearbook on Human Rights, 1996, p 1120 and *Aydin* v *Turkey*, Opinion of the European Commission of Human Rights, 7 March 1996, reprinted in European Court of Human Rights, ECHR 1997-VI, p 1937, paras 186 and 189.

[249] *Fernando and Raquel Mejía* v *Peru*, *supra* n 248, p 1120.

[250] *Ibid.*, p 1124.

observed that "one must not only look at the physical consequences, but also at the psychological and social consequences of the rape".[251]

184. In *Aydin* v *Turkey*, the European Commission of Human Rights considered the case of a woman raped in a police station. Prior to referring the case to the European Court of Human Rights, the Commission stated:[252]

> it appears to be the intention that the Convention with its distinction between "torture" and "inhuman and degrading treatment" should by the first of these terms attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering...
>
> In the Commission's opinion, the nature of such an act, which strikes at the heart of the victim's physical and moral integrity, must be characterised as particularly cruel and involving acute physical and psychological suffering. This is aggravated when committed by a person in authority over the victim. Having regard therefore to the extreme vulnerability of the applicant and the deliberate infliction on her of serious and cruel ill-treatment in a coercive and punitive context, the Commission finds that such ill-treatment must be regarded as torture within the meaning of Article 3 of the Convention.

"Against this background," the European Court of Human Rights concluded in its turn, "the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention".[253]

185. In the circumstances of this case, the Appeals Chamber finds the Appellants' claim entirely unpersuasive. The physical pain, fear, anguish, uncertainty and humiliation to which the Appellants repeatedly subjected their victims elevate their acts to those of torture. These were not isolated instances. Rather, the deliberate and co-ordinated commission of rapes was carried out with breathtaking impunity over a long period of time. Nor did the age of the victims provide any protection from such acts. (Indeed, the Trial Chamber considered the youth of several of the victims as aggravating factors.) Whether rousted from their unquiet rest to endure the grim nightly ritual of selection or passed around in a vicious parody of processing at headquarters, the victims endured repeated rapes, implicating not only the offence of rape but also that of torture under Article 5 of the Statute. In the egregious circumstances of this case, the Appeals Chamber finds that all the elements of rape and torture are met. The Appeals Chamber rejects, therefore, the appeal on this point.

---

[251] *^elebi}i* Trial Judgement, para 486.
[252] *Aydin* v *Turkey*, Opinion of the European Commission of Human Rights, *supra* n 248, paras 186 (footnote omitted) and 189.
[253] *Aydin* v *Turkey*, European Court of Human Rights, no. 57/1996/676/866, Judgement of 22 September 1997, ECHR 1997-VI, para 86.

(b) Rape and Enslavement

186. Equally meritless is the Appellants' contention that Kunarac's and Kovač's convictions for enslavement under Article 5(c) and rape under Article 5(g) of the Statute are impermissibly cumulative. That the Appellants also forced their captives to endure rape as an especially odious form of their domestic servitude does not merge the two convictions. As the Appeals Chamber has previously explained in its discussion of enslavement, it finds that enslavement, even if based on sexual exploitation, is a distinct offence from that of rape.[254] The Appeals Chamber, therefore, rejects this ground of appeal.

3. Article 3 of the Statute

(a) Scope of Article 3 of the Statute

187. The Appellants argue that Article 3 of the Statute does not apply to their actions because it is concerned only with battlefield violations (Hague law) and not with the protection of individual physical security. That Article 3 of the Statute incorporates customary international law, particularly Common article 3 of the Geneva Conventions, is clear from the discussions on the Statute in the Security Council on 25 May 1993, and has since then been confirmed in the consistent jurisprudence of the Tribunal.[255] Alone among the Articles of the Statute, Article 3 is illustrative, serving as a residual clause. It is not necessary to rehearse the arguments here and, therefore, this ground of appeal is rejected.

(b) Intra-Article Convictions under Article 3 of the Statute

188. The Appellants' argument against convictions for rape and torture are made also with regard to intra-Article convictions under Article 3 of the Statute. As with intra-Article convictions for rape and torture under Article 5 of the Statute, the Appellants argue that in the "absence of described distinct infliction of physical or mental pain... the infliction of physical or mental pain is brought down only to the very act of sexual intercourse, without the consent of the victim" and that the convicted person's conduct "can not be deemed to be both the case of a criminal offence of rape and the criminal offence of torture, because one act excludes the other".[256]

---

[254] See *supra* 'Definition of the Crime of Enslavement'.
[255] *Tadić* Jurisdiction Decision, para 91; *^elebi}i* Appeal Judgement, para 133 and *Furund`ija* Trial Judgement, paras 131-133.
[256] *Kunarac* Appeal Brief, paras 144-145.

189. The Appeals Chamber has already explained in the context of intra-Article 5 crimes why, in the circumstances of this case, the rapes and sexual abuse also amount to torture and that rape and torture each contain an element that the other does not. This holds true for the present discussion. However, in the context of cumulative convictions under Article 3 of the Statute, which imports Common article 3 of the Geneva Conventions, the Appeals Chamber acknowledges a specific problem, namely that Common article 3 refers to "cruel treatment and torture" (3(1)(a)), and "outrages upon personal dignity, in particular humiliating and degrading treatment" (3(1)(c)), but does not refer to rape.

190. The Appeals Chamber finds the invocation and the application of Common article 3, by way of a *renvoi* through Article 3 of the Statute, entirely appropriate. The Trial Chamber attempted to ground the rape charges in Common article 3 by reference to outrages upon personal dignity.[257] Although the Appeals Chamber agrees that rape may be charged in this manner, it notes that grounding the charge in Common article 3 imposes certain limitations with respect to cumulative convictions. This is because, where it is attempted to charge rape as an outrage upon personal dignity, the rape is only evidence of the outrage; the substantial crime is not rape but the outrage occasioned by the rape. This leaves open the argument that an outrage upon personal dignity is substantially included in torture, with the consequence that convictions for both may not be possible. However, as will be shown below, rape was not in fact charged as an outrage upon personal dignity in this case.

191. Where the Trial Chamber (or indeed the Prosecutor) chooses to invoke Common article 3, it is bound by the text. In other words, each offence must be hanged, as it were, on its own statutory hook. In the present case, a statutory hook for rape is absent in Common article 3. The Indictments acknowledge the absence of an express statutory provision. The Prosecutor charged Kunarac, for instance, with both torture and rape under Article 3 of the Statute but the language of the counts diverges:

> Count 3: Torture, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal and recognised by Common Article 3(1)(a)(torture) of the Geneva Conventions.
>
> Count 4: Rape, a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal.

In the case of torture, there is an express statutory provision, while in the case of rape, there is not.

[257] Trial Judgement, para 436.

192. Whether rape is considered to constitute torture under Common article 3(1)(a) or an outrage upon personal dignity under Common article 3(1)(c) depends on the egregiousness of the conduct. The Appeals Chamber notes that in the *Furund'ija* Trial Judgement, the Trial Chamber found sexual abuse to constitute an outrage upon personal dignity under Article 3 of the Statute (incorporating Common article 3).[258] The Trial Chamber pronounced the accused guilty of one criminal offence, outrages upon personal dignity, including rape. However, whether one regards rape as an instrument through which torture is committed (Common article 3(1)(a)) or one through which outrages upon personal dignity are committed (Common article 3(1)(c)), in either case, a separate conviction for rape is not permitted under Common article 3, given the absence of a distinct statutory hook for rape.

193. This statutory limitation does not, however, dispose of the matter. As the Appeals Chamber has noted, the Indictments charged Kunarac and Vuković with rape under Article 3 of the Statute without reference to Common article 3. In its discussion of the charges under Article 3 of the Statute, the Trial Chamber noted that the Prosecutor "submitted that the basis for the rape charges under Article 3 lies in both treaty and customary international law, including common Article 3".[259] Notwithstanding its exhaustive analysis of Common article 3 in connection to the charged offences under Article 3 of the Statute, the Trial Chamber's disposition makes no mention of Common article 3.

194. Article 3 of the Statute, as the Appeals Chamber has previously observed, also prohibits other serious violations of customary international law. The Appeals Chamber in the *Tadi}* Jurisdiction Decision outlined four requirements to trigger Article 3 of the Statute: [260]

> (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature...; (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values...; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

Therefore, so long as rape is a "serious" war crime under customary international law entailing "individual criminal responsibility," separate convictions for rape under Article 3 of the Statute and torture under that Article, by reference to Common article 3(1)(a), are not impermissibly cumulative.

---

[258] *Furund'ija* Trial Judgement, paras 272 and 274-275.
[259] Trial Judgement, para 400. On appeal, the Prosecution invoked the *Tadi}* Jurisdiction Decision to explain the broad scope of Article 3 of the Statute. See Prosecution Consolidated Respondent's Brief, para 2.4.
[260] *Tadić* Jurisdiction Decision, para 94.

195. In keeping with the jurisprudence of the Tribunal, the Appeals Chamber concludes that rape meets these requirements and, therefore, constitutes a recognised war crime under customary international law, which is punishable under Article 3 of the Statute.[261] The universal criminalisation of rape in domestic jurisdictions, the explicit prohibitions contained in the fourth Geneva Convention and in the Additional Protocols I and II, and the recognition of the seriousness of the offence in the jurisprudence of international bodies, including the European Commission on Human Rights and the Inter-American Commission on Human Rights, all lead inexorably to this conclusion.[262]

196. In summary, under Article 3 of the Statute, a conviction for rape can be cumulated with a conviction for torture for the same conduct. A question of cumulativeness assumes the validity of each conviction standing independently; it asks only whether both convictions may be made where they relate to the same conduct. The answer to that question will depend on whether each of the two crimes has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other. Without being exhaustive and as already noted, an element of the crime of rape is penetration, whereas an element for the crime of torture is a prohibited purpose, neither element being found in the other crime. From this, it follows that cumulative convictions for rape and torture under Article 3 of the Statute

---

[261] See *^elebi}i* Trial Judgement, para 476 ("There can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law."); *Furund`ija* Trial Judgement, paras 169-170 ("It is indisputable that rape and other serious sexual assaults in armed conflict entail the criminal liability of the perpetrators...The right to physical integrity is a fundamental one, and is undeniably part of customary international law.") and Trial Judgement, para 408 ("In particular, rape, torture and outrages upon personal dignity, no doubt constituting serious violations of common Article 3, entail criminal responsibility under customary international law."). See also *Akayesu* Trial Judgement, para 596.

[262] See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Art. 27; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted on 8 June 1977, Articles 76(1), 85 and 112; and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), adopted on 8 June 1977, Art. 4(2)(e).
After the Second World War, rape was punishable under the Control Council Law No. 10 on the Punishment of Persons Guilty of War Crimes and Crimes Against Humanity for Germany. Additionally, high-ranking Japanese officials were prosecuted for permitting widespread rapes: Charter of the International Military Tribunal for the Far East, 19 January 1946, amended 26 April 1946. TIAS No. 1589, 4 Bevans 20. See also *In re Yamashita*, 327 U.S. 1, 16 (1946), denying General Yamashita's petition for writs of habeas corpus and prohibition. In an *aide-memoire* of 3 December 1992, the International Committee of the Red Cross declared that the rape is covered as a grave breach (Article 147 of the fourth Geneva Convention). The United States independently took a comparable position. See also *Cyprus* v *Turkey*, 4 EHHR 482 (1982) (Turkey's failure to prevent and punish rapes of Cypriot woman by its troops).
See *Aydin* v *Turkey*, *supra* n 253, para 83:"FRğape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally." See also *Mejía* v *Peru*, *supra* n 248, p 1176: "Rape causes physical and mental

are permissible though based on the same conduct. Furthermore, as already explained in paragraphs 180 to 185 of this Judgement relating to the question of cumulation in respect of intra-Article 5 crimes, the rapes and sexual abuses amount to torture in the circumstances of this case. The Appeals Chamber, therefore, dismisses the Appellants' grounds of appeal relating to cumulative convictions with regard to the intra-Article 3 convictions.

4. The Appellant Kovač's Separate Ground of Appeal

197. The Appellant Kovač argues that he was impermissibly convicted of both rape and outrages upon personal dignity under Article 3 of the Statute. The Appeals Chamber rejects the argument, considering that the Trial Chamber did not base its convictions on the same conduct.[263]

198. All other grounds of appeal relating to cumulative convictions are rejected.

suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant".

[263] Trial Judgement, para 554.

VIII. ALLEGED ERRORS OF FACT (DRAGOLJUB KUNARAC)

A. Alibi

1. Submissions of the Parties

(a) The Appellant (Kunarac)

199. The Appellant argues that the Trial Chamber erred in not accepting his alibi presented at trial in connection with the following periods: 7-21 July 1992 ("first period"); 23-26 July 1992 ("second period"); 27 July-1 August 1992 ("third period"); and 3-8 August 1992 ("fourth period").

200. As to the first and second periods, the Appellant alleges that he was "on war tasks" in the areas of Čerova Ravan[264] and Jabuka[265] respectively. As to the third period, the Appellant submits that he was first in the area of Dragocevo and Preljuca, and then, on 31 July, moved to the zone of Rogoj where he stayed until the evening of 2 August 1992 when, around 10 p.m., he arrived in Vele~evo in Foča.[266] Lastly, the Appellant affirms that during the fourth period he was "on the terrain in Ftheğ zone Fof theğ Kalinovik-Rogoj mountain pass".[267]

201. The Appellant asserts that these submissions are supported by a number of Defence witnesses, including Vaso Blagojević,[268] Gordan Mastilo, D.J., Radoslav Djurović and D.E., and that the Trial Chamber erred in relying exclusively upon the Prosecutor's witnesses.[269]

202. Lastly, the Appellant adds that the Trial Chamber erred in finding that, on 2 August 1992, he took several women from Kalinovik and other women, namely FWS-75, FWS-87, FWS-50 and

---

[264] *Kunarac* Appeal Brief, para 93.
[265] *Ibid.*
[266] *Ibid.*
[267] *Ibid.*
[268] This witness claimed to have known the whereabouts of Kunarac at all times during the period of 23-26 July (Trial Judgement, para 598) and to have seen Kunarac around Čerova Ravan in the period between 7-21 July (Trial Judgement, para 605). However, the witness never claimed to have seen Kunarac around Čerova Ravan on 27 July, as held by the Trial Chamber (Trial Judgement, para 599).
[269] *Kunarac* Appeal Brief, para 93.

D.B., from the Partizan Sports Hall to the house at Ulica Osmana \iki}a no 16.[270] The Appellant asserts that on this day he was at the Rogoj pass.[271]

(b) The Respondent

203. The Respondent submits that the Trial Chamber correctly rejected Kunarac's alibi. The Respondent explains that the Trial Chamber carefully evaluated the evidence, including the testimony of Kunarac's witnesses and found several deficiencies therein. She recalls, *inter alia*, that the Trial Chamber stressed that Kunarac himself admitted to having had a role in the abduction of women from the Partizan Sports Hall, although he stated that this happened on 3 August and not on 2 August 1992. The Respondent concludes that Kunarac's submissions concerning the Trial Chamber's assessment of his alibi are unfounded and therefore should be rejected.

2. Discussion

204. At the outset, the Appeals Chamber observes that the Trial Chamber thoroughly and comprehensively dealt with the alibi put forward by Kunarac in connection with the aforementioned periods. The Appeals Chamber considers that the Trial Chamber conducted a careful analysis of the evidence before it and provided clearly articulated reasons. The Trial Chamber observed that the alibi did not cover all the periods alleged in Indictment IT-96-23.[272] It further noted that the alibi provided by some Defence witnesses "covered limited periods: hours, sometimes even a few minutes."[273] With regard to the third period, it found that the only witness providing evidence for the Defence was the accused himself.[274] The Trial Chamber stressed that Kunarac himself conceded that "he took FWS-87, D.B., FWS-50 and another girl from Partizan Sports Hall", although he claimed that this happened on 3 August and not 2 August 1992 as alleged in Indictment IT-96-23.[275] In light of the above and even though there were Defence witnesses who claimed to have known Kunarac's whereabouts during longer periods of time, the Trial Chamber came to the conclusion that "there is Fnotğ any reasonable possibility that Dragoljub Kunarac was away from the places where and when the rapes took place".[276]

---

[270] *Ibid.*, para 55.
[271] *Ibid.*, para 54.
[272] Trial Judgement, para 596.
[273] *Ibid.*, para 598.
[274] *Ibid.*, para 597.
[275] *Ibid.*, para 619.
[276] *Ibid.*, para 625.

205. The Appeals Chamber considers that by rejecting the alibi, the Trial Chamber came to a possible conclusion in the sense of one that a reasonable trier of fact could have come to. On appeal, the Appellant has simply attributed more credibility and importance to his witnesses than to those of the Prosecutor and this cannot form the basis of a successful objection.

206. In these circumstances, the Appeals Chamber finds no reason to disturb the findings of the Trial Chamber. Accordingly, this ground of appeal fails.

B. Convictions under Counts 1 to 4

1. Rapes of FWS-75 and D.B.

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

207. The Appellant challenges the Trial Chamber's findings that, at the end of July 1992, he took FWS-75 and D.B. to the house at Ulica Osmana \iki}a no 16, where he raped D.B. while a group of soldiers raped FWS-75.

208. First, the Appellant submits that the conviction against him cannot stand because of a material discrepancy between the date of the incident as found by the Trial Chamber ("at the end of July 1992")[277] and the date set out in paragraph 5.3 of Indictment IT-96-23 ("on or around 16 July 1992"). In particular, the Appellant claims that the date set out in Indictment IT-96-23 is so vague that it cannot be used to test the credibility of witnesses testifying about this incident.[278] He thus challenges the testimony of FWS-75 and D.B. on the basis of inconsistency as to the dates on which the incidents occurred.[279]

209. With regard to FWS-75, the Appellant argues that the witness contradicted herself in her testimony at trial. He asserts that FWS-75 initially declared that she was taken to the house at Ulica Osmana \iki}a no 16 by the Appellant, Gaga and Crnogorac some 5 or 6 days after her arrival at

[277] *Ibid.*, para 637.
[278] Appeal Transcript, T 145.
[279] *Kunarac* Appeal Brief, para 37.

Partizan,[280] but subsequently stated that she was not taken there by the Appellant and raped by him until 15 days after her arrival at Partizan.[281]

210. In relation to D.B., the Appellant recalls that the witness testified that she was in the house in question on two occasions, the first of which was several days before the second occasion on 2 August 1992. The Appellant contends that if, as claimed by D.B., the first rape took place only several days before 2 August 1992, that rape could not have occurred on 16 July 1992 or "around that date", as claimed by the Prosecutor.[282] Furthermore, based on D.B.'s statement to FWS-75 that she was at Ulica Osmana \iki}a no 16 on two occasions and was not raped on the first of those occasions in July 1992, the Appellant argues that D.B. could only have been raped during her second stay in the house in August 1992. However, if D.B. was raped in August, the incident ascribed to the Appellant under paragraph 5.3 of Indictment IT-96-23 must be the same as that described at paragraph 5.4 of that Indictment, which did indeed occur in August 1992. In this regard, the Appellant recalls that in his first interview he admitted to having had sexual intercourse with D.B. on 3 August 1992.[283]

211. Secondly, the Appellant argues that the Trial Chamber erred in finding that he possessed the requisite *mens rea* in relation to the rape of D.B.. The Appellant concedes that he had sexual intercourse with D.B. but denies being aware that D.B.'s consent was vitiated because of Gaga's threats,[284] and stresses that D.B. initiated the sexual contact with him and not *vice versa*, because, until that moment, he had no interest in having sexual intercourse with her.[285] Further, the Appellant alleges that the Trial Chamber erred in reaching the conclusion that he had committed the crimes with a discriminatory intent solely on the basis of the testimony of a single witness stating that, when he raped women, the Appellant told them that they would give birth to Serb babies or that they should "enjoy being fucked by a Serb".[286]

(ii) The Respondent

212. The Respondent rejects the Appellant's argument concerning the discrepancy between the date of the rape of FWS-75 in Indictment IT-96-23 and the date identified by the Trial Chamber.

---

[280] *Ibid.*
[281] *Ibid.*
[282] *Ibid.*
[283] *Ibid.*
[284] *Ibid.*, para 38.
[285] Appeal Transcript, T 146.
[286] *Kunarac* Appeal Brief, para 46.

She contends that minor differences in time are irrelevant because the specific incident referred to in the relevant Indictment was proved and could not be mistaken for another incident on another date. Indeed, the incident described in paragraph 5.3 of the said Indictment relates to two victims and cannot be confused with that at paragraph 5.4 of the same Indictment, which relates to four victims.[287]

213. As to any inconsistencies between FWS-75's statement and her testimony, the Respondent submits that the Appellant has failed to establish that the alleged inconsistencies were so grave that no reasonable Trial Chamber could have relied on FWS-75's evidence.[288] In the Respondent's view, the Trial Chamber correctly determined that any discrepancies were explained by the fact that FWS-75 was referring to events which had occurred 8 years before.[289] Analogously, the Respondent contends that the Trial Chamber's finding that the Appellant was aware that D.B. did not freely consent to the sexual intercourse was entirely reasonable due to the condition of captivity in which she was held.[290] The Respondent notes that the Appellant himself admitted to having had intercourse with D.B. and recalls, *inter alia*, the Appellant saying at trial: "I tried to pacify her, to convince her Ŧthat there wasğ no reason to be frightened".[291]

214. Finally, the Respondent recalls FWS-183's testimony that while a soldier was raping her after she had just been raped by the Appellant, "...he - Žaga [the Appellant] was saying that I would have a son and that I would not know whose it was, but the most important thing was it would be a Serb child".[292] The Respondent submits that the evidence provides a firm basis for the Trial Chamber's finding that the Appellant committed crimes for a discriminatory purpose.

(b) Discussion

215. At the outset, the Appeals Chamber identifies the two core components of the Appellant's argument as follows. First, that there was a failure on the part of the Trial Chamber to indicate the precise dates of the rapes of FWS-75 and D.B., which impacts upon the credibility of those witnesses. Secondly, that the Prosecutor did not prove beyond reasonable doubt that the Appellant raped D.B., because the Appellant was not aware that D.B. had not consented to the sexual intercourse. These contentions will be dealt with in turn.

---

[287] Prosecution Consolidated Respondent's Brief, paras 6.23 and 6.24 and Appeal Transcript, T 308.
[288] Prosecution Consolidated Respondent's Brief, paras 6.27-6.29.
[289] Appeal Transcript, T 309.
[290] Prosecution Consolidated Respondent's Brief, paras 6.32-6.35 and Appeal Transcript, T 310.

216. With respect to the dates of the rapes of FWS-75 and D.B., the Trial Chamber found, on the basis of the consistent testimony provided by the victims, that the rapes occurred at the end of July 1992 and not in mid-July 1992 as stated in Indictment IT-96-23. The Trial Chamber was also satisfied that these events were proved beyond reasonable doubt and that they were consistent with the description provided at paragraph 5.3 of Indictment IT-96-23. It found some support for this conclusion, *inter alia*, in the Appellant's own admission to having had sexual intercourse with D.B., made in his statement to the Prosecutor of March 1998 and admitted into evidence as Ex P67.[293]

217. The Appeals Chamber finds that the Trial Chamber's evaluation of the evidence and its findings on these points are reasonable. While the Trial Chamber did not indicate the specific day on which the crimes occurred, it did mention with sufficient precision the relevant period. Moreover, in the view of the Appeals Chamber, minor discrepancies between the dates in the Trial Judgement and those in the Indictment in this case go to prove the difficulty, in the absence of documentary evidence, of reconstructing events several years after they occurred and not, as implied by the Appellant, that the events charged in Indictment IT-96-23 did not occur. This is all the more so in light of the weight that must be attached to eyewitness testimony and to the partial admissions of the Appellant.

218. Turning now to the issue of D.B.'s consent, the Trial Chamber found that, given the circumstances of D.B.'s captivity in Partizan, regardless of whether he knew of the threats by Gaga, the Appellant could not have assumed that D.B. was consenting to sexual intercourse. Analogously, the Trial Chamber correctly inferred that the Appellant had a discriminatory intent on the basis, *inter alia*, of the evidence of FWS-183 regarding comments made by the Appellant during the rapes in which he was involved. Although caution must be exercised when drawing inferences, after having carefully reflected and balanced the details and arguments of the parties, the Appeals Chamber considers these inferences reasonable. The special circumstances and the ethnic selection of victims support the Trial Chamber's conclusions. For these reasons, this part of the grounds of appeal must fail.

---

[291] Appeal Transcript, T 311.
[292] Trial Transcipt, T 3683.
[293] Trial Judgement, para 642 and *Kunarac* Appeal Brief, paras 31-34 and 37.

2. Rape of FWS-95

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

219. The Appellant submits that the Trial Chamber erred in convicting him for the rape of FWS-95 on the basis of the testimony provided by FWS-95 and FWS-105.

220. First, the Appellant claims that the Trial Chamber erred in relying on FWS-95's identification of him at trial. In this regard, the Appellant recalls that, in a statement rendered on 9-12 February 1996, FWS-95 described him as a man with a beard and moustache, as did FWS-105 in her statement of the same period. However, according to the Appellant, he never had a beard or moustache. The Appellant then submits that, in a statement given on 25-26 April 1998, FWS-95 was unable to describe him. Nor was she able to recognise him from a photo-spread presented by the Prosecutor at trial. The Appellant asserts that the in-court identification by FWS-95 is vitiated by the fact that when both he and FWS-95 were in the courtroom, the Presiding Judge of the Trial Chamber called the Appellant's name to ascertain that he could follow the proceedings, thereby *de facto* identifying him.

221. Secondly, the Appellant contends that, since the Trial Chamber found that FWS-95's evidence with regard to the second of the two rapes lacked credibility, it should likewise have rejected her evidence as to the first rape. In support of this assertion, the Appellant claims that in her first statement to the Prosecutor's investigators in 1996, FWS-95 did not mention his name despite stating that some soldiers had raped her. The Appellant also observes that there is no evidence, other than her testimony, to prove that it was he who raped FWS-95.

(ii) The Respondent

222. The Respondent argues that the Appellant's arguments do not meet the requisite threshold for review. As stated in the *^elebi}i* Appeal Judgement, the Appellant must prove that the "evidence could not reasonably have been accepted by any reasonable person Fandğ that the Trial Chamber's evaluation was wholly erroneous".[294] The Prosecutor notes that the Trial Chamber considered the discrepancies between FWS-95's prior statement and her testimony in court as minor and accepted

[294] *^elebi}i* Appeal Judgement, para 491.

that they could be explained by the psychological trauma suffered by the witness.[295] The Prosecutor recalls that the Trial Chamber did not give any positive probative value to in-court identification and adds that FWS-95 clarified her evidence during her testimony before the Trial Chamber.[296] The Trial Chamber accepted the position that FWS-95 had not recognised the Appellant in the photo-spreads because they were of poor quality, and that inconsistencies in FWS-95's description of the Appellant arose from the simple fact that the soldiers were not shaved at the time the rapes took place.[297] The Respondent contends that these findings by the Trial Chamber were reasonable and should be confirmed by the Appeals Chamber.

(b) Discussion

223. In view of the submissions tendered by the Appellant on this ground of appeal, the issue before the Appeals Chamber is that of determining whether or not the Trial Chamber erred in relying on the evidence provided by FWS-95.

224. As to the inconsistencies in FWS-95's testimony, the Trial Chamber held that: [298]

> The Trial Chamber does not regard the various discrepancies between the pre-trial statements dated 25-26 April 1998, Ex D40, of FWS-95 and her testimony in court, to which attention was drawn, as grave enough to discredit the evidence that she was raped by Dragoljub Kunarac during the incident in question.

Furthermore, the Trial Chamber stated that:[299]

> In particular, the Trial Chamber is satisfied of the truthfulness and completeness of the testimony of FWS-95 as to the rape by Kunarac because, apart from all noted minor inconsistencies, FWS-95 always testified clearly and without any hesitation that she had been raped by the accused Kunarac.

225. The Trial Chamber was well aware of the inconsistencies in FWS-95's various declarations, but this did not prevent it from relying upon her testimony, in light of the manner in which she gave it before the Trial Chamber. The Appeals Chamber does not have the Trial Chamber's advantage of observing FWS-95 when she testified. It was, however, within the discretion of the Trial Chamber to rely upon the evidence provided at trial by FWS-95 and to reject the Defence's complaint about alleged inconsistencies. Further, in the circumstances of this case, the Appeals Chamber does not see any reason for disturbing the Trial Chamber's findings as to the alleged inconsistencies. These

---

[295] Prosecution Consolidated Respondent's Brief, para 6.77.
[296] Appeal Transcript, T 318.
[297] Prosecution Consolidated Respondent's Brief, para 6.76.
[298] Trial Judgement, para 679.
[299] *Ibid.*

were dealt with at trial and, as correctly held by the Trial Chamber, do not appear so grave as to undermine FWS-95's testimony.

226. With regard to the issue of identification, although the Trial Chamber unnecessarily stated that: "FWS-95 was able to identify Kunarac in the courtroom...."[300] in the Trial Judgement, it also asserted that: "[t]he Trial Chamber has not relied upon the identification made in court" of Kunarac by FWS-95.[301] Moreover, the Trial Chamber explained that:[302]

> Because all of the circumstances of a trial necessarily lead such a witness to identify the person on trial (or, where more than one person is on trial, the particular person on trial who most closely resembles the man who committed the offence charged), *no positive probative weight has been given by the Trial Chamber to these "in court" identifications.*

227. Accordingly, the Trial Chamber accepted FWS-95's identification on the basis of a witness testimony and not on the basis of an in-court identification. Indeed, the Trial Chamber held that: "The identification of Dragoljub Kunarac by FWS-95 is supported by evidence provided by FWS-105".[303] For this reason, the Appellant's allegation appears misplaced.

228. The Appellant was charged only with taking FWS-95 to Ulica Osmana \iki}a no 16, where she was raped by other soldiers. The Appellant was acquitted on the charge contained in Indictment IT-96-23, because FWS-95 "was not able to say who took her out of Partizan on this occasion".[304] Therefore, contrary to what was alleged by the Appellant, the Trial Chamber did not call the credibility of FWS-95 into question. Additionally, it has to be recalled that there is no general rule of evidence which precludes acceptance in part of the statement of a witness if good cause exists for this distinction, as was the case here. This being so, the Appellant's contention appears unfounded.

229. For the foregoing reasons, after careful analysis of the development of FWS-95's testimony in exhibits and transcripts, the Appeals Chamber finds no basis upon which to disturb the Trial Chamber's findings. Accordingly, this ground of appeal must fail.

---

[300] *Ibid.*, para 676.
[301] *Ibid.*, para 676, footnote 1390.
[302] *Ibid.*, para 562 (emphasis added).
[303] *Ibid.*, para 677.
[304] *Ibid.*, para 682.

C. Convictions under Counts 9 and 10 - Rape of FWS-87

1. Submissions of the Parties

(a) The Appellant (Kunarac)

230. The Appellant submits that the Trial Chamber erred in finding that, sometime in September or October 1992, he went to "Karaman's house" and raped FWS-87 in a room on the upper floor of that house.

231. While conceding that he visited Karaman's house on either 21 or 22 September 1992, the Appellant claims that he merely spoke to FWS-87 on that occasion, and that he did not have sexual intercourse with her. In this regard, the Appellant refers to the testimony given at trial by D.B. who, following a precise question by the Prosecutor, recalled having seen the Appellant only once at Karaman's house, on which occasion he was merely talking with D.B.'s sister (FWS-87) in the living room.[305] The Appellant adds that it was unacceptable in criminal law for the Trial Chamber to infer that he would not have been simply talking to FWS-87, but must have raped her, based only on his alleged "total disregard of Muslim women".[306]

232. The Appellant notes, *inter alia*, that FWS-87 did not mention the Appellant in her first statement given to the Prosecutor's investigators on 19-20 January 1996, when naming many of those whom she claimed to have raped her. This was despite the witness's admission at trial that her memory in 1996 when she gave that first statement was much better than when she gave her in-court testimony. Only in her second statement of 4-5 May 1998 did FWS-87 declare having been raped by the Appellant, and then only in response to a leading question by the investigator. The Appellant contends that FWS-87's reliability is further called into question due to the fact that, despite having allegedly been raped by him, she did not remember where he was wounded or on which part of his body he was wearing a cast.[307]

(b) The Respondent

233. The Respondent agrees with the Trial Chamber's findings that the inconsistencies described in the Appellant's submissions were minor and did not invalidate the whole of FWS-87's

---

[305] *Kunarac* Appeal Brief, para 68.
[306] *Kunarac* and *Kovač* Reply Brief, paras 6.32-6.33.
[307] *Kunarac* Appeal Brief, para 68.

testimony.[308] Further, the Prosecutor observes that the inconsistencies in FWS-87's prior statements relating to the Appellant's presence at Karaman's house were resolved by the Appellant's own admission that he was at that house on 21 or 22 September 1992.[309] The Prosecutor suggests that it was entirely reasonable for the Trial Chamber to dismiss the Appellant's claim that he only talked to FWS-87 as improbable, in light of the Appellant's total disregard for Muslim women. The Prosecutor submits that FWS-87's failure to recall on which body part the Appellant was wearing a cast can be explained by both the passage of time and the trauma suffered by the witness.[310]

2. Discussion

234. The Appeals Chamber finds that the discrepancies identified by the Appellant in the witnesses' testimony are minor when compared with the consistent statements made regarding the presence of the Appellant in Karaman's house, including the admission of the Appellant himself.[311] In the circumstances of this case and in light of FWS-87's testimony, the Appeals Chamber considers the Trial Chamber's inference, that the Appellant would not have simply talked to FWS-87 at Karaman's house because of his lack of respect for Muslims and the fact that he had previously raped FWS-87, as reasonable.

235. With regard to the discrepancy between FWS-87's statements in 1996 and 1998, identified by the Appellant, the Appeals Chamber notes that each testimony complements the other, and that the fact that FWS-87 identified the Appellant later rather than sooner does not render that identification incredible.

236. Finally, as to the uncertainty of FWS-87 regarding whether the Appellant was wounded and on which part of his body he was wearing a cast, the Appeals Chamber observes that FWS-87 did declare in her testimony that the Appellant was wounded, that he was wearing a cast and that "[h]e had something bandaged up somewhere."[312] While FWS-87 did not remember the exact position of the cast, this fact cannot be considered sufficient to place in reasonable doubt the recognition of the Appellant by this witness.

---

[308] Prosecution Consolidated Respondent's Brief, paras 6.89-6.92.
[309] *Ibid.*, para 6.85 and Appeal Transcript, T 307.
[310] Prosecution Consolidated Respondent's Brief, para 6.90.
[311] Trial Judgement, paras 699-703.
[312] Trial Transcript, T 1703.

237. In view of the foregoing factors, the Appeals Chamber finds no reason to disturb the Trial Chamber's findings. Accordingly, this ground of appeal is rejected.

D. Convictions under Counts 11 and 12 - Rape and Torture of FWS-183

1. Submissions of the Parties

(a) The Appellant (Kunarac)

238. The Appellant submits that the Trial Chamber erred in establishing the facts leading to his conviction for the crimes of torture and rape of FWS-183 in mid-July 1992.

239. The Appellant contends that these facts were established on the basis of testimony given by FWS-183 and FWS-61, which was inconsistent and contradictory regarding the specific time when the incident occurred.[313] The Appellant claims, in particular, that there is a discrepancy in that FWS-183 stated that the incident charged in Indictment IT-96-23 occurred in the middle of July 1992, while FWS-61 declared that it occurred "5 or 6 days" before her departure from Fo~a on 13 August 1992. The Appellant asserts that the Trial Chamber incorrectly took the view that it was not necessary to prove the exact date on which the crimes occurred given that there was evidence to establish the essence of the incident pleaded,[314] and that this approach prejudiced the Appellant's defence of alibi.[315]

240. Furthermore, the Appellant submits that FWS-61's contradictory statements discredit her identification of him. FWS-61 stated in her testimony at trial that she had never known the Appellant (referred to in the *Kunarac* Appeal Brief as Žaga) prior to his arrival at the house where she was staying with FWS-183.[316] In addition, FWS-61 declared to the Prosecutor's investigators that she had identified the Appellant upon his arrival because a soldier called Tadi} had told her that a group of soldiers would come to FWS-61's house led by the Appellant. However, at trial FWS-61 admitted that Tadi} did not indicate to her which one of the three soldiers was the Appellant, and that she identified him only because of the respect shown towards him by the other soldiers.[317]

---

[313] *Kunarac* Appeal Brief, para 76.
[314] *Ibid.*, para 59.
[315] *Ibid.*
[316] *Ibid.*, para 76 (with reference to FWS-183's Statement of 1 April 1998). See also Trial Judgement, para 340.
[317] *Kunarac* Appeal Brief, para 76.

241. Lastly, the Appellant recalls that, although FWS-61 claimed that FWS-183 told her everything of what happened to her, FWS-61 only testified that soldiers forced FWS-183 to touch them on certain parts of their bodies and not that they raped FWS-183, as held by the Trial Chamber. In the view of the Appellant, this fact goes to prove that FWS-183 was not raped.

(b) The Respondent

242. The Respondent points out that the Trial Chamber addressed the alleged inconsistencies as to the dates when events occurred, and established the general proposition that minor inconsistencies do not invalidate a witness's testimony.[318] The Prosecutor stresses that FWS-183 identified the Appellant as the leader among the men at her apartment on the basis of the respect shown towards him by the other soldiers and that, subsequently, FWS-61 confirmed for FWS-183 the identity of the Appellant as the person in command. Lastly, the Prosecutor considers that the argument that FWS-183 would have told FWS-61 about everything that had happened to her is wholly irrelevant, as FWS-183 identified the Appellant as the person who raped her.[319]

2. Discussion

243. Upon review of the supporting material, the Appeals Chamber finds that the discrepancies as to the dates of the events do not suggest any specific error in the evaluation of the evidence by the Trial Chamber. In particular, the Appeals Chamber notes that FWS-61 testified that the torture and rape of FWS-183 occurred at the end of July and not in August 1992, whereas FWS-183 declared that it was around 15 July. On this basis, the Trial Chamber reasonably concluded that the relevant incident occurred in the second part of July. As to the alibi of the Appellant, the Appeals Chamber has already stated its grounds for rejecting this defence and will not reiterate those reasons for each ground of appeal. For the reasons previously stated, the Appeals Chamber therefore finds that the Trial Chamber did all that was possible and necessary to establish the date of the crime, which was undoubtedly committed as described in Indictment IT-96-23, as precisely as possible.

244. As to the identification of the Appellant, the Appeals Chamber considers that it was perfectly reasonable for the Trial Chamber to rely upon the testimony of FWS-183 and FWS-61. Although the Trial Chamber did not dwell on this point, the Appeals Chamber finds it reasonable

[318] Prosecution Consolidated Respondent's Brief, para 6.98.
[319] *Ibid.*, para 6.99.

that, as correctly suggested by the Prosecutor, FWS-183 could have deduced the identity of the Appellant by talking to FWS-61, and, contrary to what the Appellant seems to suggest, a "formal indication" from the soldier Tadi} was not needed.

245. Finally, as to the Appellant's contention that the evidence of FWS-61 establishes that FWS-183 was merely forced to touch soldiers and not raped, the Appeals Chamber concurs with the Prosecutor that this argument is irrelevant in light of the convincing nature of the testimony of FWS-183.

246. Overall, the Appeals Chamber finds that the Appellant has failed to identify any specific error by the Trial Chamber and, for the foregoing reasons, this ground of appeal must fail.

E. Convictions under Counts 18 to 20 - Rapes and Enslavement of FWS-186 and FWS-191

1. Submissions of the Parties

(a) The Appellant (Kunarac)

247. The Appellant submits that the Trial Chamber's findings that, on 2 August 1992, he took FWS-191, FWS-186 and J.G. from the house at Ulica Osmana \iki}a no.16 to an abandoned house in Trnova~e and that, once there, he raped FWS-191 while the soldier DP 6 raped FWS-186, are "unacceptable".[320] To prove this point, the Appellant challenges the testimony rendered by FWS-186 and FWS-191.

248. As to FWS-186, the Appellant appears to contend that this witness is not credible because in her first statement, given to the Bosnian government authorities in November 1993, she did not mention his name.[321] The Appellant recalls that FWS-186 stated at trial that this failure to mention his name was due to her embarrassment about speaking in front of three men, and was not, as found by the Trial Chamber, an attempt to protect J.G..[322] The Appellant further alleges, without providing details, that pressure was put on FWS-186, because in her second statement to the Bosnian government authorities she did not confirm that she had been raped.[323]

---

[320] *Kunarac* Appeal Brief, para 80.
[321] *Ibid.* (with reference to Ex-P 212 and 212a).
[322] Trial Judgement, para 721.
[323] *Kunarac* Appeal Brief, para 80.

249. With regard to FWS-191, the Appellant claims that her testimony contradicts that of witnesses. He notes that FWS-191 stated that, on the night of 2 August 1992, although she was taken from the Kalinovik School with other girls, she was alone at Ulica Osmana \icki}a no.16. However, FWS-87, FWS-75, FWS-50 and D.B. testified that they were present at the house as well, and FWS-87 and FWS-50 testified to having been raped by the Appellant.[324] The Appellant also argues that he had no knowledge that FWS-186 and FWS-191 were likely to be raped in Trnova~e.[325] He merely recalls taking FWS-186 and FWS-191 up to Miljevina with the intention of confronting a journalist on 3 August 1992.[326]

250. Furthermore, the Appellant argues that the conclusions of the Trial Chamber regarding the rapes and enslavement of FWS-191 and FWS-186 during the six month period at the house in Trnova~e are untenable, because both witnesses were staying there voluntarily.[327] As proof of this fact, the Appellant submits that he had obtained passes which enabled both FWS-191 and FWS-186 to leave Trnova~e to go to Tivat in Montenegro to stay with his family,[328] but that both witnesses refused to do so.[329] Furthermore, the Appellant submits that both FWS-186 and FWS-191 confirmed that they were free to move in and around the house and to visit neighbours.

251. The Appellant denies that FWS-191 was his personal property. He stresses that FWS-191 stated at trial that the Appellant protected her from being raped by a drunken soldier who had offered money to be with her.[330] Furthermore, the Appellant contends that he did not have any role in keeping FWS-191 at the house in Trnova~e because that house was the property of DP 6.[331] He states that FWS-191 had asked DP 6 if she could stay in the house and that DP 6 had offered her security,[332] explaining that if they left the house she and FWS-186 "would be raped by others".[333]

(b) The Respondent

252. With regard to the inconsistencies in FWS-186's and FWS-191's testimony, the Prosecutor reiterates that this argument was put at trial and that the Trial Chamber reasonably concluded that

---

[324] *Ibid.*
[325] *Ibid.*, para 82 (with reference to Trial Judgement, paras 727 and 743).
[326] *Ibid.*, para 69.
[327] *Ibid.*, para 83.
[328] Appeal Transcript, T 134-135.
[329] *Kunarac* Appeal Brief, para 86.
[330] *Ibid.*, para 87 (citing Trial Transcript, T 2972).
[331] *Kunarac* and *Kovač* Reply Brief, para 6.39.
[332] *Kunarac* Appeal Brief, para 89.
[333] Appeal Transcript, T 134.

the identification evidence of FWS-186 was credible and that, in any case, the alleged inconsistencies were minor.

3983

253. As to the crime of enslavement, the Prosecutor argues that the Trial Chamber identified a comprehensive range of acts and omissions demonstrating the Appellant's exercise of the rights of ownership over FWS-186, thus satisfying the criteria of enslavement.[334] The Prosecutor contends that the Appellant's submissions are mere reiterations of his defence arguments which were rejected at trial, and that the Appellant has not demonstrated how or why the Trial Chamber's factual conclusions were erroneous.[335] In the view of the Prosecutor, there is no contradiction in the finding of the Trial Chamber that the Appellant forbade other men to rape FWS-191. Rather, it submits, this fact indicates a level of control and ownership consistent with the crime of enslavement.[336]

2. Discussion

254. As regards the alleged inconsistencies, the Trial Chamber relied on the testimony provided at trial by FWS-186, as confirmed by FWS-191, when coming to the conclusion that the two witnesses were kept in the Trnova~e house for five to six months. Throughout this period, FWS-186 was raped repeatedly by DP 6, while FWS-191 was raped by the Appellant during a period of about two months. The Appellant pointed out some minor differences between the various statements of FWS-186 but, *inter alia*, conceded that FWS-186's failure to mention the name of the Appellant in her first statement was justified. These minor discrepancies do not cast any doubt on the testimony and thereby on the findings of the Trial Chamber. On the contrary, given that discrepancies may be expected to result from an inability to recall everything in the same way at different times, such discrepancies could be taken as indicative of the credibility of the substance of the statements containing them. In light of these factors, the Appeals Chamber is unable to discern any error in the assessment of the evidence by the Trial Chamber.

255. Lastly, as to the crime of enslavement, the Trial Chamber found that the women at Trnova~e "were not free to go where they wanted to even if, as FWS-191 admitted, they were given the keys to the house at some point".[337] In coming to this finding, the Trial Chamber accepted that "...the girls, as described by FWS-191, had nowhere to go, and had no place to hide from Dragoljub

[334] Prosecution Consolidated Respondent's Brief, paras 6.111-6.112.
[335] *Ibid.*, para 6.119 and Appeal Transcript, T 313-314.
[336] Prosecution Consolidated Respondent's Brief, para 6.105.

Kunarac and DP 6, even if they had attempted to leave the house...."[338] The Appeals Chamber considers that, in light of the circumstances of the case at bar in which Serb soldiers had exclusive control over the municipality of Foča and its inhabitants, and of the consistent testimony of the victims, the findings of the Trial Chamber are entirely reasonable. For the foregoing reasons, this ground of appeal fails.

F. Conclusion

256. For the foregoing reasons, the appeal of the Appellant Kunarac on factual findings is dismissed.

[337] Trial Judgement, para 740.
[338] *Ibid.*

IX. ALLEGED ERRORS OF FACT (RADOMIR KOVA^)

A. Identification

1. Submissions of the Parties

(a) The Appellant (Kovač)

257. The Appellant submits that the Trial Chamber erred in relying on the testimony of FWS-75 to establish his participation in the fighting that took place in Mješaja and Trošanj on 3 July 1992.[339] He contends that there are inconsistencies in the descriptions of him given by FWS-75 in her statements.[340] He adds that poor visibility on 3 July 1992 and the fact that she did not know him before the conflict made it difficult for FWS-75 to identify him at the scene, and he suggests that the witness actually saw his brother.[341] The Appellant stresses that he was not involved in the fighting of 3 July 1992, because he was on sick leave from 25 June to 5 July 1992, which was confirmed by DV and recorded in a log book produced by the Defence.[342]

(b) The Respondent

258. As regards the Appellant's involvement in the armed conflict, the Respondent contends that the Trial Chamber was correct in concluding that the Appellant took an active part in the armed conflict in the municipality of Foča from as early as 17 April 1992.[343]

259. With respect to the credibility of FWS-75's evidence identifying the Appellant, the Respondent submits that the Trial Chamber did not err in accepting this evidence, because it was unequivocal and based on FWS-75's detailed description of the Appellant's appearance.[344] The Respondent further claims that there is evidence consistent with that of FWS-75[345] which establishes that the Appellant was involved in combat activities around Mješaja and Trošanj,[346]

---

[339] *Kova~* Appeal Brief, para 57.
[340] *Ibid.*
[341] *Ibid.*
[342] *Ibid.*, para 58.
[343] Prosecution Consolidated Respondent's Brief, paras 5.3 and 5.4.
[344] *Ibid.*, para 5.10.
[345] *Ibid.*, para 5.5.
[346] *Ibid.*, para 5.4.

whereas there is no evidence to support the Appellant's claim that he was injured and on military leave at the time in question, as DV's evidence does not confirm that claim.[347]

2. Discussion

260. The Appellant's convictions in this case are based on the acts he committed on female civilians held in his apartment from about 31 October 1992. He contests the credibility of FWS-75's evidence as to his participation in the armed conflict that broke out on 3 July 1992. The findings of the Trial Chamber do not indicate that the Appellant was guilty of acts which took place in the conflict of 3 July 1992. With regard to the Appellant's convictions, this ground of appeal has little relevance, except perhaps for the purpose of showing that the Appellant knew of the context in which his acts against the victims were committed. For this, however, there is ample other evidence.[348] As regards the credibility of FWS-75's evidence, the Appeals Chamber concurs with the arguments of the Respondent and incorporates them in this discussion. This ground of appeal is dismissed.

B. Conditions in Radomir Kova~'s Apartment

1. Submissions of the Parties

(a) The Appellant (Kovač)

261. The Appellant contends that the Trial Chamber erred in not evaluating the evidence as to the *manner* in which, whilst at his apartment, FWS-75, FWS-87, A.S. and A.B. were allegedly subjected to rape and degrading and humiliating treatment, and, at times, slapped and exposed to threats.[349] The Appellant argues that FWS-75 was once slapped on her face, but that this was because he found her drunk and not for other reasons.[350] He submits that the girls were sent to his apartment because normal conditions of life no longer existed in their previous place in Miljevina.[351] He also contends that it was not, as the Trial Chamber has found, proved beyond reasonable doubt that he completely ignored the girls' diet and hygiene and that they were sometimes left without food.[352] He maintains that the girls had access to the whole apartment,[353]

[347] *Ibid.*, para 5.6.
[348] Trial Judgement, para 586. See also para 569.
[349] *Kova~* Appeal Brief, para 59.
[350] *Ibid.*
[351] *Ibid.*, para 60.
[352] *Ibid.*, paras 63-64 and Appeal Transcript, T 171-2.
[353] *Kova~* Appeal Brief, para 65.

that they could watch television and videos,[354] that they could cook and eat together with him and Jagos Kosti},[355] and that they went to cafés in town.[356]

(b) The Respondent

262. The Respondent argues that it was open to the Trial Chamber, on the basis of the evidence presented at trial, to conclude that FWS-75, FWS-87, A.S. and A.B. were detained in the Appellant's apartment and subjected to assault and rape.[357] The Respondent argues that the Appellant has failed to specify any error on the part of the Trial Chamber, but has merely reiterated his defence at trial.[358] The Respondent argues that the fact that the Trial Chamber chose to believe certain witnesses and not others does not in itself amount to an error of fact.[359] Further, the findings of the Trial Chamber relating to the conditions in the Appellant's apartment and the mistreatment of the girls therein render the claim of the Appellant that he acted with good intentions incredible.[360] The Respondent also points out that the Trial Chamber has found that FWS-75 was slapped on occasion for refusing sexual intercourse and beaten up for having a drink.[361]

2. Discussion

263. The Appeals Chamber notes that the Trial Chamber discussed what the Appellant stated in his defence at trial.[362] Further, the Trial Chamber discussed at length the conditions in the Appellant's apartment,[363] with reference to the specific abuses suffered by the victims.[364] The proof accepted by the Trial Chamber describes in detail the manner in which the lives of the victims unfolded in the Appellant's apartment and in which physically humiliating treatment was meted out to them. The Appeals Chamber considers that the relevant findings of the Trial Chamber were carefully considered and that the correct conclusions were drawn in the Trial Judgement. The ground of appeal is obviously ill-founded and is therefore dismissed.

---

[354] *Ibid.*, para 66.
[355] *Ibid.*, paras 68-69.
[356] *Ibid.*, para 71.
[357] Prosecution Consolidated Respondent's Brief, para 5.16.
[358] *Ibid.*, para 5.12.
[359] *Ibid.*
[360] *Ibid.*, para 5.14. See also paras 5.20-5.21.
[361] *Ibid.*, para 5.15.
[362] Trial Judgement, paras 151-157.
[363] *Ibid.*, paras 750-752.
[364] *Ibid.*, paras 757-759, 761-765 and 772-773.

C. Offences Committed against FWS-75 and A.B.

1. Submissions of the Parties

(a) The Appellant (Kovač)

264. The Appellant submits that it is necessary to determine with greater precision the time and place of the offences in order to convict him.[365] He questions the credibility of FWS-75's testimony with regard to the times when certain incidents occurred and the fact that no other witnesses corroborated her testimony.[366] Further, he points to discrepancies in her testimony.[367]

(b) The Respondent

265. As regards the alleged need for greater precision, the Respondent argues that, in view of the traumatic experiences of FWS-75 and A.B.[368] and their lack of any reason to notice specific days and the means to measure the passing days,[369] the Trial Chamber was correct in accepting the range of the *approximate* dates which the Prosecution mentioned in Indictment IT-96-23.[370] The Respondent claims that it was never her contention that these dates constituted the *precise* dates when the events took place.[371] Finally, the Respondent contends that an inability to pinpoint the exact date or dates of events was not detrimental to the credibility of FWS-75 and A.B.,[372] nor did it cause prejudice to the Appellant.[373]

266. With respect to the credibility of FWS-75, it is the view of the Respondent that the Trial Chamber was entitled to come to its conclusions in light of the overwhelming evidence presented by FWS-75, FWS-87 and A.S., which supported each other in all material aspects.[374] In this regard, the Respondent recalls that A.B. confided in FWS-75 that the Appellant had raped her,[375] and that

---

[365] See *Kova~* Appeal Brief, para 73 where calculations are made by referring to the testimony, and the Appellant concludes that it was impossible that he committed certain acts.
[366] Appeal Transcript, T 174-175 and 186.
[367] *Kova~* Appeal Brief, paras 73-76 and Appeal Transcript, T 174.
[368] Prosecution Consolidated Respondent's Brief, para 5.36.
[369] *Ibid.*, para 5.33.
[370] *Ibid.*, para 5.32.
[371] *Ibid.*, para 5.30.
[372] *Ibid.*, paras 5.28, 5.33 and 5.36.
[373] *Ibid.*, paras 5.29 and 5.34-5.35.
[374] *Ibid.*, paras 5.39 and 5.57. The Respondent notes, however, that there is no legal requirement that the testimony of a single witness on a material fact be corroborated before being accepted as evidence: para 5.58.
[375] *Ibid.*, para 5.44.

FWS-87 further testified that A.B. was obviously affected by the abuse that was inflicted upon her.[376] The Respondent adds that FWS-75 was a careful witness who did not exaggerate.[377]

2. Discussion

267. As to the alleged lack of precision, the Appeals Chamber considers that the Trial Judgement is not vague as to the main place where the Appellant committed his crimes against the victims, namely, his apartment. In respect of the time of the crimes, the Trial Chamber found that FWS-75 and A.B. were kept in the Appellant's apartment "for about a week, starting sometime at the end of October or early November 1992",[378] and FWS-87 and A.S., for about four months from "on or around 31 October 1992".[379] In connection with the abuses of FWS-75 and A.B., the Appellant was found to have raped them, to have let other soldiers into his apartment to rape them, and to have handed them over to other soldiers in the knowledge that they would be raped.[380] In relation to the sufferings of FWS-87 and A.S., the Trial Chamber found that they had been repeatedly raped during the four-month period.[381] Given the continuous or repetitive nature of the offences committed by the Appellant on the four women under his control, it is only human that the victims cannot remember the exact time of each incident. In the case of FWS-87 and A.S., for instance, the Trial Chamber was satisfied that the former was raped "almost every night" by the Appellant when he spent the night at his apartment and that the Appellant's flatmate, Jagos Kosti}, "constantly raped A.S.".[382] More reasoning cannot be expected. This first argument fails.

268. On the issue of corroborating evidence, the Appeals Chamber reaffirms its settled jurisprudence that corroboration is not legally required; corroborative testimony only goes to weight. Subject to this, the Appeals Chamber notes that the Appellant focused on two incidents in particular. First, FWS-75 and A.B. were returned to the Appellant's apartment at a particular time before they were given away to other soldiers by the Appellant. Second, at that time, the Appellant was at his apartment.

269. The first incident, the Appellant argues, ended with the return of the victims not earlier than 22 or 23 December 1992. This runs counter to the finding of the Trial Chamber that the return took

[376] *Ibid.*, para 5.45.
[377] *Ibid.*, para 5.49.
[378] Trial Judgement, para 759.
[379] *Ibid.*, paras 760 and 765.
[380] *Ibid.*, para 759.
[381] *Ibid.*, paras 760 and 765.
[382] *Ibid.*, para 761.

place between the first and second weeks of December 1992. This submission of the Appellant contains a miscalculation:[383] from 16 November 1992, as suggested by the Appellant, the victims stayed in the apartment near Pod Masala for about 7 to 10 days, which would put the time in late November 1992, rather than "at least until December 22, 1992", as proposed by him.[384] This miscalculation also renders pointless the alleged alibi that he was present in his apartment only till 19 December 1992.

270. In addition, the Appeals Chamber accepts and incorporates the Respondent's convincing argument in this discussion.

271. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal.

D. Offences Committed against FWS-87 and A.S.

1. Submissions of the Parties

(a) The Appellant (Kovač)

272. The Appellant questions the credibility of FWS-95's testimony. According to him, the Trial Chamber ought not to have accepted her testimony because she was unable to remember the place where the rapes were committed against her or even some of the perpetrators.[385] He questions the credibility of other witnesses due to their young age and the fact that they experienced traumatic events.[386] He submits that the Trial Chamber erred in rejecting his claim that he was engaged in a mutual, emotional relationship with FWS-87.[387] He raises arguments, which are similar to those he advanced in relation to the offences committed against FWS-75 and A.B., regarding the conditions in his apartment, that the victims enjoyed freedom of movement, that they had sufficient food, and that the hygiene conditions were normal.[388] The Appellant argues that the Trial Chamber erred in not requiring corroborative evidence to be adduced to prove the charges of rape.[389]

---

[383] *Kovač* Appeal Brief, para 73.
[384] *Ibid.*
[385] *Ibid.*, para 79.
[386] *Ibid.*, para 80. The Appellant Kova~ finds contradictions in FWS-87's evidence which pertain to particular passages of the transcripts where she answered "No" or "I don't know" to the same questions posed by different parties.
[387] *Ibid.*, para 83.
[388] *Ibid.*, paras 85-87.
[389] *Ibid.*, para 79.

(b) The Respondent

273. The Respondent asserts that it was open to the Trial Chamber to accept the testimony of FWS-95 and other witnesses without admitting defence expert evidence relating to rape.[390] In the view of the Respondent, the weight, if any, to be attached to the evidence of an expert is a matter entirely for the trier of fact, and the Appellant has identified no error on the part of the Trial Chamber.[391]

274. As regards the alleged relationship between the Appellant and FWS-87, the Respondent contends that it was open to the Trial Chamber to reject this unsubstantiated claim[392] and to conclude on the basis of the evidence presented at trial that the above relationship was, in reality, one of cruel opportunism, abuse and domination.[393]

275. According to the Respondent, the Trial Chamber correctly concluded that FWS-87 and A.S. could not move about freely.[394] In support of this contention, the Respondent highlights the evidence, presented at trial, that the above witnesses could not leave the locked apartment unless accompanied by the Appellant and/or his associate Kosti},[395] and that on trips to cafés and pubs those witnesses were made to wear hats and other items bearing the Serb army insignias.[396]

276. With regard to the issue of corroborative evidence, the Respondent argues that the Trial Chamber acted in accordance with Rule 96 of the Rules in accepting without corroboration the evidence of FWS-87 and A.S. that sexual assaults occurred.[397]

277. The Respondent concludes by recalling that an appeal is not a trial *de novo*, and that the Appellant has failed to demonstrate that the Trial Chamber erred in the exercise of its discretion.[398] The Respondent states that all the facts disputed by the Appellant were argued and adjudicated at trial, that no good cause has been shown on appeal to justify a re-examination of the Trial

---

[390] Prosecution Consolidated Respondent's Brief, paras 5.69-5.72.
[391] *Ibid.*, para 5.72.
[392] *Ibid.*, paras 5.77 and 5.82.
[393] *Ibid.*, para 5.82 and Appeal Transcript, T 303.
[394] Prosecution Consolidated Respondent's Brief, paras 5.83 and 5.86.
[395] *Ibid.*, para 5.20 and Appeal Transcript, T 257.
[396] Prosecution Consolidated Respondent's Brief, para 5.22.
[397] *Ibid.*, paras 5.66-5.67.
[398] *Ibid.*, para 5.85.

Chamber's factual findings, and that the Trial Chamber has not been shown to have been unreasonable in its evaluation of the witnesses' evidence and its factual conclusions.[399]

2. Discussion

278. As to the Appellant's claim that FWS-95's testimony was not credible, the Appeals Chamber states that the Appellant was not found guilty of any act committed against FWS-95.

279. As to the effect of age and the degree of suffering upon the credibility of the witnesses, the Appeals Chamber notes that the Trial Chamber has clearly indicated that it was aware of this aspect of the case.[400] The Trial Chamber did not lower the threshold of proof below the standard of beyond reasonable doubt. The Appellant has failed to demonstrate that the Trial Chamber committed an error of fact in admitting evidence from traumatised young victims.

280. As to the alleged relationship between the Appellant and FWS-87, the Appeals Chamber refers to the convincing and exhaustive findings in the Trial Judgement that it "was not one of love as the Defence suggested, but rather one of cruel opportunism on Kovač's part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old".[401]

281. With regard to corroborative evidence, the Appeals Chamber considers that the Trial Chamber was, in accordance with Rule 96 of the Rules, entitled not to require corroboration for the testimony of rape victims. The Trial Chamber, therefore, committed no error in this regard and at the same time was aware of the inherent problems of a decision based solely on the testimony of the victims.

282. For the foregoing reasons, this ground of appeal is dismissed.

E. Outrages upon Personal Dignity

1. Submissions of the Parties

(a) The Appellant (Kovač)

283. The Appellant questions the Trial Chamber's findings of fact with regard to the incidents of naked dancing, by arguing that there were several such incidents and that the witnesses confused

[399] *Ibid.*, para 5.86.
[400] Trial Judgement, paras 564 and 566.

them.[402] He also points out alleged discrepancies in the evidence with regard to the time, [illegible] (where exactly in the apartment the incidents occurred) and details of the incidents (the type of table upon which the dances occurred) for which he was found responsible.[403]

(b) The Respondent

284. As a general proposition, the Respondent contends that it was open to the Trial Chamber to reach the findings it did in relation to the naked dancing incident.[404] The Respondent specifically submits that the inconsistencies and discrepancies in the witnesses' testimony were not material in the sense that they destroyed the credibility of the witnesses.[405] Further, the Respondent claims that the Trial Chamber took those inconsistencies and discrepancies into account in evaluating the evidence and reaching its findings.[406]

2. Discussion

285. Revisiting the arguments in detail, the Appeals Chamber accepts and incorporates the Respondent's arguments in its discussion of this ground of appeal. The Appeals Chamber is persuaded that the Trial Chamber made no error in this respect. This ground of appeal is dismissed.

F. Sale of FWS-87 and A.S.

1. Submissions of the Parties

(a) The Appellant (Kovač)

286. The Appellant Kova~ argues that the Trial Chamber erred in finding that a sale occurred, because there were discrepancies in the testimony with regard to the price of sale,[407] and there were contradictions between FWS-87's and A.S.'s statements and their testimony at trial.[408] He also submits that the sale as described by the Trial Chamber was highly improbable because of some details of the sale.[409]

---

[401] *Ibid.*, para 762.
[402] *Kova~* Appeal Brief, paras 90-91.
[403] *Ibid.*, paras 93-94.
[404] Prosecution Consolidated Respondent's Brief, para 5.156.
[405] *Ibid.*, para 5.157.
[406] *Ibid.*, para 5.156.
[407] *Kova~* Appeal Brief, para 96.
[408] *Ibid.*, paras 97-102.
[409] *Ibid.*, para 103.

(b) The Respondent

287. The Respondent asserts that the Trial Chamber did not err in finding that the Appellant sold FWS-87 and A.S.. The Respondent submits that the alleged differences in the testimonies of the above witnesses are insignificant and have no effect on the credibility of those witnesses.[410] The Respondent also argues that the Appellant's complaints are trivial and do not provide a sufficient basis for challenging the Trial Chamber's findings.[411]

2. Discussion

288. The Appellant has not demonstrated a link between the alleged error and his convictions. This ground of appeal is dismissed as evidently unfounded.

G. The Rape Convictions

289. To the extent that the Appellant tries to demonstrate errors of fact as regards force used in the commission of the crime of rape, his submissions are disposed of by the definition of rape endorsed by the Appeals Chamber in Chapter V, Section B, above.

H. Conclusion

290. For the foregoing reasons, the appeal of the Appellant Kova~ on factual findings is dismissed.

[410] Prosecution Consolidated Respondent's Brief, para 5.89.
[411] *Ibid.*, para 5.90.

X. ALLEGED ERRORS OF FACT (ZORAN VUKOVI])

A. Alleged Omissions in Indictment IT-96-23/1

1. Submissions of the Parties

(a) The Appellant (Vuković)

291. In the Appellant's view, the Trial Chamber could not draw any factual conclusions from the following alleged incidents because none of them was charged in Indictment IT-96-23/1 or followed by a conviction.[412] The Appellant argues that the Trial Chamber erred in using the oral rape of FWS-50 in Buk Bijela on 3 July 1992 and FWS-75's testimony indicating that on the same day the Appellant led FWS-75's uncle away covered in blood as evidence of his involvement in the attack against the civilian population of Fo~a.[413] Further, the Appellant claims that the Trial Chamber erred in using FWS-75's testimony alleging her rape by the Appellant for the purposes of identification,[414] notwithstanding that no conviction was entered in relation to this incident.[415]

292. The Appellant adds that he learned about these additional alleged incidents only at trial and therefore did not have an opportunity to prepare his case to meet the charge.[416]

(b) The Respondent

293. First, the Respondent submits that, once admitted into evidence, the Trial Chamber was fully entitled to use the testimony of FWS-50 and FWS-75 to prove the Appellant's knowledge of the widespread or systematic attack against the civilian population and for identification purposes. The Respondent claims that, although she has an obligation to set out the material facts of the case in sufficient detail, she is not required to plead all of her evidence in an indictment.[417]

---

[412] Appeal Transcript, T 199.
[413] Trial Judgement, paras 589 and 591.
[414] *Ibid.*, para 789.
[415] *Vuković* Appeal Brief, para 131.
[416] *Ibid.*
[417] Prosecution Respondent's Brief, paras 2.15 and 2.48, citing Trial Judgement, paras 589, 789 and 796.

294. Secondly, the Respondent observes that both FWS-50 and FWS-75's evidence was disclosed to the Appellant before those witnesses testified[418] and that adequate notice was given to the Appellant in the form of a memorandum prepared by the Prosecutor's investigators. The Prosecutor remarks that FWS-50 gave evidence in the examination-in-chief and was cross-examined by the Appellant, who did not object to the admission of that evidence.[419]

2. Discussion

295. The Trial Chamber found that the Appellant orally raped FWS-50 in Buk Bijela on 3 July 1992[420] and also accepted FWS-75's testimony stating that the Appellant on that occasion led her uncle away covered in blood. These findings were used for the purpose of demonstrating that the Appellant had knowledge of the attack against the civilian population, one of the necessary elements for entering a conviction for crimes against humanity. The Trial Chamber also accepted, for identification purposes, the testimony of FWS-50 that the Appellant orally raped her in the Appellant Kova~'s apartment.[421]

296. In the *Kupre{ki}* Appeal Judgement, the Appeals Chamber made the following statement with regard to the Prosecutor's obligation, under Article 18(4) of the Statute and Rule 47(C) of the Rules, to set out in that Indictment a concise statement of the facts of the case and of the crimes with which the accused is charged: [422]

> In the jurisprudence of the Tribunal, this translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment, but not the evidence by which such material facts are to be proven. Hence, the question whether an indictment is pleaded with sufficient particularity is dependent upon whether it sets out the material facts of the Prosecution case with enough detail to inform a defendant clearly of the charges against him so that he may prepare his defence.

297. The Appeals Chamber observes that, in the instant case, the testimony of FWS-50 and FWS-75 did not relate to "material facts underpinning the charges in the indictment" which must have been pleaded in Indictment IT-96-23/1. Indeed, the facts established were not used as a basis for conviction but constituted evidence used to prove material facts pleaded in the Indictment. Therefore, on the basis of its case-law, the Appeals Chamber considers that the Trial Chamber did not err in relying upon those facts as evidence.

---

[418] Appeal Transcript, T 286-287.
[419] *Ibid.*
[420] Trial Judgement, para 589.
[421] *Ibid.*, para 789.
[422] *Kupre{ki}* Appeal Judgement, para 88.

298. Moreover, as to the alleged inability to prepare his defence, the Appeals Chamber notes that the Appellant has not put forward any discernible error in the application of the Rules governing disclosure and the handling of evidence at trial to justify reconsideration of the Trial Chamber's conclusions.

299. For the foregoing reasons, the Appeals Chamber sees no error in the Trial Chamber's evaluation of the evidence. This ground of appeal must accordingly fail.

B. Rape of FWS-50

1. Submissions of the Parties

(a) The Appellant (Vuković)

300. The Appellant submits that the Trial Chamber erred in its evaluation of FWS-50's testimony and that, consequently, the charges relating to the rape and torture of FWS-50 in an apartment in mid-July 1992, alleged in paragraph 7.11 of Indictment IT-96-23/1, were not proven beyond reasonable doubt.

301. First, the Appellant notes that FWS-50 made no reference to him[423] or to the alleged oral rape at Buk Bijela in her first statement to the Prosecutor's investigators,[424] and claims that discrepancies exist between that statement and her testimony at trial.[425] In particular, the Appellant points out inconsistencies between the testimony of FWS-50 and that of FWS-87.[426] At trial, FWS-50 testified that, after threatening her mother (FWS-51), the Appellant and another Serb soldier took her and FWS-87 from Partizan Sports Hall to an abandoned apartment, where the Appellant raped her.[427] For her part, FWS-87 denied being taken out of Partizan Sports Hall with FWS-50. Further, FWS-87 testified to having seen the Appellant "only twice: once when she was raped by him at Fo~a High School and later when he came to Radomir Kova~'s apartment".[428]

302. Secondly, the Appellant contends that FWS-50 did not provide any detail as to the place where she was taken and raped.[429] Given that the Trial Chamber accepted FWS-50's evidence in

[423] *Vuković* Appeal Brief, para 129.
[424] *Ibid.*, para 126.
[425] *Ibid.*, para 123.
[426] *Ibid.*
[427] Appeal Transcript, T 202.
[428] Trial Judgement, para 246.
[429] *Vuković* Appeal Brief, para 125.

spite of this omission, the Appellant contends that the Trial Chamber used a different standard when evaluating FWS-50's evidence than when evaluating that of FWS-75 and FWS-87.[430]

303. Lastly, the Appellant claims that FWS-51 (FWS-50's mother) did not confirm that FWS-50 was taken by him from Partizan Sports Hall despite the fact that she was allegedly present when he took her daughter.[431] He alleges that FWS-51's inability to properly identify him calls into question FWS-50's credibility.[432]

(b) The Respondent

304. The Respondent contends that FWS-50's failure to refer to the Appellant and to the oral rape at Buk Bijela in her first statement to the Prosecutor's investigators does not diminish her reliability as a witness. Indeed, during cross-examination, FWS-50 explained that she did not mention this rape because she was ashamed of it.[433] The Respondent adds that FWS-50's trial testimony is remarkably consistent with her prior statement to the Prosecutor's investigators, with only insignificant discrepancies due to the passage of time.[434]

305. The Respondent points out that the Appellant erroneously stated that FWS-87 denied that FWS-50 was taken from Partizan Sports Hall and raped by the Appellant, as in fact FWS-87 merely stated that she did not remember this incident. Therefore, the Trial Chamber's decision not to convict the Appellant for the rape of FWS-87 stemmed from that witness's failure to remember the incident in question and not from any denial that it took place.[435] The Respondent submits that, at any rate, the failure by FWS-87 to recall being taken from Partizan Sports Hall and raped is fully understandable, given the frequency with which she was raped by a large number of men.[436] The Respondent claims that the lack of evidence from FWS-87 does not undermine the value of FWS-50's testimony indicating that the Appellant raped her.[437]

306. The Respondent stresses that FWS-50 gave detailed evidence of being taken to an abandoned apartment near Partizan and raped, and that she should not be expected to identify an exact location for that apartment. Therefore, the Appellant's related contention that the Trial

---

[430] *Ibid.*
[431] Appeal Transcript, T 203.
[432] *Vukovi}* Appeal Brief, para 126.
[433] Trial Transcript, T 1293-1294.
[434] Prosecution Respondent's Brief, para 2.22. See also Appeal Transcript, T 228.
[435] Appeal Transcript, T 290.
[436] *Ibid.*
[437] Prosecution Respondent's Brief, para 2.26 and Appeal Transcript, T 289.

Chamber used different standards when evaluating the evidence of FWS-75 and FWS-87 fails to a lack of support.[438]

307. Finally, with regard to FWS-51, the Respondent recalls that this witness recognised the Appellant in court as "being familiar" and asserts that, even if FWS-51 could not identify the Appellant with certainty, this fact does not affect FWS-50's ability to identify the Appellant as the man who raped her.[439]

2. Discussion

308. The Appeals Chamber notes that the essential point of the Appellant's submissions is that, due to the unreliability of FWS-50's evidence, the Trial Chamber erred in relying upon that evidence to find him guilty of the charges of rape and torture of FWS-50 in an apartment in mid-July 1992.

309. At trial, FWS-50 explained her failure to mention the first rape at Buk Bijela on earlier occasions. The Appeals Chamber takes the view that, based upon her testimony, it was not unreasonable for the Trial Chamber to conclude that this first rape was particularly painful and frightening for FWS-50,[440] and that this omission in her first statement did not affect her reliability. The alleged inconsistencies between FWS-50's prior statement and her testimony at trial have been reviewed by the Appeals Chamber and are not sufficiently significant to cast any doubt upon the credibility of FWS-50. On the contrary, the absence of such natural discrepancies could form the basis for suspicion as to the credibility of a testimony.

310. With regard to the alleged inconsistency between the evidence of FWS-87 and that of FWS-50, the Appeals Chamber observes that FWS-87 stated simply that she did not recall the particular incident referred to by FWS-50 and not that it did not occur. The mere fact that FWS-87 could not remember being taken out of Partizan with FWS-50 does not cast any doubt upon FWS-50's own credibility.

311. In reply to the Appellant's submission that FWS-50 did not explain where she was taken and where she was raped, the Appeals Chamber observes that the witness testified at trial that she was

[438] Prosecution Respondent's Brief, para 2.28.
[439] *Ibid.*, para 2.31.
[440] Trial Transcript, T 1293-1294.

taken to a room on the left side of the corridor of an abandoned apartment.[441] The Appeals Chamber considers that it would be unreasonable in the circumstances to expect the witness to identify an exact location or a street address for this apartment.

312. Lastly, with regard to FWS-51, the Appeals Chamber observes that she did testify that FWS-50 was taken from Partizan Sports Hall,[442] even though she did not specify who took her. FWS-51 did not, as the Appellant seems to imply, deny that the incident charged at paragraph 7.11 of Indictment IT-96-23/1 took place. There is no basis for upholding the Appellant's contention.

313. For the foregoing reasons, the Trial Chamber's finding that FWS-50's evidence was a reliable basis on which to convict the Appellant for the crimes alleged in paragraph 7.11 of Indictment IT-96-23/1 remains undisturbed. This ground of appeal accordingly fails.

C. Issue of Identification

1. Submissions of the Parties

(a) The Appellant (Vuković)

314. The Appellant contends that the Trial Chamber erred in accepting the identification of him provided by FWS-50 and FWS-75.[443] To prove this point, he makes the following submissions.

315. Firstly, the Appellant claims that FWS-50 identified him only at trial and that her courtroom identification was incorrectly performed in violation of criminal law principles.[444]

316. Further, the Appellant submits that, although FWS-62 testified that she saw her husband (FWS-75's uncle) being led away by the Appellant, she was not able to identify him when called to testify at trial.[445] The Appellant claims that the Trial Chamber could not rely on the identification provided by FWS-75, as this witness's unreliability is demonstrated by the fact that the Trial Chamber did not believe her evidence regarding the acts of the alleged rape in the Appellant Kovač's apartment.[446]

---

[441] *Ibid.*, T 1262.
[442] *Ibid.*, T 1148.
[443] *Vuković* Appeal Brief, para 129.
[444] *Ibid.*
[445] *Ibid.*, para 130.
[446] *Ibid.*, para 131.

317. The Appellant contends that the Trial Chamber's decision to accept FWS-75's identification of him contradicts the position held by the Trial Chamber in the *Kupreskić* case that caution must be exercised when evaluating the evidence of a witness who has suffered intense trauma.[447]

(b) The Respondent

318. The Respondent argues that the Trial Chamber was entitled to place some weight on FWS-50's in-court identification of the Appellant, even though conceding that the Trial Chamber did not attach positive probative weight to that evidence. The Respondent stresses, however, that FWS-50 saw the Appellant in Buk Bijela in early July 1992 when she was orally raped and in mid-July when he took her out of Partizan Sports Hall and raped her. In this regard, the Respondent points out that the Appellant has not indicated any discernible error on the part of the Trial Chamber in relying upon such evidence. Moreover, FWS-50 recognised the Appellant in photos shown to her by the Prosecutor's investigators in September 1999.[448] The Respondent claims that FWS-62's inability to recognise the Appellant at trial does not undermine the credibility of the evidence provided by FWS-50 or FWS-75.[449]

319. Lastly, the Respondent submits that the Trial Chamber examined the evidence concerning identification in a very careful manner and that it was acutely aware of the traumatic circumstances these witnesses faced.[450]

2. Discussion

320. With regard to the probative value of courtroom identifications, the Appeals Chamber reiterates its previous finding that the Trial Chamber was correct in giving no probative weight to in-court identification.[451]

321. As to the alleged inability of FWS-62 to identify the Appellant, the Appeals Chamber observes that the Trial Chamber relied mainly upon the testimony of FWS-50, who indicated with certainty that, *inter alia*, the Appellant was the person who raped her orally at Buk Bijela in an abandoned apartment.[452] Although caution is necessary when relying primarily upon the testimony

[447] *Ibid.*, para 129, citing *Kupreškić* Trial Judgement, para 768.
[448] Prosecution Respondent's Brief, para 2.45.
[449] *Ibid.*, para 2.51.
[450] Appeal Transcript, T 293.
[451] See *supra*, paras 226-227.
[452] Trial Judgement, para 814.

of a single witness, in the circumstances of this case it was wholly understandable that the Trial Chamber attributed more weight to the evidence provided by FWS-50 than to that of FWS-62.

322. The Appellant's argument that the Trial Chamber erred in accepting FWS-75's identification of the Appellant because it did not accept her evidence that the Appellant raped her[453] misstates the Trial Chamber's position. The Trial Chamber did accept FWS-75's evidence that the Appellant raped her in Kovač's apartment. Its failure to use that evidence for conviction or sentencing purposes stemmed from the fact that this act was not charged in Indictment IT-96-23/1 and not, as the Appellant suggests, from a belief that FWS-75 was unreliable.[454] The Trial Chamber, however, did use this particular evidence provided by FWS-75 for the purposes of identification, as it was entitled to do.[455] In view of this, the Appeals Chamber cannot find a discernible error on the part of the Trial Chamber.

323. Finally, with regard to the Appellant's contention that the Trial Chamber did not exercise sufficient caution in its use of FWS-75's, the Appeals Chamber takes note of the following finding of the Trial Chamber: [456]

> The Trial Chamber attaches much weight to the identification of Vukovi} by FWS-75 because of the traumatic context during which the witness was confronted with Vukovi} in Buk Bijela as well as in Radomir Kovač's apartment. The Trial Chamber is therefore satisfied that the identification of Vukovi} by FWS-75 was a reliable one.

324. The Appeals Chamber agrees that, in principle, there could be cases in which the trauma experienced by a witness may make her unreliable as a witness and emphasises that a Trial Chamber must be especially rigorous in assessing identification evidence. However, there is no recognised rule of evidence that traumatic circumstances necessarily render a witness's evidence unreliable. It must be demonstrated in *concreto* why "the traumatic context" renders a given witness unreliable. It is the duty of the Trial Chamber to provide a reasoned opinion adequately balancing all the relevant factors. The Appeals Chamber notes that, in the present case, the Trial Chamber has provided relatively short but convincing reasoning.

325. In view of the foregoing reasons, this ground of appeal fails.

---

[453] *Vuković* Appeal Brief, para 129.
[454] Trial Judgement, paras 789 and 796.
[455] *Ibid.*, para 589.
[456] *Ibid.*, para 789.

D. Discussion of Exculpatory Evidence

1. Submissions of the Parties

(a) The Appellant (Vuković)

326. The Appellant submits that the Trial Chamber erred in convicting him of the rape of FWS-50 because, as shown by the evidence at trial regarding an "injury" to his testicle, he was impotent at the relevant time and thus could not have committed the crime.[457]

327. The Appellant contends that the Trial Chamber should have concluded from the evidence given by Defence witnesses DP and DV that he had suffered an injury to his testicle at the relevant time. He argues that the Trial Chamber erred in ruling that a logbook of DV was inadmissible because it failed to mention the nature of Vukovi}'s injury.[458]

328. The Appellant furthermore claims that the Trial Chamber erred in preferring the evidence given by the Prosecution's expert Dr. de Grave to that of the Defence witness Professor Dunjić.[459] Vukovi} submits that both expert witnesses left open the possibility of impotence arising from his injury.[460] The Appellant asserts that Dr. de Grave's expert experience is limited in comparison to that of Professor Dunji}.[461]

329. In the *Vukovi}* Reply Brief, the Appellant reiterates that the Trial Chamber erroneously rejected the evidence of Professor Dunji} in favour of that of Dr. de Grave, who concluded that the impotence resulting from this injury would only last for three days.[462] The Appellant re-emphasises that the Trial Chamber did not determine with certainty the date when the rape alleged in paragraph 7.11 of Indictment IT-96-23/1 occurred, and hence it is not possible to exclude the existence of the Appellant's impotence at the relevant time.[463]

---

[457] *Vuković* Appeal Brief, paras 141-142.
[458] *Ibid.*, para 136.
[459] *Ibid.*, paras 137 and 139-140.
[460] *Vuković* Reply Brief, para 2.32.
[461] *Vuković* Appeal Brief, paras 139-140.
[462] *Vuković* Reply Brief, para 2.31.
[463] *Ibid.*, para 2.33.

(b) The Respondent

330. The Respondent rejects Vukovi}'s "submissions regarding the Trial Chamber's findings as to Vukovi}'s injury and its impact on his ability to have sexual intercourse at the relevant time".[464] The Respondent notes that the Trial Chamber gave considerable attention to the evidence raised by the Defence.[465] It recalls that the Trial Chamber found that "the Defence adduced no credible evidence concerning the seriousness or even the exact nature of the injury sustained by the accused on that occasion".[466] Finally, the Respondent stresses that Dr. de Grave's testimony revealed that Vukovi}'s alleged impotence would not have lasted longer than 3 days and that the Trial Chamber rightfully rejected Professor Dunji}'s medical opinion on the ground that "he was unable to conclude that such impotence actually occurred".[467]

2. Discussion

331. At the outset, the Appeals Chamber notes that the bulk of the submissions tendered by Vukovi} in this ground of appeal has already been raised during trial and satisfactorily dealt with in the Trial Judgement.

332. The Trial Chamber rejected the defence of impotence put forward by Vukovi} on the following grounds. First, it established that the injury to Vukovi}'s testicle occurred on 15 June 1992 and that the first rape ascribed to him occurred on 6 or 7 July 1992. On this basis, it held that, without excluding the possibility that Vukovi} could have been impotent for a certain period of time, by the date the crime occurred "the accused would have recovered from his injury."[468] As to the seriousness of Vukovi}'s injury, the Trial Chamber referred to the testimony of DV suggesting that the accused might have exaggerated the gravity of his injury in order to avoid being sent back to the frontline.[469] In this regard, it stressed that although indicating that Vukovi} was injured on 15 June 1992, the logbook referred to by DV said nothing about the seriousness of this injury.[470] In addition, the Trial Chamber relied on the testimony of DP, a confidant of the accused, who, although testifying that he had taken the accused to hospital for treatment 4 or 5 times, said nothing about the nature of the consequences of the injury. Finally, the Trial Chamber noted that Professor Dušan Dunjić, the medical expert called by Vukovi}, indicated that an unspecified temporary

[464] Prosecution Respondent's Brief, para 2.66.
[465] *Ibid.*, para 2.67, citing Trial Judgement, para 802.
[466] *Ibid.*, para 2.68.
[467] Trial Judgement, para 803.
[468] *Ibid.*, para 801.
[469] *Ibid.*, para 802.

impotence could result as a consequence of an accident of the sort described by the accused, but that Professor Dunjić was unable to conclude that such impotence actually occurred. On these grounds, the Trial Chamber concluded that: [471]

> ...there is no reasonable possibility that any damage to the accused's testis or scrotum led to the consequence that he was rendered impotent during the time material to the charges against him.

333. The Appeals Chamber finds that, on the basis of the evidence presented before it at trial, the conclusion of the Trial Chamber is reasonable. All arguments presented by the Appellant were analysed by the Trial Chamber. The mere assertion that one expert witness is more experienced than another has no value. The Appellant failed to demonstrate in detail and on the basis of a qualified expertise the scientific superiority of Professor Dunjić. Additionally, it must be taken into account that the underlying facts of the expert's opinion are extremely vague and allow for the conclusions which were drawn.

334. In these circumstances, the Appeals Chamber finds no reason to disturb the Trial Chamber's finding and thus this ground of appeal must fail.

E. Conclusion

335. For the foregoing reasons, the appeal of the Appellant Vukovi} on factual findings is dismissed.

---

[470] *Ibid.*
[471] *Ibid.*, para 805.

XI. GROUNDS OF APPEAL RELATING TO SENTENCING

A. The Appellant Dragoljub Kunarac's Appeal against Sentence

336. The Appellant Kunarac has received a single sentence of 28 years' imprisonment for convictions on five counts of crimes against humanity and six counts of violations of the laws or customs of war. His appeal against the sentence consists of the following grounds: 1) a single sentence is not allowed under the Rules and each convicted crime should receive an individual sentence; 2) the Trial Chamber should follow the sentencing practice in the former Yugoslavia in the sense that the sentence under appeal cannot exceed the maximum sentence prescribed for the courts of the former Yugoslavia; 3) his crimes do not deserve the maximum penalty because certain aggravating factors in relation to his crimes were not properly assessed; 4) two mitigating factors should have been taken into account in the assessment of the sentence; and 5) the Trial Chamber was ambiguous as to which version of the Rule regarding credit for time served was applied.

1. Whether the Single Sentence is in Conformity with the Rules

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

337. The Appellant submits, in effect, that the Trial Chamber should have pronounced an individual sentence for each criminal offence for which he was convicted at the conclusion of the trial, in accordance with the provision of Rule 101(C) of the Rules then in force.[472] He argues that that version of Rule 101(C) "in no case allowed for the single sentence to be pronounced", for if this were not the case, there would have been no need to amend the Rule shortly after the conclusion of the trial.[473] He further contends that the Trial Chamber did not respect the principles that each crime receives one sentence and that a composite sentence for all crimes cannot be equal to the sum of the individual sentences nor be in excess of the highest determined sentence for an individual crime.[474]

---

[472] *Kunarac* Appeal Brief, para 149. Rule 101(C) of the 18th edition of the Rules of Procedure and Evidence, 2 August 2000.
[473] *Kunarac* Appeal Brief, para 150.
[474] *Ibid.*, para 151.

(ii) The Respondent

338. The Respondent submits that the Appellant has not shown, in terms of Rule 6(D) of the Rules, how the application of the Rules in this connection has prejudiced his rights as an accused.[475] She argues that the amendment in question codified the practice of the Tribunal of allowing a global sentence to be imposed for crimes "committed in a geographically limited area over a limited period of time" since "the imposition of a single sentence is therefore more appropriate to reflect the totality of...ŧthe Appellants'ğ respective conduct."[476] Although citing another relevant rule, Rule 87 of the Rules, the Respondent fails to address the Appellant's arguments concerning Rule 101(C).

(b) Discussion

339. The Trial Chamber merely states that it "is satisfied that the rights of the three accused are not prejudiced by the application of the latest amended version" of the Rules, in accordance with Rule 6 of the Rules,[477] and that it will follow the provision of Rule 87(C) of the Rules in imposing a single sentence.[478]

340. Rule 101(C) of the Rules (18th edition, 2 August 2000) provides:

> The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

This provision was deleted at the Plenary Meetings of the Tribunal held in December 2000. Rule 87(C) of the 18th edition of the Rules provides:

> If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt.

The version of Rule 87(C) contained in the 19th edition of the Rules (19 January 2001) provides thus:

> If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.

---

[475] Prosecution Consolidated Respondent's Brief, para 8.5.
[476] *Ibid.*, para 8.9.
[477] Trial Judgement, para 823, footnote 1406.
[478] *Ibid.*, para 855.

This newer version of Rule 87(C) of the Rules combined the provisions of Rule 87(C) and Rule 101 (C) of the 18th edition of the Rules, in addition to its recognising the power of a Trial Chamber to impose a single sentence. Rule 6(D) of the Rules, the text of which remained unchanged between these two editions, states:

> An amendment shall enter into force seven days after the date of issue of the official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case.

341. The Appeals Chamber interprets this ground of appeal as alleging a legal error. The consequence of applying the newer Rule 87(C) of the Rules by the Trial Chamber was clear: the imposition of a single sentence was within the power of the Chamber. The question to be answered by the Appeals Chamber is whether the imposition of a single sentence in accordance with the newer Rule 87(C) of the Rules prejudiced the rights of the accused at the conclusion of his trial.

342. The Appeals Chamber considers that the version of Rule 101(C) contained in the 18th edition of the Rules did not expressly require a Trial Chamber to impose multiple sentences for multiple convictions. It merely required the Trial Chamber to indicate whether multiple sentences, if imposed at all, would be served consecutively or concurrently. This was a rule intended to provide clarity for the enforcement of sentences. This interpretation is also that implicitly adopted in the *Bla{ki}* Trial Judgement.[479] In that Judgement, the Trial Chamber further reasoned that:[480]

> Here, the crimes ascribed to the accused have been characterised in several distinct ways but form part of a single set of crimes committed in a given geographic region during a relatively extended time-span, the very length of which served to ground their characterisation as a crime against humanity, without its being possible to distinguish criminal intent from motive. The Trial Chamber further observes that crimes other than [*sic*] the crime of persecution brought against the accused rest fully on the same facts as those specified under the other crimes for which the accused is being prosecuted... In light of this overall consistency, the Trial Chamber finds that there is reason to impose a single sentence for all the crimes of which the accused has been found guilty.

343. In the disposition of the *Bla{ki}* Trial Judgement, it is clear that the accused was convicted on different counts for the same underlying acts for which he was held responsible. It is clear from this Judgement that, in certain cases, a single, composite sentence may be more appropriate than a set of individual sentences for individual convictions. The fundamental consideration in this regard

[479] *Bla{ki}* Trial Judgement (currently under appeal), para 805.
[480] *Ibid.*, para 807.

is, according to the *^elebi}i* Appeal Judgement, that "the sentence to be served by an accused must reflect the totality of the accused's criminal conduct".[481]

344. The Appeals Chamber holds that neither Rule 87(C) nor Rule 101(C) of the 18th edition of the Rules prohibited a Trial Chamber from imposing a single sentence, and the precedent of a single sentence was not unknown in the practice of the Tribunal or of the ICTR.[482] The newer version of Rule 87(C) of the Rules, on which the Trial Chamber relied for sentencing purposes in the present matter, simply confirmed the power of a Trial Chamber to impose a single sentence. If the Appellant had no doubt as to the fairness of Rule 101(C) of the 18th edition of the Rules, as is the case here, he could not fault the fairness of Rule 87(C) of the 19th edition of the Rules, which did no more than absorb Rule 101(C) of the earlier edition and codify a precedent in the practice of the Tribunal. This ground of appeal thus fails.

2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

345. The Appellant argues that a Trial Chamber must comply with Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules, which means that "the pronounced sentence or sentences can not exceed the general maximum prescribed by the sentencing practice in the former Yugoslavia, as the courts of the former Yugoslavia can not pronounce sentences in excess to the maximum prescribed sentence".[483] He submits that "the Trial Chamber erred and venture [*sic*] outside its discretionary framework given in Article 24 of the Statute, since the par 1 of the Article 24 of the Statute is limiting the authority of the Trial Chambers in the Tribunal to pronounce sentences over 20 years of imprisonment, except in cases where they pronounce explicitly regulated sentence of life imprisonment".[484] The maximum sentence the Appellant could foresee was a 20-year imprisonment for war crimes.[485]

(ii) The Respondent

---

[481] *^elebi}i* Appeal Judgement, para 771.
[482] *Kambanda* Appeal Judgement, paras 100-112.
[483] *Kunarac* Appeal Brief, para 153.
[484] *Kunarac* and *Kova~* Reply Brief, para 6.58.
[485] *Kunarac* Appeal Brief, para 154.

346. The Respondent submits that the fact that the Trial Chamber is not bound by the practi[illegible] of the courts of the former Yugoslavia is "beyond any serious dispute".[486]

(b) Discussion

347. The Trial Chamber states that the wording of Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules "suggests that the Trial Chamber is not *bound* to follow the sentencing practice of the former Yugoslavia."[487] In this context, references are made to the existing case-law, which shows a uniform approach of the Chambers in this connection.[488] There is not "an automatic application of the sentencing practices of the former Yugoslavia".[489]

348. Article 24(1) of the Statute requires that:

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

Rule 101(B)(iii) of the Rules (19th edition) requires a Trial Chamber to "take into account" the general practice regarding prison sentences in the courts of the former Yugoslavia.

349. The case-law of the Tribunal, as noted in the Trial Judgement, has consistently held that this practice is not binding upon the Trial Chambers in determining sentences.[490] Further, in the instant case the Trial Chamber did consider the sentencing practice of the courts of the former Yugoslavia by way of hearing a defence expert witness in this respect, and it thus complied with the provisions of Article 24(1) of the Statute and Rule 101(B)(iii) of the Rules. The question here is whether the Trial Chamber, while considering the practice of the courts of the former Yugoslavia in relation to the sentencing aspect of the present case, ventured outside its discretion by ignoring the sentencing limits set in that practice. Article 24(1) of the Statute prescribes imprisonment, but no gradation of sentence has been laid down. The Chambers have to weigh a variety of factors to decide on the scale of a sentence. In the present case, the Trial Chamber followed all the necessary steps. The Appeals Chamber considers, therefore, that the Trial Chamber did not abuse its power or make an error in this regard. The ground of appeal is rejected.

---

[486] Prosecution Consolidated Respondent's Brief, para 8.12.
[487] Trial Judgement, para 829.
[488] *Ibid.*, citing *^elebi}i* Appeal Judgement, paras 813 and 820.
[489] *Ibid.*
[490] *^elebi}i* Appeal Judgement, paras 813 and 820 and *Kupre{ki}* Appeals Judgement, para 418.

3. Aggravating Factors

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

350. The Appellant asserts that the Trial Chamber should have satisfied itself first that he deserved the maximum penalty under the 1977 Penal Code of the Socialist Federal Republic of Yugoslavia ("the 1977 Penal Code"), which was one of 20 years' imprisonment (in lieu of the death penalty).[491] His reasoning is that, if various aggravating factors had been assessed properly, he would not have received the maximum term of imprisonment. The Appellant claims that the aggravating factors found by the Trial Chamber are erroneous because: 1) the vulnerability of victims is an element of the crime of rape, not an aggravating factor; 2) there is a contradiction between the findings in paragraphs 858 and 863 of the Trial Judgement; 3) the age of certain victims, all but one younger than 19 years, cannot be an aggravating factor; 4) prolonged detention is an element of the crime of enslavement, not an aggravating factor; and 5) discriminatory grounds are an element of Article 5 offences, not an aggravating factor.

(ii) The Respondent

351. The Respondent submits that vulnerability is not an element of the crime of rape, according to the definition given by the Appellant at the trial, and moreover that considering elements of crimes as aggravating factors is anyway not unknown in the practice of the ICTR.[492] She also opines that the Trial Chamber "was probably referring to the status of women and children who are specifically accorded protection under the Geneva Conventions and other international humanitarian law instruments in times of armed conflicts".[493] In that light, "it was reasonable to conclude that the callous attacks on defenseless women merited specific assessment".[494] The Respondent argues that the Appellant has not shown any discernible errors on the part of the Trial Chamber.[495] She does not comment on the issue of the young age of the victims, but states that the Trial Chamber was correct in its approach.[496] Similarly, she merely states that the prolonged period

---

[491] *Kunarac* Appeal Brief, para 154.
[492] Prosecution Consolidated Respondent's Brief, paras 8.15 and 8.16.
[493] *Ibid.*, para 8.17.
[494] *Ibid.*
[495] *Ibid.*, para 8.18.
[496] *Ibid.*, para 8.21.

of detention being used to aggravate the sentence was not unreasonable.[497] Further, she argues that discriminatory motives can constitute an aggravating factor.[498] In her view, there are many aggravating factors in Kunarac's case.[499]

(b) Discussion

352. The Appeals Chamber notes that point 1) of this ground of appeal, regarding the factor of vulnerability of the victims, is raised in reference to the consideration of that factor given by the Trial Chamber. In particular, the Trial Chamber stated "[l]astly, that these offences were committed against particularly vulnerable and defenceless women and girls is also considered in aggravation."[500] The Trial Chamber considered the factor of the vulnerability of the victims in terms of the gravity of the offences.[501] Article 24(2) of the Statute requires that Trial Chambers consider the gravity of the offence in imposing sentences. Whether or not the vulnerability of the victim is an element of the crime of rape does not affect its being evidence of the gravity of the crime, which can duly be considered in the course of sentencing as a matter of statutory law. The Trial Chamber committed no error in this regard, and this point of the ground of appeal is thus rejected.

353. As to point 2) of this ground of appeal, the Appellant argues that the Trial Chamber reached contradictory findings with regard to his role in the armed conflict in the former Yugoslavia. In paragraph 858 it makes statements to the effect that none of the accused played relatively significant roles "in the broader context of the conflict in the former Yugoslavia"; whereas it states in paragraph 863 that "the evidence clearly shows that this accused [i.e. Kunarac] played a leading organisational role and that he had substantial influence over some of the other perpetrators". The Appeals Chamber considers that the Appellant has overlooked the different contexts of these two findings. The Trial Chamber found the Appellant not to be in any position of command in the conflict in the former Yugoslavia, thus being low down the hierarchy of power in the territory. This does not, however, contradict the finding of his role in the crimes for which he was held responsible, those crimes being confined to a particular area of the former Yugoslavia. Both paragraphs state clearly that he was not regarded as a commander in relation to the crimes. This particular part of the ground of appeal is thus without merit and is dismissed.

---

[497] *Ibid.*, para 8.22.
[498] *Ibid.*
[499] Appeal Transcript, T 326.

354. As to point 3), the Appellant has not elaborated on his argument that girls of 16-17 years age might be allowed to marry in the former Yugoslavia. A person may still be regarded as young even if he or she is eligible for marriage according to law. In Article 73 of the 1977 Penal Code, a person between 16-18 years old was considered a "senior juvenile", thus to be treated differently from adults in terms of criminal sanction. Article 1 of the 1989 Convention on the Rights of the Child,[502] effective for the former Yugoslavia since 2 February 1991, defines a child to be a human being under the age of 18 years unless national law provides the child with a younger age of majority. Young as they were (the victims concerned in this part of the appeal were aged between 15 and a half and 19 years), there was no provision in the 1977 Penal Code, or more specifically the 1977 Penal Code of the Socialist Republic of Bosnia and Herzegovina, that would aggravate the sentence for a convicted rapist due to the age of a victim who might be under 16 years but older than 14 years. Article 91 of the latter code imposed a heavier sentence for the rape of a juvenile under 14 years of age.

355. The Trial Chamber has considered the defence expert witness's evidence with regard to the sentencing practice of the former Yugoslavia for the offence of rape, which shows that the youth of victims of sexual crimes constituted an aggravating circumstance in that practice.[503] The witness confirmed in court that the rape of young girls under 18 years of age led to aggravated sentences in the former Yugoslavia.[504] In the view of the Appeals Chamber, the expert evidence did not contradict the prevailing practice in the former Yugoslav Republic of Bosnia and Herzegovina and was rightly considered by the Trial Chamber in this regard. There still was an inherent discretion of the Trial Chamber to consider a victim's age of 19 years as an aggravating factor by reason of its closeness to the protected age of special vulnerability. No doubt it was for this reason that the Trial Chamber spoke of these different ages as "relatively youthful".[505] Also, the Trial Chamber was right to distinguish between crimes committed in peacetime and in wartime. Young and elderly women need special protection in order to prevent them from becoming easy targets. The Appeals Chamber finds that the Trial Chamber was not in error by taking into account the young age of victims specified in the Trial Judgement. This part of the ground of appeal therefore fails.

---

[500] Trial Judgement, para 867.
[501] *Ibid.*, para 858.
[502] U.N. Doc. A/44/25, adopted 20 November 1989.
[503] Trial Judgement, para 835.
[504] Trial Transcript, T 5392.
[505] Trial Judgement, para 874.

356. Point 4) of this ground of appeal concerns the aggravating factor of enslavement over a prolonged period. The Trial Chamber found, in relation to the count of enslavement, that two victims were subject to abuses over a period of two months.[506] The Appellant contends that duration is an element of the crime of enslavement, and therefore cannot be an aggravating factor. However, as previously stated, the Appeals Chamber agrees with the Trial Chamber that duration may be a factor "when considering whether someone was enslaved".[507] This means that duration is not an element of the crime, but a factor in the proof of the elements of the crime. The longer the period of enslavement, the more serious the offence. The Trial Chamber properly exercised its discretion in considering a period of two months to be long enough to aggravate the sentence for the offence. This part of the ground of appeal therefore fails.

357. In point 5) of this ground of appeal it is alleged that the Trial Chamber erred in regarding the discriminatory objective as an aggravating factor, as this constitutes an element of Article 5 crimes. In this context, the Appeals Chamber recalls the *Tadić* Appeal Judgement, which states that a discriminatory intent "is an indispensable legal ingredient of the offence only with regards to those crimes for which this is expressly required, that is, for Article 5(h) of the Statute, concerning various types of persecution".[508] It is not an element for other offences enumerated in Article 5 of the Statute. This part of the ground of appeal thus fails.

4. Mitigating Factors

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

358. The Appellant claims that the fact that none of the witnesses has suffered any severe consequences at his hands should be considered as a mitigating factor. In his view, the fact that he is a father of three young children should likewise be a mitigating factor, as it would in the practice of the courts of the former Yugoslavia.[509]

(ii) The Respondent

---

[506] *Ibid.*, para 744.
[507] *Ibid.*, para 542.
[508] *Tadić* Appeal Judgement, para 305.
[509] *Kunarac* Appeal Brief, paras 158-159.

359. The Respondent makes no submission in this respect, except for a remark that "the Trial Chamber is not bound to accept the testimony of experts and more so in the case where the suffering and harmful consequences are so apparent".[510]

(b) Discussion

360. The part on the sentencing of the Appellant in the Trial Judgement contains no mention of either ground being raised by the Appellant, as the Trial Chamber simply states that "there are no other relevant mitigating circumstances to be considered with respect to" the Appellant.[511] The Appeals Chamber takes this ground of appeal to be based on the complaint that the Trial Chamber did not give consideration to the factors in question.

361. The argument regarding an alleged lack of grave consequences was not included in the sentencing section of the Defence Final Trial Brief. Nor was it asserted during the closing arguments. The Trial Chamber, therefore, committed no error in not mentioning this fact. Under Article 47(2) of the 1977 Penal Code, the grave consequences of an offence such as rape would aggravate the sentence. However, that Code contains no provision entitling perpetrators of crimes without grave consequences to mitigation of their punishment. The Trial Chamber, on the other hand, has found that the offences of which the Appellant is convicted are "particularly serious offences." The inherent gravity of those offences, as the starting point for the sentencing procedure, demands severe punishment, which will not be diminished because the offences are claimed to have produced no serious consequences for the victims. This ground of appeal is therefore dismissed.

362. As to the factor that the Appellant is the father of three young children, the Appeals Chamber notes that the Defence raised this point during trial as a matter "significant for sentencing of the Accused Dragoljub Kunarac", and that the Defence actually submitted the point as a significant mitigating circumstance.[512] This point was raised again at the hearing of closing arguments.[513] It is not clear why the Trial Chamber decided not to consider this issue. The Appeals Chamber considers this factor to be a mitigating factor, following the existing case-law of the Tribunal and having recourse to the practice of the courts of the former Yugoslavia. In the *Erdemovi}* Sentencing Judgement, the fact that the accused had a young child was considered as a

[510] Prosecution Consolidated Respondent's Brief, para 8.23.
[511] Trial Judgement, para 870.
[512] Defence Final Trial Brief, para K.h.4.
[513] Trial Transcript, T 6447.

personal circumstance under the heading of "Mitigating factors".[514] In the *Tadić* Sentencing Judgement, the personal circumstances of the accused, including his marriage, were considered separately from mitigating factors.[515] Article 24(2) of the Statute requires the Trial Chambers to take into account "the individual circumstances of the convicted person" in the course of determining the sentence. Such circumstances can be either mitigating or aggravating. Family concerns should in principle be a mitigating factor. Article 41(1) of the 1977 Penal Code required the courts of the former Yugoslavia to consider circumstances including the "personal situation" of the convicted person. The Appeals Chamber holds that this should have been considered as a mitigating factor. This ground of appeal is thus partly successful. However, in view of the number and severity of the offences committed, the Appeals Chamber finds that the sentence imposed by the Trial Chamber is the appropriate one and thus upholds the Trial Chamber's decision in this respect.

5. Credit for Time Served

(a) Submissions of the Parties

(i) The Appellant (Kunarac)

363. The Appellant submits that, in this regard, the Trial Chamber "gave an ambiguous formulation" in the last paragraph of the Trial Judgement by recalling Rule 101 of the Rules without explaining which version of the Rule was applied. He further asserts that if credit for time served is to be calculated from the date of 4 March 1998, "there is no error of the Trial Chamber regarding the application of law."[516]

(ii) The Respondent

364. The Respondent agrees with the Appellant that "no order has been made" in the last paragraph of the Trial Judgement as to the credit for time served, and invites the Appeals Chamber to clarify this point.[517] However, she points out that the Trial Chamber orally stated on 22 February 2001 that the time spent in custody should be credited towards all three convicted persons.[518]

---

[514] *Erdemović* Sentencing Judgement, para 16.
[515] *Tadić* Sentencing Judgement, para 26.
[516] *Kunarac* Appeal Brief, para 162.
[517] Prosecution Consolidated Respondent's Brief, para 8.19.
[518] Trial Transcript, T 6568, 6572 and 6574.

(b) Discussion

365. The Trial Chamber notes that the Appellant "surrendered to the International Tribunal on 4 March 1998".[519] The Appeals Chamber considers that the issue of credit for time could only be regarded as a ground of appeal if an erroneous reading was made by the Appellant of the Trial Chamber Judgement in this respect. However, the heading of the paragraph of the Trial Judgement in question, "Credit for Time Served", read in conjunction with Rule 101(C) and Rule 102 of the 19th edition of the Rules, referred to in the paragraph in question, is clear enough as to the thrust of the paragraph. The Trial Chamber has already stated clearly in footnote 1406 that it would apply the 19th edition of the Rules in this part of the Judgement. The older version of Rule 101(C) of the Rules would be unrelated to the issue of credit for time served. As the Prosecutor correctly submits, the Trial Chamber did make an oral statement, on 22 February 2001, stating that the time spent in custody should be credited to the sentences of the three convicted persons. If the Appellant had had any doubt, he could have, through his counsel, raised this matter immediately before the Trial Chamber for clarification. That would have been the proper forum. The ground of appeal is thus dismissed, provided that the last paragraph of the Trial Judgement be read together with the oral statement of the Trial Chamber of 22 February 2001. In effect, the Appellant will receive credit for his time served in detention as calculated from his surrender into the custody of the Tribunal.

6. Conclusion

366. For the reasons indicated above, the Appeals Chamber dismisses grounds 1 through 5, except for one part of ground 4. Considering, however, the relative weight of the Appellant's family situation as a mitigating factor, the Appeals Chamber decides not to revise the sentence under appeal.

B. The Appellant Radomir Kova~'s Appeal against Sentence

367. The Trial Chamber has sentenced the Appellant Kova~ to a single sentence of imprisonment of 20 years for his convictions on two counts of crimes against humanity and two counts of violations of the laws or customs of war. His appeal against the sentence relies on the following grounds: 1) the retrospective application of the amended Rule 101 of the Rules by the Trial Chamber has prejudiced the Appellant's rights before the Tribunal; 2) the Trial Chamber erroneously applied Article 24(1) of the Statute by disregarding the sentencing practice of the

former Yugoslavia; 3) there is a misunderstanding of aggravating factors by the Trial Chamber; 4) the Trial Chamber erred in considering that there was no mitigating factor in relation to the Appellant's case; and 5) the Trial Judgement is not clear as to the credit given for time served by the Appellant. The Appellant states clearly that he will not ask for a clarification of the finding of the Trial Chamber with regard to the issue of the legality of his arrest.[520]

1. The Issue of a Single Sentence and the Severity of the Sentence

(a) Submissions of the Parties

(i) The Appellant (Kova~)

368. The Appellant submits that the retroactive application by the Trial Chamber of the amended Rule 101 of the Rules "prejudiced" his rights. He argues that "it is unacceptable" and "directly opposed to the principle of legality" for crimes to be punished without "prescribed sentences" being designated for those crimes.[521] He explains that, in allowing the imposition of a single sentence for multiple convictions, the amended Rule 101 of the Rules, "seriously breaches the principle that each criminal offence must have a prescribed penalty (*nullum crimen nulla poena sine lege*)"[522] and has prejudiced his rights.[523] Along the same line of reasoning, he also questions the application of Rule 87(C) of the 19th edition of the Rules.[524] The Appellant further contends that "in view of the sentencing practice of the former Yugoslavia and the past practices" of the Tribunal, the Trial Chamber should not have imposed "such a high and severe sentence" on him.[525]

(ii) The Respondent

369. The Respondent argues that Rule 87(C) of the Rules (19th edition) codified the pre-existing practice of the Tribunal of allowing single sentences to be imposed for several crimes in situations when to do so would better reflect the totality of the convicted person's conduct.[526]

---

[519] Trial Judgement, para 890.
[520] *Kova~* Appeal Brief, para 179.
[521] *Ibid.*, para 172 and Appeal Transcript, T 183.
[522] *Kova~* Appeal Brief, para 174. See also Appeal Transcript, T 90 and 179.
[523] Appeal Transcript, T 97-98.
[524] *Ibid.*, T 92.
[525] *Kova~* Appeal Brief, para 171.
[526] Prosecution Consolidated Respondent's Brief, para 8.4.

(b) Discussion

370. As to the propriety of applying Rule 101 and in particular Rule 87(C) of the 19th edition of the Rules, the Appeals Chamber refers to its discussion in paragraphs 339-344, above.

371. As to the argument that Rule 87(C) of the 19th edition of the Rules, in allowing a single sentence to be imposed for multiple convictions, breaches the principle of legality, the Appeals Chamber considers that this argument is premised on a misconception that the Statute should function as a penal code, with prescribed minimum and maximum sentences for specific offences.

372. Ultimately, the Appellant is not challenging the Trial Judgement on the ground of the maxim *nullum crimen sine lege* but that of *nulla poena sine lege*. The former is not in dispute, following the *Tadić* Jurisdiction Decision and the *Aleksovski* Appeal Judgement. However, the latter principle, as far as penalty is concerned, requires that a person shall not be punished if the law does not prescribe punishment.[527] It does not require that the law prescribes a precise penalty for each offence depending on the degree of gravity. Be it a common law system or a civil law system, it is not the case that national legislation anticipates every possible offence with a prescribed sentence. On the contrary, it is a fact that a penal code frequently prescribes a range for sentencing with regard to an offence; that is, it often sets out both the maximum and minimum sentences. Within the range, judges have the discretion to determine the exact terms of a sentence, subject, of course, to prescribed factors which they have to consider in the exercise of that discretion.

373. The Statute does not set forth a precise tariff of sentences. It does, however, provide for imprisonment and lays down a variety of factors to consider for sentencing purposes. The maximum sentence of life imprisonment is set forth in Rule 101(A) of the Rules (correctly interpreting the Statute) for crimes that are regarded by States as falling within international jurisdiction because of their gravity and international consequences. Thus, the maxim *nulla poena sine lege* is complied with for crimes subject to the jurisdiction of the Tribunal. As the Permanent Court of International Justice once stated in relation to the principles of *nullem crimen sine lege* and *nulla poena sine lege*:[528]

---

[527] *Cf. S.W.* v *the United Kingdom*, European Court of Human Rights, no. 47/1994/494/576, Judgement of 22 November 1995, ECHR 1995-A/335-B, para 35.

[528] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Permanent Court of International Justice, Advisory Opinion, 4 December 1935, Series A/B, Judgments, Orders and Advisory Opinions, 1935, Vol 3, No. 65, p 41 at p 51.

> The law alone determines and defines an offence. The law alone decrees the penalty. A penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case.

374. Moreover, the Statute requires the Trial Chambers to have recourse to the sentencing practice of the former Yugoslavia. In each sentencing matter, parties are given sufficient time to make their submissions. A sentence is reached only after all relevant factors are considered by the Trial Chamber. Such a procedure leaves little risk of the rights of the accused being disrespected. In practice, the Trial Chamber does not, therefore, wield arbitrary powers in the sentencing process, and there is always the safeguard of appeal. This ground of appeal therefore fails.

2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia

(a) Submissions of the Parties

(i) The Appellant (Kova~)

375. The Appellant submits that the Trial Chamber cannot disregard the sentencing practice of the former Yugoslavia, and that "the maximum sentence to be pronounced, notwithstanding the life sentence, is 20 years of imprisonment".[529]

(ii) The Respondent

376. The Respondent asserts that the *Tadi}* Appeal Judgement has settled the question as to whether "the sentence of 20 years is within the discretionary framework provided to the Trial Chambers by the Statute".[530] In the instant case, the Respondent notes, the Trial Chamber took into account the practice of the former Yugoslavia, but it selected a higher sentence because of the gravity of the Appellant's offences.[531]

(b) Discussion

377. As previously stated,[532] a Trial Chamber must consider, but is not bound by, the sentencing practice in the former Yugoslavia. It is only where that sentencing practice is silent or inadequate in light of international law that a Trial Chamber may consider an approach of its own. In the *Tadi}* Sentencing Appeal Judgement, it is stated that "the wording of Sub-rule 101(A) of the Rules, which grants the power to imprison for the remainder of a convicted person's life, itself shows that a Trial

[529] *Kova~* Appeal Brief, para 175 and Appeal Transcript, T 181.
[530] Prosecution Consolidated Respondent's Brief, para 8.35.
[531] *Ibid.*, paras 8.36, 8.38 and 8.39 and Appeal Transcript, T 327.

Chamber's discretion in imposing sentence is not bound by any maximum term of imprisonm applied in a national system".[533] This statement is even more persuasive given that it was made in considering the appeal of Tadi} in that case against his 20-year jail term, which is equivalent to what the Appellant has received as punishment. Furthermore, the Trial Chamber in the instant case did take into account the sentencing practice of the former Yugoslavia.[534] This ground of appeal is thus dismissed.

3. Aggravating Factors

(a) Submissions of the Parties

(i) The Appellant (Kova~)

378. The Appellant argues that "the absence of all elements of grave physical or mental torture which would be the substance of the criminal offence, indicate that not one single aggravating circumstance could be found in the case of the accused Radomir Kova~ which would be of significance in the sentencing decision justifying the pronounced sentence in the duration of 20 years of incarceration of the accused".[535] This ground of appeal consists of the following points: 1) the relatively young age of certain victims; 2) the duration of mistreatment of certain victims; 3) the vulnerability of victims; 4) the fact of multiple victims; and 5) that retribution as a sentencing purpose is outdated.

379. As to point 1), the Appellant argues that the age of one of the victims, A.S., 20 years, should not have been considered as an aggravating factor.[536] As to point 2), the Appellant submits that, during the period of about four months, FWS-87 and A.S. "practically had the [*sic*] protection", and that during about one month, FWS-75 and A.B. were not in contact with the Appellant.[537] The Appellant argues in relation to point 3) that vulnerability or defencelessness is an element of the criminal offences of enslavement, rape and outrages upon personal dignity, and is therefore not an aggravating factor.[538] As to point 4), the Appellant contends that "[t]he involvement of more than

---

[532] *Supra*, paras 347-349.
[533] *Tadi}* Sentencing Appeal Judgement, para 21.
[534] Trial Judgement, paras 829-835.
[535] *Kova~* Appeal Brief, para 181.
[536] *Ibid.*, para 180.
[537] *Ibid.*
[538] *Ibid.*

one victim in the offences of the accused is also considered in aggravation".[539] He submits under point 5) that the Trial Chamber accepted retribution as one of the purposes of sentencing, whereas the international trend is "to consider punishment as general prevention, which ultimately must lead to global prevention".[540]

(ii) The Respondent

380. The Respondent submits in respect of point 1) that even if this argument had some truth in it, the fact would remain that several other victims were younger than 18 years and one, A.B., was only 12 years old.[541] With regard to point 3), the Respondent submits that vulnerability is not an element of the crime of enslavement, rape or outrages on personal dignity. In relation to point 5), she submits that this is a "main, general sentencing factor" in the practice of the Tribunal,[542] and that the Trial Chamber did not place undue weight on this factor.[543]

(b) Discussion

381. Concerning point 1), the Appeals Chamber recalls what it stated in paragraphs 354-355, above. The Trial Chamber was not in error in considering the age of the victim, 20 years, as an aggravating factor. This aspect of the ground of appeal thus fails.

382. As regards point 2), the Appeals Chamber agrees with the Trial Chamber in considering as aggravating factors the duration of the crimes of enslavement, rape and outrages upon personal dignity entered, namely, from about one to four months. The Appeals Chamber finds it absurd to argue that FWS-87 and A.S., both having been subjected to rape, enslavement and outrages upon personal dignity for a long period of time, were in fact being protected. Further, the Appeals Chamber finds that it is not clear why the Appellant claims that he had no contact with the victims over the period in which they were detained at his apartment,[544] or when he visited them from time to time at the other places to which they were moved temporarily.[545] This part of the ground of appeal thus fails.

---

[539] *Ibid.*
[540] *Ibid.*
[541] Prosecution Consolidated Respondent's Brief, para 8.41.
[542] *Ibid.*, para 8.43.
[543] *Ibid.*, para 8.44.
[544] Trial Judgement, para 759.
[545] *Ibid.*, para 754.

383. As regards point 3), the Appeals Chamber repeats what it stated in paragraph 352, above. This ground of appeal is therefore dismissed.

384. The Appellant offers no arguments to substantiate point 4). The Appeals Chamber considers that there is no need to pass on this point and rejects this part of the ground of appeal.

385. In respect of point 5), the Trial Chamber relies on the *Aleksovski* Appeal Judgement in considering retribution as a general sentencing factor.[546] The case-law of both this Tribunal and the ICTR is consistent in taking into account the factor of retribution,[547] retribution being "interpreted by Fthe Trialğ Chamber as punishment of an offender for his specific criminal conduct".[548] The Appellant has failed to substantiate his claim of an alleged trend in international law which speaks differently from the one followed by this Tribunal and the ICTR. This ground of appeal is therefore rejected.

4. Mitigating Factors

(a) Submissions of the Parties

(i) The Appellant (Kova~)

386. The Appellant argues that the Trial Chamber should have taken the following mitigating factors into account: 1) the Appellant had no prior intention to harm Muslims nor the knowledge that his actions formed part of a widespread and systematic attack; 2) the presence of the Appellant "when any harm could be done to any Muslims";[549] and 3) the Appellant's relationship with FWS-87 and the protection he extended to her and to A.S..

(ii) The Respondent

387. The Respondent dismisses the above arguments, stating that either they are "encompassing litigated facts and rejected by the Trial Chamber or they do not constitute mitigating factors".[550]

---

[546] *Ibid.*, para 841, citing *Aleksovski* Appeal Judgement, para 185.
[547] *Aleksovski* Appeal Judgement, footnotes 353-355.
[548] Trial Judgement, para 857.
[549] *Kova~* Appeal Brief, para 184.
[550] Prosecution Consolidated Respondent's Brief, para 8.46.

(b) Discussion

388. The Trial Chamber has found that all three accused, "in their capacity as soldiers, took an active part" in the conflict that broke out between the Serb and Muslim forces in Fo~a.[551] It states that the Appellant "was fully aware of the attack against the Muslim villages and aware of the fact that his acts were part of the attack",[552] that he knew that the four women in his control were civilians,[553] and that he "abused them and raped three of them many times, thereby perpetuating the attack upon the Muslim civilian population".[554] The Appeals Chamber finds that these factors should have been argued in relation to the elements of the offences. Before the sentencing proceedings, the Trial Chamber had already accepted these factors as being proved beyond reasonable doubt, resulting in a conviction. The Appellant thus cannot re-litigate this issue in the course of the sentencing appeal. This part of the grounds of appeal is thus dismissed.

389. The second factor is unclearly pleaded and without reasoning. The Appeals Chamber merely notes that the four women the Appellant kept in his apartment and abused were Muslims.[555] This part of the grounds of appeal therefore fails.

390. In relation to the third factor, the Trial Chamber has found that the relationship between the Appellant and FWS-87 was not one of love, "but rather one of cruel opportunism on Kova~'s part, of constant abuses and domination over a girl who, at the relevant time, was only about 15 years old".[556] The Trial Chamber also finds that the Appellant "substantially assisted Jagos Kosti} in raping A.S.".[557] The Appeals Chamber concurs with the findings of the Trial Chamber in this respect, and therefore dismisses this part of the grounds of appeal.

5. Credit for Time Served

(a) Submissions of the Parties

(i) The Appellant (Kova~)

[551] Trial Judgement, paras 567 and 569.
[552] *Ibid.*, para 586.
[553] *Ibid.*
[554] *Ibid.*, para 587.
[555] *Ibid.*
[556] *Ibid.*, para 762.
[557] *Ibid.*, para 761.

391. The Appellant submits that if credit were not to be given for his time in detention as from 2 August 1999, his rights would be infringed.[558]

(ii) The Respondent

392. The Respondent, while agreeing that no order was made in the last paragraph of the Trial Judgement with regard to credit for time served, submits that the Trial Chamber did state orally on 22 February 2001 that the time spent in custody be credited.[559]

(b) Discussion

393. The Appeals Chamber recalls its reasoning in paragraph 365, above, and dismisses this ground of appeal, provided that the last paragraph of the Trial Judgement be read together with the oral statement of the Trial Chamber of 22 February 2001. In effect, the Appellant will receive credit for his time served in detention as calculated from the moment of his being taken into the custody of the Tribunal.

6. Conclusion

394. For the foregoing reasons, the Appeals Chamber dismisses the Appellant Kova~'s appeal on sentencing in total.

C. The Appellant Zoran Vukovi}'s Appeal against Sentence

395. The Appellant Vukovi} has been sentenced to a single term of imprisonment of 12 years for convictions on two counts of crimes against humanity and two counts of violations of the laws or customs of war. His appeal is based on the following grounds: 1) each conviction should receive a sentence and to impose a single sentence for all convictions is against the Rules; 2) the Tribunal is obligated to have recourse to the sentencing practice of the courts of the former Yugoslavia, under which rape as a war crime does not incur a heavier sentence than rape committed in peacetime; 3) the Trial Chamber has misapplied aggravating factors in relation to FWS-50; 4) the Appellant's help to Muslim families and his family situation should be considered as mitigating factors; and 5) the Trial Chamber has miscalculated the credit for time served.

[558] *Kova~* Appeal Brief, para 185 and Appeal Transcript, T 92-93.
[559] Trial Transcript, T 6568, 6572 and 6574.

1. Retroactive Application of the Rules that Resulted in a Single Sentence

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

396. The Appellant submits that the Trial Chamber erred in imposing a single sentence for multiple convictions.[560] He submits that both the 1977 Penal Code and the penal codes of the new countries in the territory of the former Yugoslavia allow for a single sentence for multiple convictions, subject to the condition that this sentence cannot exceed the severity of the heaviest sentence established by law. Nor can it represent the total of all sentences for the convictions.[561] Further, he argues that by not applying Rule 101(C) of the 18th edition of the Rules, the Trial Chamber acted in contravention of the principle against retroactive application of the Rules.[562] The Appellant adds that if it were possible for the Trial Chamber to impose a single sentence in accordance with "the earlier provisions of ICTY then there would not [be a] need to codify Rule 87(C) of the Rules."[563]

(ii) The Respondent

397. The Respondent submits that "the Appellant's reliance on Rule 101(C) is misplaced", because that Rule referred to the duty of a Trial Chamber to determine "how multiple sentences should be served."[564] She further asserts that the provision did not require the Chamber to impose multiple sentences.[565] The Respondent refers to the *Kambanda* Appeal Judgement, asserting that it expressly endorses the practice of imposing a single sentence for multiple convictions.[566] She also submits that the Appellant has failed to explain "why the Trial Chamber abused its discretion in imposing a single sentence", and "how the imposition of a global sentence prejudices his rights".[567]

(b) Discussion

398. The Appeals Chamber discerns two parts in this ground of appeal: 1) the allegedly retroactive application of the Rules allowing the imposition of a single sentence; and 2) whether the

[560] *Vukovi}* Appeal Brief, para 177.
[561] *Ibid.*
[562] *Ibid.*, para 178.
[563] *Vukovi}* Reply Brief, para 4.2.
[564] Prosecution Respondent's Brief, para 4.6.
[565] *Ibid.*
[566] *Ibid.*, para 4.7.

imposition of a single sentence is subject to similar requirements to those of the 1977 Penal C[illegible] Part 2) will be dealt with in the discussion on the sentencing practice of the former Yugoslavia.

399. As for part 1), the Appeals Chamber refers to the discussion in paragraphs 339-344, above, and repeats that Rule 87(C) of the 19th edition of the Rules simply confirmed the power of a Trial Chamber to impose a single sentence. This ground of appeal therefore fails.

2. The Recourse to the Sentencing Practice in the Courts of the Former Yugoslavia

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

400. The Appellant submits, in effect, that the Trial Chamber was obligated to comply with the requirement in Article 24(1) of the Statute to have recourse to the sentencing practice in the courts of the former Yugoslavia, and that this would mean that the heaviest penalty for criminal offences was 20 years' imprisonment.[568] He argues that the appropriate comparison is not between life imprisonment, allowed under the Statute, and the capital sentence, permitted in the penal codes of the republics of the former Yugoslavia, but between life imprisonment and the sentence of 20 years' imprisonment known at the relevant time.[569] He further argues that the Trial Chamber should have considered the sentencing practice with regard to rape convictions in the former Yugoslavia as presented by the defence expert witness. In relation to that testimony, the Appellant submits that it is not relevant that the witness focused on the peacetime practice, as sexual freedom is protected in peacetime and in armed conflict.[570] He suggests that a sentence of imprisonment of up to three years might be imposed.[571] The Appellant further points out that the practice in the former Yugoslavia, referred to in the Statute, was that of peacetime.[572] He tentatively argues that rape would be a more severe offence than torture, if both offences contained the same elements.[573] He also argues against retribution as a sentencing purpose.[574]

(ii) The Respondent

---

[567] *Ibid.*, paras 4.10 and 4.11.
[568] *Vukovi}* Appeal Brief, paras 180 and 183.
[569] *Ibid.*
[570] *Ibid.*, para 181.
[571] *Ibid.*
[572] *Ibid.*, para 182.
[573] *Ibid.*, para 184.
[574] *Ibid.*, para 185.

401. The Respondent submits that "the Trial Chamber is not bound to apply the law of the for. Yugoslavia in matters of sentencing but only to take it into account".[575]

(b) Discussion

402. This ground of appeal essentially repeats Kunarac's and Kovač's arguments. The Appeals Chamber refers to its reasoning in paragraphs 347 to 349 and 377. The Appeals Chamber adds that the Trial Chamber has taken into account the evidence given by the defence expert witness regarding the sentencing practice in the former Yugoslavia, with an emphasis on the crime of rape.[576] However, as the Trial Chamber noted, the expert witness's testimony is "of little relevance" because it centred upon rape during peacetime.[577] Rape as a crime against humanity or a violation of the laws or customs of war requires proof of elements that are not included in national penal codes, such as attack upon any civilian population (in the case of the former) or the existence of an armed conflict (in the case of both). The severity of rape as a crime falling under the jurisdiction of the Tribunal is decidedly greater than that of its national counterpart. This is shown by the difference between the maximum sentences imposed respectively by the Statute and, for instance, the 1977 Penal Code of the Socialist Republic of Bosnia and Herzegovina, upon the offence of rape. This ground of appeal therefore fails.

3. Aggravating Factor

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

403. The Appellant submits that the Trial Chamber erred in finding that FWS-50's age at the time of the offences in question was 15 and a half years, when in fact her age was 17 years. He further asserts that she would have been allowed to enter into marriage, and that her age should not be considered as an aggravating factor.[578] He also contends that it was not an aggravating circumstance that FWS-50 was especially vulnerable and helpless.[579]

(ii) The Respondent

[575] Prosecution Respondent's Brief, para 4.14.
[576] Trial Judgement, para 835.
[577] *Ibid.*
[578] *Vukovi}* Appeal Brief, para 186.
[579] *Ibid.*

404. The Respondent contends that the Trial Chamber "did not err in concluding that the [illegible] was youthful and that this was an aggravating factor", even though her age might not have be[illegible] and a half years.[580] Further, she argues that the vulnerability and defencelessness of the victim are not elements of the crimes,[581] and that there is no error on the part of the Trial Chamber in considering these factors in aggravation.[582]

(b) Discussion

405. As to the question of the age of the victim as an aggravating factor, the Appeals Chamber refers to its reasoning in paragraphs 354-355, above. The Appeals Chamber considers that the slight difference between the age of the victim as found in one part of the Trial Judgement, about 16 years,[583] and that referred to in another part, 15 and a half years,[584] does not negate the fact that the victim was at a young age when the offences in question were committed against her. The Appeals Chamber concurs with the findings of the Trial Chamber that this fact can aggravate the sentence against the Appellant. As to the argument relating to the factor of vulnerability and helplessness, the Appeals Chamber refers to its reasoning in paragraph 352, above. This ground of appeal thus fails.

4. Mitigating Factors

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

406. The Appellant argues that he helped "numerous of [*sic*] Muslim families", and that this should be considered as a mitigating factor, not, as the Trial Chamber found, as proof that he had knowledge about the attack upon the Muslim population.[585] In addition, the Appellant argues that the lack of serious consequences arising from his acts and the fact that no force or compulsion was

[580] Prosecution Respondent's Brief, para 4.16.
[581] *Ibid.*, para 4.19.
[582] Appeal Transcript, T 328-329.
[583] Trial Judgement, para 235.
[584] *Ibid.*, para 879.
[585] *Vukovi}* Appeal Brief, para 188.

used should be a mitigating factor.[586] Further, he submits that the fact that he is married and has two children should be considered in mitigation.[587]

(ii) The Respondent

407. The Respondent submits that the Trial Chamber did not err in not considering as a mitigating factor that the Appellant provided some help to Muslims, as it was concerned with "what sentence to impose for the rape of this victim, not his acts to persons who he was friendly with previously".[588] However, the Respondent agrees that the Trial Chamber erred in not considering the Appellant's family situation as a mitigating factor, although this factor would not affect the sentence.[589]

(b) Discussion

408. The Appeals Chamber holds that the Appellant's help to other Muslims in the conflict does not change the fact that he committed serious crimes against FWS-50. If he is to be punished for his acts against FWS-50, it is to these acts that any possible mitigating factors should be linked. However, the Appeals Chamber also agrees that the Appellant's family situation should have been considered as a mitigating factor. This particular part of the ground of appeal, therefore, succeeds. However, the Appeals Chamber concurs with the length of the imprisonment decided by the Trial Chamber.

409. As to the Appellant's argument that the lack of consequences arising from his acts should be considered as a mitigating factor, the Appeals Chamber recalls the finding in the Trial Judgement that the rape of FWS-50 "led to serious mental and physical pain for the victim".[590] The Appeals Chamber concurs with the Trial Chamber's findings that the Appellant's acts had serious consequences. In respect of the rape of the same witness, the Trial Judgement states that "[s]he was taken out of Partizan Sports Hall to an apartment and taken to a room by Vukovi} where he forced her to have sexual intercourse with full knowledge that she did not consent".[591] This finding shows that force or compulsion was used prior to rape. In this context, the Appeals Chamber further refers

[586] *Vukovi}* Reply Brief, para 4.3.
[587] *Vukovi}* Appeal Brief, para 188.
[588] Prosecution Respondent's Brief, para 4.20.
[589] *Ibid.*, para 4.21.
[590] Trial Judgement, para 815.
[591] *Ibid.*, para 817.

back to its finding that the coercive circumstances of this case made consent to the sexual act by the Appellants impossible.[592] This argument is, therefore, without merit and is rejected.

5. Credit for Time Served

(a) Submissions of the Parties

(i) The Appellant (Vukovi})

410. The Appellant submits that the Trial Judgement is not clear in this respect and that it would be erroneous not to take his period of detention since 23 December 1999 into account when imposing the sentence.[593]

(ii) The Respondent

411. The Respondent notes that, although the last paragraph of the Trial Judgement contains no order with regard to credit for time served, the Trial Chamber did state orally on 22 February 2001 that the time spent in custody by each of the three convicted persons be credited.[594]

(b) Discussion

412. The Appeals Chamber refers to its reasoning in paragraph 365, above. This ground of appeal is dismissed, provided that the last paragraph of the Trial Judgement be read together with the oral statement of the Trial Chamber of 22 February 2001. In effect, the Appellant will receive credit for his time served in detention as calculated from the moment of his being taken into custody of the Tribunal.

6. Conclusion

413. For the foregoing reasons, the Appeals Chamber dismisses the appeal of the Appellant Vukovi}, except the submission that his family concerns should be considered as a mitigating factor. However, in the circumstances of this case, which involves a serious offence, this factor does not change the scale of the sentence imposed in the Trial Judgement.

---

[592] See *supra*, para 133.
[593] *Vukovi}* Appeal Brief, para 190.
[594] Trial Transcript, T 6568, 6572 and 6574.

D. Conclusion

414. For the foregoing reasons, the Appeals Chamber dismisses the appeals of the Appellants Kunarac, Kova~ and Vukovi}. For the reasons previously stated, the Appeals Chamber confirms the sentences imposed on the Appellants by the Trial Chamber with appropriate credit for time served.

XII. DISPOSITION

For the foregoing reasons:

A. The Appeals of Dragoljub Kunarac against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his convictions.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Dragoljub Kunarac on Counts 1-4, 9-12 and 18-20 of Indictment IT-96-23.

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Dragoljub Kunarac against his sentence;

CORRECTS the formal disposition of the Trial Judgement to reflect the Oral Statement made by the Trial Chamber that credit should be given for time served and, accordingly, Dragoljub Kunarac is entitled to credit for the time he has spent in custody since his surrender on 4 March 1998;

AND

CONSIDERING the number and severity of the offences committed, FINDS that the sentence imposed by the Trial Chamber is appropriate.

Accordingly, the Appeals Chamber AFFIRMS the sentence of 28 years' imprisonment as imposed by the Trial Chamber.

B. The Appeals of Radomir Kova~ against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kova~ against his convictions.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Radomir Kova~ on Counts 22-25 of Indictment IT-96-23.

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Radomir Kova~ against his sentence;

CORRECTS the formal disposition of the Trial Judgement to reflect the Oral Statement made by the Trial Chamber that credit should be given for time served and, accordingly, Radomir Kova~ is entitled to credit for the time he has spent in custody since his arrest on 2 August 1999;

AND

CONSIDERING the number and severity of the offences committed, FINDS that the sentence imposed by the Trial Chamber is appropriate.

Accordingly, the Appeals Chamber AFFIRMS the sentence of 20 years' imprisonment as imposed by the Trial Chamber.

C. The Appeals of Zoran Vukovi} against Convictions and Sentence

1. Convictions

The Appeals Chamber:

DISMISSES the appeal brought by Zoran Vukovi} against his convictions.

Accordingly, the Appeals Chamber AFFIRMS the convictions entered by the Trial Chamber for Zoran Vukovi} on Counts 33-36 of Indictment IT-96-23/1.

2. Sentence

The Appeals Chamber:

DISMISSES the appeal brought by Zoran Vukovi} against his sentence;

CORRECTS the formal disposition of the Trial Judgement to reflect the Oral Statement m[illegible] the Trial Chamber that credit should be given for time served and, accordingly, Zoran Vuko[illegible] entitled to credit for the time he has spent in custody since his arrest on 23 December 1999;

AND

CONSIDERING the number and severity of the offences committed, FINDS that the sentence imposed by the Trial Chamber is appropriate.

Accordingly, the Appeals Chamber AFFIRMS the sentence of 12 years' imprisonment as imposed by the Trial Chamber.

D. Enforcement of Sentences

In accordance with Rules 103(C) and 107 of the Rules, the Appeals Chamber orders that Dragoljub Kunarac, Radomir Kova~ and Zoran Vukovi} are to remain in the custody of the International Tribunal pending the finalisation of arrangements for their transfers to the State or States where their respective sentences will be served.

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

(signed)	*(signed)*	*(signed)*
Claude Jorda Presiding	Mohamed Shahabuddeen	Wolfgang Schomburg

(signed)	*(signed)*
Mehmet Güney	Theodor Meron

Dated this 12th day of June 2002
At The Hague
The Netherlands

ANNEX A: PROCEDURAL BACKGROUND

A. The Appeals

415. The Trial Judgement was delivered on 22 February 2001. Notices of appeal were filed by the Appellants Kova~[595] and Vukovi}[596] on 6 March 2001, and by the Appellant Kunarac[597] on 7 March 2001.

416. On 18 May 2001, the Appellants filed a joint application for an extension of the time limit for filing their Appellants' Briefs under Rule 111 of the Rules,[598] on the basis that they had not yet received the Trial Judgement in the B/C/S language. The Prosecutor responded to this application.[599] The Appeals Chamber ordered that the Appellants' Briefs be filed within thirty days of the filing of the B/C/S translation of the Trial Judgement.[600]

417. On 28 May 2001, counsel for the Appellant Vukovi} filed a notice of the impossibility of performing his duties as counsel, due to the expiry and non-extension of his Dutch visa.[601]

418. On 25 June 2001, the Appellants filed a joint application for authorisation to exceed page limits of their Appellants' Briefs.[602] The Prosecutor filed a response to this application on 5 July 2001.[603] The Appeals Chamber denied the request on 10 July 2001.[604]

419. The Appellant Vukovi} filed his confidential Appeal Brief on 12 July 2001.[605] The Appeal Briefs of the Appellants Kunarac[606] and Kova~[607] were filed on 16 July 2001.

420. On 10 August 2001, the Prosecutor filed a request: (i) for an extension of time to file its Respondent's Briefs under Rule 112 of the Rules; and (ii) to exceed the page limit for these

---

[595] Notice of Appeal Against Judgment of 22 February 2001, 6 March 2001.
[596] Notice of Appeal Against Judgment of 22 February 2001, 6 March 2001.
[597] Notice of Appeal Against Judgment of 22 February 2001, 7 March 2001.
[598] Extension of Time Limit for Appelant's (*sic*) Brief, 18 May 2001.
[599] Prosecution Response to Request for Extension of Time Limit for Appellant's Brief, 22 May 2001.
[600] Décision relative à la requête aux fins de prorogation de délai, 25 May 2001.
[601] Impossibility of Performing the Duties as Defense (*sic*) Counsel for Accused Zoran Vukovi} (*sic*), 28 May 2001.
[602] Joint Request for the Authorisation to Exced (*sic*) tha (*sic*) Page Limits for the Appellant's Brief, 25 June 2001.
[603] Prosecution Response to "Joint Request for the Authorisation to Exceed the Page Limits for the Appellant's Brief", 5 July 2001.
[604] Decision on Joint Request for Authorisation to Exceed Prescribed Page Limits, 10 July 2001.
[605] Appelant's (*sic*) Brief for the Acused (*sic*) Zoran Vukovic (*sic*) Against Judgment of 22. February 2001, 12 July 2001 (conf).
[606] Appelant's (*sic*) Brief for the Acused (*sic*) Dragoljub Kunarac Against Judgment of 22. February 2001, 16 July 2001.
[607] Appelant's (*sic*) Brief for the Acused (*sic*) Radomir Kova~ Against Judgment of 22. February 2001, 16 July 2001.

Briefs.[608] The Respondent's Briefs were filed within the time limit. The Prosecutor's Respondent's Brief to the Appellant Vukovi}'s Appeal Brief was filed on 13 August 2001,[609] and its Consolidated Respondent's Brief and book of authorities relating to the Appellants Kunarac and Kova~ were filed on 15 August 2001.[610] However, the Consolidated Respondent's Brief did exceed the page limit. The Appeals Chamber decided that it would deem and accept that Brief as having been validly filed with the authorisation of the Appeals Chamber.[611] On 26 September 2001, the Prosecutor filed a confidential request for clarification of that decision.[612] The Appeals Chamber ordered that: (i) the Prosecutor's Consolidated Respondent's Brief be deemed and accepted as having been validly filed on 15 August 2001 in respect of all three Appellants with the authorisation of the Appeals Chamber; and (ii) the Appellant Vukovi} be given leave to file his Brief in Reply within 15 days of the filing of the order.[613]

421. On 20 August 2001, the Appellants Kunarac and Kova~ filed a request for an extension of time to file their reply to the Prosecution Consolidated Respondent's Brief.[614] The Prosecutor responded to this request.[615] The Appeals Chamber granted the request and ordered that the Briefs in Reply be filed on or before 4 September 2001.

422. The Appellants' Briefs in Reply were filed on the following dates: 28 August 2001 by Vukovi};[616] 4 September 2001 by Kunarac and Kova~.[617] The Brief of the Appellants Kunarac and Kova~ exceeded the page limit, but was authorised retrospectively by the Pre-Appeal Judge.[618]

423. On 19 September 2001, the Appellant Kunarac filed a request for provisional release under Rule 65(I) of the Rules in order that he might undergo medical treatment in Belgrade.[619] The

---

[608] Prosecution Request for Extension of Time, Notice of Filing Respondent Briefs Over 100 Pages and, If Necessary Motion to Exceed Page Limit of Prosecution's Response Briefs, 10 August 2001.
[609] Prosecution's Respondent's Brief in Relation to "Appellant's Brief for the Accused Zoran Vukovi} against Judgement of 22 February 2001", 13 August 2001 (conf).
[610] Prosecution's Consolidated Respondent's Brief, 15 August 2001 (conf) and Book of Authorities to Prosecution's Consolidated Respondent's Brief, 15 August 2001 (conf).
[611] Decision on Prosecution Request for Extension of Time, Notice of Filing Respondent Briefs Over 100 Pages and, if Necessary Motion to Exceed Page Limit of Prosecution's Response Briefs, 3 September 2001.
[612] Prosecution's Request for Clarification, 26 September 2001.
[613] Decision on Prosecution's Request for Clarification, 11 October 2001.
[614] The Defense's Request for the Extention (*sic*) of Time Limit, 20 August 2001.
[615] Prosecution's Response to the Joint Motion of the Appellants Radomir Kova~ and Dragoljub Kunarac Entitled "The Defense's Request for the Extension of Time Limit" Filed on 20 August 2001, 23 August 2001.
[616] Appellant's Brief in Reply on Prosecutor's Respondent's Brief, 28 August 2001.
[617] Appellants' Reply on Prosecution's Consolidated Respondent's Brief, 4 September 2001 (conf).
[618] Order on Page Limits, 7 September 2001.
[619] The Defense's Request for the Provisional Release of the Accused Dragoljub Kunarac, 19 September 2001.

Prosecutor filed a confidential response to the request on 25 September 2001.[620] The Appeals Chamber rejected the request on 16 October 2001.[621]

424. On 20 September 2001, counsel for the Appellant Vukovi} informed the Appeals Chamber that the Registry had denied him access to meet with his client.[622]

425. On 2 October 2001, the appointed Pre-Appeal Judge issued an order requiring the parties to file redacted public versions of the Appellant Vuković's Appeal Brief, the Prosecution Respondent's Brief, and the Prosecution Consolidated Respondent's Brief.[623] Public versions of the latter two documents were filed on 9 October 2001. On 11 October 2001, the Appellant Vukovi} informed the Appeals Chamber that his Appeal Brief filed on 12 July 2001 was never marked as confidential and should be considered to be the public version.[624] On 18 October 2001, the Registry lifted the confidentiality of that document.[625] The Appellants Kunarac and Kova~ filed a like document on 22 October 2001 informing the Appeals Chamber that their Appeal Briefs of 16 July 2001 ought also to be considered to be the public versions.[626]

426. On 29 October 2001, the Appeals Chamber made a scheduling order to the effect that presentation of Appeal Briefs would begin on 4 December 2001.[627]

427. On 6 November 2001, the Appellant Vukovi} filed a motion for presentation of additional evidence in accordance with Rule 115 of the Rules,[628] seeking the admission of an excerpt from the Registry of Births of Bosnia and Herzegovina by which to prove the age of his daughter, Marijana

---

[620] Prosecution's Response to the Motion Entitled "The Defense's Request for the Provisional Release of the Accused Dragoljub Kunarac" Filed on 19 September 2001, 25 September 2001.
[621] Ordonnance de la Chambre d'Appel relative à la requette de Dragoljub Kunarac aux fins de mise en liberté provisoire, 16 October 2001.
[622] Information of (*sic*) Preventing Defense (*sic*) Counsel for Accused Zoran Vukovi} (*sic*) to (*sic*) Visit His Client, 20 September 2001.
[623] Order for Filing Public Versions, 2 October 2001.
[624] Information Regarding the Order for Filing Public Versions of the Appealant's (*sic*) Brief of the Accused Zoran Vukovi} (*sic*), 11 October 2001.
[625] Document entitled "Internal Memorandum", 18 October 2001.
[626] Information Regarding the Order for Filing Public Versions of the Appelants' (*sic*) Briefs of the Accused Dragoljub Kunarac and Radomir Kova~ (*sic*), 20 October 2001.
[627] Ordonnance portant calendrier, 29 October 2001.
[628] Motion of the Defence of the Accused Zoran Vukovi} (*sic*) for Presentation of Additional Evidence, 6 November 2001.

Vukovi}. The Prosecutor filed a response to this request on 16 November 2001.[629] The Appeals Chamber rejected the motion on 30 November 2001.[630]

428. On 6 November 2001, the three Appellants filed a joint statement regarding the schedule of presentation of their Appeal Briefs.[631] The Prosecutor filed its response to that statement on 9 November 2001.[632] On 26 November 2001, the three Appellants filed a joint statement about the division of total time for the presentation of their submissions.[633]

429. On 19 December 2001, the Appellant Kova~ filed a statement informing the Appeals Chamber of the exact references to a case upon which he relied in oral explanations.[634]

B. Assignment of Judges

430. On 21 May 2001, by an order of the President of the International Tribunal, the following Judges were assigned to sit on the appeal: Judge Jorda, President, Judge Vohrah, Judge Shahabuddeen, Judge Nieto-Navia and Judge Liu.[635]

431. On 8 June 2001, Judge Shahabuddeen was appointed as Pre-Appeal Judge to deal with all motions of a procedural nature.[636] On the occasion of departures of Judges and the new composition of Chambers, the President of the International Tribunal reconstituted the Appeals Chamber for the instant appeal on 23 November 2001, assigning Judge Jorda, President, Judge Shahabuddeen, Judge Schomburg, Judge Güney and Judge Meron to sit on the appeal.[637]

C. Status Conferences

---

[629] Prosecution's Response to "Motion of the Defence of the Accused Zoran Vukovi} for Presentation of Additional Evidence", 16 November 2001.
[630] Decision on the Motion of the Defence of the Accused Zoran Vukovi} for Presentation of Additional Evidence, 30 November 2001.
[631] Joint Statement of the Defence Regarding the Schedule of Presentation of the Appellant's Briefs, 6 November 2001.
[632] Prosecution's Statement Regarding the Appellant's Schedule of Presentation, 9 November 2001.
[633] Joint Statement of the Defence about Division of Total Time for Presentation of Appellants' Submissions, 26 November 2001.
[634] Statement of the Defence of the Accused Radomir Kovac (*sic*), 18 December 2001.
[635] Ordonnance du Président portant affectation de Juges à la Chambre d'Appel, 21 May 2001.
[636] Ordonnance portant nomination d'un Juge de la mise en état en appel, 8 June 2001.
[637] Ordonnance du Président relative à la composition de la Chambre d'Appel pour une affaire, 23 November 2001.

432. Status conferences were held in accordance with Rule 65*bis* of the Rules on 25 June 2001[638] and 16 October 2001.[639]

D. Appeal Hearing

433. On 16 November 2001, the Pre-Appeal Judge issued a scheduling order for the Appeal Hearing,[640] which was held over three days, from 4 to 6 December 2001.

[638] Scheduling Order, 11 June 2001.
[639] Scheduling Order, 26 September 2001.
[640] Scheduling Order for the Hearing on Appeal, 16 November 2001.

ANNEX B: GLOSSARY

1926 Slavery Convention	Slavery Convention, adopted on 25 September 1926, in force as of 9 March 1927
1977 Penal Code	Code of the Socialist Federal Republic of Yugoslavia (SFRY), adopted by the SFRY Assembly at the session of the Federal Council held on 28 September 1976, amended in 1977 (unofficial translation on file with the Tribunal library)
ABiH	Muslim Army of Bosnia-Herzegovina
Akayesu Appeal Judgement	*Prosecutor* v *Jean-Paul Akayesu,* Case No. ICTR-96-4-A, Judgement, 1 June 2001
Akayesu Trial Judgement	*Prosecutor* v *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998
Aleksovski Appeal Judgement	*Prosecutor* v *Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 March 2000
Aleksovski Trial Judgement	*Prosecutor* v *Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999
Appeal Hearing	Appeal hearing of 4 to 6 December 2001 in *Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A
Appeal Transcript	Transcript of Appeal Hearing of 4 to 6 December 2001. All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public.
Appellants	Collective term for Dragoljub Kunarac, Radomir Kovač and Zoran Vukovi}, or any combination thereof, depending upon the context of the discussion.
Blaški} Trial Judgement	*Prosecutor* v *Tihomir Blaški},* Case No. IT-95-14-T, Judgement, 3 March 2000 (currently under appeal)
Br|anin Amended Indictment Decision	*Prosecutor* v *Radoslav Br|anin & Momir Tali}*, Case No. IT-99-36-PT, Decision on Objections by Momir Tali} to the Form of the Amended Indictment, 20 February 2001
Br|anin Amended Indictment Decision II	*Prosecutor* v *Radoslav Br|anin & Momir Tali}*, Case No. IT-99-36-PT, Decision on Form of Further Amended

	Indictment and Prosecution Application to Amend, 7 June 2001
Čelebići Appeal Judgement	*Prosecutor* v *Zejnil Delali} et al.*, Case No. IT-96-21-A, Judgement, 20 February 2001
^elebi}i Trial Judgement	*Prosecutor* v *Zejnil Delali} et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998
Common article 3	Common article 3 of Geneva Conventions I through IV of 12 August 1949
Defence Final Trial Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Defence Final Trial Brief, 10 November 2000
Erdemovi} Sentencing Judgement	*Prosecutor* v *Drazen Erdemovi}*, Case No. IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998
Ex P	Prosecutor exhibit
Ex D	Defence exhibit
Furundžija Appeal Judgement	*Prosecutor* v *Anto Furundžija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000
Furund`ija Trial Judgement	*Prosecutor* v *Anto Furund`ija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998
FWS	Prosecution witness pseudonyms (Foča Witness Statements)
Geneva Conventions	The four Geneva Conventions of 12 August 1949: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; and Convention (IV) relative to the Protection of Civilian Persons in Time of War
HVO	Croatian Defence Council
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994

Indictment IT-96-23	Indictment against Dragoljub Kunarac and Radomir Kovač
Indictment IT-96-23/1	Indictment against Zoran Vuković
Indictments	Indictments IT-96-23 and IT-96-23/1
International Tribunal or Tribunal or ICTY	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Jelisić Appeal Judgement	*Prosecutor* v *Goran Jelisić*, Case No. IT-95-10-A, Judgement, 5 July 2001
Kambanda Appeal Judgement	*Jean Kambanda* v *Prosecutor*, Case No. ICTR-97-23-A, Judgement, 19 October 2000
Kayishema Appeal Judgement	*Le Procureur* c/ *Clément Kayishema et Obed Ruzindana*, Affaire No. ICTR-95-1-A, Motifs de l'ârret, 1er juin 2001 (English translation is not yet available)
Kova~	Radomir Kova~
Kova~ Appeal Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appellant's Brief for the Acused [sic] Radomir Kova~ Against Judgement of 22 February 2001, 16 July 2001 (public)
Krnojelac Amended Indictment Decision	*Prosecutor* v *Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Preliminary Motion on Form of Amended Indictment, 11 February 2000
Krnojelac Indictment Decision	*Prosecutor* v *Milorad Krnojelac*, Case No. IT-97-25-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 24 February 1999
Kunarac	Dragoljub Kunarac
Kunarac and *Kova~* Reply Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appellants' Reply on Prosecutor's Consolidated Respondent's Brief, 4 September 2001 (confidential) (public version filed on 20 October 2001)
Kunarac Appeal Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-96-23/1-A, Appellant's Brief for the Acused [sic] Dragoljub Kunarac Against Judgement of 22 February 2001, 16 July 2001 (public)
Kunarac Evidence Decision	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Decision on Prosecution's Motion for Exclusion of Evidence and Limitation of Testimony, 3 July 2000

Kupre{ki} Appeal Judgement	*Prosecutor* v *Zoran Kupre{ki} et al.*, Case No. IT-95-A, Judgement, 23 October 2001
Kupre{ki} Evidence Decision	*Prosecutor* v *Zoran Kupre{ki} et al.*, Case No. IT-95-16, Decision on Evidence of the Good Character of the Accused and the Defence of *Tu Quoque*, 17 February 1999
Kupre{ki} Trial	*Prosecutor* v *Zoran Kupre{ki} et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000
Kvo~ka Indictment Decision	*Prosecutor* v *Miroslav Kvo~ka et al.*, Case No. IT-98-30/1-PT, Decision on Defence Preliminary Motions on the Form of the Indictment, 12 April 1999
Kvo~ka Trial Judgement	*Prosecutor* v *Miroslav Kvo~ka et al.*, Case No. IT-98-30/1-T, Judgement, 2 November 2001 (currently under appeal)
Mrk{i} Rule 61 Decision	*Prosecutor* v *Mile Mrk{i} et al.*, Case No. IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996
Nikoli} Rule 61 Decision	*Prosecutor* v *Dragan Nikoli}*, Case No. IT-94-2-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October 1995
para	Paragraph
paras	Paragraphs
Prosecution Consolidated Respondent's Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1-A, Prosecution's Consolidated Respondent's Brief, 15 August 2001 (confidential) (public version filed on 9 October 2001)
Prosecution Respondent's Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23 & 23/1-A, Prosecution Respondent's Brief in Relation to "Appellant's Brief for the Accused Zoran Vuković against Judgement of 22 February 2001", 13 August 2001 (confidential) (public version filed on 9 October 2001)
Respondent and Prosecutor	The Office of the Prosecutor
Rules	Rules of Procedure and Evidence of the International Tribunal
SFRY	Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal

T	Transcript page. All transcript page numbers referre are from the unofficial, uncorrected version of the transcript. Minor differences may therefore exist between the pagination therein and that of the final transcript released to the public
Tadi} Appeal Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A, Judgement, 15 July 1999
Tadi} Contempt Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 January 2000
Tadi} Indictment Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A, Decision on the Defence Motion on the Form of the Indictment, 14 November 1995
Tadi} Jurisdiction Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Tadi} Rule 115 Decision	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998
Tadi} Sentencing Appeal Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-A & IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 January 2000
Tadi} Sentencing Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-T, Sentencing Judgement, 14 July 1997
Tadi} Trial Judgement	*Prosecutor* v *Du{ko Tadi}*, Case No. IT-94-1-T, Judgement, 7 May 1997.
Torture Convention	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 10 December 1984 by the United Nations General Assembly, in force as of 26 June 1987
Trial Judgement	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-T & IT-96-23/1-T, Judgement, 22 February 2001
Trial Transcript	Transcript of trial in *Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23 & IT-96-23/1 T.
Vukovi}	Zoran Vukovi}
Vukovi} Appeal Brief	*Prosecutor* v *Dragoljub Kunarac et al.*, Case No. IT-96-23-A & IT-23/1-A, Appellant's Brief for the Acused [sic]

ANNEX 2:

Prosecutor v Rutaganda, Judgement and Sentence, Case No. ICTR-96-3-T, Trial Chamber I, 6 December 1999.

4048

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Judgement and Sentence

The Prosecutor v. Georges Anderson Nderubumwe Rutaganda

TABLE OF CONTENTS

1. INTRODUCTION

1.1 The International Tribunal
1.2. The Indictment
1.3 Procedural Background
1.4 Evidentiary Matters
1.5 The Accused

2. THE APPLICABLE LAW

2.1 Individual Criminal Responsibility
2.2 Genocide (Article 2 of the Statute)
2.3. Crimes against Humanity (Article 3 of the Statute)
2.4. Serious Violations of Common Article 3 (murder)

2.5 Cumulative Charges

3. THE DEFENCE CASE

3.1 The Defence Case

4. FACTUAL FINDINGS

4.1. Paragraph 10 of the Indictment
4.2. Paragraph 11 of the Indictment
4.3. Paragraph 12 of the Indictment
4.4. Paragraphs 13,14, 15 and 16 of the Indictment
4.5. Paragraph 17 of the Indictment
4.6. Paragraph 18 of the Indictment
4.7 Paragraph 19 of the Indictment
4.8 General Allegations (Paragraphs 3-9 of the Indictment)

5. LEGAL FINDINGS

5.1 Count 1: Genocide
5.2 Legal Findings - Count 2: Crimes against

4049

Humanity (extermination)
5.3 Legal Findings - Count 3: Crimes against Humanity (murder)
5.4 Legal Findings - Count 5: Crimes against Humanity (murder)
5.5 Legal Findings - Count 7: Crimes against Humanity (murder)
5.6 Counts 4, 6, and 8 - Violations of Common Article 3 (murder).

6. VERDICT

7. SENTENCING

TABLE OF CONTENTS

1. INTRODUCTION 3

1.1 The International Tribunal 3

1.2. The Indictment 4

1.3 Procedural Background 11

1.4 Evidentiary Matters 14

1.5 The Accused 18

2 THE APPLICABLE LAW 20

2.1 Individual Criminal Responsibility 20

2.2 Genocide (Article 2 of the Statute) 24

2.3. Crimes against Humanity (Article 3 of the Statute) 31

2.4. Serious Violations of Common Article 3 (murder) 39

2.5 Cumulative Charges 50

3. THE DEFENCE CASE 55

3.1 The Defence Case 55

4. FACTUAL FINDINGS 72

4.1. Paragraph 10 of the Indictment 72

4.2. Paragraph 11 of the Indictment 83

4.3. Paragraph 12 of the Indictment 91

4.4. Paragraphs 13,14, 15 and 16 of the Indictment 100

4.5. Paragraph 17 of the Indictment 117

4.6. Paragraph 18 of the Indictment 121

4.7 Paragraph 19 of the Indictment 129

4.8 General Allegations (Paragraphs 3-9 of the Indictment) 133

5. LEGAL FINDINGS 143

5.1 Count 1: Genocide 143
5.2 Legal Findings - Count 2: Crimes against Humanity (extermination) 150
5.3 Legal Findings - Count 3: Crimes against Humanity (murder) 154
5.4 Legal Findings - Count 5: Crimes against Humanity (murder) 156
5.5 Legal Findings - Count 7: Crimes against Humanity (murder) 157
5.6 Counts 4, 6, and 8 - Violations of Common Article 3 (murder). 159

6. VERDICT 163

7. SENTENCING 164

1. INTRODUCTION

1.1 The International Tribunal

1. This Judgement is rendered by Trial Chamber I of the International Criminal Tribunal for Rwanda (the "Tribunal") composed of Judge Laïty Kama, presiding, Judge Lennart Aspegren, and Judge Navanethem Pillay, in the case of *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda.*

2. The Tribunal was established by the United Nations Security Council, pursuant to resolution 955 of 8 November 1994, after it had considered United Nations Reports[1] which indicated that genocide and systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda. The Security Council determined that this situation constituted a threat to international peace and security, and was convinced that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda. The Security Council established the Tribunal, under Chapter VII of the United Nations Charter.

3. The Tribunal is governed by its Statute (the "Statute") annexed to Security Council

[1] Preliminary Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994) (Document S/1994/1405) and Reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (Document S/1994/1157, annexes I and II).

Resolution 955, and by its Rules of Procedure and Evidence (the "Rules"), which were adopted by the Judges, on 5 July 1995 and subsequently amended.[2]

[2] The Rules were successively amended on 12 January 1996, 15 May 1996, 4 July 1996, 5 June 1997, 8 June 1998, and 4 June 1999.

1.2 The Indictment

4. The Indictment (the "Indictment") against Georges Anderson Nderubumwe Rutaganda (the "Accused") was submitted by the Prosecutor on 13 February 1996 and was confirmed on 16 February 1996. The Indictment is set out here in full:

> "The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the Tribunal charges:
>
> **GEORGES ANDERSON NDERUBUMWE RUTAGANDA**
>
> with **GENOCIDE, CRIMES AGAINST HUMANITY** and **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS,** as set forth below:
>
> Background
>
> 1. On April 6, 1994, a plane carrying President Juvenal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi crashed at Kigali airport, killing all on board. Following the deaths of the two Presidents, widespread killings, having both political and ethnic dimensions, began in Kigali and spread to other parts of Rwanda.
>
> The Accused
>
> 2. Georges RUTAGANDA, born in 1958 in Masango commune, Gitarama prefecture, was an agricultural engineer and businessman; he was general manager and proprietor of Rutaganda SARL. Georges RUTAGANDA was also a member of the National and Prefectoral Committees of the *Mouvement Républicain National pour le Développement et la Démocratie* (hereinafter,"MRND")and a shareholder of *Radio Télévision Libre des Mille Collines*. On April 6, 1994, he was serving as the second vice president of the National Committee of the Interahamwe, the youth militia of the MRND.

A0555

General Allegations

3. Unless otherwise specified, all acts set forth in this indictment took place between 1 January 1994 and 31 December 1994 in the prefectures of Kigali and Gitarama, territory of Rwanda.

4. In each paragraph charging genocide, a crime recognized by Article 2 of the Statute of the Tribunal, the alleged acts were committed with intent to destroy, in whole or in part, a national, ethnical or racial group.

5. The victims in each paragraph charging genocide were members of a national, ethnical, racial or religious group.

6. In each paragraph charging crimes against humanity, crimes punishable by Article 3 of the Statute of the Tribunal, the alleged acts were committed as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.

7. At all times relevant to this indictment, a state of internal armed conflict existed in Rwanda.

8. The victims referred to in this indictment were, at all relevant times, persons taking no active part in the hostilities.

9. The accused is individually responsible for the crimes alleged in this indictment. Under Article 6(1) of the Statute of the Tribunal, individual criminal responsibility is attributable to one who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of any of the crimes referred to in Articles 2 to 4 of the Statute of the Tribunal.

Charges

10. On or about April 6, 1994, Georges RUTAGANDA distributed guns and other weapons to Interahamwe members in Nyarugenge commune, Kigali.

11. On or about April 10, 1994, Georges RUTAGANDA stationed Interahamwe members at a roadblock near his office at the "Amgar" garage in Kigali. Shortly after he left the area, the Interahamwe members started checking identity cards of people passing the roadblock. The Interahamwe members ordered persons with Tutsi identity cards to stand on one side of the road. Eight of the Tutsis were then killed. The victims included men, women and an infant who had been carried on the back of one of the women.

12. In April 1994, on a date unknown, Tutsis who had been separated at a roadblock in front of the Amgar garage were taken to Georges RUTAGANDA and questioned by him. He thereafter directed that these Tutsis be detained with others at a nearby building. Later, Georges RUTAGANDA directed men under his control to take 10 Tutsi detainees to a deep, open hole near the Amgar garage. On Georges RUTAGANDA's orders, his men killed the 10 Tutsis with machetes and threw their bodies into the hole.

13. From April 7 to April 11, 1994, thousands of unarmed Tutsi men, women and children and some unarmed Hutus sought refuge at the Ecole Technique Officielle ("ETO school") in Kicukiro sector, Kicukiro commune. The ETO school was considered a safe haven because Belgian soldiers, part of the United Nations Assistance Mission for Rwanda forces, were stationed there.

14. On or about April 11, 1994, immediately after the Belgians withdrew from the ETO school, members of the Rwandan armed forces, the gendarmerie and militia, including the Interahamwe, attacked the ETO school and, using machetes, grenades and guns, killed the people who had sought refuge there. The Interahamwe separated Hutus from Tutsis during the attack, killing the Tutsis. Georges RUTAGANDA participated in the attack at the ETO school, which resulted in the deaths of a large number of Tutsis.

15. The men, women and children who survived the ETO school attack were forcibly transferred by Georges RUTAGANDA, members of the Interahamwe and soldiers to a gravel pit near the primary school of Nyanza. Presidential Guard members awaited their arrival. More Interahamwe members converged upon Nyanza from many directions and surrounded the group of survivors.

16. On or about April 12, 1994, the survivors who were able to show that they were Hutu were permitted to leave the gravel pit. Tutsis who presented altered identity cards were immediately killed. Most of the remainder of the group were attacked and killed by grenades or shot to death. Those who tried to escape were attacked with machetes. Georges RUTAGANDA, among others, directed and participated in these attacks.

17. In April of 1994, on dates unknown, in Masango commune, Georges RUTAGANDA and others known to the Prosecutor conducted house-to-house searches for Tutsis and their families. Throughout these searches, Tutsis were separated from Hutus and taken to a river. Georges RUTAGANDA instructed the Interahamwe to track all the Tutsis and throw them into the river.

18. On or about April 28, 1994, Georges RUTAGANDA, together with Interahamwe members, collected residents from Kigali and detained them near the Amgar garage. Georges RUTAGANDA and the Interahamwe demanded identity cards from the detainees. A number of persons, including Emmanuel Kayitare, were forcibly separated from the group. Later that day, Emmanuel Kayitare attempted to flee from where he was being detained and Georges RUTAGANDA pursued him, caught him and struck him on the head with a machete and killed him.

19. In June 1994, on a date unknown, Georges RUTAGANDA ordered people to bury the bodies of victims in order to conceal his crimes from the international community.

Counts 1-2

(Genocide)

(Crimes Against Humanity)

By his acts in relation to the events described in paragraphs 10-19 Georges RUTAGANDA committed:

COUNT 1: **GENOCIDE,** punishable by Article 2(3)(a) of the Statute of the Tribunal; and

COUNT 2: **CRIMES AGAINST HUMANITY** (extermination) punishable by Article 3(b) of the Statute of the Tribunal.

Counts 3-4

(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the killings at the ETO school, as described in paragraph 14, Georges RUTAGANDA committed:

COUNT 3: **CRIMES AGAINST HUMANITY** (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

COUNT 4: **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS,** as incorporated by Article 4(a) (murder) of the Statute of the Tribunal.

Counts 5-6

(Crimes Against Humanity)

(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the killings at the gravel pit in Nyanza, as described in paragraphs 15 and 16, Georges RUTAGANDA committed:

COUNT 5: **CRIMES AGAINST HUMANITY** (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

COUNT 6: **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS**, as incorporated by Article 4(a) (murder) of the Statute of the Tribunal.

Counts 7-8

(Crime Against Humanity)

(Violation of Article 3 common to the Geneva Conventions)

By killing Emmanuel Kayitare, as described in paragraph 18, Georges RUTAGANDA committed:

COUNT 7: **CRIME AGAINST HUMANITY** (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

4060

COUNT 8: **VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS,** as incorporated by Article 4(a) (murder) of the Statute of the Tribunal.

(Signed)
Richard J. Goldstone
Prosecutor; Kigali
12 February 1996"

1.3 Procedural Background

5. On 13 February 1996 the Prosecutor submitted an Indictment against Georges Rutaganda for confirmation, pursuant to Article 17 of the Statute of the Tribunal.

6. On 16 February 1996, Judge William H. Sekule, after having reviewed the Indictment and accompanying supporting material, confirmed the Indictment against the Accused, pursuant to Articles 18 of the Statute and Rule 47 of the Rules. On the same day the learned Judge issued a Warrant of Arrest for the Accused, which requested the Republic of Zambia to transfer the Accused to the custody of the Tribunal. The Accused was subsequently transferred to the Tribunal detention facility in Arusha, Tanzania, on 26 May 1996.

7. The Accused made his initial appearance before the Tribunal on 30 May 1996, pursuant to Rule 62 of the Rules, and he was formally charged. At this hearing the Accused was represented by Counsel, and he pleaded not guilty to all the counts in the Indictment.

8. On 8 September 1996, the Defence filed an extremely urgent motion requesting the postponement of all criminal proceedings against the Accused and the provisional release of the Accused, due to his state of health. The Chamber subsequently held that the Defence had not satisfied the provisions of Rule 65 of the Rules and denied this motion. Due to the ill health of the Accused, the Chamber adjourned the commencement of trial to 6 March 1997.[3]

9. On 6 December 1996, the Defence filed another motion requesting the provisional release of the Accused, on the grounds of the Accused's state of ill health and his need for medical

[3] Decision on the Request Submitted by the Defence, *The Prosecutor v. Georges Rutaganda*, Case No. ICTR-96-3-T, 25 September 1996.

treatment. The Chamber denied this motion and held that the Tribunal was able to provide adequate medical care to the Accused, and that there had been neither serious regression in his medical condition nor had other exceptional circumstances arisen which justified his provisional release.

10. The Accused requested the assignment of Counsel to represent him. The Registrar, after having established that the Accused was indigent, assigned Counsels Luc De Temmerman and Tiphaine Dickson to represent him. However, on 25 August 1997, the Accused requested the withdrawal of Mr. Luc De Temmerman, stating that he had lost confidence in the said Counsel because he had failed to provide sufficient legal and strategic support to his defence. Mr. De Temmerman subsequently withdrew and the Accused was represented by Ms Tiphaine Dickson throughout the trial. The Prosecutor was represented during the trial by Mr. James Stewart, Mr. Udo Herbert Gehring and Ms Holo Makwaia.

11. On 6 March 1997, the Chamber adjourned the trial for two weeks, following a request to this effect from the Prosecutor. The trial commenced on 18 March 1997. Twenty seven prosecution witnesses, including five experts, testified before the Prosecutor closed her case on 29 May 1998. The Defence case commenced on 8 February 1999. Fourteen witnesses, including three experts, testified on behalf of the Defence. The Defence closed its case on 23 April 1999. The Parties presented their closing submissions on 16 and 17 June 1999.

12. During the course of the pre-trial and trial stages of the criminal proceeding, the Parties filed many motions on various procedural and substantive issues, including motions for disclosure of witness statements, a motion requesting that the deposition of sixteen witnesses be given by means of a video conference, pursuant to Rule 71 of the Rules, and a motion pertaining to the false testimony of a witness.

13. Both Parties filed motions, requesting protective measures for their witnesses, pursuant to Article 19 and 21 of the Statute and Rule 69 an 75 of the Rules. The Chamber granted these motions and ordered *inter alia* that the names, addresses and other identifying information of the

witnesses shall not be disclosed to the media and public, the witnesses will be assigned pseudonyms and they will be referred to by these pseudonyms in all criminal proceedings before the Chamber and in discussions with the Parties. Therefore, most of the witnesses referred to in this Judgement are referred to by their assigned pseudonyms.

14. In her closing arguments, the Prosecutor requested an amendment of the time periods alleged in paragraphs 10, 16 and 19 of the Indictment. The Chamber finds the Prosecutor's request inadmissable.

1.4 Evidentiary Matters

15. The Chamber finds that it is necessary to address certain issues relevant to the assessment of the evidence presented at trial.

16. The Chamber notes that Rule 89(A) of the Rules provides that it is not bound by the rules of procedure and evidence of any particular national jurisdiction and concurs with the finding in the Judgement in *The Prosecutor v. Jean-Paul Akayesu* (the "*Akayesu Judgement*") which held:

> "[...] the Chamber [...] is not restricted under the Statute of the Tribunal to apply any particular legal system and is not bound by any national rules of evidence"[4].

17. In all pre-trial and trial proceedings and in the admission and evaluation of all evidence and exhibits presented at the trial, the Chamber has applied the Rules in a manner best favoured to a fair determination of the matter before it, and which is consonant with the spirit of the Statute and the general principles of law.

[4] *The Prosecutor v. Jean-Paul Akayesu* (Case No. ICTR-96-4-T), Judgement of 2 September 1998, para. 131.

18. The Chamber notes that, pursuant to Rule 96(i) of the Rules, no corroboration of the victim's testimony is required in the case of rape and sexual violence. The Chamber concurs with both the *Akayesu Judgement* [5] and the judgement of the International Criminal Tribunal for the former Yugoslavia in *The Prosecutor v. Dusko Tadic*, (the *"Tadic Judgement"*)[6], judgements which held that the fact that Rules stipulate that corroboration of the victims testimony is not required for crimes of sexual assault, does not justify the inference that corroboration of witnesses' testimony is, in fact, required, for other crimes. The Chamber's approach is that it will rely on the evidence of a single witness, provided such evidence is relevant, admissible and credible. Pursuant to Rule 89 of the Rules, the Chamber may assess all relevant evidence which it deems to have probative value. The Rules do not exclude hearsay evidence, and the Chamber has the discretion to consider such evidence. Where the Chamber decides to consider such evidence, it is inclined to do so with caution.

19. The Chamber notes that during the trial, the Prosecutor and the Defence relied on pre-trial statements from witnesses for the purposes of direct and cross-examination. In many instances, inconsistencies and contradictions between the pre-trial statements of witnesses and their testimonies at trial were pointed out by the Defence. The Chamber concurs with the reasoning in the *Akayesu Judgement*, which held:

---

[5] *Akayesu Judgement*, para. 134.

[6] *The Prosecutor v. Dusko Tadic* (Case No. IT-94-1-T) Judgement of 7 May 1997, para. 535 to 539.

"[...] these pre-trial statements were composed following interviews with witnesses by investigators of the Office of the Prosecutor. These interviews were mostly conducted in Kinyarwanda, and the Chamber did not have access to transcripts of the interviews, but only translations thereof. It was therefore unable to consider the nature and form of the questions put to the witnesses, or the accuracy of interpretation at the time. The Chamber has considered inconsistencies and contradictions between these statements and testimony at trial with caution for these reasons, and in the light of the time lapse between the statements and the presentation of evidence at trial, the difficulties of recollecting precise details several years after the occurrence of the events, the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements. Moreover, the statements were not made under solemn declaration and were not taken by judicial officers. In the circumstances, the probative value attached to the statements is, in the Chamber's view, considerably less than direct sworn testimony before the Chamber, the truth of which has been subjected to the test of cross-examination."[7]

20. During the trial proceedings, the Defence filed motions requesting investigations of alleged false testimony against two of the Prosecutor's witnesses. These motions were dismissed by the Chamber and this decision was appealed by the Defence. The Appeals Chamber dismissed these appeals. This Chamber reaffirms its position that false testimony is a deliberate offence which requires wilful intent on the part of the perpetrator to mislead the Judge and thus to cause harm[8]. The onus is on the party pleading a case of false testimony to prove the falsehood of the witness' statements and to establish that they were made with harmful intent, or, at least, that they were made by a witness who was fully aware that they were false. To only raise doubt as to the credibility of the statements made by the witness is not sufficient to reasonably demonstrate that the witness may have knowingly and wilfully given false testimony. In the Chamber's view, false

[7] *Akayesu Judgement*, para. 134.

[8] *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, (Case No. ICTR-96-3-T) Decision on the Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness E.

testimony cannot be based solely on inaccurate statements made by the witness, but rather requires wilful intent to give false testimony. The Appeals Chamber pointed out that there is a clear distinction between the credibility of witness testimony and false testimony of a witness. The testimony of a witness may lack credibility, but this does not necessarily mean that it amounts to false testimony falling within the ambit of Rule 91[9].

[9] *The Prosecutor v. Georges Anderson Nderubumwe Rutaganda*, (Case No. ICTR-96-3-T) Decision on Appeals against the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by witnesses "E" and "CC", 8 June 1998, para. 28.

21. The Chamber notes the Defence submission that some of the Prosecution witnesses are unreliable because they testified to events that they previously heard other people talk about, and that therefore the Prosecution's case is marred by "contamination". The Defence also submitted that some of the evidence was obtained by illegal means, which rendered it inadmissible[10]. The Chamber finds that this is neither a matter of "contamination", nor of "illegal means of collecting information", but of hearsay.

22. Many of the witnesses who testified before the Chamber in this case have seen atrocities committed against members of their families and close friends and/or have themselves been the victims of such atrocities. Some of these witnesses became very emotional and cried in the witness box, when they were questioned about certain events. A few witnesses displayed physical signs of fear and pain when they were asked about certain atrocities of which they were victims. The Chamber has taken into consideration these factors in assessing the evidence of such witnesses.

23. The Chamber has also taken into consideration various social and cultural factors in assessing the testimony of some of the witnesses. Some of these witnesses were farmers and people who did not have a high standard of education, and they had difficulty in identifying and testifying to some of the exhibits, such as photographs of various locations, maps etc. These witnesses also experienced difficulty in testifying as to dates, times, distances, colours and motor vehicles. In this regard, the Chamber also notes that many of the witnesses testified in Kinyarwanda and as such their testimonies were simultaneously translated into French and English. As a result, the essence of the witnesses' testimonies was at times lost. Counsel questioned witnesses in either English or French, and these questions were simultaneously translated to the witnesses in Kinyarwanda. In some instances it was evident, after translation, that the witnesses had not understood the questions.

[10] See the Defence submissions, transcripts of 17 June 1996.

1.5 The Accused

24. On 8 April 1999, the Accused testified that he was born on 28 November 1958 in Ngoma, in Gishyita *Commune*, Kibuye *Préfecture* in Rwanda. He grew up in Gitarama and Kibuye *Préfecture*, before studying and working in Butare and Kigali *Préfectures*.

25. The Accused testified that his father, Esdras Mpamo, held many civil, public and political offices and government appointments, such as the Prefect of Kibuye, Cyangugu, and Butare *Préfectures*, the Rwandese Ambassador to Uganda and Germany and the Bourgmestre of Masango *Commune*, in the Gitarama *Préfecture*. The Accused testified that although he traveled a lot he considered his origin to be Masango *Commune* in the Gitarama *Préfecture* because his father was the Bourgmestre in this *Commune*, and he returned there throughout his youth. The Accused also testified that his father was a devout Seventh Day Adventist, and that his father's religious and political beliefs significantly influenced his upbringing and subsequent political decisions.

26. The Accused testified that he is married and he is a father of three children. He stated that he received a degree in agricultural engineering in 1985, from National University of Rwanda and thereafter he was appointed agricultural engineer. He stated that as an agricultural engineer, he conducted agricultural research and he managed a farm which served as a model farm to the farmers of Huye *Commune*. According to the Accused, he was allowed to purchase this farm by virtue of a Presidential decree.

27. The Accused testified that he applied to the Agricultural Ministry to be transferred from Butare in 1991, because of threats he had received from certain people in the Huye *Commune*, following his purchase of the farm that he managed. He stated that he was subsequently transferred to a post with the Rwandese Ministry of Agriculture in Kigali, although his family remained in Butare.

28. The Accused testified that, in June 1991, he commenced work as a business man in

Kigali, dealing with import, under the name of Rutuganda SARL. He stated that Rutaganda SARL was a highly profitable enterprise, and maintained exclusive imports and distribution agreements with a number of European food and beverage producers, as well as exclusive supply agreements with smaller bars, distributors, and organizations in Rwanda.

29. The Accused testified that he joined the MRND on or about September or October 1991. He stated that various political parties offered him membership, but he joined the MRND because he believed that this political party was in a position to provide the best economic and military protection, both of which were significant concerns for him as a business proprietor in Rwanda.

30. The Accused testified that, after he joined the MRND party in 1991, he became the second vice president of its youth wing, the Interahamwe za MRND. He stated that he was involved in the creation of the Interahamwe za MRND and met regularly with its other leaders.

4071

2. THE APPLICABLE LAW

2.1 Individual Criminal Responsibility

31. The Accused is charged under Article 6(1) of the Statute with individual criminal responsibility for the crimes alleged in the Indictment. Article 6(1) provides that:

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute shall be individually responsible for the crime".

32. In the *Akayesu Judgement* findings were made on the principle of individual criminal responsibility under Article 6(1) of the Statute. The Chamber notes that these findings are, in the main, the same as those made in the *Tadic Judgement* and in the judgements in *The Prosecutor v. Clément Kayishema and Obed Ruzindana* (the "*Kayishema and Ruzindana Judgement*")[11] and *The Prosecutor versus Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo*: '*The Celebici Case*', (the "*Celebici Judgement*")[12]. The Chamber is of the view that the position as derived from the afore-mentioned case law, with respect to the principle of individual criminal

[11] Judgement of the International Criminal Tribunal for Rwanda, Trial Chamber II, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, (Case No. ICTR 95-1-T) 21 May 1999.

[12] Judgement of the International Criminal Tribunal for the Former Yugoslavia, (Case No. IT-96-21-T) *The Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo, "The Celebici Case"*, 16 November 1998.

responsibility, and as articulated, notably, in the *Akayesu Judgement* is sufficiently established and is applicable in the instant case.

33. The Chamber notes, that under Article 6 (1), an accused person may incur individual criminal responsibility as a result of five forms of participation in the commission of one of the three crimes referred to in the Statute. Article 6 (1) covers various stages in the commission of a crime, ranging from its initial planning to its execution.

34. The Chamber observes that the principle of individual criminal responsibility under Article 6 (1) implies that the planning or preparation of a crime actually leads to its commission. However, the Chamber notes that Article 2 (3) of the Statute, on the crime of genocide, provides for prosecution for attempted genocide, among other acts. However, attempt is by definition an inchoate crime, inherent in the criminal conduct *per se* irrespective of its result. Consequently, the Chamber holds that an accused may incur individual criminal responsibility for inchoate offences under Article 2 (3) of the Statute and that, conversely, a person engaging in any form of participation in other crimes falling within the jurisdiction of the Tribunal, such as those covered in Articles 3 and 4 of the Statute, could incur criminal responsibility only if the offence were consummated.

35. The Chamber finds that in addition to incurring responsibility as a principal offender, the Accused may also be held criminally liable for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed or aided and abetted another in the commission of such acts.

36. The Chamber defines the five forms of criminal participation under Article 6(1) as follows:

37. Firstly, in the view of the Chamber, "planning" of a crime implies that one or more persons contemplate designing the commission of a crime at both its preparatory and execution phases.

38. In the opinion of the Chamber, the second form of participation, that is, incitement to commit an offence, under Article 6(1), involves instigating another, directly and publicly, to commit an offence. Instigation is punishable only where it leads to the actual commission of an offence desired by the instigator, except with genocide, where an accused may be held individually criminally liable for incitement to commit genocide under Article 2(3)(c) of the Statute, even where such incitement fails to produce a result.[13]

39. In the opinion of the Chamber, ordering, which is a third form of participation, implies a superior-subordinate relationship between the person giving the order and the one executing it, with the person in a position of authority using such position to persuade another to commit an offence.

40. Fourthly, an accused incurs criminal responsibility for the commission of a crime, under Article 6(1), where he actually "commits" one of the crimes within the jurisdiction *rationae materiae* of the Tribunal.

41. The Chamber holds that an accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act.

42. A fifth and last form of participation where individual criminal responsibility arises under Article 6(1), is "[...] otherwise aid[ing] and abett[ing] in the planning or execution of a crime referred to in Articles 2 to 4".

43. The Chamber finds that aiding and abetting alone is sufficient to render the accused criminally liable. In both instances, it is not necessary that the person aiding and abetting another

[13] *Akayesu Judgement*, para. 562

to commit an offence be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the offence. The Chamber holds that aiding and abetting include all acts of assistance in either physical form or in the form of moral support; nevertheless, it emphasizes that any act of participation must substantially contribute to the commission of the crime. The aider and abettor assists or facilitates another in the accomplishment of a substantive offence.

2.2 Genocide (Article 2 of the Statute)

1. In accordance with the provisions of Article 2(3)(a) of the Statute, which stipulate that the Tribunal shall have the power to prosecute persons responsible for genocide, the Prosecutor has charged the Accused with genocide, Count 1 of the Indictment.

44. The definition of genocide, as given in Article 2 of the Tribunal's Statute, is taken verbatim from Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention")[14]. It reads as follows:

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

[14] The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948.

45. The Genocide Convention is undeniably considered part of customary international law, as reflected in the advisory opinion issued in 1951 by the International Court of Justice on reservations to the Genocide Convention, and as noted by the United Nations Secretary-General in his Report on the establishment of the International Criminal Tribunal for the Former Yugoslavia[15].

46. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975[16]. Therefore the crime of genocide was punishable in Rwanda in 1994.

47. The Chamber adheres to the definition of the crime of genocide as it was defined in the *Akayesu Judgement.*

48. The Chamber accepts that the crime of genocide involves, firstly, that one of the acts listed under Article 2(2) of the Statute be committed; secondly, that such an act be committed against a national, ethnical, racial or religious group, specifically targeted as such; and, thirdly, that the "act be committed with the intent to destroy, in whole or in part, the targeted group".

---

[15] Secretary-General's Report pursuant to para. 2 of Resolution 808 (1993) of the Security Council, 3 May 1993, S/25704.

[16] Legislative Decree of 12 February 1975, Official Gazette of the Republic of Rwanda, 1975, p.230. Rwanda acceded to the Genocide Convention but stated that it shall not be bound by Article 9 of this Convention.

The Acts Enumerated under Article 2(2)(a) to (e) of the Statute

49. Article 2(2)(a) of the Statute, like the corresponding provisions of the Genocide Convention, refers to "meurtre" in the French version and to "killing" in the English version. In the opinion of the Chamber, the term "killing" includes both intentional and unintentional homicides, whereas the word "meurtre" covers homicide committed with the intent to cause death. Given the presumption of innocence, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the Accused should be adopted, and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder in the Criminal Code of Rwanda, which provides, under Article 311, that "Homicide committed with intent to cause death shall be treated as murder".

50. For the purposes of interpreting Article 2(2)(b) of the Statute, the Chamber understands the words "serious bodily or mental harm" to include acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution. The Chamber is of the opinion that "serious harm" need not entail permanent or irremediable harm.

51. In the opinion of the Chamber, the words "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", as indicated in Article 2(2)(c) of the Statute, are to be construed "as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group", but which are, ultimately, aimed at their physical destruction. The Chamber holds that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard.

52. For the purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the words "measures intended to prevent births within the group" should be construed as including

sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages. The Chamber notes that measures intended to prevent births within the group may be not only physical, but also mental.

53. The Chamber is of the opinion that the provisions of Article 2(2)(e) of the Statute, on the forcible transfer of children from one group to another, are aimed at sanctioning not only any direct act of forcible physical transfer, but also any acts of threats or trauma which would lead to the forcible transfer of children from one group to another group.

Potential Groups of Victims of the Crime of Genocide

54. The Chamber is of the view that it is necessary to consider the issue of the potential groups of victims of genocide in light of the provisions of the Statute and the Genocide Convention, which stipulate that genocide aims at "destroy[ing], in whole or in part, a national, ethnical, racial or religious group, as such."

55. The Chamber notes that the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group.

56. Nevertheless, the Chamber is of the view that a subjective definition alone is not enough to determine victim groups, as provided for in the Genocide Convention. It appears, from a reading of the *travaux préparatoires* of the Genocide Convention[17], that certain groups, such as

[17]Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly.

political and economic groups, have been excluded from the protected groups, because they are considered to be "mobile groups" which one joins through individual, political commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.

57. Therefore, the Chamber holds that in assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the political and cultural context as indicated *supra*.

The Special Intent of the Crime of Genocide.

58. Genocide is distinct from other crimes because it requires *dolus specialis*, a special intent. Special intent of a crime is the specific intention which, as an element of the crime, requires that the perpetrator clearly intended the result charged. The *dolus specialis* of the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". A person may be convicted of genocide only where it is established that he committed one of the acts referred to under Article 2(2) of the Statute with the specific intent to destroy, in whole or in part, a particular group.

59. In concrete terms, for any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone. The perpetration of the act charged, therefore, extends beyond its actual commission, for example, the murder of a particular person, to encompass the realization of the ulterior purpose to destroy, in whole or in part, the group of which the person is only a member.

4080

60. The *dolus specialis* is a key element of an intentional offence, which offence is characterized by a psychological nexus between the physical result and the mental state of the perpetrator. With regard to the issue of determining the offender's specific intent, the Chamber applies the following reasoning, as held in the *Akayesu Judgement*:

> " [...] intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber is of the view that the genocidal intent inherent in a particular act charged can be inferred from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."[18]

61. Similarly, in the *Kayishema and Ruzindana Judgement*, Trial Chamber II held that :

> "[...] The Chamber finds that the intent can be inferred either from words or deeds and may be determined by a pattern of purposeful action. In particular, the Chamber considers evidence such as [...] the methodical way of planning, the systematic manner of killing. [...]"[19]

---

[18] *Akayesu Judgement*, para. 523

[19] *Kayishema and Ruzindana Judgement*, para. 93.

62. Therefore, the Chamber is of the view that, in practice, intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused .

2.3 Crimes against Humanity (Article 3 of the Statute)

63. The Chamber notes that the *Akayesu Judgement* traced the historical development and evolution of crimes against humanity, as far back as the Charter of the International Military Tribunal of Nuremberg. The *Akayesu Judgement* also considered the gradual evolution of crimes against humanity in the cases of *Eichmann*, *Barbie*, *Touvier* and *Papon*[20]. The Chamber concurs with the historical development of crimes against humanity, as set forth in the *Akayesu Judgement*.

64. The Chamber notes that Article 7 of the Statute of the International Criminal Court defines a crime against humanity as any of the enumerated acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. These enumerated acts are murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any other crime within the jurisdiction of the court; enforced disappearance of persons; the crime

[20] *Akayesu Judgement* para. 563 to 576

of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health.[21]

Crimes against Humanity pursuant to Article 3 of the Statute of the Tribunal

65. Article 3 of the Statute confers on the Tribunal the jurisdiction to prosecute persons for various inhumane acts which constitute crimes against humanity. The Chamber concurs with the reasoning in the *Akayesu Judgement* that offences falling within the ambit of crimes against humanity may be broadly broken down into four essential elements, namely:

(a) the *actus reus* must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health

(b) the *actus reus* must be committed as part of a widespread or systematic attack

(c) the *actus reus* must be committed against members of the civilian population

[21] Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court on 17 July 1998.

4584

(d) the *actus reus* must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.[22]

The *Actus Reus* Must be Committed as Part of a Widespread or Systematic Attack

66. The Chamber is of the opinion that the *actus reus* cannot be a random inhumane act, but rather an act committed as part of an attack. With regard to the nature of this attack, the Chamber notes that Article 3 of the English version of the Statute reads "[...] as part of a widespread or systematic attack. [...]" whilst the French version of the Statute reads "[...] dans le cadre d'une attaque généralisée et systématique [...]". The French version requires that the attack be both of a widespread *and* systematic nature, whilst the English version requires that the attack be of a widespread *or* systematic nature and need not be both.

67. The Chamber notes that customary international law requires that the attack be either of

[22] *Akayesu Judgement*, para. 578.

a widespread *or* systematic nature and need not be both. The English version of the Statute conforms more closely with customary international law and the Chamber therefore accepts the elements as set forth in Article 3 of the English version of the Statute and follows the interpretation in other ICTR judgements namely: that the "attack" under Article 3 of the Statute, must be either of a widespread or systematic nature and need not be both.[23]

68. The Chamber notes that "widespread", as an element of crimes against humanity, was defined in the *Akayesu Judgement*, as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims, whilst "systematic" was defined as thoroughly organised action, following a regular pattern on the basis of a common policy and involving substantial public or private resources[24]. The Chamber concurs with these definitions and finds that it is not essential for this policy to be adopted formally as a policy of a State. There must, however, be some kind of preconceived plan or policy.[25]

---

[23] *Akayesu Judgement*, p. 235, fn 144; *Kayishema and Ruzindana Judgement*, p. 51, fn 63.

[24] *Akayesu Judgement* para. 580.

[25] Report on the International Law Commission to the General Assembly, 51 U.N. GAOR Supp. (No 10) at 94 U.N.Doc. A/51/10 (1996)

69. The Chamber notes that "attack", as an element of crimes against humanity, was defined in the *Akayesu Judgement*, as an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute, such as murder, extermination, enslavement etc. An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner may also come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner[26]. The Chamber concurs with this definition.

70. The Chamber considers that the perpetrator must have:

> "[...]actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan."[27]

The *Actus Reus* Must be Directed against the Civilian Population

71. The Chamber notes that the *actus reus* must be directed against the civilian population, if it is to constitute a crime against humanity. In the *Akayesu Judgement*, the civilian population was defined as people who were not taking any active part in the hostilities[28]. The fact that there

---

[26] *Akayesu Judgement* para. 581.

[27] *Kayishema and Ruzindana Judgement* para. 134

[28] *Akayesu Judgement*, para. 582. Note that this definition assimilates the definition of "civilian" to the categories of person protected by Common Article 3 of the Geneva Conventions.

are certain individuals among the civilian population who are not civilians does not deprive the population of its civilian character[29]. The Chamber concurs with this definition.

The *Actus Reus* Must be Committed on Discriminatory Grounds

72. The Statute stipulates that inhumane acts committed against the civilian population must be committed on "national, political, ethnic, racial or religious grounds." Discrimination on the basis of a person's political ideology satisfies the requirement of 'political' grounds as envisaged in Article 3 of the Statute.

73. Inhumane acts committed against persons not falling within any one of the discriminatory

[29] *Ibid* para. 582, Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict; Article 50.

categories may constitute crimes against humanity if the perpetrator's intention in committing these acts, is to further his attack on the group discriminated against on one of the grounds specified in Article 3 of the Statute. The perpetrator must have the requisite intent for the commission of crimes against humanity.[30]

74. The Chamber notes that the Appeals Chamber in the *Tadic* Appeal ruled that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. The Appeals Chamber stated that a discriminatory intent is an indispensable element of the offence only with regard to those crimes for which this is expressly required, that is the offence of persecution, pursuant to Article 5(h) of the Statute of the International Criminal Tribunal for the former Yugoslavia (the "ICTY").[31]

75. The Chamber considers the provisions of Article 5 of the ICTY Statute, as compared to the provisions of Article 3 of the ICTR, Statute and notes that, although the provisions of both the aforementioned Articles pertain to crimes against humanity, except for persecution, there is a material and substantial difference in the elements of the offence that constitute crimes against humanity. This stems from the fact that Article 3 of the ICTR Statute expressly provides the enumerated discriminatory grounds of "national, political, ethnic, racial or religious", in respect of the offences of Murder; Extermination; Deportation; Imprisonment; Torture; Rape; and; Other Inhumane Acts, whilst the ICTY Statute does not stipulate any discriminatory grounds in respect of these offences..

The Enumerated Acts

---

[30] *Akayesu Judgement*, para. 584.

[31] *The Prosecutor v. Dusko Tadic*; Appeals Judgment of 15 July 1999; para. 305; p. 55.

76. Article 3 of the Statute sets out various acts that constitute crimes against humanity, namely: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial and religious grounds; and; other inhumane acts. Although the category of acts that constitute crimes against humanity are set out in Article 3, this category is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are satisfied. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.

77. The Chamber notes that in respect of crimes against humanity, the Accused is indicted for murder and extermination. The Chamber, in interpreting Article 3 of the Statute, will focus its discussion on these offences only.

Murder

78. Pursuant to Article 3(a) of the Statute, murder constitutes a crime against humanity. The Chamber notes that Article 3(a) of the English version of the Statute refers to "Murder", whilst the French version of the Statute refers to "Assassinat". Customary International Law dictates that it is the offence of "Murder" that constitutes a crime against humanity and not "Assassinat".

79. The *Akayesu Judgement* defined Murder as the unlawful, intentional killing of a human being. The requisite elements of murder are:

(a) The victim is dead;

(b) The death resulted from an unlawful act or omission of the accused or a subordinate;

(c) At the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm

is likely to cause the victim's death, and is reckless as to whether or not death ensures;

(4) The victim was discriminated against on any one of the enumerated discriminatory grounds;

(5) The victim was a member of the civilian population; and

(6) The act or omission was part of a widespread or systematic attack on the civilian population.[32]

80. The Chamber concurs with this definition of murder and is of the opinion that the act or omission that constitutes murder must be discriminatory in nature and directed against a member of the civilian population.

Extermination

81. Pursuant to Article 3(c) of the Statute, extermination constitutes a crime against humanity. By its very nature, extermination is a crime which is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not a pre-requisite for murder.

[32] *Akayesu Judgement*, para. 589 and 590.

82. The *Akayesu Judgement*, defined the essential elements of extermination as follows:

(a) the accused or his subordinate participated in the killing of certain named or described persons;

(b) the act or omission was unlawful and intentional;

(c) the unlawful act or omission must be part of a widespread or systematic attack;

(d) the attack must be against the civilian population; and

(e) the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.

83. The Chamber concurs with this definition of extermination and is of the opinion that the act or omission that constitutes extermination must be discriminatory in nature and directed against members of the civilian population. Further, this act or omission includes, but is not limited to the direct act of killing. It can be any act or omission, or cumulative acts or omissions, that cause the death of the targeted group of individuals.

4092

2.4 Serious Violations of Common Article 3 of the Geneva Conventions and Additional Protocol II

Article 4 of the Statute

84. Pursuant to Article 4 of the Statute, the Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

> (a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
>
> (b) collective punishments;
>
> (c) taking of hostages;
>
> (d) acts of terrorism;
>
> (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
>
> (f) pillage;
>
> (g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

(h) threats to commit any of the foregoing acts.

Applicability of Common Article 3 and Additional Protocol II

85. In applying Article 4 of the Statute, the Chamber must be satisfied that the principle of *nullum crimen sine lege* is not violated. Indeed, the creation of the Tribunal, in response to the alleged crimes perpetrated in Rwanda in 1994, raised the question all too familiar to the Nuremberg Tribunal and the ICTY, that of jurisdictions applying *ex post facto laws* in violation of this principle. In establishing the ICTY, the Secretary-General dealt with this issue by asserting that in the application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. However, in the case of this Tribunal, it was incumbent on the Chambers to decide whether or not the said principle had been adhered to[33], and whether individuals incurred individual criminal responsibility for violations of these international instruments.

[33] See *Akayesu Judgement*, para. 603 to 605.

86. In the *Akayesu Judgement*, the Chamber expressed its opinion that the "norms of Common Article 3 had acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which, if committed during internal armed conflict, would constitute violations of Common Article 3". The finding of the Trial Chamber in this regard followed the precedents set by the ICTY[34], which established the customary nature of Common Article 3. Moreover, the Chamber in the *Akayesu Judgement* held that, although not all of Additional Protocol II could be said to be customary law, the guarantees contained in Article 4(2) (Fundamental Guarantees) thereof, which reaffirm and supplement Common Article 3, form part of existing international law. All of the norms reproduced in Article 4 of the Statute are covered by Article 4(2) of Additional Protocol II.

87. Furthermore, the Trial Chamber in the *Akayesu Judgement* concluded that violations of these norms would entail, as a matter of customary international law, individual responsibility for the perpetrator. It was also recalled that as Rwanda had become a party to the 1949 Geneva Conventions and their 1977 Additional Protocols, on 5 May 1964 and 19 November 1984, respectively, these instruments were in any case in force in the territory of Rwanda in 1994, and formed part of Rwandan law. Thus, Rwandan nationals who violated these international instruments incorporated into national law, including those offences as incorporated in Article 4 of the Statute, could be tried before the Rwandan national courts[35].

88. In the *Kayishema and Ruzindana Judgement*, Trial Chamber II deemed it unnecessary to delve into the question as to whether the instruments incorporated in Article 4 of the Statute should be considered as customary international law. Rather the Trial Chamber found that the instruments were in force in the territory of Rwanda in 1994 and that persons could be prosecuted for breaches thereof on the basis that Rwanda had become a party to the Geneva Conventions and

[34] See *Tadic Judgement* and Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995.

[35] See *Akayesu Judgement*, para. 616 and 617.

their Additional Protocols. The offences enumerated in Article 4 of the Statute, said the Trial Chamber, also constituted offences under Rwandan law[36].

89. Thus it is clear that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the guarantees provided for by the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and convention, incurred individual responsibility, and could result in the prosecution of the authors of the offences.

The Nature of the Conflict

90. The 1949 Geneva Conventions and Additional Protocol I generally apply to international armed conflicts, whereas Common Article 3 extends a minimum threshold of humanitarian protection to persons affected by non-international armed conflicts. This protection has been enhanced and developed in the 1977 Additional Protocol II. Offences alleged to be covered by Article 4 of the Statute must, as a preliminary matter, have been committed in the context of a conflict of a non-international character satisfying the requirements of Common Article 3, which applies to "armed conflict not of an international character" and Additional Protocol II, applicable to conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

[36] See *Kayishema and Ruzindana Judgement*, para. 156 and 157.

91. First to be addressed is the question of what constitutes an armed conflict under Common Article 3. This issue was dealt with extensively during the 1949 Diplomatic Conference of Geneva leading to the adoption of the Conventions. Of concern to many participating States was the ambiguous and vague nature of the term "armed conflict". Although the Conference failed to provide a precise minimum threshold as to what constitutes an "armed conflict", it is clear that mere acts of banditry, internal disturbances and tensions, and unorganized and short-lived insurrections are to be ruled out. The International Committee of the Red Cross (the "ICRC"), specifies further that conflicts referred to in Common Article 3 are armed conflicts with armed forces on either side engaged in hostilities: conflicts, in short, which are in many respects similar to an international conflict, but take place within the confines of a single country[37]. The ICTY Appeals Chamber offered guidance on the matter by holding "that an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [...] in the case of internal conflicts, a peaceful settlement is reached"[38].

92. It can thence be seen that the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an "armed conflict", meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis. Hence, in dealing with this issue, the *Akayesu Judgement* suggested an "evaluation test", whereby it is necessary to evaluate the intensity and the organization of the parties to the conflict to make a finding on the

[37] See generally ICRC Commentary IV Geneva Convention, para. 1 - Applicable Provisions.

[38] *Ibid.* 34

existence of an armed conflict. This approach also finds favour with the Trial Chamber in this instance.

93. In addition to armed conflicts of a non-international character, satisfying the requirements of Common Article 3, under Article 4 of the Statute, the Tribunal has the power to prosecute persons responsible for serious violations of the 1977 Additional Protocol II, a legal instrument whose overall purpose is to afford protection to persons affected by non-international armed conflicts. As aforesaid, this instrument develops and supplements the rules contained in Common Article 3, without modifying its existing conditions of applicability. Additional Protocol II reaffirms Common Article 3, which, although it objectively characterized internal armed conflicts, lacked clarity and enabled the States to have a wide area of discretion in its application. Thus the impetus behind the Conference of Government Experts and the Diplomatic Conference[39] in this regard was to improve the protection afforded to victims in non-international armed conflicts and to develop objective criteria which would not be dependent on the subjective judgements of the parties. The result is, on the one hand, that conflicts covered by Additional Protocol II have a higher intensity threshold than Common Article 3, and on the other, that Additional Protocol II is immediately applicable once the defined material conditions have been fulfilled. If an internal armed conflict meets the material conditions of Additional Protocol II, it then also automatically satisfies the threshold requirements of the broader Common Article 3.

94. Pursuant to Article 1(1) of Additional Protocol II the material requirements to be satisfied for the applicability of Additional Protocol II are as follows:

[39] Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 24 May to 12 June 1971, and 3 May to 3 June 1972; Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, 20 February to 29 March 1974, 3 February to 18 April 1975, 21 April to 11 June 1976 and 17 March to 10 June 1977.

(i) an armed conflict takes place in the territory of a High Contracting Party, between its armed forces and dissident armed forces or other organized armed groups;

(ii) the dissident armed forces or other organized armed groups are under responsible command;

(iii) the dissident armed forces or other organized armed groups are able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and

(iv) the dissident armed forces or other organized armed groups are able to implement Additional Protocol II.

Ratione Personae

The Class of Perpetrator

95. Under Common Article 3 of the Geneva Conventions, the perpetrator must belong to a "Party" to the conflict, whereas under Additional Protocol II[40] the perpetrator must be a member of the "armed forces" of either the Government or of the dissidents. There has been much discussion on the exact definition of "armed forces" and "Party", discussion, which in the opinion of the Chamber detracts from the overall protective purpose of these instruments. A too restrictive definition of these terms would likewise dilute the protection afforded by these instruments to the victims and potential victims of armed conflicts. Hence, the category of persons covered by these terms should not be limited to commanders and combatants but should be interpreted in their broadest sense.

[40] See Article 1(1) of Additional Protocol II

96. Moreover, it is well established from the jurisprudence of International Tribunals that civilians can be held as accountable as members of the armed forces or of a Party to the conflict. In this regard, reference should be made to the *Akayesu Judgement*, where it was held that:

> "It is, in fact, well-established, at least since the Tokyo trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking. Other post-World War II trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favored by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities."[41]

97. Consequently, the duties and responsibilities of the Geneva Conventions and the Additional Protocols will normally apply to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. It will be a matter of evidence to establish if the accused falls into the category of persons who can be held individually criminally responsible for serious violations of these international instruments, and in this case, of the provisions of Article 4 of the Statute.

The Class of Victims

98. Paragraph 8 of the Indictment states that the victims referred to in this Indictment were persons taking no active part in the hostilities. This wording stems from the definition to be

[41] *Akayesu Judgement*, para. 633

found in Common Article 3(1) of the Geneva Conventions, which affords protection to "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat", and is synonymous to Article 4 of Additional Protocol which refers to "all persons who do not take a direct part in the hostilities or who have ceased to take part in the hostilities".

99. From a reading of the Indictment, it can be adduced that the victims were all allegedly civilians. There is no concise definition of "civilian" in the Protocols. As such, a definition has evolved through a process of elimination, whereby the civilian population[42] is made up of persons who are not combatants or persons placed hors de combat, in other words, who are not members of the armed forces[43]. Pursuant to Article 13(2) of the Additional Protocol II, the civilian population, as well as individual civilians, shall not be the object of attack. However, if civilians take a direct part in the hostilities, they then lose their right to protection as civilians *per se* and could fall within the class of combatant. To take a "direct" part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces[44].

100. It would be beyond the scope of the matter at hand for the Chamber to attempt to provide an exhaustive list of all categories of persons who are not considered civilians under the Geneva Conventions and their Additional Protocols. Rather the Chamber considers that a civilian is

---

[42] It should be noted that the civilian population comprises all persons who are civilians. (Article 50 (2) of Additional Protocol II)

[43] See ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, commentary on Protocol I, Article 50.

[44] *Ibid.*, Commentary on Additional Protocol II, Article 13.

anyone who falls outside the category of "perpetrator" developed *supra,* "perpetrators" being individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. The class of civilians thus broadly defined, it will be a matter of evidence on a case-by-case basis to determine whether a victim has the status of civilian.

Ratione Loci

101. The protection afforded to individuals under the Geneva Conventions and the Additional Protocols, extends throughout the territory of the State where the hostilities are occurring, once the objective material conditions for applicability of the said instruments have been satisfied.

102. This was affirmed in the *Akayesu Judgement*[45] and by the ICTY[46] (with regard in particular to Common Article 3), where it has been determined that the requirements of Common Article 3 and Additional Protocol II apply in the whole territory where the conflict is occurring and are not limited to the "war front" or to the "narrow geographical context of the actual theater of combat operations".

The Nexus between the Crime and the Armed Conflict

[45] See *Akayesu Judgement* para. 635-636.

[46] See ICTY *Tadic* decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 69.

103. In addition to the offence being committed in the context of an armed conflict not of an international character satisfying the material requirements of Common Article 3 and Additional Protocol II, there must be a nexus between the offence and the armed conflict for Article 4 of the Statute to apply. By this it should be understood that the offence must be closely related to the hostilities or committed in conjunction with the armed conflict[47].

[47] See *Akayesu Judgement* para. 643 and *ibid*, para. 70.

104. The Chamber notes the finding made in the *Kayishema and Ruzindana Judgement*, whereby the term nexus should not be defined *in abstracto*[48]. Rather, the evidence adduced in support of the charges against the accused must satisfy the Chamber that such a nexus exists. Thus, the burden rests on the Prosecutor to prove beyond a reasonable doubt that, on the basis of the facts, such a nexus exists between the crime committed and the armed conflict.

The Specific Violation

105. The crime committed must represent a serious violation of Common Article 3 and Additional Protocol II, as incorporated in Article 4 of the Statute. A "serious violation" is one which breaches a rule protecting important values with grave consequences for the victim. The fundamental guarantees included in Article 4 of the Statute represent elementary considerations of humanity. Violations thereof would, by their very nature, be deemed serious.

106. The Accused is charged under Counts 4, 6 and 8 of the Indictment for violations of Article 3 common to the Geneva Conventions, as incorporated by Article 4(a) (murder) of the Statute of the Tribunal. If all the requirements of applicability of Article 4, as developed *supra,* are met, the onus is on the Prosecutor to then prove that the alleged acts of the Accused constituted murder. The specific elements of murder are stated in Section 2.3 on Crimes against Humanity in the Applicable law.

[48] See *Kayishema and Ruzindana Judgement* para. 188.

2.5 Cumulative Charges

107. In the indictment, the Accused, by his alleged acts in relation to the events described in paragraphs 10-19, is cumulatively charged with genocide (count 1) and crimes against humanity (extermination) (count 2). Moreover, by his alleged acts in relation to the killings at the *École Technique Officielle* described in paragraph 14, his acts at the gravel pit in Nyanza described in paragraphs 15 and 16, and for the alleged murder of Emmanuel Kayitare described in paragraph 18, Rutaganda is charged cumulatively with crimes against humanity (murder) (counts 3, 5 and 7) and violations of Article 3 common to the Geneva Conventions (murder) (counts 4, 6 and 8).

108. Therefore, the issue before the Chamber is whether, assuming that it is satisfied beyond a reasonable doubt that a particular act alleged in the indictment and given several legal characterizations under different counts has been established, it may adopt only one of the legal characterizations given to such act or whether it may find the Accused guilty on all the counts arising from the said act.

109. The Chamber notes, first of all, that the principle of cumulative charges was applied by the Nuremberg Tribunal, especially regarding war crimes and crimes against humanity.[49]

49. The indictment against the major German War Criminals presented to the International Military Tribunal stated that "the prosecution will rely upon the facts pleaded under Count Three (violations of the laws and customs of war) as also constituting

crimes against humanity(Count Four)". Several accused persons were convicted of both war crimes and crimes against humanity. The judgement of the International Military Tribunal delivered at Nuremberg on 30 September and 1 October 1946 ruled that "[...]from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity." The commentary on *Justice* case held the same view: "It is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crimes." The trials on the basis of Control Council Law No. 10 followed the same approach. *Pohl, Heinz Karl Franslau, Hans Loerner,* and *Erwin Tschentscher* were all found to have committed war crimes and crimes against humanity. National cases, such as *Quinn v. Robinson*, the *Eichmann* case and the *Barbie* case also support this finding. In the *Tadic* case, the Trial Chamber II of ICTY, based on the above reasoning, ruled that "acts which are enumerated elsewhere in the Statute may also entail additional culpability if they meet the requirements of persecution." Thus, the same acts, which meet the requirements of other crimes--grave breaches of Geneva Conventions, violation of the laws or customs of war and genocide, may also constitute the crimes against humanity for persecution.

110. Regarding especially the concurrence of the various crimes covered under the Statute, the Chamber, in the *Akayesu Judgement*, the first case brought before this Tribunal, considered the matter and held that:

> "[...]it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the previous creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, [...]or (b) where one offence charges accomplice liability and the other offence charges liability as [...]"[50].

111. Trial Chamber II of the Tribunal, in its *Kayishema and Ruzindana Judgement*, endorsed the afore-mentioned test of concurrence of crimes and found that it is only acceptable:

> "(1) where offences have differing elements, or (2) where the laws in question protect differing social interests."[51]

---

[50] *Akayesu Judgement*, para.468.

[51] *Kayishema and Ruzindana Judgement*, para. 627.

112. Trial Chamber II ruled that the cumulative charges in the *Kayishema and Ruzindana Judgement* in particular were legally improper and untenable. It found that all elements including the *mens rea* element requisite to show genocide, "extermination" and "murder" in the particular case were the same, and the evidence relied upon to prove the crimes were the same. Furthermore, in the opinion of Trial Chamber II, the protected social interests were also the same. Therefore, it held that the Prosecutor should have charged the Accused in the alternative.[52]

113. Judge Tafazzal H. Khan, one of the Judges sitting in Trial Chamber II to consider the said case, dissented on the issue of cumulative charges. Relying on consistent jurisprudence he pointed out that the Chamber should have placed less emphasis on the overlapping elements of the cumulative crimes.

> "What must be punished is culpable conduct; this principle applies to situations where the conduct offends two or more crimes, whether or not the factual situation also satisfies the distinct elements of the two or more crimes, as proven."[53]

114. In his dissenting opinion, the Judge goes on to emphasized that the full assessment of charges and the pronouncement of guilty verdicts are important in order to reflect the totality of the accused's culpable conduct.

> "[...]where the culpable conduct was part of a widespread and systematic attack specifically against civilians, to record a conviction for genocide alone does not reflect the totality of the accused's culpable conduct. Similarly, if the Majority had chosen to

---

[52] *Kayishema and Ruzindana Judgement*, para. 645, 646 and 650.

[53] *Kayishema and Ruzindana Judgement*, Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan Regarding the Verdicts Under the Charges of Crimes Against Humanity/Murder and Crimes Against Humanity/Extermination, para. 13.

convict for extermination alone instead of genocide, the verdict would still fail to adequately capture the totality of the accused's conduct."[54]

115. This Chamber fully concurs with the dissenting opinion thus entered. It notes that this position, which endorses the principle of cumulative charges, also finds support in various decisions rendered by the ICTY. In the case of the *Prosecutor v. Zoran Kupreskic and others*, the Trial Chamber of ICTY in its decision on Defence challenges to form of the indictment held that:

"The Prosecutor may be justified in bringing cumulative charges when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others."[55]

116. Furthermore, the Chamber holds that offences covered under the Statute - genocide, crimes against humanity and violations of Article 3 common to Geneva Conventions and of Additional Protocol II - have disparate ingredients and, especially, that their punishment is aimed at protecting discrete interests. As a result, multiple offenses may be charged on the basis of the same acts, in order to capture the full extent of the crimes committed by an accused.

117. Finally, the Chamber notes that in Civil Law systems, including that of Rwanda, there exists a so called doctrine of *concours idéal d'infractions* which allows multiple charges for the same act under certain circumstances. Rwandan law allows multiple charges in the following circumstances:

"Penal Code of Rwanda: Chapter VI - Concurrent offences:

---

[54] *Ibid.* para.33.

[55] *The Prosecutor v. Zoran Kupreskic and others*, Decision on Defence Challenges to Form of the Indictment, IT-95-16-PT, 15 May 1998.

Article 92: Where a person has committed several offences prior to a conviction on any such charges, such offences shall be concurrent.

Article 93: Notional plurality of offences occurs:

1. Where a single conduct may be characterized as constituting several offences;

2. Where a conduct includes acts which, though constituting separate offences, are interrelated as deriving from the same criminal intent or as constituting lesser included offences of one another.

In the former case, only the sentence prescribed for the most serious offence shall be passed while, in the latter case, only the sentence provided for the most severely punished offence shall be passed, the maximum of which may be exceeded by half".[56]

---

[56] The English text quoted is an unofficial translation of the following "Code pénal du Rwanda : Chapitre VI - Du concours d'infractions" :

Article 92 - Il y a concours d'infractions lorsque plusieurs infractions ont été commises par le même auteur sans

qu'une condamnation soit intervenue entre ces infractions.

Article 93 - Il y a concours idéal :

1. Lorsque le fait unique au point de vue matériel est susceptible de plusieurs qualifications ;

2. Lorsque l'action comprend des faits qui, constituant des infractions distinctes, sont unis entre eux comme procédant d'une intention délictueuse unique ou comme étant les uns des circonstances aggravantes des autres.

Seront seules pronocées dans le premier cas les peines déterminées par la qualification la plus sévère, dans le second cas les peines prévues pour la répression de l'infraction la plus grave, mais dont le maximum pourra être alors élevé de moitié".

118. Consequently, in light of the foregoing, the Chamber maintains that it is justified to convict an accused of two or more offences for the same act under certain circumstances and reiterates the above findings made in the *Akayesu Judgement*.

3. THE DEFENCE CASE

119. The Accused pleaded not guilty to all counts of the Indictment at his initial appearance on 30 May 1996. The Defence case consisted of two main arguments. The first of these was a general defence. The second was a defence of alibi.

3.1 The Arguments of General Defence

120. The Defence developed several main lines of argument. The Defence argued that the political activity of the Accused was minimal. The Accused testified and, his Counsel argued, that his involvement in the *Interahamwe za MRND* was limited to participation in meetings of this organization in its earliest stage, which it was argued was as a "think tank" or "group of reflection"[57]. The Defence also argued that the meaning of *Interahamwe* changed significantly between 1991 and 1994. The Defence argued that the Accused was a member of the *Interahamwe za MRND* at its embryonic stage, and that the term *Interahamwe* later included people who were not all members of the *Interahamwe za MRND*.

[57] See Testimony of Georges Rutaganda, transcript of 08, 09, 22 April 1999.

121. The Defence Counsel questioned the credibility and reliability of several Prosecution witnesses. Counsel for the Defence submitted that the case file was "contaminated"[58] by virtue of testimony given concerning the "Hindi Mandal" building in the Amgar garage complex. The Defence further submitted that certain evidence gathered by Captain Luc Lemaire was illegally collected and thus could not be tendered as evidence by the Prosecutor. The Defence argued that the United Nations Assistance Mission for Rwanda ("UNAMIR") contingent, of which Captain Lemaire was a part, had been prohibited from gathering intelligence[59].

122. The Defence called fourteen witnesses, including the Accused, who testified at length about the role of the Accused as second Vice-President of the *Interahamwe*. The Chamber notes that a number of Defence witnesses testified that the Accused took action to help others, including Tutsi refugees. The Defence further argued that, contrary to the allegations that the Accused detained Tutsi civilians in the "Hindi Mandal" building at the Amgar garage, that Tutsis actually sought refuge there and that the Accused permitted this and that he provided them with basic foodstuffs and medicine.

123. The Accused testified before the Chamber that prior to the advent of multiparty politics in Rwanda in 1991, he was a businessman with no interest in political participation. After being released from a presidentially assigned post in June 1991, he stated, he worked for himself, operating an import and distribution business registered as "Rutaganda SARL." The Accused

[58] See Closing Argument of the Defence, transcript of 17 June 1999.

[59] *Ibid.*

testified that he focused on his business to the exclusion of any other civic, political, or administrative activities.

124. The Accused stated that he joined the MRND party in September or October 1991, in an atmosphere of increasing political tension in order to benefit from its protection and to safeguard his business interests. This tension was as a result of increasing competition between President Habyarimana's ruling MRND party and new opposition parties as they vied for members. It was in this context, the Accused testified, that he chose to join the MRND party because of the specific protections it afforded. He further submitted that although his father had been a member of the MDR, the strong regional affiliations which the MDR was reputed to have did not seem to him to be beneficial in light of the political climate in Kigali in 1991. It was at his father's urging, he stated, that he joined the MRND party in 1991. The Accused was, he claimed, simply a member of the MRND party – with no time for, or interest in, wielding political influence within the party or among the general population.

125. Nonetheless, in November 1991,the Accused was invited to attend an initial meeting of intellectuals who sought to find ways to recruit for and promote the MRND party. The Accused told the Chamber that he was also to become an elected representative in the national committee of the MRND in April 1993, as a representative of Gitarama *Préfecture*.[60] As such, he was one among fifty-five representatives, five from each *Préfecture*, who met at National Assemblies and voted on party decisions and actions.

126. A select group of persons, whom the Accused referred to as intellectuals, convened in order to devise strategies for attracting new members and for furthering the MRND party's objectives in the new, multiparty political environment. This group was known as the *Interahamwe za MRND*. The Accused indicated to the court that this was an embryonic "think tank" for the MRND. The Accused testified that he did not know when this initial "think tank" was organized, but that he was nonetheless involved in the initial impetus behind the creation of

[60] See *Testimony of Georges Rutaganda, transcript of 22 April 1999.*

this committee. He participated in meetings of this group, he testified, in order to contribute his own ideas to the party. He stated that although more people joined this core group, they were all personally invited rather than publicly recruited. He stated that he attended one of their meetings for the first time in November 1991, at the invitation of Pheneas Ruhumuriza, who was later to become first Vice-President of the *Interahamwe za MRND.*[61]

[61] See *Testimony of Georges Rutaganda, transcript of 08 April 1999.*

127. According to the testimony given by the Accused, *Interahamwe* is a Kinyarwanda word that was used frequently by persons in political parties or other associations, which indicated a close relationship between people who did something together. This name was drawn, he explained, from a popular and patriotic song from the 1960s, which was associated with the MDR. Witness DNN gave a similar description of the source of the term Interahamwe.[62]

128. The Accused testified that the *Interahamwe za MRND* quickly grew from its embryonic form and gained both senior members and young recruits. The five members who were to compose the National Committee of the *Interahamwe za MRND* were selected by a larger assembly. The Accused was appointed as second vice president even though he declined to be a candidate in elections. He testified, however, that the five official positions comprising the National Committee, as those of ensuing committee heads and organizers were really only formalities, with no attached responsibility or authority.

129. The Accused stated that although the Committee had a clear structure and its members had titles which suggested a hierarchy of responsibility and authority, his position as second vice-president was a mere formality, and he did not act in a capacity commensurate with the responsibility such a title might suggest. The Accused testified that there was no real leadership structure, budget, or autonomy - but that the titles, communiques, and meetings simply reflected a hope for future actions of the *Interahamwe za MRND*. The Accused also testified that as second vice president and member of this National Committee, he acted as a mediator and liaison between the National Committee of the MRND party and the young members who joined the party, quite possibly as a response to the organization and initiative of the *Interahamwe za MRND*.

[62] See *Testimony of Witness DNN, transcript of 16 February 1999.*

130. According to the testimony of the Accused, the size and character of the *Interahamwe za MRND* changed significantly between its inception and the events which followed the death of President Habyarimana in April 1994. During his testimony, the Accused described a transformation in the popular usage and understanding of the word Interahamwe, as well as an increase in the number of people who joined the MRND, and in particular the *Interahamwe za MRND*. The Accused testified that the *Interahamwe za MRND* was initially composed of a small number of men who were mostly between the ages of thirty and forty. The Accused later referred to the *Interahamwe* as "the youth", and also stated that increasing numbers of Rwandan youth were drawn to the party and were subsequently organized. The Accused testified that by 6 April 1994 the *Interahamwe* had become an entirely different organization than the one in which he was originally involved. The Accused stated that the organization had already changed by mid-1992, and continued its transformation through 1994.

131. The Accused testified that the evolution of the *Interahamwe* as a youth wing of the party was an organic development, which he did not foresee when he joined this committee at its inception. Responding to questions concerning President Habyarimana's opinion of the *Interahamwe*, the Accused testified that in May 1992 President Habyarimana expressed his approval and encouraged "the youth" to join the organization.

132. The Accused stated to the court that the *Interahamwe* was popularly understood to encompass many more people than the *Interahamwe za MRND*. The word *Interahamwe*, and even *Interahamwe za MRND*, gained a pejorative, or negative meaning in popular usage and was used to describe a large and loosely organized militia which is said to have fought against the RPF[63], as well as to connote certain persons who had committed acts of banditry and violence[64]. While stating that popular understanding of the word *Interahamwe* had changed, the Accused

[63] See *Testimony of Georges Rutaganda, transcript of 23 April 1999.*

[64] See *Testimony of Georges Rutaganda, transcript of 22 April 1999*

added that the way in which this term was used after 6 April 1994 had little to do with the MRND, and that he had little knowledge of the persons perpetrating such acts, much less any political, social, or ideological connection with them.

133. Testifying about roadblocks that *Interahamwe* members were alleged to have manned, and where the Accused was alleged to have been, the Accused stated that roadblocks were initially set up and manned by civilians, largely through efforts of the civil defence, which was a multi-ethnic corps of citizens rallying together against the Rwandan Patriotic Front (the "RPF") army. Some confusion may have arisen, he suggested, because some people wore clothing falsely said to be a uniform of the *Interahamwe*. He further testified that the *Interahamwe* did not create or monitor roadblocks, and was not officially or unofficially involved at the roadblock sites, or in criminal acts allegedly committed there and therefrom.

134. Testifying about special clothing worn by *Interahamwe* and alleged Interahamwe members, the Accused submitted that there were both official and unofficial clothing and accessory items which were worn and promoted by the MRND. He also stated that there was no official uniform as such. He further stated that impostors wore clothing which had been associated with the MRND or *Interahamwe* when committing "evil" or criminal acts. This was the subject of a communiqué issued by the National Committee of the *Interahamwe za MRND*, addressed to the International Community and signed by the Accused, which discouraged members from wearing their "uniforms." According to the Accused, this communiqué was intended to dissociate the *Interahamwe* from Rwandan youths who were not members of, but who were publicly perceived as being members of and acting under the auspices of, the *Interahamwe za MRND* and who committed criminal or violent acts.

135. Witness DNN testified, to the contrary, that *Interahamwe za MRND* members did have a uniform, made out of kitenge fabric in yellow, blue and black colours. However, some wore clothes of the same colour as the party flag, that is black, yellow and green. This uniform was

needed to distinguish the members of *Interahamwe* from members of the youth wings of other political parties.[65]

136. Finally, the Accused testified that although he did not officially resign after 6 April 1994, his position in the *Interahamwe* and *MRND* was effectively rendered irrelevant, in what he described as "chaos", both within the organization and throughout Rwanda.

3.2 Defence of Alibi

137. The Defence case included submission of a defence of alibi. In his testimony, the Accused stated that he was in locations other than those alleged to be crime sites, or involved in activities other than those alleged during the times at which the crimes enumerated in the indictment were allegedly committed.

[65] See *Testimony of Witness DNN, 16 February 1999.*

138. In her closing argument, Defence Counsel stated that a notice of alibi. The Chamber notes that no record of a notice of alibi was filed at any time, and that there is no record of such a notice in the judicial archives or within the judicial record. Notwithstanding this, the Trial Chamber finds it appropriate and necessary to examine the defence of alibi, pursuant to Rule 67(B) of the Rules which states that "Failure of the defence to provide such notice under this Rule shall not limit the right of the Accused to rely on the above defences."[66]

139. The Accused, Witness DF, Witness DD, and Witness DDD testified regarding the whereabouts of the Accused between the evening of 6 April 1994 to 9 April 1994.

[66] See *Rules of Procedure and Evidence*, Rule 67.

140. The Defence submitted that in the first days following the crash of the aeroplane carrying President Habyarimana, the Accused was busy seeking protection for his family, trying to obtain news, and searching for food and other goods. The Accused testified that on the night of 6 April 1994, he and his friends were taken out of a car at a location close to the Kimihurura roundabout. They were first told to sit down and later they were told to lie down on the road. They were finally released, the Accused testified, at 3:00 a.m. on 7 April 1994. They were then stopped at another roadblock manned by gendarmes in Kicukiro. At that time, they were asked to get out of the car, to show their identity cards and to sit on a hill by the side of the road before being allowed to continue on their way. The Accused testified that he then passed "Sonatubes," the airport, Bugesera and the town before reaching his home. The Accused stated that he remained at home on 7 April 1994.[67]

141. Witness DF stated that he had a drink with the Accused on the evening of 6 April 1994, and that DF left the Accused at 9:00 p.m. that night. [68]

142. Witness DD testified that he had a drink with the Accused on the evening of 6 April 1994. Witness DD further testified that he and the Accused separated on the night of 6 April 1994. Witness DD stated that he telephoned the home of the Accused on the morning of 7 April 1994 and the Accused's wife told DD that the Accused had not yet returned. Witness DD stated that at

---

[67] See *Testimony of Georges Rutaganda, transcripts of 21 and 22 April 1999.*

[68] See *Testimony of Witness DF, transcript of 17 March 1999.*

about 1:00 p.m. he contacted the Accused. During this conversation, the Accused told DD that he had encountered problems at Kimihurura on the night of 6 April 1994. Witness DD testified that the Accused told him that members of the Presidential Guard had stopped him there, and that he had spent the night sleeping on the ground.[69]

[69] See *Testimony of Witness DD, transcript of 16 March 1999.*

143. Witness DDD testified that she saw the Accused at 3:00 am on 7 April 1994. At this time, the Accused told DDD that many roadblocks had been erected. Witness DDD testified that the Accused told her that he was stopped at a roadblock at Kimihurura roundabout at 9:00 p.m. on 6 April 1994 and left that roadblock after 12:00 a.m. on 7 April 1994. Witness DDD testified that she and the Accused stayed at home together on 7 April 1994.[70]

144. The Accused stated that on 8 April 1994, he walked towards the city from Kicukiro neighbourhood with a friend in order to find out whether his family should remain at home or leave. The Accused testified that he and his friend were shot at by the RPF as they neared a gendarmerie squad. After this, he decided to move his family. He stated that he took the road towards Rebero and left his family at the Rebero hotel. The Accused testified that he returned back in the evening and went to the parish mission by car. At the mission, he testified, he found a number of people whom he stated to the Chamber were seeking refuge from the RPF. The Accused proceeded, he testified, to visit the Conseiller to inquire where these refugees would spend the night. He testified that at his suggestion, some of these people followed him to his home where they spent the night.

145. The Accused testified that he went to the Rebero hotel on the morning of 9 April 1994, passing through roadblocks in front of the ETO school and around the air station. He testified that he returned with his family along the same route by which he had come. Arriving home, the Accused testified that he called his father, who informed him that his friend Jean Sebagenzi and his family had been killed. The Accused testified that he then went to see the Conseiller to get permission to move within the sector, in order to follow his father's wishes and bury the Sebagenzi family. The Accused testified that he was denied this permission by the Conseiller.

---

[70] See *Testimony of Witness DDD, transcript of 15 February 1999.*

146. Witness DDD stated that she and the Accused went to the Rebero hotel, located on Rebero hill behind Kicukiro Sector on 8 April 1994. DDD testified that she next saw the Accused on 9 April 1994, at which time they left the Rebero hotel and returned to their house. Witness DDD stated that at that time a curfew had been imposed, and that the Accused went to the Sector office seeking special permission to move freely. DDD further testified that the Accused was denied such permission at the Sector office.

147. The Accused, Witness DD, Witness DF, and Witness DDD testified as to the whereabouts of the Accused on 10 April 1994.

148. The Accused testified that he returned to see the Conseiller on Sunday 10 April 1994. At this time he was granted a permit allowing free movement and exempting him from the curfew which was in place. The Accused testified that he reached the home of a friend in Muyima, where caskets containing the bodies of the Sebagenzi family were being loaded into a pickup truck. The Accused stated to the Chamber that he continued along with these people as they made their way to Nyirambo to bury these people. En route, he testified, they passed through many roadblocks - where the caskets were even opened to verify that they contained only dead bodies.

149. Witness DDD testified that the Accused received permission to move on 10 April 1994. Witness DDD learned of this when the Accused returned home in order to take a vehicle to go to the abovementioned burial. DDD testified that the Accused returned at 7:00 p.m. on the evening of 10 April 1994. Upon his return he explained to DDD that it had taken a long time because they had been stopped at many roadblocks, they had been searched, and that the caskets were even searched at the Agakingiro roadblock, where also that there were six people to bury.

150. Witness DF stated that he saw the Accused at this burial, which DF thought took place on 10 April 1994. Witness DF further testified that people manning the roadblock at Agakingiro wanted to open the caskets being transported for burial, and that they were also stopped close to a mosque at Biryogo and at a roadblock close to St Andrews school in Nyirambo.

151. Witness DD provided a detailed description of the day of the burial of 7 people in 5 coffins. He testified that they were detained at the Agakingiro roadblock, 10 metres from Amgar, while the coffins that he and the Accused were transporting were searched. Witness DD could not remember if the date was April 10; however, he thought that it took place on a Sunday afternoon.

152. The Accused, Witness DDD, Witness DF, and Witness DS gave testimony concerning the whereabouts of the Accused between 11 and 14 April 1994.

153. The Accused stated that at 7:30 a.m. on 11 April 1994, he left Kicukiro along with thirteen other people in a "505" sedan. They stopped at the house of an acquaintance where, the Accused testified, he wished to leave his family. Since this was not possible, they returned to his house. The Accused stated that they drove to Masango *Commune* instead, and that they arrived in Karambi in Masango at around 5:30 p.m. The Accused testified that he remained in his house in Karambi on the night of 11 April 1994. He stated that he had never been into the ETO compound, and was not near the premises on 11 April 1994. The Accused testified that early in the morning of 12 April 1994, he began thinking about how to finish construction of his house in Karambi. He testified that he drew up a contract with a trader and a mason for the construction work. He supervised the commencement of this work on 13 April 1994. The Accused stated that he returned to Kigali on the evening of 14 April 1994. He further testified that he could not reach Kicukiro because of the danger involved. Instead, he stated, he remained at the Amgar garage complex. The Accused testified that he found people hiding there. He stated to the Chamber that he took pity on these people and fed and cared for them. He also began to think of a strategy to evacuate them.

154. Witness DDD stated that she arrived in Kiyovu with the Accused at 9:00 a.m. on 11 April 1994 and stayed with a friend who was living there until about midday on that same day. DDD testified that they did not receive any special treatment at the roadblocks. Each of the adults had to show their identity card at the roadblocks. Witness DDD stated that the officials manning the roadblocks did not have a special reaction to any of the occupants of the vehicle she traveled in. They crossed Nyabarongo and arrived in Masango at about 6:00 p.m. Witness DDD testified that

the accused remained there for three days, departing for Kigali on 14 April 1994. Witness DDD testified that over the course of these three days, the Accused did not participate in any meetings.

155. Witness DF testified that the Accused left after the burial on 10 April 1994, and came back after two days. Witness DF stated that he saw the Accused at the Amgar garage. DF further stated that all of the people at the Amgar garage were there willingly, and had not been taken there by force.

156. The Accused, Witness DDD, Witness DEE, and Witness DS gave testimony concerning the whereabouts of the Accused from 15-18 April 1994.

157. The Accused testified that he arrived at the Amgar complex on 14 April 1994 and remained there on 15 April 1994. He also tried to collect money before returning to Masango *Commune*, where he told the Chamber he remained during the night of 16 April 1994. The Accused stated that he returned to Kigali early in the morning on 17 April 1994. The Defence Counsel submitted that the Accused organized the evacuation of vulnerable persons from the Amgar garage complex. The Chamber notes that the Accused did not specify a date on which the said evacuation occurred. The Accused stated that he met his mother and sister at the Red Cross in Kiyovu. He took them to the Amgar complex, he testified, and later a convoy was organized to move them. This was done with great difficulty. The Accused testified that they were sent back during their first attempt. The Accused testified that he remained in Kigali from 17 April 1994 until 29 April 1994.

158. Witness DEE testified that on 12 April 1994, she went to CHK hospital in Kigali. DEE stated that she then spent two days there and on the third she went to the Amgar complex. DEE stated that she spent two days there, and that she saw the Accused there on both days. Witness DEE testified that when she saw the Accused there, he was wearing civilian clothing. DEE further testified that she never saw him enter the house carrying a weapon. Witness DEE testified that she spent two days at the Amgar complex and that on the third day the Accused organized the departure for their respective *préfectures*.

159. Witness DEE testified that she, the Accused , and four other people, departed in a vehicle which the Accused drove. Witness DEE testified that they were stopped at roadblocks. On 9 February 1999, DEE stated to the Chamber that at the first roadblock everyone in the car, including the Accused, was asked to produce their identity cards. However, on 10 February 1999, during her second day of testimony, she stated that they were not even asked for their identity cards[71]. This Witness testified that there was no special recognition or relationship between the Accused and the roadblock controller, and that this was evident because the Accused was asked to produce his identity card.

160. At a second roadblock which the witness stated was near the petrol station at Nyabugogo, the Accused was asked again to show his identity card. The people manning the roadblock also demanded the identity card of Witness DEE. Upon seeing it, these people told the witness that they should kill her. At this point, Witness DEE testified, the Accused begged them not to do so and gave them money. The Witness testified that the people at the roadblock did not know the Accused, which surprised her. DEE stated that she found this surprising because she thought that the Accused was well known throughout the country as he was an official of the MRND party.[72]

161. At a third roadblock, which was not far from the second, and was situated along the road, in the direction of the road to Gitarama, there were many people who had been stopped. DEE testified that on the evening before this trip, the RTLM had broadcast that the vehicle in which

[71] See *Testimony of Witness DEE, transcripts of 9 & 10 February 1999.*

[72] See *Testimony of Witness DEE, transcripts of 9 & 10 February 1999.*

they were traveling was being sought because the vehicle was said to have been used to find Tutsi and hide them. The witness testified, however, that the owner alleged by the RTLM was not the Accused, but was a person who was at the Amgar garage. This car was identified at the roadblock, but its passengers were not required to produce their identity cards. They turned around and went straight back to the Amgar complex. Witness DEE testified that the Accused organized another trip the next day. They traveled in a different car and reached Masango that night, 17 April 1994. They stayed in Masango at the house of the Accused's father.

162. Witness DDD stated that the Accused returned to Masango on 16 April 1994. DDD testified that the Accused left for Kigali again on the evening of 17 April 1994. Witness DDD further testified that the Accused did not do anything special when he was at Masango, and that all he did was bring back food.

163. The Accused testified that he remained in Kigali without leaving between 17April 1994 and 29 April 1994. He testified that he was very busy selling out his stocks of beer during this time. The Accused testified that he was approached by the Red Cross during the week of 17 to 24 April 1994. The Accused testified that the Red Cross asked him to draw up a communiqué appealing to MRND members, and in particular to members of the *Interahamwe za MRND*, if they were involved in killing, to stop, and to facilitate the transport of the wounded. The Accused stated that he left Kigali on 29 April 1994 and went to deposit his money at a bank in Gitarama. He then went to Masango to visit his family and stayed the night there. The Accused stated that he returned to Amgar on the following day and stayed there for about a week. On 8 May 1994, the Accused returned to Masango. He stated that he tried once again to deposit money in Gitarama before leaving. This did not work, so he asked his wife to deposit this money. He testified, without providing a date, that he went immediately back to Kigali and tried to shut down his business. The Accused testified that he could not state that he remained at Amgar permanently during the month of May 1994. Rather, he testified, he moved around a great deal and tried to attend to many matters.

164. Witness DDD stated that the Accused went to Kigali from Masango on the evening of 17 April 1994 and did not return for a period of two to three weeks.

165. Witness DEE testified that she saw the Accused in Butare once but that they did not have any interaction. DEE stated that this was either at the end of April or the beginning of May 1994. DEE testified that Rutaganda did not stay in Butare for the month or so that followed. Witness DEE believed that the Accused was in Masango staying either with his parents or at his home. However, DEE never actually saw the Accused in Masango.

166. The Accused, Witness DDD, Witness DS, Witness DD, Witness DF, and Witness DEE gave testimony concerning the whereabouts of the Accused from the end of May 1994 to the beginning of July 1994.

167. Defence Counsel submitted that the Accused left Kigali on 25 May 1994 and that he did not return there again. The Accused stated that he left the Amgar complex in Kigali on 27 May 1994. The Defence further stated that the Accused reached Cyangugu on 31 May 1994. The Accused testified that one week later, around 10 June 1994, he left Rwanda. He further testified that he returned to Rwanda twice to see his family. He stated that he did not return to Rwanda after the end of June 1994.

168. Witness DDD testified that the Accused arrived at Masango on the evening of 27 May 1994. According to her testimony, DDD and the Accused departed for Gitarama together on 28 May 1994. DDD stated that they then went to Ngange, in Kivumu *Commune* before returning to Masango. According to the testimony of DDD they then departed for Cyangugu on the following day, 29 May 1994. They passed through roadblocks. At each one they had to present identity cards. DDD testified that the people manning the roadblocks did not recognize the Accused. DDD testified that they reached Cyangugu on the night of 31 May 1994. DDD testified that they stayed there together for a month, before leaving on 1 July 1994, and that the Accused did not return to Kigali.

169. Witness DS testified that he and the Accused left Kigali on 27 May 1994 and that they went to Gitarama.

170. Witness DD testified to having left the Amgar complex in company of the Accused on 27 May 1994. They experienced difficulties crossing roadblocks, and had to pay people who were manning the roadblocks. Witness DD testified that their trip lasted three days, and that this was due to the difficulties they encountered trying to cross the roadblocks. DD stated that he saw the Accused often when the Accused came to visit his family in Cyangugu.

171. Witness DF stated that DF and the Accused left the Amgar complex on the same day, on 27 May 1994. DF testified that the Accused was at first not allowed to pass through the Gikongoro roadblock, and that if he had been able to do so they would not have spent so many days there. DF stated that they reached Cyangugu on 31 May 1994. Witness DF stated that DF left Rwanda on 17 July. DF thought that the Accused departed two weeks earlier. DF testified that when the Accused reached Cyangugu, the Accused did not go to Kigali or Gikongoro.

172. Witness DEE stated that around 17 to 19 June 1994, she left Gikongoro for Cyangugu with the Accused and others. At a roadblock the Accused's vehicle was searched. DEE testified that the Accused's attitude was not that of someone in control when they were at the roadblocks. DEE testified that other people were supervising and controlling the roadblocks. DEE testified that on the following day the Accused suggested that he should take them to Bukavu, Zaire. They went to Zaire at some point not later than 26 June 1994.[73]

[73] See *Testimony of Witness DEE, transcripts of 09 & 10 February 1999.*

173. The Chamber considers the defence of alibi, after having reviewed the Prosecutor's case in the factual findings on the relevant paragraphs of the Indictment.[74]

[74] See Chapter 4 of this Judgement.

4. FACTUAL FINDINGS

4.1 Paragraph 10 of the Indictment

174. Paragraph 10 of the indictment reads as follows:

> "On or about April 6, 1994, Georges Rutaganda distributed guns and other weapons to *Interahamwe* members in Nyarugenge commune, Kigali."

Events alleged

175. Witness J, a Tutsi man who lived in the Cyahafi sector in the Nyarugenge *Commune*, testified that he had known the Accused since he was young because they were in neighboring *Communes*. He knew the Accused as the President of a sports team, as a Tuborg beer importer, and as someone he had seen leading several demonstrations of the *Interahamwe* of the MRND party. Witness J said that on 15 April, a policeman named Munyawara arrived in Cyahafi from Kimisagara and said that the *Inyenzi* had attacked and shot at the councillor of Cyahafi sector. The policeman gathered people together, including Witness J, and told them to follow him to go and fight the *Inyenzi* who were coming down.

176. Witness J said the group stopped just below a bar called Mount Kigali by a public standpipe near Mr. Shyirakera's house. At 3:00 p.m., they saw a pick-up truck arrive and stop near the standpipe. They approached the truck and saw two people in front and two people in back in the open bed of the truck. The Accused got out on the passenger side, and went to the back of the truck. He opened the cab and they saw him distributing weapons to young people, some of whom Witness J said he recognized as *Interahamwe*. Among these he named Bizimungo, Ziad, Muzehe, Cyuma and Polisi and said they were *Interahamwe* who had gone for training in the *Commune* of Bicumbi. He said they were his neighbors and he knew them. Witness J said that he was close to the vehicle, indicating the length of the courtroom as a measure. He clarified on examination that the Accused did not himself distribute the weapons but

was standing next to the truck as they were distributed. After this distribution of weapons, according to Witness J, the shooting started. Witness J testified that Muzehe immediately shot someone called Rusagara, who was standing with them, and Rusagara died on the spot. He estimated that from the time of the arrival of the vehicle to the time of this first shot, less than ten minutes passed. When he heard the shot, Witness J immediately fled. The shooting continued, and Muzehe and Bizimungo shot at young people known to Witness J, whom he named as Kalinda Viater and Musoni Emmanuel. Witness J saw them fall immediately and jumped over their bodies as he fled home. He stated that all the men he saw shot were Tutsi.

177. On cross-examination, the Defence produced two pre-trial written statements of Witness J. In the first statement, which was dated 5 December 1995, the witness said the event described had occurred on 6 April 1994. In the second statement, which was dated 3 May 1996, the witness had corrected this date to read 7 April 1994. Witness J maintained that it was either 15 or 16 April that Munyawera came to gather people together and stated that he had said it was 16 April at the time he made the statement. Witness J noted that it must have been 16 April, as on 6 April the plane had not yet been shot down. He said it was not possible that this happened on 7 April either because there was still calm on that date. He also stated that he did not remember saying to the Office of the Prosecutor that the event took place on 7 April.

178. Witness J was also questioned as to whether the councillor of Cyahafi was shot before or after the distribution of arms. In his testimony he indicated the shooting was beforehand and in the pre-trial statement it was indicated as having happened afterwards. The witness stated that the councillor was shot during a meeting which took place before the firearms arrived. He suggested that what he said might not have been written down accurately. He explained that he had been in a hurry to get back to work when the interpreter translated the statement into Kinyarwanda. The interpreter had said he would come back to him with a revised statement but Witness J said he never did. When asked whether he had not met with investigators again on 3 May 1996, he said he didn't really remember that.

179. Witness J confirmed on cross-examination that the Accused did not distribute the weapons but that he got out and stood next to the vehicle while those in the back distributed the weapons. Witness J was also questioned as to when he fled - whether it was after Mr. Rusagara had been shot as he stated on direct examination, or as soon as people began getting out of the pickup truck, as reported in the pre-trial written statement. He responded that when the young men received weapons and approached them, they thought they were going to be defended. But then the firing began and at that time he fled.

180. Witness M, a Tutsi man, testified that he was in Nyarugenge *Commune*, in the sector of Kimisagara, when he heard of the President's plane crash on RTLM radio. On the next day, 7 April, he went to take refuge at the CHK hospital, which was 8 km from his house, after seeing people who had been killed by the *Interahamwe* and left strewn along the road, including neighbors he knew. On the way to the hospital he saw *Interahamwe* who were armed and bodies of people who had just been killed. He also saw two roadblocks, manned by soldiers and *Interahamwe*, with dead bodies lying nearby. He avoided these roadblocks for fear of being killed. At the hospital, Witness M saw many refugees and many dead bodies, three of which he recognized as Minister Zamubarumbao Fredrick and his daughter, and councillor Ngango Felistian. On 12 April, Witness M left the hospital and went to the Cyahafi sector, where he took refuge in the home of Nyamugambo, a Tutsi man, who told him that the sector was being protected by soldiers.

181. Witness M said that the sector was peaceful until 15 April, when the Accused "had the killings started". He said he saw the Accused at 9:30 a.m. with six people inside a pick-up truck. They were armed with guns and wearing UNAMIR clothing and vests. Witness M was at a standpipe with other people, and had been there about one hour when the Accused arrived, wearing a military uniform, and stopped in front of the house of Shirakara Nishon. After he arrived, Witness M saw the Accused giving the guns he had brought to the *Interahamwe*, and saw him give a gun to a man named Muzehe. Witness M said the Accused sent his driver, Francois, to look for *Interahamwe* to whom the guns would be distributed. He said the guns were short black rifles, which he saw himself, and he said he knew the men were *Interahamwe* because the

person leading them was the vice-president of the *Interahamwe* and they were wearing the clothing of the MRND party. He said that the Accused told the *Interahamwe* to kill the Tutsi and if they did not, he would bring in a tank to exterminate them all. Witness M said he was eight to ten meters a way from the vehicle and that the Accused, whom he identified in court, was speaking in a loud voice.

182. Witness M said that the killing began that afternoon. After hearing the Accused say that the Tutsi should be killed, Witness M went back to where he was staying. In the afternoon, Muzehe shot Nyamugambo, the person who had provided refuge to Witness M, with the gun he had received from the Accused and then he came to loot the house. Witness M heard Muzehe say to an *Interahamwe* who was with him that he was going to tell the Accused that he had already started the job, and Muzehe left directly to go towards the Accused. Witness M was not able to hear what was said thereafter because he fled immediately. He stated that Muzehe did not kill him immediately because Muzehe was his friend and a taxi driver for whom he was a client. According to Witness M, of the 31 people who took refuge in Nyamugambo's house prior to the 15 April, the others were all killed by the *Interahamwe*. He said he knew they died because he hadn't seen them since. Witness M subsequently sought refuge with Alexander Murego, whose house was nearby, and he stayed in this house until the end of the war, during which his parents were killed.

183. On cross-examination, Defence counsel questioned the circumstances in which Witness M went to the CHK. The witness stated that he went alone and that all those in the house with him separated when they fled. Defence counsel questioned the date on which Witness M saw the Accused, which he testified had been 15 April. In the pre-trial written statement dated December 4, 1995, the date had been recorded as 16 April. The witness maintained that it was 15 April when he saw the Accused. The Defence pointed out to the witness that on direct examination he had testified that he was with five to ten people at the standpipe, whereas his written statement had indicated that eighty people were there, and that while he testified that the date on which he left his house for refuge was 7 April, the pre-trial written statement indicated this date as 9 April. Witness M affirmed that there were eighty people at the standpipe as he had said in the pre-trial

statement. He maintained that he left his house on 7 April, suggesting that it may have been written down incorrectly.

184. The Defence also challenged Witness M to explain why he had testified that he went to the standpipe to get water, while the pre-trial written statement indicates that he said he went to the standpipe to get guns, which he heard would be handed out for protection of the Tutsi. Witness M affirmed that he went to get guns as stated in his pre-trial statement and he said he thought he had testified to this on direct examination. Defence counsel pointed out that Witness M's statement says that when he reached the standpipe the Accused had already arrived, whereas in his testimony Witness M said that he had been there for an hour when the Accused arrived. Defence counsel questioned Witness M as to how he knew that the people with the Accused were *Interahamwe*. He said he knew a number of them and that they were the ones carrying guns and killing. Witness M was also questioned on his testimony that they were wearing UNAMIR clothing, which he said he had heard had been taken from the Belgian soldiers who were killed.

185. Witness M reaffirmed on cross-examination that he heard the Accused say to the *Interahamwe* that they should go and kill the Tutsi or he would bring tanks to exterminate them. He was asked why he had not mentioned having heard this in his pre-trial statement, and he indicated that the statement he made at that time had been limited, whereas the Tribunal had not limited him and asked him for many more facts. He affirmed that the statement made by the Accused was the immediate provocation to begin killings. When asked how he could have forgotten to mention such an important statement, he said his memory was not good.

186. Defence counsel questioned Witness M on a number of other details relating to the incident. In response to the question of whether or not Muzehe was armed before he received a weapon from the Accused, Witness M stated that he did not remember well, that he had given approximate dates and numbers, and that his statement had been made a long time ago. He again reviewed details of the event, stating that the eighty people present were crowded but not too closely, and reaffirming the details of his earlier testimony of the killing of Nyamugambo and that he witnessed this killing.

187. Witness U testified that after the death of the President, the *Interahamwe* began killing in Nyarugenge. After two days, he left his home because of the killing. He said the *Interahamwe* stopped him and others with him, arrested them and took them to a place where they were killing people. According to Witness U, soldiers from the Kigali camp arrived at around 2:30 p.m. to calm down the situation. They told the *Interahamwe* to stop killing, which they did briefly, and the soldiers went back to their camp. Afterwards, Witness U said that the Accused arrived, driving a pickup truck which was filled with firearms and machetes which he himself saw. Witness U stated that he knew the Accused because he had a shop in the business district which sold beer. Witness U said the Accused distributed the weapons to the *Interahamwe* and ordered them to work, and the Accused said there was a lot of dirt that needed to be cleaned up. The Accused remained there with a rifle which he had over his shoulder.

188. Seeing this, Witness U said he left the place because they had started killing the people who remained. He hid in bushes below a nearby garage, which appeared to the Chamber to be the Amgar garage. At this time it was 3:00 p.m. and there was no one at the garage. Witness U then saw the Accused arrive, with many other *Interahamwe* who seemed to be his guards. Witness U estimated that they were approximately thirty in number. Witness U was very near the garage and said he could see clearly through the bush. He said the Accused spoke loudly as there were many people, and Witness U was able to hear. Witness U said this incident took place just below the garage. He said he did not know the name of the owner of the garage. Witness U left the bushes and went further down. When he turned around he saw that they were killing people with machetes and throwing them in the hole.

189. On cross examination, Witness U was asked how he knew the Accused, how often he had seen him and where. The witness replied that he used to see the Accused in Kigali, in his shop or when he passed by on the way to meetings. He said he knew the Accused was President of the *Interahamwe* from the radio and from the meetings, and the fact that he took the floor at the meetings and spoke on the radio. On further questioning regarding how he knew the Accused to be President of the *Interahamwe* and the relationship between the MRND and the *Interahamwe*,

Witness U said he had heard the Accused on the radio encouraging people to kill one another but that this was before the war.

190. When questioned on the distribution of weapons he witnessed, Witness U affirmed that this event took place two days after the President's plane was shot down. When confronted by Defence counsel with his pre-trial written statement, which recorded him as having said that the distribution took place on a Friday at the end of April 1994, he said he did not remember telling investigators that it was at the end of April. He said the day Agakingiro was attacked was the same day the weapons were distributed and the killings took place.

191. Witness U affirmed having said to investigators that he hid near the Accused's garage. When Defence counsel recalled that on direct examination he had said he did not know whose garage it was he hid near, he affirmed having said that he did not know the owner of the garage. Defence counsel elicited further detail from the witness on the circumstances prior to the arrival of the Accused in a pickup with weapons, and the witness affirmed that soldiers told the *Interahamwe*, who he said were from Kimisagara and Cyahafi, to stop killing. He stated that the soldiers did not seize the weapons and left the *Interahamwe* armed.

192. Witness T testified that he was a neighbour of the Accused in Cyahafi sector, and that he knew him. He said that the killings that started after the death of the President on 6 April did not reach Cyahafi until late April because there was a group of Abakombozi, people from the Parti Social Democrate ("PSD"), defending the sector from *Interahamwe* from neighboring sectors. He said that around the time of 24 April, the *Interahamwe* attacked the Abakombozi and the killings started at around 5 p.m. He said the *Interahamwe* used guns in the attack. Witness T said that the Accused was present during the attack and had a red pick-up in which he brought weapons. He said that the Accused was standing in the vehicle and at that time the Tutsis and Hutus were separated and that when the killings were taking place, the Accused was sitting in the vehicle. He had an Uzzi gun, and Uzzi guns were being used for the killings. Witnes T said there were guns in the pick-up and that the Accused distributed some of them and the rest stayed in the pick-up. He said the Accused was assisted by the senior *Interahamwe* in the neighborhood,

including Francois, the President of the *Interahamwe* in Cyahafi. He said the Accused gave the weapons to the President of the *Interahamwe*, who in turn distributed them. He said the *Interahamwe* gave weapons to those in the neighborhood who did not have any. On cross-examination, Witness T was asked about the weapons that he saw the Accused distribute, and specifically whether there pistols or only guns. He replied that the only type of weapon brought by the Accused was the Uzzi, although the *Interahamwe* may have gotten pistols from elsewhere.

193. Witness Q also stated that the Accused distributed firearms. Responding to questions from the Judges on the connection between the Accused and the *Interahamwe*, Witness Q testified that the Accused was a leader of the *Interahamwe* and cited the fact that he was the one who distributed firearms and ordered the distribution of firearms. Witness Q also stated that everyone said that the Accused was distributing weapons at the *Commune* level. Witness Q was not cross-examined on this statement.

Factual Findings

194. Witness J and Witness M both testified about a distribution of firearms which took place in mid-April in Cyahafi Sector, Nyarugenge *Commune*. The Chamber found Witness J to be credible. He was consistent in his testimony on cross-examination and provided reasonable responses to the questions raised on cross-examination with regard to inconsistencies between his testimony and his pre-trial statement. Witness M, however, stated on cross-examination, that his memory had been affected by the events he had witnessed. The Chamber considers the testimony of Witness M to be unreliable with respect to details, particularly on dates, time, numbers and the sequence of events. The inconsistencies which arose in his testimony during cross-examination as well as the inconsistencies between his testimony and his pre-trial written statement are of a material nature in some cases. Although parts of his evidence are corroborated by the evidence of Witness J, other parts are materially inconsistent with the evidence of Witness J. Although the Chamber found Witness M to be a credible witness in that he made a sincere effort truthfully to recall what he saw and heard, and readily acknowledged his memory lapses, the Chamber

considers that it cannot rely on the testimony of Witness M in its findings. The Chamber found Witness U, Witness T and Witness Q to be credible in their testimonies.

195. The Chamber notes that the testimony of the Accused and Witness DDD indicates that the Accused did leave his house on 8 April, and that he was in Kigali at the Amgar office on 15 April and on 24 April. His defence to the allegations set forth in paragraph 10 of the Indictment is a bare denial. The Chamber notes that under cross-examination, the Defence did not suggest to the Prosecution witnesses that the Accused had not participated in the distribution of weapons, or that he was not present at Nyarugenge *Commune* on 8, 15 and 24 April 1994. Further the Defence did not produce any witnesses to confirm an alibi by testifying that the Accused was elsewhere when the events described by the Prosecution witnesses took place, as he does in respect of other allegations in the Indictment. A number of Defence witnesses testified that the Accused was very busy selling beer after his return to Kigali on 14 April, but the Chamber considers that selling beer would not have precluded the Accused from also engaging in the distribution of guns as alleged by the Prosecutor. For these reasons, the Chamber considers that the Defence has not provided evidence which effectively refutes the evidence presented by the Prosecutor in support of the allegations set forth in paragraph 10 of the Indictment.

196. The Chamber finds that on 15 April 1994 in the afternoon, the Accused arrived in a pick-up truck, with a driver and two men in the back, at a public standpipe in Cyahafi Sector, Nyarugenge *Commune*. In the back of the pickup truck were guns. The Accused got out of the vehicle, opened the back of the truck, and the men in the back distributed the guns to *Interahamwe*, including Bizimungo, Ziad, Muzehe, Cyuma and Polisi, while the Accused stood by. A crowd of people, including Witness J, had been gathered together at the standpipe by a policeman named Munyawara before the arrival of the Accused. Immediately following the distribution of the guns, Muzehe shot Rusagara, who died on the spot, and the shooting continued. Kalinda Viater and Musoni Emmanuel were shot by Muzehe and Bizimungo and fell immediately. All of the men shot were Tutsi. The crowd did not immediately disperse when the guns were distributed because they had been led to believe the *Interahamwe* who had received the weapons would protect them.

197. The Chamber finds that on the afternoon of 8 April 1994, the Accused arrived in a pickup truck at a place in Nyarugenge where the *Interahamwe* had been taking and killing people from the *Commune*. The pickup truck was filled with firearms and machetes, which the Accused distributed to the *Interahamwe*. He ordered them to work and said that there was a lot of dirt that needed to be cleaned up. The Accused was armed with a rifle slung over his shoulder and a machete hanging from his belt.

198. The Chamber finds that on or about 24 April in Cyahafi sector, the Accused distributed Uzzi guns to the president of the *Interahamwe* of Cyahafi during an attack by the *Interahamwe* on the Abakombozi.

199. In its findings on these three incidents, the Chamber notes certain common features. In each case, the Accused arrived in a pick-up truck with guns, which he distributed or had distributed, to *Interahamwe* in Nyarugenge *Commune*. The distribution of these weapons was immediately followed by the killing of people who, in at least two of the incidents, had been gathered together at these places prior to the arrival of the Accused.

200. The Chamber notes that the dates of the three incidents - 8 April, 15 April, and 24 April - vary from the date on or about 6 April, which is set forth in paragraph 10 of the Indictment[75]. The phrase "on or about" indicates an approximate time frame, and the testimonies of the witnesses date the events within the month of April. The Chamber does not consider these variances to be material or to have prejudiced the Accused. The Accused had ample opportunity

[75] See Chapter 1, Section 3 of this Judgement.

to cross-examine the witnesses. In reviewing the allegation set forth in this paragraph of the Indictment, the Chamber finds that the date is not of the essence. The essence of the allegation is that the Accused distributed weapons in this general time period.

4.2. Paragraph 11 of the Indictment

201. Paragraph 11 of the Indictment reads as follows:

> "On or about 10 April 1994, Georges Rutaganda stationed *Interahamwe* members at a roadblock near his office at the "Amgar" garage in Kigali. Shortly after he left the area, the *Interahamwe* members started checking identity cards of people passing the roadblock. The *Interahamwe* members ordered persons with Tutsi cards to stand on one side of the road. Eight of the Tutsis were then killed. The victims included men, women and an infant who had been carried on the back of one of the women".

202. The Chamber is of the opinion that for the sake of clarity with respect to its findings on the events alleged in paragraph 11 of the Indictment, it is necessary to discuss successively the events relating to:

- Firstly, the fact that Georges Rutaganda stationed *Interahamwe* members at a roadblock near the Amgar garage;

- Secondly, the fact that the *Interahamwe* members checked the identity cards of people passing the roadblock and ordered persons with Tutsi cards to stand on one side of the road; and

- Thirdly, the fact that eight Tutsis were then killed and the victims included men, women and an infant who had been carried on the back of one of the women.

Regarding the fact that Georges Rutaganda stationed Interahamwe members at a roadblock near the "Amgar" garage:

203. The Chamber is of the opinion that as far as the above allegation is concerned, the Prosecutor must not only prove that a roadblock or a barrier was erected near the Amgar garage and manned by *Interahamwe* members but also that the Accused himself had stationed *Interahamwe* members there.

204. Prosecution Witnesses AA and HH identified in the slide tendered by the Prosecutor as exhibit 144, the location where the roadblock obstructing traffic was mounted, the location of the traffic lights and, on the left of the same slide, the wall of the Amgar Garage. According to the Prosecutor, the Amgar garage was located at the boundary of the Cyahafi *secteur*, in the Nyarugenge *Commune, Préfecture* of Kigali-*ville*. The main entrance to the garage opened onto the Avenue de la Justice where the said roadblock had allegedly been erected and which was indeed the location that witnesses AA and HH had identified as the location of the roadblock.

205. Witness HH, a Tutsi man, testified before the Chamber under direct examination that the roadblock near the Amgar garage was manned by members of the *Interahamwe* whom he could recognized by the *Interahamwe* uniform they wore, made out of red, yellow and green kitenge material, which was similar to the MRND party flag. During his cross-examination, the Defence asked Witness HH to explain the inconsistencies between his testimony and the statement he made to the investigators, as recorded in the transcripts of his questioning, to the effect that the roadblock was manned by soldiers. Witness HH replied that some *Interahamwe* dressed like soldiers.

206. Witness HH also testified before the Chamber that the young people manning the roadblock and with whom he had been in touch, had told him that the roadblock in front of Amgar was "Georges'". Witness HH, stated that he had been hiding near the Amgar garage and as a result witnessed what took place at that roadblock. He testified that he saw the Accused come to the said roadblock many times, often in a Peugeot pick-up. According to Witness HH,

the roadblock was the Accused's, indeed, like all roadblocks in Kigali and Rwanda, which were all under his control.

207. Witness HH also testified before the Tribunal that, on 20 May 1994, the *Interahamwe* had closed the road on which the said roadblock was erected. Witness HH asserted that he witnessed the arrival of the Accused at the roadblock around 9:00 a.m. According to HH, the Accused ordered the *Interahamwe* to open the road and they complied.

208. Prosecution Witness AA testified that, up until 18 April 1994, the road in front of Amgar Garage, like the neighbourhood, was controlled by the inhabitants of Agakingiro (Cyahafi). The people had erected a roadblock on that road which the *Interahamwe* destroyed on 18 April 1994. According to Witness AA, after the *Interahamwe* had attacked the neighbourhood and taken control of it, the Accused had a new roadblock erected in front of the gate to his garage. That roadblock was solidly built, with beer cases and wreckage from cars spanning the entire width of the road.

209. Witness AA stated that among the *Interahamwe* who used to come to the roadblocks, some were dressed in military uniforms while others wore *Interahamwe* uniforms.

210. According to Witness AA, the Accused was a famous man and the Amgar Garage, which belonged to him, was referred to at the time as a venue for the *Interahamwe*. According to the witness, people even spoke of "Rutaganda's soldiers"at that time.

211. Prosecution Witness T testified that soldiers of the Rwandan Armed Forces had erected a roadblock on the paved road, by a kiosk, near the Agakingiro market. Once resistance waned in Cyahafi, towards the end of April, that roadblock was then controlled by the *Interahamwe*, who took over from the soldiers, who had gone to the frontline.

212. Prosecution Witness BB testified that he was arrested at the roadblock near the Accused's home. There were more than 10 people there, some of whom wore items of military uniform and

others the *Interahamwe* uniform. BB explained, however, that none of those people was a real soldier. Some wore berets, with the sign of a pruning hook and a small hoe, identifying them as belonging to the *Interahamwe*. They were armed with guns, clubs, pangas, hammers, and knives. Witness BB stated that the *Interahamwe* had told him that their leaders were Robert Kajuga and Georges Rutaganda. The people manning the roadblocks said they would not kill anyone without prior instruction from Robert Kajuga or Georges Rutaganda.

213. Three defence witnesses confirmed that there was a roadblock in front of Amgar Garage. Witnesses DSS and DF stated that a roadblock had been mounted in front of Amgar Garage from 9 April 1994. According to Witness DD, the roadblock was erected from 7 April 1994 and was located about ten metres away from the garage, close to the traffic lights on Avenue de la Justice.

214. Witness DD testified that the people manning that roadblock were "bandits". He explained that some of them were armed, but that he saw neither uniforms nor any other signs suggesting that they were members of the *Interahamwe*. Witness DD also saw no distinctive signs or symbols that identified the people manning the roadblock with any political group whatsoever.

Regarding the matter of the Interahamwe checking the identity cards of persons who passed through the roadblock and ordering persons whose identity cards indicated they were Tutsi to stand on one side of the road:

215. Prosecution Witness HH testified that he passed the roadblock on 8 April 1994. He stated that people crossing the roadblock had to show their identity cards and also raise their hands so that their pockets could be checked for grenades. According to Witness HH, the people manning the roadblock shot at persons whose identity cards indicated they were Tutsi. Witness HH testified before the Chamber that he managed to cross that roadblock despite the fact that he was Tutsi because he was in the middle of a crowd and he was carrying his identity card at arm's length so that his pockets could be searched.

216. During cross-examination, the Defence asked Witness HH to explain an apparent difference between his testimony and a pre-trial statement he made to the Prosecution investigators. Witness HH had told the investigators that he passed through the roadblock without showing his identity card because there was a crowd of people around.

217. Witness HH added that from the location where he was hiding near the roadblock, he had heard the Accused tell the *Interahamwe* manning the roadblock to check the identity cards very well. Witness HH specified that when the *Interahamwe* saw a card with the reference "Tutsi", they took the holder into a house nearby. According to HH, people were arrested in this way every day.

218. Prosecution Witness AA testified that, at the time of the alleged events, the roadblocks, including the one near Amgar Garage, were used by the *Interahamwe* to "do their job", which, according to AA, meant to arrest Tutsis or other persons and to strip them of their belongings. According to AA, to pass a roadblock, one had to show one's identity card or other document that indicated the holder's identity.

219. Prosecution Witness BB testified that he was arrested at the roadblock near the residence of the Accused where he was asked to produce his identity card. According to BB, when the *Interahamwe* who manned the roadblock realized that he was Tutsi, they told him that they had received orders that very day to present anyone who had been apprehended at the roadblock to their president or vice-president. Two *Interahamwe*, one of whom carried a gun and the other grenades, removed his shoes and took him to the Accused at Amgar Garage. BB was then allegedly beaten by one of the *Interahamwe*. According to BB, the Accused then left and returned a little later and asked why BB who was Tutsi had not been killed. BB than held the Accused by the leg of his pants and asked him why he had not yet allowed the *Interahamwe* to kill him. BB testified that the Accused then kicked him and sent him away to do some work, gathering dirt in some area close by.

220. Under cross-examination, Witness BB acknowledged that upon his arrival at Amgar, when he was taken to the Accused, he was given tea because he was very weak. BB also admitted that a servant had brought him food. He then explained that it was indeed after he had been given the tea and food that the Accused had kicked him.

221. Defence Witness DD testifed that he could not confirm that the people manning the roadblock in front of Amgar Garage checked identity cards. He stated that he did not see anyone being taken aside and made to stand on one side of the road. Defence Witnesses DD, DDD and DNN testified that identity cards were checked at the roadblocks in order to identify RPF "infiltrators".

Regarding the fact that eight Tutsis had been killed, including men, women and an infant on the back of one of the women:

222. Prosecution Witness HH testified that immediately after crossing the roadblock, he had heard the sound of gunfire as he ran away; he had turned around and seen dead bodies on the ground. Witness HH testified before the Chamber that they were eight of them including, children, men and women. One of the women who fell was carrying an infant on her back. Witness HH testified further that the youths manning the roadblock later gave him protection. They told him that they had killed men, women and children.

223. Under cross-examination, Witness HH initially testified that on crossing the roadblock, he had not paid attention to whether the identity cards of people in the crowd were being checked. In reply to the Judges' question as to the material discrepancy between his testimony under direct examination and his statement under cross-examination, Witness HH stated that Tutsis who appeared at the roadblock were detained there.

224. Prosecution Witness AA, after testifying that the *Interahamwe* stopped Tutsis or anyone else at roadblocks to strip them of their belongings, explained that when people were arrested, they were led away and the sound of gunfire could then be heard close to Amgar.

Factual Findings

225. Based on corroborated testimonies, the Chamber finds that as from an unspecified date in mid-April, a roadblock was erected by *Interahamwe* on the Avenue de la Justice near a traffic light not far from the entrance to the Amgar Garage at the Cyahafi Sector boundary, in Nyarugenge *Commune* of the Kigali-*ville Préfecture*. The Chamber holds that, at the said roadblock, the *Interahamwe* checked the identity cards of those who crossed it and detained those who carried identity cards bearing the "Tutsi" ethnic reference or were otherwise considered as "Tutsi" because they had stated that they were not in possession of an identity card. However, the Chamber notes that the Prosecutor has not led evidence to the effect that the *Interahamwe*

manning the roadblock had been stationed there by the Accused. Hence, the Chamber finds that it has not been proven beyond reasonable doubt that the Accused stationed *Interhamwe* members at the said roadblock.

226. With respect to the allegation regarding the killing of eight Tutsis, including men, women and an infant carried on her back by one of the women, the Chamber notes that just one witness - Witness HH - had testified to those specific events. However, it notes that the Prosecution Witness HH was unable to provide a convincing explanation of the material inconsistencies, identified by the Defence, in his testimony before the Chamber and his earlier statement to the Prosecution investigators, as recorded. Accordingly, the Chamber has decided to disregard his testimony. Since the Prosecutor had not called any other witness, apart from Witness HH, to testify to such events, the Chamber finds that the allegation regarding the killing of eight Tutsis has not been proven beyond reasonable doubt.

4.3 Paragraph 12 of the Indictment

227. Paragraph 12 of the Indictment reads as follows:

> "In April 1994, on a date unknown, Tutsis who had been separated at a roadblock in front of the Amgar garage were taken to Georges RUTAGANDA and questioned by him. He thereafter directed that these Tutsis be detained with others at a nearby building. Later, Georges RUTAGANDA directed men under his control to take 10 Tutsi detainees to a deep, open hole near the Amgar garage. On Georges RUTAGANDA's orders, his men killed the 10 Tutsis with machetes and threw their bodies into the hole."

Regarding the allegations that on a date unknown, in April 1994, Tutsis who had been separated at a roadblock in front of the Amgar garage were taken to Georges Rutaganda and questioned by him. He thereafter directed that they be detained with others at a nearby building:

228. The Chamber notes that the said allegation follows the allegations contained in paragraph 11 of the Indictment. The Chamber, in its findings *supra* on the allegations set forth in paragraph 11, held that a roadblock had indeed been erected by the *Interahamwe* on Avenue de la Justice, near a traffic light, not far from the entrance to the Amgar Garage, at the Cyahafi sector boundary in Nyarugenge *Commune*.

229. Prosecution Witness BB testified before the Chamber that he was arrested at the roadblock near the residence of the Accused because he was a Tutsi. There were many people there, some of whom wore items of military uniform, while others were clad in *Interahamwe* uniform. According to Witness BB, the people at the roadblock said that they would kill no person without prior instruction from Robert Kajuga or Georges Rutaganda. When they realized that BB was Tutsi, the *Interahamwe* told him that they had received orders that very day to take anyone apprehended at the roadblock to "the president or vice-president". Two *Interahamwe*, one of whom carried a gun and the other grenades, removed his shoes.

230. They took him to a location which Witness BB identified on the slide tendered by the Prosecutor as exhibit 145 as the Amgar garage. Witness BB was taken to the Accused in his office . An *Interahamwe* hit him. The Accused left the office and returned later. Witness BB testified that he held the Accused by the leg of his trousers and asked him why he had not yet allowed the *Interahamwe* to kill him. Witness BB testified that he begged for mercy but the Accused kicked him and sent him away to do some work, gathering dirt in a place where a cellar was under construction. Witness BB explained that the Accused had forced him to work on the cellar construction site without payment. In his opinion, he was therefore a slave of the Accused's. Witness BB testified that he stayed at Amgar until Kigali was captured by the RPF because he could no longer move about as he had thrown his identity card in some latrine.

231. Under cross-examination, Witness BB explained that the cellar was not under construction but that they were actually assigned to demolish part of a wall to create an entrance into the cellar from the Amgar garage. Witness BB also admitted that a mason had been hired to do the work and that the people, including himself, who were involved in such work were not prisoners, but mere workmen. Witness BB stated that there were no prisoners at that time and that, in fact, there were ordinary workmen who went home in the evenings.

232. Moreover, under cross-examination, when asked by the Defence to explain why, if the Accused had been the leader of a group of killers, BB had chosen to stay at the Accused's place rather than to move about and had found it safer to do so, Witness BB stated that he could not provide any explanation to that.

233. Prosecution Witness T who had testified that, at the time of the alleged events, he lived near Amgar garage, indicated that a neighbour of his, a Tutsi man, told him that, for a while, he was forced to live inside Amgar garage. Around the end of May 1994, that man was killed. That same day, Witness T, his brother and their employee were arrested. The latter two men were also killed.

234. Prosecution Witness Q testified that, around 21 April 1994, he arrived at the Agakingiro roadblock where he was arrested because he did not have an identity card and because one of the people there, Vedaste Segatarama, had recognized him. Around 8 a.m., he was led into a garage, together with three other people who had also been detained at the roadblock because they had been identified as Tutsis on the basis of their identity cards.

235. Witness Q testified that he had not been to that garage before. He identified it before the Chamber on the slide which had been tendered by the Prosecutor as exhibit 145.

236. Witness Q stated that he was led, along with the three other Tutsis who had also been arrested, into the Chief's office. He testified before the Chamber that he recognized the office of the Accused to which he had been taken on the slide that had been filed as exhibit 149. They were introduced to the Accused, who ordered that they be locked up in the prison because they were *Inyenzi*. Witness Q explained that, in that office, the people who had been arrested were undergoing some kind of registration.

237. According to Witness Q, the prison where they were detained was in an Indian temple with the inscription "Hindi Mandal". He recognized it on a slide, tendered as exhibit 165. Witness Q stated that the temple was full, with about two hundred people. Only a small room, located behind the building and used for storage, was not full. Witness Q said that he was there for some three hours. The Accused then returned and said that 10 people should be taken out.

238. Defence Witnesses DD, DF and DDD testified before the Chamber that, in April, the Accused continued to sell beer within the premises of the Amgar garage. Witness DD stated that he knew the people who had come to take refuge at Amgar. According to Witness DF people of various ethnic groups had been given refuge at Amgar, and no one was held against his or her will. Both Witnesses DD and DF testified that they saw no prisoners at Amgar. However, Witness DD explained that he did not go around the property to check.

239. Defence Witness DS testified that he remained with the Accused at Amgar from 14 April to 27 May 1994. Throughout that period, he never saw any prisoners or anyone being mistreated.

240. Defence Witness DEE stayed at Amgar from 14 to 17 April 1994. She explained that she was not the only Tutsi there. She knew some of the other Tutsis there. Of the Tutsis she did not know, she was told that they were hiding at Amgar. Witness DEE testified that she never saw any prisoners during her stay at Amgar, nor did she see anyone beaten, tortured or killed.

Regarding the allegations that Georges Rutaganda later directed men under his control to take 10 Tutsi detainees to a deep, open hole near the Amgar garage, and that upon his orders, his men had killed the 10 Tutsis with machetes and thrown their bodies into the hole:

241. Prosecution Witness BB identified on the slide tendered as exhibit 169, a site located between the ETM and the Accused's garage, where according to him the Tutsis were killed. According to Witness BB, at the time of the events referred to in the Indictment, there was a metal sheet wall near the blue fence located at the back to the right. It was at that spot that the Tutsis had been shot.

242. Prosecution Witness Q testified that after spending approximately three hours in the Indian temple, he was brought out, on the orders of the Accused, who had ordered that 10 people be taken outside. Witness Q stated that he himself, the three people who had been arrested with him at the roadblock and 10 other detainees were led away, around 10 or 11 a.m., to a pit, by men acting on the orders of the Accused. The pit was behind the garage, where there was a house with a tiled roof and a fence. Witness Q identified the metal sheet fence on a slide tendered by the Prosecutor as exhibit 156. He recognized the location of the pit on the slide as exhibit 172, explaining that the metal item pictured on the slide was not there at the time of the events alleged.

243. At the said pit, the 14 persons were made to sit down in a hole, the location of which Witness Q recognized on a slide, tendered as exhibit 168, and ordered to look down. The people

who had taken them to the pit then asked the Accused, who was present at the site, whether to use guns or machetes to kill them. The Accused allegedly told them "to kill with guns, is a waste of bullets." Witness Q stated that the people who had taken them to the pit then started to kill with machetes. At that point he bowed his head and then he lost consciousness upon seeing two persons die.

244. During cross-examination, the Defence asked Witness Q to explain why his statement to the investigators reflected that he had fainted after one man had killed three persons and a second person had killed three others. Witness Q confirmed before the Chamber that he fainted after two persons had been killed. He asserted that he had made the same statement to the investigators.

245. According to Witness Q, after those two persons had been put to death, the other four persons still alive, including himself, were made to get up and bury them. Witness Q testified before the Chamber that at that point he had no strength left and the Accused spared him and another man. The Accused kicked Witness Q and told him to leave, and told him that he would be killed on the day of Habyarimana's burial.

246. During cross-examination, the Defence asked Witness Q to explain the disparity between his testimony before the Tribunal and his earlier statement to the investigators. In the said statement, Witness Q had indicated that the Accused had ordered the four persons still alive to throw the bodies of the victims into the pit and that, once they had finished doing that, the Accused kicked Witness Q who further explained that he then left with the four other persons.

247. In reply to the question, Witness Q testified before the Chamber that he did not bury the people and that when the investigators had read out the statement to him before he signed it, it did not include any reference to the effect that he had buried the bodies.

248. Defence Witness DD testified that he knew about the pit behind the Amgar garage and that around 26 April 1994, the Accused had a closed sheet metal fence built in front of the pit. Defence Witness DF also testified that the Accused had a metal fence built to protect his beer

stocks. The said fence had no door. Witness DF explained that it was impossible to hear what was going on behind the fence from the garage. According to Witness DF, he was not aware that killings were going on at that location, but explained, however, that after the fence had been built, he could not know what was happening there. He did not hear any gunshots from the said location, but rather from the valley behind the "Hindi Mandal" temple.

249. Defence Witness DEE testified that on 14 April 1994, the day he arrived at the Amgar garage, she saw a group of about 10 people including men, women and children there. She spoke to some of them and they told her that they had found refuge there. Witness DEE who was not sure where the others had come from, thought that they were the Accused's family members.

250. During the time that she was at Amgar, from 14 to 17 April 1994, DEE heard gunshots and grenade explosions, but she was not sure where they came from. She explained that she was pregnant and sick at the time and was often lying down.

Factual Findings

251. The Chamber finds that all the Prosecution witnesses who testified to the aforementioned allegations are credible, including Witnesses BB and Q, and consequently decides to admit their testimonies. Indeed, the Chamber is of the opinion that although under cross-examination the Defence pointed out some contradictions in the testimonies of Witnesses BB and Q, such contradictions are not of a material nature and do not vitiate the consistency of the substance of their testimonies, as to their account of the facts at issue in the instant case.

252. With respect to Witness Q in particular, the Chamber holds that the said contradictions can probably be attributed to the trauma he may have suffered from having to recount the painful events he witnessed and of which he was a victim. The Chamber stresses further that the time

lapse between the events and the testimony of the witness must be taken into account in assessing the recollection of details.

253. Further, the Chamber recalls that the inconsistencies in the witnesses's testimonies and their pre-trial statements must be assessed in light of the difficulties inherent *inter alia* in interpreting the questions asked to the witnesses. It also important to note that these statements were not made under oath before a commissioner of oaths.

254. The Chamber notes that the testimonies of Defence Witnesses DD, DF, DS, DEE and DDD do not refute the fact that the Accused was in his office at the Amgar garage from 15 to 24 April 1994. Such testimonies were offered to prove that the Accused was transacting business at Amgar during that period. The Defence submitted that the Accused welcomed into Amgar refugees of diverse ethnic groups including Tutsis and that no one was held at Amgar against his or her will, nor mistreated, or tortured or killed. The Chamber considers that, in any case, these facts would not exclude the Accused's participation in the events alleged in paragraph 12 of the Indictment.

255. The Chamber notes, furthermore, that Witness Q identified the hole where the ten persons were killed and where their bodies were thrown on the slide tendered by the Prosecutor as exhibit 168. The Chamber observes that the said slide shows the site identified as RUG-1 by Professor William Haglund, a forensic anthropologist, who appeared as an expert witness for the Prosecution. According to Professor Haglund, who exhumed several sites near Amgar garage, three bodies were exhumed from the hole identified as site "RUG-1". Dr. Nizam Peerwani, a pathologist, who had worked jointly with Professor Haglund and who also appeared as an expert witness for the Prosecutor submitted the following findings on the three exhumed bodies: the first body was that of a man aged between 35 and 45 at the time of death, the probable cause of which was homicide; the second body was that of a woman, aged between 30 and 39 at the time of death, the probable cause of which was homicide; and the third body was that of a man, aged between 35 and 45 at the time of death, the probable cause of which was blunt force trauma.

256. Firstly, the Chamber, on the basis of the testimony by Dr. Kathleen Reich, a forensic anthropologist, called by the Defence as an expert witness, is not satisfied that the scientific method used by Professor Haglund is such as to allow the Chamber to rely on his findings in the determination of the case.

257. Secondly, and above all, the Chamber notes that the Prosecutor failed to show a direct link between the findings of Professor Haglund and Dr. Peerwani and the specific allegations in the Indictment. Consequently, the Chamber holds that the findings of the said expert witnesses should not be admitted in the instant case.

258. Accordingly, the Chamber holds that the findings of the said expert witnesses do not help the Chamber determine the facts of the case. Moreover, the Chamber is not satisfied that the grave site referred to by Witness Q and the one exhumed by Professor Haglund are one and the same.

259. Thus, on the basis of the corroborating testimonies of Witnesses Q and BB, the Chamber is satisfied beyond any reasonable doubt that, in April 1994, Tutsis who had been separated at a roadblock in front of Amgar garage were taken to the office of the Accused inside Amgar garage. Based on the corroborating testimonies of Witnesses Q and T, the Chamber is satisfied beyond reasonable doubt that the Accused ordered that the Tutsis thus brought to him be detained within the premises of the Amgar garage.

260. Based on the testimony of Witness Q, the Chamber is satisfied beyond any reasonable doubt that the Accused ordered men under his control to take fourteen detainees, including at least four Tutsis, to a deep hole located near Amgar garage and that on the orders of Georges Rutaganda and in his presence, his men killed ten of the said detainees with machetes. The bodies of the victims were thrown into the hole.

"On or about April 12, 1994, the survivors who were able to show that they were Hutu were permitted to leave the gravel pit. Tutsis who presented altered identity cards were immediately killed. Most of the remainder of the group were attacked and killed by grenades or shot to death. Those who tried to escape were attacked with machetes. Georges Rutaganda, among others, directed and participated in these attacks".

Events Alleged

266. Witness A, a Tutsi man who had worked for the Accused as a mason, testified that on 7 April 1994 he went with his wife and five children to the ETO, a kilometre away from his house, to seek refuge and protection because the UNAMIR troops were stationed there. Upon his arrival, he realized he had not brought any food or blankets and returned home for supplies, leaving his family in the ETO compound. According to Witness A, there were approximately six thousand refugees in the ETO compound, outside and inside the buildings. When Witness A returned that evening, after circumventing the *Interahamwe* he encountered outside, he was unable to re-enter the compound for there were too many people. He spent the night near the sports field of the ETO.

267. According to Witness A, the next day Colonel Leonides Rusatila arrived and asked the Hutus to separate themselves from the group. Thereafter approximately 600 to 1,000 Hutus left the compound. The witness testified that on 10 April 1994, UNAMIR troops left the compound, although the refugees begged them to stay, as the *Interahamwe* had already surrounded the ETO compound. The departure of the UNAMIR troops created panic among the refugees and caused many of them to leave the ETO entrance; as a result, Witness A was able to re-enter the compound where he was reunited with his family. The *Interahamwe* also came in at that time and mixed in with the crowd of refugees inside the building. According to Witness A, the refugees then decided to proceed together to the Amahoro stadium. They therefore left the ETO and headed in that direction but were diverted en route by soldiers at a roadblock. They were gathered together with their arms up over their heads, and ordered to lie on the ground. A soldier with a

4.4 Paragraphs 13, 14, 15 and 16 of the Indictment

261. The charges set forth in paragraphs 13, 14, 15 and 16 of the Indictment are as follows.

262. Paragraph 13 reads as follows:

> "From April 7 to April 11, 1994, thousands of unarmed Tutsi men, women and children and some unarmed Hutus sought refuge at the *École Technique Officielle* "ETO school" in Kicukiro sector, Kicukiro *Commune*. The ETO school was considered a safe haven because Belgian soldiers, part of the United Nations Assistance Mission for Rwanda forces, were stationed there."

263. Paragraph 14 reads as follows:

> "On or about April 11, 1994, immediately after the Belgians withdrew from the ETO school, members of the Rwandan armed forces, the *Gendarmerie* and militia, including the *Interahamwe*, attacked the ETO school and, using machetes, grenades and guns, killed the people who had sought refuge there. The *Interahamwe* separated Hutus from Tutsis during the attack, killing the Tutsis. Georges Rutaganda participated in the attack at the ETO school, which resulted in the deaths of a large number of Tutsis."

264. Paragraph 15 reads as follows:

> "The men, women and children who survived the ETO school attack were forcibly transferred by Georges Rutaganda, members of the *Interahamwe* and soldiers to a gravel pit near the primary school of Nyanza. Presidential Guard members awaited their arrival. More *Interahamwe* members converged upon Nyanza from many directions and surrounded the group of survivors."

265. Paragraph 16 reads as follows:

megaphone then came to them and told them it was not a good idea to go to the stadium and suggested instead that they go to Nyanza, where he said they would be safe.

268. Thereupon, Witness A and his family headed for Nyanza in a group of approximately 4,500 persons, flanked on both sides by *Interahamwe*. According to the Witness, at this time the *Interahamwe*, armed with machetes, clubs, axes, spears, and nail studded metal sticks had started killing people along the way, threatening people, forcibly taking young girls, spitting on them and committing atrocities. Along the way, Witness A saw the Accused coming in the opposite direction from Nyanza in his vehicle. He pulled over to the side of the road, got out, and stood leaning against the vehicle. Witness A saw a mason who had worked for the Accused pleading him for help, but the Accused waved him away.

269. Upon arrival at Nyanza, Witness A saw the Accused again who was directing the *Interahamwe* into position to surround the refugees who had been gathered together in one spot. Armed soldiers had taken position on the hill overlooking this spot. A sack full of grenades was brought by a man, and Hutus were told to show their identity cards. These Hutus were allowed to leave. Some Tutsis who tried to pass for Hutus were killed on the spot by the *Interahamwe* who knew them, and others were forced back into the group. A grenade was then hurled into the crowd and the soldiers began to fire their guns. Those who tried to flee from the group were snatched back by the *Interahamwe* surrounding them. Witness A saw the child his wife was carrying on her back blown off by a grenade. He was shot and fell to the ground, still holding another of his children in his arms. Others fell on top of him.

270. When the shooting stopped, Witness A heard the soldiers tell the *Interahamwe* to go to work, and the latter proceeded to kill people with clubs and other types of weapons. They also singled out some girls and put them aside. According to the witness they "had their way" with these girls and then killed them. Most of the women killed were stripped of their clothing, "so that Tutsi women could be seen naked." The *Interahamwe* continued to "have their way" until they left satisfied at around 11 p.m. Witness A's wife and four of his children were killed in this attack. His five year old child, whom he had shielded in his arms, sustained injuries from a

grenade explosion. According to Witness A, when the *Interahamwe* returned the next day at dawn, he pretended to be dead. His injured arm was stepped on and he was hit on the head with a sharp object to see if he was alive, but he did not move. He spent that day, which he testified was Tuesday 12 April, at that spot, while the *Interahamwe* looted the bodies. In the morning of 13 April, RPF soldiers came and took him and other survivors away. Witness A testified that there were approximately two hundred survivors.

271. During the cross-examination, Defence counsel challenged the testimony of Witness A as being inconsistent with his prior statement dated 7 December 1995 made to OTP investigators. He had stated that he had three children, all of whom had died in the attack. When asked about his prior statement as to the number of children he had the witness maintained that four of his children had died in the attack and that only one had survived. He testified that he had no interest in saying there was a survivor among his children if they had all been killed.

272. Witness A was also asked about which radio station he was listening to on the morning of 7 April 1994. On direct examination he had testified that on that day he had tuned in to RTLM. The Witness explained that he generally listened to RTLM but that on that particular morning he had tuned in to Radio Rwanda. He further testified that RTLM broadcast only in the afternoon and that he had also learnt about the death of the President on RTLM on 7 April 1994 in the afternoon. Defence counsel also asked him how he had managed to listen to the radio, as he had testified that he did not own a radio. The witness explained that he listened to the radio at his neighbour's house.

273. The Defence also asked the witness whether he knew the Accused well. The witness answered that he had never spoken to the Accused but had known him for six years, having seen him many times and having worked for him. Through further examination, Defence elicited additional details with respect to Witness A's earlier testimony regarding such matters as there being other persons with the Accused in his vehicle and the Accused positioning the *Interahamwe* at Nyanza.

274. Witness H, a Tutsi man from Kicukiro, testified that his house was attacked and searched in February 1994 by *Interahamwe*, armed with clubs, who had arrived shortly before a vehicle. Witness H was told that General Karangwa and the Accused, who owned the vehicle, were inside it. The Witness said that the Accused was his neighbour and lived 600 metres from his house. He knew the Accused as a businessman who imported beer, and he also knew him as the vice-president of the *Interahamwe*. When the killings began after the plane crash on 6 April, Witness H took his family to the ETO school, for their protection, where UNAMIR troops told them to come inside the compound. He stated that there were 3,500 to 4,000 refugees at the ETO, some of whom were in buildings but most of whom were on the sports field where Witness H was. The witness testified that the *Interahamwe*, armed with guns, grenades and other weapons, came and surrounded the ETO, but that they did not attack because they were afraid of the UNAMIR troops.

275. On 11 April 1994, Witness H saw the UNAMIR troops packing up to leave. A group of refugees, including the Witness, positioned themselves in front of a UNAMIR vehicle and begged the troops to stay, but they would not. According to Witness H, once UNAMIR left the ETO compound, the *Interahamwe* immediately entered and proceeded to attack, firing guns and hurling grenades. At that time, Witness H saw the Accused with Gerard Karangwa, the President of the *Interahamwe* at the *commune* level. According to the Witness, as an *Interahamwe* official at the national level, the Accused ranked higher than Karangwa. They were in the group in front of him, and the group began throwing grenades and firing. The Witness saw the Accused before the shots were fired.

276. Witness H testified that he left the ETO with others and headed for the Amahoro stadium which he thought would be safe as it was under RPF control. En route, they were stopped by the *Interahamwe* and led to a road where they found soldiers who ordered them to sit down on the road. Thereafter, a military commander came and told them that he was taking them to Nyanza where he could ensure their safety. Led by Colonel Rusatila and surrounded on both sides by soldiers and *Interahamwe*, the group of refugees was escorted to Nyanza. Along the way, the *Interahamwe*, who were armed with machetes, grenades, spears and other weapons, beat and

threatened the refugees. Of the four thousand refugees, many were injured en route to Nyanza. Witness H saw the Accused on the way to Nyanza, at the Kicukiro centre. The Accused was in a separate group talking to a number of people, including Mr. Kagina, a teacher at the ETO school whom he knew to be a member of the *Interahamwe*. When they arrived at Nyanza, the *Interahamwe* and the soldiers ordered the refugees to stop and to sit down. The Hutus were told to identify themselves and to stand up. They showed their identity cards and were told to leave. Thereafter, grenades were thrown and shots fired at the group. Witness H managed to escape and hide under a small bush sixty metres away. From that location, the witness heard shots and cries of pain. When the soldiers ran out of grenades and bullets, they asked the *Interahamwe* to begin killing people with knives. The killing lasted for more than an hour. Witness H heard the soldiers tell the *Interahamwe* to look around for people who were not dead yet and finish them off. Witness H testified that he did not see the Accused at Nyanza. He had waited until nightfall, and then fled to Kicikuro.

277. Under cross-examination, Witness H confirmed that he had been at the ETO compound from 7 to 11 April. The Defence asked Witness H whether he had met *Interahamwe* on the way to the ETO, to which he replied that he had seen several groups of *Interahamwe* carrying weapons, but that they had not prevented him from going to the ETO. The Defence also asked Witness H to state specifically where he was located on the ETO sports field, the number of UNAMIR troops and their location. Witness H stated that he had moved around on the sports field during his stay at the ETO. He testified that the UNAMIR troops were camped near the sports field. When questioned on the activities of the *Interahamwe* before the soldiers left, and the circumstances of his departure from the ETO, Witness H stated that while he was at the ETO the *Interahamwe* did launch small-scale attacks, which were repelled by the UNAMIR troops.

278. Defence counsel also asked Witness H how the refugees reacted to being diverted from the road to Amahoro stadium towards Nyanza, whether they believed what they had been told about their safety, how they felt, his location within the crowd of refugees, en route to Nyanza, and the location of the bush at Nyanza where he hid during the attack on the refugees as well as the location of the *Interahamwe* and the soldiers during that attack. To those and related

questions from the Defence, Witness H replied by providing additional information that had remained unclear under direct examination.

279. Witness DD, a Tutsi man who was a high school student in 1994, testified that he was a neighbour of the Accused and also knew him as the vice-president of the *Interahamwe*. When he learned of the death of the President, Witness DD and his family fled to the ETO for refuge because the UNAMIR troops were there and they thought their safety would be ensured. While at ETO, Witness DD saw the *Interahamwe*, some on foot and others in vehicles. They were armed, but Witness DD said they felt safe because of the UNAMIR presence. At the ETO, Witness DD stayed on the sports field, and had gone into one of the buildings only once. He estimated that there were approximately 5,000 refugees on the ETO premises. On 11 April, when the UNAMIR troops left, Witness DD saw the *Interahamwe* attack. He testified that *Interahamwe* leaders were present and named the Accused as well as the councillor of Kicukiro, who was also his neighbour, as having been among these leaders. He saw the Accused at about fifty metres away from the ETO entrance, together with the councillor and many others he was unable to identify. According to Witness DD, all of them were armed, and the Accused had a gun. Witness DD fled the ETO when the *Interahamwe* attacked and was thus separated from his family.

280. Witness DD went to the Sonatube factory, where he and other persons were stopped by soldiers who ordered them to sit on the ground, which they did. The soldiers said they would take them to Nyanza where they would provide them with assistance. According to Witness DD, the women with children were forcibly separated from the group and raped by the *Interahamwe*. Witness DD stated that he learned only later that the women had been raped, when he saw them again and they told him that the *Interahamwe* had made them their wives, raped them and impregnated them. When they arrived at Nyanza, the refugees were assembled and surrounded by soldiers and *Interahamwe*. The Hutus were then asked to show their identity cards and to separate themselves from the group, following which they were allowed to leave. Witness DD also saw a person who tried to pass for a Hutu, shot on the spot. Once the Hutus had been separated, the soldiers began to kill people and throw grenades. When they stopped throwing

grenades, they asked the *Interahamwe* to check the bodies for any survivors and to finish them off. Witness DD testified that he did not see the Accused again after the ETO.

281. During cross-examination, Defence counsel asked Witness DD about the circumstances in which he had seen the Accused at the ETO - where precisely it had been, and whether it was an open space with unobstructed view. The witness testified that he had been on the sports field when he saw the Accused. The Defence counsel submitted that in his pre-trial statement, Witness DD had stated that he had seen the Accused when he left the classroom with his family and that the Accused was in the school yard. The witness maintained that he had been on the sports field, and reiterated that he had come out of the classroom to see members of his family. He stated that the confusion stemmed from the fact that there was a basketball court near the entrance to the ETO. The Defence Counsel noted that there were several buildings between the sports field and the ETO entrance and that the witness could have had an open, unobstructed view. The witness responded that he had been on the sports field and that there were no buildings there.

282. Witness W, a Tutsi man, also a neighbour of the Accused's, testified that he knew the Accused as the vice-president of the *Interahamwe*, and also as an engineer and a business man. On the morning of 7 April, Witness W fled his home, for Luberizi. On the way, he met the Accused setting up a roadblock in the company of the *Interahamwe*.

283. There were many people at that location and Witness W was able to return to his house, where he hid in the nearby bushes until nightfall, when he fled to the ETO together with four of his sister's children. He went to the ETO because the UNAMIR troops were there. Witness W testified that after the UNAMIR troops left, the *Interahamwe* and the Presidential Guard immediately entered the ETO compound, armed with grenades, machetes and clubs. He recognized some of the *Interahamwe* he had seen with the Accused at the roadblock on his way to the ETO but did not see the Accused. The *Interahamwe* then began to throw grenades onto the sports field and between the buildings where there were many people. His older brother's children and other people he knew were killed in that attack. Witness W also saw his mother die

from a blow from a club. He himself was injured though not seriously and was able to flee through the back of the ETO compound to the house of a white person he knew. The latter who could not keep him in his house advised him to go to Sonatube.

284. Witness W walked towards Sonatube, together with others who had fled the ETO. They were stopped at Sonatube by soldiers who told them that Rusatila had ordered that they be sent to Nyanza where their security would be ensured. There were approximately 4, 500 refugees at Sonatube. They sat on the ground for about 30 minutes, and were forced towards Nyanza by the *Interahamwe* and soldiers of the Presidential Guard. Along the way, the refugees, surrounded by the *Interahamwe*, were mistreated. Some were stripped off their clothing or money, and others were killed by the *Interahamwe* and the Presidential Guards. Witness W recognized some of the *Interahamwe* on the road to Nyanza, and he observed the vehicle of the Accused bringing in *Interahamwe* as reinforcements. He testified that the Accused could have been in this vehicle, which he only saw from afar, but he did not actually see the Accused. As they approached Nyanza, Witness W realized that they would be killed rather than protected. He and about 150 of his companions broke away from the group and fled. Some of them were shot from behind by the *Interahamwe*. Witness W and his companions hid in the forest nearby waiting for nightfall, during which time they heard gunfire from the Nyanza hill. They then fled to an RPF zone, the group of 150 having been reduced to only 60 by the time they arrived.

285. During cross-examination, Defence counsel asked Witness W which members of his family arrived at the ETO school with him. The Witness stated that his father, the children of his elder brother and others living in the house were with him. When confronted with his testimony on direct examination, he explained that he had mistakenly said he was with the children of his sister but that he meant his brother. Most of the cross-examination of Witness W related to other events and not to his experience at the ETO and Nyanza.

286. Luc Lemaire, a captain in the Belgian army who served with UNAMIR, testified that he was stationed at the ETO school, until the departure of UNAMIR troops from ETO on 11 April. He testified that there were approximately 2,000 refugees in the ETO compound by the time

UNAMIR left. Captain Lemaire testified that at that time there was increased aggression by the *Interahamwe* near the ETO and that the latter were gathering quite near the compound, and were seen sometimes with weapons. Under cross-examination, Captain Lemaire was questioned about the *Interahamwe*. He stated that he had not seen *Interahamwe* in uniform near the ETO, but that he knew that the people he had seen were *Interahamwe* for they were able to move about freely and he had been told so by those at the ETO compound who knew them.

287. Defence Witness DZZ, a Hutu woman from Kicukiro, testified that she fled to a nearby church mission on 7 April, after hearing the sound of shooting. From there, on the same day she was taken by a Belgian priest to the ETO, about one and a half kilometres away, along with a group of 25 other refugees. She testified that when she arrived, there were about 2,000 refugees at the ETO. More people came subsequently, and Witness DZZ said she continued to hear gunshots. While she was at the ETO, she said that RPF soldiers in uniform came to take away some people who were Tutsi. On 9 April, the UNAMIR soldiers told Witness DZZ that they would be leaving, and she left the next day, on 10 April. Witness DZZ said that about 500 people remained at ETO by the time she left, and that many of those who left went to the Amahoro stadium. Witness DZZ returned home, which was approximately three kilometres away. She testified that she did not see any bodies or any roadblocks on the way. Under cross-examination, Witness DZZ stated that she could not testify to what happened at the ETO after she left on 10 April, or to what happened subsequently at Nyanza.

288. Defence Witness DPP testified that in April 1994 she was living in Kicukiro, approximately 400 to 500 metres from the ETO. She said that she saw the UNAMIR troops leave the ETO on 11 April on her way to get medicine for her sick child. After they left, she saw about fifty people including some people she knew go into ETO. She testified that they were not wearing uniforms and that some of them were armed. She heard gunshots, but from far away. Witness DPP saw people coming out of the ETO, carrying away school property, and then she saw men, women and children leaving the compound. She stated that they were not running and were unharmed. She testified that she did not see the Accused. In May 1994, Witness DPP sought refuge at the ETO. She said that at that time bullets were falling on the ETO, and she

encountered some people who had taken refuge there after 6 April and stayed there throughout this period. She testified that there were mostly Tutsi but some Hutu refugees as well. After 11 May, Witness DPP said that Government soldiers came to camp at the ETO as well, and that there was no problem between them and the Tutsis there. She testified that on 23 May everyone left the ETO, as the RPF were shooting. During cross-examination, Witness DPP stated that she stayed by the ETO for two hours on 11 April. She said that she did not see people in the ETO being attacked and clarified that she saw people entering but could not see the place where the refugees were from where she was. She stated that one person she spoke to told her they were on the way to the stadium but had been stopped en route and forced back. This person also told her that when they reached where they were going some were killed by knives or shot dead.

289. The Accused testified that on the morning of 11 April, his neighbour woke him up to tell him that the RPF were already in the neighbourhood and that they had killed a child. The Accused decided that he and his family had to leave their house in Kicukiro. They left around 7:30 a.m., with 14 people in his vehicle, and they drove to the house of an acquaintance, passing through many roadblocks. He found his acquaintance about to leave for Kibuye with his family. They left the house of this acquaintance around noon, and after much trouble at the roadblocks, arrived around 5:30 p.m. in Masango, where the Accused had a house in Karambi. The Accused described a mass exodus from the city, with many people on foot and others in vehicles. The Accused said he was never in the ETO, at the entrance or in the compound, on 11 April or any other time. He said he knew of the buildings there only through the slides which had been presented during the trial proceedings and that he had had no reason to go to the ETO. The Accused said he remained in Masango *commune* until 14 April, when he returned to Kigali. During cross-examination, the Accused said that he had not been aware of the fact that there were refugees at the ETO.

290. Defence Witness DDD testified that she and the Accused and their family had left their home on the morning of 11 April and gone to the house of a family friend in Kiyovu, where they arrived at around 9 a.m. They found that this friend was leaving Kiyovu for security reasons. After managing to obtain petrol, Witness DDD said they left Kiyovu around mid-day for

Masango, where they arrived at 6 p.m. She said that the Accused remained in Masango until 14 April.

Factual Findings

291. Having heard and reviewed the testimony of the Prosecution witnesses regarding the allegations set forth in paragraphs 13, 14, 15 and 16 of the Indictment, the Trial Chamber finds Witness A, Witness H, Witness DD, Witness W and Captain Luc Lemaire all to be credible witnesses. They presented a similar account of the refugee situation at the ETO, the attack by the *Interahamwe* following the departure of UNAMIR troops, the diversion of refugees heading towards Amahoro stadium to Nyanza, and the massacre of refugees by soldiers and the *Interahamwe* which took place at Nyanza. Extensive cross-examination of the witnesses primarily elicited further details and background, without revealing any material inconsistencies. The Chamber considers that such inconsistencies as pointed out were not material and could for the most part be attributed to external factors relating to pre-trial statements and other language and translation issues. For example, the Defence highlighted the fact that the trial testimony of Witness A that he had four children who died and one who survived was inconsistent with the pre-trial statement he signed in 1995 stating that he had three children, all of whom died. The Chamber considers that the witness knew how many children he had and how many of them died, and that the error can be attributed to difficulties of transcription and translation, as addressed under the Evidentiary Matters.

292. Having heard and reviewed the testimony of the Defence witnesses, including the Accused, regarding the allegations set forth in paragraphs 13, 14, 15 and 16 of the Indictment, the Trial Chamber makes the following findings with regard to their evidence.

293. The Chamber notes that Witness DZZ was not, and did not claim to be, an eyewitness to the events at the ETO compound and at Nyanza on 11 April. Her testimony confirms that there were refugees at the ETO compound, but as she left prior to the events alleged in the Indictment, her testimony cannot challenge the eyewitness accounts of these events presented by the

Prosecution. Her assertion that most refugees had left the compound and that only about 500 remained there by the time she left on 10 April, is inconsistent with the testimony of all the witnesses who were still there on 11 April when UNAMIR left, including Captain Luc Lemaire, who estimated - as they all did - that there were several thousand refugees at the ETO compound on 11 April.

294. Witness DPP was on the road in front of the ETO on 11 April, and she saw the UNAMIR troops leaving. She saw other people, including some armed, enter the compound, but she could not see inside the compound from where she was standing. She heard gunshots, although she said they were far away. She subsequently saw some people departing from the ETO but those people were not harmed and they were not running. The Chamber considers that much of this testimony is consistent with evidence provided by Prosecution witnesses, with regard to the departure of the UNAMIR troops and the subsequent incursion of others who were armed. Witness DPP concluded that these others went to loot the building, but testified that she was not in a position to see what was happening inside.

295. The Chamber accepts the evidence of Defence Witness DZZ and Defence Witness DPP but finds that this evidence does not refute the evidence presented by the Prosecution with respect to the allegations set forth in paragraphs 13, 14, 15 and 16 of the Indictment.

296. The Chamber has considered the testimony of the Accused and Witness DDD, jointly, as their testimony is consistent and puts forward a defence of alibi, claiming that the Accused was en route to Masango on 11 April and was not present at the ETO, at Nyanza, or at any of the locations on the way to the ETO from Nyanza where Witness A, Witness H, Witness DD and Witness W testified that they saw him on that day. The Chamber notes that the alibi defence was not introduced until near the end of the trial, after the Prosecution rested its case. Neither the Accused nor Witness DDD mentioned the alibi at the time of the arrest of the Accused or during any of the pre-trial proceedings.

297. The Chamber particularly notes that Defence counsel did not mention the alibi of the Accused in her opening statement or in her cross-examination of any of the Prosecution witnesses who testified over a period of 18 months. Consequently, Witness A, Witness H, Witness DD and Witness W were never confronted with and given an opportunity to respond to the assertion that the Accused was not present on 11 April at the ETO or at Nyanza and that their testimony must therefore be false. The Chamber has found these Prosecution witnesses to be credible, and finds the extremely delayed revelation of an alibi defence to be suspect. The inference to be drawn is that this defence was an afterthought and that the account of dates was tailored by the Accused and Defense Witness DDD, following the conclusion of the Prosecution's case. The only witness to support the alibi of the Accused is Witness DDD, and the Chamber is mindful that she has a personal interest in his protection. For these reasons, the Chamber does not accept the testimony of the Accused and Witness DDD that they were on the way to Masango on 11 April.

298. On the basis of the testimony cited above, the Chamber finds it established beyond a reasonable doubt that from 7 April to 11 April 1994, several thousand people, primarily Tutsis, sought refuge at the ETO. As all of the witnesses testified, they went to the ETO because UNAMIR troops were stationed there and they thought they would find protection there. The *Interahamwe*, armed with guns, grenades, machetes and clubs, gathered outside the ETO compound, effectively surrounding it. Colonel Leonides Rusatila separated Hutus from Tutsis at the ETO, prior to the attack, and several hundred Hutus left the ETO compound. When the UNAMIR troops left the ETO on 11 April 1994, the *Interahamwe* and members of the Presidential Guard entered and attacked the compound, throwing grenades, firing guns and killing with machetes and clubs. A large number of Tutsis, including many family members and others known to the witnesses, were killed in this attack.

299. Witness H saw the Accused at the time of this attack on the ETO, just before shots were fired, together with Gerard Karangwa, the President of the *Interahamwe* at the *Commune* level, in a group which began throwing grenades and firing. Witness DD also saw the Accused at the time of the attack, armed with a gun, about 50 metres away from the ETO entrance. Based on this

evidence, the Chamber finds beyond a reasonable doubt that the Accused was present and participated in the attack on Tutsi refugees at the ETO school.

300. Many of the refugees who escaped or survived the attack at ETO headed in groups towards the Amahoro Stadium, where they thought they would be safe as it was under RPF control. These groups were stopped en route by soldiers, gathered together near the Sonatube factory and diverted, having been told that Colonel Rusatila had ordered them to Nyanza where their safety would be ensured. Some women were taken forcibly from the group and subsequently raped. Flanked on both sides by *Interahamwe*, approximately 4,000 refugees were then forcibly marched to Nyanza. Along the way, these refugees were abused, threatened and killed by soldiers and by the *Interahamwe* surrounding them, who were armed with machetes, clubs, axes, and other weapons.

301. When they arrived at Nyanza, the refugees were stopped by the *Interahamwe*, assembled together and made to sit down in one spot, below a hill on which there were armed soldiers. They were surrounded by *Interahamwe* and soldiers. Hutus were told to stand up and identify themselves and were allowed to leave. Some Tutsis who tried to leave, pretending they were Hutus, were killed on the spot by *Interahamwe* who knew them. Grenades were then thrown into the crowd by the *Interahamwe*, and the soldiers began to fire their guns from the hillside. Those who tried to flee were brought back by the *Interahamwe* surrounding them. This attack took place on 11 April, in the late afternoon and into the evening. Many were killed in this attack, including Witness A's wife and four of their five children. Following the shooting and grenades, the soldiers told the *Interahamwe* to begin killing people. The *Interahamwe* then began killing people with clubs and other weapons. Some girls were selected, put aside, and raped before they were killed. Clothing had been removed from many of the women who were killed. The killing lasted more than an hour. The soldiers then told the *Interahamwe* to look for those who were not dead and finish them off. The *Interahamwe* left at approximately 11:00 p.m. and returned on the morning of 12 April, when they came back to loot and to kill all surviving refugees. Approximately 200 people survived the massacre.

302. On the way to Nyanza, Witness A saw the Accused coming in a vehicle from the direction of Nyanza, pull over to the side of the road and get out. Thereafter, he saw the Accused wave away a person who had worked for him and approached him from the marching group of refugees for assistance. Witness H also saw the Accused on the way to Nyanza, standing in a group talking to a member of the *Interahamwe* whom he recognized and other people.

303. Witness W saw a vehicle belonging to the Accused bringing in *Interahamwe* as reinforcements. At Nyanza, Witness A again saw the Accused, directing the *Interahamwe* who were armed with grenades, machetes and clubs - into position to surround the refugees just prior to the massacre. The Chamber finds beyond a reasonable doubt that the Accused was present and participated in the forced diversion of refugees to Nyanza and that he directed and participated in the attack at Nyanza.

4.5. Paragraph 17 of the Indictment

304. Paragraph 17 of the Indictment reads as follows:

> "In April of 1994, on dates unknown, in Masango *Commune*, Georges Rutaganda and others known to the Prosecutor conducted house-to-house searches for Tutsis and their families. Throughout these searches, Tutsis were separated from Hutus and taken to a river. Georges Rutaganda instructed the *Interahamwe* to track all the Tutsis and throw them into the river".

Regarding allegations according to which in April of 1994, on dates unknown, in Masango Commune, Georges Rutaganda and others known to the Prosecutor conducted house-to-house searches for Tutsis and their families, and that throughout these searches, Tutsis were separated from Hutus and taken to a river:

305. Prosecution Witness EE testified that he saw, on three occasions, the father of the accused and other *Interahamwe* go to pick up Tutsis in vehicles, telling them that they were taking them to a safe location. Witness EE testified that he had seen these vehicles go to the river. He also explained that other people were led on foot to the river. He testified that his neighbours had told him that the people taken to the river had been thrown into it. Witness EE also stated that, from the window of his house, he heard people say they were returning from the river where they had just thrown Tutsis.

306. Under cross-examination, in reply to the Defence, EE indicated that he could not see the river from his house.

307. Prosecution Witness C also testified before the Chamber that, in Masango, the people who were tracking the Tutsis went to collect those who had sought refuge at the Bureau communal in order to beat and kill them. Witness C testified that many Tutsis had therefore been killed in the Masango region. Those who sought refuge at the river were thrown into it while

others were thrown into mass graves. In reply to questions from the Chamber, Witness C specified clearly that he did not see the Accused participate in the said massacres.

Regarding the allegations formulated as follows "Georges Rutaganda instructed the Interahamwe to track all the Tutsis and throw them into the river":

308. Prosecution Witness O testified before the Chamber that he saw the accused, on 22 April 1994, at about 5 p.m., in Masango. According to Witness O, the Accused was in mufti, armed with a short firearm and was driving a white Toyota pick-up which he parked at some 15 metres from Witness O's shop. Witness O then stated that he saw at the rear of this vehicle, guns partially covered with a tarpaulin. Witness O also testified that the Accused was accompanied by Robert Kajuga, National President of the *Interahamwe* and some 10 other people including about four in military uniform and others in the distinctive green, red and yellow *Interahamwe* uniform. Witness O testified that some of the men accompanying the Accused carried grenades or firearms and that Kajuga was carrying grenades on his belt. Witness O further stated that he saw the Accused speak with a certain Karera, in charge of the Youth Wing of the local *Interahamwe za MRND*, in Masango, near a pole from which a flag flew.

309. Prosecution Witness V testified before the Chamber that the Accused held a meeting at a place known as Gwanda (sic), located between Masango and Karambi, on a date he could not accurately recall. During the examination-in-chief, Witness V situated this meeting at the beginning of the month of May 1994 and, under cross-examination, he stated that it was rather in April 1994. Witness V stated that the Accused conducted this meeting in his capacity as Vice-President of the *Interahamwe*. Witness V testified that the Accused said during that meeting that it was necessary to stop eating the cows of Tutsis and to get rid of the Tutsis instead. Witness V, a Tutsi man, who attended the meeting, fled to safety. According to Witness V, the massacres in Masango started after the Accused had held the said meeting. Witness V testified that prior to that there had been some looting but no killings.

310. Prosecution Witness C saw the Accused attending an MRND meeting at Masango. According to the witness, the Accused was wearing the uniform of the *Interahamwe.* The father of the Accused, Esdras Mpamo, was also in attendance as well as a certain Jean-Marie Vianney Jyojyi. The two individuals who took the floor, Mwanafunzi Anteri and a Protestant pastor urged the gathering not to support the Arusha Accords and to fight the enemy. According to Witness C, the RPF and the Tutsis were referred to as "the enemy" at the time. The witness also testified that the proverbs used at the meeting were meant to convey the notion that Tutsis, their families and children were to be tracked. Witness C noted that the Accused was present throughout the meeting and did not object to the statements made there. He was seated with Mwananfuzi Anteri and Sebuhuro at the table facing the gathering. His father, Esdras Mpamo, a former *Bourgmestre* of Masango who at the time of the events alleged was an MRND parliamentarian was also seated at the table next to the speakers. Witness C testified that the attacks against the Tutsis started after that meting.

311. Prosecution Witness EE, for his part, testified before the Chamber that he had attended a meeting, after 6 April 1994, at which the father of the Accused, Mpamo, who was chairing the meeting, had declared that Tutsis had to be killed to prevent them from taking over. The meeting was held near the Masango Communal Office. According to EE, the Accused was in attendance and was seated next to his father, at a table facing the audience. He explained that the Accused and his father were not the only ones seated at the table and that the Accused had not taken the floor.

312. Under cross-examination, Witness EE testified that he had attended that meeting because he had received a written invitation from Esdras Mpamo. He confirmed that he was personally surprised at the statements made at the meeting and that he had not reacted, nor had the *bourgmestre*, Louis, who was also present. Witness EE then indicated that he was also seated at the table, next to the speakers, facing the audience.

Factual Findings

313. The Chamber notes that the Prosecutor had led no evidence in support of the allegations that in April 1994, the Accused had conducted house-to-house searches for Tutsis and their families in Masango *Commune* and that, throughout these searches, Tutsis were separated from Hutus and taken to a river.

314. Regarding the allegations that Georges Rutaganda had ordered the *Interahamwe* to track down all Tutsis and throw them into the river, the Chamber is satisfied, based on the testimonies of Witnesses C, V and EE, that the Accused had attended at least one meeting at which specific statements of incitement to kill Tutsis were made. The Chamber notes that the Accused did not object to such statements and that, in view of the authority he exercised over the population and the position he occupied during that meeting, being seated at the table of speakers next to his father, the former *bourgmestre* of the *Commune*, he had acquiesced to such statements. The Chamber notes however that only Prosecution Witness V had testified that the Accused had chaired the meeting and had taken the floor. The Chamber notes that V's testimony on this point is not corroborated by those of Witnesses C and EE, both of whom had declared that the Accused was indeed present at the meeting and had taken a seat at the table of speakers but had himself not taken the floor. Accordingly, the Chamber holds that, on the basis of uncorroborated testimonies presented to it, it has not been proven beyond a reasonable doubt that the Accused ordered that all Tutsis be tracked and thrown into the river.

4.6 Paragraph 18 of the Indictment

315. Paragraph 18 of the Indictment reads as follows:

> "On or about April 28, 1994, Georges Rutaganda, together with *Interahamwe* members, collected residents from Kigali and detained them near the Amgar garage. Georges Rutaganda and the *Interahamwe* demanded identity cards from the detainees. A number of persons, including Emmanuel Kayitare, were forcibly separated from the group. Later that day, Emmanuel Kayitare attempted to flee from where he was being detained and Georges Rutaganda pursued him, caught him and struck him on the head with a machete and killed him."

Regarding the allegations that on or about April 28, 1994, the Accused, together with Interahamwe members, collected residents from Kigali and detained them near the Amgar garage and demanded identity cards from them:

316. Prosecution Witness U testified before the Chamber that, on a day, that he was unable to pin point but that he put after 6 April 1994, at about 3 p.m., he hid in a bush near a garage of which he knew neither the name nor the owner. Later, Witness U recognized the said garage on a slide tendered by the Prosecutor as Exhibit 143. The Chamber notes that the garage identified is Amgar.

317. The witness testified that he clearly saw the following events unfold near the garage from where he was hiding. The Accused and some 30 *Interahamwe*, some of whom were in military uniform and others in mufti, armed with tools such as machetes, took away some 30 people there to kill them. According to Witness U, the *Interahamwe* looked like the bodyguards of the Accused.

318. Prosecution Witness AA testified that on 28 April 1994, around 10 a.m., *Interahamwe* conducted a house-to-house search in the Agakingiro neighbourhood asking the people to show

their identity cards. They took away those they detained towards the "Hindi Mandal" temple, located near the Amgar garage and a mass grave, at a place now called Jango. According to Witness AA, streams of people who had been forced out of their homes headed up towards that location. Witness AA was among the persons detained and led near the garage. He testified that the Accused was present at the location where the detainees were gathered. According to Witness AA, the Accused was the leader of those *Interahamwe*. He wore a military uniform, comprising a coat and trousers, and carried a rifle.

319. Under cross-examination, Witness AA reiterated his testimony that the Accused himself did not directly conduct searches, at least he did not see him do so. The Accused was present at the location where the detainees were gathered, near Amgar garage. The accused was already there when AA arrived. Also under cross-examination, Witness AA testified that the Accused carried a pistol and not a rifle, and that he also carried grenades on his belt.

320. According to Witness AA, the persons who managed to leave this site where people had been assembled were Hutus. Those who were kept behind were either Tutsis or people from another ethnic group, known as member of political parties opposed to the government. According to Witness AA, those persons were later killed and buried on the spot.

Regarding the allegations that a number of persons, including Emmanuel Kayitare, were forcibly separated from the group and that when Emmanuel Kayitare attempted to flee, the Accused pursued him, caught him and struck him on the head with a machete and killed him:

321. Witness AA testified that the Accused was on the spot where the detainees including him were assembled. According to Witness AA, all the persons detained had their eyes riveted on the Accused in the hope that he would have mercy. Witness AA testified that the people were afraid and that whenever the Accused looked at them they cast their eyes downwards. Witness AA was seated, crouching some 10 or 20 metres away from the Accused.

322. According to Witness AA, the detainees included Emmanuel Kayitare, nicknamed Rujindiri. Witness AA knew Emmanuel Kayitare's younger brother, Michel Kayitare very well. A man called Cekeri told Emmanuel that he knew him and that he was aware that he was going to the CND. Witness AA testified during the examination-in-chief that Emmanuel took fright and took off running. Witness AA saw the Accused grab Emmanuel by the collar to prevent him from escaping. The Accused seized a machete from Cekeri with which he struck Emmanuel on the neck.

323. In answer to questions from the Bench, Witness AA reiterated that the Accused did kill Emmanuel not with a bullet but rather with a machete. Witness AA then explained that the Accused was not carrying a gun but rather a pistol. When reminded by the Defence that he had testified before the Chamber, just as he had stated to the investigators of the Office of the Prosecutor that the Accused was carrying a gun, Witness AA replied that it was a pistol.

324. Under cross-examination, Witness AA testified that the Accused had grabbed Emmanuel by the collar of his shirt when the latter stood up to run and therefore had not chased after him. He further stated that the Accused had not even taken a step; he had merely turned around and grabbed Emmanuel. In answer to the Defence, Witness AA added that the Accused had seized Emmanuel with one hand while holding the weapon with the other hand. Witness AA confirmed that the Accused did not run after Emmanuel. Witness AA then stated that when he was called by Cekeri, Emmanuel stood up as if to walk towards him. Emmanuel walked by the Accused. That was when the Accused grabbed him by the neck.

325. Witness AA then insisted on the fact that the Accused held Emmanuel by the collar of his shirt and not by the neck as he had previously stated to the investigators of the Office of the Prosecutor.

326. Under cross-examination, Witness AA reiterated his statement to the effect that the Accused had struck Emmanuel on the neck with a machete. In response to the Defence pointing out an inconsistency between his testimony and his statement to the investigators of the Office of

the Prosecutor in which he had alleged that the Accused had split Emmanuel's skull, Witness AA stated that he had seen the Accused strike Emmanuel with a machete, that there had been a splash of blood and that he had covered his eyes with his hands.

327. In answer to the Bench which had asked whether the splash of blood was from the front or the back of the head, Witness AA stated that Emmanuel had fallen with his head to the ground and that there was so much blood that neither his face nor his hair could be seen.

328. Prosecution Witness U testified before the Chamber that Emmanuel and another person, nicknamed Venant, were among those arrested and taken near the garage close to where he was hiding. U knew Emmanuel very well. He stated that Emmanuel and Venant were tied together with their shirts lest they escaped. The Accused untied them.

329. Witness U testified that he had then heard the Accused, speaking out loud so as to be heard, telling those who were with him that he was going to show them how they should work. According to U, the Accused had a machete hanging from his belt with which he hit Emmanuel on the head . Witness U testified that Emmanuel's head was split in two. Emmanuel fell dead instantly. According to Witness U, Emmanuel was killed by machete in a single blow.

330. Witness U testified further that when Emmanuel fell, the Accused then took the kalachnikov which he was carrying on his shoulder and shot Venant who also fell beside Emmanuel.

331. Again according to Witness U, the Accused then picked up their bodies and threw them into a pit with the help of those who were with him. Witness U identified the pit into which Emmanuel and Venant were thrown on the slide tendered as Prosecution Exhibit No.169. According to U, Emmanuel was a Tutsi and Venant, a Hutu who did not approve of the killings.

332. Witness U also stated that as he attempted to flee, he saw the Accused engaged in killing with a machete assisted by *Interahamwe*. The bodies were then thrown into a pit. Witness U

stated that there were two pits - a small one into which two bodies were thrown and a larger into which a lot of bodies were dumped.

Factual Findings

333. The Chamber is of the opinion that Witness AA is credible and, consequently, accepts his testimony. Although contradictions emerged under cross-examination in his testimony with regards to details, such contradictions are not material and do not impugn the substance of his testimony on the circumstances of the death of Emmanuel Kayitare. The Chamber finds that such contradictions may be attributed to the possible trauma caused to Witness AA as a result of recounting the painful events he had witnessed and the period of time between the said events and AA's appearance before the Chamber. Additionally, the Chamber recalls that the inconsistencies between the witness testimony and statements made before the trial must be analysed in the light of difficulties linked, particularly, to the interpretation of the questions asked and the fact that those were not solemn statements made before a commissioner of oaths.

334. In the instant case, the Chamber notes, for instance, that the difficulties Witness AA faced in describing accurately the type of weapon carried by the Accused, that is, whether it was a rifle or a pistol, may be explained by lack of knowledge of weapons and by the fact that the witness is unable to tell apart the two types of weapons. Similarly, the Chamber is of the opinion that Witness AA's inability to indicate whether the blow unleashed by the Accused cut off the head or neck of the victim cannot call into question the reliability of his testimony since it is difficult for a lay person to ascertain the respective limits of the head and the neck.

335. Based on AA's testimony, as substantially corroborated by Witness U, the Chamber is satisfied beyond any reasonable doubt that, on 28 April 1994, the *Interahamwe* conducted a house-to-house search in the Agakingiro neighbourhood, asking people to show their identity cards. The Tutsi and people belonging to certain political parties were taken towards the "Hindi Mandal" temple, near Amgar garage. The Accused was present at the location where the people

caught were gathered. He wore a military uniform, comprising a coat and trousers, and carried a rifle.

336. Furthermore, after considering the respective testimonies of Witnesses AA and U, the Chamber is satisfied that they are corroborative as regards the circumstances surrounding the killing of Emmanuel Kayitare, a Tutsi, by the Accused.

337. The Chamber notes that Witness U identified the grave where Emmanuel and Venant were killed and into which their bodies were thrown on the slide tendered by the Prosecutor as exhibit 169.

338. The Chamber observes that said slide tendered as exhibit 169 shows the same view as the one tendered by the Prosecutor as exhibit 269, which has been referred to by Professor William Haglund, a forensic anthropologist, who had appeared as an expert witness for the Prosecutor, as an exhumation site identified as "RUG-1".

339. According to Professor Haglund, three bodies were exhumed from the hole shown on the slide tendered as exhibit 269[76]. Dr. Nizam Peerwani, a pathologist, who had worked jointly with Professor Haglund and who had also appeared as an expert witness for the Prosecutor, submitted the following findings on the three bodies exhumed: The first body was that of a man aged between 35 and 45 years at the time of his death the probable cause of which, according to Dr. Peerwani, was homicide. The second body was that of a woman, aged between 30 and 39 years at the time of her death the probable cause of which was homicide. The third exhumed body was that of a man aged between 35 and 45 at the time of his death the probable cause of which, according to Dr. Peerwani, was blunt force trauma injuries.

[76] See Chapter 4, section 3 (of the present Judgement), factual findings on the allegations contained in paragraph 12 of the Indictment.

340. Firstly, the Chamber, on the basis of the testimony by Dr. Kathleen Reich, a forensic anthropologist, called by the Defence as an expert witness, is not persuaded that the scientific method used by Professor Haglund is such as to allow the Chamber to rely on his conclusions in the determination of the case.

341. Secondly and, above all, the Chamber notes that the Prosecutor has failed to show a direct link between the findings of Professor Haglund and Dr. Peerwani and the specific allegations in the Indictment or even to call the attention of the Chamber to the fact that the slide tendered by the Prosecutor as exhibit 169, identified by Witness U as showing the hole where Emmanuel and Venant were killed and into which their bodies were thrown shows the same view as the slide tendered as exhibit 269, featuring the exhumation site "RUG-1".

342. Consequently, the Chamber holds that the said findings are not helpful to the Chamber in determining the facts of the case. Moreover, the Chamber is not satisfied that the grave site referred to by Witness U and Witness AA and that exhumed by Professor Haglund is one and the same.

343. Finally, on the basis of the testimonies of Witnesses AA and U, the Chamber finds that it has been established beyond any reasonable doubt that the Accused struck Emmanuel Kayitare with a machete and that the latter died instantly.

4.7 Charges as set forth in Paragraph 19 of the Indictment.

344. Paragraph 19 of the Indictment reads as follows:

> "In June 1994, on a date unknown, Georges RUTAGANDA ordered people to bury the bodies of victims in order to conceal his crimes from the international community."

Events Alleged

345. In respect of the aforementioned allegation, Witness Q testified in direct examination that he was hiding in the house that belonged to a person he identified as Thomas when an *Interahamwe* named Cyuma took him and a young girl to a hole behind the Technical school of Muhazi (École technique de Muhazi). The Witness said that when he arrived at this hole he saw the corpse of this nephew lying inside. He said that the young girl was killed by an *Interahamwe* named Karangwa, on the orders of Cyuma and he was about to be killed when a woman he identified as Martha, who at that time was the head of the cell, stopped Cyuma and the others from killing him.

346. Witness Q testified in direct examination that, whilst at the hole behind the Technical school of Muhazi, he saw another hole that he referred to in his evidence as the third hole and he stated that he saw the Accused, in the company of other people, standing in the vicinity of this hole. The Witness stated that, from where he was, he could see this hole but he could not get to it. The Witness stated that the Accused thereafter called Martha who immediately went to him, whereupon the Accused ordered a stop to all killings during the day and the dead buried immediately, as the killings were badly perceived by the people the Witness described as "whites" and "foreigners". According to the Witness, the Accused further ordered that killing should only take place at night.

347. Witness Q testified in direct examination that the Accused was addressing all those people in the vicinity of this third hole when he ordered that all killings be stopped and all

corpses buried. The Witness stated that he did not hear the Accused give these orders but that he had learnt of these orders when Martha returned to the vicinity of the hole behind the Technical school and conveyed them to Cyuma, Karangwa and the others who had been participating in killings. When the Witness was asked by the Prosecutor to state what Martha said, in conveying the orders of the Accused, the Witness stated that Martha said that it was necessary to stop the killing. The remaining people will be killed after the burial of the Late President Juvenal Habyarimana.

348. Under cross examination Witness Q stated that Martha conveyed the orders of the Accused when she stated that the killing must stop and the dead must be buried immediately, because the foreigners were not in favour of the killing. In the tail end of his cross examination, the Witness stated that he saw and he heard the Accused give orders to Martha and the other people that were in the vicinity of the third hole. The Witness also testified that this incident took place at the end of April 1994.

349. Witness AA testified in chief, that on 28 April 1994 he saw the Accused kill Emmanuel behind the Amgar garage. The Witness also testified that there was a mass grave site at this location and many bodies, including that of Emmanuel were later exhumed from this mass grave.

350. Witness HH testified that he was hiding in a bush near a roadblock and he saw Prefect Renzaho telling people manning a roadblock to stop the killings during the day because there was a satellite that was monitoring their activities.

351. The Accused testified that he was taken by a member of UNAMIR to a roadblock where a UNAMIR convoy was stopped. He stated that there were 72 adults in the convoy. He stated that the roadblock was manned by angry people who were armed and soldiers. He stated that on his arrival at the roadblock, people from the neighbourhood, some of whom were armed with sticks and machettes, gathered around. The Accused stated that the people at the roadblock were intent on killing those traveling in the convoy. The Accused said that when the people saw him alight the UNAMIR motor vehicle, they mocked him. The Accused stated that he spoke to some

of the people at the roadblock and he told them that they were being monitored by satellite, in an attempt to persuade them to allow the convoy to pass.

352. Under cross-examination, the Accused confirmed saying to people that they were monitored by satellite and therefore people should not be killed. He stated that he made these statements to remind people of their responsibility. According to the Accused, he also used another argument to remind people of their responsibility. He would say that the International Community would not come to their assistance if they knew about any killings, but the Accused stated that he did not have any contact with anybody in the International Community.

Factual Findings

353. The Chamber considers that Witness Q identified the Accused in court, he knew of the Accused and of his father, before the events of 1994 and he described the Accused as a rich business man who lived in the neighbouring *Commune* of Masango. The Witness also testified that, after having been stopped at a roadblock at Agakingiro, he was taken by a person he identified as Vedaste Segatarama to the Accused. The Witness described how he was made to enter a little office and presented to the Accused. The Chamber is satisfied beyond a reasonable doubt that Witness Q is able to positively identify the Accused and that the Accused was present at this hole that served as a mass grave, as testified to by the Witness.

354. The Chamber notes that there are discrepancies in the testimony of Witness Q, such as his factual account of the exact words used by the Accused, in conveying his (the Accused's) orders. Despite these discrepancies, the Witness nevertheless conveyed clearly the crux of what was ordered, that is the killing should stop and the bodies buried in order to conceal the dead from the foreigners.

355. It is clear from Witness Q's evidence that the Accused was present at this mass grave site and that he ordered the burial of bodies. However there is no evidence that the Accused gave these orders, in order to conceal his crimes from the International Community. The Chamber is

satisfied beyond a reasonable doubt, that the Accused ordered the burial of bodies in order to conceal the dead from foreigners. The Chamber is however not satisfied beyond a reasonable doubt, that in giving the said order the Accused sought to conceal his crimes from the International Community.

4.8 General allegations (Paragraphs 3-9 of the Indictment)

356. The Chamber now considers the general allegations in Paragraphs 5, 6, 7 and 8 of the Indictment.

Paragraph 6 alleges: *"In each paragraph charging crimes against humanity, crimes punishable by Article 3 of the Statute of the Tribunal, the alleged acts were committed as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds";*

Paragraph 7 alleges: *"At all times relevant to this Indictment, a state of internal armed conflict existed in Rwanda";*

Paragraph 8 alleges: *"The victims referred to in this indictment were, at all relevant times, persons taking no active part in the hostilities":*

357. In respect of the allegations in Paragraph 6 of the Indictment, Witness C testified that at a MNRD meeting held in April 1994, it was stated that Tutsis were the accomplices of the RPF. It was also stated that every Tutsi was the enemy[77]. Witness EE testified that a meeting was held at the *Commune* office, following the death of President Habyarimana. During this meeting the Accused's father stated that Tutsis had to be killed, to prevent them from assuming power[78]. Witness Hughes testified that, following radio announcements calling for the apprehension of Tutsis, people actively sought Tutsis at roadblocks and on the streets. Tutsis were terrified to walk the streets. Hughes stated that Tutsis were in hiding, even in areas where the killings had not begun[79]. Witness W testified that following the death of the President, people in vehicles

[77] See Testimony of Witness C, transcript of 04 March, 1998

[78] See Testimony of Witness EE, transcript of 04 March 1998

[79] See Testimony of Witness Mr Hughes, transcripts of 25, 26 and 27 May 1998

used megaphones to spread propaganda messages about the *Inkotanyi.* Following this announcement Tutsis were killed, their houses looted and burned, and their cattle killed.

358. The Chamber considers that Witnesses A, B, H, W, O, Z, BB and HH testified about the construction of roadblocks immediately after the death of President Habyarimana. People fleeing for safety, were intercepted at such roadblocks. Some people were selected to be killed, whilst others were allowed to proceed. Such selection and separation process began with the erection of such roadblocks.[80]

359. Witness W testified that the Accused ordered Councillors and heads of *cellules* to erect roadblocks. Roadblocks were immediately erected and all persons passing through these roadblocks, who produced identity cards indicating their Tutsi ethnicity, were apprehended and some were immediately killed.[81]

[80] See supra, Chapter 4, part 2, on Factual Findings, para. 11

[81] See Testimony of Witness W, transcript of 28 May 1997

360. Witness A testified to having observed Tutsis separated from Hutus at the Nyanza crossroads[82]. Witness DD also testified that, at Nyanza, soldiers and members of the *Interahamwe* surrounded her group. According to the witness Hutus were asked to leave such group. Hutus were then asked to produce their identity cards. On producing their cards, a man who had lied about his ethnicity was immediately killed. The Tutsis were thereafter attacked by soldiers and members of the *Interahamwe.* The witness recalled that grenades were used in such attack[83]. Witness H also testified, that soldiers were everywhere. The soldiers asked them to sit down and told Hutus to identify themselves and leave. They attacked the remaining group of people, by throwing grenades and firing guns into the group. The *Interahamwe* also participated killing people, with their knives[84]. Mr Hughes testified that a group of survivors from the Nyanza massacre were found with machete wounds to the back of their heads and limbs.[85]

361. Witness Z, a Hutu living in Kicukiro, testified that when he came out of his house, he observed corpses of men and women near a roadblock. He stated that he and others were divided into four groups to dig holes, collect and bury bodies[86].

362. An expert witness for the Prosecutor, Mr Nsanzuwera testified that the Accused held a high position within the *Interahamwe* and exercised authority over members of the *Interahamwe.* The witness also testified that the Accused was often present at roadblocks and barriers, issuing orders[87]. The Accused testified that after he joined the MRND party in 1991, he was involved in the creation of its youth wing, the *Interahamwe za MRND,* and was subsequently its second vice-president.

---

[82] See Testimony of Witness A, transcript of 24 March 1997

[83] See Testimony of Witness DD, transcript of 27 May 1997

[84] See Testimony of Witness H, transcript 26 March 1997

[85] See Testimony of Witness Mr Hughes, transcript of 25 May 1998

[86] See Testimony of Witness Z, transcript of 20 March 1998

[87] See Testimony of expert witness Mr Nsanzuwera, transcript of 24 March 1998

363. Defence witness DNN testified to hearing that the *Interahamwe* received military training. The witness also stated that such training commenced at the beginning of the war[88]. Witness DNN confirmed that they received this training[89].

364. Defence Witness DZZ stated that she had heard about the *Interahamwe* receiving military training, but only after the beginning of the war[90]. Defence Witness DNN confirmed that the *Interahamwe* received such training.[91]

365. Defence witnesses DDD[92], DD[93], DNN[94] and DZZ[95] testified that RPF infiltrators were identified at roadblocks, by virtue of their falsified identity cards. Defence Witness DEE testified

---

[88] See Testimony of Witness DZZ, transcript of 11 February 1999

[89] See Testimony of Witness DNN, transcript of 16 February 1999

[90] See Testimony of Witness DZZ, transcript of 11 February 1999

[91] See Testimony of Witness DNN, transcript of 16 February 1999

[92] See Testimony of Witness DDD, transcript of 16 February 1999

[93] See Testimony of Witness DD, transcript of 17 March 1999

that identity cards were verified at all roadblocks she passed through in Kigali, except the roadblock near the hospital. She stated that being in possession of an identity card, indicating Tutsi ethnicity, was justification enough to be killed.[96]

366. Witnesses H and DD testified to hiding in the house of a Burundian and survived house to house searches. Defence Witness DF testified to house to house searches conducted in Kigali. Witnesses U, T, J and Q testified that the Accused was present and participated in the distribution of weapons to the *Interahamwe*. It has been established that weapons were distributed to the *Interahamwe*. The Accused was present and participated in the distribution of weapons on at least three occasions.

---

[94] See Testimony of Witness DNN, transcript of 16 February 1999

[95] See Testimony of Witness DZZ, transcript of 11 February 1999

[96] See Testimony of Witness DEE, transcript of 09 February 1999

367. The Accused testified that:

"It developed a situation such that the people who were identified as RPF unfortunately I regret the fact and most of them were Tutsis. 90 percent were Tutsis and this led to a generalisation and excessive behaviour which also affected people who I – you know – old men, children and so on and so forth."[97]

[97] See Testimony of the Accused, transcript of 21 April 1999. In French this reads:
"Il a évolué, et une situation telle que les gens identifiés comme au FPR, malheureusement je regrette, étaient à plus de 90% Tutsi. Ce qui a conduit à une globalisation que je déplore – et même jusqu'à maintenant - à une globalisation et à un excès, un débordement... un débordement qui a touché également les personnes vraiment que moi je... des personnes, des vieillards, des enfants, tout ça."

"What happened in my country – in our country is an incident which I would call a tragedy, a tragedy. It's a series of massacres, of killings which affected people from the RPF and the Inkotanyi. Yesterday, I spoke about the generalisation of the Tutsis and this even affected children."[98]

[98] See Testimony of the Accused, transcript of 22 April 1999. In French this reads:
"Ce qui s'est passé dans notre pays c'est un incident, mais pas un incident, moi je le qualifie de drame, de drame. C'est une série de massacres, de tueries, qui ont gardé les gens du FPR et les Inkotanyi, j'ai expliqué hier dans la globalisation des Tutsis, qui a connu même des débordements jusqu'à atteindre les enfants."

368. According to Expert Witness Nsanzuwera, the Tutsi were systematically targeted as such, because they were considered to be opponents of the regime. Mr Nsanzuwera testified that, the militia, including the *Interahamwe*, killed Tutsis and Hutus who opposed the Hutu Regime, the victims of these massacres being civilians. Mr Nsanzuwera also confirmed that the *Interahamwe*'s involvement in the killing of Tutsis was not spontaneous but well planned[99].

369. Professor Reyntjens, an expert witness for the Prosecution, testified to the existence of a plan formulated years prior to the events of 1994 in Rwanda, which suggests that the attacks were systematic[100]. Mr Hughes testified that the attacks appeared to be pre-planned due to their consistent pattern.[101]

370. The Chamber finds that there is sufficient evidence of meetings held to organise and encourage the targeting and killings of the Tutsi civilian population as such and not as "RPF Infiltrators", as testified to by Defence Witnesses DDD, DD, DNN and DZZ. The Chamber also finds that this organisation and encouragement took the form of radio broadcasts calling for the apprehension of Tutsi, the use of mobile announcement units to spread propaganda messages about the *Inkontanyi,* the distribution of weapons to the *Interahamwe* militia, the erection of roadblocks manned by soldiers and members of the *Interahamwe* to facilitate the identification,

---

[99] See Testimony of expert Witness Mr Nsanzuwera, transcript of 23 April, 1998

[100] See Testimony of expert Witness Mr Reyntjens, transcript 13 October 1997

[101] See Testimony of Witness Mr Hughes, transcript of 25 May 1998

separation and subsequent killing of Tutsi civilians and, the house to house searches conducted to apprehend Tutsis, clearly suggest that a systematic attack on the Tutsi civilian population existed throughout Rwanda in 1994.

371. The Chamber accepts the testimony of expert Witnesses Mr Nsanzuwera and Professor Reyntjens that the attack on the Tutsi population was of a systematic character. The Chamber also accepts Mr. Nsanzuwera's evidence that the victims of the massacres were civilians. The Chamber finds that the attack on the Tutsi population occurred in various parts of Rwanda, such as in Nyanza, Nyarugenge *Commune*, Kiemesakara Sector in the Kigali Prefecture, Nyamirambo, Cyahafi, Kicukiro, Masango. The Chamber finds beyond a reasonable doubt that the attack on the Tutsi civilian population was of a widespread and systematic character.

With regard to the allegation in paragraph 5, which alleges that : "The victims in each paragraph charging genocide were members of a national, ethnical, racial or religious group".

372. As indicated *supra* in the discussion on the applicable law, the Chamber holds that in assessing whether a particular group may be considered as protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proferred and the political, social and cultural context.[102]

373. The Chamber concurs with the *Akayesu Judgement*[103], that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population. However, the Chamber finds that there are a number of objective indicators of the group as a group with a distinct identity. Every Rwandan citizen was, before 1994, required to carry an identity card which included an entry for ethnic group, the ethnic group being either Hutu, Tutsi or Twa. The Rwandan Constitution and laws in force in 1994 also identified Rwandans by reference to their ethnic group. Moreover, customary rules existed in Rwanda governing the determination of

[102] See Chapter 2, section 2 of this Judgement

[103] *Akayesu Judgement*, para. 170

ethnic group, which followed patrilineal lines. The identification of persons as belonging to the group of Hutu or Tutsi or Twa had thus become embedded in Rwandan culture, and can, in the light of the *travaux préparatoires* of the Genocide Convention, qualify as a stable and permanent group, in the eyes of both the Rwandan society and the international community. In Rwanda in 1994, the Tutsi constituted an ethnic group.

374. The reference to ethnic origin exists in the Rwandan life today as it did before 1994, although with different connotations, but still used by most Rwandans, inside and outside of the country. All witnesses heard referred to the Tutsi as a particular group and identified themselves before the Chamber by ethnicity.

375. The Chamber notes that the Defence did not challenge the fact that the Tutsi constitutes a group protected under the Genocide Convention, and further notes that the *Kayishema and Ruzindana Judgement* [104] and the *Akayesu Judgement* [105] establish that the Tutsi group is a group envisaged by the Genocide Convention.

376. Consequently, after having reviewed all the evidence presented, the Chamber finds that the Tutsi group is characterised by its stability and permanence and is generally accepted as a distinct group in Rwanda. Therefore, the Chamber considers that it constitutes a group protected by the Genocide Convention and, thence, by Article 2 of the Statute.

---

[104] *Kayishema and Ruzindana Judgement* para. 291

[105] *Akayesu Judgement* para. 170-172

Regarding paragraph 7, which alleges that at all times relevant to this indictment, a state of internal armed conflict existed in Rwanda:

377. Paragraph 7 of the Indictment alleges that there existed in Rwanda at the time set out in the Indictment a state of internal armed conflict. According to the testimony of Professor Reyntjens, in the early 1990's Rwanda experienced a period of political turmoil while in transition to a multiparty political system. During this time several political parties were organised in opposition to the ruling party MRND. These parties included the *Mouvement Démocratique Républicain* (MDR), *Parti Social Démocrate* (PSD), *Parti Libéral* (PL), *Parti Démocrate Chrétien* (PDC) and the *Coalition pour la Défense de la République* (CDR). The Accused testified that these political parties competed to recruit new members. Among the activities to attract newcomers was the creation of youth wings, and the Interahamwe was the youth wing of the MRND.

378. According to the Accused, the term *Interahamwe* attained a negative connotation and came to be used to describe in popular usage, after 6 April 1994, a large or loosely organized militia which is said to have fought against the RPF[106].

379. Mr Nsanzuwera testified that the *Interahamwe* evolved from the youth wing of a political party into a militia[107]. Mr Nsanzuwera further testified that, on 5 January 1994, the President of Rwanda was sworn in but he did not swear in a government and the National Assembly as intended by the Arusha Peace Accords. Moreover certain obstacles remained that prevented the full participation of other political parties in the interim government. Consequently, widespread

[106] See Testimony of the Accused, transcript of 22 and 23 April 1999.

[107] See Testimony of expert Witness Mr Nsanzuwera, transcript of 24 March 1998.

insecurity prevailed in Kigali. On 6 April 1994 the plane carrying President Habyarimana crashed. The interim government appealed to the population to join the civil defence and the RAF to fight against the RPF and eliminate the moderate wing within the government[108].

[108] *Ibid.*

380. The armed conflict between the government and the RPF resumed. The RPF battalion engaged in hostilities with the RAF, according to testimonies by Mr Reyntjens and Mr Nsanzuwera. Immediately, roadblocks were erected in and around Kigali and later extended to the rest of the country to prevent the penetration of RPF. However, according to testimonies of eyewitnesses heard by the Chamber, and of Mr Reyntjens as expert witness for the Prosecutor[109], one only needed to be a suspected sympathiser of the RPF to be targeted. This resulted in a globalisation of crimes with Tutsis being systematically targeted and eliminated for representing the majority of RPF infiltrators. The Accused further testified that roadblocks were set up initially by civilians who, as the "civil defence" were rallying together against the RPF[110]. According to Mr Nsanzuwera, the civil defence was mainly composed of Interahamwe members and radical youth wings of other political parties like the CDR which aimed at the elimination of the Tutsi as a support for the RPF[111]. The Defence expert witness, Professor Mbonimpa, called the RPF a militia and agreed that militia also had a command structure, wore a different uniform, was armed, and capable of carrying out war. Both sides mobilised people for war through their radios,

[109] See Testimony of expert Witness Mr Reyntjens, transcript of 14 October 1997.

[110] See Testimony of the Accused, transcript of 22 April 1999

[111] See Testimony of expert Witness Mr Nsanzuwera, transcripts of 23, 24 and 27 March 1998

including the RTLM radio on the government's side. He stated that the RPF said that any force that intervened in the conflict was regarded as an enemy force[112].

381. The Chamber notes the findings in the *Akayesu Judgement* and finds that the evidence establishes that there existed an internal armed conflict in Rwanda during the time period alleged in the Indictment.

[112] See Testimony of expert Witness Mr Mbonimpa, transcript of 6 April 1999

5. LEGAL FINDINGS

5.1 Count 1: Genocide

382. Count 1 covers all the acts described in the Indictment. It is the Prosecutor's contention that, by his acts as alleged in paragraphs 10 to 19 of the Indictment, the Accused committed the crime of genocide punishable by Article 2(3)(a) of the Statute.

383. In its findings *supra*[113] on the law applicable to the crime of genocide, the Chamber held that for the crime of genocide to be established, it was necessary, firstly, that one of the acts enumerated under Article 2(2) of the Statute be perpetrated; secondly, that such act be directed against a group specifically targeted as such on ethnic, racial or religious grounds; and thirdly, that such act be committed with intent to destroy the targeted group in whole or in part.

Regarding the acts alleged in paragraphs 10 to 19 of the Indictment and based on its factual findings supra, the Chamber is satisfied beyond any reasonable doubt of the following:

384. Regarding the facts alleged in paragraph 10, the Chamber finds that it is established beyond any reasonable doubt that, on the afternoon of 8 April 1994, the Accused arrived at Nyarugenge in a pick-up truck, filled with firearms and machetes. The Accused personally distributed weapons to the *Interahamwe* and ordered them to go to work stating that there was a lot of dirt that needed to be cleaned up. The Accused was carrying a rifle slung over his shoulder and a machete hanging from his belt. The Chamber also finds that it is established beyond any reasonable doubt that on 15 April 1994 in the afternoon, the Accused arrived at the Cyahafi Sector, Nyarugenge *Commune*, in a pick-up truck. The pick-up was parked near a public

[113] See Chapter 2, Section 2 of this Judgement.

standpipe. The Accused got out of the vehicle, opened the back of the truck where the guns were kept. The men who had come with him distributed the weapons to members of the *Interahamwe.* Immediately after the distribution of rifles, those who received them started shooting. Three persons were shot dead; all were Tutsis. The Chamber also finds that it is established beyond a reasonable doubt that on or about 24 April 1994, in the Cyahafi Sector, the Accused distributed Uzzi guns to the President of the *Interahamwe* of Cyahafi during an attack by the *Interahamwe* on the Abakombozi.

385. In the opinion of the Chamber, the Accused is individually criminally responsible by reason of such acts for having aided and abetted in the preparation for and perpetration of killings of members of the Tutsi group and for having caused serious bodily or mental harm to members of said group.

386. With respect to the acts alleged under paragraph 11 of the Indictment, the Prosecutor failed to satisfy the Chamber that such acts are proven beyond any reasonable doubt and that the Accused incurs criminal responsibility as a result.

387. Regarding the allegations included in paragraph 12 of the Indictment, the Chamber is satisfied beyond any reasonable doubt that in April 1994, Tutsis who had been separated at a roadblock in front of Amgar garage were taken to the office of the Accused inside Amgar garage and that the Accused thereafter directed that these Tutsis be detained within Amgar. The Accused subsequently directed men under his control to take fourteen detainees, at least four of whom were Tutsis, to a deep hole near Amgar garage. On the orders of the Accused and in his presence, his men killed ten of the detainees with machetes. The bodies of the victims were thrown into the hole.

388. In the opinion of the Chamber, the Accused is individually criminally responsible as charged for having ordered, committed, aided and abetted in the preparation and execution of killings of members of the Tutsi group and caused serious bodily or mental harm to members of said group.

389. As concerns the acts alleged in paragraphs 13, 14, 15 and 16 of the Indictment, the Chamber finds that these have been established beyond any reasonable doubt. From 7 April to 11 April 1994, several thousand persons, most of them Tutsis, sought refuge at the ETO. Members of the *Interahamwe*, armed with rifles, grenades, machetes and cudgels gathered outside the ETO. Prior to the attack, the Hutus were separated from the Tutsis who were at the ETO, following which hundreds of Hutus then left the ETO compound. When UNAMIR troops withdrew from the ETO on 11 April 1994, members of the *Interahamwe* and of the Presidential Guard surrounded the compound and attacked the refugees, throwing grenades, firing shots and killing people with machetes and cudgels. The attack resulted in the deaths of a large number of Tutsis. The Accused was present during the ETO attack, armed with a rifle in the midst of a group of attackers who proceeded to throw grenades and fire shots. He was seen about fifty metres away from the entrance to the ETO. The Chamber finds that it is established beyond any reasonable doubt that the Accused was at the ETO and that he participated in the attack against the Tutsi refugees.

390. A large number of the refugees who managed to escape or survived the attack on the ETO then headed in groups for the Amahoro Stadium. On their way, they were intercepted by soldiers who assembled them close to the Sonatube factory and diverted them towards Nyanza. They were insulted, threatened and killed by soldiers and members of the *Interahamwe* who were escorting them and who were armed with machetes, cudgels, axes and other weapons. At Nyanza, the *Interahamwe* forced the refugees to stop; they were assembled and made to sit at the foot of a hill where armed soldiers stood. The refugees were surrounded by *Interahamwe* and soldiers. The Hutus were asked to stand up and identify themselves and were subsequently allowed to leave. Some Tutsis who tried to leave pretending to be Hutus were killed on the spot by members of the *Interahamwe* who knew them. Grenades were then hurled into the crowd by the *Interahamwe* and the soldiers on the hill started shooting. Those who tried to escape were escorted back by the *Interahamwe*. Many people were killed. After firing shots and throwing grenades at the refugees, the soldiers ordered the *Interahamwe* to start killing them. Thereupon the *Interahamwe* started killing, using cudgels and other weapons. Some young girls were singled out, taken aside and

raped before being killed. Many of the women who were killed were stripped of their clothing. The soldiers then ordered the *Interahamwe* to check for survivors and to finish them off. The Accused directed the *Interahamwe* who were armed with grenades, machetes and clubs into position to surround the refugees just prior to the massacre. The Chamber finds that it has been established beyond any reasonable doubt that the Accused was present and participated in the Nyanza attack. Furthermore, it holds that by his presence, the Accused abetted in the perpetration of the crimes.

391. With respect to the acts alleged against the Accused, as described in paragraphs 13 to 16 of the Indictment, the Chamber finds that individual criminal responsibility attached to the Accused for having committed, aided and abetted in the killings of members of the Tutsi group and having caused serious bodily or mental harm to members of the Tutsi group.

392. With respect to the allegations made in paragraph 17 of the Indictment, the Chamber notes that the Prosecutor has failed to lead evidence in support of the allegations that, in April 1994, the Accused conducted searches in the Masango *Commune*. Nor has the Prosecutor satisfied the Chamber beyond any reasonable doubt that the Accused instructed that all Tutsis be tracked down and thrown into the river.

393. The Chamber finds, with regard to the events alleged in paragraph 18, that it is established beyond any reasonable doubt that, on 28 April 1994, *Interahamwe* conducted house-to-house searches in the Agakingiro neighbourhood demanding identity cards from people. Tutsis and people belonging to certain political parties were taken to the "Hindi Mandal" temple, near Amgar garage. The Accused was present at the location where the detainees had been gathered. He was dressed in military uniform, including a coat and trousers, and was carrying a rifle. Among the detainees was Emmanuel Kayitare, alias Rujindiri, a Tutsi. A man called Cekeri told Emmanuel that he knew him and that he was aware that he was going to the National Development Council (CND). Emmanuel became frightened and took off running. The Accused caught Emmanuel by the collar of his shirt to prevent him from running away. He struck Emmanuel Kayitare on the head with a machete, killing him instantly.

394. The Chamber finds that the Accused incurs individual criminal responsibility for such acts for having personally killed a Tutsi and for having aided and abetted in the preparation or causing of serious bodily and mental harm on members of the Tutsi group.

395. Regarding the events alleged in paragraph 19 of the Indictment, the Chamber finds that, while it is established that the Accused ordered that the bodies of the victims be buried, the Prosecutor, however, failed to satisfy the Chamber beyond reasonable doubt that the Accused gave such orders in order to conceal his crimes from the international community.

396. In light of the foregoing, the Chamber is satisfied beyond reasonable doubt that the Accused incurs criminal responsibility, under Article 6(1) of the Statute, for having ordered, committed or otherwise aided and abetted in the preparation or execution of murders and the causing of serious bodily or mental harm on members of the Tutsi group.

As to whether the above-mentioned acts were committed against the Tutsi group, specifically targeted, as such, and whether the Accused had the requisite intent in committing the above - mentioned acts for which he incurs criminal responsibility:

397. In its findings on the applicable law with respect to the crime of genocide[114], the Chamber held that, in practice, intent may be determined, on a case by case basis, through a logical inference from the material evidence submitted to it, and which establish a consistent pattern of conduct on the part of the Accused. Quoting a text from the findings in the *Akayesu Judgement*, it holds:

> "On the issue of determining the offender's specific intent, the Chamber considers that the intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the Accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act".[115]

---

[114] See Chapter 2, Section 2 of this Judgement.

[115] *Akayesu Judgement*, para. 523.

398. The Chamber notes that many corroborating testimonies presented at trial show that the Accused actively participated in the widespread attacks and killings committed against the Tutsi group. The Chamber is satisfied that the Accused, who held a position of authority because of his social standing, the reputation of his father and, above all, his position within the *Interahamwe,* ordered and abetted in the commission of crimes against members of the Tutsi group. He also directly participated in committing crimes against Tutsis. The victims were systematically selected because they belonged to the Tutsi group and for the very fact that they belonged to the said group. As a result, the Chamber is satisfied beyond any reasonable doubt that, at the time of commission of all the above-mentioned acts which in its opinion are proven, the Accused had indeed the intent to destroy the Tutsi group as such.

399. Moreover, on the basis of evidence proffered at trial and discussed in this Judgement under the section on the general allegations,[116] the Chamber finds that, at the time of the events referred to in the Indictment, numerous atrocities were committed against Tutsis in Rwanda. From the widespread nature of such atrocities, throughout the Rwandan territory, and the fact that the victims were systematically and deliberately selected owing to their being members of the Tutsi group, to the exclusion of individuals who were not members of the said group, the Chamber is able to infer a general context within which acts aimed at destroying the Tutsi group were perpetrated. Consequently, the Chamber notes that such acts as are charged against the Accused were part of an overall context within which other criminal acts systematically directed against members of the Tutsi group, targeted as such, were committed.

400. The Chamber recalls that, in its findings on the general allegations, it also indicated that, in its opinion, the Tutsi group clearly constitutes a protected group, within the meaning of the Convention on genocide.

---

[116] See Chapter 4, Section 8 of this Judgement.

401. In light of the foregoing, the Chamber is satisfied beyond any reasonable doubt; **firstly**, that the above-mentioned acts for which the Accused incurs individual responsibility on the basis of the allegations under paragraphs 10, 12, 13, 14, 15, 16 and 18 of the Indictment, are constitutive of the material elements of the crime of genocide; **secondly**, that such acts were committed by the Accused with the specific intent to destroy the Tutsi group as such;, and **thirdly**, that the Tutsi group is a protected group under the Convention on genocide. Consequently, the Chamber finds that the Accused incurs individual criminal responsibility for the crime of genocide.

5.2 Count 2: Crime Against Humanity (extermination)

402. Count 2 of the Indictment charges the Accused with crimes against humanity (extermination), pursuant to Article 3(b) and Article 6(1) of the Statute, for the acts alleged in paragraphs 10 to 19 of the Indictment.

403. In respect of paragraph 10 of the Indictment, the Chambers finds that on 8 April 1994, the Accused arrived at Nyarugenge *Commune* in a pick-up truck, carrying firearms and machetes. The Accused distributed weapons to the *Interahamwe* and ordered them to go to work, stating that there was a lot of dirt that needed to be cleaned up.

404. The Chamber finds that on the afternoon of 15 April 1994, the Accused went to Cyahafi Sector, Nyarugenge *Commune* in a pick-up truck. The Accused opened the back of the truck and the men who were with him distributed weapons to the *Interahamwe.* The Chamber also finds that on or about 24 April 1994 and in the Cyahafi sector, the Accused distributed fire arms to the President of the *Interahamwe* of Cyahafi, during an attack by the *Interahamwe* on the Abakombozi.

405. In respect of the allegations in paragraph 12 of the Indictment, the Chamber finds that in April 1994 Tutsis were singled out at a roadblock near the Amgar garage and taken to the

Accused, who ordered the detention of these people. The Accused subsequently ordered that 14 detainees be taken to a hole near the Amgar garage. On the orders of the Accused and in his presence, ten of these detainees were killed and their bodies were thrown into the hole.

406. In respect of the allegations in paragraphs 13 and 14 of the Indictment, the Chamber finds that several thousand people, mostly Tutsis, sought refuge at the ETO, from 7 to 11 April 1994. Following the departure of UNAMIR from the ETO, on 11 April 1994 , Colonel Leonides Rusatila went into the ETO compound and separated Hutus from Tutsis and several hundred Hutus left the ETO. Thereafter the *Interahamwe*, together with the Presidential Guard attacked the people in the compound. The Accused was present and participated in this attack. A number of Tutsis, including many family members and others known to the witnesses were killed in the attack.

407. In respect of the allegations in paragraphs 15 and 16 of the Indictment, the Chamber finds that the Accused was present and participated in the forced diversion of refugees to Nyanza and that he directed and participated in the attack at Nyanza on 11 April 1994.

408. The Chamber notes that paragraph 16 of the Indictment alleges that certain events, namely the separation of Hutus and Tutsis refugees and the attack on the Tutsis refugees, took place on or about 12 April 1994. As noted by the Prosecutor, these events took place on 11April 1994. The Chamber does not consider this variance to be material, particularly in light of the language "on or about". The sequence of events leading to the massacre is described in paragraphs 14, 15 and 16 of the Indictment as having commenced on 11 April 1994. Moreover, the killing at Nyanza was resumed on the morning of 12 April 1994. The Chamber considers that 11 April 1994 constitutes "on or about April 12, 1994".

409. The Chamber further notes that paragraphs 15 and 16 of the Indictment allege that refugees were transferred to a gravel pit near the primary school of Nyanza, where they were surrounded and attacked. As the Defence indicated in her closing statement, none of the witnesses described the site of the massacre as a gravel pit. The evidence establishes that the

refugees were assembled and surrounded at a site at Nyanza, at the base of a nearby hill. The Chamber does not consider the description of this site as a gravel pit in the allegation, to be of the essence to the charges set forth in the Indictment and finds that the allegations set forth in paragraph 15 and 16 of the Indictment have been proved, beyond a reasonable doubt.

410. In respect of the allegations in paragraph 18 of the Indictment, the Chamber finds beyond a reasonable doubt that on 28 April 1994, Emmanuel Kayitare, together with other people, were taken to the "Hindi Mandal" temple, near the Amgar Garage, where they were detained. The Accused was present at this location, and when Emmanuel Kayitare tried to escape by running off, the Accused grabbed him by his collar and struck him on his head with a machete, which resulted in his death.

411. The Chamber relies on this factual finding to hold the Accused criminally responsible for crimes against humanity (murder), as charged in Count 7 of the Indictment. The Chamber finds that the act of killing Emmanuel Kayitare, taken together with other proven acts, such as, the distribution of fire arms and machetes to the *Interahamwe* and the killings at ETO and Nyanza, cumulatively form the basis for crimes against humanity (extermination). The Chamber will therefore take into consideration the factual findings in paragraph 18, together with other proven acts, when assessing the responsibility of the Accused, in respect of Count 2.

412. In respect of the allegation in paragraph 19 of the Indictment, the Chamber finds that the accused ordered the burial of bodies, in order to conceal the dead from the "'foreigners". The Chamber finds that there is no evidence to suggest that the Accused ordered the burial of bodies to conceal his crimes from the international community. The allegation in paragraph 19 has therefore only been proved in part.

413. In respect of the allegations in paragraphs 11 and 17 of the Indictment, the Chamber finds that these allegations have not been proved, beyond a reasonable doubt.

414. The Chamber notes that Article 6(1) of the Statute, provides that a person who "planned,

instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime."

415. The Chamber finds beyond a reasonable doubt that the Accused: aided and abetted in the killings by distributing weapons to the *Interahamwe* on 8, 15 and 24 April 1994; ordered the killing of 10 people in April 1994 who were subsequently killed in his presence; participated in an attack on the people who sought refuge at the ETO; directed and participated in the attack at Nyanza; murdered Emmanuel Kayitare and by his conduct intended to cause the death of a large number of people belonging to the Tutsi ethnic group, because of their ethnicity.

416. The Chamber finds beyond a reasonable doubt that in the time periods referred to in the indictment there was a widespread and systematic attack on the Tutsi ethnic group, on ethnic grounds. The accused had knowledge of this attack, and he intended his conduct to be consistent with the pattern of this attack and to be a part of this attack.

417. The Chamber therefore finds beyond a reasonable doubt that the Accused is individually criminally responsible for crimes against humanity (extermination), pursuant to Articles 2(3)(b) and 6(1) of the Statute.

5.3 Count 3: Crime Against Humanity (murder)

418. Count 3 of the Indictment charges the Accused with crimes against humanity (murder), pursuant to Articles 3(a) and 6(1) of the Statute, for the acts alleged in paragraph 14 of the Indictment.

419. The Chamber notes that pursuant to Count 2 of the Indictment, the Accused is charged for crimes against humanity (extermination), under Articles 3(b) and 6(1) of the Statute of the Tribunal, for the acts alleged in paragraphs 10-19 of the Indictment, which acts include the attack on the ETO compound, as alleged in paragraph 14. The allegations in paragraph 14 of the indictment also form the basis for Count 3, crimes against humanity (murder)

420. The Chamber concurs with the reasoning in the *Akayesu Judgement*[117] that:

> "[...] it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide."

421. As crimes against humanity, murder and extermination share the same constituent elements of the offence of a crime against humanity, that it is committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Both murder and extermination are constituted by unlawful, intentional killing.

---

[117] *Akayesu Judgement*, para. 468.

Murder is a the killing of one or more individuals, whereas extermination is a crime which is directed against a group of individuals.

422. The Chamber notes that in the *Akayesu Judgement*, a series of murder charges set forth in individual paragraphs of the Indictment were held collectively to constitute extermination. In that case the individual allegations which formed the basis for counts of murder and at the same time formed the basis for a collective count of extermination were incidents in which named persons had been murdered. In this case, the single allegation of the ETO attack, although charged as murder, is in itself an allegation of extermination, that is the killing of a collective group of individuals.

423. Having held the Accused criminally responsible for his conduct, as alleged in paragraph 14 of the Indictment, in respect of crimes against humanity (extermination), as charged in Count 2, the Chamber finds that he cannot also be held criminally responsible for crimes against humanity (murder), as charged in Count 3 of the Indictment on the basis of the same act.

5.4 Count 5: Crime Against Humanity (murder)

424. Count 5 of the Indictment charges the Accused with crimes against humanity (murder), pursuant to Articles 3(a) and 6(1) of the Statute, for the acts alleged in paragraph 15 and 16 of the Indictment.

425. The Chamber notes that the Accused is charged, pursuant to Count 2 of the Indictment for crimes against humanity (extermination), under Articles 3(b) and 6(1) of the Statute, for the acts alleged in paragraphs 10-19 of the Indictment, which acts include the massacre of Tutsi refugees at Nyanza, as alleged in paragraphs 15 and 16. These allegations also support Count 5, crimes against humanity (murder).

426. For the reasons set forth in the legal findings pertaining to Count 3 above, the Chamber finds that the Accused cannot be held criminally responsible for crimes against humanity (murder), as charged in Count 5 of the Indictment.

5.5 Count 7: Crime Against Humanity (murder)

427. Count 7 of the Indictment charges the Accused with crimes against humanity (murder), pursuant to Articles 3(a) and 6(1) of the Statute, for the acts alleged in paragraph 18 of the Indictment.

428. The Chamber finds beyond a reasonable doubt that on 28 April 1994, Emmanuel Kayitare together with other people were taken near the Amgar Garage, where they were detained. The Accused was present at this location and when Emmanual Kayitare tried to escape by running off, the Accused grabbed hold of him by his collar and struck him on his head with a machette, which resulted in his death.

429. The Chamber notes that Article 6(1) of the Statute of the Tribunal provides that a person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime." The Chamber finds beyond a reasonable doubt that the Accused detained or alternatively aided and abetted in the detention of Tutsis and other people belonging to certain political parties and that he murdered Emmanual Kayitare when the said Kayitare attempted to escape.

430. The Chamber finds beyond a reasonable doubt that Emmanual Kayitare was a civilianbelonging to the Tutsi ethnic group.

431. The Chamber finds beyond a reasonable doubt that in April 1994 there was a widespread and systematic attack on the Tutsi ethnic group, because of their ethnicity. The accused had knowledge of this attack and he intended the murder of Kayitare to be consistent with the pattern of this attack and to be a part of this attack.

432. The Chamber finds beyond a reasonable doubt that the Accused is individually criminally responsible for crimes against humanity (murder), as charged in Count 7 of the Indictment.

5.6 Counts 4, 6, and 8 : Violation of Common Article 3 of the Geneva Conventions (murder)

433. Counts 4, 6 and 8 of the Indictment charge the Accused with violations of Common Article 3 of the 1949 Geneva Conventions, as incorporated in Article 4 of the Statute. The Prosecutor has chosen to restrict the wording of these counts to violations of Common Article 3 only, even though Article 4 of the Statute covers both Common Article 3 and also Additional Protocol II of 1977 to the Geneva Conventions of 1949. As indicated *supra* by the Chamber[118], Additional Protocol II merely supplements and reaffirms Common Article 3, without modifying the article's field of applicability. The only true difference between the Article and the Protocol is the higher threshold to be met for internal conflicts to be characterized as meeting the requirements of the Additional Protocol.

434. The Prosecutor, in her closing brief, outlined the elements of the offences and the burden of proof with which she was laden. In so doing, she developed not only the material requirements to be met for an offence to constitute a serious violation of Common Article 3, but also presented to the Chamber the material requirements to be met for Additional Protocol II to be applicable. It thus transpires from her argumentation that she intended to prove that the material requirements of both Common Article 3 and Additional Protocol II had to be met before any finding of guilt could be made with regard to counts 4, 6 and 8 of the Indictment. Moreover, were any doubt to remain as to whether the Prosecutor needs to demonstrate that Common Article 3 is applicable, or that both Common Article 3 and Additional Protocol II are applicable, the Chamber recalls that in criminal proceedings, matters in doubt should be interpreted in favour of the Accused. Furthermore, the Trial Chamber considers the material requirements of Article 4 of the Statute to be indivisible, in other words, that Common Article 3 and Additional Protocol II must be satisfied conjunctively, before an offence can be deemed to be covered by Article 4 of the Statute. Thus, it is the opinion of the Chamber that for a finding of guilt to be made for any one of counts

[118] See section 2.4 of Applicable Law

4, 6 and 8 of the Indictment, the Chamber must be satisfied that the material requirements of Common Article 3 and Additional Protocol II have to be met. Consequently, the Prosecutor must prove that at the time of the events alleged in the Indictment there existed an internal armed conflict in the territory of Rwanda, which, at the very least, satisfied the material requirements of Additional Protocol II, as these requirements subsume those of Common Article 3.

435. On the basis of evidence presented in this case by Professor Reyntjens, Mr. Nsanzuwera, Professor Mbonimpa and Captain Lemaire, the Chamber is satisfied that at the time of the events alleged in the Indictment, namely, in April, May and June 1994, there existed an internal armed conflict between, on the one hand, the government forces and, on the other, the dissident armed forces, the RPF. The RPF were under the responsible command of General Kagame and exercised such control over part of their territory as to enable them to carry on sustained and concerted military operations. The RPF also stated to the International Committee of the Red Cross that it considered itself bound by the rules of international humanitarian law[119]. Moreover, the theater of combat in April 1994 included the town of Kigali, as the opposing forces fought to gain control of the capital.

[119] See Report of the United Nations High Commissioner for Human Rights on his Mission to Rwanda 11-12 May 1994, paragraph 20.

436. Evidence adduced in support of the paragraphs contained in the general allegations, and more specifically paragraphs 7 and 8, and also the allegations set out in paragraphs 14, 15, 16 and 18 of the Indictment, demonstrate that the victims of the offences were unarmed civilians, men, women and children who had been identified as the "targets" on the basis of their ethnicity. Those persons who had carried weapons were disarmed by the UNAMIR troops on entering the ETO compound. The Chamber does not consider that the bearing of these weapons prior to being disarmed deprived the victims of the protection afforded to them by Common Article 3 of the Geneva Conventions and Additional Protocol II. Indeed, the Chamber is not of the opinion that these "armed" civilians were taking a direct part in the hostilities, but rather finds that the bearing of these weapons was a desperate and futile attempt at survival against the thousands of armed assailants.

437. The Chamber is satisfied that the victims were persons taking no active part in the hostilities and were thus protected persons under Common Article 3 of the Geneva Conventions and Additional Protocol II.

438. The Accused was in a position of authority vis-à-vis the *Interahamwe* militia. Testimonies in this case have demonstrated that the Accused exerted control over the *Interahamwe*, that he distributed weapons to them during the events alleged in this Indictment, aiding and abetting in the commission of the crimes and directly participating in the massacres with the *Interahamwe*. The expert witness, Mr. Nsanzuwera, testified that the *Interahamwe* militia served two roles during April, May and June 1994, on the one hand, they supported the RAF war effort against the RPF, and on the other hand, they killed Tutsi and Hutu opponents.

439. Moreover, as testified by Mr. Nsanzuwera, there is merit in the submission of the Prosecutor that, considering the position of authority of the Accused over the *Interahamwe*, and the role that the *Interahamwe* served in supporting the RAF against the RPF, there is a nexus between the crimes committed and the armed conflict. In support thereof, the Prosecutor argues that the *Interahamwe* were the instrument of the military in extending the scope of the massacres.

440. Thus, the Chamber is also satisfied that the Accused, as second vice-president of the youth wing of the MRND, being known as the *Interahamwe za MRND* and being the youth wing of the political majority in the government in April 1994, falls within the category of persons who can be held individually responsible for serious violations of the provisions of Article 4 of the Statute.

441. The Prosecutor argues that the *Interahamwe* orchestrated massacres as part of their support to the RAF in the conflict against the RPF, and as the Accused was in a position of authority over the *Interahamwe*, that, *ipso facto*, the acts of the Accused also formed part of that support. Such a conclusion, without being supported by the necessary evidence, is, in the opinion of the Chamber, insufficient to prove beyond reasonable doubt that the Accused is individually criminally responsible for serious violations of Common Article 3 and Additional Protocol II. Consequently, the Chamber finds that the Prosecutor has not shown how the individual acts of the Accused, as alleged in the Indictment, during these massacres were committed in conjunction with the armed conflict.

442. Moreover, in the opinion of the Chamber, although the Genocide against the Tutsis and the conflict between the RAF and the RPF are undeniably linked, the Prosecutor cannot merely rely on a finding of Genocide and consider that, as such, serious violations of Common Article 3 and Additional Protocol II are thereby automatically established. Rather, the Prosecutor must discharge her burden by establishing that each material requirement of offences under Article 4 of the Statute are met.

443. The Chamber therefore finds that it has not been proved beyond reasonable doubt that there existed a nexus between the culpable acts committed by the Accused and the armed conflict.

444. Consequently, the Chamber finds the Accused not guilty of Counts 4, 6, and 8 of the Indictment, being serious violations of Common Article 3 of the Geneva Conventions (murder), as incorporated under Article 4 (a) of the Statute.

6. VERDICT

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER unanimously finds as follows:

Count 1:	Guilty of Genocide
Count 2:	Guilty of Crime Against Humanity (Extermination)
Count 3:	Not Guilty of Crime Against Humanity (Murder)
Count 4:	Not Guilty of Violation of Article 3 Common to the Geneva Conventions (Murder)
Count 5:	Not Guilty of Crime Against Humanity (Murder)
Count 6:	Not Guilty of Violation of Article 3 Common to the Geneva Conventions (Murder)
Count 7:	Guilty of Crime Against Humanity (Murder)
Count 8:	Not Guilty of Violation of Article 3 Common to the Geneva Conventions (Murder)

7. SENTENCE

445. The Chamber will now summarize the legal texts relating to sentences and penalties and their enforcement, before going on to specify the applicable scale of sentences, on the one hand, and the general principles governing the determination of penalties, on the other.

A. Applicable texts

446. The Chamber will apply the statutory and regulatory provisions hereafter. Article 22 of the Statute on judgement, Articles 23 and 26 dealing respectively with penalties and enforcement of sentences, Rules 101, 102, 103 and 104 of the Rules which cover respectively sentencing procedure on penalties, status of the convicted person, place and supervision of imprisonment.

B. Scale of sentences applicable to the Accused found guilty of one of the crimes listed in Articles 2, 3 or 4 of the Statute of the Tribunal

447. The Tribunal may impose on an accused who pleads guilty or is convicted as such, penalties ranging from prison terms up to and including life imprisonment. The Statute of the Tribunal excludes other forms of punishment such as the death sentence, penal servitude or a fine.

448. Whereas in most national systems the scale of penalties is determined in accordance with the gravity of the offence, the Chamber notes that the Statute does not rank the various crimes falling under the jurisdiction of the Tribunal and, thereby, the sentence to be handed down. In theory, the sentences are the same for each of the three crimes, namely a maximum term of life imprisonment.

449. It should be noted, however, that in imposing the sentence, the Trial Chamber should take into account, in accordance with Article 23 (2) of the Statute, such factors as the gravity of the offence. In the opinion of the Chamber, it is difficult to rank genocide and crimes against

humanity as one being the lesser of the other in terms of their respective gravity. The Chamber holds that both crimes against humanity, already punished by the Nuremberg and Tokyo Tribunals, and genocide, a concept defined later, are crimes which are particularly shocking to the collective conscience.

450. Regarding the crime of genocide, in particular, the preamble to the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international cooperation to liberate humanity from such an odious scourge. The crime of genocide is unique because of its element of *dolus specialis,* (special intent) which requires that the crime be committed with the intent 'to destroy in whole or in part, a national, ethnic, racial or religious group as such', as stipulated in Article 2 of the Statute; hence the Chamber is of the opinion that genocide constitutes the "crime of crimes", which must be taken into account when deciding the sentence.

451. There is no argument that, precisely on account of their extreme gravity, crimes against humanity and genocide must be punished appropriately. Article 27 of the Charter of the Nuremberg Tribunal empowered that Tribunal, pursuant to Article 6(c) of the said Charter, to sentence any accused found guilty of crimes against humanity to death or such other punishment as shall be determined by it to be just.

452. Rwanda, like all the States which have incorporated crimes against humanity or genocide in their domestic legislation, provides the most severe penalties for such crimes under its criminal legislation. To this end, the Rwandan Organic Law on the Organization of Prosecutions for Offences constituting Genocide or Crimes against Humanity, committed since 1 October 1990, [120], groups accused persons into four categories, according to their acts of criminal participation. Included in the first category are the masterminds of the crimes (planners, organizers), persons in positions of authority, and persons who have exhibited excessive cruelty and perpetrators of

[120] Organic Law No. 8/96 of 30 August 1996, published in the Gazette of the Republic of Rwanda, 35th year. No. 17, 1 September 1996.

sexual violence. All such persons are punishable by the death penalty. The second category covers perpetrators, conspirators or accomplices in criminal acts, for whom the prescribed penalty is life imprisonment. Included in the third category are persons who, in addition to committing a substantive offence, are guilty of other serious assaults against the person. Such persons face a short-term imprisonment. The fourth category is that of persons who have committed offences against property.

453. Reference to the practice of sentencing in Rwanda and to the Organic law is for purposes of guidance. While referring as much as practicable to such practice of sentencing, the Chamber maintains its unfettered discretion to pass sentence on persons found guilty of crimes falling within its jurisdiction, taking into account the circumstances of the case and the individual circumstances of the accused persons.

C. General principles regarding the determination of sentences

454. In determining the sentence, the Chamber shall be mindful of the fact that this Tribunal was established by the Security Council pursuant to Chapter VII of the Charter of the United Nations within the context of measures the Council was empowered to take under Article 39 of the said Charter to ensure that violations of international humanitarian law in Rwanda in 1994 were halted and effectively redressed. The objective was to prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity and thereby to promote national reconciliation and the restoration of peace.

455. That said, it is clear that the penalties imposed on accused persons found guilty by the Tribunal must be directed, on the one hand, at retribution of the said accused, who must see their crimes punished, and over and above that, on other hand, at deterrence, namely to dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.

456. The Chamber also recalls that, in the determination of sentences, it is required under Article 23(2) of the Statute and Rule 101(B) of the Rules to take into account a number of factors including the gravity of the offence, the individual circumstances of the convicted person, the existence of any aggravating or mitigating circumstances, including the substantial co-operation with the Prosecutor by the convicted person before or after his conviction. It is a matter, as it were, of individualizing the penalty.

457. Clearly, however, as far as the individualization of penalties is concerned, the judges of the Chamber cannot limit themselves to the factors mentioned in the Statute and the Rules. Here again, their unfettered discretion in assessing the facts and attendant circumstances should enable them to take into account any other factor that they deem pertinent.

458. Similarly, the factors referred to in the Statute and in the Rules cannot be interpreted as having to be applied cumulatively in the determination of the sentence.

D. Submissions of the Parties

Prosecutor's submissions

459. In her final brief and in her closing argument made in open court on 16 June 1999, the Prosecutor submitted that the crimes committed by Rutaganda, in particular the crime of genocide and crimes against humanity, are of extremely serious offences calling for appropriate punishment. She submitted that the Chamber should take into account the status of Rutaganda in the society, his individual role in the execution of the crimes, his motivation, his mental disposition and his will, the attendant circumstances of his crimes and his behaviour after the criminal acts.

460. The Prosecutor submitted that the following aggravating circumstances are such as to justify a more severe sentence in this matter:

(i) Rutaganda was known in society as the second vice-president of the *Interahamwe* at the national level. He also was a rich businessman;

(ii) His criminal participation extended to all levels. He acted as a principal authority at Amgar garage, ETO and Nyanza massacres. He incited to kill and he also killed with his own hands. He provided logistical support in distributing weapons;

(iii) He endorsed the genocidal plan of the interim government. At the same time, he seized the occasion for his personal gain;

(iv) He played a leading role in the genocide. He killed or ordered his victims to be killed in cold blood;

(v) He ordered the *Interahamwe* to kill the victims with various blunt and sharp weapons in complete disregard for the suffering of the individual victim.

The victims were placed in a world of total persecution which lasted for 100 days;

(vi) In his capacity as direct supervisor of the *Interahamwe* at Amgar garage, he failed to punish the perpetrators. In fact, he was one of the principal offenders.

461. Furthermore, the Prosecutor submits that there are no mitigating circumstances. The Accused did not cooperate with the Prosecutor. He has shown no remorse for his crimes.

462. With regard to the issue of multiple sentences which could be imposed on Rutaganda as envisaged by Rule 101(c) of the Rules, the Prosecutor asked for separate sentences for each of the counts on which Rutaganda was found guilty while specifying that the Accused should serve the more severe sentence. The Prosecutor, submitted that the Chamber should impose a sentence for each offence committed in order to fully recognize the seriousness of each crime, and the particular role of the convicted person in its commission.

463. In conclusion, the Prosecutor recommends life imprisonment for each count for which the accused is convicted.

Defence's submissions

464. During the final arguments hearing, the Defence submitted that Rutaganda is innocent and asked that he be acquitted of all the eight counts charged. The Accused himself expressed his sorrow to the Rwandan population especially those who live in his native land. He called on the Chamber to consider especially his health condition and though he did not feel he was guilty, he prayed that the Chamber afford him time to live with his children, should it find him guilty.

E. Personal circumstances of Georges Rutaganda

465. Rutaganda was born on 28 November 1958. His father was a prominent person in Rwanda. Rutaganda is married and has three children. He was a rich businessman. He was a member of MRND at the national and prefectural levels. He served as the second vice- president of the *Interahamwe* at the national level.

466. The Chamber has scrupulously examined all the submissions presented by the parties in determination of sentence; from which it derives the following:

F. Aggravating circumstances

(i) Gravity of the Offences:

467. The offences with which the accused Georges Rutaganda is charged are, indisputably, extremely serious, as the Trial Chamber already pointed out when it described genocide as the "crime of crimes".

(ii) The position of authority of Georges Rutaganda in the *Interahamwe*

468. Rutaganda was the second vice- president of the *Interahamwe* at the national level. The Chamber finds that the fact that a person in a high position abused his authority and committed crimes is to be viewed as an aggravating factor.

(iii) The role played by Rutaganda in the execution of the crimes

469. The Chamber finds that Rutaganda played an important leading role in the execution of the crimes. He distributed weapons to the *Interahamwe* for the purpose of killling Tutsis. He positioned the *Interahamwe* at Nyanza and incited and ordered the killing of Tutsis on several occasions. As a second vice president of the *Interahamwe*,. He killed Emmanuel Kayitare, alias Rujindiri, a Tutsi, by stricking him on the head with a machete.

G. Mitigating circumstances

(i) Assistance given by Georges Rutaganda to certain people

470. The Defence alleges that Georges Rutaganda, during the period of the commission of the crimes with which he is charged, helped people to evacuate to various destinations at various times and by various means. The Chamber accepts, as mitigating factors, the fact that Rutaganda had evacuated the families of witnesses DEE and DS and that he had used exceptional means to save witness DEE, the Tutsi wife of one of his friends and that he provided food and shelter to some refugees.

(ii) Rutaganda's health condition

471. Rutaganda requested that the Chamber consider his present health condition. The Chamber notes that Rutaganda is in poor health and has had to seek medical help continously.

472. Having reviewed all the circumstances of the case, the Chamber is of the opinion that the aggravating factors outweigh the mitigating factors, especially as Rutaganda occupied a high position in the *Interahamwe* at the time the crimes were committed. He knowingly and consciously participated in the commission of such crimes and never showed remorse for what he inflicted upon the victims.

TRIAL CHAMBER I

FOR THE FOREGOING REASONS,

DELIVERING its decision in public, *inter partes* and in the first instance;

PURSUANT to Articles 23, 26 and 27 of the Statute of the Tribunal and Rules 101, 102, 103 and 104 of the Rules of Procedure and Evidence;

Noting the general practice regarding sentencing in Rwanda;

Noting that Rutaganda has been found guilty of:

Genocide	- Count 1
Crime Against Humanity (extermination)	- Count 2
Crime Against Humanity (murder)	- Count 7

Noting the brief submitted by the Prosecutor;

Having heard the Prosecutor and the Defence;

IN PUNISHMENT OF THE ABOVE MENTIONED CRIMES,

ANNEX 3:

Prosecutor v Delalic et al. (Celebici case), Judgement, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001.

UNITED NATIONS

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

Case No.: IT-96-21-A

Date: 20 February 2001

Original: ENGLISH

IN THE APPEALS CHAMBER

Before: **Judge David Hunt, Presiding**
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar: **Mr Hans Holthuis**

Judgement of: **20 February 2001**

PROSECUTOR

V

Zejnil DELALIĆ, Zdravko MUCIĆ (aka "PAVO"), Hazim DELIĆ and Esad LANDŽO (aka "ZENGA")

("^*ELEBIĆI* Case")

JUDGEMENT

Counsel for the Accused:
Mr John Ackerman and Ms Edina Rešidovi} for Zejnil Delalić
Mr Tomislav Kuzmanović and Mr Howard Morrison for Zdravko Mucić
Mr Salih Karabdić and Mr Tom Moran for Hazim Delić
Ms Cynthia Sinatra and Mr Peter Murphy for Esad Landžo

The Office of the Prosecutor:
Mr Upawansa Yapa
Mr William Fenrick
Mr Christopher Staker
Mr Norman Farrell
Ms Sonja Boelaert-Suominen
Mr Roeland Bos

4234

CONTENTS

I. INTRODUCTION 2

II. GROUNDS OF APPEAL RELATING TO ARTICLE 2 OF THE STATUTE 4

A. Whether the Trial Chamber Erred in Holding that the Armed Conflict in Bosnia and Herzegovina at the Time Relevant to the Indictment was of an International Character 4
1. What is the Applicable Law? 6
2. Has the Trial Chamber Applied the "Overall Control" Test? 10
3. The Nature of the Conflict Prior to 19 May 1992 11
4. The Nature of the Conflict After 19 May 1992 12

B. Whether the Bosnian Serbs Detained in the ^elebi}i Camp were Protected Persons Under Geneva Convention IV 16
1. What is the Applicable Law? 18
2. Did the Trial Chamber Apply the Correct Legal Principles? 26
3. Conclusion 31

C. Whether Bosnia and Herzegovina was a Party to the Geneva Conventions at the Time of the Events Alleged in the Indictment 32

III. GROUNDS OF APPEAL RELATING TO ARTICLE 3 OF THE STATUTE 36

A. Whether Common Article 3 of the Geneva Conventions Falls Within the Scope of Article 3 of the Statute 38
1. What is the Applicable Law? 38
2. Did the Trial Chamber Follow the *Tadi}* Jurisdiction Decision? 44

B. Whether Common Article 3 is Applicable to International Armed Conflicts 44
1. What is the Applicable Law? 44
2. Did the Trial Chamber Follow the *Tadi}* Jurisdiction Decision? 48

C. Whether Common Article 3 Imposes Individual Criminal Responsibility 49
1. What is the Applicable Law? 49
2. Did the Trial Chamber Apply the Correct Legal Principles? 55

IV. GROUNDS OF APPEAL CONCERNING COMMAND RESPONSIBILITY 56

A. The Ninth Ground of Appeal of Muci} 57
1. *De Facto* Authority as a Basis for a Finding of Superior Responsibility in International Law 57
2. The Trial Chamber's Factual Findings 62
3. Discussion 63
4. Conclusion 67

B. The Prosecution Grounds of Appeal 67
1. Mental Element – "Knew or had Reason to Know" 67
2. Whether Delali} Exercised Superior Responsibility 77
3. Deli}'s Acquittal under Article 7(3) 101

V. UNLAWFUL CONFINEMENT OF CIVILIANS 109

A. Introduction 109

4235

B. The Prosecution appeals 116
1. Article 7(3) Liability 116
2. Article 7(1) Liability 117

C. Muci}'s Appeal 129

D. Conclusion 136

VI. MULTIPLE CONVICTIONS BASED ON THE SAME ACTS 137

A. Discussion 140
1. Cumulative Charging 140
2. Cumulative Convictions 140

B. Conclusion 149

C. Impact on Sentencing 151

VII. DELIĆ GROUNDS OF APPEAL ALLEGING ERRORS OF FACT 153

A. Introduction 153

B. Issues 9 and 10: Convictions under Counts 1 and 2 154

C. Issues 11 and 12: Convictions Under Counts 3 and 4 161

D. Issues 13 and 14: Convictions Under Counts 18 and 19 170

E. Issues 15 and 16: Convictions under Counts 21 and 22 174

F. Issues 17 and 18: Convictions Under Counts 46 and 47 177

VIII. THE PROSECUTION INTERVIEWS WITH MUCIĆ 185

IX. DIMINISHED MENTAL RESPONSIBILITY 200

A. Background 200

B. The Issues on Appeal 204

C. The Trial Chamber's Refusal to Define Diminished Mental Responsibility 204

D. Does Diminished Responsibility Constitute a Defence? 206

E. The Trial Chamber's Rejection of Diminished Mental Responsibility 210

X. SELECTIVE PROSECUTION 213

XI. JUDGE KARIBI-WHYTE 222

A. The Allegations as to the Presiding Judge's Conduct 224

B. Applicable Legal Principles 224

C. Was the Allegation Proved? 225

D. Absence of Identifiable Prejudice 226

E. Obligation to Raise the Issue at Trial 231

F. Conclusion 235

XII. JUDGE ODIO BENITO AND VICE-PRESIDENCY OF COSTA RICA 235

A. Background 236

B. Was Judge Odio Benito No Longer Qualified as a Judge of the Tribunal? 237

C. Should Judge Odio Benito Have Disqualified Herself as a Judge of the Tribunal? 246

D. Conclusion 249

XIII. JUDGE ODIO BENITO AND THE VICTIMS OF TORTURE FUND 253

XIV. GROUNDS OF APPEAL RELATING TO SENTENCING 260

A. Introduction 260

B. Prosecution's Appeal Against Mucić's Sentence 266
1. Failure to take into account the gravity of the offences 267
2. Failure to have regard to crimes not alleged in the Indictment 280
3. The determination that all sentences should be served concurrently 283

C. Mucić's Appeal Against Sentence 286
1. Consideration of aggravating and mitigating factors 286
2. Comparison to the case of *Wilhelm Von Leeb* 295
3. Weight to be given to the element of deterrence 296

D. Delić's Appeal Against Sentence 299
1. Violation of the Principle *Nulla Poena Sine Lege* and failure to properly consider the sentencing practice of the courts of the former Yugoslavia 301
2. The sentence imposed was excessive 304

E. Esad Land'o 306
1. Comparison with other sentences imposed by the Tribunal 307
2. Insufficient weight given to mitigating factors 309

F. Significance of Respective Roles in the Broader Context of the Conflict – Ground of Appeal Submitted by Land'o, Delić and Mucić 311

G. Conclusion 314

XV. DISPOSITION 317

XVI. SEPARATE AND DISSENTING OPINION OF JUDGE DAVID HUNT AND JUDGE MOHAMED BENNOUNA 320

4237

A. Introduction 320

B. Background 320

C. Analysis 323
1. Cumulative Charging 324
2. Cumulative Convictions 324

D. Application of these principles to the present case 337
1. Whether the crimes charged are legally distinct crimes 338
2. The determination of which of the duplicative convictions should be retained 339

E. Disposition 343

F. Sentencing Consequences 345

ANNEX A 347

A. Procedural Background 347
1. Notices of Appeal 347
2. Filings 347
3. Grounds of Appeal 349
4. Hearing 354
5. Status Conferences 354

B. Issues Relating to the Composition of the Appeals Chamber 354
1. Assignment of Judges 354
2. Disqualification 355

C. Issues Relating to Defence Counsel 357
1. Provisional Release 358
2. Severance 359

D. Issues Relating to Evidence 360
1. Motions to "Preserve and Provide" Evidence 360
2. Production of Documents 363
3. Admission of Evidence and Related Issues 363

ANNEX B - GLOSSARY OF TERMS 366

SENTENCES Georges Rutaganda to:

A SINGLE SENTENCE OF LIFE IMPRISONMENT
FOR ALL THE COUNTS ON WHICH HE HAS BEEN FOUND GUILTY

RULES that imprisonment shall be served in a State designated by the President of the Tribunal, in consultation with the Trial Chamber, the Government of Rwanda and the designated State shall be notified of such designation by the Registrar;

RULES that this judgement shall be enforced immediately, and that, however:

(i) Until his transfer to the designated place of imprisonment, Georges Rutaganda shall be kept in detention under the present conditions;

(ii) Upon notice of appeal, if any, the enforcement of the sentence shall be stayed until a decision has been rendered on the appeal, with the convicted person nevertheless remaining in detention.

Arusha, 6 December 1999,

Laïty Kama	Lennart Aspegren	Navanethem Pillay
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Respon[illegible] for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is seized of appeals against the Judgement rendered by Trial Chamber II on 16 November 1998 in the case of *Prosecutor v Zejnil Delali}, Zdravko Muci} also known as "Pavo", Hazim Deli}, Esad Land`o also known as "Zenga"* ("Trial Judgement").[1]

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

HEREBY RENDERS ITS JUDGEMENT.

[1] *Prosecutor v Zejnil Delali}, Zdravko Muci} also known as "Pavo", Hazim Deli}, Esad Land`o also known as "Zenga"*, Case No: IT-96-21-T, Trial Chamber, 16 Nov 1998 ("Trial Judgement"). (For a list of designations and abbreviations used in this Judgement, *see* Annex B).

4240

I. INTRODUCTION

1. The Indictment against *Zejnil Delali}, Zdravko Muci}, Hazim Deli}* and *Esad Land`o*, confirmed on 21 March 1996, alleged serious violations of humanitarian law that occurred in 1992 when Bosnian Muslim and Bosnian Croat forces took control of villages within the Konjic municipality in central Bosnia and Herzegovina. The present appeal concerns events within the Konjic municipality, where persons were detained in a former Yugoslav People's Army ("JNA") facility: the Čelebići camp. The Trial Chamber found that detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhumane treatment by Muci}, Deli} and Land`o.[2] Muci} was found to have been the commander of the ^elebi}i camp, Deli} the deputy commander and Land`o a prison guard.

2. In various forms, Delali} was co-ordinator of Bosnian Muslim and Bosnian Croat forces in the Konjic area between approximately April and September 1992. He was found not guilty of twelve counts of grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war. The Trial Chamber concluded that Delali} did not have sufficient command and control over the Čelebići camp or the guards that worked there to entail his criminal responsibility for their actions.[3]

3. Muci} was found guilty of grave breaches of the Geneva Conventions and of violations of the laws or customs of war for crimes including murder, torture, inhuman treatment and unlawful confinement, principally on the basis of his superior responsibility as commander of the Čelebići camp, but also, in respect of certain counts, for his direct participation in the crimes.[4] Muci} was sentenced to seven years imprisonment.[5] Delić was found guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war for his direct participation in crimes including murder, torture, and inhuman treatment.[6] Delić was sentenced to twenty years imprisonment.[7] Landžo was found guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war, for crimes including murder, torture, and cruel treatment, and sentenced to fifteen years imprisonment.[8]

---

2 Trial Judgement, pp 290-394.
3 Trial Judgement, para 721.
4 Trial Judgement, pp 424-428.
5 Trial Judgement, pp 441-443.
6 Trial Judgement, pp 429-434.
7 Trial Judgement, pp 443-446.
8 Trial Judgement, pp 447-449.

4. The procedural background of the appeal proceedings is found in Annex A, which also contains a complete list of the grounds of appeal. Certain of the grounds of appeal of the individual parties dealt with substantially the same subject matter, and certain grounds of appeal of Land`o were joined by Muci} and Deli}. For that reason, this judgement considers the various grounds of appeal grouped by subject matter, which was also the way the different grounds of appeal were dealt with during oral argument.

II. GROUNDS OF APPEAL RELATING TO ARTICLE 2 OF THE STATUTE

5. Deli}, Muci} and Landžo have raised two closely related issues in relation to the findings of the Trial Chamber based on Article 2 of the Statute. The first is the question of the legal test for determining the nature of the conflict, and the second, that of the criteria for establishing whether a person is "protected" under Geneva Convention IV. Delić has raised a third issue as to whether Bosnia and Herzegovina was a party to the Geneva Conventions at the time of the events alleged in the Indictment.

A. Whether the Trial Chamber Erred in Holding that the Armed Conflict in Bosnia and Herzegovina at the Time Relevant to the Indictment was of an International Character

6. Deli},[9] Muci},[10] and Land`o[11] challenge the Trial Chamber's finding that the armed conflict in Bosnia and Herzegovina was international at all times relevant to the Indictment. Relying upon the reasoning of the majority in the *Tadi}* and *Aleksovski* first instance Judgements, the appellants argue that the armed conflict was internal at all times. It is submitted that the Trial Chamber used an incorrect legal test to determine the nature of the conflict and that the test set out by the majority of the *Tadi}* Trial Chamber, the "effective control" test, based on *Nicaragua*,[12] is the appropriate test. In the appellants' opinion, applying this correct test, the facts as found by the Trial Chamber do not support a finding that the armed conflict was international. Consequently, the appellants seek a reversal of the verdict of guilty on the counts of the Indictment based upon Article 2 of the Statute.[13]

---

[9] Hazim Deli}'s Ground 8, as set out in the Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, reads: Whether the Trial Chamber erred in holding that the conflict in Bosnia-Herzegovina was an international armed conflict at the times relevant to this indictment. Counsel for Deli} presented the arguments in relation to this ground of appeal on behalf of all appellants at the hearing.

[10] Zdravko Muci}'s Ground 5, as set out in Appellant Zdravko Muci}'s Final Designation of His Grounds of Appeal, 31 May 2000, reads: Whether the Trial Chamber erred in holding that the conflict as described in this case in Bosnia-Herzegovina was an International Armed Conflict at the times relevant to this indictment.

[11] Esad Land`o's Ground 5, as set out in the Land`o Brief, reads: The Trial Chamber erred in law and fact in finding that an international armed conflict existed with reference to the events alleged to have occurred at the ^elebi}i camp.

[12] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v U.S.)* (Merits), 1986 ICJ Reports 14 (*"Nicaragua"*).

[13] In addition, Deli} argues that the Prosecution included the allegation of international armed conflict in each count of the Indictment. Consequently in his view, all the counts should be dismissed, as this allegation has become an element of each offence charged. Moreover, it is argued that because the Prosecution relied on the allegation of an international conflict to invoke the Tribunal's jurisdiction, the Appeals Chamber should dismiss the entire indictment for lack of subject-matter jurisdiction. Deli} Brief, paras 227-248.

7. The Prosecution submits that these grounds of appeal should be dismissed. It submits that the correct legal test for determining whether an armed conflict is international was set forth by the Appeals Chamber in the *Tadi}* Appeal Judgement, which rejected the "effective control" test in relation to acts of armed forces or paramilitary units. Relying upon the *Aleksovski* Appeal Judgement, the Prosecution contends that the Appeals Chamber should follow its previous decision.

8. As noted by the Prosecution, the issue of the correct legal test for determining whether an armed conflict is international was addressed by the Appeals Chamber in the *Tadi}* Appeal Judgement. In the *Aleksovski* Appeal Judgement, the Appeals Chamber found that "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice".[14] Elaborating on this principle, the Chamber held:

> Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."
>
> It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.
>
> What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.[15]

In light of this finding, the *Aleksovski* Appeals Chamber followed the legal test set out in the *Tadić* Appeal Judgement in relation to internationality.

9. Against this background, the Appeals Chamber will turn to the question of the applicable law for determining whether an armed conflict is international.

---

[14] *Aleksovski* Appeal Judgement, para 107.
[15] *Aleksovski* Appeal Judgement, paras 108-110 (footnote omitted).

1. What is the Applicable Law?

10. The Appeals Chamber now turns to a consideration of the *Tadi}* Appeal Judgement, and to the relevant submissions of the parties in this regard, in order to determine whether, applying the principle set forth in the *Aleksovski* Appeal Judgement, there are any cogent reasons in the interests of justice for departing from it.[16]

11. From the outset, the Appeals Chamber notes that the findings of the Trial Chamber majorities in the *Tadi}* and *Aleksovski* Judgements, upon which the appellants rely, were overturned on appeal.

12. In the *Tadi}* case, the Appeals Chamber was concerned with, *inter alia*, the legal criteria for establishing when, in an armed conflict which is *prima facie* internal, armed forces may be regarded as acting on behalf of a foreign power, thereby rendering the conflict international.

13. The Appeals Chamber saw the question of internationality as turning on the issue of whether the Bosnian Serb forces "could be considered as *de iure* or *de facto* organs of a foreign power, namely the FRY".[17] The important question was "*what degree of authority or control* must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal".[18] The Chamber considered, after a review of various cases including *Nicaragua*, that international law does not always require the same degree of control over armed groups or private individuals for the purpose of determining whether they can be regarded as a *de facto* organ of the State. The Appeals Chamber found that there were three different standards of control under which an entity could be considered *de facto* organ of the State, each differing according to the nature of the entity. Using this framework, the Appeals Chamber determined that the situation with which it was concerned fell into the second category it identified,[19] which was that of the acts of armed forces or militias or paramilitary units.

---

[16] Although the appellants' and the Prosecution's Briefs were filed prior to the issue of the *Aleksovski* Appeal Judgement, the appellants and the Prosecution were given an opportunity to present submissions on these issues at the hearing.

[17] *Tadi}* Appeal Judgement, para 87.

[18] *Ibid*, para 97 (emphasis in original).

[19] The other categories identified by the Appeals Chamber were (1) acts by a single private individual or a group that is not militarily organised, to which the applicable standard is that of "specific instructions" or public endorsement or approval *ex post facto* by the State, para 137; and (3) acts of individuals assimilated to State organs on account of their actual behaviour within the structure of a State, regardless of the existence of State instructions, paras 141-144.

14. The Appeals Chamber determined that the legal test which applies to this category was the "overall control" test:

> In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields *overall control* over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity. [...] However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.[20]

15. Overall control was defined as consisting of more than "the mere provision of financial assistance or military equipment or training".[21] Further, the Appeals Chamber adopted a flexible definition of this test, which allows it to take into consideration the diversity of situations on the field in present-day conflicts:

> This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.[22]

16. The Appeals Chamber in *Tadi}* considered *Nicaragua* in depth, and based on two grounds, held that the "effective control" test enunciated by the ICJ was not persuasive.

17. Firstly, the Appeals Chamber found that the *Nicaragua* "effective control" test did not seem to be consonant with the "very logic of the entire system of international law on State responsibility",[23] which is "not based on rigid and uniform criteria".[24] In the Appeals Chamber's view, "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities".[25] Thus, regardless of whether or not specific instructions were issued, the international responsibility of the State may be engaged.[26]

---

[20] *Tadi}* Appeal Judgement, para 131 (emphasis added).
[21] *Tadi}* Appeal Judgement, para 137.
[22] *Id* (emphasis in original).
[23] *Tadi}* Appeal Judgement, para 116.
[24] *Ibid*, para 117.
[25] *Ibid*, para 121.
[26] *Ibid*, para 123.

18. Secondly, the Appeals Chamber considered that the *Nicaragua* test is at variance with judicial and State practice. Relying on a number of cases from claims tribunals, national and international courts, and State practice, the Chamber found that, although the "effective control" test was upheld by the practice in relation to individuals or unorganised groups of individuals acting on behalf of States, it was not the case in respect of military or paramilitary groups.[27]

19. The Appeals Chamber found that the armed forces of the Republika Srpska were to be regarded as acting under the overall control of, and on behalf of, the FRY, sharing the same objectives and strategy, thereby rendering the armed conflict international.

20. The Appeals Chamber, after considering in depth the merits of the *Nicaragua* test, thus rejected the "effective control" test, in favour of the less strict "overall control" test. This may be indicative of a trend simply to rely on the international law on the use of force, *jus ad bellum*, when characterising the conflict. The situation in which a State, the FRY, resorted to the indirect use of force against another State, Bosnia and Herzegovina, by supporting one of the parties involved in the conflict, the Bosnian Serb forces, may indeed be also characterised as a proxy war of an international character. In this context, the "overall control" test is utilised to ascertain the foreign intervention, and consequently, to conclude that a conflict which was *prima facie* internal is internationalised.

21. The appellants argue that the findings of the *Tadi}* Appeal Judgement which rejected the "correct legal test" set out in *Nicaragua* are erroneous as the Tribunal is bound by the ICJ's precedent.[28] It is submitted that when the ICJ has determined an issue, the Tribunal should follow it, (1) because of the ICJ's position within the United Nations Charter, and (2) because of the value of precedent.[29] Further, even if the ICJ's decisions are not binding on the Tribunal, the appellants submits that it is "undesirable to have two courts (...) having conflicting decisions on the same issue".[30]

22. The Prosecution rebuts this argument with the following submissions: (1) The two courts have different jurisdictions, and in addition, the ICJ Statute does not provide for precedent. It would thus be odd that the decisions of the ICJ which are not strictly binding on

---

[27] *Ibid*, paras 124, and 125-136.

[28] Deli} Reply, para 99; also adopted by Land'o.

[29] At the appeal hearing counsel for Deli} submitted that the Tribunal is bound by the ICJ's decisions because the ICJ is the "primary judicial organ of the organisation of the United Nations" (Appeal Transcript, p 375), and "essentially the Supreme Court of the United Nations" (*ibid*, p 376), whereas the Tribunal is "an organ of another principal organ, the Security Council" (*ibid*, p 375).

itself would be binding on the Tribunal which has a different jurisdiction.[31] (2) The Appeal Chamber in the *Tadi}* appeal made specific reference to *Nicaragua* and held it not to be persuasive.[32] (3) Judge Shahabuddeen in a dissenting opinion in an ICTR decision found that the differences between the Tribunal and the ICJ do not prohibit recourse to the relevant jurisprudence on relevant matters, and that the Tribunal can draw some persuasive value from the ICJ's decisions, without being bound by them.[33]

23. The Appeals Chamber is not persuaded by the appellants' argument. The Appeals Chamber in *Tadi}*, addressing the argument that it should not follow the *Nicaragua* test in relation to the issue at hand as the two courts have different jurisdiction, held:

> What is at issue is not the distinction between two classes of responsibility. What is at issue is a preliminary question: that of the conditions on which under international law an individual may be held to act as a *de facto* organ of a State.[34]

24. The Appeals Chamber agrees that "so far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal. [...] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern".[35] However, this Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ"[36] within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.

25. An additional argument submitted by Land'o is that the Appeals Chamber in the *Tadi}* Jurisdiction Decision accurately decided that the conflict was internal. The Appeals Chamber notes that this argument was previously raised by the appellants at trial. The Trial Chamber

---

30 Appeal Transcript, p 379.
31 Appeal Transcript, p 379.
32 Appeal Transcript, p 380.
33 Appeal Transcript, p 380. The transcript records the Prosecution as referring to the decision as being made in the case of *Anatole Nsengiyumva v Prosecutor*. No date was provided for the decision but it appears that it was a reference to the Dissenting Opinion of Judge Shahabuddeen in *Anatole Nsengiyumva v Prosecutor*, Case No. ICTR-96-12-A, 3 June 1999. However, the intention appears to have been to refer to the Separate Opinion of Judge Shahabuddeen in *Le Procureur v Laurent Semanza*, ICTR, Case No ICTR-97-20-A, 31 May 2000.
34 *Tadi}* Appeal Judgement, para 104 (emphasis removed).
35 Separate Opinion of Judge Shahabuddeen, appended to Decision, *Le Procureur v Laurent Semanza*, ICTR, Case No ICTR-97-20-A, App Ch, 31 May 2000, para 25.
36 Charter of the United Nations, Article 92.

then concluded that it is "incorrect to contend that the Appeals Chamber has already settled the matter of the nature of the conflict in Bosnia and Herzegovina. In the *Tadi} Jurisdiction Decision* the Chamber found that 'the conflicts in the former Yugoslavia have both internal and international aspects' and deliberately left the question of the nature of particular conflicts open for the Trial Chamber to determine".[37] The Appeals Chamber fully agrees with this conclusion.

26. Applying the principle enunciated in the *Aleksovski* Appeal Judgement, this Appeals Chamber is unable to conclude that the decision in the *Tadi}* was arrived at on the basis of the application of a wrong legal principle, or arrived at *per incuriam*. After careful consideration of the arguments put forward by the appellants, this Appeals Chamber is unable to find cogent reasons in the interests of justice to depart from the law as identified in the *Tadi}* Appeal Judgement.[38] The "overall control" test set forth in the *Tadi}* Appeal Judgement is thus the applicable criteria for determining the existence of an international armed conflict.

27. The Appeals Chamber will now examine the Trial Judgement in order to ascertain what test was applied.

2. Has the Trial Chamber Applied the "Overall Control" Test?

28. The Appeals Chamber first notes that the *Tadi}* Appeal Judgement which set forth the "overall control" test had not been issued at the time of the delivery of the Trial Judgement. The Appeals Chamber will thus consider whether the Trial Chamber, although not, from a formal viewpoint, having applied the "overall control" test as enunciated by the Appeals Chamber in *Tadi}*, based its conclusions on a legal reasoning consistent with it.

29. The issue before the Trial Chamber was whether the armed forces of the Bosnian Serbs could be regarded as acting on behalf of the FRY, in order to determine whether after its withdrawal in May 1992[39] the conflict continued to be international or instead became internal. More specifically, along the lines of *Tadi}*, the relevant issue is whether the Trial Chamber came to the conclusion that the Bosnian Serb armed forces could be regarded as having been under the overall control of the FRY, going beyond the mere financing and equipping of such

---

[37] Trial Judgement, para 229 (footnote omitted).

[38] The same conclusion was reached by the *Aleksovski* Appeals Chamber, at para 134 of the *Aleksovski* Appeal Judgement.

[39] The date commonly accepted as the reference in time is 19 May 1992. *Tadić* Trial Judgement, paras 569 and 571. *^elebi}i* Trial Judgement, para 231.

forces, and involving also participation in the planning and supervision of military operations after 19 May 1992.[40]

30. The Prosecution submits that the test applied by the Trial Chamber is consistent with the "overall control" test.[41] In the Prosecution's submission, the Trial Chamber adopted the "same approach" as subsequently articulated by the Appeals Chamber in *Tadić* and *Aleksovski*. Further, the Trial Judgement goes through the "exact same facts, almost as we found in the *Tadić* decision".[42] The Prosecution contends that the Appeals Chamber has already considered the same issues and facts in the *Tadić* appeal, and found that the same conflict was international after May 1992. In the Prosecution's opinion, the Trial Chamber's conclusion that "the government of the FRY was the [...] controlling force behind the VRS"[43] is consistent with *Tadić*.

3. The Nature of the Conflict Prior to 19 May 1992

31. The Trial Chamber first addressed the question of whether there was an international armed conflict in Bosnia and Herzegovina in May 1992 and whether it continued throughout the rest of that year, *i.e.*, at the time relevant to the charges alleged in the Indictment.[44]

32. The Trial Chamber found that a "significant numbers of [JNA] troops were on the ground when the [BH] government declared the State's independence on 6 March 1992".[45] Further, "there is substantial evidence that the JNA was openly involved in combat activities in Bosnia and Herzegovina from the beginning of March and into April and May of 1992."[46] The Trial Chamber therefore concluded that:

> [...] an international armed conflict existed in Bosnia and Herzegovina at the date of its recognition as an independent State on 6 April 1992. There is no evidence to indicate that the hostilities which occurred in the Konjic municipality at that time were part of a separate

---

[40] *Tadić* Appeal Judgement, para 145.
[41] Appeal Transcript, p 383.
[42] Appeal Transcript, pp 383-384.
[43] *Id.*
[44] Trial Judgement, para 211. The Trial Chamber relied upon the ICRC Commentary (GC IV) to hold: "We are not here examining the Konjic municipality and the particular forces involved in the conflict in that area to determine whether it was international or internal. Rather, should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities."
[45] *Ibid*, para 212.
[46] *Ibid*, para 213.

armed conflict and, indeed, there is some evidence of the involvement of the JNA in the fighting there.[47]

33. The Trial Chamber's finding as to the nature of the conflict prior to 19 May 1992 is based on a finding of a direct participation of one State on the territory of another State. This constitutes a plain application of the holding of the Appeals Chamber in *Tadi}* that it "is indisputable that an armed conflict is international if it takes place between two or more States",[48] which reflects the traditional position of international law. The Appeals Chamber is in no doubt that there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict was international prior to 19 May 1992.

4. The Nature of the Conflict After 19 May 1992

34. The Trial Chamber then turned to the issue of the character of the conflict after the alleged withdrawal of the external forces it found to be involved prior to 19 May 1992.[49] Based upon, amongst other matters, an analysis of expert testimony and of Security Council resolutions, it found that after 19 May 1992, the aims and objectives of the conflict remained the same as during the conflict involving the FRY and the JNA prior to that date, *i.e.*, to expand the territory which would form part of the Republic. The Trial Chamber found that "[t]he FRY, at the very least, despite the purported withdrawal of its forces, maintained its support of the Bosnian Serbs and their army and exerted substantial influence over their operations".[50]

35. The Trial Chamber concluded that "[d]espite the formal change in status, the command structure of the new Bosnian Serb army was left largely unaltered from that of the JNA, from which the Bosnian Serbs received their arms and equipment as well as through local SDS organisations".[51]

36. In discussing the nature of the conflict, the Trial Chamber did not rely on *Nicaragua*, noting that, although "this decision of the ICJ constitutes an important source of jurisprudence

---

[47] *Ibid*, para 214.
[48] *Tadi}* Appeal Judgement, para 84.
[49] Trial Judgement, para 215.
[50] *Ibid*, para 224.
[51] *Ibid*, para 227.

on various issues of international law", the ICJ is "a very different judicial body concerned with rather different circumstances from the case in hand".[52]

37. The Trial Chamber described its understanding of the factual situation upon which it was required to make a determination as being

> [...] characterised by the breakdown of previous State boundaries and the creation of new ones. Consequently, the question which arises is one of *continuity of control of particular forces*. The date which is consistently raised as the turning point in this matter is that of 19 May 1992, when the JNA apparently withdrew from Bosnia and Herzegovina.[53]

38. It continued:

> The Trial Chamber must keep in mind that the forces constituting the VRS had a prior identity as an actual organ of the SFRY, as the JNA. When the FRY took control of this organ and subsequently severed the formal link between them, by creating the VJ and VRS, the *presumption* remains that these forces retained their link with it, unless otherwise demonstrated.[54]

39. Along the lines of Judge McDonald's Dissenting Opinion in the *Tadi}* case (which it cited), the Trial Chamber found that:

> [...] the withdrawal of JNA troops who were not of Bosnian citizenship, and the creation of the VRS and VJ, constituted a deliberate attempt to mask the continued involvement of the FRY in the conflict while its Government remained in fact the controlling force behind the Bosnian Serbs. From the level of strategy to that of personnel and logistics the operations of the JNA persisted in all but name. It would be wholly artificial to sever the period before 19 May 1992 from the period thereafter in considering the nature of the conflict and applying international humanitarian law.[55]

40. The appellants submit that the Trial Chamber did not rely on any legal test to classify the conflict, *i.e.*, it failed to pronounce its own test to determine whether an intervening State has sufficient control over insurgents to render an internal conflict international.[56] On the other hand, the Prosecution submits that the Trial Chamber classified the conflict on the basis of whether the Prosecution had proved that the FRY/VJ was the "controlling force behind the Bosnian Serbs".[57]

41. The Appeals Chamber disagrees with the appellants' submission that the Trial Chamber did not rely on any legal test to determine the issue. The Trial Chamber appears to have relied on a "continuity of control" test in considering the evidence before it, in order to determine

---

[52] *Ibid*, para 230.
[53] *Ibid*, para 231 (emphasis added).
[54] *Ibid*, para 232 (footnote omitted and emphasis added).
[55] *Ibid*, para 234.
[56] Deli} Brief, paras 214-220.

whether the nature of the conflict in Bosnia and Herzegovina, which was international until a point in May 1992, had subsequently changed. The Trial Chamber thus relied on a "control" test, evidently less strict than the "effective control" test. The Trial Chamber did not focus on the issuance of specific instructions, which underlies the "effective control" test.[58] In assessing the evidence, however, the Trial Chamber clearly had regard to all the elements pointing to the influence and control retained over the VRS by the VJ, as required by the "overall control" test.

42. The method employed by the Trial Chamber was later considered as the correct approach in *Aleksovski*. The *Aleksovski* Appeals Chamber indeed interpreted the "overall control" test as follows:

> The "overall control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control. Bearing in mind that the Appeals Chamber in the *Tadi}* Judgement arrived at this test against the background of the "effective control" test set out by the decision of the ICJ in *Nicaragua*, and the "specific instructions" test used by the Trial Chamber in *Tadi}*, the Appeals Chamber considers it appropriate to say that the standard established by the "overall control" test is not as rigorous as those tests. [59]

43. The Appeals Chamber finds that the Trial Chamber's assessment of the effect in reality of the formal withdrawal of the FRY army after 19 May 1992 was based on a careful examination of the evidence before it. That the Trial Chamber indeed relied on this approach is evidenced by the use of phrases such as "despite the attempt at camouflage by the authorities of the FRY",[60] or "despite the formal change in status"[61] in the discussion of the evidence before it.

44. An additional argument submitted by Land'o in support of his contention that the Trial Chamber decided the issue wrongly is based on the agreement concluded under the auspices of the ICRC on 22 May 1992. In Land'o's opinion, this agreement, which was based on common Article 3 of the Geneva Conventions, shows that the conflict was considered by the parties to it to be internal.[62] The Appeals Chamber fully concurs with the Trial Chamber's finding that the *Tadi}* Jurisdiction Decision's reference to the agreement "merely demonstrates that some of the norms applicable to international armed conflicts were specifically brought into force by the

---

[57] Prosecution Response, p 44.
[58] *See Tadi}* Appeal Judgement, para 125.
[59] *Aleksovski* Appeal Judgement, para 145 (footnote omitted).
[60] Trial Judgement, para 221.
[61] *Ibid*, para 227.
[62] Land'o also relies on the *Tadi}* Jurisdiction Decision in support of his contention; Land'o Brief, p 45.

parties to the conflict in Bosnia and Herzegovina, some of whom may have wished it to be considered internal, and does not show that the conflict must therefore have been internal in nature".[63]

45. The appellants further argue that the Trial Chamber relied on a "presumption" that the FRY/VJ still exerted control over the VRS after 19 May 1992 to determine the nature of the conflict. The Trial Chamber thus used an "incorrect legal test" when it concluded that because of the former existing links between the FRY and the VRS, the FRY/VJ retained control over the VRS.[64] The Prosecution responds that it is unfounded to suggest that the Trial Chamber shifted to the Defence the burden of proving that the conflict did not remain international after the withdrawal of the JNA.

46. The Appeals Chamber is of the view that although the use of the term "presumption" by the Trial Chamber may not be appropriate, the approach it followed, *i.e.*, assessing all of the relevant evidence before it, including that of the previous circumstances, is correct. This approach is clearly in keeping with the Appeals Chamber's holding in *Tadi}* that in determining the issue of the nature of the conflict, structures put in place by the parties should not be taken at face value. There it held:

> Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in *de facto* control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.[65]

47. The Trial Chamber's finding is also consistent with the holding of the Appeals Chamber in *Tadi}* that "[w]here the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold".[66] The "overall control" test could thus be fulfilled even if the armed forces acting on behalf of the "controlling State" had autonomous choices of means and tactics although participating in a common strategy along with the "controlling State".

---

[63] Trial Judgement, para 229.
[64] Deli} Brief, paras 208-213.
[65] *Tadi}* Appeal Judgement, para 154.
[66] *Tadi}* Appeal Judgement, para 140.

48. Although the Trial Chamber did not formally apply the "overall control" test set forth by the *Tadi}* Appeal Judgement, the Appeals Chamber is of the view that the Trial Chamber's legal reasoning is entirely consistent with the previous jurisprudence of the Tribunal. The Appeals Chamber will now turn to an additional argument of the parties concerning the Trial Chamber's factual findings.

49. Despite submissions in their briefs that suggested that the appellants wished the Appeals Chamber to review the factual findings of the Trial Chamber in addition to reviewing its legal conclusion,[67] the appellants submitted at the hearing that they "just ask the Court to apply the proper legal test to the facts that were found by the Trial Chamber".[68] The Appeals Chamber will thus not embark on a general assessment of the Trial Chamber's factual findings.

50. The Trial Chamber came to the conclusion, as in the *Tadi}* case, that the armed conflict taking place in Bosnia and Herzegovina after 19 May 1992 could be regarded as international because the FRY remained the controlling force behind the Bosnian Serbs armed forces after 19 May 1992. It is argued by the parties[69] that the facts relied upon in the present case are very similar to those found in the *Tadi}* case. As observed previously, however, a general review of the evidence before the Trial Chamber does not fall within the scope of this appeal. It suffices to say that this Appeals Chamber is satisfied that the facts as found by the Trial Chamber fulfil the legal conditions as set forth in the *Tadi}* case.

51. The Appeals Chamber therefore finds that Deli}'s Ground 8, Muci}'s Ground 5, and Land`o's Ground 5 must fail.

B. Whether the Bosnian Serbs Detained in the ^elebi}i Camp were Protected Persons Under Geneva Convention IV

52. Delali}, Muci}, Deli} and Land`o[70] submit that the Trial Chamber erred in law in finding that the Bosnian Serbs detainees at the ^elebi}i camp could be considered not to be

---

[67] In the Deli} Brief at p 85 it is argued "while the FRY may have supported the Bosnian Serbs and even given general guidance, (it) lacked sufficient control over (them) to impute the actions of the Bosnian Serbs to the FRY." Deli} also submits at p 99 that the Appeals Chamber "should conduct a *de novo* review of the Trial Chamber's holding, giving due weight to the historical facts as found by the Trial Chamber and recited in its judgement but determining the legal test itself." At the same time, Deli} accepts that, at p 86, "many of the factual findings of the Trial Chamber are not controversial". Land`o submits that the evidence clearly shows that the conflict which resulted in the events at the ^elebi}i camp was not international, Land`o Brief pp 43-47.

[68] Appeal Transcript, p 385.

[69] Prosecution Response, p 46; Deli} Brief, p 60; Landžo Brief, pp 44-47.

[70] Delali}'s Ground of Contention 3, as set out in the Delali} Brief, reads: The Trial Chamber committed errors of both law and fact in its determination that the ^elebi}i detainees were persons protected by the Geneva

nationals of Bosnia and Herzegovina for the purposes of the category of persons protected und Geneva Convention IV. They contend that the Trial Chamber's conclusions are inconsistent with international law and Bosnian law. The appellants request that the Appeals Chamber enter judgements of acquittal on all counts based on Article 2 of the Statute.

53. The Prosecution submits that the appellants' grounds of appeal have no merit and that the Appeals Chamber should follow its previous jurisprudence on the issue, as set out in the *Tadi}* Appeal Judgement, and confirmed by the *Aleksovski* Appeal Judgement. It submits that it is now settled in that jurisprudence that in an international conflict victims may be considered as not being nationals of the party in whose hands they find themselves, even if, as a matter of national law, they were nationals of the same State as the persons by whom they are detained. Further, the Prosecution submits that the test applied by the Trial Chamber is consistent with the *Tadi}* Appeal Judgement.

54. As noted by the Prosecution, the Appeals Chamber in *Tadi}* has previously addressed the issue of the criteria for establishing whether a person is "protected" under Geneva Convention IV. In accordance with the principle set out in the *Aleksovski* Appeal Judgement, as enunciated in paragraph 8 of this Judgement, the Appeals Chamber will follow the law in relation to protected persons as identified in the *Tadi}* Appeal Judgement, unless cogent reasons in the interests of justice exist to depart from it.

55. After considering whether cogent reasons exist to depart from the *Tadi}* Appeal Judgement, the Appeals Chamber will turn to an analysis of the Trial Chamber's findings so as to determine whether it applied the correct legal principles to determine the nationality of the victims for the purpose of the application of the grave breaches provisions.

Conventions of 1949. Muci}'s Ground 4, as set out in Appellant Zdravko Muci}'s Final Designation of His Grounds of Appeal, 31 May 2000, reads: Whether the Trial Chamber erred at [*sic*] holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention IV. Deli}'s Ground 4, as set out in the Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, reads: Whether the Trial Chamber erred in holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Land`o's Ground 6, as set out in the Land`o Brief, reads: The Trial Chamber erred in law by finding that the victims of the alleged crimes were "protected persons" for the purpose of the Geneva Conventions.

1. What is the Applicable Law?

56. Article 2 of the Statute of the Tribunal provides that it has the power to prosecute persons who committed grave breaches of the Geneva Conventions "against persons or property *protected under the provisions of the relevant Geneva Conventions*".[71] The applicable provision to ascertain whether Bosnian Serbs detained in the *^elebi}i* camp can be regarded as victims of grave breaches is Article 4(1) of Geneva Convention IV on the protection of civilians, which defines "protected persons" as "those in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The Appeals Chamber in *Tadi}* found that:

> [...] the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work, the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection....[72]

57. The Appeals Chamber held that "already in 1949 *the legal bond of nationality was not regarded as crucial* and allowance was made for special cases".[73] Further, relying on a teleological approach, it continued:

> [...] Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. [...] In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.[74]

58. The Appeals Chamber in *Aleksovski* endorsed the *Tadi}* reasoning holding that "Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors."[75]

59. The appellants submit that the Appeals Chamber decisions in *Tadi}* and *Aleksovski* wrongly interpreted Article 4 of Geneva Convention IV, and that the *Tadi}* and *Aleksovski* Trial Chamber Judgements are correct. It is essentially submitted that in order for victims to gain "protected persons" status, Geneva Convention IV requires that the person in question be of a different nationality than the perpetrators of the alleged offence, based on the national law on

---

[71] Emphasis added.
[72] *Tadi}* Appeal Judgement, para 164 (footnote omitted).
[73] *Tadi}* Appeal Judgement, para 165 (emphasis added). In this context, the Appeals Chamber referred to the situation of refugees and nationals of neutral States who do not enjoy diplomatic protection.
[74] *Tadi}* Appeal Judgement, para 168.
[75] *Aleksovski* Appeal Judgement, para 151.

citizenship of Bosnia and Herzegovina. This interpretation is based on a "strict" interpretatic of the Convention which is, in the appellants' view, mandated by the "traditional rules of treaty interpretation".

60. The Prosecution contends that the Appeals Chamber in *Aleksovski* already adopted the approach used in the *Tadi}* Appeal Judgement,[76] and that the appellants in this case have not demonstrated any "cogent reasons in the interests of justice" that could justify a departure by the Appeals Chamber from its previous decisions on the issue.

61. Before turning to these arguments, the Appeals Chamber will consider an additional argument submitted by the appellants which goes to the status of the *Tadi}* Appeal Judgement statement of the law and may be conveniently addressed as a preliminary matter.

62. The appellants submit that the *Tadi}* statements on the meaning of protected persons are *dicta*, as in their view the Appeals Chamber in *Tadi}* and *Aleksovski* cases derived the protected persons status of the victims from the finding that the perpetrators were acting on behalf of the FRY or Croatia.[77] The Prosecution on the other hand submits that the Appeals Chamber's statement in *Tadi}* was part of the *ratio decidendi*.[78]

63. While the Appeals Chamber in *Tadi}* appears to have reached a conclusion as to the status of the victims as protected persons based on the previous finding that the Bosnian Serbs acted as *de facto* organs of another State, the FRY,[79] it set forth a clear statement of the law as to the applicable criteria to determine the nationality of the victims for the purposes of the Geneva Conventions. The Appeals Chamber is satisfied that this statement of the applicable law, which was endorsed by the Appeals Chamber in *Aleksovski*, falls within the scope of the *Aleksovski* statement in relation to the practice of following previous decisions of the Appeals Chamber.

64. The Appeals Chamber now turns to the main arguments relied upon by the appellants, namely that the Appeals Chamber's interpretation of the nationality requirement is wrong as it is (1) contrary to the "traditional rules of treaty interpretation"; and (2) inconsistent with the national laws of Bosnia and Herzegovina on citizenship.

---

[76] Appeal Transcript, p 426.
[77] Appeal Transcript, pp 395-396. The appellants' submission in respect of *Aleksovski* is similar.
[78] Prosecution Response to Supplementary Brief, pp 8-9.
[79] *Tadi}* Appeal Judgement, para 167.

65. The appellants submit that "the traditional rules of treaty interpretation" should be applied to interpret strictly the nationality requirement set out in Article 4 of Geneva Convention IV.[80] The word "national" should therefore be interpreted according to its natural and ordinary meaning.[81] The appellants submit in addition that if the Geneva Conventions are now obsolete and need to be updated to take into consideration a "new reality", a diplomatic conference should be convened to revise them.[82]

66. The Prosecution on the other hand contends that the Vienna Convention on the Law of Treaties of 1969[83] provides that the ordinary meaning is the meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.[84] It is submitted that the Appeals Chamber in *Tadi}* found that the legal bond of nationality was not regarded as crucial in 1949, *i.e.*, that there was no intention at the time to determine that nationality was the sole criteria.[85] In addition, adopting the appellants' position would result in the removal of protections from the Geneva Conventions contrary to their very object and purpose.[86]

67. The argument of the appellants relates to the interpretative approach to be applied to the concept of nationality in Geneva Convention IV. The appellants and the Prosecution both rely on the Vienna Convention in support of their contentions. The Appeals Chamber agrees with the parties that it is appropriate to refer to the Vienna Convention as the applicable rules of interpretation, and to Article 31 in particular, which sets forth the general rule for the interpretation of treaties. The Appeals Chamber notes that it is generally accepted that these provisions reflect customary rules.[87] The relevant part of Article 31 reads as follows:

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

---

[80] Appeal Transcript, p 401. Counsel for Delali} presented the arguments on behalf of all appellants.
[81] Appeal Transcript, p 394.
[82] Appeal Transcript, p 400.
[83] Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 331 ("the Vienna Convention").
[84] Appeal Transcript, p 426.
[85] Appeal Transcript, p 427.
[86] Appeal Transcript, p 429.
[87] The ICJ in the *Case concerning the Territorial Dispute* (Libyan Arab Jamahiriya/Chad), Judgement of 3 February 1994, ICJ Reports (1994), p 21 at para 41, held that Article 31 reflected customary international law. Its statement on the customary status of Article 31 was endorsed in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility), Judgement of 15 February 1995, ICJ Reports (1995), p 18 at para 33.

68. The Vienna Convention in effect adopted a textual, contextual *and* a teleological approach of interpretation, allowing for an interpretation of the natural and ordinary meaning of the terms of a treaty in their context, while having regard to the object and purpose of the treaty.

69. In addition, Article 32 of the Vienna Convention, entitled "Supplementary means of interpretation", provides that:

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

70. Where the interpretative rule set out in Article 31 does not provide a satisfactory conclusion recourse may be had to the *travaux préparatoires* as a subsidiary means of interpretation.

71. In finding that ethnicity may be taken into consideration when determining the nationality of the victims for the purposes of the application of Geneva Convention IV, the Appeals Chamber in *Tadi}* concluded:

> Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, *not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose* suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.[88]

72. This reasoning was endorsed by the Appeals Chamber in *Aleksovski*:

> The Appeals Chamber considers that this extended application of Article 4 *meets the object and purpose of Geneva Convention IV*, and is particularly apposite in the context of present-day inter-ethnic conflicts.[89]

73. The Appeals Chamber finds that this interpretative approach is consistent with the rules of treaty interpretation set out in the Vienna Convention. Further, the Appeals Chamber in *Tadi}* only relied on the *travaux préparatoires* to reinforce its conclusion reached upon an examination of the overall context of the Geneva Conventions. The Appeals Chamber is thus unconvinced by the appellants' argument and finds that the interpretation of the nationality requirement of Article 4 in the *Tadi}* Appeals Judgement does not constitute a rewriting of

---

[88] *Tadi}* Appeal Judgement, para 166 (emphasis added).

Geneva Convention IV or a "re-creation" of the law.[90] The nationality requirement in Article 4 of Geneva Convention IV should therefore be ascertained within the context of the object and purpose of humanitarian law, which "is directed to the protection of civilians to the maximum extent possible".[91] This in turn must be done within the context of the changing nature of the armed conflicts since 1945, and in particular of the development of conflicts based on ethnic or religious grounds.

74. The other set of arguments submitted by the appellants relates to the national laws of Bosnia and Herzegovina on citizenship, and the applicable criteria to ascertain nationality. The appellants contend that the term "national" in Geneva Convention IV refers to nationality as defined by domestic law. It is argued that according to the applicable law of Bosnia and Herzegovina on citizenship at the time relevant to the Indictment, the Bosnian Serbs were of Bosnian nationality. In the appellants' submission, all former citizens of the former Socialist Republic of Bosnia and Herzegovina (including those of Serbian ethnic origin), one of the constituent republics of the SFRY, became Bosnian nationals when the SFRY was dissolved and Bosnia and Herzegovina was recognised as an independent State in April 1992.[92] Further, FRY citizenship was limited to residents in its constituent parts, and the law of Bosnia and Herzegovina did not provide a possibility for its citizens of Serb ethnic background to opt for FRY citizenship.[93] Delali} submits that in addition, the Bosnian Serbs subsequently agreed to the Dayton Agreement, which provides that they are nationals of Bosnia and Herzegovina.[94]

75. The appellants' arguments go to the issue of whether domestic laws are relevant to determining the nationality of the victims for the purpose of applying the Geneva Conventions. As observed above, however, the nationality requirement of Article 4 of Geneva Convention IV is to be interpreted within the framework of humanitarian law.

76. It is a settled principle of international law that the effect of domestic laws on the international plane is determined by international law. As noted by the Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia*, "[f]rom

---

[89] *Aleksovki* Appeal Judgement, para 152 (emphasis added).
[90] Delali} Brief, p 59. Deli} Brief, p 23.
[91] *Tadi}* Appeal Judgement, para 168.
[92] Appeal Transcript, p 408.
[93] Appeal Transcript, p 409.
[94] The Prosecution submits that the Trial Chamber did not act unreasonably in not giving due weight to the Defence arguments based on national legislation. Prosecution Response, p 36. Delali} Brief, pp 54-55.

the standpoint of International Law and of the Court which is its organ, municipal laws ar merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[95] In relation to the admissibility of a claim within the context of the exercise of diplomatic protection based on the nationality granted by a State, the ICJ held in *Nottebohm*:[96]

> But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.[97]

77. The ICJ went on to state that "[i]nternational practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect".[98] To paraphrase the ICJ in *Nottebohm*, the question at issue must thus be decided on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Tribunal's own functions. Consequently, the nationality granted by a State on the basis of its domestic laws is not automatically binding on an international tribunal which is itself entrusted with the task of ascertaining the nationality of the victims for the purposes of the application of international humanitarian law. Article 4 of Geneva Convention IV, when referring to the absence of national link between the victims and the persons in whose hands they find themselves, may therefore be considered as referring to a nationality link defined for the purposes of international humanitarian law, and not as referring to the domestic legislation as such. It thus falls squarely within the competence of this Appeals Chamber to ascertain the effect of the domestic laws of the former Yugoslavia within the international context in which this Tribunal operates.

78. Relying on the ICRC Commentary to Article 4 of Geneva Convention IV, the appellants further argue that international law cannot interfere in a State's relations with its own nationals, except in cases of genocide and crimes against humanity.[99] In the appellants' view, in the

---

[95] *Case Concerning Certain German Interests in Polish Upper Silesia*, Merits, 25 May 1926, PICJ Reports, Series A, No 7, p 19. *See* also Opinion No 1 of the *Arbitration Commission of the Peace Conference on Yugoslavia,* 29 November 1991, which states that "the form of internal political organisation and the constitutional provisions are mere facts" (para 1 c).

[96] *Nottebohm Case* (Liechtenstein v Guatemala), (Second Phase), Judgement of 6 April 1955, ICJ Reports 1955.

[97] *Nottebohm* at pp 20-21.

[98] *Nottebohm* at p 21.

[99] Appeal Transcript, pp 397-398.

situation of an internationalised armed conflict where the victims and the perpetrators are of the same nationality, the victims are only protected by their national laws.[100]

79. The purpose of Geneva Convention IV in providing for universal jurisdiction only in relation to the grave breaches provisions was to avoid interference by domestic courts of other States in situations which concern only the relationship between a State and its own nationals. The ICRC Commentary (GC IV), referred to by the appellants, thus stated that Geneva Convention IV is "faithful to a recognised principle of international law: it does not interfere in a State's relations with its own nationals".[101] The Commentary did not envisage the situation of an internationalised conflict where a foreign State supports one of the parties to the conflict, and where the victims are detained because of their ethnicity, and because they are regarded by their captors as operating on behalf of the enemy. In these circumstances, the formal national link with Bosnia and Herzegovina cannot be raised before an international tribunal to deny the victims the protection of humanitarian law. It may be added that the government of Bosnia and Herzegovina itself did not oppose the prosecution of Bosnian nationals for acts of violence against other Bosnians based upon the grave breaches regime.[102]

80. It is noteworthy that, although the appellants emphasised that the "nationality" referred to in Geneva Convention IV is to be understood as referring to the legal citizenship under domestic law, they accepted at the hearing that in the former Yugoslavia "nationality", in everyday conversation, refers to ethnicity.[103]

81. The Appeals Chamber agrees with the Prosecution that depriving victims, who arguably are of the same nationality under domestic law as their captors, of the protection of the Geneva Conventions solely based on that national law would not be consistent with the object and purpose of the Conventions. Their very object could indeed be defeated if undue emphasis were placed on formal legal bonds, which could also be altered by governments to shield their nationals from prosecution based on the grave breaches provisions of the Geneva Conventions. A more purposive and realistic approach is particularly apposite in circumstances of the dissolution of Yugoslavia, and in the emerging State of Bosnia and Herzegovina where various parties were engaged in fighting, and the government was opposed to a partition based on

---

[100] Appeal Transcript p 415.
[101] ICRC Commentary (GC IV), p 46.
[102] *See* Tribunal's Second Annual Report, para 132; Third Annual Report, para 167 and Fourth Annual Report, para 183.
[103] Appeal Transcript, pp 545-546.

ethnicity, which would have resulted in movements of population, and where, ultimately, th issue at stake was the final shape of the State and of the new emerging entities.

82. In *Tadi}*, the Appeals Chamber, relying on a teleological approach, concluded that formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds:

> This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance.[104]

83. As found in previous Appeals Chamber jurisprudence, Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of "the substance of relations"[105] and not based on the legal characterisation under domestic legislation. In today's ethnic conflicts, the victims may be "assimilated" to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the *Tadi}* Appeal Judgement that "even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable".[106]

84. Applying the principle enunciated in *Aleksovski*, the Appeals Chamber sees no cogent reasons in the interests of justice to depart from the *Tadi}* Appeal Judgement. The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State.

85. It is therefore necessary to consider the findings of the Trial Chamber to ascertain whether it applied these principles correctly.

---

[104] *Tadi}* Appeal Judgement, para 166.
[105] *Tadi}* Appeal Judgement, para 168.
[106] *Tadi}* Appeal Judgement, para 169.

2. Did the Trial Chamber Apply the Correct Legal Principles?

86. As in the section relating to the nature of the conflict, the Appeals Chamber first notes that the *Tadi}* Appeal Judgement, which set forth the law applicable to the determination of protected person status, had not been issued at the time of the issue of the Trial Judgement. The Appeals Chamber will thus consider whether the Trial Chamber, although having not, from a formal viewpoint, applied the reasoning of the Appeals Chamber in the *Tadi}* Appeal Judgement, based its conclusions on legal reasoning consistent with it.

87. The issue before the Trial Chamber was whether the Bosnian Serb victims in the hands of Bosnian Muslims and Bosnian Croats could be regarded as protected persons, *i.e.,* as having a different nationality from that of their captors.

88. The appellants argue that the Bosnian Serb victims detained in the ^elebi}i camp were clearly nationals of Bosnia and Herzegovina, and cannot be considered as FRY nationals. Thus, the victims could not be considered as "protected persons". The Prosecution on the other hand contends that the test applied by the Trial Chamber was consistent with the *Tadi}* Appeal Judgement.

89. It is first necessary to address a particular argument before turning to an examination of the Trial Chamber's findings. Delali} submits, contrary to the Prosecution's assertions, the *Tadi}* Appeal Judgement does not govern the protected persons issue in this case, because the facts of the two cases are dramatically different.[107] The Appeals Chamber in *Aleksovski* observed that the principle that the Appeals Chamber will follow its previous decisions "only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision".[108]

90. In *Tadi}* and *Aleksovski* the perpetrators were regarded as acting on behalf of an external party, the FRY and Croatia respectively, and the Bosnian Muslim victims were considered as protected persons by virtue of the fact that they did not have the nationality of the party in whose hands they found themselves. By contrast, in this case, where the accused are Bosnian Muslim or Bosnian Croat, no finding was made that they were acting on behalf of a foreign State, whereas the Bosnian Serb victims could be regarded as having links with the party (the

[107] Delali}'s Reply, p 4.
[108] *Aleksovski* Appeal Judgement, para 110.

Bosnian Serb armed forces) acting on behalf of a foreign State (the FRY). However, although the factual circumstances of these cases are different, the legal principle which is applicable to the facts is identical. The Appeals Chamber therefore finds the appellant's argument unconvincing.

91. The Trial Chamber found that the Bosnian Serb victims could be regarded "as having been in the hands of a party to the conflict of which they were not nationals, being Bosnian Serbs detained during an international armed conflict by a party to that conflict, the State of Bosnia and Herzegovina".[109] The Trial Chamber essentially relied on a broad and purposive approach to reach its conclusion, rejecting the proposition that a determination of the nationality of the victims should be based on the domestic laws on citizenship.

92. The Trial Chamber first emphasised the role played by international law in relation to nationality,[110] holding that "the International Tribunal may choose to refuse to recognise (or give effect to) a State's grant of its nationality to individuals for the purposes of applying international law".[111] It then nevertheless found that "[a]n analysis of the relevant laws on nationality in Bosnia and Herzegovina in 1992 does not, however, reveal a clear picture. At that time, as we have discussed, the State was struggling to achieve its independence and all the previous structures of the SFRY were dissolving. In addition, an international armed conflict was tearing Bosnia and Herzegovina apart and the very issue which was being fought over concerned the desire of certain groups within its population to separate themselves from that State and join with another".[112] The Trial Chamber also noted that "the Bosnian Serbs, in their purported constitution of the SRBH, proclaimed that citizens of the Serb Republic were citizens of Yugoslavia".[113]

93. The Trial Chamber also declined to rely upon the argument presented by the Prosecution's expert Professor Economides that there is an emerging doctrine in international law of the right to the nationality of one's own choosing. Finding that the principle of a right of option was not a settled rule of international law, the Trial Chamber held that this principle

[109] Trial Judgement, para 274.
[110] Trial Judgement, para 248.
[111] Trial Judgement, para 258 (footnote omitted).
[112] Trial Judgement, para 251.
[113] Trial Judgement, para 253.

could not be, of itself, determinative in viewing the Bosnian Serbs to be non-nationals of Bosnia and Herzegovina.[114]

94. The Trial Chamber discussed the nationality link in the light of the *Nottebohm* case and concluded:

> Assuming that Bosnia and Herzegovina had granted its nationality to the Bosnian Serbs, Croats and Muslims in 1992, there may be an insufficient link between the Bosnian Serbs and that State for them to be considered Bosnian nationals by this Trial Chamber in the adjudication of the present case. The granting of nationality occurred within the context of the dissolution of a State and a consequent armed conflict. Furthermore, the Bosnian Serbs had clearly expressed their wish not to be nationals of Bosnia and Herzegovina by proclaiming a constitution rendering them part of Yugoslavia and engaging in this armed conflict in order to achieve that aim. Such finding would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose. It would also be in the spirit of that law by rendering it as widely applicable as possible.[115]

95. In the light of its finding on the international character of the conflict, the Trial Chamber held that it is "possible to regard the Bosnian Serbs as acting on behalf of the FRY in its continuing armed conflict against the authorities of Bosnia and Herzegovina".[116] The Bosnian Serb victims could thus be considered as having a different nationality from that of their captors.

96. That the Trial Chamber relied upon a broad and purposive, and ultimately realistic, approach[117] is indicated by the following references which concluded its reasoning:

> [T]his Trial Chamber wishes to emphasise the necessity of considering the requirements of article 4 of the Fourth Geneva Convention in a more flexible manner. The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which ensue from such events. The Commentary to the Fourth Geneva Convention charges us not to forget that "the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests" and thus it is the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible. It would indeed be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law.[118]

97. The Appeals Chamber finds that the legal reasoning adopted by the Trial Chamber is consistent with the *Tadić* reasoning. The Trial Chamber rejected an approach based upon formal national bonds in favour of an approach which accords due emphasis to the object and

---

[114] Trial Judgement, para 256.
[115] Trial Judgement, para 259.
[116] Trial Judgement, para 262.
[117] The Trial Chamber characterised its approach as "broad and principled" (para 275).

purpose of the Geneva Conventions.[119] At the same time, the Trial Chamber took ir consideration the realities of the circumstances of the conflict in Bosnia and Herzegovina, holding that "(t)he law must be applied to the reality of the situation".[120] Although in some respects the legal reasoning of the Trial Chamber may appear to be broader than the reasoning adopted by the Appeals Chamber, this Appeals Chamber is satisfied that the conclusions reached fall within the scope of the *Tadi}* reasoning. As submitted by the Prosecution,[121] the Trial Chamber correctly sought to establish whether the victims could be regarded as belonging to the opposing side of the conflict.

98. The Appeals Chamber particularly agrees with the Trial Chamber's finding that the Bosnian Serb victims should be regarded as protected persons for the purposes of Geneva Convention IV because they "were arrested and detained mainly on the basis of their Serb identity" and "they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State".[122]

99. The Trial Chamber's holding that its finding "would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose"[123] also follows closely the Appeals Chamber's position that the legal test to ascertain the nationality of the victims is applicable within the limited context of humanitarian law, and for the specific purposes of the application of Geneva Convention IV in cases before the Tribunal. Land'o submitted in his brief that the Trial Chamber's finding suggests that a person can have one nationality for the purposes of national law, and another for purposes of international law, which, in his opinion, is contrary to international law. He also contended that the Trial Chamber's holding involuntarily deprives all Bosnian Serbs of their nationality. The argument that the Trial Chamber's findings have the consequence of regulating the nationality of the victims in the national sphere is unmeritorious. It should be made clear that the conclusions reached by international judges in the performance of their duties do not have the effect of regulating the nationality of these persons *vis à vis* the State within the national sphere. Nor do they purport to pronounce on the internal validity of the laws of Bosnia and Herzegovina. The

---

[118] Trial Judgement, para 263.
[119] *See* for instance: "In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach here taken", Trial Judgement, para 266.
[120] Trial Judgement, para 264.
[121] Prosecution Response, p 36.
[122] Trial Judgement, para 265.
[123] Trial Judgement, para 259.

Appeals Chamber agrees with the Prosecution that the Trial Chamber did not act unreasonably in not giving weight to the evidence led by the Defence concerning the nationality of the particular victims under domestic law.

100. The appellants submit arguments based upon the "effective link" test derived from the ICJ case *Nottebohm*.[124] In their view, the following indicia should be taken into consideration when assessing the nationality link of the victims with the FRY: place of birth, of education, of marriage, of vote, and habitual residence; the latter being, they submit, the most important criterion.

101. The *Nottebohm* case was concerned with ascertaining the effects of the national link for the purposes of the exercise of diplomatic protection, whereas in the instant case, the Appeals Chamber is faced with the task of determining whether the victims could be considered as having the nationality of a foreign State involved in the conflict, for the purposes of their protection under humanitarian law. It is thus irrelevant to demonstrate, as argued by the appellants, that the victims and their families had their habitual residence in Bosnia and Herzegovina, or that they exercised their activities there. Rather, the issue at hand, in a situation of internationalised armed conflict, is whether the victims can be regarded as not sharing the same nationality as their captors, for the purposes of the Geneva Conventions, even if arguably they were of the same nationality from a domestic legal point of view.

102. Although the Trial Chamber referred to the *Nottebohm* "effective link" test in the course of its legal reasoning, its conclusion as to the nationality of the victims for the purposes of the Geneva Conventions did not depend on that test. The Trial Chamber emphasised that "operating on the international plane, the International Tribunal may choose to refuse to recognise (or give effect to) a State's grant of its nationality to individuals for the purposes of applying international law".[125] Further, the Trial Chamber when assessing the nationality requirement clearly referred to the specific circumstances of the case and to the specific purposes of the application of humanitarian law.

---

[124] Delali} Brief, p 55. Deli} Brief, pp 36-39. Landžo Brief, pp 62-64.
[125] Trial Judgement, para 258.

4269

103. Delali} further submitted that the Trial Chamber altered international law in relying upon the "secessionist activities" of the Bosnian Serbs to reach its conclusion, as the right to self-determination is not recognised in international law.[126]

104. It is irrelevant to determine whether the activities with which the Bosnian Serbs were associated were in conformity with the right to self-determination or not. As previously stated, the question at issue is not whether this activity was lawful or whether it is in compliance with the right to self-determination. Rather, the issue relevant to humanitarian law is whether the civilians detained in the ^elebi}i camp were protected persons in accordance with Geneva Convention IV.

105. Deli} also submits that the Trial Chamber's finding that the Bosnian Serb victims were not Bosnian nationals is at odds with its factual conclusions that Bosnian Serbs were Bosnian citizens for the purpose of determining the existence of an international armed conflict.[127] This argument has no merit. Contrary to the Appellant's contention, the findings of the Trial Chamber are not contradictory. In finding that the conflict which took place in Bosnia and Herzegovina was of an international character, the Trial Chamber merely concluded that a foreign State was involved and was supporting one of the parties in a conflict that was *prima facie* internal. This finding did not purport to make a determination as to the nationality of the party engaged in fighting with the support of the foreign State.

3. Conclusion

106. The Appeals Chamber finds that the legal reasoning applied by the Trial Chamber is consistent with the applicable legal principles identified in the *Tadi}* Appeal Judgement. For the purposes of the application of Article 2 of the Statute to the present case, the Bosnian Serb victims detained in the ^elebi}i camp must be regarded as having been in the hands of a party to the conflict, Bosnia and Herzegovina, of which they were not nationals. The appellants' grounds of appeal therefore fail.

---

[126] Delali} in his Brief made reference to the proclamation of Serbian autonomous regions and the establishment of the Republika Sprska in 1992, pp 52-54.

[127] Delić Brief, pp 48-49.

C. Whether Bosnia and Herzegovina was a Party to the Geneva Conventions at the Time of the Events Alleged in the Indictment

107. Delić challenges the Trial Chamber's findings of guilt based on Article 2 of the Statute, which vests the Tribunal with the jurisdiction to prosecute grave breaches of the 1949 Geneva Conventions. Deli} contends that because Bosnia and Herzegovina did not "accede" to the Geneva Conventions until 31 December 1992, *i.e.*, after the events alleged in the Indictment, his acts committed before that date cannot be prosecuted under the treaty regime of grave breaches.[128] Delić also argues that the Geneva Conventions do not constitute customary law. Therefore, in his opinion, the application of the Geneva Conventions to acts which occurred before the date of Bosnia and Herzegovina's "accession" to them would violate the principle of legality or *nullem crimen sine lege*.[129] All counts based on Article 2 of the Statute in the Indictment should, he argues, thus be dismissed.

108. The Prosecution contends that regardless of whether or not Bosnia and Herzegovina was bound by the Geneva Conventions *qua* treaty obligations at the relevant time, the grave breaches provisions of the Geneva Conventions reflected customary international law at all material times.[130] Further, Bosnia and Herzegovina was bound by the Geneva Conventions as a result of their instrument of succession deposited on 31 December 1992, which took effect on the date on which Bosnia and Herzegovina became independent, 6 March 1992.[131]

109. The Appeals Chamber first takes note of the "declaration of succession" deposited by Bosnia and Herzegovina on 31 December 1992 with the Swiss Federal Council in its capacity as depositary of the 1949 Geneva Conventions.

110. Bosnia and Herzegovina's declaration of succession may be regarded as a "notification of succession" which is now defined by the 1978 Vienna Convention on Succession of States in Respect of Treaties as "any notification, however phrased or named, made by a successor State

---

[128] Deli}'s Issue 3 as set out in the Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, reads: Whether Deli} can be convicted of grave breaches of the Geneva Conventions of 12 August 1949 in that at the time of the acts alleged in the indictment the Republic of Bosnia and Herzegovina was not a party to the Geneva Conventions of 12 August 1949.

[129] Deli} Brief, pp 19-21. Appeal Transcript, pp 338-345.

[130] Prosecution Response, pp 37-40.

[131] Appeal Transcript pp 367–370.

expressing its consent to be considered as bound by the treaty".[132] Thus, in the case of the replacement of a State by several others, "a newly independent State which makes a notification of succession [...] shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.[133] The date of 6 March 1992 is generally accepted as the official date of Bosnia and Herzegovina's independence (when it became a sovereign State) and it may be considered that it became an official party to the Geneva Conventions from this date.[134] Indeed, the Swiss Federal Council subsequently notified the State parties to the Geneva Conventions that Bosnia and Herzegovina "became a party to the Conventions [...] at the date of its independence, i.e. on 6 March 1992".[135] In this regard, the argument put forward by the appellants appears to confuse the concepts of "accession" and "succession".

111. Although Article 23(2) of the Convention also provides that pending notification of succession, the operation of the treaty in question shall be considered "suspended" between the new State and other parties to the treaty, the Appeals Chamber finds that in the case of this type of treaty, this provision is not applicable. This is because, for the following reasons, the Appeals Chamber confirms that the provisions applicable are binding on a State from creation. The Appeals Chamber is of the view that irrespective of any findings as to formal succession, Bosnia and Herzegovina would in any event have succeeded to the Geneva Conventions under customary law, as this type of convention entails automatic succession, *i.e.*, without the need for any formal confirmation of adherence by the successor State. It may be now considered in international law that there is automatic State succession to multilateral humanitarian treaties in

---

[132] 17 ILM 1488. The Vienna Convention on Succession of States in Respect of Treaties was adopted on 22 August 1978 and entered into force on 6 November 1996. Bosnia and Herzegovina succeeded as a party to the Convention on 23 July 1993. Although the Convention was not in force at the time relevant to the issue at hand, the provisions of relevance to the issue before the Appeals Chamber codify rules of customary international law, as has been recognised by State. *See, e.g.*, Declaration of Tanganyika, 1961, and the subsequent declarations made by new States since then (United Nations Legislative Series, ST/LEG/SER.B/14 p 177). The Appeals Chamber notes that the practice of international organisations (UN, ILO, ICRC) and States shows that there was a customary norm on succession *de jure* of States to general treaties, which applies automatically to human rights treaties.

[133] Article 23(1) of the Vienna Convention.

[134] Opinion 11, dated 16 July 1993, of the Arbitration Commission of the Peace Conference on Yugoslavia (Badinter Commission) concludes that following the official promulgation of the result of the referendum on independence on 6 March 1992, "6 March 1992 must be considered the date on which Bosnia and Herzegovina succeeded the Socialist Federal Republic of Yugoslavia".

[135] Swiss Federal Department of Foreign Affairs, Notification to the Governments of the State parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, 17 February 1993.

the broad sense, *i.e.*, treaties of universal character which express fundamental human rights.[136] It is noteworthy that Bosnia and Herzegovina itself recognised this principle before the ICJ.[137]

112. It is indisputable that the Geneva Conventions fall within this category of universal multilateral treaties which reflect rules accepted and recognised by the international community as a whole. The Geneva Conventions enjoy nearly universal participation.[138]

113. In light of the object and purpose of the Geneva Conventions, which is to guarantee the protection of certain fundamental values common to mankind in times of armed conflict, and of the customary nature of their provisions,[139] the Appeals Chamber is in no doubt that State succession has no impact on obligations arising out from these fundamental humanitarian conventions. In this regard, reference should be made to the Secretary-General's Report submitted at the time of the establishment of the Tribunal, which specifically lists the Geneva Conventions among the international humanitarian instruments which are "beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise".[140] The Appeals Chamber finds further support for this position in the *Tadić* Jurisdiction Decision.[141]

114. For these reasons the Appeals Chamber finds that there was no gap in the protection afforded by the Geneva Conventions, as they, and the obligations arising therefrom, were in force for Bosnia and Herzegovina at the time of the acts alleged in the Indictment.

---

[136] In relation to international human rights instruments, *see* UN Human Rights Commission resolutions 1993/23, 1994/16 and 1995/18; E/CN4/1995/80 p 4; Human Rights Committee General Comment 26(61) CCPR/C/21/Rev. 1/Add.8/Rev. 1. *See* also in relation to Bosnia and Herzegovina's succession to the ICCPR, Decision adopted by the Human Rights Committee on 7 October 1992 and discussion thereto, in Official Records of the Human Rights Committee 1992/93, Vol 1, p 15. *See* also Separate Opinion of Judge Weeramantry, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement*, ICJ Reports 1996.

[137] In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement*, ICJ Reports 1996, the ICJ noted that Bosnia and Herzegovina "contended that the Genocide Convention falls within the category of instruments for the protection of human rights, and that consequently, the rule of 'automatic succession' necessarily applies", para 21.

[138] As of Sept 2000, 189 States are parties to the Geneva Conventions. Only two United Nations members are not party to them (Marshall and Nauru).

[139] Article 158, para 4, of Geneva Convention IV provides that the denunciation of the Convention "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience". Further, Article 43 of the 1969 Vienna Convention on the Law of Treaties entitled "Obligations imposed by international law independently of a treaty" provides: "The invalidity, termination, or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation [...] shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty".

[140] Secretary-General's Report, para 34.

[141] *Tadić* Jurisdiction Decision, paras 79-85.

115. The Appeals Chamber dismisses this ground of appeal.

4273

III. GROUNDS OF APPEAL RELATING TO ARTICLE 3 OF THE STATUTE

116. Delali},[142] Muci}[143] and Deli}[144] challenge the Trial Chamber's findings that (1) offences within common Article 3 of the Geneva Conventions of 1949 are encompassed within Article 3 of the Statute; (2) common Article 3 imposes individual criminal responsibility; and (3) that common Article 3 is applicable to international armed conflicts. The appellants argue that the Appeals Chamber should not follow its previous conclusions in the *Tadi}* Jurisdiction Decision, which, it is submitted, was wrongly decided. That Decision determined that violations of common Article 3 were subjected to the Tribunal's jurisdiction under Article 3 of its Statute, and that, as a matter of customary law, common Article 3 was applicable to both internal and international conflicts and entailed individual criminal responsibility. The Prosecution submits that the appellants' grounds should be rejected because they are not consistent with the *Tadi}* Jurisdiction Decision, which the Appeals Chamber should follow. The Prosecution contends that the grounds raised by the appellants for reopening the Appeals Chamber's previous reasoning are neither founded nor sufficient.

117. As noted by the parties, the issues raised in this appeal were previously addressed by the Appeals Chamber in the *Tadi}* Jurisdiction Decision. In accordance with the principle set out in the *Aleksovski* Appeal Judgement, as enunciated in paragraph 8 of this Judgement, the Appeals Chamber will follow its *Tadi}* jurisprudence on the issues, unless there exist cogent reasons in the interests of justice to depart from it.

---

[142] Delali}'s Grounds of Contention as set out in his Brief read: "Whether the Security Council intended to incorporate common article 3 into Article 3 of the Statute" and "Whether Common Article 3 is customary international law in respect of its application to natural persons". At the hearing, Delali}'s counsel presented the arguments in relation to these grounds on behalf of all other appellants.

[143] Muci}'s Ground 6 reads: Whether at the time of the acts alleged in the indictment customary international law provided for individual criminal responsibility for violations of Common Article 3 of the Geneva Conventions (Appellant Zdravko Muci}'s Final Designation of his Grounds of Appeal, 31 May 2000, p 2). Muci} adopts the arguments of Delali}.

[144] Deli}'s Grounds read: "Issue Number Five: Whether, at the time of the acts alleged in the indictment, customary international law provided for individual criminal responsibility for violations of Common Article 3"; "Issue Number Six: Whether the Security Council vested the Tribunal with jurisdiction to impose individual criminal sanctions for violations of common Article 3"; "Issue Number Seven: Whether Common Article 3 constitutes customary international law in international armed conflicts to the extent that it imposes criminal sanctions on individuals who violate its terms" (Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, pp 2-3).

118. The grounds presented by the appellants raise three different issues in relation to common Article 3 of the Geneva Conventions: (1) whether common Article 3 falls within the scope of Article 3 of the Tribunal's Statute; (2) whether common Article 3 is applicable to international armed conflicts; (3) whether common Article 3 imposes individual criminal responsibility. After reviewing the *Tadi}* Jurisdiction Decision in respect of each of these issues to determine whether there exist cogent reasons to depart from it, the Appeals Chamber will turn to an analysis of the Trial Judgement to ascertain whether it applied the correct legal principles in disposing of the issues before it.

119. As a preliminary issue, the Appeals Chamber will consider one of the appellants' submissions concerning the status of the *Tadi}* Jurisdiction Decision, which is relevant to the discussion of all three issues.

120. In their grounds of appeal, the appellants invite the Appeals Chamber to reverse the position it took in the *Tadi}* Jurisdiction Decision concerning the applicability of common Article 3 of the Geneva Conventions under Article 3 of the Statute, and thus to revisit the issues raised. Delali} *inter alia* submits that the Appeals Chamber did not conduct a rigorous analysis at the time (suggesting also that there is a difference in nature between interlocutory appeals and post-judgement appeals) and that many of the issues raised now were not briefed or considered in the *Tadi}* Jurisdiction Decision.[145] In the appellants' view, the Decision was rendered *per incuriam*.[146] Such a reason affecting a judgement was envisaged in the *Aleksovski* Appeal Judgement as providing a basis for departing from an earlier decision.[147]

121. As to the contention that the arguments which the appellants make now were not before the Appeals Chamber in *Tadi}*, the Prosecution submits that it is not the case that they were not considered in the *Tadi}* Jurisdiction Decision: the essence of most of the arguments now submitted by the appellants was addressed and decided by the Appeals Chamber in that Decision. In relation to the argument that the *Tadi}* Jurisdiction Decision was not based on a rigorous analysis, the Prosecution submits that that Decision contains detailed reasoning and that issues decided in an interlocutory appeal should not be regarded as having any lesser status than a decision of the Appeals Chamber given after the Trial Chamber's judgement. Further,

---

[145] Delali} Brief, p 6. Delali} does not point to any specific issue.

[146] Appeal Transcript p 320. "There is no indication that that issue was properly and fully briefed for that court [...]. It was really only decided in an interlocutory fashion to guide the Trial Chamber in *Tadi}* through the *Tadi}* trial" (Appeal Transcript pp 321-322).

[147] *Aleksovki* Appeal Judgement, para 108 (footnote omitted).

the Decision was not given *per incuriam*, as the Appeals Chamber focused specifically on this issue, the arguments were extensive and many authorities were referred to.[148] In the Prosecution's submission, there are therefore no reasons to depart from it.

4276

122. This Appeals Chamber is of the view that there is no reason why interlocutory decisions of the Appeals Chamber should be considered, as a matter of principle, as having any lesser status than a final decision on appeal. The purpose of an appeal, whether on an interlocutory or on a final basis, is to determine the issues raised with finality.[149] There is therefore no basis in the interlocutory status of the *Tadić* Jurisdiction Decision to consider it as having been made *per incuriam.*

A. Whether Common Article 3 of the Geneva Conventions Falls Within the Scope of Article 3 of the Statute

1. What is the Applicable Law?

123. Article 3 of the Statute entitled "Violations of the Laws or Customs of War" reads:

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and science, historic monuments and works of art and science;
>
> (e) plunder of public or private property.

124. Common Article 3 of the Geneva Conventions provides in relevant parts that:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

---

[148] Appeal Transcript pp 323-24.

[149] It is noted that the Appeals Chamber in *Aleksovski* did not draw any distinction between the authoritative nature of its interlocutory and final decisions.

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> > (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> >
> > (b) Taking of hostages;
> >
> > (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
> >
> > (d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
>
> (2) The wounded and the sick shall be collected and cared for.

125. In relation to the scope of Article 3 of the Statute, the Appeals Chamber in the *Tadi}* Jurisdiction Decision held that Article 3 "is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 and 5".[150] It went on:

> Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.[151]

126. The conclusion of the Appeals Chamber was based on a careful analysis of the Secretary-General's Report. The Appeals Chamber *inter alia* emphasised that the Secretary-General acknowledged that the Hague Regulations, annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, which served as a basis for Article 3 of the Statute, "have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in the hostilities (prisoners of war), but also the conduct of hostilities".[152] The Appeals Chamber noted that, although the Secretary-General's Report subsequently indicated "that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions",

---

[150] *Tadi}* Jurisdiction Decision, para 89.
[151] *Ibid*, para 91 (underlining in original).
[152] *Ibid*, para 87.

Article 3 contains the phrase "shall include but not be limited to".[153] The Appeals Chamber concluded: "Considering this list in the general context of the Secretary-General's discussion of the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law."[154]

127. In support of its conclusion, the Appeals Chamber also relied on statements made by States in the Security Council at the time of the adoption of the Statute of the Tribunal, which "can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law".[155] The Appeals Chamber also relied on a teleological approach in its analysis of the provisions of the Statute. Reference was also made to the context and purpose of the Statute as a whole, and in particular to the fact that the Tribunal was established to prosecute "serious violations of international humanitarian law".[156] It continued: "Thus, if correctly interpreted, Article 3 fully realises the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed".[157] The Appeals Chamber concluded that Article 3 is intended to incorporate violations of both Hague (conduct of war) and Geneva (protection of victims) law[158] provided that certain conditions, *inter alia* relating to the customary status of the rule, are met.[159]

128. The Appeals Chamber then went on to specify four requirements that must be met in order for a violation of international humanitarian law to be subject to Article 3 of the Statute.[160] The Appeals Chamber then considered the question of which such violations, when committed in internal conflicts, met these requirements. It discussed in depth the existence of customary international humanitarian rules applicable to internal conflicts, and found that State practice had developed since the 1930s, to the effect that customary rules exist applicable to non-international conflicts. These rules include common Article 3 but also go beyond it to include rules relating to the methods of warfare.[161]

---

[153] *Ibid.*
[154] *Ibid.*
[155] *Ibid*, para 88.
[156] *Ibid*, para 90.
[157] *Ibid*, para 92.
[158] *Ibid*, para 89.
[159] *Ibid*, para 94.
[160] *Ibid.*
[161] *Tadi}* Jurisdiction Decision, paras 119-125.

129. The Appeals Chamber will now turn to the arguments of the appellants which discuss the *Tadi}* Jurisdiction Decision conclusions in order to determine whether there exist cogent reasons in the interests of justice to depart from them.

130. In support of their submission that violations of common Article 3 are not within the jurisdiction of the Tribunal, the appellants argue that in adopting Article 3 of the Statute, the Security Council never intended to permit prosecutions under this Article for violations of common Article 3,[162] and, had the Security Council intended to include common Article 3 within the ambit of Article 3, it would have expressly included it in Article 2 of the Statute, which deals with the law related to the protection of victims. In their opinion, an analysis of Article 3 of the Statute shows that it is limited to Hague law. A related argument presented by the appellants is that Article 3 can only be expanded to include offences which are comparable and lesser offences than those already listed, and not to include offences of much greater magnitude and of a completely different character. In support of their argument, the appellants also rely on a comparison of the ICTY and ICTR Statutes, as Article 4 of the ICTR Statute *explicitly* includes common Article 3.[163] The appellants further argue that the Security Council viewed the conflict taking place in the former Yugoslavia as international, and accordingly provided for the prosecution of serious violations of humanitarian law in the context of an international conflict only.[164] The Prosecution submits that the Appeals Chamber should follow its previous conclusion in the *Tadi}* Jurisdiction Decision.

131. As to the appellants' argument based on the intention of the Security Council, the Appeals Chamber is of the view that the Secretary-General's Report and the statements made by State representatives in the Security Council at the time of the adoption of the Statute, as analysed in *Tadi}*, clearly support a conclusion that the list of offences listed in Article 3 was meant to cover violations of *all* of the laws or customs of war, understood broadly, in addition to those mentioned in the Article by way of example. Recourse to interpretative statements made by States at the time of the adoption of a resolution may be appropriately made by an international court when ascertaining the meaning of the text adopted, as they constitute an important part of the legislative history of the Statute.[165] These statements may shed light on some aspects of the drafting and adoption of the Statute as well as on its object and purpose,

---

[162] Appeal Transcript p 319.
[163] Appeal Transcript p 320.
[164] *See* Delali} Brief, pp 8-20.
[165] *See* for instance *Ngeze and Nahimana* v *Prosecutor*, ICTR Appeals Chamber, 5 Sept 2000, Joint Separate Opinion, Judge Vohrah and Judge Nieto-Navia, paras 12-17.

when no State contradicts that interpretation, as noted in *Tadi}*.[166] This is consistent with the accepted rules of treaty interpretation.[167]

132. The Appeals Chamber is similarly unconvinced by the appellants' submission that it is illogical to incorporate violations of common Article 3 which are "Geneva law" rules, within Article 3 which covers "Hague law" rules. The Appeals Chamber in *Tadi}* discussed the evolution of the meaning of the expression "war crimes". It found that war crimes have come to be understood as covering both Geneva and Hague law, and that violations of the laws or customs of war cover both types of rules. The traditional law of warfare concerning the protection of persons (both taking part and not taking part in hostilities) and property is now more correctly termed "international humanitarian law" and has a broader scope, including, for example, the Geneva Conventions.[168] The ICRC Commentary (GC IV) indeed stated that "the Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are commonly called war crimes".[169] Further, Additional Protocol I contains rules of both Geneva and Hague origin.[170]

133. Recent confirmation that a strict separation between Hague and Geneva law in contemporary international humanitarian law based on the "type" of rules is no longer warranted may be found in Article 8 of the ICC Statute. This Article covers "War crimes" generally, namely grave breaches and "other serious violations of the laws and customs of war applicable in international armed conflict"; violations of common Article 3 in non-international armed conflicts; and "other serious violations of the laws and customs of war applicable in non-international armed conflict". The Appeals Chamber thus confirms the view expressed in the *Tadi}* Appeal Judgement that the expression "laws and customs of war" has evolved to encompass violations of Geneva law at the time the alleged offences were committed, and that consequently, Article 3 of the Statute may be interpreted as intending the incorporation of

---

[166] *Tadi}* Jurisdiction Decision, para 75.

[167] Article 32 of the Vienna Convention on the Law of Treaties provides that the preparatory work of a treaty may be used as a supplementary means of interpretation to interpret the provisions of a treaty.

[168] *Tadi}* Jurisdiction Decision, para 87.

[169] ICRC Commentary (GC IV), p 583.

[170] The draft Statute of an International Criminal Court prepared by the ILC also followed this approach in its Article 20 entitled "Crimes within the jurisdiction of the Court", which listed among the offences subject to the jurisdiction of the Court "serious violations of the laws and customs of war applicable in armed conflicts", including both Geneva and Hague law. ILC Report 1994, p 70. *See* also the ILC Draft Code against the Peace and Security of Mankind adopted in 1996. The Commission stated in its Report that the expressions "war crimes", "violations of laws and customs of war" and "violations of the rules of humanitarian law applicable in armed conflicts" are used in the report interchangeably. ILC Report 1996, p 113. Further, Article 20 entitled "War crimes" included violations of Hague law, as well as Geneva law under a common heading.

Geneva law rules. It follows that the appellants' argument that violations of common Article 3 cannot be included in Article 3 as they are of a different fails.

134. Turning next to the appellants' argument that common Article 3 would more logically be incorporated in Article 2 of the Statute, the Appeals Chamber observes that the Geneva Conventions themselves make a distinction between the grave breaches and other violations of their provisions. The offences enumerated in common Article 3 may be considered as falling into the category of other serious violations of the Geneva Conventions, and are thus included within the general clause of Article 3. There is thus no apparent inconsistency in not including them in the scope of Article 2 of the Statute. This approach based on a distinction between the grave breaches of the Geneva Conventions and other serious violations of the Conventions, has also later been followed in the ICC Statute.[171]

135. As will be discussed below, the appellants' argument that the Security Council viewed the conflict as international, even if correct, would not be determinative of the issue, as the prohibitions listed under common Article 3 are also applicable to international conflicts. It is, however, appropriate to note here that the Appeals Chamber does not share the view of the appellants that the Security Council and the Secretary-General determined that the conflict in the former Yugoslavia at the time of the creation of the Tribunal was international. In the Appeals Chamber's view, the Secretary-General's Report does not take a position as to whether the various conflicts within the former Yugoslavia were international in character for purposes of the applicable law as of a particular date. The Statute was worded neutrally. Article 1 of the Statute entitled "Competence of the International Tribunal" vests the Tribunal with the power to prosecute "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991", making no reference to the nature of the conflict.[172] This supports the interpretation that the Security Council in adopting the Statute was of the view that the question of the nature of the conflict should be judicially determined by the Tribunal itself, the issue involving factual and legal questions.

136. The Appeals Chamber thus finds no cogent reasons in the interests of justice to depart from its previous jurisprudence concerning the question of whether common Article 3 of the Geneva Conventions is included in the scope of Article 3 of the Statute.

---

[171] ICC Statute, Article 8.

[172] Article 8 of the Statute sets out, in relation to the temporal jurisdiction of the Tribunal, the neutral date of 1 January 1991. Article 5 of the Statute, which, in relation to crimes against humanity, vests the Tribunal with the power to prosecute them in internal as well as international conflicts.

2. Did the Trial Chamber Follow the *Tadić* Jurisdiction Decision?

137. The Trial Chamber generally relied on the *Tadić* Jurisdiction Decision as it found "no reason to depart" from it.[173] That the Trial Chamber accepted that common Article 3 is incorporated in Article 3 of the Statute appears clearly from the following findings. The Trial Chamber referred to paragraphs 87 and 91 of the *Tadić* Jurisdiction Decision to describe the "division of labour between Articles 2 and 3 of the Statute".[174] The Trial Chamber went on to hold that "this Trial Chamber is in no doubt that the intention of the Security Council was to ensure that all serious violations of international humanitarian law, committed within the relevant geographical and temporal limits, were brought within the jurisdiction of the International Tribunal."[175]

138. In respect of the customary status of common Article 3, the Trial Chamber found:

> While in 1949 the insertion of a provision concerning internal armed conflicts into the Geneva Conventions may have been innovative, there can be no question that the protections and prohibitions enunciated in that provision have come to form part of customary international law. As discussed at length by the Appeals Chamber, a corpus of law concerning the regulation of hostilities and protection of victims in internal armed conflicts is now widely recognised.[176]

139. The Appeals Chamber therefore finds that the Trial Chamber correctly adopted the Appeals Chamber's statement of the law in disposing of this issue.

B. Whether Common Article 3 is Applicable to International Armed Conflicts

1. What is the Applicable Law?

140. In the course of its discussion of the existence of customary rules of international humanitarian law governing internal armed conflicts, the Appeals Chamber in the *Tadić* Jurisdiction Decision observed a tendency towards the blurring of the distinction between interstate and civil wars as far as human beings are concerned.[177] It then found that some treaty rules, and common Article 3 in particular, which constitutes a mandatory minimum code applicable to internal conflicts, had gradually become part of customary law. In support of its position that violations of common Article 3 are applicable regardless of the nature of the conflict, the Appeals Chamber referred to the ICJ holding in *Nicaragua* that the rules set out in

---

[173] Trial Judgement, para 280.
[174] Trial Judgement, para 297.
[175] Trial Judgement, para 299.
[176] Trial Judgement, para 301 (footnote omitted).

common Article 3 reflect "elementary considerations of humanity" applicable under customary international law to any conflict.[178] The ICJ in *Nicaragua* discussed the customary status of common Article 3 to the Geneva Conventions and held:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22; paragraph 215).[179]

Thus, relying on *Nicaragua*, the Appeals Chamber concluded:

> Therefore at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.[180]

141. The Appeals Chamber also considered that the procedural mechanism, provided for in common Article 3,[181] inviting parties to internal conflicts to agree to abide by the rest of the Conventions, "reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict."[182] The Appeals Chamber also found that General Assembly resolutions corroborated the existence of certain rules of war concerning the protection of civilians and property applicable in both internal and international armed conflicts.[183]

142. Referring to the *Tadi}* Jurisdiction Decision, which the Trial Chamber followed, Delali} argues that the Appeals Chamber failed to properly consider the status of common Article 3,

---

[177] *Tadi}* Jurisdiction Decision, para 97.

[178] *Nicaragua*, para 218.

[179] *Nicaragua*, para 218. The ICJ considers that the Geneva Conventions in general are customary international law. Paragraph 219 reads in relevant parts: "Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for one or for the other category of conflict". In the *Corfu Channel* case, the ICJ regarded the provisions of the Hague Convention as a special application of a much more general principle of universal applicability. Its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the ICJ reiterated the principle that certain minimum rules are applicable regardless of the nature of the conflict: "It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgement of 9 April 1949 in the *Corfu Channel* case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law". *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), para 79.

[180] *Tadi}* Jurisdiction Decision, para 102.

[181] Common Article 3 provides: "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".

[182] *Tadi}* Jurisdiction Decision, para 103. In this context, the Appeals Chamber specifically referred to the 1967 conflict in Yemen.

[183] *Tadi}* Jurisdiction Decision, paras 110-112 referring to resolutions 2444 (1968) and 2675 (1970).

and in particular failed to analyse state practice and *opinio juris*, in support of its conclusion that it was, as a matter of customary international law, applicable to international armed conflicts. Further, in his opinion, the findings of the ICJ on the customary status of common Article 3 and its applicability to both internal and international conflicts are *dicta*.[184] The Prosecution is of the view that, as stated by the ICJ in *Nicaragua*, it is because common Article 3 gives expression to elementary considerations of humanity, which are applicable irrespective of the nature of the conflict, that common Article 3 is applicable to international conflicts.[185]

143. It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles.[186] These principles were codified in common Article 3 to constitute the minimum core applicable to internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts.[187] In the words of the ICRC, the purpose of common Article 3 was to "ensur(e) respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself".[188] These rules may thus be considered as the "quintessence" of the humanitarian rules found in the Geneva Conventions as a whole.

144. It is these very principles that the ICJ considered as giving expression to fundamental standards of humanity applicable in *all* circumstances.

145. That these standards were considered as reflecting the principles applicable to the Conventions in their entirety and as constituting substantially similar core norms applicable to both types of conflict is clearly supported by the ICRC Commentary (GC IV):

---

[184] Delali} also submits that the ICJ findings are not based on state practice and *opinio juris*; Delali} Brief, pp 32-34.

[185] Appeal Transcript, pp 350-51.

[186] The rules of common Article 3 setting out standards of basic humanitarian protection were originally intended to serve as a general statement of the object of the Geneva Conventions as a whole. The ICRC Commentary (GC IV) provides that the wording of common Article 3 is largely based on general ideas contained in various draft preambles which were eventually omitted, pp 26-34.

[187] This interpretation is supported by the Preamble of Additional Protocol II which provides that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and

> This minimum requirement in the case of non-international conflict, is *a fortiori* applicable in international armed conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built.[189]

146. This is entirely consistent with the logic and spirit of the Geneva Conventions; it is a "logical application of its fundamental principle".[190] Specifically, in relation to the substantive rules set out in subparagraphs (1) (a)-(d) of common Article 3, the ICRC Commentary continues:

> The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser", as one might say.[191]

147. Common Article 3 may thus be considered as the "minimum yardstick"[192] of rules of international humanitarian law of similar substance applicable to both internal and international conflicts. It should be noted that the rules applicable to international conflicts are not limited to the minimum rules set out in common Article 3, as international conflicts are governed by more detailed rules. The rules contained in common Article 3 are considered as applicable to international conflicts because they constitute the core of the rules applicable to such conflicts. There can be no doubt that the acts enumerated in *inter alia* subparagraphs (a), violence to life, and (c), outrages upon personal dignity, are heinous acts "which the world public opinion finds particularly revolting".[193] These acts are also prohibited in the grave breaches provisions of Geneva Convention IV, such as Article 147. Article 75 of Additional Protocol I, applicable to international conflicts, also provides a minimum of protection to any person unable to claim a particular status. Its paragraph 75(2) is directly inspired by the text of common Article 3.

148. This interpretation is further confirmed by a consideration of other branches of international law, and more particularly of human rights law.

149. Both human rights and humanitarian law focus on respect for human values and the dignity of the human person. Both bodies of law take as their starting point the concern for

---

the dictates of the public conscience". This statement is founded on the Martens clause, which was set out in the preamble of the 1899 and 1907 Hague Conventions.

[188] ICRC Commentary (GC IV), p 44.

[189] ICRC Commentary (GC IV), p 14.

[190] ICRC Commentary (GC IV), p 26.

[191] ICRC Commentary (GC IV), p 14.

[192] *Nicaragua,* para 218.

human dignity, which forms the basis of a list of fundamental minimum standards of humanity. The ICRC Commentary on the Additional Protocols refers to their common ground in the following terms: "This irreducible core of human rights, also known as 'non-derogable rights' corresponds to the lowest level of protection which can be claimed by anyone at anytime [...]".[194] The universal and regional human rights instruments[195] and the Geneva Conventions share a common "core" of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted. The object of the fundamental standards appearing in both bodies of law is the protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances.[196]

150. It is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber's view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader. The Appeals Chamber is thus not convinced by the arguments raised by the appellants and finds no cogent reasons to depart from its previous conclusions.

2. Did the Trial Chamber Follow the *Tadić* Jurisdiction Decision?

151. The Trial Chamber found:

> While common Article 3 of the Geneva Conventions was formulated to apply to internal armed conflicts, it is also clear from the above discussion that its substantive prohibitions apply equally in situations of international armed conflicts. Similarly, and as stated by the Appeals Chamber, the crimes falling under Article 3 of the Statute of the International Tribunal may be committed in either kind of conflicts. The Trial Chamber's finding that the

---

[193] ICRC Commentary (GC IV), p 38.
[194] ICRC Commentary on the Additional Protocols, p 1340.
[195] The Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; European Convention on Human Rights; and Inter American Convention on Human Rights.
[196] The UN Human Rights Commission is currently conducting a study to identify certain minimum humanitarian standards applicable at all times, which draw from both bodies of law. *See* UN documents E/C.N. 4/1998/87, E/C.N. 4/1999/92, E/C.N. 4/2000/94, and E/C.N. 4/2000/145.

> conflict in Bosnia and Herzegovina in 1992 was of an international nature does not, therefore, impact upon the application of Article 3.[197]

4287

152. The Trial Chamber therefore clearly followed the Appeals Chamber jurisprudence.

C. Whether Common Article 3 Imposes Individual Criminal Responsibility

1. What is the Applicable Law?

153. The Appeals Chamber in the *Tadi}* Jurisdiction Decision, in analysing whether common Article 3 attracts individual criminal responsibility first noted that "common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions".[198] Referring however to the findings of the International Military Tribunal at Nuremberg[199] that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches, provided certain conditions are fulfilled, it found:

> Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognised as the mandatory minimum for conduct in armed conflict of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.[200]

154. In the Appeals Chamber's opinion, this conclusion was also supported by "many elements of international practice (which) show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts".[201] Specific reference was made to prosecutions before Nigerian courts,[202] national military manuals,[203] national legislation (including the law of the former Yugoslavia adopted by Bosnia and Herzegovina after its independence),[204] and resolutions adopted unanimously by the Security Council.[205]

155. The Appeals Chamber found further support for its conclusion in the law of the former Yugoslavia as it stood at the time of the offences alleged in the Indictment:

---

[197] Trial Judgement, para 314.
[198] *Tadi}* Jurisdiction Decision, para 128.
[199] The Appeals Chamber further referred to the IMT's holding that crimes against international law are committed by individuals. *Tadi}* Jurisdiction Decision, para 128.
[200] *Ibid*, para 129.
[201] *Ibid*, para 130.
[202] *Ibid*, at para 130, referring to paras 106 and 125.
[203] *Ibid*, para 131.
[204] *Ibid*, para 132.
[205] *Ibid*, para 133.

> Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.[206]

4288

156. Reliance was also placed by the Appeals Chamber on the agreement reached under the auspices of the ICRC on 22 May 1992, in order to conclude that the breaches of international law occurring within the context of the conflict, regarded as internal by the agreement, could be criminally sanctioned.[207]

157. The appellants contend that the evidence presented in the *Tadi}* Jurisdiction Decision does not establish that common Article 3 is customary international law that creates individual criminal responsibility because there is no showing of State practice and *opinio juris*.[208] Additionally, the appellants submit that at the time of the adoption of the Geneva Conventions in 1949, common Article 3 was excluded from the grave breaches system and thus did not fall within the scheme providing for individual criminal responsibility.[209] In their view, the position had not changed at the time of the adoption of Additional Protocol II in 1977. It is further argued that common Article 3 imposes duties on States only and is meant to be enforced by domestic legal systems.[210]

158. In addition, the appellants argue that solid evidence exists which demonstrates that common Article 3 is *not* a rule of customary law which imposes liability on natural persons.[211] Particular emphasis is placed on the ICTR Statute and the Secretary-General's Report which states that common Article 3 was criminalised for the first time in the ICTR Statute.[212]

159. The Prosecution argues that the *Tadi}* Jurisdiction Decision previously disposed of the issue and should be followed. The Prosecution submits that, if violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why once those laws came to be extended to the context of internal armed

---

[206] *Ibid*, para 135.
[207] *Ibid*, para 136.
[208] Delali} Brief, pp 20-40.
[209] The appellants emphasise that violations of common Article 3 were thus not subjected to the universal jurisdiction provisions, Delalić Brief, p 28.
[210] Deli} Brief, p 80.
[211] The appellants rely on the ICRC practice; *Nicaragua*; the conclusions of the UN Expert Commission; the ILC draft codes; comments made in the Security Council; the ICC Statute. In relation to *Nicaragua*, Delali} submits that the finding that common Article 3 constitute customary international law is *dicta* and therefore not an authoritative holding. It is also argued that the ICC Statute constitutes evidence that common Article 3 does not reflect customary law: Delalić Brief, pp 32-40.
[212] The report stated that Article 4 "for the first time criminalizes common article 3 of the four Geneva Conventions". Report of the Secretary-General pursuant to Paragraph 5 of Security Council resolution 955 (1994), S/1995/134, 13 February 1995, para 12.

conflicts, their violation in that context should not have been criminal, at least in the absence of clear indications to the contrary.[213] It is further submitted that since 1949, customary law and international humanitarian law have developed to such an extent that today universal jurisdiction does not only exist in relation to the grave breaches of the Geneva Conventions but also in relation to other types of serious violations of international humanitarian law.[214] The Prosecution contends that this conclusion is not contrary to the principle of legality, which does not preclude development of criminal law, so long as those developments do not criminalise conduct which at the time it was committed could reasonably have been regarded as legitimate.[215]

4289

160. Whereas, as a matter of strict treaty law, provision is made only for the prosecution of grave breaches committed within the context of an international conflict, the Appeals Chamber in *Tadi}* found that as a matter of customary law, breaches of international humanitarian law committed in internal conflicts, including violations of common Article 3, could also attract individual criminal responsibility.

161. Following the appellants' argument, two different regimes of criminal responsibility would exist based on the different legal characterisation of an armed conflict. As a consequence, the same horrendous conduct committed in an internal conflict could not be punished. The Appeals Chamber finds that the arguments put forward by the appellants do not withstand scrutiny.

162. As concluded by the Appeals Chamber in *Tadi}*, the fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule. The IMT indeed followed a similar approach, as recalled in the *Tadi}* Jurisdiction Decision when the Appeals Chamber found that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.[216] The Nuremberg Tribunal clearly established that individual acts prohibited by international law constitute criminal offences even though there was no provision regarding the jurisdiction to try violations: "Crimes against

---

[213] Appeal Transcript pp 351-352.
[214] Appeal Transcript pp 355-356.
[215] Appeal Transcript p 352.
[216] *Tadi}* Jurisdiction Decision, para 128. The IMT prosecuted violations of Hague Convention IV and Geneva Convention of 1929 even though they did not provide for the punishment of their breaches.

international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[217]

163. The appellants argue that the exclusion of common Article 3 from the Geneva Conventions grave breaches system, which provides for universal jurisdiction, has the necessary consequence that common Article 3 attracts no individual criminal responsibility. This is misconceived. In the Appeals Chamber's view, the appellants' argument fails to make a distinction between two separate issues, the issue of criminalisation on the one hand, and the issue of jurisdiction on the other. Criminalisation may be defined as the act of outlawing or making illegal certain behaviour.[218] Jurisdiction relates more to the judicial authority to prosecute those criminal acts. These two concepts do not necessarily always correspond. The Appeals Chamber is in no doubt that the acts enumerated in common Article 3 were intended to be criminalised in 1949, as they were clearly intended to be illegal within the international legal order. The language of common Article 3 clearly prohibits fundamental offences such as murder and torture. However, no jurisdictional or enforcement mechanism was provided for in the Geneva Conventions at the time.

164. This interpretation is supported by the provisions of the Geneva Conventions themselves, which impose on State parties the duty "to respect and ensure respect for the present Conventions in all circumstances".[219] Common Article 1 thus imposes upon State parties, upon ratification, an obligation to implement the provisions of the Geneva Conventions in their domestic legislation. This obligation clearly covers the Conventions in their entirety and this obligation thus includes common Article 3. The ICJ in the *Nicaragua* case found that common Article 1 also applies to internal conflicts.[220]

165. In addition, the third paragraph of Article 146 of Geneva Convention IV, after setting out the universal jurisdiction mechanism applicable to grave breaches, provides:

> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

166. The ICRC Commentary (GC IV) stated in relation to this provision that "there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches

---

[217] As referred to in para 128 of *Tadić* Jurisdiction Decision.
[218] Black's Law Dictionary, 6th ed (1990).
[219] Article 1 common to the Geneva Conventions ("Common Article 1").
[220] *Nicaragua*, para 220.

listed and only in the second place administrative measures to ensure respect for the provisions of the Convention".[221] It then concluded: 4291

> This shows that all breaches of the Convention should be repressed by national legislation. The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches. Furthermore, under the terms of this paragraph, the authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention.[222]

167. This, in the Appeals Chamber's view, clearly demonstrates that, as these provisions do not provide for exceptions, the Geneva Conventions envisaged that violations of common Article 3 could entail individual criminal responsibility under domestic law, which is accepted by the appellants. The absence of such legislation providing for the repression of such violations would, arguably, be inconsistent with the general obligation contained in common Article 1 of the Conventions.

168. As referred to by the Appeals Chamber in the *Tadić* Jurisdiction Decision, States have adopted domestic legislation providing for the prosecution of violations of common Article 3. Since 1995, several more States have adopted legislation criminalising violations of common Article 3,[223] thus further confirming the conclusion that States regard violations of common Article 3 as constituting crimes. Prosecutions based on common Article 3 under domestic legislation have also taken place.[224]

169. The Appeals Chamber is also not convinced by the appellants' submission that sanctions for violations of common Article 3 are intended to be enforced at the national level only. In this regard, the Appeals Chambers refers to its previous conclusion on the customary nature of common Article 3 and its incorporation in Article 3 of the Statute.

170. The argument that the ICTR Statute, which is concerned with an internal conflict, made violations of common Article 3 subject to prosecution at the international level, in the Appeals Chamber's opinion, reinforces this interpretation. The Secretary-General's statement that violations of common Article 3 of the Geneva Conventions were criminalised for the first time, meant that provisions for international jurisdiction over such violations were *expressly* made for

---

[221] ICRC Commentary (GC IV), p 594.
[222] *Ibid.*
[223] *See* for instance the United States War Crimes Act 1996 extended by the Expanded War Crimes Act of 1997 to include violations of common Article 3.

the first time. This is so because the Security Council when it established the ICTR was nc creating new law but was *inter alia* codifying existing customary rules for the purposes of the jurisdiction of the ICTR. In the Appeals Chamber's view, in establishing this Tribunal, the Security Council simply created an international mechanism for the prosecution of crimes which were already the subject of individual criminal responsibility.

4292

171. The Appeals Chamber is unable to find any reason of principle why, once the application of rules of international humanitarian law came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context could not be criminally enforced at the international level. This is especially true in relation to prosecution conducted by an international tribunal created by the UN Security Council, in a situation where it specifically called for the prosecution of persons responsible for violations of humanitarian law in an armed conflict regarded as constituting a threat to international peace and security pursuant to Chapter VII of the UN Charter.

172. In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.[225]

173. The Appeals Chamber is similarly unconvinced by the appellants' argument that such an interpretation of common Article 3 violates the principle of legality. The scope of this principle was discussed in the *Aleksovski* Appeal Judgement, which held that the principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime.[226] It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations."

---

[224] *See* for instance in Switzerland, *Jugement en la cause Fulgence Niyonteze*, Tribunal de division 2, 3 septembre 1999, and Tribunal militaire d'appel 1, 26 mai 2000.

[225] The Appeals Chamber also notes that in human rights law the violation of rights which have reached the level of *jus cogens*, such as torture, may constitute international crimes.

[226] *Aleksovski* Appeal Judgement, para 126.

174. The Appeals Chamber is unable to find any cogent reasons in the interests of justice to depart from the conclusions on this issue in the *Tadi}* Jurisdiction Decision. 4293

2. Did the Trial Chamber Apply the Correct Legal Principles?

175. The Appeals Chamber notes that the appellants raised before the Trial Chamber the same arguments now raised in this appeal. The Trial Chamber held:

> Once again, this is a matter which has been addressed by the Appeals Chamber in the *Tadi} Jurisdiction Decision* and the Trial Chamber sees no reason to depart from its findings. In its Decision, the Appeals Chamber examines various national laws as well as practice, to illustrate that there are many instances of penal provisions for violations of the laws applicable in internal armed conflicts. From these sources, the Appeals Chamber extrapolates that there is nothing inherently contrary to the concept of individual criminal responsibility for violations of common Article 3 of the Geneva Conventions and that, indeed, such responsibility does ensue.[227]

176. It then concluded:

> The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of common Article 3 clearly does not in itself preclude such liability. Furthermore, identification of the violation of certain provisions of the Conventions as constituting "grave breaches" and thus subject to mandatory universal jurisdiction, certainly cannot be interpreted as rendering all of the remaining provisions of the Conventions as without criminal sanction. While "grave breaches" *must* be prosecuted and punished by all States, "other" breaches of the Geneva Conventions *may* be so. Consequently, an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions.[228]

177. In support of this conclusion, which fully accords with the position taken by the Appeals Chamber, the Trial Chamber went on to refer to the ILC Draft Code of Crimes against the Peace and Security of Mankind and the ICC Statute.[229] The Trial Chamber was careful to emphasise that although "these instruments were all drawn up after the acts alleged in the Indictment, they serve to illustrate the widespread conviction that the provisions of common Article 3 are not incompatible with the attribution of individual criminal responsibility".[230]

178. In relation to the ICTR Statute and the Secretary-General's statement in his ICTR report that common Article 3 was criminalised for the first time, the Trial Chamber held: "the United Nations cannot 'criminalise' any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above,

---

[227] Trial Judgement, para 307.
[228] Trial Judgement, para 308.
[229] Trial Judgement, para 309.
[230] *Ibid.*

this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the Statute of the ICTR".[231] This statement is fully consistent with the Appeals Chamber's finding that the lack of explicit reference to common Article 3 in the Tribunal's Statute does not warrant a conclusion that violations of common Article 3 may not attract individual criminal responsibility.

179. The Trial Chamber's holding in respect of the principle of legality is also consonant with the Appeals Chamber's position. The Trial Chamber made reference to Article 15 of the ICCPR,[232] and to the Criminal Code of the SFRY, adopted by Bosnia and Herzegovina,[233] before concluding:

> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[234]

180. The Appeals Chamber fully agrees with this statement and finds that the Trial Chamber applied the correct legal principles in disposing of the issues before it.

181. It follows that the appellants' grounds of appeal fail.

IV. GROUNDS OF APPEAL CONCERNING COMMAND RESPONSIBILITY

182. In the present appeal, Muci} and the Prosecution have filed grounds of appeal which relate to the principles of command responsibility. Article 7(3) of the Statute, "Individual criminal responsibility", provides that:

> The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the

---

[231] *Ibid*, para 310.
[232] *Ibid*, para 311.
[233] *Ibid*, para 312.
[234] *Ibid*, para 313.

superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4295

A. The Ninth Ground of Appeal of Muci}

183. The ninth ground of Muci}'s appeal alleges both a legal and factual error on the part of the Trial Chamber in finding that Muci} had, at the time when the crimes concerned in this case were being committed, the *de facto* authority of a commander in the ^elebi}i camp.[235] Most of the arguments presented by Muci} are concerned with the Trial Chamber's factual findings.[236] The Prosecution argues that Muci}'s ground be denied.

184. The Appeals Chamber understands that the remedy desired by the appellant in this ground of appeal is an acquittal of those convictions based on his command responsibility.[237]

185. The Appeals Chamber will first consider the issue of whether a superior may be held liable for the acts of subordinates on the basis of *de facto* authority, before turning to the arguments relating to alleged errors of fact.

1. *De Facto* Authority as a Basis for a Finding of Superior Responsibility in International Law

186. In his brief, Muci} appeared to contest the issue of whether a *de facto* status is sufficient for the purpose of ascribing criminal responsibility under Article 7(3) of the Statute. It is submitted that *de facto* status must be equivalent to *de jure* status in order for a superior to be held responsible for the acts of subordinates.[238] He submits that a person in a position of *de facto* authority must be shown to wield the same kind of control over subordinates as *de jure* superiors.[239] In the appellant's view, the approach taken by the Trial Chamber that the absence of formal legal authority, in relation to civilian and military structures, does not preclude a

---

[235] Muci}'s ground 9 reads: "Whether the Trial Chamber made the proper legal and factual determinations in convicting Mr Muci} of command responsibility pursuant to Article 7(3)", Appellant Zdravko Muci}'s Final Designation of his Grounds of Appeal, 31 May 2000, at p 2. This document serves to clarify the previous documents setting out Muci}'s grounds.

[236] While the appellant made some submissions in his Brief on matters of law, it is difficult to identify the precise errors that are alleged to have been committed by the Trial Chamber. Matters were not further clarified at the hearing. Counsel for the appellant however asked the Appeals Chamber to consider the issue of superior responsibility arising out of a *de facto* position of authority, Appeal Transcript, pp 253-254.

[237] Particulars of the Grounds of Appeal of the Appellant Zdravko Muci} dated the 2nd July 1999, 26 July 1999, Registry p 1800. Muci} submits that the convictions entered by the Trial Chamber pursuant to Article 7(3) of the Statute are "nullified" as a result of its reasoning.

[238] Muci} Brief, Section 3, p 1.

[239] Muci} Brief, Section 3, p 7.

finding of superior responsibility, "comes too close to the concept of strict responsibility".[240] Further, Muci} interprets Article 28 of the ICC Statute as limiting the application of the doctrine of command responsibility to "commanders or those effectively acting as commanders".[241] He submits that "the law relating to *de jure/de facto* command responsibility is far from certain" and that the Appeals Chamber should address the issue.[242]

4296

187. The Prosecution argues that Muci} has failed to adduce authorities to support his argument that the Trial Chamber erred in finding Muci} to be a *de facto* superior.[243] In its view, the finding of the *de facto* responsibility does not amount to a form of strict liability, and *de facto* authority does not have to possess certain features of *de jure* authority. It is submitted that Muci} has not identified any legal basis for alleging that the Trial Chamber has erred in holding that the doctrine of command responsibility applies to civilian superiors.

188. The Trial Chamber found:

> [...] a *position of command is indeed a necessary precondition* for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position *cannot be determined by reference to formal status alone.* Instead, the factor that determines liability for this type of criminal responsibility is the *actual possession, or non-possession, of powers of control over the actions of subordinates.* Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure*, position as a commander.[244]

189. It is necessary to consider first the notion of command or superior authority within the meaning of Article 7(3) of the Statute before examining the specific issue of *de facto* authority. Article 87(3) of Additional Protocol I to the 1949 Geneva Conventions provides:

> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons *under his control* are going to commit or have committed a breach of the Conventions or of his Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[245]

190. The *Blaski}* Judgement, referring to the Trial Judgement and to Additional Protocol I, construed control in terms of the material ability of a commander to punish:

---

[240] Muci} Brief, Section 3, p 6.
[241] Muci} Brief, Section 3, p 18.
[242] Appeal Transcript, p 252. When replying to the Prosecution, Muci} did not object to the Prosecution's submissions, Appeal Transcript, p 302, that he did not take issue with the Trial Chamber's legal finding that a person can be found liable under Article 7(3) on the basis of *de facto* authority, Appeal Transcript, pp 316-317.
[243] Prosecution Response, section 10.
[244] Trial Judgement, para 370 (emphasis added).
[245] (Emphasis added).

> What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.[246]

4297

191. In respect of the meaning of a commander or superior as laid down in Article 7(3) of the Statute, the Appeals Chamber held in *Aleksovski*:

> Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision.[247]

192. Under Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.

193. The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.

194. In relation to Muci}'s responsibility, the Trial Chamber held:

> [...] whereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.[248]

---

[246] *Blaški}* Judgement, para 302.
[247] *Aleksovski* Appeal Judgement, para 76.
[248] Trial Judgement, para 736.

195. The Trial Chamber, prior to making this statement in relation to the case of Muci}, had already considered the origin and meaning of *de facto* authority with reference to existing practice.[249] Based on an analysis of World War II jurisprudence, the Trial Chamber also concluded that the principle of superior responsibility reflected in Article 7(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority.[250] The Appeals Chamber finds no reason to disagree with the Trial Chamber's analysis of this jurisprudence. The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature.[251] In relying upon the wording of Articles 86 and 87 of Additional Protocol I to conclude that "it is clear that the term 'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control", the Trial Chamber properly considered the issue in finding the applicable law.[252]

196. "Command", a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term "control", which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect, the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control.[253] Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility. The *Bla{ki}* Trial Chamber for instance endorsed the finding of the Trial Judgement to this effect.[254] The showing of effective control is required in cases involving both *de jure* and *de facto* superiors. This standard has more recently been reaffirmed in the ICC Statute, Article 28 of which reads in relevant parts:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court;
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces,

[249] Trial Judgement, paras 364-378.
[250] Trial Judgement, paras 356-363.
[251] By the end of 1992, 119 States had ratified Additional Protocol I, *International Review of the Red Cross* (1993), No. 293, at p 182.
[252] Trial Judgement, para 371.
[253] Trial Judgement, paras 355-363. *See* also Secretary-General's Report, paras 55-56.
[254] *Bla{ki}* Judgement, paras 300-301 referring to *^elebi}i* Trial Judgement, para 378.

[...]

> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates [...][255]

197. In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.[256] This would equally apply in the context of criminal responsibility. In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced. The Appeals Chamber considers that the ability to exercise effective control is necessary for the establishment of *de facto* command or superior responsibility[257] and thus agrees with the Trial Chamber that the absence of formal appointment is not fatal to a finding of criminal responsibility, provided certain conditions are met. Muci}'s argument that *de facto* status must be equivalent to *de jure* status for the purposes of superior responsibility is misplaced. Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts. The Appeals Chamber therefore agrees with the Trial Chamber's conclusion:

> While it is, therefore, the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. *The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates.* A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. *It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their "superiors" within the meaning of Article 7(3) of the Statute.* While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest

---

[255] *Tadi}* Appeal Judgement, para 223, which states that the text of the ICC Statute "may be taken to express the legal position *i.e., opinio juris*" of those States that adopted the Statute, at the time it was adopted. Muci}'s reliance on the ICC Statute in support of his arguments is thus not helpful in relation to the determination of the law as it stood at the time of the offences alleged in the Indictment.

[256] In relation to State responsibility see ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports, 1971, p 16 at para 118.

[257] At the hearing, Muci} referred with approval to the *Aleksovski* Judgement's finding that "[A]nyone, including a civilian may be held responsible, pursuant to Article 7(3) of the Statute, if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations." Appeal Transcript, p 238, referring to para 70 of the *Aleksovski* Appeal Judgement, quoting para 103 of the *Aleksovski* Judgement.

> responsibility for heinous acts, *great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.*
>
> Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, *it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.* With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[258]

4300

198. As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.[259]

199. The remainder of Muci}'s ground of appeal concerns the sufficiency of the evidence regarding the existence of his *de facto* authority. This poses a question of fact, which the Appeals Chamber will now consider.

2. The Trial Chamber's Factual Findings

200. At the appeal hearing, Muci} argued that the Trial Chamber's reliance on the evidence cited in the Trial Judgement in support of the finding that he exercised superior authority was unreasonable. He made a number of arguments which were ultimately directed to his central contention that the evidence was insufficient to support a conclusion that he was a *de facto* commander for the entire period of time set forth in the Indictment.[260] His submissions particularly emphasised that he had no authority in the camp during the months of May, June, or July of 1992.[261]

---

[258] Trial Judgement, paras 377-378 (emphasis added; footnote omitted). In relation to the case of Delali}, the Trial Chamber further held that a *de facto* position of authority may be sufficient for a finding of criminal responsibility, "provided the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control." Trial Judgement, para 646. The Appeals Chamber does not understand this as a reference to any need for a formal appointment.

[259] The Appeals Chamber thus agrees with the Prosecution that reliance on *de facto* control to establish superior responsibility does not amount to a form of strict liability.

[260] Appeal Transcript, p 236.

[261] Appeal Transcript, pp 236-237. Counsel for the appellant referred to the testimony of a number of witnesses in support of his contention.

201. At the hearing, the Prosecution submitted that it was open to a reasonable Chamber to conclude from the evidence as a whole that Muci} was commander of the ^elebı}ı camp throughout the period referred to in the Indictment.[262] It was argued that Muci} has not shown that the Trial Chamber has been unreasonable in its evaluation of evidence, and that it is a reasonable inference of the Trial Chamber that Muci} wielded a degree of control and authority in the ^elebi}i camp, drawn from the fact that he had the ability to assist detainees.[263]

3. Discussion

202. In respect of a factual error alleged on appeal, the *Tadi}* Appeal Judgement provides the test that:

> It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber.[264]

203. In the appeal of *Furund`ija*, the Appeals Chamber declined to conduct an independent assessment of the evidence admitted at trial, as requested by the appellants, understood as a request for *de novo* review, and took the view that "[t]his Chamber does not operate as a second Trial Chamber."[265]

204. In paragraphs 737-767 of the Trial Judgement, a thorough analysis of evidence led the Trial Chamber to conclude that Muci} "had all the powers of a commander" in the camp.[266] The conclusion was also based on Muci}'s own admission that he had "necessary disciplinary powers".[267] Muci}, who disputes this conclusion on appeal, must persuade the Appeals Chamber that the conclusion is one which could not have reasonably been made by a reasonable tribunal of fact, so that a miscarriage of justice has occurred.[268]

205. The Appeals Chamber notes that Muci} argued at trial to the effect that, in the absence of any document formally appointing him to the position of commander or warden of the camp, it was not shown what authority he had over the camp personnel.[269] On appeal, he repeats this

---

[262] Appeal Transcript, p 314.
[263] Prosecution Response, Section 10, pp 61-63.
[264] *Tadi}* Appeal Judgement, para 64. *See* also *Aleksovski* Appeal Judgement, para 63.
[265] *Furund`ija* Appeal Judgement, paras 38 and 40.
[266] Trial Judgement, para 767.
[267] *Ibid.*
[268] *See* also paras 434 and 435 *infra*.
[269] Trial Judgement, para 731.

argument,[270] and reiterates some of his objections made at trial in respect of the Prosecut evidence which was accepted by the Trial Chamber as showing that he had *de facto* authority in the camp in the period alleged in the Indictment.[271]

4302

206. Having concluded that "the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility" provided that the *de facto* superior exercises actual powers of control,[272] the Trial Chamber considered the argument of Muci} that he had no "formal authority".[273] It looked at the following factors to establish that Muci} had *de facto* authority: Muci}'s acknowledgement of his having authority over the ^elebi}i camp since 27 July 1992,[274] the submission in the defence closing brief that Muci} used his "limited" authority to prevent crimes and to order that the detainees not be mistreated and that the offenders tried to conceal offences from him,[275] the defence statement that when Muci} was at the camp, there was "far greater" discipline than when he was absent,[276] the evidence that co-defendant Deli} told the detainees that Muci} was commander,[277] the evidence that he arranged for the transfer of detainees,[278] his classifying of detainees for the purpose of continued detention or release,[279] his control of guards,[280] and the evidence that he had the authority to release prisoners.[281] At trial, the Trial Chamber accepted this body of evidence. The Appeals Chamber considers that it has not been shown that the Trial Chamber erred in accepting the evidence which led to the finding that Muci} was commander of the camp and as such exercised command responsibility.

207. Muci} argues that the Trial Chamber failed to explain on what date he became commander of the camp. The Trial Chamber found:

> The Defence is not disputing that there is a considerable body of evidence [...] that Zdravko Muci} was the acknowledged commander of the prison-camp. Instead, the Defence submits that the Prosecution has to provide evidence which proves beyond a reasonable doubt the dates during which Muci} is alleged to have exercised authority in the ^elebi}i prison-camp [...]. The Trial Chamber agrees that the Prosecution has the burden of proving that Muci} was the commander of the ^elebi}i prison-camp and that the standard of proof in this respect

---

[270] Appeal Transcript, pp 239-241.
[271] Appeal Transcript pp 242-249.
[272] Trial Judgement, para 736.
[273] *Ibid*, para 741.
[274] *Ibid*, para 737.
[275] *Ibid*, para 740.
[276] *Ibid*, para 743.
[277] *Ibid*, para 746.
[278] *Ibid*, para 747.
[279] *Ibid*, para 748.
[280] *Ibid*, paras 765-66.
[281] *Ibid*, para 764.

> is beyond reasonable doubt. However, the issue of the actual date on which Muci} became a commander is not a necessary element in the discharge of this burden of proof. Instead, the issue is whether he was, during the relevant period as set forth in the Indictment, the commander of the prison-camp.[282]

208. The Appeals Chamber can see no reason why the Trial Chamber's conclusion that it was unnecessary to make a finding as to the exact date of his appointment – as opposed to his status during the relevant period – was unreasonable.

209. Muci} claims that he had no authority of whatever nature during the months of May, June and July of 1992. The Indictment defined the relevant period in which Muci} was commander of the camp to be "from approximately May 1992 to November 1992". The offences of subordinates upon which the relevant charges against Muci} were based took place during that period. The Appeals Chamber notes that the Trial Judgement considered the objection of Muci} to the evidence which was adduced to show that he was present in the camp in May 1992.[283] The objection was made through the presentation of defence evidence, which was rejected by the Trial Chamber as being inconclusive.[284] On this point, the Appeals Chamber observes that Muci} did not challenge the testimony of certain witnesses which was adduced to show that Muci} was not only present in the camp but in a position of authority in the months of May, June and July of 1992. Reference is made to the evidence given by Witness D, who was a member of the Military Investigative Commission in the camp and worked closely with Muci} in the classification of the detainees.[285] The Trial Chamber was "completely satisfied" with this evidence.[286] The witness testified that Muci} was present at the meeting of the Military Investigative Commission held in early June 1992 to discuss the classification and continued detention or release of the detainees.[287] It is also noteworthy that, in relation to a finding in the case of Deli}, it was found that the Military Investigative Commission only conducted interviews with detainees after informing Muci}, or Deli} when the former was absent, and that only Muci} and Deli} had access to the files of the Commission.[288] Further, Muci} conceded in his interview with the Prosecution that he went to the camp as early as 20 May 1992.[289] Moreover, Grozdana]e}ez, a former detainee at the camp, was interrogated by

---

[282] *Ibid*, para 745.
[283] *Ibid*, para 754.
[284] *Ibid*, para 754.
[285] *Ibid*, para 748.
[286] *Ibid*, para 762.
[287] *Ibid*, para 748.
[288] *Ibid*, para 807.
[289] *Ibid*, para 737.

Muci} in late May or early June 1992.[290] The Appeals Chamber is satisfied that the evidence relied upon by the Trial Chamber constitutes adequate support for its findings.

210. The Appeals Chamber is satisfied that it was open to the Trial Chamber to find that from "before the end of May 1992" Muci} was exercising *de facto* authority over the camp and its personnel.[291]

211. In addition, Muci} submitted:[292]

> (i) The Trial Chamber failed to consider the causal implications of the acquittal of the co-defendant Delali} from whom the Prosecution alleged Muci} obtained his necessary authority; and
>
> (ii) The Trial Chamber gave wrongful and/or undue weight to the acts of benefice [*sic*] attributed to Muci} at, *inter alia*, paragraph 1247 of the Trial Judgement, to found command responsibility, instead of treating them as acts of compassion coupled with the strength of personal character which constitute some other species of authority.[293]

212. The first argument appears to be based on an assumption that Muci}'s authority rested in some formal way on that of Delali}. This argument has no merit. It is clear that the Trial Chamber found that, regardless of the way Muci} was appointed, he in fact exercised *de facto* authority, irrespective of Delali}'s role in relation to the camp.

213. The second point lacks merit in that the acts related to in paragraph 1247 of the Trial Judgement were considered by the Trial Chamber for the purpose of sentencing, rather than conviction; and that acts beneficial to detainees done by Muci} referred to by the Trial Chamber may reasonably be regarded as strengthening its view that Muci} was in a position of authority to effect "greater discipline" in the camp than when he was absent.[294] Although potentially compassionate in nature, these acts are nevertheless evidence of the powers which Muci} exercised and thus of his authority.

---

[290] *Ibid*, para 747.
[291] *Ibid*, para 761.
[292] Particulars of the Grounds of Appeal of the Appellant Zdravko Muci} dated the 2nd July 1999, 26 July 1999, Registry page 1799. This document serves to clarify section 3 of the Muci} Brief.
[293] Particulars of the Grounds of Appeal of the Appellant Zdravko Muci} dated the 2nd July 1999, 26 July 1999, Registry page 1799.
[294] Trial Judgement, para 743.

4. Conclusion

4305

214. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal and upholds the finding of the Trial Chamber that Muci} was the *de facto* commander of the ^elebi}i camp during the relevant period indicated in the Indictment.

B. The Prosecution Grounds of Appeal

215. The Prosecution has filed three grounds of appeal relating to command responsibility.[295]

1. Mental Element – "Knew or had Reason to Know"

216. The Prosecution's first ground of appeal is that the Trial Chamber has erred in law by its interpretation of the standard of "knew or had reason to know" as laid down in Article 7(3) of the Statute.[296]

217. Delali} argues that the Trial Chamber's interpretation of "had reason to know" is *obiter dicta* and does not affect the finding concerning Delali} that he never had a superior-subordinate relationship with Deli}, Muci}, and Land`o.[297] He submits that the Trial Chamber did not determine the matter of the mental element of command responsibility in terms of customary law. The ground should therefore not be considered. He argues that if the Appeals Chamber proceeds to deal with this ground, Delali} will agree with the interpretation given by the Trial Chamber in this regard.[298]

218. Acknowledging Delali}'s submission, the Prosecution asks the Appeals Chamber to deal with the mental element as a matter of general significance to the Tribunal's jurisprudence.[299] The Trial Chamber, it contends, determined the matter in terms of the

---

[295] Ground one: "The Trial Chamber erred in paragraphs 379-393 when it defined the mental element 'knew or had reasons to know' for the purposes of Superior Responsibility";
Ground two: "The Trial Chamber's finding that Zejnil Delali} did not exercise superior responsibility";
Ground five: "The Trial Chamber erred when it decided in paragraphs 776–810 that Hazim Deli} was not a 'superior' in the ^elebi}i Prison Camp for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute".

[296] Prosecution Brief, para 2.7.

[297] Delali} Response, p 155. Appeal Transcript, p 257.

[298] Delali} Response, p 156.

[299] Prosecution Reply, para 2.3.

customary law applicable at the time of the offences.[300] The Prosecution does not argue mental standard based on strict liability.[301] 4306

219. Delić agrees with the Prosecution's position that Articles 86 and 87 of Additional Protocol I reflect customary law as established through the post Second World War cases. A commander has a duty to be informed, but not every failure in this duty gives rise to command responsibility.[302]

220. The issues raised by this ground of appeal of the Prosecution include:

(i) whether in international law, the duty of a superior to control his subordinates includes a duty to be apprised of their action, i.e. a duty to know of their action and whether neglect of such duty will always result in criminal liability;

(ii) whether the standard of "had reason to know" means either the commander had information indicating that subordinates were about to commit or had committed offences or he did not have this information due to dereliction of his duty; and

(iii) whether international law acknowledges any distinction between military and civil leaders in relation to the duty to be informed.

221. The Appeals Chamber takes note of the fact that this ground of appeal is raised by the Prosecution for its general importance to the "jurisprudence of the Tribunal".[303] Considering that this ground concerns an important element of command responsibility, that the Prosecution alleges an error on the part of the Trial Chamber in respect of a finding as to the applicable law,[304] that the parties have made extensive submissions on it, and that it is indeed an issue of general importance to the proceedings before the Tribunal,[305] the Appeals Chamber will consider it by reference to Article 7(3) of the Statute and customary law at the time of the offences alleged in the Indictment.[306]

(i) The Mental Element Articulated by the Statute

---

[300] *Ibid*, para 2.5.
[301] *Ibid*, para 2.6.
[302] Delić Response, para 212.
[303] Prosecution Reply, para 2.3; Appeal Transcript pp 147-148.
[304] Trial Judgement, para 393.
[305] *See Tadić* Appeal Judgement, paras 247 and 281.
[306] Secretary-General's Report, para 34.

222. Article 7(3) of the Statute provides that a superior may incur criminal responsibility for criminal acts of subordinates "if he knew or had reason to know that the subordinate was about to commit such acts or had done so" but fails to prevent such acts or punish those subordinates. 4307

223. The Trial Chamber held that a superior:

> [...] may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Articles 2 through 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[307]

224. The Prosecution position is essentially that the reference to "had reason to know" in Article 7(3) of the Statute, refers to two possible situations. First, a superior had information which put him on notice or which suggested to him that subordinates were about to commit or had committed crimes. Secondly, a superior lacked such information as a result of a serious dereliction of his duty to obtain the information within his reasonable access.[308] As acknowledged by the Prosecution, only the second situation is not encompassed by the Trial Chamber's findings.[309] Delali} argues to the effect that the Trial Chamber was correct in its statement of the law in this regard, and that the second situation envisaged by the Prosecution was in effect an argument based on strict liability.[310] Deli} agrees with the Prosecution's assessment of customary law that "the commander has an international duty to be informed", but argues that the Statute was designed by the UN Security Council in such a way that the jurisdiction of the Tribunal was limited to cases where the commander had actual knowledge or such knowledge that it gave him reason to know of subordinate offences, which was a rule inconsistent with customary law laid down in the military trials conducted after the Second World War.[311]

225. The literal meaning of Article 7(3) is not difficult to ascertain. A commander may be held criminally liable in respect of the acts of his subordinates in violation of Articles 2 to 5 of the Statute. Both the subordinates and the commander are individually responsible in relation to the impugned acts. The commander would be tried for failure to act in respect of the offences of his subordinates in the perpetration of which he did not directly participate.

---

[307] Trial Judgement, para 383.
[308] Prosecution Brief, para 2.7; Appeal Transcript p 121.
[309] Appeal Transcript, p 121.

226. Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. The Appeals Chamber takes it that the Prosecution seeks a finding that "reason to know" exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so. The Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.

227. As the Tribunal is charged with the application of customary law,[312] the Appeals Chamber will briefly consider the case-law in relation to whether there is a duty in customary law to know of all subordinate activity, breach of which will give rise to criminal responsibility in the context of command or superior responsibility.

(ii) Duty to Know In Customary Law

228. In the *Yamashita* case, the United States Military Commission found that:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility [...]. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[313]

The Military Commission concluded that proof of widespread offences, and secondly of the failure of the commander to act in spite of the offences, may give rise to liability. The second

---

[310] Delali} Response, p 157.
[311] Deli} Response, para 215.
[312] Secretary–General's Report, para 34.
[313] Law Reports of Trials of War Criminals, Vol IV, p 35.

factor suggests that the commander needs to discover and control. But it is the first fact[illegible] is of primary importance, in that it gives the commander a reason or a basis to discover the scope of the offences. In the *Yamashita* case, the fact stood out that the atrocities took place between 9 October 1944 to 3 September 1945, during which General Yamashita was the commander-in-chief of the 14th Army Group including the Military Police.[314] This length of time begs the question as to how the commander and his staff could be ignorant of large-scale atrocities spreading over this long period. The statement of the commission implied that it had found that the circumstances demonstrated that he had enough notice of the atrocities to require him to proceed to investigate further and control the offences. The fact that widespread offences were committed over a long period of time should have put him on notice that crimes were being or had been committed by his subordinates.

229. On the same case, the United Nations War Crimes Commission commented:

> [...] the crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing either prima facie evidence that the accused *knew* of their perpetration, or evidence that he must have failed to fulfil a duty to *discover* the standard of conduct of his troops.[315]

This last sentence deserves attention. However, having considered several cases decided by other military tribunals, it went on to qualify the above statement:

> Short of maintaining that a Commander has a duty to *discover* the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded *means of knowledge* as being the same as knowledge itself.[316]

In summary, it pointedly stated that "the law on this point awaits further elucidation and consolidation".[317] Contrary to the Trial Chamber's conclusion, other cases discussed in the Judgement do not show a consistent trend in the decisions that emerged out of the military trials conducted after the Second World War.[318] The citation from the Judgement in the case of *United States v Wilhelm List*[319] ("*Hostage case*") indicates that List failed to acquire "supplementary reports to apprise him of all the pertinent facts".[320] The tribunal in the case

---

[314] *Ibid*, p 19.
[315] *Ibid*, p 94.
[316] *Ibid*, p 94.
[317] *Ibid*, p 95.
[318] The Trial Chamber held that "the jurisprudence from the period immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates." Trial Judgement, para 388.
[319] *United States v Wilhelm List et al*, Vol XI, TWC, 1230.
[320] *Ibid*, p 1271, cited in Trial Judgement, para 389.

found that if a commander of occupied territory "fails to require and obtain *com*[illegible] information" he is guilty of a dereliction of his duty.[321] List was found to be charged with notice of the relevant crimes because of reports which had been made to him.[322] Therefore, List had in his possession information that should have prompted him to investigate further the situation under his command. The Trial Chamber also quoted from the *Pohl* case.[323] The phrase quoted is also meant to state a different point than that suggested by the Trial Chamber. In that case, the accused Mummenthey pleaded ignorance of fact in respect of certain aspects of the running of his business which employed concentration camp prisoners.[324] Having refuted this plea by invoking evidence showing that the accused knew fully of those aspects, the tribunal stated:

> Mummenthey's assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know.[325]

That statement, when read in the context of that part of the judgement, means that the accused was under a duty arising from his position as an SS officer and business manager in charge of a war-time enterprise to know what was happening in his business, including the conditions of the labour force who worked in that business. Any suggestion that the tribunal used that statement to express that the accused had a duty under international law to know would be *obiter* in light of the finding that he had knowledge. In the *Roechling* case, which was also referred to by the Trial Chamber, the court concluded that Roechling had a "duty to keep himself informed about the treatment of the deportees."[326] However, it also noted that "Roechling [...] had repeated opportunities during the inspection of his concerns to ascertain the fate meted out to his personnel, since he could not fail to notice the prisoner's uniform on those occasions".[327] This was information which would put him on notice. It is to be noted that the courts which referred to the existence of a "duty to know" at the same time found that the accused were put on notice of subordinates' acts.

230. Further, the Field Manual of the US Department of Army 1956 (No. 27-10, Law of Land Warfare) provides:

> The commander is...responsible, if he had actual knowledge, or *should have had knowledge, through reports received by him or through other means*, that troops or other persons subject

---

[321] *Ibid* (emphasis added).
[322] *United States v Wilhelm List et al,* Vol XI, TWC, at pp 1271-1272.
[323] Trial Judgement, para 389.
[324] *United States v Oswald Pohl et al.*, TWC, Vol. V, p 1055.
[325] *Ibid.*
[326] TWC, Vol XIV, Appendix B, p 1136.
[327] TWC, Vol XIV, Appendix B, p 1136-37.

> to his control are about to commit or have committed a war crime and he fails to use the means at his disposal to insure compliance with the law of war.[328]

The italicised clause is clear that the commander should be presumed to have had knowledge if he had reports or other means of communication; in other words, he *had already information* as contained in reports or through other means, which put him on notice. On the basis of this analysis, the Appeals Chamber must conclude, in the same way as did the United Nations War Crimes Commission,[329] that the then customary law did not impose in the criminal context a general duty to know upon commanders or superiors, breach of which would be sufficient to render him responsible for subordinates' crimes.

231. The anticipated elucidation and consolidation of the law on the question as to whether there was a duty under customary law for the commander to obtain the necessary information came with Additional Protocol I. Article 86(2) of the protocol provides:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or *had information which should have enabled them to conclude in the circumstances at the time*, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[330]

232. The phrase, "had reason to know", is not as clear in meaning as that of "had information enabling them to conclude", although it may be taken as effectively having a similar meaning. The latter standard is more explicit, and its rationale is plain: failure to conclude, or conduct additional inquiry, in spite of alarming information constitutes knowledge of subordinate offences. Failure to act when required to act with such knowledge is the basis for attributing liability in this category of case.

233. The phrase "had information", as used in Article 86(2) of Additional Protocol I, presents little difficulty for interpretation. It means that, at the critical time, the commander had in his possession such information that should have put him on notice of the fact that an unlawful act was being, or about to be, committed by a subordinate. As observed by the Trial Chamber, the apparent discrepancy between the French version, which reads *"des informations leur permettant de conclure"* (literally: information enabling them to conclude), and the English version of Article 86(2) does not undermine this interpretation.[331] This is a reference to

---

[328] Emphasis added.
[329] Law Reports of Trials of War Criminals, Vol IV, p 94.
[330] Emphasis added.
[331] Trial Judgement, para 392. The two commentaries on Additional Protocol I appear to agree that the French text, which is broader, should be preferred. *See* Commentary on the Two 1977 Protocols Additional to the Geneva

information, which, if at hand, would oblige the commander to obtain *more* information conduct further inquiry), and he therefore "had reason to know".

234. As noted by the Trial Chamber, the formulation of the principle of superior responsibility in the ILC Draft Code is very similar to that in Article 7(3) of the Statute.[332] Further, as the ILC comments on the draft articles drew from existing practice, they deserve close attention.[333] The ILC comments on the *mens rea* for command responsibility run as follows:

> Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or had reason to know *in the circumstances at the time* that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime...In the second situation, he has *sufficient relevant information to enable him to conclude under the circumstances at the time* that his subordinates are committing or are about to commit a crime.[334]

The ILC further explains that "[t]he phrase 'had reason to know' is taken from the statutes of the ad hoc tribunals and should be understood as having the same meaning as the phrase 'had information enabling them to conclude' which is used in the Additional Protocol I. The Commission decided to use the former phrase to ensure an objective rather than a subjective interpretation of this element of the first criterion."[335]

235. The consistency in the language used by Article 86(2) of Additional Protocol I, and the ILC Report and the attendant commentary, is evidence of a consensus as to the standard of the *mens rea* of command responsibility. If "had reason to know" is interpreted to mean that a commander has a duty to inquire further, on the basis of information of a general nature he has in hand, there is no material difference between the standard of Article 86(2) of Additional

---

Conventions of 1949, Michael Bothe, Karl Joseph Partsch, Waldemar A Solf, (Martinus Nijhoff: The Hague 1982), pp 525-526; ICRC Commentary para 3545.

[332] Trial Judgement, para 342.

[333] ILC Report, pp 34 ff.

[334] *Ibid*, pp 37-38 (emphasis added).

[335] *Ibid*, p 38. Article 28(a) of the ICC Statute provides for the responsibility of a military commander or a person effectively acting as a military commander. To establish the responsibility, proof is required that the commander or person "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes".

Protocol I and the standard of "should have known" as upheld by certain cases decided after the Second World War.[336] 4313

236. After surveying customary law and especially the drafting history of Article 86 of Additional Protocol I,[337] the Trial Chamber concluded that:

> An interpretation of the terms of this provision [Article 86 of Additional Protocol I] in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the *travaux préparatoires*, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3). The Trial Chamber thus makes no finding as to the present content of customary law on this point.[338]

237. The Prosecution contends that the Trial Chamber relied improperly upon reference to the object and purpose of Additional Protocol I.[339] The ordinary meaning of the language of Article 86(2) regarding the knowledge element of command responsibility is clear. Though adding little to the interpretation of the language of the provision, the context of the provision as provided by Additional Protocol I simply confirms an interpretation based on the natural meaning of its provisions. Article 87 requires parties to a conflict to impose certain duties on commanders, including the duty in Article 87(3) to "initiate disciplinary or penal action" against subordinates or other persons under their control who have committed a breach of the Geneva Conventions or of the Protocol. That duty is limited by the terms of Article 87(3) to circumstances where the commander "is aware" that his subordinates are going to commit or have committed such breaches. Article 87 therefore interprets Article 86(2) as far as the duties of the commander or superior are concerned, but the criminal offence based on command responsibility is defined in Article 86(2) only.

238. Contrary to the Prosecution's submission, the Trial Chamber did not hold that a superior needs to have information on subordinate offences in his actual possession for the purpose of

---

[336] Trial Judgement, para 389, where the trial of Admiral Toyoda was cited. Also, the *Tokyo Trial* Judgement, International Military Tribunal for the Far East (29 April 1946-12 November 1948), Vol.1, p 30, cited in the Prosecution Brief, para 2.9.

[337] The Trial Chamber, in particular, correctly observed to the effect that an overly broad "should have known" standard was rejected at the conference which adopted Additional Protocol I. Trial Judgement, para 391.

[338] *Ibid*, para 393.

[339] *See* Prosecution argument in Prosecution Brief, paras 2.15-2.19. Reference is made to Article 31 of the Vienna Convention on the Law of Treaties of 1969.

ascribing criminal liability under the principle of command responsibility. A showing that the superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he "had reason to know". The ICRC Commentary (Additional Protocol I) refers to "reports addressed to (the superior), [...] the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits" as potentially constituting the information referred to in Article 86(2) of Additional Protocol I.[340] As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.

239. Finally, the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, "in the possession of". It is not required that he actually acquainted himself with the information. In the Appeals Chamber's view, an assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question. Thus, as correctly held by the Trial Chamber,[341] as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of *strict* imputed liability.

(iii) Civilian Superiors

240. The Prosecution submits that civilian superiors are under the same duty to know as military commanders.[342] If, as found by the Appeals Chamber, there is no such "duty" to know in customary law as far as military commanders are concerned, this submission lacks the necessary premise. Civilian superiors undoubtedly bear responsibility for subordinate offences

[340] ICRC Commentary (Additional Protocol I), para 3545.
[341] Trial Judgement, para 383.
[342] Prosecution Brief, para 2.11.

under certain conditions, but whether their responsibility contains identical elements to th military commanders is not clear in customary law. As the Trial Chamber made a factual determination that Delali} was not in a position of superior authority over the ^elebi}i camp in any capacity, there is no need for the Appeals Chamber to resolve this question.

(iv) Conclusion

241. For the foregoing reasons, this ground of appeal is dismissed. The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard "had reason to know", that is, a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.[343] This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment.

2. Whether Delali} Exercised Superior Responsibility

242. The Prosecution's second ground of appeal alleges an error of law in the Trial Chamber's interpretation of the nature of the superior-subordinate relationship which must be established to prove liability under Article 7(3) of the Statute. The Prosecution contends that the Trial Chamber wrongly "held that the doctrine of superior responsibility requires the perpetrator to be part of a subordinate unit in a direct chain of command under the superior."[344] This legal error, it is said, led to the erroneous finding that Delali} did not exercise superior responsibility over the ^elebi}i camp and thus was not responsible for the offences of the camp staff.[345]

243. The Prosecution argues that, contrary to the finding of the Trial Chamber, the doctrine of command responsibility does not require the existence of a direct chain of command under the superior, and that other forms of *de jure* and *de facto* control, including forms of influence, may suffice for ascribing liability under the doctrine.[346] The criterion for superior responsibility is actual control, which entails the ability to prevent violations, rather than direct subordination.[347] Delali} was in a special position in that the facts found by the Trial Chamber established that he "act[ed] on behalf of the War Presidency, he act[ed] on behalf of the

[343] Trial Judgement, para 393.
[344] Prosecution Brief, para 3.6.
[345] *Ibid*, para 3.6.
[346] *Ibid*, paras 3.17, 3.22.
[347] *Ibid*, para 3.27.

supreme command in Sarajevo, he act[ed] on behalf of the investigating commissio: respect to prisoners, he issued orders with respect to the functioning of the ^elebi}i prison".[348] It concludes that, as the Trial Chamber found him to have knowledge of the ill-treatment in the camp,[349] and yet failed to prevent or punish the violations,[350] the Appeals Chamber may substitute verdicts of guilty on those counts under which command responsibility was charged.[351]

244. The Prosecution submits that, if the Appeals Chamber applies the correct test to all of the facts found by the Trial Chamber, the *only* conclusion it could reach is that Delalić was a superior and was guilty of the crimes charged, which would permit it to reverse the verdict of acquittal.[352] If the Appeals Chamber finds that the facts found by the Trial Chamber do not permit it to reach that conclusion, it should remit the case to a newly constituted Trial Chamber to determine the relevant counts.[353]

245. In the alternative, the Prosecution requests leave to be granted to present additional evidence which had been "wrongly excluded by the Trial Chamber", being evidence that it sought to call in rebuttal.[354] The documentary evidence which had not been admitted was annexed to the Prosecution Brief. The submission in relation to admission of wrongfully excluded evidence as expressed in the Prosecution Brief initially suggested that this course was proposed as an alternative *remedy* which would fall for consideration only should the Appeals Chamber accept the argument that the Trial Chamber made an error of law in its statement of the nature of the superior-subordinate relationship.[355] However, it was also stated that the Prosecution alleges that the Trial Chamber's exclusion of the evidence constituted a distinct error of law, and in subsequent written and oral submissions it was made apparent that, although not expressed as a separate ground of appeal, the submissions as to erroneous exclusion of evidence constitute an independent basis for challenging the Trial Chamber's finding that

---

[348] Appeal Transcript, p 163; Prosecution Brief, para 3.36.
[349] Prosecution Brief, para 3.60.
[350] *Ibid*, para 3.66.
[351] Counts 13, 14, 33-35, 38, 39, 44, 45, 46, 47 and 48. *Ibid*, para 3.79.
[352] Appeal Transcript, p 165; *See* also Appeal Transcript at pp 156-158, noting the decisions in the *Tadić* Appeal Judgement and *Aleksovski* Appeal Judgement dealing with the Appeals Chambers powers to intervene on factual matters.
[353] Appeal Transcript, p 166.
[354] Prosecution Brief, para 3.80.
[355] *Ibid*, para 3.80: "In the alternative, should the Appeals Chamber determine that the facts as found by the Trial Chamber are not of themselves sufficient to support a reversal of the acquittals of Delalić, the Prosecution submits that it should be granted leave by the Appeals Chamber to present additional evidence that was wrongly excluded by the Trial Chamber." Cf para 3.84: "[...] the Prosecution now seeks an appellate remedy against these decisions of the Trial Chamber [not to admit the evidence]".

Delalić was not a superior.[356] As Delalić in fact answered this Prosecution argumen prejudice will result if the Appeals Chamber deals with this alternative submission as an independent allegation of error of law.

246. Delali} contends that in any event the evidence of the position of Delali} in relation to the ^elebi}i camp demonstrates that he had no superior authority there,[357] and that the Prosecution's theory of "influence responsibility" is not supported by customary law.[358] He argues that a revision of the judgement by the Appeals Chamber can only concern errors of law, and that, where there is a mix of factual and legal errors, the appropriate remedy is that a new trial be ordered.[359] Delali} submits that the Trial Chamber was correct in refusing the to allow the proposed Prosecution witnesses to testify as rebuttal witnesses and in rejecting the Prosecution motion to re-open the proceedings.[360]

247. The Prosecution's argument relating to the Trial Chamber's findings as to the nature of the superior-subordinate relationship is considered first before turning to the second argument relating to the exclusion of evidence which was sought to be admitted as rebuttal or fresh evidence.

(i) The Superior-Subordinate Relationship in the Doctrine of Command Responsibility

248. The Prosecution interprets the Trial Chamber to have held that, in cases involving command or superior responsibility, the perpetrator must be "part of a subordinate unit in a direct chain of command under the superior" for the superior to be held responsible.[361] The Prosecution submissions do not refer to any specific express statement of the Trial Chamber to this effect but appear to consider that this was the overall effect of the Trial Chamber's findings. The Prosecution first refers to, and apparently accepts, the finding of the Trial Chamber that:

---

[356] Prosecution Reply, para 3.16; para 3.23; Appeal Transcript p 16: "The issue is an issue of error of law. The issue is whether or not the Trial Chamber applied the correct test for the admission of fresh or rebuttal evidence. If they applied the incorrect test and it's an error of law, then the Trial Chamber erred" and at p 171, where the Prosecution agreed that their submission was "[...] that there was an error of law, the documents which are attached to the submissions will demonstrate that it was an error of law which caused harm to the Prosecution's case, and therefore, you want a new trial."

[357] Appeal Transcript, pp 30-97.

[358] Delali} Response, pp 119, 122.

[359] Delali} Response, pp 9-10.

[360] Delali} Response, p 129.

[361] Prosecution Brief, para 3.6.

> [...] in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences [...] such authority can have a *de facto* or *de jure* character.[362]

249. The Prosecution then refers to certain subsequent conclusions of the Trial Chamber which it apparently regards as supporting its interpretation that the Trial Chamber held that the doctrine of superior responsibility requires the perpetrator to be part of a subordinate unit in a direct chain of command under the superior. First, the Prosecution refers to the Trial Chamber's statement that, in the case of the exercise of *de facto* authority, it must be

> [...] accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means that the perpetrator of the underlying offence must be the subordinate of the person of higher rank *and under his direct or indirect control.*[363]

The section of the judgement cited and relied upon in the Prosecution Brief, however, omits the italicised portion of the passage. This qualification expressly conveys the Trial Chamber's view that the relationship of subordination required by the doctrine of command responsibility may be direct *or indirect.*

250. The Trial Chamber also referred to the ICRC Commentary (Additional Protocols), where it is stated that the superior-subordinate relationship should be seen "in terms of a hierarchy encompassing the concept of control".[364] Noting that Article 87 of Additional Protocol I establishes that the duty of a military commander to prevent violations of the Geneva Conventions extends not only to his subordinates but also to "other persons under his control", the Trial Chamber stated that:

> This type of superior-subordinate relationship is described in the Commentary to the Additional Protocols by reference to the concept of "indirect subordination", in contrast to the link of "direct subordination" which is said to relate the tactical commander to his troops.[365]

251. Two points are clear from the Trial Chamber's consideration of the issue. First, the Trial Chamber found that a *de facto* position of authority suffices for the purpose of ascribing command responsibility. Secondly, it found that the superior-subordinate relationship is based on the notion of control within a hierarchy and that this control can be exercised in a direct or indirect manner, with the result that the superior-subordinate relationship itself may be both direct and indirect. Neither these findings, nor anything else expressed within the Trial

---

[362] Trial Judgement, para 378, cited in Prosecution Brief at para 3.2.
[363] Trial Judgement, para 646, cited in Prosecution Brief at para 3.3.
[364] Trial Judgement, para 354, quoting from the ICRC Commentary (Additional Protocols), para 3544.

Judgement, demonstrates that the Trial Chamber considered that, for the necessary superior-subordinate relationship to exist, the perpetrator must be in a *direct* chain of command under the superior.

252. Examining the actual findings of the Trial Chamber on the issue, it is therefore far from apparent that it found that the doctrine of superior responsibility requires the perpetrator to be part of a subordinate unit in a *direct* chain of command under the superior; nor is such a result a necessary implication of its findings. This seems to have been implicitly recognised by the Prosecution in its oral submissions on this ground of appeal at the hearing.[366] The Appeals Chamber regards the Trial Chamber as having recognised the possibility of both indirect as well as direct relationships subordination and agrees that this may be the case, with the proviso that effective control must always be established.

253. However, the argument of the Prosecution goes further than challenging the perceived requirement of *direct* subordination. The key focus of the Prosecution argument appears to be the Trial Chamber's rejection of the Prosecution theory that persons who can exert "substantial influence" over a perpetrator who is not necessarily a subordinate may, by virtue of that influence, be held responsible under the principles of command responsibility.[367] The Prosecution does not argue that *anyone* of influence may be held responsible in the context of superior responsibility, but that a superior encompasses someone who "may exercise a substantial degree of influence over the perpetrator or over the entity to which the perpetrator belongs."[368]

254. The Trial Chamber understood the Prosecution at trial to be seeking "to extend the concept of the exercise of superior authority to persons over whom the accused can exert substantial influence in a given situation, who are clearly not subordinates",[369] which is essentially the approach taken by the Prosecution on appeal. The Trial Chamber also rejected the idea, which it apparently regarded as being implicit in the Prosecution view, that a superior-subordinate relationship could exist in the absence of a subordinate:

---

[365] Trial Judgement, para 371.
[366] The Prosecution submitted that the Trial Chamber "*appeared* to focus on the necessity of a chain of command. It *appeared to focus* on the necessity of that there has to be a command structure..." and referred to "...the Trial Chamber's reliance on the need for a chain of command, and specifically some – *what appears to be* some direct link or direct chain of command ...", Appeal Transcript, pp 152 and 153.
[367] *See* Trial Judgement, para 648.
[368] Appeal Transcript, pp 116-118.
[369] Trial Judgement, para 648.

> The view of the Prosecution that a person may, in the absence of a subordinate unit through which authority is exercised, incur responsibility for the exercise of a superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility.[370]

The Trial Chamber thus unambiguously required that the perpetrator be subordinated to the superior. While it referred to hierarchy and chain of command, it was clear that it took a wide view of these concepts:

> The requirement of the existence of a "superior-subordinate relationship" which, in the words of the Commentary to Additional Protocol I, should be seen "in terms of a hierarchy encompassing the concept of control", is particularly problematic in situations such as that of the former Yugoslavia during the period relevant to the present case – situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures may be ambiguous and ill-defined. It is the Trial Chamber's conclusion ... that persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so.[371]

The Trial Chamber's references to concepts of subordination, hierarchy and chains of command must be read in this context, which makes it apparent that they need not be established in the sense of formal organisational structures so long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct, is satisfied.

255. It is clear that the Trial Chamber drew a considerable measure of assistance from the ICRC Commentary (Additional Protocols) on Article 86 of Additional Protocol I (which refers to the circumstances in which a superior will be responsible for breaches of the Conventions or the Protocol committed by his subordinate) in finding that actual control of the subordinate is a necessary requirement of the superior-subordinate relationship.[372] The Commentary on Article 86 of Additional Protocol I states that:

---

[370] Trial Judgement, para 647, cited in the Prosecution Brief at para 3.4.

[371] Trial Judgement, para 354.

[372] Trial Judgement, paras 354, 371 and 647, referring to para 3544 of the ICRC Commentary (Additional Protocols). Article 86(2) provides: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

> [...] we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, *being his subordinate, is under his control.* The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1 [of Article 86]. Furthermore only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However it should not be concluded from this that the provision only concerns the commander under whose direct orders the subordinate is placed. The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.[373]

The point which the commentary emphasises is the concept of control, which results in a relationship of superior and subordinate.

256. The Appeals Chamber agrees that this supports the Trial Chamber's interpretation of the law on this point. The concept of effective *control* over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[374]

257. In considering the Prosecution submissions relating to "substantial influence", it can be noted that they are not easily reconcilable with other Prosecution submissions in relation to command responsibility. The Prosecution expressly endorses the requirement that the superior have effective *control* over the perpetrator,[375] but then espouses, apparently as a matter of general application, a theory that in fact "substantial influence" alone may suffice, in that "where a person's powers of influence amount to a *sufficient* degree of authority or control in the circumstances to put that person in a position to take preventative action, a failure to do so may result in criminal liability."[376] This latter standard appears to envisage a lower threshold of control than an effective control threshold; indeed, it is unclear that in its natural sense the concept of "substantial *influence*" entails any necessary notion of control at all. Indeed, certain of the Prosecution submissions at the appeal hearing suggest that the substantial influence standard it proposes is not intended to pose any different standard than that of control in the sense of the ability to prevent or punish:

> But we would submit that if there is the substantial influence, which we concede is something which has got to be determined essentially on a case-by-case basis, if this superior does have

---

[373] ICRC Commentary (Additional Protocols), para 3544.

[374] It has been elsewhere accepted in the jurisprudence of the Tribunal that, where there is no effective control, there is no superior responsibility: *Aleksovski* Trial Judgement, para 108 (HVO soldiers with arms forced their way into the prison without the guards being able to stop them) and para 111 (no finding was made on any existence of control by Aleksovski over the HVO soldiers).

[375] Prosecution Brief para 3.7; Appeal Transcript p 115.

[376] Prosecution Brief, para 3.15 (emphasis added).

> *the material ability to prevent or punish*, he or she should be within the confines of this doctrine of command responsibility as set forth in Article 7(3).[377]

The Appeals Chamber will consider whether substantial influence has ever been recognised as a foundation of superior responsibility in customary law.

258. The Prosecution relied at trial and on appeal on the *Hostage case* in support of its position that the perpetrators of the crimes for which the superior is to be held responsible need not be subordinates, and that substantial influence is a sufficient degree of control.[378] The Appeals Chamber concurs with the view of the Trial Chamber that the *Hostage case* is based on a distinction in international law between the duties of a commander for occupied territory and commanders in general. That case was concerned with a commander in occupied territory. The authority of such a commander is to a large extent territorial, and the duties applying in occupied territory are more onerous and far-reaching than those applying to commanders generally. Article 42 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907, provides:

> Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43 provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This clearly does not apply to commanders in general. It was not then alleged, nor could it now be, that Delali} was a commander in occupied territory, and the Trial Chamber found expressly that he was not.[379]

259. The Prosecution emphasises however that it did not rely on the *Hostage case* alone.[380] At trial, and on appeal, the Prosecution relied on the judgement in the *Muto* case before the

---

[377] Appeal Transcript, p 119.
[378] The *Hostage case*, TWC, Vol. XI, p 1260.
[379] Trial Judgement, para 649.
[380] Prosecution Brief, para 3.20.

International Military Tribunal for the Far East.[381] The Appeals Chamber regards the *Muto* c. as providing limited assistance for the present purpose. Considering Muto's liability as Chief-of-Staff to General Yamashita, the Tokyo Tribunal found him to be in a position "to influence policy", and for this reason he was held responsible for atrocities by Japanese troops in the Philippines. It is difficult to ascertain from the judgement in that case whether his conviction on Count 55 for his failure to take adequate steps to ensure the observance of the laws of war reflected his participation in the making of that policy or was linked to his conviction on Count 54 which alleged that he "ordered, authorized and permitted" the commission of conventional war crimes.[382] It is possible that the conviction on Count 54 led to that on Count 55.

260. On the other hand, the Military Tribunal V in *United States v Wilhelm von Leeb et al*, states clearly that:

> In the absence of participation in criminal orders or their execution within a command, a Chief of Staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call those matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitively upon his commander.[383]

This suggests that a Chief-of-Staff would be found guilty only if he were involved in the execution of criminal policies by writing them into orders that were subsequently signed and issued by the commanding officer. In that case, he could be *directly* liable for aiding and abetting or another form of participation in the offences that resulted from the orders drafted by him. The Appeals Chamber therefore confines itself to stating that the case-law relied on by the Prosecution was not uniform on this point. No force of precedent can be ascribed to a proposition that is interpreted differently by equally competent courts.

261. The Prosecution also relies on the *Hirota* and *Roechling* cases.[384] In the *Hirota* case, the Tokyo Tribunal found that Hirota, the Japanese Foreign Minister at the time of the atrocities committed by Japanese forces during the Rape of Nanking, "was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing

---

[381] Trial Judgement, paras 368-369; Appeal Transcript, p 117, Tokyo War Crimes Trial, The International Military Tribunal for the Far East, Judgement, Official Transcript reprinted in R John Pritchard and Sonia Magbanna Zaide (eds.) The Toyko War Crimes Trial, Vol. 20 (1981).

[382] J Pritchard et al (eds), *The Tokyo War Crimes Trial* (Garland Publishing Inc, New York and London, 1981) (complete transcripts), vol 20 (Judgement and Annexes), pp 49,772.

[383] *United States v Wilhelm von Leeb et al*, TWC, Vol. XI, pp 513-514, quoted in the Trial Judgement, para 367.

[384] Appeal Transcript, p 117; Prosecution Brief, para 3.16.

any other action open to him to bring about the same result."[385] The Trial Chamber found this to be "language indicating powers of persuasion rather than formal authority to order action to be taken".[386]

4324

262. In the *Roechling* case,[387] a number of civilian industrialists were found guilty in respect of the ill-treatment of deportees employed in forced labour, not on the basis that they ordered the treatment but because they "permitted it; and indeed supported it, and in addition, for not having done their utmost to put an end to the abuses".[388] The Trial Chamber referred specifically to the findings in relation to von Gemmingen-Hornberg, who was the president of the Directorate and works manager of the Roechling steel plants. The tribunal at first instance had found that "the high position which he occupied in the corporation, as well as the fact that he was Herman Roechling's son-in-law, gave him certainly sufficient authority to obtain an alleviation in the treatment of these workers", and that this constituted "cause under the circumstances" to find him guilty of inhuman treatment of the workers. The reference to "sufficient authority" was interpreted by the Trial Chamber as indicating "powers of persuasion rather than formal authority", partly because of the tribunal's reference to the fact that the accused was Roechling's son-in-law,[389] and it is upon this interpretation that the Prosecution appears to rely.[390]

263. The Appeals Chamber does not interpret the reference to "sufficient authority" as entailing an acceptance of powers of persuasion or influence alone as being a sufficient basis on which to found command responsibility. The *Roechling* judgement on appeal does not refer to the fact that the accused was Roechling's son-in-law, but it emphasises his senior position as president of the Directorate and his position as works manager, "that is, as the works representative in negotiations with the authorities specially competent to deal with matters relating to labor. His sphere of competence also included contact with the Gestapo in regard to

---

[385] *The Tokyo Judgment*, The International Military Tribunal for the Far East, 29 April 1946-12 November 1948, Vol I, (ed B V A Röling and C F Rüter, 1977, APA University Press, Amsterdam) pp 447-448.

[386] Trial Judgement, para 376.

[387] *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v Directors of the Roechling Enterprises,* XIV Trials of War Criminals Before the Nuremberg Military Tribunals, p 1061("*Roechling* case") at pp 1092-3.

[388] *Roechling* case, judgement on appeal at p 1136.

[389] Trial Judgement, para 376.

[390] The Prosecution does not cite the relevant parts of the judgement on which it relies but refers to the Trial Chamber's references to the case. Prosecution Brief para 3.17. *See* also Appeal Transcript at p 117. The Trial Chamber was, as is apparent from the reference in footnote 404 of the Trial Judgement, referring to the accused von Gemmingen-Hornberg.

the works police".[391] The judgements suggest that he was found to have powers of control over the conditions of the workers which, although not involving any formal ability to give orders to the works police, exceeded mere powers of persuasion or influence. Thus the Appeals Chamber considers the Trial Chamber's initial characterisation of the case as being "best construed as an example of the imposition of superior responsibility on the basis of *de facto* powers of control possessed by civilian industrial leaders" as being the more accurate one.[392]

4325

264. The Appeals Chamber also considers that the *Pohl* case does not support the proposition of the Prosecution that the substantial influence alone of a superior may suffice for the purpose of command responsibility.[393] The person in question, Karl Mummenthey, an SS officer and a business manager, not only possessed "military power of command" but, more importantly in this case, "control" over the industries where mistreatment of concentration camp labourers occurred.[394] This is apparent even from the passage of the judgement cited by the Prosecution in its Appeal Brief:[395]

> Mummenthey was a definite integral and important figure in the whole concentration camp set-up, and, as an SS officer, *wielded military power of command.* If excesses occurred in the industries *under his control* he was in a position not only to know about them, but to do something.[396]

265. In the context of relevant jurisprudence on the question, it should also be noted that the Prosecution also relies on the fact that a Trial Chamber of the International Criminal Tribunal for Rwanda, in *Prosecutor v Kayishema and Ruzindana,*[397] relied on these World War II authorities, and on the references to them in the judgement of the Trial Chamber in *Čelebići*, to find that powers of influence are sufficient to impose superior responsibility.[398] The ICTR Trial Chamber stated:

> [...] having examined the *Hostage* and *High Command* cases the Chamber in *Čelebići* concluded that they authoritatively asserted the principle that, "powers of influence not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility." This Trial Chamber concurs.[399]

---

[391] *Roechling* Case, judgement on appeal, p 1136; *See* also p 1140. The Superior Military Government Court also referred specifically to the fact that the chief of the works police (Werkschutz) was an SS officer called Rassner who was appointed by the accused von Gemmingen-Hornberg: p 1135.
[392] Trial Judgement, para 376.
[393] *United States v Oswald Pohl et al*, TWC, Vol. V, p 958. Relied on in the Prosecution Brief at 3.14 and 3.20.
[394] *Ibid*, pp 1052-1053.
[395] Prosecution Brief, para 3.14, citing the *Pohl* case as referred to in the Trial Judgement, para 374.
[396] *United States v Oswald Pohl et al,* Vol V, TWC, p 958 (emphasis added).
[397] *Prosecution* v *Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgement, 21 May 1999.
[398] Prosecution Brief, para 3.18.
[399] *Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgement, 21 May 1999, para 220.

No weight can be afforded to this statement of the ICTR Trial Chamber, as it is based o misstatement of what the Trial Chamber in *Čelebići* actually held. The quoted statement was *not* a conclusion of the Trial Chamber, nor its interpretation of the *Hostage* and *High Command* cases, but the ICTR Trial Chamber's interpretation of the decision of the Tokyo Tribunal in the *Muto* case.[400] The Trial Chamber in *Čelebići* ultimately regarded any "influence" principle which may have been established by *Muto* case as being outweighed by other authorities which suggested that a position of command in the sense of effective control was necessary.

266. The Appeals Chamber considers, therefore, that customary law has specified a standard of *effective* control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed.

267. The Appeals Chamber therefore finds that the Trial Chamber has applied the correct legal test in the case of Delali}. There is, therefore, no basis for any further application of that test to the Trial Chamber's findings, whether by the Appeals Chamber or by a reconstituted Trial Chamber.[401]

268. The Prosecution's argument dealt with here is limited to the submission that it was the Trial Chamber's alleged error of law in the legal test which led it to an erroneous conclusion that Delalić did not exercise superior authority. There was no independent allegation in the Prosecution Brief that the Trial Chamber made errors of fact in its factual findings which should be overturned by the Appeals Chamber, although certain submissions at the hearing of the appeal suggest that the Prosecution submits that, even under the standard of effective control (which was in fact applied by the Trial Chamber), the Trial Chamber should have found Delalić

[400] Trial Judgement, para 375.
[401] Prosecution Brief, para 3.33; Appeal Transcript pp 158 and 166.

to have exercised superior authority.[402] However, nothing raised by the Prosecution would support a finding by the Appeals Chamber that the Trial Chamber's findings, and its ultimate conclusion from those facts that Delalić did not exercise the requisite degree of control, was so unreasonable that no reasonable tribunal of fact could have reached them.[403]

(ii) Whether the Trial Chamber erred in excluding rebuttal or fresh evidence

269. As discussed above, the Prosecution submitted "in the alternative" that the Appeals Chamber should grant leave to the Prosecution to present "additional" evidence that was wrongly excluded by the Trial Chamber.[404] The nature of the "alternative" was described as follows:

> The issue is an issue of an error of law. The issue is whether or not the Trial Chamber applied the correct test for the admission of rebuttal or fresh evidence. If they applied the incorrect test and it's an error of law, then the Trial Chamber erred.[405]

270. As noted above, the Appeals Chamber deals with this argument as an independent allegation of an error of law on behalf of the Trial Chamber.

271. At the request of the Trial Chamber during the case of the last of the accused to present his defence, the Prosecution filed a notification of witnesses proposed to testify in rebuttal. It proposed to call four witnesses, one relating to the case against Landžo and the others relating to the case against Delalić, one of whom was a Prosecution investigator being called essentially to tender a number of documents "not previously available to the prosecution".[406] Oral submissions on the proposal were heard by the Trial Chamber on 24 July 1998,[407] and the Trial Chamber ruled that, with the exception of the witness relating to the case against Landžo, the proposed evidence was not rebuttal evidence, but fresh evidence, and that the Prosecution had not put forward anything which would support an application to admit fresh evidence.[408] This

---

[402] Appeal Transcript, p 164: after referring to various facts found by the Trial Chamber, it was submitted that: "As a result of this specific position and someone who is granted authority by the higher command, it is the Prosecution's position that those facts demonstrate he had *control*."

[403] *Tadić* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63; *Furundžija* Appeal Judgement, para 37 and *infra* paras 434-436.

[404] Prosecution Brief, para 3.80.

[405] Appeal Transcript, p 168.

[406] Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, 22 July 1998, ("Notification"), 5th unnumbered page.

[407] Trial Transcript, pp 14934-14974.

[408] Trial Transcript, pp 14943, 14972, 14975.

decision was reflected in a written Order which noted that "rebuttal evidence is limited to matters that arise directly and specifically out of defence evidence".[409]

272. The evidence which was not admitted by the Trial Chamber related to Delić, Mucić and Delalić, but the Prosecution submission that the exclusion constituted an error invalidating the decision is limited in application to the effect of this evidence on its case against Delalić. Its overall purpose was to show that Delali} had the requisite degree of control over the ^elebi}i camp. The three proposed witnesses, and the documents they sought to adduce, were as follows:

(i) Rajko Đorđic, Sr, to testify as to his release from the ^elebi}i camp pursuant to a release form signed by Delalić and dated 3 July 1992. It was proposed that the witness produce and authenticate the document. This was intended to rebut the evidence of defence witnesses that Delalić was authorised to sign release documents only in exceptional circumstances when the members of the Investigative Commission were not present in ^elebi}i.

(ii) Stephen Chambers, an investigator of the Office of the Prosecutor, to present "documentary evidence not previously available to the Prosecutor" which had been seized from the State Commission for the Search for the Missing in Sarajevo and from the home and work premises of an official of the State Commission for Gathering Facts on War Crimes in Konjić. This was said to rebut the testimony of witnesses that Delalić, as commander of Tactical Group 1, had no authority over the ^elebi}i camp.[410]

(iii) Professor Andrea Stegnar, a handwriting expert, to give expert testimony in relation to a number of the recently obtained documents alleged to bear the signature of the accused. This was not argued to have any independent rebuttal basis.[411]

---

[409] Order on the Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, 30 July 1998, p 2.

[410] Notification, 4th and 5th unnumbered pages. It was put by the Prosecution on appeal that one item of documentary evidence would also more specifically rebut defence evidence as to the reliability of Prosecution Exhibit 214, a document signed by the President of the Konjic State Commission for the Exchange of War Prisoners which was described as "indicat[ing] that the overseeing and guarding of the prisoners had been taken over by the Tactical Group", as the new document in question was an authenticated copy of the document. *See* Prosecution Brief, para 3.81(2)(c) and fn 160.

[411] Notification, 6th unnumbered page. There were originally two categories of documents in relation to which the Prosecution sought Professor Stegnar's testimony. The Prosecution only appeals against the decision not to admit one of these categories (the new documents). Prosecution Brief, para 3.81(4) and fn 162.

273. The Trial Chamber characterised the nature of rebuttal evidence as "evidence to refute particular piece of evidence which has been adduced by the defence", with the result that it is "limited to matters that arise directly and specifically out of defence evidence."[412] This standard is essentially consistent with that used previously and subsequently by other Trial Chambers.[413] The Appeals Chamber agrees that this standard – that rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated – is correct. It is in this context that the Appeals Chamber understands the Trial Chamber's statement, made later in its Decision on Request to Reopen, that "evidence available to the Prosecution *ab initio*, the relevance of which does not arise *ex improviso,* and which remedies a defect in the case of the Prosecution, is generally not admissible."[414] Although the Appeals Chamber would not itself use that particular terminology, it sees, contrary to the Prosecution submission,[415] no error in that statement when read in context.

274. The Trial Chamber's particular reasons for rejecting the evidence as rebuttal evidence, as expressed in the oral hearing on 24 July, were, in relation to category (i), that the other evidence heard by the Trial Chamber was that Delalić had signed such documents only on behalf of the Investigating Commission and not in his own capacity. As the relevant release document also was acknowledged to state that Delalić was signing "for" the Commission,[416] the Trial Chamber queried how it could be considered to rebut what had already been put in evidence.[417] The Trial Chamber appeared to assess the document as having such low probative value in relation to the fundamental matter that the Prosecution was trying to prove – namely, Delalić's authority to release prisoners in his own capacity – that it could not be considered to

---

[412] Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, ("Decision on Request to Reopen"), para 23.

[413] *Prosecutor v Tadić*, Case No IT-94-1, Trial Transcript, 29 May 1998: p 3676, Judge McDonald refusing the admission in rebuttal of those parts of testimony which were "evidence that [the Prosecutor] could have adduced during [her] case in chief. Our concern is that this not be a practice of offering additional evidence that you would have an opportunity to offer on the case in chief." *Prosecutor v Furundžija*, Case No IT-95-17/2, Confidential Decision on Prosecutor's Motion in Respect of Rebuttal Witness and Witness Protection Issued Pertaining to Disclosure and Testimony by the Witness, 19 June 1998. The right of rebuttal is "to be used to challenge Defence evidence that could not have reasonably been foreseen, and that it would be a misuse of this right to permit it to be used to adduce evidence that should properly have been proved as part of the Prosecution case against an accused". (Nothing referred to here from that decision is confidential material). In *Prosecutor v Kordić*, Case No IT-95-14/2, Transcript 18 Oct 2000. The Trial Chamber endorsed the practice of the Trial Chambers in *^elebiji* and *Furundžija* of limiting rebuttal evidence strictly to matters arising in the defence case which were not already covered in the Prosecution case. It described the relevant standard to be the "only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case in chief will be permitted." *See* p 26647.

[414] Decision on Request to Reopen, para 23.

[415] Prosecution Brief, para 3.104.

[416] Trial Transcript, p 14936.

[417] Trial Transcript, p 14938.

rebut the defence evidence identified by the Prosecution. This assessment was reasonably op to the Trial Chamber.

275. In relation to category (ii), the Trial Chamber rejected the characterisation of the evidence as rebuttal evidence on the basis that it was better characterised as fresh evidence. While it may have been desirable for the Trial Chamber to state more specifically its view as to why the evidence did not refute a particular matters arising directly and specifically out of defence evidence, the Appeals Chamber agrees that it was open to regard the evidence as not being evidence in rebuttal. It is first noteworthy that the Prosecution, in applying to adduce the evidence, described it first as "fresh evidence, not previously available to the prosecution"[418] and gave only a fairly cursory description of how in its view the evidence rebutted defence evidence. It said that the evidence would rebut the evidence of witnesses "who all stated that Zejnil Delalić as Commander of Tactical Group 1 had no *de facto* authority, or any other authority whatsoever" over the ^elebi}i camp.[419] Thus the evidence was intended to establish that Delalić did in fact exercise such authority. As such, it went to a matter which was a fundamental part of the case the Prosecution was required to prove in relation to its counts under Article 7(3). Such evidence should be brought as part of the Prosecution case in chief and not in rebuttal. As the Trial Chamber correctly observed, where the evidence which "is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it", it is inappropriate to admit it in rebuttal, and the Prosecution "cannot call additional evidence merely because its case has been met by certain evidence to contradict it." [420]

276. Where such evidence could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies. This is essentially what the Trial Chamber found. There is therefore no merit in the Prosecution's submission that the evidence should have been admitted as "the reason for not adducing it during the Prosecution's case [was] not due to the failure to foresee

[418] Notification, para A, 4th unnumbered page.
[419] *Ibid.*
[420] Decision on Request to Reopen, para 23.

the issues that may arise during the Defence case." [421] The issue as to whether the evidence should have been admitted as fresh evidence is considered below.

277. The admission of the testimony of the handwriting expert referred to in category (iii) essentially relied on the admission of the category (ii) evidence, so it need not be further considered.

278. Following the Trial Chamber's rejection of the evidence as rebuttal evidence, the Prosecution filed an alternative request to re-open the Prosecution case.[422] The Trial Chamber rejected this alternative orally,[423] issuing its written reasons on 19 August 1998.[424] The Prosecution filed applications under Rule 73 for leave to appeal the Order of 30 July and the Decision of 4 August, on 6 August and 17 August, respectively. A Bench of the Appeals Chamber denied leave to appeal in respect of both applications on the basis that it saw no issue that would cause such prejudice to the case of the Prosecution as could not be cured by the final disposal of the trial including post-judgement appeal, or which assumed general importance to the proceedings of the Tribunal or in international law generally, these being the two tests established by Rule 73(B) regarding the granting or withholding of leave to appeal.[425]

279. In its Decision on Request to Reopen the Trial Chamber, after considering the basis on which evidence could be admitted as rebuttal evidence, acknowledged the possibility that the Prosecution "may further be granted leave to re-open its case in order to present new evidence not previously available to it." It stated:

> Such fresh evidence is properly defined not merely as evidence that was not in fact in the possession of the Prosecution at the time of the conclusion of its case, but as evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time. The burden of establishing that the evidence sought to be adduced is of this character rests squarely on the Prosecution.[426]

280. The Trial Chamber also identified the factors which it considered relevant to the exercise of its discretion to admit the fresh evidence. These were described as:

> (i) the "advanced stage of the trial"; i.e., the later in the trial that the application is made, the less likely the evidence will be admitted;

---

[421] Prosecution Brief, para 3.94.
[422] Prosecution Brief, para 3.83.
[423] Trial Transcript, 4 Aug 1998, pp 15518-15520.
[424] Decision on Request to Reopen.
[425] Decision on Prosecutor's Applications for Leave to Appeal the Order of 30 July 1998 and Decision of 4 August 1998 of Trial Chamber II *Quater*, Case No. IT-96-21-AR73.6 and AR73.7, 29 Aug 1998.
[426] Decision on Request to Reopen, para 26.

(ii) the delay likely to be caused by a re-opening of the Prosecution case, and the suitability of an adjournment in the overall context of the trial; and

(iii) the probative value of the evidence to be presented.[427]

281. Taking these considerations into account the Trial Chamber assessed both the evidence and the Prosecution's explanation for its late application to adduce it and concluded that the Prosecution had not discharged its burden of proving that the evidence could not have been found earlier with the exercise of reasonable diligence.[428] In addition, it found that the admission of the evidence would result in the undue protraction of the trial for up to three months, as the testimony of further witnesses to authenticate the relevant documents could be required as well as the evidence of any witnesses that the defence should be permitted to bring in response.[429] Finally, the Trial Chamber assessed the evidence to be of minimal probative value, consisting of "circumstantial evidence of doubtful validity", with the result that its exclusion would not cause the Prosecution injustice.[430] It concluded generally that "the justice of the case and the fair and expeditious conduct of the proceedings enjoins a rejection of the application."[431]

282. The Prosecution does not challenge the Trial Chamber's definition of fresh evidence as evidence which was not in the possession of the party at the time and which by the exercise of all reasonable diligence could not have been obtained by the relevant party at the conclusion of its case. Nor does it challenge the "general principle of admissibility" used by the Trial Chamber.[432]

283. The Appeals Chamber agrees that the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could *not* have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion,

---

[427] Decision on Request to Reopen, para 27.
[428] Decision on Request to Reopen, para 29-30.
[429] Decision on Request to Reopen, para 36.
[430] Decision on Request to Reopen, para 34.
[431] Decision on Request to Reopen, para 37.
[432] Prosecution Brief, para 3.98.

reflected in Rule 89 (D) of the Rules, to exclude evidence where its probative value substantially outweighed by the need to ensure a fair trial. Although this second aspect of the question of admissibility was less clearly stated by the Trial Chamber, the Appeals Chamber, for the reasons discussed below, considers that it applied the correct principles in this respect.

284. The Prosecution contends that although the Trial Chamber was correct in requiring proof of the exercise of reasonable diligence, it should have found that it had exercised such diligence.[433] The Trial Chamber took the view, having considered the reasons put forward by the Prosecution, that the Prosecution had not discharged its burden of demonstrating that even with reasonable diligence the proposed evidence could not have been previously obtained and presented as part of its case in chief. It implicitly expressed its opinion that the Prosecution had not pursued the relevant evidence vigorously until after the close of the Defence case.[434] The Prosecution submits that this finding was "factually incorrect" and represented "a misapprehension of the facts in relation to the efforts of the Prosecution to obtain this evidence", but does not more than reiterate the description of the efforts to obtain the evidence which it had already provided to the Trial Chamber.[435] It does not identify how, in its view, the Trial Chamber's conclusion on the facts were so unreasonable that no reasonable Trial Chamber could have reached it. It is not suggested that the Trial Chamber did not consider the Prosecution's explanation. No such suggestion could be made in light of the obvious demonstrations both in the hearing of the oral submissions on the issue[436] and the Decision on the Request to Reopen[437] that the Trial Chamber did consider the explanations the Prosecution was putting to it. In the Appeals Chamber's view, even making considerable allowances to the Prosecution in relation to the "complexities involved in obtaining the evidence",[438] it is apparent that there were failures to pursue diligently the investigations for which no adequate attempt to provide an explanation was made.

285. Two examples demonstrate this problem. A number of the documents which were sought to be admitted had been seized in June 1998 from the office and home of Jasminka Džumhur, a former official of the State Commission for Exchange in Konjić and the Army of Bosnia and Herzegovina 4th Corps Military Investigative Commission.[439] The material provided

[433] Prosecution Brief, paras 3.110-3.113.
[434] Decision on Request to Reopen, para 29.
[435] Prosecution Brief, para 3.111.
[436] Trial Transcript, 24 July 1998, pp 14946-14949; 14968-14971.
[437] Decision on Request to Reopen, para 28.
[438] Prosecution Brief, para 3.109.
[439] Request to Reopen, para 28.

by the Prosecution in its Request to Reopen to explain its prior effort to obtain documents and information from Ms Džumhur includes the statement that:

> Between late 1996 and early 1997, the Prosecution contacted Jasminka Džumhur three times. She consistently refused to provide a statement, but on one occasion, *briefly showed an investigator an untranslated document concerning the transfer of duties in Čelebići prison in November 1996*, signed by Zdravko Mucić and Zejnil Delalić. *She said she had other documents, but none of the documents were provided to the Prosecution.*[440]

With this knowledge, obtained in November 1996, that Ms Džumhur held documents which they considered would be relevant to their case, the next step apparently taken by the Prosecution was four to five months later in mid-April 1997, when it made a formal request for assistance to the Government of Bosnia and Herzegovina.[441] The Prosecution received a response on 23 July 1997, following a reminder in June 1997. On the material provided by the Prosecution, it was almost five months later that it took the next step of issuing a second request to the Government of Bosnia and Herzegovina, which received a relatively rapid response in early January, by providing certain documents.[442] Given that the trial had opened in March 1997, it was open to the Trial Chamber to regard the lapse of these periods of time between the taking of active steps to pursue the documents during after the trial had actually commenced as an indication that reasonable diligence was not being exercised.

286. Secondly, in a case such as the present where the evidence is sought to be presented not only after the close of the case of the Prosecution but long after the close of the case of the relevant accused, it was necessary for the Prosecution to establish that the evidence could not have been obtained, even if after the close of its case, at an earlier stage in the trial. The application to have the new evidence admitted was made many months after the Prosecution gained actual knowledge of the location at which the relevant documents were likely to be held. The information provided by the Prosecution, in its "Alternative Request to Reopen the Prosecution's Case", indicated that the Prosecution gained possession of certain documents from the State Commission for the Search for the Missing on 27 March 1998, which indicated that the relevant documents were in the possession of Jasminka Džumhur. It was not until 5 May 1998 that the Prosecution took any further step in trying to obtain the documents, when it "informed the authorities that various requests concerning the contacting of officials and former officials of Konjić Municipality, including Jasminka Džumhur remained outstanding". An application for a search warrant was made to a Judge of the Tribunal on 10 June 1998, after

[440] Request to Reopen, para 27.
[441] Request to Reopen, para 28

Delalić's defence case had closed. Even making allowances for the complexities of such investigations, allowing a period of over five weeks to elapse between becoming aware of the location of the documents and taking any further active step to obtain them, in light of the advanced state of the defence case, cannot be considered to be the exercise of reasonable diligence. If the Prosecution was in fact taking steps to obtain the information at that time, it did not disclose them to the Trial Chamber and cannot now complain at the assessment that it did not exercise "reasonable diligence" in obtaining and presenting the evidence earlier. Given that the burden of proving that reasonable diligence was exercised in obtaining the evidence lies on the Prosecution, it was open to the Trial Chamber to decide on the information provided to it by the Prosecution that it has not discharged that burden.

287. The Prosecution further submits that the Trial Chamber erred in the exercise of its discretion in certain of the matters it took into account. As the Trial Chamber's finding that reasonable diligence had not been exercised was a sufficient basis on which to dispose of the application, it is not strictly necessary to determine this issue, but as the Trial Chamber expressed its views on this aspect of the application, the Appeals Chamber will consider it here. The Prosecution argues that relevant and probative evidence is only excluded when its admission is substantially outweighed by the need to ensure a fair trial, and cites the provisions of certain national systems in support of this. In relation to these provisions which the Prosecution has selectively drawn from only three national jurisdictions, it can be observed that even if they were to be accepted as a guide to the principles applicable to this issue in the Tribunal, two of them simply confer a discretion on the Trial Chamber *exceptionally* to admit new evidence. The provision cited from the Costa Rican Code of Criminal Procedure states that:

> *Exceptionally*, the court *may* order [...] that new evidence be introduced if, during the trial proceedings new facts or circumstances have arisen that *need to be established.*[443]

The provision relied on from the German Code provides for the admission of new evidence "if this is absolutely necessary".[444]

288. The Trial Chamber stated the principle as being that:

---

[442] Request to Reopen, para 29-31.
[443] Code of Criminal Procedure, Costa Rica, Article 355, unofficial Prosecution translation, Prosecution Brief, para 3.88.

> While it is axiomatic that all evidence must fulfil the requirements of admissibility, for the Trial Chamber to grant the Prosecution permission to reopen its case, the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused. Great caution must be exercised by the Trial Chamber lest injustice be done to the accused, and it is therefore only in exceptional circumstances where the justice of the case so demands that the Trial Chamber will exercise its discretion to allow the Prosecution to adduce new evidence after the parties to a criminal trial have closed their case.[445]

The Prosecution argues that the statement of the Trial Chamber that "the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused" incorrectly states the applicable principle, which is that stated in Rule 89(D), namely that the need to ensure a fair trial substantially outweighs the probative value of the evidence.[446] The reference by the Trial Chamber to the potential "prejudice caused to the accused" was not, in the view of the Appeals Chamber, the appropriate one in the context. However it is apparent from a reading of the rest of the Decision on Request to Reopen that the Trial Chamber, in referring to prejudice to the accused was turning its mind to matters which may affect the fairness of the accused's trial. This is apparent both from the reference, in the passage cited above, to the need to avoid "injustice to the accused" and the concluding statement in the decision:

> In our view, the justice of the case and the fair and expeditious conduct of the proceedings enjoins a rejection of the application.[447]

289. The Prosecution also argues that the Trial Chamber erred in its assessment of the probative value of the evidence. It contends that the Trial Chamber erred in finding that the evidence was inferential and equivocal.[448] The Prosecution relies on a statement by the Trial Chamber that the documents "cannot be probative".[449] Although this was perhaps unfortunate terminology, it is apparent from the Trial Chamber's decision that after considering the evidence it was of the view not that it could not be probative but that the documents "contain circumstantial evidence of doubtful validity".[450] This was an assessment not that the documents were incapable, as a matter of law, of having probative value, but that, having regard to their contents which did not disclose direct evidence of the matters in dispute but, at best, gave rise to "mere inferences",[451] the documents had a low probative value. This assessment, and more

---

[444] Code of Criminal Procedure (*Strafprozeßordnung*) Article 244(2), unofficial Prosecution translation, Prosecution Brief, para 3.88.
[445] Decision on Request to Reopen, para 27.
[446] Prosecution Brief, para 3.107.
[447] Decision on Request to Reopen, para 37.
[448] Prosecution Brief, para 3.120.
[449] Decision on Request to Reopen, para 32, referred to in Prosecution Brief at para 3.115, 3.121.
[450] Decision on Request to Reopen, para 32.
[451] *Ibid*, para 32.

specifically the exercise of balancing the particular degree of probative value disclosed by the documents against the unfairness which would result if the evidence were admitted, is a matter for the Trial Chamber which will not be interfered with on appeal in the absence of convincing demonstration of error. No such demonstration has been made.

290. The Prosecution also specifically challenged the Trial Chamber's conclusion that the trial had reached such a stage that the evidence should not be admitted.[452] The stage in the trial at which the evidence is sought to be adduced and the potential delay that will be caused to the trial are matters highly relevant to the fairness to the accused of admission of fresh evidence. This consideration extends not only to Delalić as the accused against whom the evidence was sought to be admitted, but also the three co-accused whose trial would be equally delayed for reasons unrelated to themselves. The Appeals Chamber does not understand the Trial Chamber to have taken the stage of the trial into account in any sense other than its impact on the fairness of the trial of the accused, and, in the circumstances, the Appeals Chamber regards the Trial Chamber as having been fully justified in taking the very late stage of the trial into account. The Prosecution sought to have this evidence admitted not only after the close of its own case, but well after the close of the defence case of Delalić and only very shortly before the close of the case of the last accused. The Prosecution contends that "none of the accused objected to the potential presentation of the evidence of Mr Chambers."[453] This assertion is clearly incorrect. At the hearing of oral submissions on whether the evidence could be admitted as rebuttal or fresh evidence, counsel for Delalić stated:

> His Honour Karibi-Whyte has said what I was thinking and that is that we're in the second year of this trial, and, perhaps, the third or fourth year of investigations concerning these matters. And the Prosecution, despite what they say, despite what reasons they may offer, I think is a matter of law. *It's unfair at this point to produce documents in June, 1998.*[454]

The defence for Delalić also expressed its opposition to the presentation of the fresh evidence in its written response to the request to reopen.[455]

291. The Prosecution also argued that the Trial Chamber was wrong in its finding that the admission of the evidence would cause three months' delay:

---

[452] Prosecution Brief, para 3.101.
[453] Prosecution Brief, para 3.126
[454] Trial Transcript, p 14971 (emphasis added).
[455] Response of the Defendant Delalić Opposing the Prosecution's Alternative Request to Open the Prosecution's Case, 31 July 1998, pp 1; 10, 11. At p 10 the response states: "the Trial Chamber should consider whether it is in the interests of justice to permit the Prosecution to adduce the evidence at this late stage and whether to allow it would breach the Defendant's right to a fair trial as set out in Articles 20 and 21 of the Statute."

> The Prosecutor calculated that the three remaining proposed witnesses would take, on direct examination, less than four hours. It is respectfully submitted that the Trial Chamber's estimation that this would likely postpone the trial for three months is not borne out, given that there were only three witnesses and approximately 22 documents, some only supporting documents for the search warrant.[456]

This submission is disingenuous. The time which the Trial Chamber needed to take into account in determining the effect on the accused was not limited to the time which it may take to examine the three witnesses. The Trial Chamber found that, given the nature of the documents, it was likely that the testimony of further witnesses would be required to authenticate the relevant documents. It would also be necessary to allow for the defence to call appropriate witnesses in response.[457] Further, as noted by the Trial Chamber, the Prosecution had stated in its Request to Reopen, after acknowledging that the defence may need to call witnesses:

> In addition, the Prosecution would seek leave to call witnesses to rebut the testimony of those brought by the Defence.[458]

292. In light of these considerations, it was open to the Trial Chamber – which, having presided over the trial which had already taken over eighteen months, was well-placed to assess the time required taking into account practical considerations such as temporary witness unavailability – to conclude that the likely delay would be up to three months. In light of this finding, it is apparent that the Trial Chamber considered that the admission of the evidence would create a sufficiently adverse effect on the fairness of the trial of all of the accused, that it outweighed the limited probative value of the evidence. As a secondary matter, it is also apparent that the Trial Chamber was concerned to fulfil its obligation under Article 20 of the Statute to ensure the trial was expeditious.[459] In light of these considerations, the decision not to exercise its discretion to grant the application was open to the Trial Chamber.

293. For the above reasons, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber committed any error in the exercise of its discretion. This aspect of this ground of appeal relating to the exclusion of evidence by the Trial Chamber is therefore also dismissed, and with it this ground of appeal in its entirety.

---

[456] Prosecution Brief, para 3.127.
[457] Decision on Request to Reopen, para 36.
[458] Request to Reopen, para 70.
[459] Decision on Request to Reopen, para 37.

3. Deli}'s Acquittal under Article 7(3)

294. The Prosecution's fifth ground of appeal alleges that the Trial Chamber "erred when it decided ... that Hazim Deli} was not a 'superior' in the ^elebi}i Prison Camp for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute."[460] The Prosecution submits that the Trial Chamber applied the wrong legal test when it held that "the perpetrator of the underlying offence must be the *subordinate* of the person of higher rank" and that "a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility."[461] The Prosecution also submits, apparently in the alternative, that, even if the test formulated by the Trial Chamber for determining who is a superior for the purposes of Article 7(3) was correct, it misapplied the test in this case.[462] The Prosecution refers to the Trial Chamber's findings, including its finding that Deli} was the "deputy commander" of the camp,[463] to say that he should have been found to be a superior. Because, it is said, the Trial Chamber's findings also establish that he was aware of the offences of subordinates,[464] and that he failed to prevent or punish them, the Appeals Chamber should find Deli} guilty under Article 7(3) on counts 13, 14, 33, 34, 38, 39, 44, 45, 46 and 47.[465]

295. In support of this ground, the Prosecution reiterates its theory that command responsibility entails a superior-subordinate relationship in which the superior effectively controls the subordinate, in the sense that the superior possesses the material ability to prevent or punish the offences and that "[s]uch control can be manifest in powers of influence which permit the superior to intervene".[466] It also argues that the Trial Chamber erred in requiring Deli} to be part of the chain of command, as the correct test is whether he has sufficient control, influence, or authority to prevent or punish.[467] If, as the Trial Chamber found, *de facto* control is sufficient in this context, it should assess in each case whether an accused has *de facto* powers or control to prevent or punish.[468]

296. Deli} responds that among the elements required for finding a person liable under the doctrine of command responsibility are the requirement of "a hierarchy in which superiors are

---

[460] Prosecution Brief, para 6.1.
[461] *Ibid*, para 6.7.
[462] *Ibid*, para 6.16.
[463] *Ibid*, para 6.12.
[464] *Ibid*, para 6.18.
[465] *Ibid*, para 6.23.
[466] Prosecution Brief, para 6.10; Prosecution Reply, para 6.2.
[467] Prosecution Reply, para 6.5.
[468] *Ibid*, para 6.11.

authorized to control their subordinates to a degree that the superior is responsible for the actions of his subordinates" and that the superior must be "vested with authority to control his subordinates."[469] In the military, the chain of command is a hierarchy of commanders, with deputy commanders being outside this chain of command.[470]

297. Turning to the Trial Chamber's findings on the question of Delić's liability under Article 7(3), it clearly found that Delić held the position of "deputy commander" of the ^elebi}i camp.[471] However, it also found that this was "not dispositive of Deli}'s status" as the real issue before the Trial Chamber was:

> [w]hether the accused had the power to issue orders to subordinates and to prevent or punish the criminal acts of his subordinates, thus placing him within the chain of command. In order to do so the Trial Chamber must look to the actual authority of Hazim Delić as evidenced by his acts in the Čelebići prison camp.[472]

298. The Chamber proceeded to consider evidence of the degree of actual authority wielded by Deli} in the camp, and concluded that:

> [...] this evidence is indicative of *a degree of influence* Hazim Deli} had in the ^elebi}i prison-camp on some occasions, in the criminal mistreatment of detainees. However, this influence could be attributable to the guards' fear of an intimidating and morally delinquent individual who was the instigator of and a participant in the mistreatment of detainees, and *is not, on the facts before the Trial Chamber, of itself indicative of the superior authority of Deli} sufficient to attribute superior responsibility to him.*[473]

Having examined more evidence, it further found:

> This evidence indicates that Hazim Deli} was tasked with assisting Zradvko Muci} by organising and arranging for the daily activities in the ^elebi}i prison-camp. However, it cannot be said to indicate that he had actual command authority in the sense that he could issue orders and punish and prevent the criminal acts of subordinates.[474]

299. The Trial Chamber therefore concluded that, despite Delić's position of deputy commander of the camp, he did not exercise actual authority in the sense of having powers to prevent or punish and therefore was not a superior or commander of the perpetrators of the relevant offences in the sense required by Article 7(3).

300. The Appeals Chamber has already rejected, in its discussion of the Prosecution's second ground of appeal, the Prosecution argument that "substantial influence" is a sufficient measure

---

[469] *Deli}* Response, para 239.
[470] *Ibid*, para 247.
[471] Trial Judgement, paras 739 and 1268.
[472] Trial Judgement, para 800.
[473] *Ibid*, para 806.

of "control" for the imposition of liability under Article 7(3). It need only therefore confirm that the Trial Chamber's finding that Delić had powers of influence was not of itself a sufficient basis on which to find him a superior if it was not established beyond reasonable doubt by the evidence that he actually had the ability to exercise effective control over the relevant perpetrators.

301. The remaining issue as to the applicable law raised by the Prosecution in relation to this ground which has not previously been considered is its contention that the Trial Chamber erred because it required Delić to be part of the chain of command and, more generally, it required the perpetrators of the underlying offences to be his "subordinates" before liability under Article 7(3) could be imposed.

302. It is beyond question that the Trial Chamber considered Article 7(3) to impose a requirement that there be a superior with a corresponding subordinate.[475] The Prosecution itself submits that one of the three requirements under Article 7(3) is that of a superior-subordinate relationship. There is therefore a certain difficulty in comprehending the Prosecution submission that the Trial Chamber erred in law in requiring the perpetrator of the underlying offence to be a subordinate of the person of higher rank.[476] The Trial Chamber clearly did understand the relationship of subordination to encompass indirect and informal relationships, as is apparent from its acceptance of the concepts of civilian superiors and *de* facto authority, to which the Appeals Chamber has referred in its discussion of the issue in relation to the Prosecution's second ground of appeal.

303. The Appeals Chamber understands the necessity to prove that the perpetrator was the "subordinate" of the accused, not to import a requirement of *direct* or *formal* subordination but to mean that the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of the superior-subordinate relationship, will almost invariably not be satisfied unless such a relationship of subordination exists. However, it is possible to imagine scenarios in which one of two persons of equal status or rank – such as two soldiers or two civilian prison guards – could in fact exercise "effective control" over the other

---

[474] *Ibid*, para 809 (emphasis added).
[475] Trial Judgement, paras 646-647.

at least in the sense of a purely practical ability to prevent the conduct of the other by, for example, force of personality or physical strength. The Appeals Chamber does not consider the doctrine of command responsibility – which developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others – as having been intended to impose criminal liability on persons for the acts of other persons of completely equal status.[477]

304. The Appeals Chamber acknowledges that the Trial Chamber's references to the absence of evidence that Delić "lay within" or was "part of" the chain of command[478] may, if taken in isolation, be open to the interpretation that the Trial Chamber believed Article 7(3) to require the accused to have a formal position in a formal hierarchy which directly links him to a subordinate who also holds a formal position within that hierarchy. Given that it has been accepted that the law relating to command responsibility recognises not only civilian superiors, who may not be in any such formal chain of command, and *de facto* authority, for which no formal appointment is required, the law does not allow for such an interpretation. However, when read in the context of the rest of the Trial Chamber's Judgement, the Appeals Chamber is satisfied that the Trial Chamber was *not* in fact imposing the requirement of such a formalised position in a formal chain of command, as opposed to requiring that there be proof that Delić was a superior in the sense of having the material ability to prevent or punish the acts of persons subordinate to him. This is apparent from, for example, the Trial Chamber's references to the sufficiency of *indirect* control (where it amounts to effective control)[479] and its acceptance of *de facto* authority,[480] to which reference has already been made by the Appeals Chamber in the context of the Prosecution's second ground of appeal.

305. However, the Prosecution has also submitted that, "even on the Trial Chamber's test for the superior-subordinate relationship, Delić should have been convicted as the Trial Chamber misapplied this test to its own findings of fact".[481] The Prosecution, based on its understanding that the Trial Chamber required proof that Delić was exercising authority within a formal chain

---

[476] Prosecution Brief, para 6.7.
[477] In any event, concepts of accessory criminal liability such as aiding and abetting will potentially apply to persons of moral or personal authority who, by failing to act in such scenarios, have the effect in the circumstances of encouraging the commission of offences. *See Furundžija* Trial Judgement at para 209; *Aleksovski* Judgement, para 62.
[478] Trial Judgement, paras 796 and 810.
[479] Trial Judgement, paras 371 and 646.
[480] Trial Judgement, para 378.
[481] Prosecution Brief para 6.16; Prosecution Reply, para 6.13.

of command, contends that the facts found by the Trial Chamber establish this. As indicated above, the Appeals Chamber considers that the Trial Chamber essentially applied the correct test – whether Delić exercised effective control in having the material ability to prevent or punish crimes committed by subordinates – and did not require him to have a formalised position in a direct chain of command over the subordinates. However, the Appeals Chamber will consider the Trial Chamber findings which are relied on by the Prosecution to determine whether those findings must have compelled a conclusion that either standard was satisfied. As this aspect of the appeal involves an allegation that the Trial Chamber erred in its findings of fact, the Prosecution must establish that the conclusion reached by the Trial Chamber (that Delić did not exercise superior authority) was one which *no* reasonable tribunal of fact could have reached.[482] In order to succeed on its submission that the Appeals Chamber should substitute its own finding for that of the Trial Chamber – that is, that Delić did in fact exercise command responsibility and enter convictions accordingly – it is necessary for the Prosecution to establish that this finding is the *only reasonable* finding available on the evidence.[483] This standard was acknowledged by the Prosecution.[484]

306. The Prosecution first relies on the Trial Chamber's finding that Delić was deputy commander of the camp.[485] The Appeals Chamber accepts the Trial Chamber's view that this title or position is not dispositive of the issue and that it is necessary to look to whether there was evidence of *actual* authority or control exercised by Delić. For the same reason, the fact that the detainees regarded him as the deputy commander, and as a person with influence over the guards,[486] is not conclusive evidence of his *actual* authority.

307. The Prosecution identifies four other findings of the Trial Chamber which it says demonstrate such actual control.[487] The Appeals Chamber considers them in turn.

308. The Trial Chamber referred to testimony of four witnesses to the effect that the guards feared Delić and that he occasionally criticised them severely.[488] This evidence appeared to be accepted by the Trial Chamber, but it was interpreted by the Trial Chamber as showing a "degree of influence" which could be "attributable to the guards' fear of an intimidating and

---

[482] *See infra* paras 434-436.
[483] *Aleksovski* Appeal Judgement, para 74.
[484] Appeal Transcript, p 198.
[485] Prosecution Brief, paras 6.12-6.15.
[486] A matter also relied on by the Prosecution as evidence of authority: Prosecution Brief, para 6.11; Appeal Transcript, pp 193-194.
[487] Appeal Transcript at pp 193-194.

morally delinquent individual" rather than as unambiguous evidence of superior authority.[488] The Appeals Chamber considers that this interpretation of this piece of evidence was open to the Trial Chamber, who, it must be remembered, heard the witnesses and the totality of the evidence itself. There was certainly nothing submitted by the Prosecution which would demonstrate that this conclusion was so unreasonable that no reasonable tribunal of fact could have reached it.

309. The Prosecution also referred to evidence that Delić had ordered the beating of detainees on certain occasions.[490] As the Prosecution itself acknowledges, the Trial Chamber did not find beyond reasonable doubt that Delić did in fact order guards to conduct the series of beatings which was the subject of the evidence referred to in paragraph 804 of the Trial Judgement. The Trial Chamber referred to the evidence of certain witnesses and concluded that the evidence "*suggests* that Mr Delić conducted a vindictive beating of the people from Bradina on one particular day and then told at least one other guard, Mr Landžo to continue this beating. However, it is *not proven* that the beatings that followed from that day or [*sic*] were 'ordered' by Mr Delić".[491] In relation to the second occasion referred to in paragraph 805 of the Judgement, the Trial Chamber only referred to the Prosecution allegation of Delić ordering a beating and stated:

> Witness F and Mirko Đorđić testified to this incident and indicated that Delić "ordered" or was "commanding" the guards in this collective beating.

The Trial Chamber did not state whether it accepted this evidence, and it made *no* finding as to whether Delić actually ordered the beating or not. Despite the Prosecution's apparent suggestion that it is enough that "the Trial Chamber made no finding that this evidence was unreliable",[492] this is not a sufficient basis for the Appeals Chamber to take it as a finding by the Trial Chamber that the ordering of the beating was proved beyond reasonable doubt. The Appeals Chamber therefore cannot identify from the matters referred to by the Prosecution any unambiguous findings that it was proven beyond reasonable doubt that Delić ordered guards to mistreat detainees.

---

[488] Trial Judgement, para 803, referred to in Prosecution Brief at para 6.11(3) and Appeal Transcript at p 194.
[489] Trial Judgement, para 806.
[490] *Ibid*, paras 804 and 805.
[491] Emphasis added.
[492] Appeal Transcript, p 194.

310. The Prosecution also refers to the finding that Delić "was tasked with assisting Zdravko Mucić by organising and arranging for the daily activities in the camp."[493] A finding as to such a responsibility for organising and arranging *activities* in the camp, while potentially demonstrating that Delić had some seniority within the camp, actually provides no information at all as to whether he had authority or effective control over the guards within the camp who were the perpetrators of the offences for which it is sought to make Delić responsible. The Appeals Chamber therefore agrees with the Trial Chamber that it was open to regard this evidence as inconclusive.

311. Finally, the Prosecution refers to evidence given by Delić's co-accused Landžo that he "carried out all of [Delić's] orders out of fear and also because I believed I had to carry [*sic*] execute them".[494] While the Trial Chamber certainly considered this evidence, it did not accept it, as it found that Landžo was not a credible witness and that his evidence could not be relied on unless supported by other evidence.[495] It did not identify any other evidence which it regarded as constituting such support.

312. There were therefore a number of problems with the relevance of the findings or the quality of the underlying evidence relied on by the Prosecution. The weakness of such evidence as the foundation of any finding *beyond reasonable doubt* that Delić exercised superior authority was recognised by the Trial Chamber, which concluded that all this evidence was "indicative of a degree of influence Hazim Deli} had in the ^elebi}i prison-camp on some occasions, in the criminal mistreatment of detainees", but that it "is not, on the facts before this Trial Chamber, of itself indicative of the superior authority of Deli} sufficient to attribute superior responsibility to him".[496] The Appeals Chamber does not see anything in this conclusion which suggests it is unreasonable, and certainly not that it is so unreasonable that no reasonable tribunal of fact could reach it.

313. Although this conclusion effectively disposes of this ground of appeal, it is necessary to make an observation in relation to one final issue. The Prosecution submitted that, should it be accepted that the Trial Chamber should have found that Delić did in fact exercise superior authority over the guards in the camp, it would then be possible to reverse his acquittals on the

[493] Trial Judgement, para 809.
[494] Appeal Transcript, p 194, referring to evidence cited at para 801 of Trial Judgement.
[495] Trial Judgement, para 802. This was acknowledged by the Prosecution: Appeal Transcript, p 194.
[496] *Ibid*, para 806.

basis of the findings in the Trial Judgement. In particular, it submits that it is established that Delić knew or had reason to know on the following basis:

> It cannot seriously be disputed that Delić knew of the crimes being committed in the camp generally. The Trial Chamber said that "The crimes committed in the Čelebići prison-camp were so frequent and notorious that there is no way that *Mr Mucić* could not have known or heard about them." There is also no way that Delić could not have known about them, given that he was himself convicted for directly participating in them, and was involved in the operation of the camp on a daily basis.[497]

It must first be observed that, contrary to this submission, there was *no* finding that Delić directly participated in all of the crimes for which he is sought to be made responsible. Secondly, it cannot be accepted that a finding by the Trial Chamber that a co-accused who was commander of the camp must have known of the crimes committed in the camp can be taken, by some kind of imputation, as a finding beyond reasonable doubt that *Delić* knew or had reason to know of the crimes for which the Prosecution seeks to have convictions entered. The Trial Judgement contains no findings as to Delić's state of knowledge in relation to many of the crimes for which the Prosecution seek a reversal of the acquittal. It is undisputed that command responsibility does not impose strict liability on a superior for the offences of subordinates. Thus, had the Appeals Chamber accepted that the only reasonable conclusion on the evidence was that Delić was a superior, the question of whether he knew or had reason to know of the relevant offences would have remained unresolved, and it would in theory have been necessary to remit the matter to a Trial Chamber for consideration.

314. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal.

[497] Prosecution Brief, para 6.18. (Emphasis added).

V. UNLAWFUL CONFINEMENT OF CIVILIANS

A. Introduction

315. Count 48 of the Indictment charged Muci}, Deli} and Delali} with individual participation in, and superior responsibility for, the unlawful confinement of numerous civilians in the ^elebi}i camp. The offence of unlawful confinement of civilians is punishable under Article 2(g) of the Statute as a grave breach of the Geneva Conventions. Count 48 provided:

> Between May and October 1992, Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ participated in the unlawful confinement of numerous civilians at Čelebići camp. Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the unlawful confinement of civilians, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ are responsible for:
>
> Count 48. A Grave Breach punishable under Article 2(g) (unlawful confinement of civilians) of the Statute of the Tribunal.

316. The Trial Chamber found Muci} guilty of unlawful confinement of civilians as charged in count 48 under both Articles 7(1) and 7(3) of the Statute. It found Delali} and Deli} not guilty under this count. The Prosecution appeals against these acquittals. The Prosecution contends in its third ground of appeal that:

> The Trial Chamber erred when it decided in paragraphs 1124-1144 that Zejnil Delalić was not guilty of the unlawful confinement of civilians as charged in count 48 of the Indictment.[498]

The Prosecution's sixth ground of appeal is that:

> The Trial Chamber erred when it decided in paragraphs 1125-1144 that Hazim Delić was not guilty of the unlawful confinement of civilians as charged in count 48 of the Indictment.[499]

317. The Prosecution contends that the Trial Chamber applied the wrong legal principle to determine the responsibility of Delalić and Delić for the unlawful confinement of the civilians in the ^elebi}i camp. In the case of Delalić, the Prosecution contends that the Trial Chamber also failed to apply correctly the law relating to aiding and abetting.

318. Mucić appeals against his conviction. He contends in his twelfth ground of appeal that:

---

[498] Prosecution Brief, p 68.
[499] Prosecution Brief, p 117.

> The Trial Chamber erred in fact and law in finding that the detainees, or any of them, within the ^elebići camp were unlawfully detained [...][500]

Mucić also challenges the Trial Chamber's findings that he had the requisite *mens rea* for the offence and that any acts or omissions by him were sufficient to constitute the *actus reus* for the offence.[501]

319. These grounds of appeal, although dealing with different matters, touch on a number of issues which are common to each ground. It is convenient to discuss two of these common legal issues before turning to the specific issues raised discretely by each ground of appeal:

(i) the legal standard for determining what constitutes the *unlawful* confinement of civilians; and
(ii) whether the Trial Chamber was correct in its conclusion that some of the civilians in the Čelebići camp were unlawfully detained.

(i) The unlawful confinement of civilians

320. The offence of unlawful confinement of a civilian, a grave breach of the Geneva Conventions which is recognised under Article 2(g) of the Statute of the Tribunal, is not further defined in the Statute. As found by the Trial Chamber, however, clear guidance can be found in the provisions of Geneva Convention IV. The Trial Chamber found that the confinement of civilians during armed conflict may be permissible in limited cases, but will be unlawful if the detaining party does not comply with the provisions of Article 42 of Geneva Convention IV, which states:

> The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.
>
> If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Thus the involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful. Further, an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of

---

[500] Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić Dated the 2nd July 1999, 26 July 1999, RP 1795. In the document Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, 31 May 2000, this ground of appeal was omitted but it was confirmed by counsel at the appeal hearing that this omission was unintentional and that the ground of appeal was being maintained. Appeal Transcript, p 459.

[501] Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić Dated the 2nd July 1999, 26 July 1999, RP 1795.

the detained persons and does not establish an appropriate court or administrative board prescribed in Article 43 of Geneva Convention IV.[502] That article provides:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.
>
> Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

321. In its consideration of the law relating to the offence of unlawful confinement, the Trial Chamber also referred to Article 5 of Geneva Convention IV, which imposes certain restrictions on the protections which may be enjoyed by certain individuals under the Convention.[503] It provides, in relevant part:

> Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is *definitely suspected of or engaged in activities hostile to the security of the State*, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> [...]
>
> In each case, such persons shall nevertheless be treated with humanity, and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.[504]

This provision reinforces the principle behind Article 42, that restrictions on the rights of civilian protected persons, such as deprivation of their liberty by confinement, are permissible only where there are reasonable grounds to believe that the security of the State is at risk.

322. The Appeals Chamber agrees with the Trial Chamber that the exceptional measure of confinement of a civilian will be lawful only in the conditions prescribed by Article 42, and

---

[502] Trial Judgement, para 583.
[503] Trial Judgement, paras 566-567.
[504] Emphasis added.

where the provisions of Article 43 are complied with.[505] Thus the detention or confinemen civilians will be unlawful in the following two circumstances:

(i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, *ie* they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and

(ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.

(ii) Was the confinement of the Čelebići camp detainees unlawful?

323. As stated above, the Trial Chamber found that the persons detained in the Čelebići camp were civilian protected persons for the purposes of Article 4 of Geneva Convention IV.[506] The Trial Chamber accepted evidence that indicated that a number of the civilians in the camp were in possession of weapons at the time of their capture, but refrained from making any finding as to whether the detaining power could legitimately have formed the view that the detention of this category of persons was necessary for the security of that power.[507] However, the Trial Chamber also found that the confinement of a significant number of civilians in the camp could not be justified by any means. Even taking into account the measure of discretion which should be afforded to the detaining power in assessing what may be detrimental to its own security, several of the detained civilians could not reasonably have been considered to pose any sufficiently serious danger as to warrant their detention.[508] The Trial Chamber specifically accepted the evidence of a number of witnesses who had testified that they had not participated in any military activity or even been politically active, including a 42-year old mother of two children.[509] It concluded that at least this category of people were detained in the camp although there existed no serious and legitimate reason to conclude that they seriously

[505] This does not preclude the existence of other circumstances which may render confinement of a civilian unlawful, but that question does not now arise for determination by the Appeals Chamber.
[506] *See* above, Chapter II, Section B.
[507] Trial Judgement, para 1131.
[508] Trial Judgement, para 1132.
[509] Trial Judgement, para 1133.

prejudiced the security of the detaining party, which indicated that the detention was a collec' measure aimed at a specific group of persons, based mainly on their ethnic background.[510]

324. Mucić argues in relation to his ground of appeal,[511] and Delić and Delalić argue in response to the Prosecution's ground of appeal, that the Prosecution failed to prove beyond reasonable doubt that the persons confined in the Čelebići camp were unlawfully detained. They reiterate their submission that the detainees were not in fact protected persons, a submission which the Appeals Chamber is rejecting in relation to the ground of appeal based on that argument.[512]

325. The Prosecution responds that the findings of the Trial Chamber that the victims were unlawfully detained must stand unless the accused show that those findings were unreasonable in the sense that no reasonable person could have reached them.[513]

326. Delali} contends that since "the Trial Chamber, in determining that they [the civilians] were protected persons, found that they were not loyal to [...] Bosnia and Herzegovina, then they are virtually *ipso facto* security risks to the Government in that they are supporting the rebel forces".[514] He explains the detention of persons who may not have borne arms on the basis that "if not engaged in actual fighting, then they are certainly in a position to provide food, clothing, shelter and information to those who are".[515]

327. In the Appeals Chamber's view, there is no necessary inconsistency between the Trial Chamber's finding that the Bosnian Serbs were regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict[516] and the finding that some of them could not reasonably be regarded as presenting a threat to the detaining power's security. To hold the contrary would suggest that, whenever the armed forces of a State are engaged in armed conflict, the *entire* civilian population of that State is necessarily a threat to security and therefore may be detained. It is perfectly clear from the provisions of Geneva Convention IV

---

[510] Trial Judgement, para 1134.
[511] Most of the submissions of Mucić on this issue are drawn from the closing submissions made on behalf of Delalić at trial. *See* Motion to Amend by Substitution the Appeal Brief of Zdravko Mucić Filed on 2 July 1999, 15 July 1999, para 4: "The Appellant adopts as a substantive appeal against conviction on Count 48 the arguments and reasoning contained in the Final Written Submissions of Zejnil Delalić dated the 28th of August 1998 and set out at paragraph R, pages 337-343 inclusive of that document [...]."
[512] *Supra,* para 106.
[513] Prosecution Response, pp 50-51.
[514] Delali} Response, p 146.
[515] Delali} Response, p 146.
[516] Trial Judgement, para 265.

referred to above that there is no such blanket power to detain the entire civilian population party to the conflict in such circumstances, but that there must be an assessment that each civilian taken into detention poses a *particular risk* to the security of the State. This is reflected in the ICRC Commentary to Article 42 of Geneva Convention IV:

> [...] the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence.[517]

Thus the Appeals Chamber agrees with the conclusion reached by the Trial Chamber that "the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living, and is not, therefore, a valid reason for interning him."[518]

328. It was contended by Deli} that detention in the present case was justified under international law because "[t]he government is clearly entitled to some reasonable time to determine which of the detainees is a danger to the State's security".[519] Although the Appeals Chamber accepts this proposition, it does not share the view apparently taken by Delić as to what is a "reasonable time" for this purpose. The reasonableness of this period is *not* a matter solely to be assessed by the detaining power. The Appeals Chamber recalls that Article 43 of Geneva Convention IV provides that the decision to take measures of detention against civilians must be "reconsidered *as soon as possible* by an appropriate court or administrative board."[520] Read in this light, the reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk must be the *minimum* time necessary to make enquiries to determine whether a view that they pose a security risk has any objective foundation such that it would found a "definite suspicion" of the nature referred to in Article 5 of Geneva Convention IV. Although the Trial Chamber made no express finding upon this issue, the Appeals Chamber is satisfied that the only reasonable finding upon the evidence is that the civilians detained in the Čelebići camp had been detained for longer than such a minimum time.

329. The Trial Chamber found that a Military Investigative Commission for the crimes allegedly committed by the persons confined in the Čelebići camp was established,[521] but that

[517] ICRC Commentary (GC IV) p 258.
[518] Trial Judgement, para 1134.
[519] Deli} Response, para 262, p 218.
[520] Emphasis added.
[521] *See infra* para 382.

this Commission did not meet the requirements of Article 43 of Geneva Convention IV as it not have the necessary power to decide finally on the release of prisoners whose detention could not be considered as justified for any serious reason.[522] There is therefore nothing in the activities of the Commission which could justify the continued detention of detainees in respect of whom there was no reason to categorise as a security risk. Indeed, it appears to have recommended the release of several of the Čelebići camp detainees, albeit without result.[523] Delić submits that "the government had the right to continue the confinement until it determined that the State's security would not be harmed by release of the detainees."[524] This submission, which carries the implication that civilian detainees may be considered a risk to security which makes their detention absolutely necessary until proved otherwise, completely reverses the onus of justifying detention of civilians. It is upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view.

330. The Trial Chamber, as the trier of facts, is in the best position to assess and weigh the evidence before it, and the Appeals Chamber gives a margin of deference to a Trial Chamber's evaluation of the evidence and findings of facts.[525] Nothing put to the Appeals Chamber indicates that there is anything unreasonable in the relevant sense in the Trial Chamber's findings as to the unlawful nature of the confinement of a number of civilians in the Čelebići camp. As observed in the ICRC Commentary, the measure of confinement of civilians is an "exceptionally severe" measure, and it is for that reason that the threshold for its imposition is high – it must, on the express terms of Article 42, be "absolutely necessary".[526] It was open to the Trial Chamber to accept the evidence of a number of witnesses that they had not borne arms, nor been active in political or any other activity which would give rise to a legitimate concern that they posed a security risk. The Appeals Chamber is also not satisfied that the Trial Chamber erred in its conclusion that, even if it were to accept that the initial confinement of the individuals detained in the Čelebići prison-camp was lawful, the continuing confinement of these civilians was in violation of international humanitarian law, as the detainees were not granted the procedural rights required by article 43 of Geneva Convention IV.

---

[522] Trial Judgement, paras 1138-1140.
[523] Trial Judgement, paras 1137-1138.
[524] Delić Response, para 262, p 218.
[525] *See Aleksovski* Appeal Judgement, para 63.
[526] ICRC Commentary (GCIV) p 261: "the Convention describes internment and placing in assigned residence as exceptionally severe measures which may be applied only if they are absolutely necessary for the security of the State."

B. The Prosecution appeals

331. As stated above, the Prosecution claims that the Trial Chamber erred in acquitting Delalić of both direct responsibility under Article 7(1) and superior responsibility under Article 7(3) for the offence of unlawful confinement.

332. The Prosecution requests the Appeals Chamber to reverse the Trial Chamber's acquittal of Delali} and Muci} on count 48, and substitute a verdict of guilty for this count. Delali} and Deli} respond that their acquittals on this count were correct in law and should not be disturbed.

1. Article 7(3) Liability

333. The Prosecution argues as part of the third ground of appeal that the Trial Chamber erred in finding that it was not proved that Delali} had superior authority in connection with the unlawful confinement of civilians, and relies for support on its arguments submitted in relation to its second ground of appeal, without more.[527] In relation to the sixth ground of appeal, the Prosecution contends that the Trial Chamber erred in finding that Deli} did not have superior responsibility for the unlawful confinement of civilians.[528]

334. The Trial Chamber found that:

> Zejnil Delali} and Hazim Deli} have respectively been found not to have exercised superior authority over the ^elebi}i prison-camp. For this reason, the Trial Chamber finds that these two accused cannot be held criminally liable as superiors, pursuant to Article 7(3) of the Statute, for the unlawful confinement of civilians in the ^elebi}i prison-camp.[529]

The resolution of this aspect of these grounds therefore rests upon the resolution of the Prosecution's second and fifth grounds of appeal, which challenged the Trial Chamber's finding that Delalić and Delić did not exercise superior authority under Article 7(3) of the Statute. The Appeals Chamber has dismissed those grounds of appeal,[530] with the result that the Trial Chamber's determination that Delalić and Delić were not superiors for the purposes of Article 7(3) of the Statute remains. The present grounds of appeal therefore cannot succeed insofar as they relate to Delalić and Delić's liability for the unlawful confinement of civilians pursuant to Article 7(3) of the Statute.

---

[527] Prosecution Brief, para 4.5. The Second Ground of Appeal is that the Trial Chamber erred in finding that Delali} did not exercise superior responsibility.
[528] *Ibid*, para 7.19.
[529] Trial Judgement, para 1144.
[530] *Supra*, Chapter IV, Section B.

2. Article 7(1) Liability

335. The Prosecution contends that the Trial Chamber erred in law in the principles it applied in considering when an accused can be held responsible under Article 7 (1) for unlawful confinement of civilians.[531] The Prosecution argues that, had the Trial Chamber applied the correct legal principles in regard to Article 7(1) to the facts it had found, Delali} and Deli} would have been liable under Article 7(1) for aiding and abetting in the commission of the unlawful confinement of civilians. It is submitted that the Trial Chamber's findings demonstrate that Delali} and Deli} knew that civilians were unlawfully confined in the camp and consciously participated in their continued detention, and that this is sufficient to found their personal liability for the offence.[532]

336. As discussed above, the Trial Chamber found that civilians are unlawfully confined where they are detained in contravention of Articles 42 and 43 of Geneva Convention IV. In relation to the nature of the individual participation in the unlawful confinement which will render an individual personally liable for the offence of unlawful confinement of civilians under Article 2(g) of the Statute, the Trial Chamber, having found that Delali} and Deli} did not exercise superior responsibility over the camp, held:

> *Furthermore, on the basis of these findings, the Trial Chamber must conclude that the Prosecution has failed to demonstrate that Zejnil Delalić and Hazim Delić were in a position to affect the continued detention of civilians in the Čelebići prison-camp.* In these circumstances, Zejnil Delalić and Hazim Delić cannot be deemed to have participated in this offence. Accordingly, the Trial Chamber finds that Zejnil Delalić and Hazim Delić are not guilty of the unlawful confinement of civilians, as charged in count 48 of the Indictment.[533]

337. On the basis of the italicised portion of the above passage, the Prosecution interprets the Trial Chamber as having applied a test which requires proof of the exercise of superior authority under Article 7(3) of the Statute before an individual could be held responsible under Article 7(1) of the Statute for the offence of unlawful confinement.[534] More generally, the Prosecution submits that the Trial Chamber erred in finding that, as a matter of law, an accused cannot be criminally liable under Article 7(1) for the unlawful confinement of civilians unless that person was "in a position to affect the continued detention of civilians".[535] The Prosecution observes

[531] Prosecution Brief, para 7.7.
[532] Prosecution Brief, paras 7.13 and 7.16.
[533] Trial Judgement, para 1144, (emphasis added).
[534] Prosecution Brief, para 4.10.
[535] Prosecution Brief, para 4.11.

that individual criminal liability extends to any person who committed an offence in the te... of Article 7(1).[536]

338. In relation to the contention that the Trial Chamber found that an accused can be liable under Article 7(1) for the offence of unlawful confinement only if it is proved that he exercises superior authority under Article 7(3), there is some question as to whether the Trial Chamber in fact made such a legal finding. The Trial Chamber's statement that, "on the basis of" its findings that Delalić and Delić could not be held criminally liable under Article 7(3) of the Statute, it "must conclude" that there had been a failure to prove that they had been in a position to affect the continued detention of the civilians in the camp could be interpreted as suggesting that the Trial Chamber believed that, as a *legal* matter, there could be no liability for unlawful confinement under Article 7(1) without superior responsibility under Article 7(3) being established. Such a legal interpretation is clearly incorrect, as it entwines two types of liability, liability under Article 7(1) and liability under Article 7(3). As emphasised by the Secretary-General's Report,[537] the two liabilities are different in nature. Liability under Article 7(1) applies to direct perpetrators of crimes and to accomplices. Article 7(3) applies to persons exercising command or superior responsibility. As has already been acknowledged by the Appeals Chamber in another context, these principles are quite separate and neither is dependent in law upon the other. In the *Aleksovski* Appeal Judgement, the Appeals Chamber rejected a Trial Chamber statement, made in relation to the offence of outrages of personal dignity consisting of the use of detainees for forced labour and as human shields, that the accused "cannot be held responsible under Article 7(1) in circumstances where he does not have direct authority over the main perpetrators of the crimes".[538] There is no reason to believe that, in the context of the offence of unlawful confinement, there would be any special requirement that a position of superior authority be proved before liability under Article 7(1) could be recognised.

339. However, the Appeals Chamber is not satisfied that this is what the Trial Chamber in fact held. The reference to its findings on the issue of superior authority when concluding that, "[i]n these circumstances, Zejnil Delalić and Hazim Delić cannot be deemed to have participated in this offence" suggests that the Trial Chamber was referring not to its *legal* conclusion that the two accused were not superiors for the purposes of Article 7(3), but to the

[536] Prosecution Brief, paras 7.8-7.9.
[537] Secretary-General's Report, paras 56-58.
[538] *Aleksovski* Appeal Judgement, para 170.

previous *factual findings* that it had made in that context, which were also relevant to the issue of their individual responsibility for the offence of unlawful confinement. Whether the Trial Chamber was unreasonable in relying on those findings to conclude that Delalić and Delić should be acquitted of the offence under Article 7(1) is a separate issue which is discussed below.

340. The Prosecution also challenges the Trial Chamber's apparent conclusion that, to be responsible for this offence under Article 7(1), the perpetrator must be "in a position to affect the continued detention" of the relevant civilians. Responsibility may be attributed if the accused falls within the terms of Article 7(1) of the Statute, which provides that:

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

341. It is submitted that an accused can be liable under Article 7(1) for committing the crime of unlawful confinement of civilians even if the accused was not the person who could determine which victim would be detained, and whether particular victims would be released.[539] The Prosecution proposes that, in order to establish criminal responsibility for *committing* the offence of unlawful confinement of civilians it is sufficient to prove (i) that civilians were unlawfully confined, (ii) knowledge that the civilians were being unlawfully confined and (iii) participation in the confinement of those persons.[540] The Prosecution submits that, in relation to guards in a prison, the third matter "will be satisfied by showing that the duties of the guard were in themselves in execution or administration of the illegal system."[541]

342. The Appeals Chamber is of the view that to establish that an individual has *committed* the offence of unlawful confinement, something more must be proved than mere knowing "participation" in a general system or operation pursuant to which civilians are confined. In the Appeals Chamber's view, the fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has *committed* a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a

---

[539] Prosecution Brief, para 7.9.
[540] Prosecution Brief, para 7.13.
[541] Prosecution Brief, para 7.13

security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist. In the case of prison guards who are employed or conscripted to supervise detainees, and have no role in the determination of who is detained or released, the Prosecution submits that the presence alone of the camp guards was the "most immediate obstacle to each detainee's liberty"[542] and that the guard's presence in the camp in that capacity alone would therefore constitute commission by them of the crime of unlawful confinement. This, however, poses the question of what such a guard is expected to do under such circumstances. The implication from the Prosecution submissions is that such a guard must release the prisoners. The Appeals Chamber, however, does not accept that a guard's omission to take unauthorised steps to release prisoners will suffice to constitute the commission of the crime of unlawful confinement. The Appeals Chamber also finds it difficult to accept that such a guard must cease to supervise those detained in the camp to avoid such liability, particularly in light of the fact that among the detainees there may be persons who are lawfully confined because they genuinely do pose a threat to the security of the State.

343. It is not necessary for present purposes for the Appeals Chamber to attempt an exhaustive definition of the circumstances which will establish that the offence is *committed*, but it suffices to observe that such liability is reserved for persons responsible in a more direct or complete sense for the civilian's unlawful detention. Lesser degrees of directness of participation obviously remain relevant to liability as an accomplice or a participant in a joint criminal enterprise, which concepts are best understood by reference first to what will establish primary liability for an offence.

344. In relation to accomplice liability, the Prosecution contends that, "[i]n the case of the crime of unlawful confinement of civilians under Article 2(g) of the Statute, a person who, for instance, *instigates* or *aids and abets* may not ever be in a position to affect the continued detention of the civilians concerned."[543] The Prosecution also observes that many of the crimes within the Tribunal's jurisdiction may in practice be committed jointly by a number of persons if they have the requisite *mens rea* and that the crime of unlawful confinement is a clear

[542] Prosecution Brief, para 7.12.
[543] Prosecution Brief, para 7.8, (emphasis in the original).

example of this as "it was the various camp guards and administrators, acting jointly, w collectively ran the camp and kept the victims confined within it."[544]

345. Although it did not explicitly discuss as a discrete legal matter the exact principles by which individuals will be held individually criminally responsible for the unlawful confinement of civilians, the Trial Chamber did, earlier in its Judgement, discuss the general principles relating to criminal responsibility under Article 7(1) of the Statute. It cited the following statement from the Trial Chamber in the *Tadi}* Judgement which the *Čelebići* Trial Chamber considered to state accurately "the scope of individual criminal responsibility under Article 7(1)":[545]

> [...] the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.

This statement, from its context in the *Tadić* Trial Judgement, although broadly expressed, appears to have been intended to refer to liability for aiding and abetting or all forms of accomplice liability rather than all forms of individual criminal responsibility under Article 7(1) including primary or direct responsibility.[546] In the case of primary or direct responsibility, where the accused himself commits the relevant act or omission, the qualification that his participation must "directly and substantially affect the commission of the offence" is an unnecessary one. The Trial Chamber, in referring to the ability to "affect the continued detention" of the civilians, appears to have been providing a criterion to enable the identification of the person who could have a "direct and substantial effect" on the commission of unlawful confinement of civilians in the sense of the *Tadić* statement.

346. It may have been clearer had the Trial Chamber set out expressly its understanding of the relevant principles in relation to the establishment of primary or direct responsibility for the offence of unlawful confinement of civilians, in relation to which the general principles of accomplice liability set out earlier in its Judgement would also be applied. However, the

---

[544] Prosecution Brief, para 7.11.

[545] Trial Judgement para 329, citing *Tadi}* Trial Judgement, para 692.

[546] *See Tadić* Trial Judgement, at *e.g.*, para 688, where the opposition is drawn between culpability where the accused "intentionally commits" a crime or where he "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime". (The underlining is in the original). The reference to "directly and substantially" is made only in relation to the latter category. *See* also the following paras 689-691 which appear to be concerned with aiding and abetting only.

Appeals Chamber does not consider that these submissions establish that the Trial Chamber erred in stating that an accused must be in a position to affect the continued detention of the civilians if this is understood, as the Appeals Chamber does, to mean that they must have participated in some significant way in the continued detention of the civilians, whether to a degree which would establish primary responsibility, or to a degree necessary to establish liability as an accomplice or pursuant to a common plan. The particular submissions the Prosecution makes in support of its contention that Delalić and Delić should have been convicted under Article 7(1) for the offence are now considered.

(a) Delali}

347. The Prosecution alleges that Delalić should have been found guilty for aiding and abetting the offence of unlawful confinement. Delali} argues that the Indictment did not charge him with aiding and abetting in Count 48 and that, even if it were to be accepted that he was so charged, the evidence did not show beyond a reasonable doubt that he was guilty as an aider and abettor.[547]

348. The Prosecution responds that Delali} was charged with aiding and abetting in Count 48 of the Indictment by the use of the word "participation".[548] Delali} contends however that "when the Prosecutor intends to charge aiding and abetting it is done so specifically",[549] and he advances some examples of other indictments before the Tribunal that charge aiding and abetting for the offence of unlawful confinement.[550] Delali} refers to Articles 18(4) and 21(4)(a) of the Statute which require that the indictment contain "a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute" and that an accused must be informed of the nature and cause of the charge against him.[551]

349. The Appeals Chamber notes that the alleged offence of unlawful confinement is charged in count 48 of the Indictment[552] as follows:

> Between May and October 1992, Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ *participated in* the unlawful confinement of numerous civilians at Čelebići camp. Zejnil DELALIĆ, Zrdavko MUCIĆ, and Hazim DELIĆ also knew or had reason to know that

[547] Delalić Response, p 149.
[548] Prosecution Reply paras 4.17-4.19.
[549] Delalić Response, p 148.
[550] *See* Counts 3 and 4 and paragraph 35 of the indictment filed against Radovan Karadzi} and Ratko Mladi} in July 1995 and *see* Count 22 and paragraph 44 of the amended indictment filed against Dario Kordi} in Sept 1998. Delali} Response, p 148.
[551] Delali} Response, pp 147-149.
[552] Indictment, para 36, (emphasis added).

> persons in positions of subordinate authority to them were about to commit those acts resulting in the unlawful confinement of civilians, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ are responsible for:
>
> Count 48. A Grave Breach punishable under Article 2(g) (unlawful confinement of civilians) of the Statute of the Tribunal.

Article 7 (1) does not contain the wording used in the Indictment of "participating", but the Prosecution contends that it is evident that a person can participate in a crime through any of the types of conduct referred to in that provision.

350. The Appeals Chamber notes that the language used in Count 48 could (and should) have been expressed with greater precision. Although the accused are clearly charged under both Article 7(1) and Article 7(3) of the Statute, no particular head of Article 7(1) is indicated. The Appeals Chamber has already referred to the difficulties which arise from the failure of the Prosecution to identify exactly the type of responsibility alleged against an accused, and has recommended that the Prosecution "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged".[553] However, it was also accepted in that case that the general reference to the terms of Article 7(1) was, in that context, an adequate basis on which to find that the accused had been charged with aiding and abetting.

351. In relation to use of the word "participate" to describe forms of responsibility, the Appeals Chamber notes that the Report of the Secretary-General mentions the word "participate" in the context of individual criminal responsibility:

> The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.[554]

It is clear that Article 7 (1) of the Statute encompasses various modes of participation, some more direct than other. The word "participation" here is a broad enough term to encompass all forms of responsibility which are included within Article 7(1) of the Statute. Although greater specificity in drafting indictments is desirable, failure to identify expressly the exact mode of participation is not necessarily fatal to an indictment if it nevertheless makes clear to the accused the "nature and cause of the charge against him".[555] There has been no suggestion that a complaint was made prior to the trial that Delalić did not know the case that he had to meet. It

---

[553] *Aleksovski* Appeal Judgement para 171, fn 319. *See* also the *Furundžija* Judgement, para 189.
[554] Secretary-General's Report, para 54.
[555] Article 21(4)(a) of the Statute of the Tribunal.

is too late to make the complaint now on appeal that the Indictment was inadequate to advise the accused that all such forms of responsibility were alleged. The use of the word "participate" is poor drafting, but it should have been understood here as including all forms of participation referred to in Article 7(1) given that superior responsibility was expressed to be an additional form of responsibility.

352. The Trial Chamber therefore correctly interpreted Count 48 of the Indictment and the supporting paragraph as charging the three accused generally with participation in the unlawful confinement of civilians pursuant to Article 7(1) of the Statute, as well as with responsibility as superiors pursuant to Article 7(3) of the Statute.[556] The Trial Chamber had earlier defined aiding and abetting as:

> [including] all acts of assistance that lend encouragement or support to the perpetration of an offence and which are accompanied by the requisite *mens rea*. Subject to the caveat that it be found to have contributed to, or have had an effect on, the commission of the crime, the relevant act of assistance may be removed both in time and place from the actual commission of the offence.[557]

The Prosecution does not challenge that definition. Subject to the observation that the acts of assistance, encouragement or support must have a substantial effect on the perpetration of the crime, the Appeals Chamber also accepts the statement as accurate.[558]

353. As noted above, in its conclusions in relation to the liability of Delalić and Delić under Article 7(1) for the offence of unlawful confinement, the Trial Chamber referred to its earlier findings made in the context of its consideration of their liability as superiors pursuant to Article 7(3) of the Statute. Although those findings were being made for the primary purpose of determining whether superior responsibility was being exercised, it is clear that they involved a broad consideration by the Trial Chamber of the nature of the involvement of the two accused in the affairs of the Čelebići camp. The Prosecution indeed contends that the findings made by the Trial Chamber provided an adequate basis on which to determine Delalić's liability for aiding and abetting.

354. The Trial Chamber considered the evidence in relation to the placing of civilians in detention at the camp, but it made no finding that Delali} participated in their arrest or in

---

[556] Trial Judgement, para 1125.
[557] Trial Judgement, para 327.
[558] *Tadi}* Appeal Judgement, para 229.

placing them in detention in the camp.[559] The Prosecution advances no argument that the Tr[illegible] Chamber erred in this respect.

355. However, the Prosecution argues that Delali} participated in the continued detention of civilians as an aider and abettor. The Trial Chamber found that there was "no evidence that the Čelebići prison-camp came under Delalić's authority by virtue of his appointment as co-ordinator".[560] The Trial Chamber found that the primary responsibility of Delalić in his position as co-ordinator was to provide logistical support for the various formations of the armed forces; that these consisted of, *inter alia*, supplies of material, equipment, food, communications equipment, railroad access, transportation of refugees and the linking up of electricity grids.[561] These findings as to the scope of Delalić's role obviously supported its later conclusion that he was not in a position to affect the continued detention of the civilians at the Čelebići camp.

356. The Prosecution, however, refers to two specific matters which it says constituted aiding and abetting by Delalić: his role in "publicly justifying and defending the purpose and legality of the camp",[562] and his "participation in the classification and releasing of prisoners".[563]

357. The Prosecution contends that the evidence before the Trial Chamber showed that Delali} was involved in the release of Doctor Gruba~ and Witness P in July 1992,[564] and that he signed orders on 24 and 28 August 1992[565] for the classification of detainees and their release. However, the Trial Chamber explicitly found that:

> As co-ordinator, Zejnil Delalić had no authority to release prisoners.[566]

The Trial Chamber found that the orders referred to by the Prosecution were not signed in Delalić's capacity as "co-ordinator", as all documents were signed "for" the Head of the Investigating Body of the War Presidency.[567] He had no independent authority to do so.[568]

---

[559] Trial Judgement, para 1131.
[560] Trial Judgement, para 669.
[561] Trial Judgement, para 664.
[562] Prosecution Brief, para 4.18.
[563] Prosecution Brief, para 4.21.
[564] Trial Judgement, para 684.
[565] Trial Judgement, para 692. *See* Prosecution Exhibits 99-7/10 and 99-7/11.
[566] Trial Judgement, para 684.
[567] Trial Judgement, para 684.
[568] Trial Judgement, para 685. It should be noted that, in the week prior to the hearing of the Appeal, the Prosecution filed a motion for the adjournment of the hearing of the appeal on the basis that it had recently received new documents from the archives of the Croatian government which related to the Čelebići camp: Prosecution Motion for Adjournment of Oral Argument of Argument of Appeal or Alternatively for Adjournment of Oral Argument of Certain Grounds of Appeal, 31 May 2000. The Prosecution believed at that

358. The Appeals Chamber considers that this conclusion has not been shown to be unreasonable that no reasonable trier of fact could have reached it. The Trial Chamber interpreted those orders explicitly as not constituting evidence that he exercised superior responsibility in relation to the camp.[569] The Trial Chamber appears to have interpreted the orders as being, although indicative of some degree of involvement in the continuing detention or release of detainees, inadequate to establish a degree of participation that would be sufficient to constitute a substantial effect on the continuing detention which would be adequate for the purposes of aiding and abetting. The Appeals Chamber considers that this interpretation of the significance of the orders was open to the Trial Chamber.

359. The Prosecution's submission that the Trial Chamber erred in failing to find that Delalić aided and abetted the commission of the offence of unlawful confinement by publicly justifying and defending the purpose of the camp must be rejected for similar reasons.[570] The Trial Chamber referred to the evidence that Delalić had contacts with the ICRC, and that he had been interviewed by journalists in relation to the camp.[571] Even if it could be accepted that this reference alone constituted a finding by the Trial Chamber that these contacts and interviews occurred, it was open to the Trial Chamber to find that any supportive effect that this had in relation to the detention of civilians in the camp was inadequate to be characterised as having a substantial effect on the commission of the crime.

360. The Prosecution has not referred to any other evidence before the Trial Chamber which would indicate that a finding of guilt for Delalić on this count was the *only reasonable*

---

stage the there were "certain documents which appear to relate to the responsibilities of Zejnil Delalić as a commander in the region and his role in relation to the Čelebići prison camp during the relevant time period" and sought time to have the documents translated and properly assessed. A brief description of certain of these documents was annexed to the motion and indicated that there may be documents which related in some way to Delalić's relationship with the Čelebići camp. This motion for adjournment was refused on the basis that the material referred to in the motion did not adequately indicate that they were relevant to the allegations of errors of law in the relevant grounds of appeal, but the Appeals Chamber reserved the question of the use to which the material in the documents could be put to the hearing of the appeal. The Prosecution then made an oral motion at the hearing of the appeal that the appeal proceedings not be closed for a period of time after the hearing to enable the filing of written submissions in relation to the documents (*see* Appeal Transcript pp 79-82). This motion was supported by certain translated documents (Confidential Exhibits for Prosecution Oral Motion to File Supplementary Materials after the Conclusion of the Hearing of the Appeal, 5 June 2000), including a document which was described as being relevant to the capacity in which Delalić signed the orders for release referred to in the above text (Appeal Transcript pp 87-88). The Prosecution was given until the final day of the hearing of the appeal to determine whether it wished to bring an application for the use of the documents in some capacity but ultimately advised the Appeals Chamber that it would not do so (Appeal Transcript p 636). The Prosecution therefore closed its case without seeking to rely on those documents.

[569] Trial Judgement, para 685.

[570] Prosecution Brief, para 4.19. *See* also Trial Judgement, para 700.

[571] Trial Judgement, para 700.

conclusion to be drawn, a matter which must be established before an acquittal would be overturned on appeal.[572] The Prosecution's third ground of appeal must therefore be dismissed in its entirety.

(b) Delić

361. The Prosecution submits that Delić should have been found guilty under Article 7(1), although its written or oral submissions again emphasise the concept of "participation" and do not clearly identify exactly what mode of participation it contends the Trial Chamber should have found had been established.

362. The Trial Chamber found no evidence which demonstrated beyond reasonable doubt that Delić had any role in the creation of the camp, in the arrest and placing in detention of the civilians. Delić argues that it has not been established that he exercised any role in the decision to detain or release prisoners.[573]

363. Although Delić belonged to the military police of the joint command of the TO and HVO,[574] which the Trial Chamber found had been involved in the creation of the camp, there was no finding by the Trial Chamber that Delić in his position had authority to detain or release civilians or even that as a practical matter he could affect who should be detained or released. The Prosecution does not refer to any evidence which would have established such a finding beyond reasonable doubt. The Trial Chamber did find that the evidence established that Delić was "tasked with assisting Zdravko Mucić by organising and arranging for the daily activities in the Čelebići prison-camp."[575]

364. Although the Prosecution appears to contend that the evidence established Delić's primary responsibility for commission of the offence of unlawful confinement of civilians, it does not refer to any evidence which establishes more than that he was aware of the unlawfulness of the detention of at least some of the detainees, and that he, as a guard and deputy commander of the camp, thereby participated in the detention of the civilians held there.[576] The Prosecution makes the general submission that:

---

[572] *Aleksovski* Appeal Judgement, para 172.
[573] Delić Response, para 267.
[574] *Ibid*, para 797.
[575] Trial Judgement, para 809.
[576] Prosecution Brief, para 7.16.

> Clearly, any detainee who had attempted to leave the Čelebići camp would have been physically prevented from so doing, not by the person in command of the camp, but by one of the camp guards. The most immediate cause of each detainee's confinement, and the most immediate obstacle to each detainee's liberty, was thus the camp guards. Provided that he or she had the requisite *mens rea,* each camp guard who participated in the confinement of civilians in the camp, and prevented them from leaving it, will thus be criminally liable on the basis of Article 7(1) for the unlawful confinement of civilians, whether or not the particular guard, under the regime in force in the camp, had any responsibility for determining who would be detained and who would be released.[577]

Insofar as this may suggest that any prison guard who is aware that there are detainees within the camp who were detained without reasonable grounds to suspect that they were a security risk is, without more, responsible for the crime of unlawful confinement, the Appeals Chamber does not accept this submission. As already indicated above, the Appeals Chamber has concluded that a greater degree of involvement in the confinement of an individual is required to establish primary responsibility, and that, even in relation to aiding and abetting, it must be established that the accused's assistance to the principal must have a substantial effect on the commission of the crime. What will satisfy these requirements will depend on the circumstances of the particular case, but the Appeals Chamber would not accept that the circumstance alone of holding a position as a guard somewhere within a camp in which civilians are unlawfully detained suffices to render that guard responsible for the crime of unlawful confinement of civilians. The Prosecution has not referred to particular evidence which would place Delić's involvement in the confinement of the civilians at the Čelebići camp at a level higher than the holding of the offices of guard and deputy-commander.

365. It appears from certain other submissions of the Prosecution that, although is does not put its case in this way, it in fact considers that the doctrine of common criminal purpose or joint criminal enterprise is the most apposite form of responsibility to apply to Delić.[578] However it does not identify any findings of the Trial Chamber on the evidence which would establish the necessary elements of criminal liability through participation in a joint criminal enterprise.

366. Although it may be accepted that the only reasonable finding on the evidence, particularly in relation to the nature of some of the detainees at the camp, including elderly persons,[579] must have been that Delić was aware that, in respect of at least some of the detainees, there existed no reasonable grounds to believe that they constituted a security risk,

---

[577] Prosecution Brief, para 7.12.
[578] Prosecution Brief, paras 7.11 and 7.13.
[579] *See infra* at para 385.

this is not the only matter which must be established in relation to an allegation of participation in a common criminal design. The existence of a common concerted plan, design or purpose between the various participants in the enterprise (including the accused) must also be proved.[580] It is also necessary to establish a specific *mens rea*, being a shared intent to further the planned crime, an intent to further the common concerted system of ill-treatment, or an intention to participate in and further the joint criminal enterprise, depending on the circumstances of the case.[581] The Prosecution has not pointed to any evidence before the Trial Chamber which would have made the conclusion that these elements had been proved beyond reasonable doubt the *only reasonable* conclusion on the evidence.

367. As to Deli}'s relationship to the work of the Military Investigative Commission in charge of granting procedural guarantees to detainees, the Trial Chamber concluded that the role of Delić was to assist Mucić by organising and arranging for detainees to be brought to interrogations.[582] The Trial Chamber made no finding that Deli} had participated in the work of the Commission. It also made no finding that Delić himself had either responsibility for ensuring that the procedural review was conducted, or authority or power to release detainees, a power which should have been exercised when the appropriate reviews were not conducted.

368. The Appeals Chamber is satisfied that it was open to the Trial Chamber to assess the evidence before it as not proving beyond reasonable doubt that Deli}'s acts and omissions constituted any adequate form of "participation" in the offence of unlawful confinement for the purpose of ascribing criminal responsibility under Article 7(1).

369. The Appeals Chamber therefore finds that the Prosecution has not established that the Trial Chamber's conclusion that Deli} was not guilty under Article 7 (1) for the offence of unlawful confinement was unreasonable.

C. Muci}'s Appeal

370. Mucić, in support of this ground of appeal, adopted "as a substantive appeal against conviction on Count 48" the closing submissions made on behalf of Delalić at trial and made

---

[580] *Tadić* Appeal Judgement, para 227.
[581] *Tadić* Appeal Judgement, para 228.
[582] Trial Judgement, para 807; the finding was made essentially on the evidence on Witness D (a member of the Commission) that the Commission would receive a list of detainees in the prison-camp from Mucić and that the Commission would write out a list of people to be "interviewed". Witness D testified that they would give the list of detainees to Mucić, and if he was not there to Delić, and that Delić (alone with Mucić) had access to Commission files.

only a limited number of his own submissions on this ground.[583] The Prosecution submits as these "incorporated" arguments were filed before the Trial Chamber's Judgement was rendered, they should not be considered.

371. The task of the Appeals Chamber, as defined by Article 25 of the Statute, is to hear appeals from the decisions of Trial Chambers on the grounds of an error on a question of law invalidating the decision or of an error of fact which has occasioned a miscarriage of justice. An appellant must show how the Trial Chamber erred in law or in fact, and the Appeals Chamber expects their submissions to be directed to that end. The submissions "incorporated" by Muci} provide no assistance on the aspects of his ground of appeal which allege an error of fact. However, to the extent that the submissions are relevant to the questions of law raised by Mucić's ground of appeal, the Appeals Chamber has considered them in addition to the submissions made by counsel for Mucić at the hearing of the appeal.

372. Muci} challenges his conviction for the offence of illegal detention or unlawful confinement first with the argument that the detainees of the camp were *lawfully* confined because of suspicion of inciting armed rebellion against the State of Bosnia and Herzegovina.[584] The Appeals Chamber has already considered the submission that the Trial Chamber erred in finding that at least some of the detainees were unlawfully confined, and has rejected it.[585]

373. Muci} then submits that it was not proved that he had the requisite *mens rea* because:

> Given that it is not remotely suggested that the Appellant has, or had, any expert or other knowledge of International Law, it would be a counsel of impossible perfection to conclude that in 1992 he could have known, or did know, that there was a possibility that the confinement of persons at Čelebići could, or would be, construed as illegal under an interpretation of an admixture of the Geneva Conventions and Article 2(g) of the Statute of the Tribunal, a Statute not then in existence.[586]

374. The Prosecution notes that it is unclear whether Muci} contends that the knowledge of the law is an element of the crime or whether Muci} is raising a defence of error of law.[587] In either of those cases, the Prosecution argues that there is no general principle of criminal law that knowledge of the law is an element of the *mens rea* of a crime and that no defence of

---

[583] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucić Filed on 2 July 1999, 15 July 1999, para 4: "The Appellant adopts as a substantive appeal against conviction on Count 48 the arguments and reasoning contained in the Final Written Submissions of Zejnil Delalić dated the 28th of August 1998 and set out at paragraph R, pages 337-343 inclusive of that document [...]." These submissions will be referred to as the "Incorporated Submissions".

[584] *See* Incorporated Submissions at pp 339-342.

[585] *See* above, para 330.

[586] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucić Filed on 2 July 1999, p 2.

mistake of law is available under international humanitarian law. These submissions miss the real issue raised by Mucić's submission – that he could not have been expected to know that the detention of the Čelebići detainees would become illegal at some future time. Mucić's submission has no merit because it is clear from the provisions cited above from Geneva Convention IV that the detention of those persons was illegal at the very time of their detention.

375. Mucić also argued that it was not his function as "prison administrator" to know whether the detention of the victims was unlawful.[588] At the hearing of the appeal, counsel for Mucić placed greater emphasis on the argument that Mucić did not in fact have the requisite *mens rea* for a conviction under Article 7(1) of the Statute, and that the Trial Chamber relied upon evidence which established only that he "had reason to know" as a basis for a positive finding that he did in fact have the requisite knowledge that the detainees were unlawfully detained.[589] The Prosecution argues that, because Muci} knew of the types of people detained in the camp and the circumstances of their arrest, he had the *mens rea* for the commission of the offence.[590]

376. The Trial Chamber found that Mucić, by virtue of his position of command, was the individual with primary responsibility for, and had the ability to affect, the continued detention of civilians in the camp.[591] Muci} submits in this regard that the determination of the legality of the detention is not a function or duty of prison administrators but rather of those who authorize arrests and the placing of arrestees into detention.[592] The Appeals Chamber accepts that it is not open simply to conclude that, because of a position of superior authority somewhere in relation to a prison camp, an accused is also *directly* responsible under Article 7(1) for the offence of unlawful confinement committed anywhere in that camp. The particular circumstances entailing liability under Article 7 (1) have to be specifically established before liability could be imposed. This depends on the particular organisation of duties within a camp, and it is a matter to be determined on the evidence.

---

[587] Prosecution Response, paras 8.14-8.15.
[588] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucić Filed on 2 July 1999, p 2.
[589] Appeal Transcript, pp 468-470.
[590] Prosecution Response, para 8.20.
[591] Trial Judgement, para 1145.
[592] Motion to Amend by Substitution the Appeal Brief of Zdravko Muci} Filed on 2 July 1999, p 2.

377. The Trial Chamber found that some detainees were possibly legally detained *ab in*[illegible] but found that some other detainees were not.[593] The Trial Chamber made no finding that Muci} ordered, instigated, planned or otherwise aided and abetted the process of the arrest and placement of civilians in detention in the camp. However, as observed above, there is a second means by which the offence of unlawful confinement can be committed. The detention of detainees without granting the procedural guarantees required by Article 43 of Geneva Convention IV also constitutes the offence of unlawful confinement, whether the civilians were originally lawfully detained or not. It was this aspect of the offence that the Trial Chamber was relying on when it held:

> Specifically, Zdravko Mucić, in this position, [*ie* of superior authority over the camp] had the authority to release detainees. By omitting to ensure that a proper enquiry was undertaken into the status of the detainees, and that those civilians who could not lawfully be detained were immediately released, Zdravko Mucić participated in the unlawful confinement of civilians in the ^elebi}i prison-camp.[594]

Thus the Trial Chamber appears to have found Mucić guilty on the basis of the denial of procedural guarantees under the second "category" of this offence, and the Appeals Chamber's consideration will be limited to his liability in that context. The Appeals Chamber first notes that, although Mucić contests whether it was his responsibility as camp commander to know whether the detainees were lawfully detained or not, he does not contest on appeal the Trial Chamber's finding that he had the authority to release prisoners. In any case, the Appeals Chamber notes that the Trial Chamber made reference to a variety of evidence in support of this finding.[595] The Appeals Chamber therefore proceeds on the basis that this finding was open to the Trial Chamber and that it is the relevant one.

378. As is evident from the earlier discussion of the law relating to unlawful confinement, the Appeals Chamber considers that a person in the position of Mucić commits the offence of

---

[593] Trial Judgement, para 1131.

[594] This finding of the Trial Chamber is not challenged by Muci}. Muci} Response, p 5.

[595] Trial Judgement, para 1145. The Trial Chamber found that from May until December 1992, individuals and groups were released from the ^elebi}i prison-camp at various times, some to continued detention at Musala, some for exchange, others under the auspices of the International Red Cross, which visited the camp on two occasions in the first half of August 1992 (Trial Judgement, para 157). It also found that there was evidence of the control by Mucić of the detainees who would leave or be transferred from the Čelebići prison-camp to another detention facility: (Trial Judgement, para 764; *See* also Trial Transcript, p 1331 and Exhibit 75, signed by Muci}, a release document in respect of the detention of Branko Gotovac. There is also Exhibit 84, signed by Mucić for Mirko Kuljanin and Exhibit 91, signed by Mr. Mucić, which is the release document for Milojka Antić. Mucić also signed Exhibit 158, a release document for Witness B, and Exhibit 159, which is the release document for Zoran Ninković. Witness F testified that Muci} released detainees, sick and elderly people, late June, early July and on 8 October 1992: Trial Transcript, p 1331).

unlawful confinement of civilians where he has the authority to release civilian detainees a... fails to exercise that power, where

(i) he has no reasonable grounds to believe that the detainees do not pose a real risk to the security of the state;[596] or

(ii) he knows that they have not been afforded the requisite procedural guarantees (or is reckless as to whether those guarantees have been afforded or not).[597]

379. Where a person who has authority to release detainees knows that persons in continued detention have a right to review of their detention[598] and that they have not been afforded that right, he has a duty to release them. Therefore, failure by a person with such authority to exercise the power to release detainees, whom he knows have not been afforded the procedural rights to which they are entitled, commits the offence of unlawful confinement of civilians, even if he is not responsible himself for the failure to have their procedural rights respected.

380. The Trial Chamber expressly found that the detainees were not afforded the necessary procedural guarantees. It also found that Mucić did in fact have the power to release detainees at the camp. The only remaining question raised by Muci}'s ground of appeal is therefore whether the Trial Chamber had found (although it did not refer to it explicitly) that Mucić had the relevant *mens rea*, *i.e.*,he knew that the detainees had a right to review of their detention but had not been afforded this review or was reckless as to whether they had been afforded it or not. It is not strictly necessary, in relation to an allegation that the offence of unlawful confinement has been committed through non-compliance with the obligation to afford procedural guarantees, to establish that there was also knowledge that the initial detention of the relevant detainees had been unlawful. This is because the obligation to afford procedural guarantees applies to all detainees whether initially lawfully detained or not. However, as is apparent from the discussion below, the Trial Chamber's findings also suggest that it had concluded that Mucić was also aware that no reasonable ground existed for the detention of at least some of the detainees.

381. The Trial Chamber concluded in relation to Mucić that "[b]y *omitting to ensure that a proper enquiry was undertaken into the status of the detainees* and that those civilians who

[596] This relates to the first "category" of the offence.
[597] This relates to the second "category".
[598] It is unnecessary that he is aware of the legal source of this right.

could not lawfully be detained were immediately released, Zdravko Mucić participated in 4372 unlawful confinement of civilians in the ^elebi}i prison-camp."[599] It is implicit in this finding that Mucić knew that a review of the detainees' detention was required but had not been conducted.[600] There are a number of findings of the Trial Chamber on the evidence before it which support this conclusion.

382. Relevant to Mucić's knowledge of the unlawful nature of the confinement of certain of the detainees (both because of absence of review of detention and, in some cases, of the absence of grounds for the initial detention) is his knowledge of the work of the Military Investigative Commission. As noted above, the Trial Chamber found that a Military Investigative Commission was established by the Konjić Joint Command following a decision by the War Presidency of Konjić to investigate crimes allegedly committed by the detainees prior to their arrival at the ^elebi}i camp,[601] and that the Commission did not have the power to finally decide on the release of wrongfully detained prisoners.[602]

383. The Trial Chamber found that the Commission consisted of five members, one of which was Witness D. The Trial Chamber referred to Witness D's testimony that he worked closely with Mucić in the classification of the detainees in the Čelebići camp, and that Mucić had a complete list of the detainees which he brought out for members of the Commission.[603] It is apparent from the context of the Trial Chamber's reference that it accepted that evidence. Witness D also testified that Mucić was present early in June when members of the Commission met to discuss how they would go about their work of the classification of the detainees and consideration for their continued detention or release.[604] It is implicit in these findings as to Mucić's awareness of the work of the Commission, and even of its existence as an independent body with a review function over the camp, that Mucić must have known that such a review was legally required.

384. The Trial Chamber also found that the Commission had prepared a report in June 1992 detailing the "conditions in the prison-camp, including the mistreatment of detainees and the

---

[599] Trial Judgement, para 1145 (emphasis added).
[600] This conclusion is not affected by the fact that Mucić could not ultimately be held responsible for failure to ensure such a review, or that (given that it was the detention practices of Mucić as person having authority over the camp, which were to be the subject of review) this responsibility appears to have lain with authorities outside the camp such as the Military Investigative Commission or the entities who were ultimately responsible for the creation of the camp.
[601] Trial Judgement, para 1136.
[602] Trial Judgement, para 1137.
[603] Trial Judgement, para 748.

continued incarceration of persons who were peaceful civilians", and the fact that they were unable to correct them. The Trial Chamber cited from the report, which stated, *inter alia*:

> Detainees were maltreated and physically abused by certain guards from the moment they were brought in until the time their statement was taken i.e. until their interview was conducted. Under such circumstances, Commission members were unable to learn from a large number of detainees all the facts relevant for each detainee and the area from which he had been brought in and where he had been captured. [...] Commission members also interviewed persons arrested outside the combat zone; the Commission did not ascertain the reason for these arrests, but these detainees were subjected to the same treatment [...] Persons who had been arrested under such circumstances stayed in detention even after it had been established that they had been detained for no reason and received the same treatment as persons captured in the combat zone [...] Because self-appointed judges have appeared, any further investigation is pointless until these problems are solved.[605]

385. It is obvious from this report, which the Trial Chamber accepted, that there were persons in the camp in respect of whom no reasons existed to justify their detention and that the Commission was not able to perform the necessary review of the detention of the Čelebići camp detainees. The Trial Chamber found that, after working for about one month at the prison-camp, the Commission was in fact disbanded at the instigation of its members as early as the end of June 1992.[606] Although the Trial Chamber made no finding that Mucić had read the Commission's report, in view of its findings that Mucić worked closely with the Commission, it is implicit in the findings taken as a whole that Mucić was aware of the matters that the Commission discussed in the report, including the fact that there were civilians there who had been detained without justification, and that the detainees generally had not had their detention properly reviewed. This knowledge can only have been reinforced by the presence in the camp, of which Mucić must have been aware, of detainees of a kind which would have appeared so unlikely to pose a security risk that it must have raised doubts as to whether any reasonable grounds had ever existed for their initial detention. This included elderly persons[607] and persons such as Grozdana Ćećez, a 42 year old mother of two children.[608]

386. The Appeals Chamber finds that it was open to the Trial Chamber, from its primary findings (which have not been shown to be unreasonable), to conclude that Muci}, by not using his authority to release detainees whom he knew had not had their detention reviewed and had therefore not received the necessary procedural guarantees, committed the offence of unlawful

---

[604] Trial Transcript, pp 5175-5176, pp 5189-5190.
[605] Trial Judgement, para 1138.
[606] Trial Judgement, para 1136.
[607] Such as Šćepo Gotovac, the man of about 70 years of age who was the victim of the wilful killing/murder charged in Counts 1 and 2 of the Indictment. *See* Trial Judgement, para 823.

confinement of civilians and was therefore guilty of the offence pursuant to Article 7(1) of the Statute.

387. The Appeals Chamber therefore dismisses this ground of appeal.

D. Conclusion

388. For the foregoing reasons, the Appeals Chamber dismisses the twelfth ground of appeal of Muci}, and the third and sixth grounds of appeal of the Prosecution.

---

[608] Trial Judgement, para 1133.

VI. MULTIPLE CONVICTIONS BASED ON THE SAME ACTS

389. The Trial Chamber found Mucić, Delić, and Landžo guilty both of grave breaches of the Geneva Conventions and of violations of the laws or customs of war based on the same acts. The counts containing convictions under both Articles 2 and 3 of the Statute are as follows:

Muci}:	Counts 13 and 14; 33 and 34; 38 and 39; 44 and 45; 46 and 47.
Deli}:	Counts 1 and 2; 3 and 4; 11 and 12; 18 and 19; 21 and 22; 42 and 43; 46 and 47.
Land'o:	Counts 1 and 2; 5 and 6; 7 and 8; 11 and 12; 15 and 16; 24 and 25; 30 and 31; 36 and 37; 46 and 47.

390. Muci} and Deli} have appealed against the judgement of the Trial Chamber, stating in the Deli}/Muci} Supplementary Brief that these convictions violate the *Blockburger* standard, established by the U.S. Supreme Court in 1932. In *Blockburger v United States*, the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of a fact which the other does not."[609]

391. Although Land'o was also convicted under both Articles 2 and 3 based on the same acts, he did not lodge an appeal on this issue.

392. The crux of the appellants' arguments is as follows:

> Setting aside the question of the applicability of Common Article 3 to international armed conflict and whether Common Article 3 imposes international individual criminal liability, to obtain a conviction under Common Article 3, the elements are identical with one exception. An element of grave breaches of the Geneva Conventions is that the complainant was a person protected by one of the Conventions. Absent such proof, there can be no conviction under the Tribunal's jurisdiction to try allegations of grave breaches of the Geneva Conventions.
>
> Thus, judgements of conviction for both grave breaches of the Geneva Convention and violations of the laws and customs of war would violate the *Blockburger* standard.[610]

The appellants concede that Articles 2 and 3 differ. Beyond that, however, they provide very little analysis of this issue, merely concluding that the *Blockburger* standard is violated. Their argument appears to hinge on the fact that the requisite proof of protected person status under the grave breaches charge is lacking.

---

[609] *Blockburger v. United States,* 284 U.S. 299, 304 (1932) ("*Blockburger*").

[610] Appellants-Cross Appellees Hazim Deli}'s and Zdravko "Pavo" Muci}'s Motion for Leave to File Supplemental Brief and Supplemental Brief, 14 Feb 2000, p 13, (footnotes omitted).

393. In their 7 April 2000 Response to the Prosecutor's Supplementary Brief, the appellai restate that the *Blockburger* standard is the appropriate test for double jeopardy.[611] They further claim that under the reasoning of the *Kupreskić* Judgement and of *Ball v United States*, a 1985 U.S. Supreme Court case which applied the *Blockburger* test, multiple convictions based on the same acts are not allowed.[612]

394. In their respective designations of the issues on appeal, Muci} and Deli} reiterate the issue as follows:

> Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches for the Geneva Conventions and for violations of the Laws and Customs of War based on the same acts.[613]

The relief sought by the appellants is dismissal of one of the counts; they do not indicate which one.

395. According to the Prosecution, the *Kupreskić* Judgement represents an unwarranted departure from the prior practice of both the Tribunal and the ICTR.[614] In *Kupreskić*, the Trial Chamber held that the primary applicable test is whether each offence contains an element not required by the other.[615] An additional test, which ascertains whether the various provisions at issue protect different values, can be used in conjunction with and in support of the primary test.[616] The Trial Chamber in *Kupreskić* found that an individual cannot be convicted of both murder as a crime against humanity and murder as a war crime, because murder as a war crime does not require proof of elements that murder as a crime against humanity requires.[617]

396. The Prosecution maintains that the solution should be sought in the practice of the International Tribunals, rather than in particular national systems, although the latter contain useful terminology that can be employed in an analysis of the issues.[618] After discussing the terminology found in various national systems, the Prosecution examines in detail the practice

---

[611] Appellant-Cross Appellees Zdravko Muci} and Hazim Deli}'s Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 7 Apr. 2000, para 21.
[612] *Ibid* at para 24.
[613] Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000, p 4; Appellant Zdravko Muci}'s Final Designation of His Grounds of Appeal, 31 May 2000, para 7.
[614] Prosecution Response to the Appellants' Supplementary Brief, 25 Apr. 2000, para 4.5.
[615] *Kupreskić* Judgement, para 682.
[616] *Ibid* at para 693-695.
[617] *Ibid* at para 700-701.
[618] Prosecution Response to Supplementary Brief, para 4.7.

of this Tribunal and the ICTR, and concludes that the "*Tadić-Akayesu* test is consistent with the weight of precedent in both Tribunals, and consistent with international standards of justice."[619]

397. In *Tadić*, the Prosecution states, the Trial Chamber rejected the challenge to the cumulative charges in the indictment and convicted the accused cumulatively of a number of crimes.[620] The Trial Chamber imposed concurrent sentences upon the accused.[621] The Prosecution appealed on various grounds, and the *Tadi}* Appeal Judgment resulted in the accused being convicted cumulatively under two or three articles of the Statute.[622] Under the *Tadić* test, according to the Prosecution, the "accused can be charged with and convicted of as many crimes as the facts of the case disclose"[623] if there is "ideal concurrence." Ideal concurrence describes the situation "where a single act of an accused contravenes more than one provision of the criminal law."[624]

398. Further, the Prosecution explains that the ICTR Trial Chamber in *Akayesu*[625] held that cumulative convictions are acceptable:

> 1. where the offences have different elements;
> 2. where the provisions creating the offences protect different interests; or
> 3. where it is necessary to record a conviction for both offences in order to fully describe what the accused did.[626]

399. The Prosecution finally states that the *Tadić* and *Akayesu* tests can be reconciled if "the *Akayesu* test is considered as a test for distinguishing between cases of ideal concurrence and cases of apparent concurrence."[627]

---

[619] *Ibid* at para 4.94.
[620] *Ibid* at paras 4.9, 4.10.
[621] *Id.*
[622] *Ibid* at paras 4.11-4.12.
[623] *Ibid* at para 4.78(1).
[624] *Ibid* at para 4.8.
[625] *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, 2 Sept. 1998.
[626] Prosecution Response to Supplementary Brief, para 4.50.
[627] *Ibid* at para 4.83. According to the Prosecution, the relevant principles under a combined "*Tadi}-Akayesu*" test would be as follows: (1) In cases of ideal concurrence [...], the accused can be charged with and convicted of as many crimes as the facts of the case disclose. The fact that multiple counts relate to the same conduct is considered relevant only at the post-conviction stage, in relation to sentencing. (*Tadi}* test). (2) Two crimes will stand in a relationship of ideal concurrence [...] (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. (*Akayesu* test.). *Id.*

A. Discussion

1. Cumulative Charging

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

2. Cumulative Convictions

401. Before examining the relevant provisions of the Statute of the International Tribunal, the jurisprudence of the Tribunal and of national jurisdictions may be considered for guidance on this issue.

402. During the proceedings in the present case, a bench of the Appeals Chamber had to decide whether the accused Delić's complaint, that he was being charged on multiple occasions throughout the indictment with two different crimes arising from one act or omission, justified the granting of leave to appeal.[628] The bench quoted the reasoning of the Trial Chamber in *Tadić*,[629] and stated that it did not consider that the reasoning in *Tadić* revealed an error, much less a grave one, justifying the granting of leave to appeal.[630]

403. Based upon the Prosecution's appeal from the Trial Chamber judgment in *Tadić*, the Appeals Chamber overturned the acquittal of Tadić on all relevant Article 2 counts and on four cumulatively charged counts relating to the killing of five victims from the village of Jaskici.[631] The Appeals Chamber did so even though all of the Article 2 counts related to conduct for which the accused had already been convicted under other provisions of the Statute, namely

---

[628] *Prosecutor v Delalić et al.*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, paras 35-6, 6 Dec. 1996.

[629] The Trial Chamber in *Tadić* stated: "In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading." *Prosecutor v Dusko Tadić*, Decision on the Defence Motion on the Form of the Indictment, Case No. IT-94-1-T, 14 Nov. 1995, p. 10.

[630] *Prosecutor v Delalić et al.*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, paras 35-6, 6 Dec. 1996.

[631] *Tadić* Appeal Judgement, p 144.

Articles 3 and 5. As a result, Tadić was cumulatively convicted with respect to the same conduct, based on numerous different groups of counts.[632] The problem of multiple convictions was not addressed as such by the Chamber. The multiple convictions were however taken into account in the *Tadić* Sentencing Appeal Judgement, where the Appeals Chamber imposed concurrent sentences on the accused.[633]

404. During the *Aleksovski* Appeal, the Appeals Chamber briefly addressed the issue of multiple convictions for the same acts, in connection with sentencing.[634] The Trial Chamber in that case had acquitted the accused on Counts 8 and 9 of grave breaches of the Geneva Conventions but convicted him on Count 10 of a violation of the laws or customs of war.[635] The Appeals Chamber stated:

> The material acts of the Appellant underlying the charges are the same in respect of Counts 8 and 9, as in respect of Count 10, for which the Appellant has been convicted. Thus, even if the verdict of acquittal were to be reversed by a finding of guilt on these counts, it would not be appropriate to increase the Appellant's sentence. Moreover, any sentence imposed in respect of Counts 8 and 9 would have to run concurrently with the sentence on Count 10.[636]

405. This analysis of the Tribunal's jurisprudence reveals that multiple convictions based on the same acts have sometimes been upheld, with potential issues of unfairness to the accused being addressed at the sentencing phase. The Appeals Chamber of the ICTR has not made any pronouncements on the issue of multiple convictions as yet.

406. National approaches vary with respect to cumulative convictions. Some countries allow such convictions, letting the record reflect fully each violation that occurred, and preferring to address any allegations of unfairness in the manner of sentencing. Other countries reserve such

---

[632] The counts and convictions were as follows:
(1) Counts 8, 9, 10, and 11: Various beatings of prisoners; Convictions: Article 2(b) (inhuman treatment); Article 2(c) (wilfully causing great suffering or serious injury); Article 3 (common Article 3(1)(a) cruel treatment); and Article 5(i) (inhumane acts).
(2) Counts 12, 13, and 14; Counts 15, 16, and 17; Counts 21, 22 and 23; Counts 32, 33, and 34; Convictions: Article 2(c) (wilfully causing great suffering or serious injury); Article 3 (common Article 3(1)(a) cruel treatment); and Article 5(i) (inhumane acts).
(3) Counts 29, 30, and 31; Convictions: Article 2(a) (wilful killing); Article 3 (common Article 3(1)(a) (murder); Article 5(a) (murder).

[633] *Prosecutor v Tadić*, Case No. IT-94-1A and IT-94-1-Abis, Judgement in Sentencing Appeals, p 33, 26 Jan. 2000.

[634] *Aleksovski* Appeal Judgement, pp 59-60, 24 Mar. 2000.

[635] *Id.* at 59. The counts are as follows.
Count 8: a grave breach as recognised by Articles 2(b) (inhuman treatment), 7(1) and 7(3);
Count 9: a grave breach as recognised by Articles 2(c) (wilfully causing great suffering or serious injury to body or health), 7(1) and 7(3);
Count 10: a violation of the laws or customs of war (outrages upon personal dignity) as recognised by Articles 3, 7(1) and 7(3).

[636] *Aleksovski* Appeal Judgement, at 60.

convictions for acts resulting in the most severe of crimes, whereas still others require different statutory elements before cumulative criminal convictions may be imposed. A few examples will demonstrate these different approaches.

407. Under German law, for example, the judgment of the court details every crime that has been perpetrated as a result of a single act. In cases of ideal concurrence:

> the perpetrator receives only one sentence, but because he is convicted of all crimes committed by him, or of the multiple commissions of a crime, the judgement documents which crimes have been fulfilled or how often the perpetrator has fulfilled a crime.[637]

408. In Zambia, on the other hand, multiple convictions based on the same act can only be imposed for capital crimes. Under the Zambian Penal Code:

> [a] person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.[638]

409. In the United States, by contrast, the *Blockburger* ruling establishes that multiple convictions can be imposed under different statutory provisions if each statutory provision requires proof of a fact which the other does not.[639] This test has been more recently affirmed in the *Rutledge* case decided by the U.S. Supreme Court in 1996.[640]

410. Another approach, that of a United States military tribunal established at the end of World War II to prosecute persons charged with crimes against peace, war crimes, and crimes against humanity, is also instructive. According to the Law Reports of Trials of War Criminals, the United States Military Tribunal established pursuant to Allied Control Council Law No. 10 was of the opinion that:

> war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic manner, on political, racial or religious grounds, they may also amount to crimes against humanity.[641]

---

[637] Prosecution Response to Supplementary Brief, para 4.92 (citing A. Schönke/H. Schröder, *Strafgesetzbuch: Kommentar* 697 (25th ed. Munich: 1997) (counsel's translation)).
[638] Republic of Zambia Penal Code Act, Ch. 87 of the Laws of Zambia, p 28.
[639] *Blockburger* at 304.
[640] *Rutledge v. U.S.*, 517 U.S. 292, 297 (1996).
[641] Law Reports of Trials of War Criminals, U.N. War Crimes Commission VI, p 79 (London: 1948).

411. The Law Reports note that it seemed as if the tribunal "was willing to agree that [illegible] taken in pursuance of the *Nacht und Nebel Plan* constituted crimes against humanity as well as war crimes."[642] In the *Trial of Josef Altstötter and Others (The Justice Trial),* the tribunal found numerous defendants guilty of war crimes as well as crimes against humanity based on exactly the same acts,[643] thus appearing to uphold the possibility of cumulative convictions, at least when war crimes and crimes against humanity are involved.

412. Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

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

414. In this case, defendants Mucić and Delić have been convicted of numerous crimes under Articles 2 and 3 of the Statute, which crimes arise out of the same acts. The chart below summarises their convictions.

Article 2 (Grave Breaches of Geneva Convention No. IV	Article 3 (Violations of the Laws or Customs of War—Common Article 3)
1. wilful killings	1. murders
2. wilfully causing great suffering or serious injury to body or health	2. cruel treatment
3. torture	3. torture

642 *Id.*

643 *Ibid* at 75-76. *See also* Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc S/25274 ("The Commission notes that fundamental rules of human rights law often are materially identical to rules of the law of armed conflict. It is therefore possible for the same act to be a war crime and a crime against humanity."). However, the Report does not indicate whether *convictions* based on the same acts are possible under provisions for war crimes and crimes against humanity.

Land'o was cumulatively convicted under Articles 2 and 3, as to categories 1, 2, and 3 above (see chart). Although he did not file an appeal on this issue, the Appeals Chamber finds that reasons of fairness and the consideration that only distinct crimes may justify multiple convictions, merit the application of the same principles to his convictions as well.

415. Under Article 2 of the Statute,

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> a. wilful killing;
>
> b. torture or inhuman treatment, including biological experiments;
>
> c. wilfully causing great suffering or serious injury to body or health;
>
> d. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
>
> e. compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
>
> f. wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
>
> g. unlawful deportation or transfer or unlawful confinement of a civilian;
>
> h. taking civilians as hostages.

416. The appellants have been convicted under Geneva Convention IV. Article 147 of this Convention proscribes grave breaches such as wilful killing, torture or inhuman treatment, and wilfully causing great suffering or serious injury to body or health, if committed against persons or property protected by the Convention. The Convention defines "protected persons" as those who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[644] The ICRC Commentary (GC IV) explains that the term "in the hands of"

> is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or hands' of the Occupying Power.... In other words, the expression in the hands of'

[644] Article 4, Geneva Convention IV.

> need not necessarily be understood in the physical sense; it simply means that the person *is in territory which is under the control of the Power in question.*[645]

417. The definition of "protected person" under Geneva Convention IV is further limited by the fact that "persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall *not be considered as protected persons within the meaning of the present Convention.*"[646]

418. However, it should be noted that this Tribunal's jurisprudence has held that "protected persons" may encompass victims possessing the same nationality as the perpetrators of crimes, if, for example, these perpetrators are acting on behalf of a State which does not extend these victims diplomatic protection or to which the victims do not owe allegiance.[647]

419. Under Article 3 of the Statute, "The International Tribunal shall have the power to prosecute persons violating the laws or customs of war."[648] The origins of the convictions at issue—murder, cruel treatment, and torture—lie in common Article 3 of the Geneva Conventions, which states in the pertinent part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

---

[645] ICRC Commentary (GC IV), p. 47 (emphasis provided). At page 46, the ICRC Commentary lists further limitations to the granting of protected person status. On the territory of belligerent States, protection is accorded under Article 4 to "all persons of foreign nationality and to persons without any nationality," but the following are excluded:
(1) Nationals of a State which is not bound by the Convention;
(2) Nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are;
(3) Persons covered by the definition given above [...] who enjoy protection under one of the other three Geneva Conventions of August 12, 1949.
In occupied territories, protection is accorded to "all persons who are not of the nationality of the occupying State," but the following are excluded:
(1) Nationals of a State which is not party to the Convention;
(2) Nationals of a co-belligerent State, so long as the State in question has normal diplomatic representation in the occupying State;
(3) Persons covered by the definition given above [...] who enjoy protection under one of the three other Geneva Conventions of August 12, 1949.

[646] Article 4, Geneva Convention IV (emphasis provided).

[647] *See Tadić* Appeal Judgement, paras 168-169. *See also Aleksovski* Appeal Judgement, paras 151-2 ("In the *Tadić* Judgement, the Appeals Chamber, after considering the nationality criterion in Article 4, concluded that not only the text and the drafting history of the Convention, but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.").

[648] Article 3, Statute.

> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment; F...g.[649]

420. Common Article 3 of the Geneva Conventions is intended to provide minimum guarantees of protection to persons who are in the middle of an armed conflict but are not taking any active part in the hostilities. Its coverage extends to *any* individual not taking part in hostilities and is therefore broader than that envisioned by Geneva Convention IV incorporated into Article 2 of the Statute, under which "protected person" status is accorded only in specially defined and limited circumstances, such as the presence of the individual in territory which is under the control of the Power in question, and the exclusion of wounded and sick members of the armed forces from protected person status; while protected person status under Article 2 therefore involves not taking an active part in hostilities, it also comprises further requirements. As a result, Article 2 of the Statute is more specific than common Article 3. This conclusion is further confirmed by the fact that the Appeals Chamber has also stated that Article 3 of the Statute functions as a "residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal."[650] Finally, common Article 3 is present in all four Geneva Conventions, and as a rule of customary international law, its substantive provisions are applicable to internal and international conflicts alike.[651]

421. Applying the provisions of the test articulated above, the first issue is whether each applicable provision contains a materially distinct legal element not present in the other, bearing

---

[649] Article 3, Geneva Conventions of 1949.

[650] *Tadić* Jurisdiction Decision, para 91.

[651] *See Nicaragua*, para 218 ("Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called elementary considerations of humanity").

in mind that an element is materially distinct from another if it requires proof of a fact required by the other.[652]

422. The first pair of double convictions concerned are "wilful killing" under Article 2 and "murder" under Article 3. Wilful killing as a grave breach of the Geneva Conventions (Article 2) consists of the following elements:

a. death of the victim as the result of the action(s) of the accused,
b. who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death,[653]
c. and which he committed against a protected person.

423. Murder as a violation of the laws or customs of war (Article 3) consists of the following elements:

a. death of the victim as a result of an act of the accused
b. committed with the intention to cause death[654]
c. and against a person taking no active part in the hostilities.

The definition of wilful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person. This requirement necessitates proof of a fact not required by the elements of murder, because the definition of a protected person includes, yet goes beyond what is meant by an individual taking no active part in the hostilities. However, the definition of murder under Article 3 does not contain an element requiring proof of a fact not required by the elements of wilful killing under Article 2. Therefore, the first prong of the test is not satisfied, and it is necessary to apply the second prong. Because wilful killing under Article 2 contains an additional element and therefore more specifically applies to the situation at hand, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed.

---

[652] It should also be borne in mind that Article 2 applies to international conflicts, while Article 3 applies to both internal and international conflicts. However, this potentially distinguishing element does not come into play here, because the conflict at issue has been characterised as international as well. *See* discussion above, at para 50, on this point. In addition, both Articles 2 and 3 require a nexus between the crimes alleged and the armed conflict.

[653] *Blaskić* Judgement, para 153.

[654] *Jelisić* Judgement, para 35; *Blaskić* Judgement, para 181.

424. The second pair of double convictions at issue are "wilfully causing great sufferi serious injury to body or health" under Article 2, and "cruel treatment" under Article 3. The former is defined as

a. an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health,[655]

b. committed against a protected person.

Cruel treatment as a violation of the laws or customs of war is

a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,[656]

b. committed against a person taking no active part in the hostilities.

The offence of wilfully causing great suffering under Article 2 contains an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. Because protected persons necessarily constitute individuals who are not taking an active part in the hostilities, the definition of cruel treatment does not contain a materially distinct element—that is, it does not *require* proof of a fact that is not required by its counterpart. As a result, the first prong of the test is not satisfied, and it thus becomes necessary to apply the second prong of the test. Because wilfully causing great suffering under Article 2 contains an additional element and more specifically applies to the situation at hand, that conviction must be upheld, and the Article 3 conviction must be dismissed.

425. The third pair of double convictions at issue are torture under Article 2 and torture under Article 3. Because the term itself is identical under both provisions, the sole distinguishing element stems from the protected person requirement under Article 2. As a result, torture under Article 2 contains an element requiring proof of a fact not required by torture under Article 3, but the reverse is not the case, and so the first prong of the test is not satisfied. Again, it becomes necessary to apply the second prong of the test. Because torture under Article 2 contains an additional element that is required for a conviction to be entered, that conviction must be upheld, and the Article 3 conviction must be dismissed.

---

[655] *Blaskić* Judgement, para 156.
[656] *Jelisi}* Judgement, para 41; Trial Judgement, para 552; *Blaskić* Judgement, para 186.

426. The final pair of double convictions at issue are "inhuman treatment" under Artic[1] and "cruel treatment" under Article 3. Cruel treatment is defined above.[657] Inhuman treatment is

a. an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity,[658]

b. committed against a protected person.

Again, the sole distinguishing element stems from the protected person requirement under Article 2. By contrast, cruel treatment under Article 3 does not require proof of a fact not required by its counterpart. Hence the first prong of the test is not satisfied, and applying the second prong, the Article 3 conviction must be dismissed.

B. Conclusion

427. For these reasons, the Appeals Chamber finds that, of the double convictions entered by the Trial Chamber, only the Article 2 convictions must be upheld, and the Article 3 convictions must be dismissed.

Mucić: Count 13: upheld

Count 14: dismissed

Count 33: upheld

Count 34: dismissed

Count 38: upheld

Count 39: dismissed

Count 44: upheld

Count 45: dismissed

Count 46: upheld

Count 47: dismissed.

Delić: Count 1: dismissed--see section on Deli} factual grounds

---

[657] *See* para 424 above.

[658] *Blaskić* Judgement, para 154; *see* also Trial Judgement, para 543.

Count 2: dismissed--see section on Delić factual grounds

Count 3: upheld

Count 4: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld[659]

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

Count 18: upheld

Count 19: dismissed

Count 21: upheld

Count 22: dismissed

Count 42: upheld

Count 43: dismissed

Count 46: upheld

Count 47: dismissed.

Landžo: Count 1: upheld

Count 2: dismissed

Count 5: upheld

Count 6: dismissed

Count 7: upheld

Count 8: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld[660]

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

---

[659] Delić was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

[660] Land'o was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

Count 15: upheld

Count 16: dismissed

Count 24: upheld

Count 25: dismissed

Count 30: upheld

Count 31: dismissed

Count 36: upheld

Count 37: dismissed

Count 46: upheld

Count 47: dismissed

C. Impact on Sentencing

428. If, on application of the first prong of the above test, a decision is reached to cumulatively convict for the same conduct, a Trial Chamber must consider the impact that this will have on sentencing. In the past, before both this Tribunal and the ICTR, convictions for multiple offences have resulted in the imposition of distinct terms of imprisonment, ordered to run concurrently.[661]

429. It is within a Trial Chamber's discretion to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive.[662] In terms of the final sentence imposed, however, the governing criteria is that it should reflect the totality of the culpable conduct (the 'totality' principle),[663] or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.

---

[661] Such sentences have been confirmed by the Appeals Chamber in the *Tadić* Sentencing Appeal Judgement and the *Furund'ija* Appeal Judgement.

[662] *See* also Rule 101(C) of the Rules: "The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently."

[663] "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate.' (footnote omitted) D.A. Thomas, *Principles of Sentencing* (Heinemann: London, 1980), p 56; *See also R v Bocskei* (1970) 54 Cr. App. R. 519, at 521: "[...] when consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive." Section 28(2)(b) Criminal Justice Act 1991 preserves this principle. It applies in all cases where consecutive sentences are imposed, *e.g.*, *R v Reeves,* 2 Cr. App. R (S) 35, CA; *R v Jones,* [1996] 1 Ar. App.R (S) 153; In Canada *see e.g.*, *R v M (CA),* [1996] 1 SCR 500: "the global sentence imposed should reflect the overall

430. Therefore, the overarching goal in sentencing must be to ensure that the final aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.

431. Of the double convictions imposed on the accused in this case, only the Article 2 convictions have been upheld; the Article 3 convictions have been dismissed. The Appeals Chamber acknowledges that if the Trial Chamber had not imposed double convictions, a different outcome in terms of the length and manner of sentencing, might have resulted. Because this is a matter that lies within the discretion of the Trial Chamber, this Chamber remits the issue of sentencing to a Trial Chamber to be designated by the President of the Tribunal.

432. Judge Hunt and Judge Bennouna append a separate and dissenting opinion in relation to the issues arising in this chapter.

---

culpability of the offender and the circumstances of the offence"; In Australia: *Postiglione v R,* 145 A.L.R. 408; *Mill v R* (1988) 166 CLR 59 at 63; *R v Michael Arthur Watts,* [2000] NSWCCA 167 (the court should look at the individual offences, determine the sentences for each of them and look at the total sentence and structure a sentence reflecting that totality); *R v Mathews,* Supreme Court of New South Wales, 16 July 1991.

VII. DELIĆ GROUNDS OF APPEAL ALLEGING ERRORS OF FACT

A. Introduction

433. Delić has filed two grounds of appeal in relation to each of the convictions which he has challenged. The first is that the evidence was not what was described as *legally* sufficient to sustain the convictions; the second is that the evidence was not what was described as *factually* sufficient to sustain the convictions.

434. The issue as to whether there is a *legal* basis to sustain a conviction usually arises at the close of the Prosecution case at trial, a situation now covered by Rule 98*bis*(B),[664] following the earlier practice of seeking a judgement of acquittal upon the basis that, in relation to one or more charges, there is no case to answer. The test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.[665] In the present case, the Trial Chamber ruled that there was a case to answer,[666] and there was no appeal from that decision. The test to be applied in relation to the issue as to whether the evidence is *factually* sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which *no* reasonable tribunal of fact *could* have reached.[667]

435. If an appellant is *not* able to establish that the Trial Chamber's conclusion of guilt beyond reasonable doubt was one which no reasonable tribunal of fact could have reached, it follows that there must have been evidence upon which such a tribunal could have been satisfied beyond reasonable doubt of that guilt. Under those circumstances, the latter test of legal sufficiency is therefore redundant, and the appeal must be dismissed. Similarly, if an appellant *is* able to establish that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it, the appeal against conviction must be allowed and a judgement of acquittal entered. In such a situation it is unnecessary for an appellate court to

---

[664] Rule 98*bis*(B) provides: "The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges".

[665] The jurisprudence of the Tribunal in relation to Rule 98*bis*(B) and the earlier practice was recently reviewed in *Prosecutor v Kunarac*, Case No IT-96-23-T, Decision on Motion for Acquittal, 3 July 2000, at paras 2-10.

[666] *Prosecutor v Delalić et al*, Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case, 18 Mar 1998.

[667] *Tadić* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.

determine whether there was evidence (if accepted) upon which such a tribunal could reached such a conclusion.

436. The Appeals Chamber intends, therefore, to consider only the issue as to whether the evidence was *factually* sufficient to sustain the conviction, in the sense already stated.

437. Delić also argues in relation to a number of these grounds that the Prosecution has failed to show (1) that the victim was a protected person under the Geneva Conventions and (2) that common Article 3 provides for individual international criminal liability as a matter of customary international law.[668] These two matters, which raise questions of whether the Trial Chamber committed an error of law, have been addressed by the Appeals Chamber elsewhere in this Judgement. The present consideration is limited to whether the Trial Chamber committed any error of fact.

B. Issues 9 and 10: Convictions under Counts 1 and 2

438. Counts 1 and 2 related to killing of one Šćepo Gotovac ("Gotovac") in the Čelebići prison camp late in June 1992. The appellants Delić and Landžo were alleged, with others, to have beaten Gotovac for an extended period of time and to have nailed an SDA badge to his forehead. Gotovac is said to have died soon after from the resulting injuries. Count 1 charged the two accused with a grave breach of the Geneva Conventions (wilful killing); Count 2 charged them with a violation of the laws or customs of war (murder).

439. The Trial Chamber found that Delić and Landžo approached Gotovac, who sat near to the door inside hangar 6, and that Delić accused him of having killed two Muslims in 1942. He also referred to some old enmity between their families, and he told Gotovac that he should not hope to remain alive. When Gotovac denied these allegations, Delić started to beat him. Gotovac was taken outside the hangar, and the sound of blows and his moaning could be heard inside the hangar. After some time, he was dragged into the hangar.[669] All of these findings were clearly open to the Trial Chamber on the evidence.

440. The Trial Chamber also found that Gotovac was again taken out of the hangar a few hours later, and that both Delić and Landžo again administered a severe beating. A metal badge was pinned to his head, and Landžo threatened the rest of the detainees in the hangar that he

[668] Delić Brief, para 303.
[669] Trial Judgement, para 817.

would kill anyone who dared to remove it. As a consequence of this *second* beating, the Trial Chamber found, Gotovac died in the hangar some time later.[670]

441. The limitation of the finding that Gotovac's death resulted from the *second* of those beatings is vital to the resolution of these grounds of appeal, the issue being whether a reasonable tribunal of fact could have concluded that Delić participated in the second beating. It was very properly conceded by the Prosecution that there was no finding by the Trial Chamber that there was any causal connection between Gotovac's death and the first beating, and that the evidence was not such as to establish such a connection as the only reasonable conclusion available.[671]

442. No witness gave evidence of having actually seen Delić involved in this second beating, but the Trial Chamber effectively concluded that he was involved, its finding being based on circumstantial evidence. The Trial Chamber stated that, in view of what the witnesses had seen and heard inside the hangar, it could reasonably be said that they were in a position to know what was happening outside.[672] The Trial Chamber went on to say that, when everything which had been seen and heard inside the hangar was considered together, there was no room for doubt that Delić and Landžo "participated" in the beating which resulted in the death of the victim.[673]

443. The only circumstance upon which the Trial Chamber explicitly relied which specifically identified Delić was the threat which he made before the earlier beating that Gotovac should not hope to remain alive, and his involvement in that earlier beating. Those findings which were clearly open to the Trial Chamber on the evidence. The remaining circumstances upon which the Trial Chamber explicitly relied were that Gotovac was brought back into the hangar in a poor condition, he was taken out again later the same day, the sounds of blows and the moans and cries of Gotovac could be heard, he was carried back into the hangar after a short time with the metal badge stuck on his forehead, Landžo's threat that anyone who removed the badge would be similarly treated, and the discovery the next morning that Gotovac had died.[674] None of these additional circumstances were disputed in Delić's appeal.

---

[670] *Ibid*, para 818.
[671] Appeal Transcript, pp 523-524.
[672] Trial Judgement, para 820.
[673] *Ibid*, para 821.
[674] *Ibid*, para 820.

444. There was also evidence from Landžo that he had been asked by Delić (and by Muc[illegible] to kill Gotovac, but this evidence was rejected by the Trial Chamber on the basis that Landžo was an unreliable witness.[675] The evidence which Landžo gave was that others were involved with him in the second beating, but he did not suggest that Delić was ever present at the second beating.[676]

445. A number of detainees called by the Prosecution gave evidence of the circumstances surrounding the beatings of Šćepo Gotovac, and this evidence must be examined briefly to see whether it provides any basis for a finding that Delić had participated in the second beating.

446. Branko Gotovac (no relation) gave evidence of having seen Šćepo Gotovac taken outside the hangar and beaten "several times".[677] However, when the witness was asked to give details of what he saw, he was able to describe no more than what (by reference to all the other evidence) could only have been the first beating.[678] During cross-examination,[679] he said that he saw Šćepo Gotovac –

> [...] when two of them brought him in. He was like dead [...] and soon thereafter he was dead.

This may have been a reference to the second beating, but this was never made clear. Nor was the witness asked to identify the "two of them" were who brought Šćepo Gotovac in.

447. Witness F gave evidence that he did not know who called Gotovac out on the second occasion, and he was not asked who brought him back.[680] He did not suggest that Delić was present on this second occasion, and he was not asked whether he was. Stevan Gligorević described Gotovac being beaten twice, but he was able to identify only Landžo as having called him out on both occasions. He also made no reference to any participation by Delić in the beatings.[681] Witness N said that Delić had beaten Gotovac "several times" *inside* the hangar, but he then goes on to describe the events surrounding what (by reference to all the other evidence) could only have been what has been called the second beating *outside* the hangar, and he identified only Landžo as having been involved in those circumstances.[682] When asked who

---

675 Trial Judgement, para 822.
676 Trial Transcript, pp 15045–15047.
677 *Ibid*, p 985.
678 *Ibid*, pp 986, 1103.
679 *Ibid*, pp 1098-1099.
680 *Ibid*, p 1322.
681 *Ibid*, pp 1469-1470.
682 *Ibid*, pp 1916-1917.

else was in the area who could have seen Gotovac being taken out and beaten, he did suggest that Delić had been there.[683]

448. Dragan Kuljanin gave evidence of Gotovac being called out several times by the guards, but he said that he did not know the names of the guards who did so.[684] He did not see the beating himself.[685] He made no reference to any participation by Delić in the second beating. Mirko Đorđić said that it was Landžo who called Gotovac out of the hangar on the second occasion, and that it was Landžo who ordered some prisoners to carry Gotovac out.[686] He did not suggest that Delić had participated in the second beating.

449. Branko Sudar gave evidence in relation to both beatings. He firmly identified Delić as having participated in the first of them.[687] He said that it was Landžo who took Gotovac out for the second beating.[688] In cross-examination, he repeated the evidence which he had given, apparently in relation to the first beating without nominating the occasion as such,[689] but the Prosecution asked no questions which may have led to a change in the only reasonable conclusion from his evidence, that he was in fact still speaking of the first occasion only. Risto Vukalo described both beatings. Of the second beating, he identified only Landžo as being involved – as having called Gotovac out and as having ordered two of the detainees to bring him back inside the hangar.[690] Witness R described the threat made by Delić as having occurred on a quite separate occasion from any beating. In relation to the one beating which he saw, which (by reference to all the other evidence) could only have been the second, Witness R identified only Landžo as having been involved.[691]

450. None of the detainees so far discussed supported the Prosecution case that Delić participated in the second beating which caused the death of Gotovac. There were three other detainees upon whose evidence some reliance was placed in the appeal.

451. Witness B gave evidence of the threat made by Delić to Gotovac, that he should not hope to leave alive.[692] He referred to the first beating as having occurred the same evening,

---

[683] *Ibid*, p 1999.
[684] *Ibid*, p 2346.
[685] *Ibid*, p 2411.
[686] *Ibid*, p 4782.
[687] *Ibid*, p 5766.
[688] *Ibid*, p 5767.
[689] *Ibid*, p 5945.
[690] *Ibid*, pp 6280-6281.
[691] *Ibid*, p 7795.
[692] *Ibid*, p 5055.

without identifying who was involved in it.[693] He said that he thought that the second beat occurred the next evening, and said:

> He was called out again outside, at night fall. I remember Zenga, Esad Landžo. He came in. He came into the hangar. I think that Delić was near the door, outside. He didn't want to go out. He was – and then two other prisoners were ordered to help him get up and push him out, outside the door. This was right next to me in the hangar. They started beating him and by the number of blows, the movements and everything we could hear, there must have been a large group of people, several people.[694]

The "he" who did not want to go out was clearly Gotovac. Witness B was not asked to identify who "they" were who started beating Gotovac. He later described the threat by Landžo concerning the badge on Gotovac's forehead.[695]

452. The Prosecution argued that the sentence "I think that Delić was near the door, outside" should be interpreted as expressing doubt not as to whether Delić was there at the time of the second beating, but only as to where he was standing.[696] Such an argument would have greater force if Witness B had elsewhere in his evidence identified Delić as having been present, but he did not do so. The presence of Delić during the second beating was a vital piece of evidence linking him to that beating. It is the obligation of the Prosecution to ensure that its vital evidence is clear and unambiguous. An accused person should not be convicted upon the basis of a verbal ambiguity in that vital evidence. This sentence of Witness B's evidence, read literally, expresses some doubt as to whether Delić was present, not merely as to where he was standing. Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution.

453. Rajko Draganić described Delić and Landžo as beating Gotovac on the first occasion.[697] In relation to what may have been either the first or the second beating (the evidence is ambiguous), he said:[698]

---

[693] *Ibid*, p 5056.
[694] *Ibid*, p 5056.
[695] *Ibid*, p 5057.
[696] Appeal Transcript, pp 519-520.
[697] Trial Transcript, p 6929.
[698] *Ibid*, p 6930.

> [...] and that Delić said, Zenga [Landžo], I do not know exactly, he said two people should come and carry him inside.

It is clear from this evidence that the witness was unable to say which of the two accused had requested the assistance upon whichever occasion it was. Insofar as this uncertainty may suggest that Delić was present at the second beating, and that the only uncertainty related to *which* of the accused had requested assistance, the same ambiguity exists as in relation to the last witness. It is perhaps significant that, when the Trial Chamber identified the details of the circumstantial case upon which it relied to find beyond reasonable doubt that Delić participated in the second beating, it did not include any *direct* evidence that Delić was present in the area when the second beating took place.[699]

454. Mirko Babić gave evidence that Delić had come to the door of the hangar with Landžo, that he had threatened Gotovac that he would be killed and that Delić was one of three men who had taken Gotovac out of the hangar for the first beating.[700] He then said that, an hour or so later, Delić again came to the door of the hangar, with Landžo, that Gotovac was "told the same thing as the first time", and that Delić had put a knife "next" to Gotovac when they took him out and beat him again.[701] In cross-examination, Babić asserted that he had been an eyewitness to these events.[702] This was the only evidence in the case which unambiguously involved Delić in the events leading to and following the second beating. If accepted, it would lead to the inevitable conclusion that Delić had participated in that beating – either as one of those who inflicted the beating personally, or as an accessory aiding and abetting it.

455. On appeal, Delić pointed out that, in relation to charges of torture and cruel treatment of Mirko Babić by Landžo and himself,[703] the Trial Chamber did not consider the unsupported evidence of Babić of the mistreatment which he alleged that he had received to be "wholly reliable".[704] Delić argued, therefore, that the evidence which Babić gave in support of the counts presently under consideration was "also insufficient to support a factual finding that [he] participated in the fatal beating" alleged in those counts, particularly as no one else gave evidence of having seen him there.[705] The Prosecution responded that a finding that Babić's evidence in relation to another incident was not "wholly reliable" does not amount to a

---

[699] Trial Judgement, para 820.
[700] Trial Transcript, pp 284-285.
[701] *Ibid*, p 285.
[702] *Ibid*, p 413.
[703] Counts 27, 28 and 29.
[704] Trial Judgement, para 988.
[705] Delić Brief, para 282b.

conclusion that Babić was a completely unreliable witness who could not be believed in any circumstances.[706]

456. In the circumstances of this case, the Appeals Chamber does not accept the "fine distinction" which the Prosecution sought to draw between not being satisfied beyond reasonable doubt as to the reliability of a witness's evidence and a finding that the witness was lying.[707] The nature of the evidence which Babić gave in support of the torture and cruel treatment charges was of such a nature that, if true, it established those charges beyond reasonable doubt. It was not just the absence of supporting evidence which led to the acquittal on those charges. There was a wealth of evidence which demonstrated that Babić was lying in relation to them, including evidence that the injuries which he alleged had resulted from the mistreatment (which included having his leg doused in petrol and set alight) had occurred sometime prior to his detention at the Čelebići prison camp.[708]

457. But this debate concerning the evidence of Babić does not need to be resolved in this appeal, as it is apparent from the judgement itself that the Trial Chamber did not rely upon it. As already stated, the Trial Chamber did not include in the circumstantial case upon which it relied in finding beyond reasonable doubt that Delić participated in the second beating any direct evidence that Delić was present in the area when the second beating took place. If the evidence of Babić that Delić was present *had* been accepted, it was of such a vital nature that it would inevitably have been included in the statement of the circumstances relied on. Its absence from that statement demonstrates that the Trial Chamber did *not* accept that evidence, and that it did not interpret the evidence of either Witness B or Rajko Dragonić as demonstrating that Delić was present on the occasion of the second beating.

458. A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him – here that he participated in the second beating of Gotovac. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another

[706] Appeal Transcript, pp 517.
[707] *Ibid*, p 518.
[708] Trial Judgement, paras 986-987.

conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.

459. The Appeals Chamber is satisfied that, without some acceptable evidence that Delić *was* present at the time of the second beating, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that Delić participated in the second beating from the circumstances identified by the Trial Chamber in this case. The enmity between Delić and Gotovac, his threat to Gotovac that he would be killed, and his participation in the earlier (and separate) beating do not, even in combination, eliminate the reasonable possibility that he was not there at the time. Such a possibility arises from the absence of any acceptable evidence from any of the many witnesses who were present that Delić was also present. No finding that he participated in the second beating was therefore available.

460. The conviction of Delić on Counts 1 and 2 must accordingly be quashed, and a judgement of acquittal entered on both counts.

C. Issues 11 and 12: Convictions Under Counts 3 and 4

461. Delić was convicted under Counts 3 and 4 of the Indictment for a grave breach of the Geneva Convention (wilful killing) and with a violation of the laws or customs of war (murder) in respect of the death of Željko Milošević ("Milošević"). It was alleged that Delić selected Milošević from Tunnel 9 where he was detained and brought him outside where Delić and others severely beat him, and that, by the following morning, Milošević had died from his injuries.

462. The Trial Chamber found that Delić had inflicted numerous beatings on Milošević while he was detained in the camp. Prior to his death, journalists had visited the camp and Milošević had been taken out by Delić to make "confessions" in front of them, which Milošević refused to do. After that incident, Delić called Milošević out of the tunnel at night, and then beat him severely for a period of at least an hour, such that his screaming and moaning could be heard by the detainees inside the tunnel. The dead body of Milošević was seen outside the tunnel the next morning. The Trial Chamber found that the beating inflicted on this occasion caused the death of Milošević.[709]

[709] Trial Judgement, paras 832 and 833.

463. In challenging his conviction under these counts, Delić contends that only [illegible] witnesses, Milenko Kuljanin and Novica Đorđić, testified to direct knowledge of Delić's involvement in the beating to death of Milošević, that their testimony is incredible as their versions of the incident are inconsistent and that their testimony as to events leading up to the death of Milošević conflicts with the testimony of other Prosecution witnesses.[710]

464. The Prosecution argues that the fact that the witnesses did not see the beating which occasioned the victim's death is not of itself a basis for concluding that there was an error of fact. It is contended that the Trial Chamber found that the witnesses were able to confirm that Delić administered the fatal beating and that none of the inconsistencies referred to by Delić establish that this finding was unreasonable.[711]

465. Regarding its findings as to the events leading up to the death of Milošević, the Trial Chamber relied upon the testimony of two witnesses, Milenko Kuljanin and Novica Đorđić. The Trial Chamber described Novica Đorđić as having testified that he was situated only a very short distance from the door of Tunnel 9, from where he was in a position to see and hear what was going on outside the door when it was open. He conceded that he did not see the final beating as the door of Tunnel 9 was closed, but that he heard Delić calling Milošević out of the tunnel, a discussion, beatings and finally a shot. Milošević did not return to Tunnel 9 that night.[712]

466. The Trial Chamber held that the testimony of Novica Đorđić was supported by that of Milenko Kuljanin. It described Milenko Kuljanin as testifying that Delić called Milošević and personally took him out of Tunnel 9. He then heard the victim screaming, moaning and crying out for over an hour, indicating the severity of the beating inflicted upon him.

467. The Trial Chamber stated that the following morning the motionless body of Milošević was observed by a number of Prosecution witnesses, including Novica Đorđić, Milenko Kuljanin and Witness J, lying "near the place where [the prisoners] were taken to urinate".[713] The Trial Chamber found that, although there were "some variations between the testimony

[710] Delić Brief, pp 128-132.
[711] Prosecution Response, paras 11.9-11.11.
[712] Trial Judgement, paras 831-832.
[713] Trial Judgement, para 832.

provided by the witnesses to these events, the fundamental features of this testimony, a[illegible] relates to Željko Milošević's last evening of life, are consistent and credible".[714]

468. Delić submits that the inconsistencies between the testimony of Milenko Kuljanin and Novica Đorđić were "so great that they are unreliable and they cannot be used to establish the facts and reach a judgement".[715] As indicated above, the Trial Chamber did accept that there were some variations in the witnesses' testimony but did not identify specifically what these were. The Appeals Chamber will consider whether the matters referred to by Delić were in fact inconsistencies in the evidence and then consider whether any effect they may have had on the evidence on these counts referred to the Trial Chamber when taken as a whole was such as to make it unreasonable to find that the "fundamental features" of the testimony were sufficiently consistent and credible to justify a finding of guilt beyond reasonable doubt.

469. The first inconsistency identified by Delić relates to the manner in which Milošević was removed from Tunnel 9. Milenko Kuljanin testified that Delić called Milošević and personally took him out of Tunnel 9 but that, according to Novica Đorđić, Milošević left the tunnel upon the call of Delić's voice; he made no mention of Delić taking Milošević out personally.

470. Milenko Kuljanin testified that prior to Milošević's death, journalists had visited the prison-camp and Milošević was taken out of Tunnel 9 by Delić and asked to make "confessions" in front of these journalists, which he refused to do.[716] Milenko Kuljanin's evidence as to what followed was that:

> Delić returned [Milošević and another detainee Rajko Đorđić] to tunnel number nine, from which they had come, and when the journalists had left, he entered the tunnel again and said that they would remember him well. Zeljko [Milošević], however, remained for another couple of days in the tunnel. Delić then came and told him to get ready around 1 pm. Then Deli} came and called Milošević. I cannot say exactly when he came. It was night. It was perhaps midnight or 2 o'clock am. It was pitch dark. He took Zeljko out personally. He called him to come out and took him out. After they had gone out, we heard Zeljko screaming and moaning and crying out. In the morning when they took us out to go to the toilet, Zeljko Milošević was behind the door lying there dead.[717]

Novica Đorđić testified that:

> And indeed, as Hazim had said, that night -- I don't know what time it was -- his voice could be heard outside building Number 9 and he called out Zjelko Milošević. Zjelko went out. The door was closed behind him. We heard talk, but this time it was a bit further away from

[714] Trial Judgement, para 832.
[715] Appeal Transcript, p 498.
[716] Trial Transcript, pp 5480-81.
[717] Trial Transcript, p 5481.

> the entrance, so we couldn't understand as well as the previous days when it was just outside the door, but we heard the discussion, later beatings and finally a bullet.[718]

471. There is a difference in the accounts: Novica Đorđić testified only that Delić's voice could be heard outside the tunnel and that he "called out" Milošević, who "went out", and Kuljanin stating that Delić "took him [Milošević] out personally." It is not possible to understand this as a loose way of saying that he *called* Milošević out personally in light of his further evidence: "He called him to come out *and took him out*. After *they* had gone out [...]". There is thus a difference in the evidence as to whether Delić came into the tunnel or simply called Milošević from outside. It is apparent that the Trial Chamber found only that Delić had called Milošević out, relying on the fact that the two witnesses had recognised his voice, and did not rely on Milenko Kuljanin's evidence relating to Delić having also personally taken him out. The only relevance of the inconsistency would therefore be as to Kuljanin's credit, which the Appeals Chamber will consider in the context of the other inconsistencies alleged by Delić.

472. The second inconsistency referred to is that, following the sound of beating and screaming, to which the witnesses testified, Novica Đorđić heard a "bullet".[719] Milenko Kuljanin did not testify to hearing any shot. Again, the Trial Chamber, having found Milošević died from the *beating* inflicted upon him (to which both witnesses testified), did not rely on the evidence as to the sound of a shot and the only relevance of the matter could be to the credibility of the witnesses.

473. Delić submits that the evidence of Kuljanin and Delić as to the location of Milošević's body on the day following the beating was inconsistent with that of Witness J. Kuljanin gave evidence that:

> In the morning when they took us out to go to the toilet, Zeljko Milošević was behind the door lying there dead.[720]

And then, in response to questioning:

> Q. You say that in the morning, going to the toilet outside you saw the body outside of the tunnel entrance. Did you see the body, both going to the toilet and coming back from the toilet?
>
> A. Yes, it was there on our way and when we were coming back to the tunnel, both times.[721]

---

[718] Trial Transcript, p 4179.
[719] Trial Transcript p 4179.
[720] Trial Transcript, p 5481.
[721] Trial Transcript, p 5483.

Novica Đorđić testified that:

> In the morning – I think it was very early – we were taken out in groups of five or six to the toilet or rather the hole, and when I went out right next to the hole on the northern side of the hole was Zjelko Milošević's corpse covered with some kind of rag or tee-shirt over his forehead with a large blood stain.[722]

474. Delić points out that the Trial Chamber erred when saying that Milenko Kuljanin saw the dead body "near the place where they were taken to urinate"[723] as the witness testified that he saw the body behind or outside the door of Tunnel 9. Although the Trial Chamber's description of Milenko Kuljanin's testimony appears on its face to be slightly inaccurate, as he testified that he saw the body lying behind the door of Tunnel 9,[724] this inaccuracy, and the alleged inconsistency between the witnesses' testimony as to the location at which the body was found are more apparent than real, when the evidence is taken in context. It appears from the evidence that the hole where the prisoners were taken to urinate was in fairly close proximity to Tunnel 9 and that the area outside the tunnel entrance or door was close enough to where the prisoners were taken to urinate that witnesses referring to the locations by the different descriptions could reasonably be referring to essentially the same place. When asked to describe where the hole was and where the body of Milošević had been found, Novica Đorđić responded that:

> The hole was just here, somewhere in the middle of Tunnel Number 9. You pass this small concrete wall and it was just here. The body was right next to the hole.[725]

And in cross-examination, when asked again about the location of the body, the following interchange took place:

> Q. Point again where you saw the corpse?
>
> A. (Indicating) Here *next to a hole that was dug in as a toilet.* He was right next to it in the middle here.
>
> Q. So all of that occurred *behind Tunnel 9*?
>
> A. *Somewhere behind the entrance*, yes.[726]

This witness therefore considered that the relevant location could be described as both "next to the hole" and "behind the entrance" to Tunnel 9.

---

[722] Trial Transcript, p 4179.
[723] Trial Judgement, para 832.
[724] Trial Transcript, p 5481.
[725] Trial Transcript, p 4181.
[726] Trial Transcript, p 4232 (emphasis added).

475. This understanding appears to have been shared by Witness J, who described the location at which he saw Milošević's body as being:

> [...] close to this local [*sic*] which we used to relieve ourselves, we were taken out there. When we were taken there to urinate, we all saw him lying there next to the hole, lying dead and all of us could see him, all the detainees could see him.[727]

When asked again where he had seen Milošević's body, he later elaborated, making indications on a plan of the camp, that it was behind Tunnel 9:

> This was the pit where we went to the toilet and his body was lying next to it. This is also behind number 9. If this is number 9, it would be up here, around this area. I know that it was not far.[728]

The Appeals Chamber therefore regards the evidence as to the location of Milošević's body on the morning following his beating as fully supporting the Trial Chamber's finding.

476. Delić also argues that the testimony of Witness J that the body of Milošević was all yellow is inconsistent with that of the two other witnesses who said that his head was covered with some kind of garment stained with blood.[729] The Appeals Chamber considers that there is no necessary inconsistency between these accounts, as it is quite plausible that the skin on those parts of Milošević's *body* which were visible, was yellow perhaps from ill health, but that he also had a *head* injury which was indicated by the fact that his head was fully or partly covered with a blood stained cloth.

477. Delić alleges that there is an inconsistency in the evidence as to when the incident occurred, as Novica Đorđić and Milenko Kuljanin "did not agree on the date that the alleged events occurred".[730] Although Milenko Kuljanin was not able to recall precisely the time of the killing in terms of dates in time,[731] he was able to situate it by reference to other events. His evidence, that it followed shortly after the visit of the journalists,[732] is in no way contradicted by Novica Đorđić and Witness J, who did not give specific evidence as to the date on which the fatal beating occurred.

---

[727] Trial Transcript p 7497.
[728] Trial Transcript, p 7510.
[729] Delić Brief, para 293.
[730] Delić Brief, para 293.
[731] *See* Trial Transcript, p 5482: "I spent around 110 days in the tunnel. All this took place during this 110 days which I spent there. Whether it was the beginning of July or the end of June, I cannot really tell. I do not orient myself really quite well, because we really, at least as far as I myself am concerned, cannot remember these more important dates because I could not orient myself in the space of time there. So I cannot say exactly. Possibly, it was the end of June or July, but his killing took place after Šlavko Susić's incident".
[732] Trial Transcript, p 5481.

478. Delić contends further that Milenko Kuljanin and Novica Đorđić's testimony relating to the death of another detainee, Slavko Šusić, which is similar to that given in relation to the death of Milošević, was rejected by the Trial Chamber. In relation to the evidence of Novica Đorđić, it is not apparent from the Trial Judgement that the Trial Chamber rejected his evidence. It referred to his evidence that he had seen Delić and Landžo take Slavko Šusić out of Tunnel 9, that he had seen Šusić pushed back in a long time later, and that he had died shortly afterwards. The Trial Chamber appeared to accept, rather than to reject it.[733] The fact that the Trial Chamber did not find that Delić and Landžo were responsible for the death of Šusić was not because it disbelieved the witnesses, but because none of them gave sufficient evidence to establish that by the beating Delić and Landžo were responsible for his death. The Trial Chamber did accept that the evidence established that Delić and Landžo had severely beaten Šusić, and on that basis entered convictions for wilfully causing great suffering or serious injury to body or health and cruel treatment.[734]

479. Milenko Kuljanin's testimony in regard to the killing of Slavko Šusić was that, from his position in the Tunnel, he had been able to see Šusić being mistreated in various ways outside the tunnel door, which was open. This was not accepted by the Trial Chamber, on the basis that it "was not convinced that from this location he would have been able to have a clear sight of the mistreatment meted out to Slavko Šusić".[735] It also observed that not all of his evidence was consistent with other witnesses' testimony, but not because of any inherent problem with his credibility which would affect his evidence in relation to all other matters on which he gave evidence.[736] The Appeals Chamber is of the view that it was open to the Trial Chamber, having examined Milenko Kuljanin's testimony in the context of the whole of the evidence in relation to the counts relating to Milošević, to accept that evidence even though it did not rely on his evidence in relation to other matters for reasons specific to those matters.

480. The Trial Chamber also relied upon evidence as to beatings to which Delić had subjected Milošević during his detention at the camp which, in combination with evidence as to certain statements made by Delić shortly before the fatal beating of Milošević, demonstrated Delić's intention at least to inflict serious bodily injury upon him. Upon the evidence presented

[733] Trial Judgement, para 863.
[734] Trial Judgement para 866.
[735] Trial Judgement, para 862.
[736] Trial Judgement, para 863.

by numerous Prosecution witnesses,[737] the Trial Chamber found that Milošević was subj by Delić and sometimes Landžo to a series of beatings and other abuses prior to the fatal incident. All were either inside Tunnel 9 or outside its entrance and could in general be seen as well as heard by the prisoners in the tunnel.[738]

481. Delić argues that there is an inconsistency in the evidence in relation to these beatings as the Prosecution witness Assa'ad Harraz, one of the journalists who came that day to the camp, denied that detainees were beaten in the presence of the journalists as Milenko Kuljanin and Novica Đorđić testified. The Trial Chamber did not refer to the testimony of Assa'ad Harraz in the Judgement in reaching its findings on this issue, but there is no indication that the Trial Chamber did not weigh all the evidence that was presented to it. A Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching particular findings. The Appeals Chamber is satisfied that it was open to the Trial Chamber, which saw the witnesses give their testimony, to prefer the evidence of Milenko Kuljanin and Novica Đorđić insofar as any inconsistency arose with the testimony of Assa'ad Harraz.

482. More specifically, there was compelling evidence before the Trial Chamber that Delić had made specific threats to Milošević warning him that he would be coming for him on the evening on which he was killed. The Trial Chamber referred[739] to the testimony of Milenko Kuljanin that:

> Delić returned [Milošević and another detainee Rajko Đorđić] to tunnel number nine, from which they had come, and when the journalists had left, he entered the tunnel again and said that they would remember him well. Zeljko, however, remained for another couple of days in the tunnel. Delić then came and told him to get ready around 1 pm. Then Delic came and called Milošević. I cannot say exactly when he came. It was night. It was perhaps midnight or 2 o'clock am.[740]

---

[737] Among the number of Prosecution witnesses relied upon by the Trial Chamber were Miro Golubović, Novica Đorđić, Milenko Kuljanin, Witness P, Risto Vukalo and Witness J. Trial Judgement para 830.

[738] Trial Judgement, para 830. Novica Đorđić testified in relation to the occasion on which Milošević was taken out in front of the journalists that "Zjelko Milošević was taken out in front of Tunnel Number 9. That means just in front of the door of Tunnel 9, so you can hear very well and see what's happening outside, if we were allowed to look. [...] In his case I remember a piece of cable was used, electrical cable which was about 2 cms thick and it had a steel wire inside this cable, and every time he was taken out, he was beaten very severely, and later led back in." Trial Transcript, pp 4173-4174. He stated at 4174-4175 that it was Delić who would call Milošević out. He confirmed at 4176 that the door to the tunnel was mostly open.

[739] Trial Judgement, para 832.

[740] Trial Transcript, p 5481.

He reiterated later in his evidence that Delić "...had actually forewarned him [Milošević] what was to come and told him to be ready at one, and that was what happened".[741] 4407

483. Although not specifically referred to by the Trial Chamber, Novica Đorđić also gave evidence of Delić's specific threats to Milošević:

> [...] the day before this night [of Milošević's death], Hazim Delić told him that that night at 1.00 am he would "go to the toilet". I beg your pardon for using the word "to piss".
>
> [...] And indeed, as Hazim had said, that night – I don't know what time it was – his voice could be heard outside building number 9 and he called out Zjelko Milošević.[742]

It is reasonable to assume that the Trial Chamber was taking this evidence into account when making its findings as to the threats made by Delić to the victim which demonstrated an intent to cause at least very serious bodily injury to him.[743]

484. As to the inconsistencies in the evidence of the witnesses which Delić has alleged, the only two which the Appeals Chamber can regard as demonstrating genuine differences related to whether Delić called Milošević out of the tunnel or whether he also personally came in to take him out, and to whether there was a final gunshot. These must be considered in light of the significance of the matters on which the witnesses gave consistent evidence:

- During Milošević's detention in the prison-camp, he was singled out by Delić for frequent interrogation and was repeatedly beaten or otherwise mistreated by him, including outside the doors of Tunnel 9.
- Shortly prior to his death, Milošević was taken out of Tunnel 9 by Delić and, with another detainee, was asked to make confessions to visiting journalists which he refused to do. On this occasion too he was beaten.
- Some time after this incident, Delić threatened Milošević and told him specifically that he would come for him at one o'clock at night.
- At a time late at night, Delić came to Tunnel 9 and called out Milošević, spoke to him outside the door of Tunnel 9 and then the sounds of beating and the screams, cries and moans of Milošević could be heard for over an hour.
- The dead body of the victim was seen the following morning near the hole where the prisoners were taken to urinate, behind Tunnel 9.

---

[741] Trial Transcript, p 5483.
[742] Trial Transcript, pp 4177 and 4179.
[743] Trial Judgement, para 833.

In the face of this body of evidence, the Appeals Chamber does not believe it was unreasonable for the Trial Chamber to regard these inconsistencies as being of inadequate significance to undermine the fundamental features of the evidence.

485. As is clear from the above discussion, the other matters raised by Delić as undermining the credibility of the witnesses are not, in the view of the Appeals Chamber, of such a character as would require a reasonable Trial Chamber to reject their evidence. The Appeals Chamber is satisfied that on the evidence before the Trial Chamber it was open to accept what it described as the "fundamental features" of the testimony.

486. Having made the findings set out above, it was reasonable to find that Delić had subjected Milošević to a prolonged and serious beating, that this beating had caused his death, and that it was inflicted with an intention to kill or at least to cause serious bodily injury. It was therefore not unreasonable for the Trial Chamber to regard the totality of the evidence, when taken as a whole, as establishing beyond reasonable doubt Delić's guilt.

487. Delić's grounds of appeal relating to Counts 3 and 4 must accordingly be dismissed.

D. Issues 13 and 14: Convictions Under Counts 18 and 19

488. In Counts 18 and 19, Delić was found guilty of torture for the rape of Grozdana Ćećez (for the purposes of this section, "the victim").[744] It was found that the victim was taken to the Čelebići camp on 27 May 1992 and on her arrival was brought to a room in which Delić was waiting. She was interrogated by Delić, during the course of which he slapped her. She was then taken to another room with three men including Delić. Delić subsequently raped her.[745] It was found that these rapes constituted the offence of torture.[746]

489. Delić's principal argument centres on the victim's testimony, submitting that it was so weak and contradicted, that the Trial Chamber's conclusions were clearly wrong.[747] In particular, he refers to elements of her testimony which illustrate her unreliability because: (1) she failed to identify Delić properly;[748] (2) her own evidence was weak and contradictory when

[744] Specifically, Delić was found guilty of torture as a Grave Breach of Geneva Convention IV (Article 2(b) of the Statute) and as a Violation of the Laws or Customs of War (Article 3 of the Statute): Trial Judgement para 943.
[745] Trial Judgement, para 937.
[746] Trial Judgement, para 941.
[747] Delić Brief, para 304; Appeal Transcript, p 499.
[748] Delić submits that although she later identified him by name, she was unable to identify him in a photograph array prepared by the Prosecution and she was not asked to identify him in court. Delić Brief, para 305.

given in relation to certain issues;[749] (3) her evidence contradicted evidence given by [illegible] witnesses, in particular Milojka Antić;[750] and (4) she was unable to recall certain events, illustrating what he describes as her "selective memory".[752]

490. As to the reliability of the testimony presented in relation to these counts, the Trial Chamber in general found:

> the testimony of Ms. Ćećez, and the supporting testimony of Witness D and Dr. Grubač, credible and compelling, and thus concludes that Ms. Ćećez was raped by Delić, and others, in the ^elebići prison-camp.[753]

491. The argument made under these grounds attacks the credibility and reliability of the main witness on whom the Trial Chamber relied to convict. The Appeals Chamber recalls that the Trial Chamber was in the best position to hear, assess and weigh this testimony. It was accordingly for the Trial Chamber to consider whether the witness was reliable and her evidence credible. In such circumstances, the Appeals Chamber must always give a margin of deference to a Trial Chamber's evaluation of the evidence and findings of fact.[754] It is for Delić in these circumstances to demonstrate that this evidence could not reasonably have been accepted by any reasonable person, that the Trial Chamber's evaluation was wholly erroneous and that therefore the Appeals Chamber should substitute its own finding for that of the Trial Chamber.[755]

492. Delić does not dispute the fact that the Rules do not require corroboration of a victim's testimony.[756] However, although the Trial Chamber also relied on additional testimony to support the principal account, the only direct evidence (and that disputed) in relation to the rapes carried out by Delić was that of the victim. Delić states that this testimony was not worthy of belief, due primarily to inconsistencies in the evidence which he claims illustrate its unreliability.

493. As to these alleged inconsistencies, Delić firstly alleges that the victim's identification of him as the person who raped him was suspect, as she could not identify him in a photograph

---

[749] Appeal Transcript, p 501.
[750] Delić Brief, para 302.
[751] Appeal Transcript, p 500.
[752] Delić Brief, para 306.
[753] Trial Judgement, para 936.
[754] *Tadić* Appeal Judgement, para 65; *Aleksovski* Appeal Judgement, para 63.
[755] *Aleksovski* Appeal Judgement, para 63.
[756] Rule 96(i) of the Rules provides that in cases of sexual assault, "no corroboration of the victim's testimony shall be required".

array and was not asked to identify him directly in court.[757] The Trial Chamber found "Upon her arrival at the prison-camp she was taken [...] to a room where a man with a crutch was waiting, whom she subsequently identified as Delić".[758] The Appeals Chamber notes that the victim, having identified Delić at the start of her testimony as "the man with a crutch", confirmed this identification throughout her testimony,[759] while also referring to him by name.[760] The Appeals Chamber sees no reason to question the evaluation of this identification by the Trial Chamber.

494. Delić specifically points to the fact that the victim failed to identify Delić from a photograph array. The Appeals Chamber notes that when questioned as to her inability to identify Delić from the photographs, the victim replied: "I am not sure. All those pictures were of bald-ish men. So I didn't dare say which one. Maybe the man has changed. After all, I haven't seen him for five years. So I was not sure".[761]

495. The Appeals Chamber determines that it has no reason to find that the Trial Chamber erred in its findings as to the victim's identification of Delić. The Appeals Chamber notes that the victim identified Delić by name on several occasions throughout her testimony and continued to refer to him as such throughout.[762] In addition, although not a necessary requirement, the Appeals Chamber notes that there were corroborating accounts before the Trial Chamber of the fact that Delić was identified as using a crutch.[763] The simple fact that the

---

[757] Delić Brief, paras 297 and 305.

[758] Trial Judgement, para 937.

[759] In testimony, she stated: "When I entered that room, it was a very small room. I saw a man with a crutch. There was a crutch next to him. His leg was bandaged". Trial Transcript p 491. She continued to refer to him as the "the man with the crutch", (*e.g.*, Trial Transcript p 492, when asked who slapped her) and "[t]he one with the crutch" (*e.g.*, Trial Transcript p 494, when asked who raped her). She then stated: "At that time I still did not know who he was but later I found out. Soon after that I found out who and what he was Hazim Delić" (Trial Transcript p 494).

[760] In particular, when asked again to confirm the identification, Grozdana Ćećez stated that although she did not know who Delić was when he raped her, she "learned shortly [after]. [ ] The women from Bradina had come, and somebody from the entrance was looking for Hazim Delić and he appeared, so I realised that he was the man. He was carrying a crutch and he was limping, so I knew straight away who he was". She further testified that she "saw him quite frequently", that he was there all the time and that she heard his name frequently (Trial Transcript pp 513-514, 517).

[761] Trial Transcript, p 516.

[762] *See* Trial Transcript, p 510-511.

[763] Corroboration is not *required* either in general (*see* for example: *Aleksovski* Appeal Judgement, para 62: "the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration"); *Tadić*, Appeal Judgement, para 65, or in particular, in relation to testimony by victims of sexual assault. In any event, the testimony of other witnesses, although not expressly referred to by the Trial Chamber, did refer to the identifying feature that Deli} used a crutch. For example, Dr Grubač (Trial Transcript pp 5998-5999), whose testimony was relied upon by the Trial Chamber to convict on these counts, finding it also to be credible and compelling (Trial Judgement, para 939). He testified that: "A day after my arrival to Čelebići I met Hazim Delić.[...]. Knowing him I thought I could address him and I did, and I told him, 'here I am' [...]. At that time

victim failed to identify him in a photograph array (or rather, as it appears to the Ap- Chamber, was too cautious to try to identify him), several years after the incident took place, does not suffice to illustrate fault on behalf of the Trial Chamber's overall appreciation of the evidence and treatment of identification.[764]

496. Delić also refers to certain inconsistencies in the victim's testimony, which he states illustrate that it was unreliable.[765] The Appeals Chamber notes that as an introduction to its consideration of the factual and legal findings, the Trial Chamber specifically discussed the nature of the evidence before it.[766] It found that often the testimony of witnesses who appear before it, consists of a "recounting of horrific acts"[767] and that often "recollection and articulation of such traumatic events is likely to invoke strong psychological and emotional reactions [...]. This may impair the ability of such witnesses to express themselves clearly or present a full account of their experiences in a judicial context".[768] In addition, it recognised the time which had lapsed since the events in question took place and the "difficulties in recollecting precise details several years after the fact, and the near impossibility of being able to recount them in exactly the same detail and manner on every occasion [...]."[769] The Trial Chamber further noted that inconsistency is a relevant factor "in judging weight but need not be, of [itself], a basis to find the whole of a witness' testimony unreliable".[770]

497. Accordingly, it acknowledged, as it was entitled to do, that the fact that a witness may forget or mix up small details is often as a result of trauma suffered and does not necessarily impugn his or her evidence given in relation to the central facts relating to the crime. With regard to these counts, the Trial Chamber, after seeing the victim, hearing her testimony (and

---

he was carrying a crutch under his armpit. He said his leg had been injured; he was limping a little bit and using this crutch". *See* also the testimony of Mirko Dordič (Trial Transcript p 4718) and Dr Jusufbegović (Trial Transcript p 11963).

[764] *See Furundžija* Appeal Judgement, paras 103-107, where the Appeals Chamber agreed with the Trial Chamber finding that the identification of the accused by the victim in that case was satisfactory, because despite minor and reasonable inconsistencies in her identification, there was "in any event [...] other evidence of the Appellant's identity on the basis of which it would be reasonable for the Trial Chamber to be satisfied with the identification of the Appellant" (para 107).

[765] In particular, he refers to: her failure to recollect when she made corrections to a statement made to investigating magistrates in Yugoslavia; her failure to recall being interviewed on television; the fact that her testimony contradicted that of another witness, Milojka Antić, when she stated that she had given her contraceptive pills and that of her physician who stated that he did not recommend for her contraceptive pills.

[766] Trial Judgement, paras 594-598.

[767] Trial Judgement, para 595.

[768] Trial Judgement, para 595.

[769] Trial Judgement, para 596.

[770] Trial Judgement, para 597.

that of the other witnesses) and observing her under cross-examination chose to accep[illegible] testimony as reliable. Clearly it did so bearing in mind its overall evaluation of the nature of the testimony being heard. Although the Trial Chamber made no reference in its findings to the alleged inconsistencies in the victim's testimony, which had been pointed out by Delić, it may nevertheless be assumed that it regarded them as immaterial to determining the primary question of Delić's perpetration of the rapes.[771] The Appeals Chamber can see no reason to find that in doing so it erred.

498. The Trial Chamber is not obliged in its Judgement to recount and justify its findings in relation to every submission made during trial. It was within its discretion to evaluate the inconsistencies highlighted and to consider whether the witness, when the testimony is taken as a whole, was reliable and whether the evidence was credible. Small inconsistencies cannot suffice to render the whole testimony unreliable. Delić has failed to show that the Trial Chamber erred in disregarding the alleged inconsistencies in its overall evaluation of the evidence as being compelling and credible, and in accepting the totality of the evidence as being sufficient to enter a finding of guilt beyond a reasonable doubt on these grounds.[772]

499. Accordingly, these grounds of appeal must fail.

E. Issues 15 and 16: Convictions under Counts 21 and 22

500. Counts 21 and 22 related to repeated incidents of forcible sexual intercourse and rape of Witness A (Ms Antić)[773] over six weeks by Delić. Count 21 charged Delić with a grave breach of the Geneva Conventions (torture) under Article 2 of the Statute. Count 22 charged him with a violation of the laws or customs of war, based on common Article 3 of the Geneva Conventions (torture), under Article 3 of the Statute.

501. Based upon the testimony of Ms Antić, the Trial Chamber identified and discussed in the Judgement three occasions when Ms Antić was raped by Delić. The first time was on the night of her arrival in the Čelebići camp, in Building B, when Delić interrogated her and threatened to shoot her or transfer her to another camp if she did not comply with his orders.[774] The second time occurred in Building A, after Deli} had ordered Ms Antić to wash herself in

---

[771] *See* also Prosecution Response, para 11.14.
[772] *Aleksovski* Appeal Judgement, para 64.
[773] The witness referred to as Witness A in the Indictment did not seek protective measures at trial and was subsequently referred to as Ms Milojka Antić in the Judgement; *See* para 945, Trial Judgement.
[774] Trial Judgement, para 958.

Building B. On that occasion Delić was found to have penetrated her both anally vaginally.[775] The third rape occurred in Building A during the day.[776] The Trial Chamber noted that on the three occasions Delić was in uniform and armed and threatened her.[777] The Trial Chamber also observed that the victim was constantly crying and had to be treated with tranquilizers, and concluded that "there can be no question that these rapes caused severe mental and physical pain and suffering to Ms Antić".[778] The Trial Chamber found that the rape and severe emotional and psychological suffering of Ms Antić was corroborated by the testimony of Ms Ćećez and Dr Gruba~.[779] It also concluded that the purpose of the first rape was to obtain some information and that the rapes were perpetrated by Delić with a discriminatory intent.[780] The Trial Chamber accordingly found Delić guilty of torture under Counts 21 and 22 of the Indictment.[781]

502. Deli} contends that the Trial Chamber erred in relying on the testimony of the victim only, which was not consistent and not credible. He further argues that the Trial Chamber wrongly relied on a "presumption of reliability" in favour of the rape victim who gave testimony in court, thus shifting the burden of proof to the defence to rebut that presumption. He submits that Rule 96(i) of the Rules merely removes a presumption of unreliability of victims of sexual offence but does not create a legal presumption that victims are reliable witnesses, which would be contrary to Article 21(2) of the Statute. Deli} submits that acquittals should be substituted on these counts or that a new trial should be ordered.[782]

503. The Prosecution submits that the testimony of a single witness on a material fact may be sufficient to establish guilt beyond reasonable doubt. Contrary to Deli}'s contention, the Trial Chamber's reference to a presumption of reliability in relation to victims of sexual assault does not imply that the accused is presumed guilty. In the Prosecution's submission, Deli}'s arguments as to unreliability do not demonstrate that the Trial Chamber's findings were unreasonable.[783]

---

[775] *Ibid*, para 960.
[776] *Ibid*, para 961.
[777] *Ibid*, para 963.
[778] *Ibid*, para 964.
[779] *Ibid*, para 959.
[780] *Ibid*, para 963.
[781] The Trial Chamber dismissed Count 23, a violation of the laws or customs of war, with which Deli} was charged in the alternative; *See* para 965.
[782] Deli} Brief, paras 308-319; Deli} Reply, paras 124-128, and Appeal Transcript, pp 502-503.
[783] Prosecution Response, paras 11.15-11.17, and Appeal Transcript, pp 535-538.

504. The arguments put forward by Deli} are primarily concerned with the standard used by the Trial Chamber to assess the testimony of the victim of the sexual assaults perpetrated by him. The relevant paragraph of the Judgement reads:

> The Trial Chamber notes that sub-Rule 96(i) of the Rules, provides that no corroboration of the victim's testimony shall be required. It agrees with the view of the Trial Chamber in the *Tadi} Judgement*, quoted in the *Akayesu Judgement*, that this sub-Rule:
>
> > accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of other crimes, something long been denied to victims of sexual assault by the common law.[784]

505. The Trial Chamber in this paragraph was expressing its agreement with the holding of another Trial Chamber that victims of sexual assault should be considered as reliable as victims of other crimes. The use of the term "presumption of reliability" was inappropriate as there is no such presumption. However, the Appeal Chamber interprets that holding as simply affirming that the purpose of Rule 96(i) is to set forth clearly that, contrary to the position taken in some domestic jurisdictions, the testimony of victims of sexual assault is not, as a general rule, less reliable than the testimony of any other witness. The appellant's argument that the Trial Chamber shifted the burden of proof to the Defence is thus misconceived, as the Trial Chamber did not rely on any "presumption of reliability" to assess the evidence before it. In the paragraph following the one just quoted the Trial Chamber assessed the evidence of Ms Anti} as follows:

> Despite the contentions of the Defence, the Trial Chamber accepts Ms. Anti}'s testimony, and finds, on this basis, and the supporting evidence of Ms.]e}ez, Witness P and Dr. Petko Gruba~, that she was subjected to three rapes by Hazim Deli}. *The Trial Chamber finds Ms. Anti}'s testimony as a whole compelling and truthful, particularly in light of her detailed recollection of the circumstances of each rape and her demeanour in the court room in general and, particularly, under cross-examination.* The alleged inconsistencies between her evidence at trial and prior statements are immaterial and were sufficiently explained by Ms. Anti}. She consistently stated under cross-examination that, when she made those prior statements, she was experiencing the shock of reliving the rapes that she had "kept inside for so many years". Further, the probative value of these prior statements is considerably less than that of direct sworn testimony which has been subjected to cross-examination.[785]

506. As already stated, there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence.[786] What matters is the reliability and credibility accorded to the testimony. Contrary to Deli}'s assertion, the Trial Chamber did not presume that the testimony of Ms Anti} was reliable and credible as it discussed it carefully, and identified particular reasons why it considered her credible. Clearly,

---

[784] Trial Judgement, para 956 (footnote omitted).
[785] Trial Judgement, para 957 (emphasis added).

the testimony of Ms Anti} was ascertained on its individual merit, and treated as the testir of any other witness, and the Trial Chamber was careful to discuss the inconsistencies between prior and live testimony.[787] Moreover, as held above and also in this Judgment, the hearing, assessing and weighing of the evidence presented at trial is primarily vested with the Trial Chamber, which is best placed to ascertain whether a witness is reliable in the circumstances of the case.[788]

507. The Appeals Chamber is of the view that the appellant has failed to demonstrate that the Trial Chamber erred in its evaluation of the evidence, and reached a conclusion that no reasonable tribunal could have reached. Accordingly, these grounds of appeal must fail.

F. Issues 17 and 18: Convictions Under Counts 46 and 47

508. The final convictions against which Delić appeals on the grounds of error of fact are Counts 46 and 47 of the Indictment, which contained the following charges:

> Count 46. A Grave Breach punishable under Article 2(c) (wilfully causing great suffering) of the Statute of the Tribunal; and
>
> Count 47. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.[789]

These charges are based on paragraph 35 of the Indictment, which alleges that:

> [b]etween May and October 1992, the detainees at ^elebi}i camp were subjected to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions by being deprived of adequate food, water, medical care, as well as sleeping and toilet facilities. These conditions caused the detainees to suffer severe psychological and physical trauma...

The Indictment charged Delić under Article 7(1) of the Statute with having directly participated in creating these conditions, and with responsibility as a superior under Article 7(3).

509. The Trial Chamber found that because Delić could not be held responsible as a superior under Article 7(3), he could not be held responsible for the inhumane conditions which prevailed in the camp generally. However, it found that:

---

[786] *See* above para 492.
[787] Trial Judgement, para 957.
[788] *Tadić* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.
[789] Indictment, 19 Mar 1996, para 35.

> [...] by virtue of his direct participation in those specific acts of violence with which he is charge[d] in the Indictment and which the Trial Chamber has found proven above, Hazim Delić was a direct participant in the creation and maintenance of an atmosphere of terror in the Čelebići prison camp.[790]

It therefore found Delić guilty of Counts 46 and 47 under Article 7(1).

510. The Trial Chamber had found Delić guilty of specific acts of violence under Counts 3 and 4 (killing of Željko Milošević), 11 and 12 (wilfully causing great suffering or serious injury to and cruel treatment of Slavko Šušic), 18 and 19 (torture and rape of Ms Ćećez), 21 and 22 (torture and rape of Ms Antić), and 42 and 43 (inhumane acts involving use of electrical device).[791] Although the Appeals Chamber has found that the Trial Chamber erred in finding Delić guilty of Counts 1 and 2 (killing of Šćepo Gotovac), it notes that in overturning the finding that Delić was responsible for the death of Gotovac it did not disturb the Trial Chamber's finding that Delić had participated in the first beating of the victim.

511. The Appeals Chamber observes that in imposing these convictions, the Trial Chamber made a number of findings of specific acts of violence inflicted by Delić, based on the testimony of witnesses who testified as to Delić's direct participation in promoting the atmosphere of terror created by the killings, abuse and inhumane living conditions at the Čelebići camp.

512. The Trial Chamber found that it was proved beyond reasonable doubt that Delić had raped Ms Antić on three occasions in threatening and coercive circumstances.[792] In her testimony, Milojka Antić described in great detail the three occasions on which she had been raped by Delić.[793] As noted above in relation to the grounds of appeal relating to Delić's convictions for the rape of Ms Antić under Counts 21 and 22, the Trial Chamber accepted Ms Antić's testimony as being overall "compelling and truthful"[794] and the Appeals Chamber has accepted that the Trial Chamber acted reasonably in arriving at that conclusion. The Trial Chamber also found that Delić raped Ms Ćećez.[795] Again, the Appeals Chamber has considered this finding in relation to Delić's appeal against his conviction under Counts 18 and 19 of the Indictment and has found that the Trial Chamber considered the testimony of Ms Ćećez, after a

---

[790] Trial Judgement, para 1121.
[791] *Ibid* at para,1285.
[792] Trial Judgement, paras 958-965.
[793] Trial Transcript, pp 1779-1800.
[794] Trial Judgement, para 957.
[795] Trial Judgement, para 936.

discussion of the nature of such evidence, and was not unreasonable in accepting her evid[illegible] and convicting him under those counts.

513. The Trial Chamber found that Delić had participated in the beating of a group of detainees and had ordered at least one guard to do the same.[796] In relation to that incident, a number of witnesses testified that, following the burning of the village of Bradina, Delić ordered as a vindictive measure that all detainees from Bradina be beaten. Evidence as to this and other collective beatings was given by Witness R,[797] Witness F,[798] Witness M,[799] Mirko Đorđić[800] and Hristo Vukalo.[801] This evidence was adduced largely for the purpose of indicating Delić's superior authority, but was not accepted by the Trial Chamber as proving that status. However, it was accepted by the Trial Chamber as being "indicative of a degree of influence Hazim Delić had in the Čelebići prison-camp on some occasions, in the criminal mistreatment of detainees".[802]

514. Delić was also convicted of inhuman treatment and cruel treatment under Counts 42 and 43 of the Indictment for the use of a device emitting electrical current on Milenko Kuljanin and Novica Đorđić.[803] The Trial Chamber found that:

> [...] Hazim Delić deliberately used an electric shock device on numerous prisoners in the Čelebići prison-camp during the months of July and August 1992. The use of this device by Delić caused pain, burns, convulsions, twitching and scaring [*sic*]. Moreover, it frightened the victims and reduced them to begging for mercy from Delić, a man who derived sadistic pleasure from the suffering and humiliation that he caused.[804]

This finding was based on the testimony of at least six witnesses, explicitly identified in the Trial Judgement.[805] Delić's conviction under these counts was not the subject of appeal.

515. The Appeals Chamber has also reviewed the Trial Chamber's findings in relation to Delić's participation in the incidents relating to Šćepo Gotovac. Although the Appeals Chamber has found that the Trial Chamber's finding that Delić was responsible for the death of

---

[796] Trial Judgement, para 804
[797] Trial Transcript, p 7801.
[798] Trial Transcript pp 1323, 1337.
[799] *Ibid* at pp 5048, p 5050.
[800] *Ibid* at pp 4760-4761.
[801] *Ibid* at p 6269.
[802] Trial Judgement, para 806.
[803] Trial Judgement, para 1059.
[804] Trial Judgement, para 1058.
[805] Witness P, Witness B, Witness R, Novica Đorđić, Milenko Kuljanin and Stevan Gligorević. *See* Trial Judgement, paras 1053-1056; based on testimony at Trial Transcript at pp 4560 (Witness P), 5047 (Witness B), 7782 (Witness R) 4197 (Novica Đorđić), 5453 (Milenko Kuljanin) and 1455 (Stevan Gligorević).

Šćepo Gotovac and therefore his conviction under Counts 1 and 2 of the Indictment can stand, it has accepted that the Trial Chamber's finding that Delić was involved in at least one violent beating of Gotovac was clearly open on the evidence.

516. In relation to Counts 11 and 12 which charged the wilful killing and murder of Slavko Šušić, the Trial Chamber found that despite there being a "strong suspicion" that Šušić died as a result of the severe beating and mistreatment inflicted upon him by Delić and Landžo, it was not absolutely clear who inflicted the fatal injuries. As a result the Trial Chamber found Delić and Landžo not guilty of wilful killing and murder but did convict them both of wilfully causing great suffering or serious injury to and cruel treatment on the basis that it was "clear that Delić and Landžo were, at the very least, the perpetrators of heinous acts which caused great physical suffering to the victim".[806] In reaching that finding the Trial Chamber referred to the evidence of four witnesses who had witnessed Delić personally beating Šušić.[807]

517. Although the Trial Chamber did not rely on Delić's involvement in the creation of the prevailing inhumane living conditions at the camp, it did refer in its findings under this count to the testimony of certain witnesses as to Delić's direct participation in creating those conditions. The Trial Chamber described as "compelling" the evidence of Witness R that access to water became increasingly restricted until it reached a stage where "under threat of heavy beatings and even death, not a drop of water could be brought in without the knowledge and permission of the deputy commander Hazim Delic".[808] With regard to the provision of medical care, the Trial Chamber referred specifically to the testimony of Witness R who stated that "when confronted with a request for medical care by a detainee, Hazim Delić would respond "sit down, you have to die anyway, whether you are given medical assistance or not".[809] The Trial Chamber also referred specifically to the testimony of Mirko Dordić as to Delić's participation in creating severely restricted access to toilet facilities:

> Hazim Delic would force us to go to urinate in a group of 30-40 people. We had to run there. Upon his command he would say: 'Take it out. Stop.' This was very short, the time we had.

---

[806] Trial Judgement, para 866.

[807] Trial Judgement, para 864. The transcripts confirm that this was in fact the evidence of the identified witnesses: Grozdana Ćećez (Trial Transcript pp 547-548), Miljoka Antić (pp 1804-1806), Miro Golubović (pp 2132-2134), Witness P (pp 4544-4554).

[808] Trial Judgement at para 1097, referring to Trial Transcript at p 7706-7707.

[809] Trial Judgement at para 1089, referring to Trial Transcript at p 7774. Other evidence given by Witness R in relation to specific persons supports this account: Trial Transcript at pp 7706-7 as did the evidence of other witnesses, *see e.g.*, Nedeljko Draganić who testified that he was injured and that "whenever [he] would ask to go [to the infirmary] so that they could clean the wound, very often Delić would not allow [him] to go". Trial Transcript, p 1631.

> We just ran out and had to run back, so that there were people who just didn't have enough time to finish.[810]

The Trial Chamber referred to the testimony of four other witnesses which confirmed this account.[811]

518. The above evidence, consisting of testimony stating that Delić perpetrated acts of rape and cruelty in the Čelebići camp, led the Trial Chamber to the conclusion that Hazim Delić was very much involved in the abuse and ill-treatment of the detainees at the camp. In particular, the Trial Chamber observed that testimony of the witnesses suggested that on many occasions, he was a direct participant and primary actor in acts of inherent cruelty.

519. However, Delić presents three specific arguments in support of his claim that the convictions under Counts 46 and 47 were not based on factually sufficient evidence. In particular, Delić submits that the Trial Chamber ignored the testimony of Dr Bellas, a forensic pathologist, according to whom there would have been evidence of widespread infectious diseases, deaths or injuries due to heat stroke, or evidence of more injuries, greater severity of injuries and more complications, if the Prosecution's witnesses were truthful.[812] Delić also submits that an Egyptian journalist, Mr Harraz, visited the camp and saw no signs of mistreatment or cruel treatment of the prisoners.[813] Finally, Delić submits that the Trial Chamber should have considered the defence of necessity, which "generally allows a person to break the law—so long as it does not involve the intentional killing of an innocent—so long as the benefit of violating the law is greater than the danger the law is designed to prevent".[814]

520. These arguments could be rejected by reference alone to the fact that they misconceive the basis upon which the Trial Chamber found Delić guilty under Counts 46 and 47 of the Indictment. These arguments focus on the evidence relating to the general conditions in which the detainees were kept. However, as noted above, the Trial Chamber did not find that Delić was responsible generally for the living conditions within the camp. Delić was found guilty under Counts 46 and 47 for having been "a direct participant in the creation and maintenance of an atmosphere of terror in the Čelebići prison-camp" by virtue of each of the specific acts of violence with which he had been charged in the Indictment and which the Trial Chamber had

---

[810] *Ibid* at p 4726, referred to by the Trial Chamber in the Trial Judgement at para 1109.
[811] Trial Judgement, para 1109.
[812] Deli} Brief, para 329 (g).
[813] *Ibid* at para 330.
[814] *Ibid* at para 337.

found to be proved.[815] As already observed, it was clearly open to the Trial Chamber to r those findings on the basis of the evidence before it. The Appeals Chamber will nevertheless consider the specific objections raised by each of the arguments.

521. An examination of the testimony of Dr Bellas reveals that, contrary to Delić's submissions, it is not inconsistent with the witnesses' testimony detailed above. When asked whether, given the conditions in the Čelebići camp, he would have expected to see numerous cases of heat stroke, Dr Bellas replied: "Well, if not numerous, I could expect to have some people with real, real problems about the environmental temperature".[816] This indicates that *numerous* cases of heat stroke need not have resulted. With regard to infectious diseases, Dr Bellas admitted that he was not stating that one would expect to a reasonable medical probability that there would be a cholera epidemic in the camp.[817] He stated that diarrhoea was also an infectious disease, and that some prisoners did in fact suffer from it.[818] He agreed that there are many open wounds that do not develop gangrene,[819] and that some infections remain localized, without spreading to other parts of the body.[820] In addition, he maintained that portions of the transcript indicating that persons lost consciousness and died as a result of beatings were not inconsistent with his medical opinion.[821] He also indicated that rib fractures "can heal spontaneously with time".[822]

522. It is also apparent from the testimony of Dr Bellas that it was difficult for him to be statistically precise about injuries and illnesses, because he was relying on transcripts, not on medical examinations of the victims following these incidents, and a more precise evaluation of each incident depended on crucial factors unknown to him – namely, the degree of force used, the positioning of instruments of force, and the individual resistance of a person. As a result, the Appeals Chamber concludes that it is completely open to a reasonable tribunal of fact to find that this evidence in no way undermines the strength of the evidence concerning Delić's acts of abuse and cruelty.

523. In evaluating Mr Harraz's testimony as to its capacity to undermine the testimony of the witnesses discussed above, it should be noted at the outset that Mr Harraz stated that he

---

[815] Trial Judgement at para 1121.
[816] Trial Transcript at p 13954.
[817] *Ibid* at p 14024.
[818] *Ibid.*
[819] *Ibid* at p 14025.
[820] *Ibid* at pp 13994-13995.
[821] *Ibid* at p 14026.

believed the visit took forty-five minutes to an hour, and that when he talked to a few of the prisoners, officials from the camp were also present.[823] He was not allowed to visit the area reserved for "hard cases".[824] In the large ward, he only "*quickly* scanned the faces of the prisoners".[825] The combination of these factors make it unlikely that Mr Harraz would have been able to perceive evidence of abuse. In addition, the following exchange contained in the transcript is significant:

> Mr Moran (In cross examination): So if someone were to come and say that people were beaten for an hour in front of you and your cameraman, those people would either be mistaken or they would be lying, would they not?
>
> Mr Harraz: I do not know, perhaps they are talking about what happened in front of other reporters. I can only say what happened before me in that place and I think even if any torture, beating or humiliations happened, *I do not think that would happen before cameras.*[826]

524. Mr Harraz also admitted that while the general impression he received was that the camp was not a place where acts of torture were carried out, "of course, the persons in charge of the camp knew that [they] were coming on the next day to visit the camp".[827] These statements reveal that Mr Harraz himself acknowledged that acts of abuse could have been carried out in the camp. Therefore, a reasonable tribunal of fact could not conclude that Mr Harraz's testimony disproves the testimony of the witnesses concerning Delić's acts of violence and mistreatment.

525. Finally, the defence of necessity, also raised by Delić in relation to his convictions under Counts 46 and 47, is simply inapposite. Such a defence could not be used to justify the acts of cruel treatment upon which the Trial Chamber founded these convictions. The Trial Chamber disposed of this argument, correctly, on the basis that the legal standards regulating the treatment of the detainees were "absolute, not relative.[828] They delineate a minimum standard of treatment, from which no derogation can be permitted". Further, as previously observed by the Appeals Chamber, even assuming the existence of a defence of necessity under international

---

[822] *Ibid* at p 13963.
[823] *Ibid* at p 5820.
[824] *Ibid* at p 5830.
[825] *Ibid* at p 5831 (emphasis added).
[826] *Ibid* at p 5895 (emphasis added).
[827] *Ibid* at p 5831.
[828] Trial Judgement, para 1117; *see* also para 1118.

law, it is simply not possible to raise such a defence in relation to an allegation of ac[illegible] mistreatment of detainees for which no justification could exist.[829]

526. Having considered the evidence provided by the above witnesses, the Appeals Chamber can arrive at only one conclusion: the evidence was factually sufficient to support Delić's convictions under Counts 46 and 47 of the Indictment. The evidence overwhelmingly indicates that Delić wilfully caused great suffering to the prisoners (Count 46) and treated them cruelly (Count 47). No reasonable tribunal of fact would conclude merely on the basis of Dr Bellas' and Mr Harraz's testimony that Delić did not commit these acts. As a result, this Chamber cannot hold that the conclusion of guilt beyond a reasonable doubt is one that *no* reasonable tribunal of fact could have reached.

527. For the foregoing reasons, the Appeals Chamber therefore rejects these grounds of appeal and upholds the convictions against Hazim Delić under Counts 46 and 47.

[829] *Aleksovski* Appeal Judgement, para 54.

VIII. THE PROSECUTION INTERVIEWS WITH MUCIĆ

528. Mucić has appealed against (1) a decision by the Trial Chamber admitting into evidence interviews conducted with him following his arrest and (2) a decision by the Trial Chamber refusing to issue a subpoena to an interpreter.[830] Although these decisions were confirmed in the Trial Judgement,[831] the original interlocutory decisions were issued by the Trial Chamber on 2 September 1997 ("the Exclusion Decision")[832] and 8 July 1997 ("the Subpoena Decision")[833] respectively. The Appeals Chamber notes that although Mucić has separated his submissions in relation to each decision, in fact both relate to the same issue, that is whether or not Mucić voluntarily waived the right to have counsel present during certain of his interviews. Mucić's ultimate submission is that the Trial Chamber erred in finding that this waiver was voluntary and as a result, evidence of all of the interviews should have been excluded from the trial proceedings.

(i) Background

529. On 8 May 1997, Mucić filed a motion seeking to exclude from evidence interviews conducted with him following his arrest.[834] Between 2 June and 11 June 1997, the Trial Chamber heard testimony from the Prosecution witnesses through whom these interviews would be admitted. On 2 June 1997, Mucić filed an *ex parte* motion seeking an order compelling an interpreter present throughout the interviews to give evidence. On 12 June 1997, the Trial Chamber heard oral arguments from the parties on the motion to exclude evidence

---

[830] Although Mucić filed his Notice of Appeal on 27 November 1998, on 26 July 1999 he filed the Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić Dated The 2nd July 1999. In this document, he separated this issue into two grounds of appeal, labelled ground 5 (concerning the admission into evidence of Mucić's interviews held from 19 – 21 March 1996) and ground 6 (concerning the refusal of the Trial Chamber to issue a subpoena to an interpreter). By Order dated 31 March 2000 (Order on Motion of Appellants Hazim Delić and Zdravko Mucić for leave to file supplementary brief and on Motion of Prosecution for leave to file supplementary brief), Mucić was ordered *inter alia* to file a document identifying his amended grounds of appeal. On 31 May 2000 this document was filed (Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal) and in doing so he renumbered and re-organised the issues, filing this issue as one ground of appeal (concerning the admission into evidence of the prosecution interviews). The Appeals Chamber will however consider the two separate issues raised by this ground of appeal, noting that in any event they are clearly related.

[831] Trial Judgement, paras 59 and 63.

[832] Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 Sept 1997. The Trial Chamber initially ruled orally on this motion on 12 June 1997 (Transcript, pp 4093 – 4098).

[833] Decision on the Motion *ex parte* by the Defence of Zdravko Mucić Concerning the Issue of a Subpoena to an Interpreter, 8 July 1997.

[834] Motion to Exclude Evidence, 8 May 1997.

following which it made an oral ruling on the same day. On 8 July 1997, the Trial Chamber issued the Subpoena Decision and on 2 September 1997 it issued the Exclusion Decision.

530. In the Exclusion Decision, the Trial Chamber found that statements made by Mucić to the Austrian Police Force on 18 March 1996 ("the First Interviews") should be excluded from evidence as having been obtained in breach of his right to counsel under Article 18 of the Statute and Rule 42 of the Rules. It reached this decision on the basis that Mucić was denied the right to counsel during the First Interviews because the Austrian procedural rules did not recognise the right of a suspect to have counsel present during questioning. However, statements made to Prosecution investigators on 19, 20 and 21 March 1996 ("the Second Interviews") were ruled admissible, on the basis that Mucić was clearly informed of his right under the Rules to have counsel present and he voluntarily waived it.[835]

531. Mucić points out that it is clear that the Trial Chamber relied upon the Second Interviews in the course of its Judgement and consequent conviction of him. However, he submits that as the interviews as a whole[836] amounted "to a course of interviewing conduct which was irrevocably tainted, at least in the mind or consciousness of [Mucić...]; all of the interviews should have been thereby excluded."[837] He submits that the overall objective in considering what is said in interviews is that the Trial Chamber should be fair and that the decision by the Trial Chamber breaches this objective.[838]

(ii) Discussion

532. The Appeals Chamber notes that Mucić does not dispute the overall factual findings of the Trial Chamber with regard to the conduct of both the First Interviews and the Second Interviews.[839] However, as a matter of law, he alleges for several reasons that the Trial Chamber erred in the exercise of its discretion in admitting the Second Interviews, having excluded the First Interviews. The Appeals Chamber recalls that for such a ground of appeal to succeed, although an appellant must discharge an initial burden of raising arguments in support of an alleged error of law with the Appeals Chamber, the Appeals Chamber may proceed to

[835] Exclusion Decision, para 63.
[836] That is, including the First Interviews.
[837] Mucić Brief, Section 2, p 1 (underlining in original).
[838] Appeal Transcript, p 462.
[839] As pointed out by the Prosecution with regard to the Second Interviews in the Prosecution Response, para 16.8.

examine whether or not the alleged error is such that it invalidates the Trial Chamber's decision.[840]

533. As to the Trial Chamber's decision, the Appeals Chamber notes that a Trial Chamber exercises considerable discretion in deciding on issues of admissibility of evidence. As a result, a Trial Chamber should be afforded a certain degree of deference in making decisions based on the circumstances of the case before it. To this extent the Appeals Chamber agrees with the Prosecution submissions on this point during the hearing on appeal.[841] Nevertheless, the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it. Indeed the Appeals Chamber has intervened in the past to do so.[842] In these decisions, the Appeals Chamber confirmed that a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the relevant evidence is reliable. If evidence is admitted and an appellant can subsequently show that prejudice has been caused by a failure by the Trial Chamber to properly apply such protections, then it may be found that the Trial Chamber has erred and exceeded its discretion. This is when Rule 89(D) and Rule 95 of the Rules may come into play and in these circumstances a ground of appeal may succeed.

534. In its oral ruling on the Exclusion Decision, the Trial Chamber found that the Second Interviews were "reliable and admissible [...]. The weight to be attached and the probative value will be determined by considering all the other circumstances in these proceedings."[843] Mucić submits that "it is plain that the Trial Chamber relied upon the second interview in the

---

[840] Article 25(1)(a) of the Statute. *See Furundžija* Appeal Judgement, paras 35-36.

[841] Appeal Transcript, pp 475–476. The Prosecution submits that "[...] in making [...] determination of this final matter, the Trial Chamber is required to weigh all the facts in evidence before it, and in some cases involving issues of this kind, it may be required to receive evidence and hear witnesses, and so in accordance with general principles, it would be necessary to afford a considerable margin of deference to the finding of the Trial Chamber, and it would only be where the decision of the Trial Chamber could be shown to be an abuse of discretion that there would be justification in the Appeals Chamber intervening on appeal."

[842] *See* for example: *Prosecuto v Kordić and Čerkez,* Decision on Appeal Regarding Statement of a Deceased Witness, Case No IT-95-14/2-AR73.5, 21 July 2000; *Prosecutor v Kordić and Čerkez,* Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Case No IT-95-14/2-AR73.6, 18 Sept 2000; *The Prosecutor v Kupreškić et al,* Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, Case No IT-95-16-AR73.3, 15 July 1999.

[843] Trial Transcript, p 4098.

course of [its] judgement."[844] This cannot be disputed. The Trial Chamber, in convicting Mucić under Article 7(3) of the Statute[845] found:

> In his interview with the Prosecution, Mucić admitted he had authority over the camp, at least from 27 July 1992. However, in the same interview he admitted that he went to the prison-camp daily from 20 May 1992 onwards.[846]

535. In addition, it noted that:

> Mucić admitted in his interview with the Prosecution that he was aware that crimes were being committed in the prison-camp at Čelebići in June and July 1992 and that he had personally witnessed detainees being abused during this period.[847]

536. Mucić's argument is that the Trial Chamber erred in the admission of the Second Interviews into evidence. However, as a result of this decision and in its findings in the Trial Judgement, the Trial Chamber relied *inter alia* on this evidence to convict. Accordingly, it is logical to conclude that Mucić's argument must include an allegation that the Trial Chamber also erred in subsequently relying in part on the Second Interviews in this conviction.

537. Mucić's arguments may be summarised as follows. He submits that contrary to the Trial Chamber's findings, the First Interviews and the Second Interviews should have been considered as one continuing event.[848] If they had been, he submits that the Trial Chamber would have found that the Second Interviews should be excluded. As noted above, the First Interviews were excluded because the Trial Chamber found them to be in breach of Mucić's right to counsel during questioning, guaranteed by Article 18 of the Statute[849] and Rule 42 of the Rules.[850] Mucić submits that as he was informed that he had no right to counsel during the First

---

[844] Mucić Brief, Section 2, p 1.

[845] Trial Judgement, para 775.

[846] Trial Judgement, para 737. *See* also, para 767: "Zdravko Mucić had all the powers of a commander to discipline camp guards and to take every appropriate measure to ensure the maintenance of order. Mucić himself admits he had all such necessary disciplinary powers. He could confine guards to barracks as a form of punishment and for serious offences he could make official reports to his superior authority at military headquarters. Further, he could remove guards, as evidenced by his removal of Esad Land'o in October 1992." (Footnotes referring to Trial Exhibit 101-1 – (record of interview with Prosecution) omitted).

[847] Trial Judgement, para 769.

[848] Mucić Brief, Section 2, pp 1, 7-8.

[849] Article 18(3) of the Statute provides: "If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands."

[850] Rule 42(A)(i) of the Rules provides that a suspect shall have "the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it." Rule 42(B) provides that "[q]uestioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."

Interviews, it was not unreasonable to expect that he would believe this prohibition to cont[illegible] to apply in the Second Interviews, despite the fact that he had been informed to the contrary. Such expectation arose from the fact that the interviews were conducted very close together. He was in a foreign country and should not have been expected to perform "the necessary intellectual gymnastics to give informed consent" to the Second Interviews, when he had been informed he was not entitled to be represented by counsel in the First Interviews.[851] He submits that although he may have stated that he did not want counsel present in the Second Interviews, this waiver was neither informed nor voluntary. He argues that in considering whether or not he voluntarily waived the right to counsel in the Second Interviews, the Trial Chamber should have applied a subjective test and found that in the circumstances, his consent was not voluntary.

538. Several issues arise. Initially, the Appeals Chamber notes that Mucić relies considerably on precedent drawn from the United Kingdom. The Appeals Chamber recalls that reference to principles applied in national jurisdictions can be of assistance to both Trial Chambers and the Appeals Chamber in interpreting provisions of the Statute and the Rules.[852] However, Rule 89(A) of the Rules expressly provides that the Chambers "shall not be bound by national rules of evidence." What is of primary importance is that a Trial Chamber "apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."[853] The Appeals Chamber notes that the Trial Chamber found that implicit in this principle was "the application of national rules of evidence by the Trial Chamber."[854] On the contrary, the Appeals Chamber confirms that rules of evidence as expressly provided in the Rules should be primarily applied, with the assistance of national principles only if necessary for guidance in the interpretation of these Rules.

539. The particular precedent relied upon by Mucić concerns generally the exclusion of evidence of interviews obtained by oppression, in circumstances likely to render them unreliable or which would render it unfair to the accused to admit it. In particular he refers to Section 76(2) and Section 78(1) of the Police and Criminal Evidence Act 1984 ("PACE")

---

[851] Mucić Brief, Section 2, p 11.

[852] *See* for example, *Furundžija* Appeal Judgement, paras 183-188; *Aleksovski* Appeal Judgement, para 186.

[853] Rule 89(B) of the Rules. Although strictly speaking this relates to "cases not otherwise provided for" in Section 3 of the Rules (the title being "Rules of Evidence") nevertheless, the general principle is important. *See Prosecutor v Kordić and Čerkez,* Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Case No IT-95-14/2-AR73.6, 18 Sept 2000, para 22. *See* also Prosecution Brief, paras 12.11 and 16.11.

[854] Exclusion Decision, para 34.

applicable in the United Kingdom.[855] Although the principles drawn therefrom may arguably be of some assistance, the Appeals Chamber turns primarily to Rule 89(D) and Rule 95 of the Rules, which expressly apply to this issue.

> **Rule 89(D)**
>
> A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.
>
> **Rule 95**
>
> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antiethical to, and would seriously damage, the integrity of the proceedings.

540. The Appeals Chamber notes that the Trial Chamber correctly referred to these Rules in its consideration of the interviews. It found that:

> where the probative value of [...] evidence is substantially outweighed by the need to ensure a fair trial, it ought to be excluded – Sub-rule 89(D). Also to be excluded by Rule 95, is evidence obtained by means contrary to internationally protected human rights.[856]

It further found that Rule 95 of the Rules in particular enables "the exclusion of evidence antiethical to and damaging, and thereby protecting the integrity of the proceedings."[857] The Appeals Chamber can see no reason why the Trial Chamber should be required to look elsewhere for the applicable legal principles.

541. During the hearing on appeal, the Appeals Chamber questioned the parties as to whether or not it would have been appropriate for the Trial Chamber to hold a *voir dire* to resolve this issue. It was stated that "the very issue of whether or not something is voluntary is the prime example of where a voir dire is often taken"[858] so that for example in this case, Mucić could

---

[855] Section 76(2) PACE provides: "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained – (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid." Section 78(1) PACE provides: "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

[856] Exclusion Decision, para 35.

[857] Exclusion Decision, para 44.

[858] Appeal Transcript, p 482.

have been provided with the opportunity to "explain what was affecting his mind."[859] Appeals Chamber notes that although there is no express provision in the Rules for such procedure, it is generally available in, *inter alia*, common law jurisdictions. It allows for arguments and evidence to be brought before the court solely on a defined issue and would provide an accused with the opportunity to give evidence on a limited basis, prohibiting questions beyond the issues raised. It would ensure in general that arguments and evidence led be confined to the issue in dispute and not extend to discussion of the facts of the case itself.[860]

542. The Appeals Chamber notes that during proceedings at first instance, the possibility of resolving this issue by way of *voir dire* was in fact raised.[861] In Mucić's motion to exclude the First Interviews and Second Interviews from evidence[862] he submitted that "the appropriate way of dealing with [this issue of admissibility] is that there should be a hearing by way of *voire* [*sic*] *dire* (or 'trial-within-a-trial')".[863] However, he did not submit specifically that in doing so, he wished to have the opportunity to give evidence personally. On the contrary, he submitted generally that this procedure would allow both parties to "call evidence and have witnesses examined, cross-examined and re-examined in the normal way."[864] At that point, he submitted that it would "be apparent that further oral argument [...would] then be appropriate."[865]

543. As stated, this procedure is not expressly provided for in the Rules. However, this does not mean that it would be unsuitable for a Trial Chamber to utilise it if in a particular case it thought it appropriate. In this case, relevant evidence on the issue could be obtained through the testimony of the investigators, including the Prosecution investigators, the interpreter (see below) and Mucić. The Appeals Chamber notes that three witnesses gave evidence on behalf of the Prosecution regarding the circumstances leading up to the Second Interviews, including two of the Prosecution investigators who questioned Mucić during the Second Interviews.[866] The Appeals Chamber has been directed to no record of any occasion when Mucić suggested that he himself wished to give evidence. Indeed during the hearing on appeal, his counsel submitted

---

859 Appeal Transcript, p 483.

860 *See* for example, Archbold 2000 (Sweet and Maxwell Limited, 2000), paras 15-360 – 15-365.

861 The Appeals Chamber also notes that during the hearing on appeal, both parties appeared unaware of the fact that this issue had been specifically raised at first instance.

862 Motion to Exclude Evidence, 8 May 1997.

863 Motion to Exclude Evidence, 8 May 1997, para 18.

864 Motion to Exclude Evidence, 8 May 1997, para 18.

865 Motion to Exclude Evidence, 8 May 1997, para 18. *See* also Trial Transcript, pp 2770-2771.

866 Lieutenant Geschwendt (an officer with the Austrian police), gave evidence on 4 and 5 June 1997. Mr Aribat, a Prosecution investigator gave evidence on 2 June 1997 and Mr d'Hooge, another Prosecution investigator gave evidence on 3 and 11 June 1997. A second Austrian Police Officer, Moerbauer also gave evidence on 5, 9 and 10 June 1997.

that in the circumstances of proceedings before the Tribunal such a procedure in general is inappropriate as both the finders of fact and law are the same tribunal.[867]

544. Nevertheless, although the Appeals Chamber does not agree with the latter assertion and notes that this procedure could in theory have been employed by the Trial Chamber to resolve the matter, the Appeals Chamber makes no finding that the Trial Chamber erred in failing to do so. Nor does it find that Mucić should have specifically requested that he be permitted to give evidence on this limited basis.[868] It does however point out that in any event, evidence in relation to the issue in dispute was heard by the Trial Chamber in the course of the Trial and relied upon by it in both decisions.

545. As stated above, Mucić submits that the Trial Chamber should have considered the First Interviews and the Second Interviews as one continuing event and that because Mucić must have done so, the reasons for excluding the First Interviews applied to the Second Interviews. He submits that the interviews as a whole amounted to a course of interviewing conduct which was irrevocably tainted, at least in his mind, and that therefore both sets of interviews should have been excluded. During the hearing on appeal Mucić supplements his arguments by stressing that the issue should have been approached, taking "as the base point complete fairness."[869]

546. On the contrary, the Prosecution submits that the First Interviews do not affect the Second Interviews because before the Austrian authorities the accused had no "right" to have counsel present. The Trial Chamber recognised this and ruled that the First Interviews should be excluded. However, Mucić did have a right to have counsel present in the Second Interviews as they were conducted for the purposes of proceedings before the Tribunal. The Prosecution submits that he was clearly informed of this right and that it is clear that he voluntarily waived it.[870] Accordingly, the Trial Chamber did not abuse its discretion in the Exclusion Decision.

547. The Trial Chamber found:

> It is clear on the evidence before the Trial Chamber that there were two interviews of the suspect. [...] T here i s evidence that the Austrian Police conducted their investigation and gave the caution and rights of the suspect under Austrian law. The interview with the Prosecution was conducted in accordance with the Rules. There is no doubt [...] that

---

867 Appeal Transcript, p 488.

868 As stated elsewhere in this Judgement, an accused before the Tribunal has an absolute right to remain silent during his or her trial (Rule 85(C)).

869 Appeal Transcript, p 466.

870 Prosecution Brief, paras 16.7-16.19.

> different teams conducted each interview. [...] The contiguity of time and the environment around which they took place should not obscure the fact that there were two independent and separate interviews of the suspect. The interview by the Prosecution cannot be regarded as a continuation of the interview of the Austrian Police. The interview of the Austrian Police was directed towards the extradition of the Accused. That of the Prosecution towards establishing substantive offences within the jurisdiction of the International Tribunal. The purposes are distinct and different.[871]

548. The Appeals Chamber can find no error in these findings and finds that the contention that Mucić could subjectively have regarded the First Interviews and the Second Interviews as one continuous event cannot be borne out. The Trial Chamber found that the First Interviews were conducted by the Austrian police over one day, specifically in relation to extradition proceedings. The Second Interviews were conducted by different investigators, in the absence of the Austrian police officers, over the next three days, for a different purpose and at different times. At the start of the Second Interviews Mucić was informed that it was being conducted by investigators from the Office of the Prosecutor of the Tribunal. It is clear to the Appeals Chamber that as found by the Trial Chamber, the interviews were at all times conducted separately and distinctly. Accordingly there can be no reason to find that Mucić could have been led to believe that they were one continuing interview. The Appeals Chamber can find no error in the Trial Chamber's analysis.

549. Mucić submits that the Trial Chamber erred in rejecting any argument that his cultural background and the fact that he was under arrest in a foreign country should be considered in determining if he voluntarily waived the right to remain silent.[872] He submits that the Trial Chamber should have applied a subjective test in considering the admissibility of the Second Interviews and that it erred in solely applying an objective test in interpreting the Rules.[873] "The fact that somebody is being interviewed in a language other than his, probably in a jurisdiction or a place [of] which he has no cultural or personal knowledge, and the fact that he is being interviewed about matters which have arisen from an extraordinary and extra-national set of circumstances [...] is very germane."[874] He submits further that this impacted on his decision making and because the First Interviews were excluded, the logical consequence should be that he would have considered the same rules to apply in the Second Interviews.[875] He also submits

---

871 Exclusion Decision, para 40.
872 Mucić Brief, Section 2, p 9; Appeal Transcript, pp 464-466.
873 Mucić Brief, Section 2, p 7.
874 Appeal Transcript, p 465.
875 Mucić Brief, Section 2, p 10.

that although Rule 42 of the Rules may have been read to him, it is not the words that mat[illegible] a legal context but the full implication of the effect of the words.[876]

550. The Trial Chamber found:

> [...] the cultural argument difficult to accept as a basis for considering the interpretation of the application of the human rights provisions. The suspect had the facility of interpretation of the rights involved in a language which he understands. Hence, whether he was familiar with some other systems will not concern the new rights interpreted to him. If we were to accept the cultural argument, it would be tantamount to every person interpreting the rights read to him subject to his personal or contemporary cultural environment. The provision should be objectively construed.[877]

551. The Appeals Chamber again finds that Mucić has failed to satisfy the Appeals Chamber that the Trial Chamber erred in this reasoning. Rule 42 of the Rules provides that a suspect must be informed prior to questioning of various rights, including the right to be assisted during questioning by counsel of the suspect's choice.[878] It further provides that questioning must not continue in the absence of counsel unless a suspect has voluntarily waived the right to have counsel present.[879] This right is neither ambiguous nor difficult to understand. As long as a suspect is clearly informed of it in a language he or she understands, the Prosecution fulfils its obligations. Contrary to Mucić's submissions,[880] an investigator is not obliged to go further.

552. In this regard, the Trial Chamber expressly found that there is no duty incumbent on an investigator to explain in greater depth the implications of Rule 42, "the duty is only to interpret to the suspect the rules in a language he or she understands."[881] As pointed out by the Prosecution, "[p]rovided that the suspect's rights are explained in a language that the suspect understands, it shouldn't matter in what country the suspect is at the time, particularly in the case of an international tribunal which may interview suspects in many different countries and which has a legal system that's different to that in any particular national jurisdiction."[882]

553. The Appeals Chamber agrees with the interpretation by the Trial Chamber that the Rule should be construed objectively. However, it also notes that even if it were to consider the admissibility of the Second Interviews on the basis of a "subjective standard of informed consent" (which it has found is not the appropriate test), nevertheless, a submission that Mucić

---

876 Mucić Brief, Section 2, p 10.
877 Exclusion Decision, para 59.
878 Rule 42(A)(i) of the Rules.
879 Rule 42(B).
880 Mucić Brief, Section 2, pp 10-11.
881 Exclusion Decision, para 58.
882 Appeal Transcript, p 480.

suffered from cultural and linguistic problems resulting in involuntary waiver has foundation. Mucić did not dispute that he had been living in Austria for several years prior to his arrest. This was conceded on his behalf before the Trial Chamber, together with the fact that as a result he "was no doubt familiar with the street-wise ways of that country."[883] In addition, he was provided with the assistance of an interpreter throughout the course of the interviews, while also speaking with a lawyer on one occasion (see below). In these circumstances, there can be no basis for an argument that based on a subjective test, he may have had difficulty in understanding the fact that he had a right to counsel in the Second Interviews.

554. The Appeals Chamber finds that it has no reason to doubt that Mucić was fully aware of the fact that although he did not have a right to counsel in the First Interviews, he did have such a right in the Second Interviews. Accordingly, it finds no error in the Trial Chamber's findings that there is clear evidence that Mucić expressed a wish to be interviewed without counsel. The Appeals Chamber finds most persuasive the fact that the record shows that Mucić was informed on numerous occasions that he had a right to have counsel present while being interviewed and on each occasion declined. The Trial Chamber found that there was evidence that "several times during the interview, the suspect was asked whether he was prepared to carry on without counsel, and on each occasion he unequivocally answered in the affirmative.[884] Even when counsel [...] assigned to him appeared to assist him, the Accused indicated he did not need his assistance, and he left."[885] As submitted by the Prosecution, Mucić "manifested all the indicia of understanding and of voluntarily waiving his rights."[886] Mucić has failed to establish that the evidence illustrates that he could have been confused regarding his right to have counsel present and the Appeals Chamber can find no error in the same conclusion reached by the Trial Chamber.

555. Finally, as to Mucić's argument that fairness should be the base point in considering the admissibility of the interviews, the Appeals Chamber does not dispute such a contention. However, it also finds no reason to hold that the Trial Chamber failed to apply this principle. It

---

[883] Transcript, p 4026. Counsel proceeds to state:" [...] but the fact of the matter is that over a period of four days he was subjected to two quite different cultures. [...]. Within a space of four days he was subjected to those two quite distinct systems, which, in my respectful submission, are pretty well opposed to one another in the terms of the kinds of rights that they afford." Transcript, pp 4026-4027.

[884] In particular, the Appeals Chamber notes Trial Exhibit 101-1, pp 1, 14, 33, 52. The Appeals Chamber notes the following exchange on pp 51-52 as being exemplary of Mucić's attitude to the Second Interviews: "Investigator (interpreted): [...]. Do you agree to continue the interview tomorrow? Mucić: By all means. Investigator (interpreted): You have a choice. Mucić: I want to continue it. Investigator (interpreted): So, you agree to continue the interview tomorrow morning? Mucić: Yes."

[885] Exclusion Decision, para 62.

is not disputed that a Trial Chamber should not admit relevant evidence if in doing so the accused's right to a fair trial is violated. If admission of evidence is outweighed by the need to have a fair trial, then Rule 89(D) and Rule 95 of the Rules provide a mechanism for exclusion. As seen above, these provisions were specifically applied by the Trial Chamber in its consideration of both the First Interviews and the Second Interviews. In particular, the Trial Chamber pointed out that "[t]here is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95."[887] However it also found for the reasons set out above, that there was no reason to conclude in this case that the Second Interviews fell within the provisions of either Rule violating Mucić's right to a fair trial such that they should have been excluded. The Appeals Chamber can find no error in the Trial Chamber's decision.

(iii) Rejection of the request to issue a subpoena

556. Mucić submits that the Trial Chamber erred in refusing to issue a subpoena to the interpreter, Alexandra Pal. It was recorded that at 15:10 on 19 May 1996, Mucić expressed a desire to have counsel present during the Second Interviews. At 15:30 on the same day, the Second Interviews began and it was recorded that contrary to his previously expressed wish, he was in fact happy to be interviewed un-represented. In reading Mucić his rights at the start of the Second Interviews, the Prosecution investigators asked, *inter alia*: "do you agree to answer our questions without the presence of an attorney, *in accordance with our previous conversation*?"[888] Mucić submits that this remark refers to a previous conversation which he alleges must have taken place during the twenty minute gap immediately before the Second Interviews began, during which an unrecorded exchange took place between the Prosecution investigators and Mucić while the investigators were setting up their equipment. It is alleged that because Mucić changed his mind during this short period of time, "something was said and/or done to persuade him to" do so.[889] It is submitted that the interpreter present in this interval could have testified as to the contents of any such conversation and consequently the reason for Mucić's sudden change of mind and decision finally to proceed without counsel.[890]

---

[886] Prosecution Brief, para 16.19.
[887] Exclusion Decision, para 41.
[888] Mucić Brief, Section 2, p 12 (emphasis added).
[889] Mucić Brief, Section 2, p 13.
[890] Mucić Brief, Section 2 p 13.

It is ultimately alleged that whatever was said resulted in Mucić involuntarily waiving the [redacted] to counsel.[891]

(iv) Discussion

557. These arguments were brought before the Trial Chamber in an *ex parte* motion,[892] and on 8 July 1997 it decided that it would not issue this subpoena. It determined that:

> [...] [t]he Trial Chamber is not satisfied that the Defence has established that there is indeed an omission in the record of proceedings of the interview of Mucić. The Defence has alleged an unrecorded interrogation and founded its allegation on suppositions of what might have been said or done therein. This is clearly not a satisfactory ground on which to base the application. There is no undisputed evidence of the "previous conversation" alleged to have taken place.[893]

558. The Appeals Chamber agrees. As pointed out by the Trial Chamber, an application to issue a subpoena may be granted under Rule 54 of the Rules if an applicant shows "that the order is necessary for the purposes of investigation. Alternatively, it must be shown that it is necessary for the preparation or conduct of the trial."[894] The Trial Chamber found that it was "not persuaded by the contention [...] that the only way to fill the [alleged] gap [...] is through testimony of the interpreter."[895] It found that based on the evidence before it, it could not be satisfied that "an order is necessary for investigation into the evidence of whether there was a previous conversation and the context of such a conversation."[896] In fact, the Appeals Chamber notes that as also found by the Trial Chamber, Mucić had "founded [his] allegation on supposition of what might have been said or done therein",[897] and simply speculated as to what may have occurred.[898] The Appeals Chamber agrees that there could be no error in a finding that such speculation cannot discharge the burden under Rule 54 of the Rules to persuade a Trial Chamber to issue a subpoena.

559. However, the Appeals Chamber also notes that this allegation was in any event not left unchallenged. Although as noted above, it appears that Mucić did not request that he should be

---

[891] Mucić Brief, Section 2 p 13.
[892] *See* "Background" Section above.
[893] Subpoena Decision, para 16.
[894] Subpoena Decision, para 12. Rule 54 of the Rules provides in full: "At the request of either party, or *proprio motu,* a Judge or a Trial Chamber may issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial."
[895] Subpoena Decision, para 15.
[896] Subpoena Decision, para 16.
[897] Subpoena Decision, para 16.

provided with the chance to testify before the Trial Chamber on this sole issue in the conte... a *voir dire* and in fact he could not be required to have done so, nevertheless, he was provided with the opportunity to challenge the Prosecution investigators present at the time as to whether or not this alleged conversation took place. During their testimony the allegation was denied and it was stated that any conversation with Mucić was simply to inform him in general terms of his rights during interview.[899] The Trial Chamber was entitled to assess this evidence and find that it was reliable and credible.[900] The Appeals Chamber cannot accept a general allegation by Mucić that simply because they work for the Prosecution, "the investigators who gave evidence...would have a motive to conceal what had caused this sudden change of mind."[901]

560. However, it is clear to the Appeals Chamber that the allegation that Mucić was improperly persuaded by the Prosecution investigators to refuse the assistance of counsel, is primarily rebutted by the fact that throughout the Second Interviews it is recorded that he repeatedly asserted that he was happy to be interviewed un-represented.[902] Ultimately, this satisfied the Trial Chamber that his consent was voluntary and refuted any allegation or speculation to the contrary. The Trial Chamber found in the Exclusion Decision:

> There is no doubt the Accused understood that he had a right to counsel during the interview. It was obvious also that he was aware of his right to waive the exercise of the right to Counsel. It appears to us obvious that the suspect voluntarily waived the exercise of the right to counsel. The Defence has not established to the satisfaction of the Trial Chamber that the discussion of the unrecorded portion of the interview was responsible for the exercise by the suspect of his right to waive the exercise of his right to counsel. It would be dangerous to act on the several ingenious speculations of Defence Counsel as to what could have transpired.[903]

---

[898] *See* also, later in the Exclusion Decision where the Trial Chamber found that "[t]he challenge by the Defence of the waiver of the right to counsel is based on speculation of what might have transpired [...]". Exclusion Decision, para 62.

[899] *See* Trial Transcript, pp 3211-3305 (testimony of Mr Aribat in which he denies that the alleged conversation took place). Mucić submits that because Mr Aribat knew at the start of the interviews that Mucić did not want a lawyer, he must have had a conversation with Mucić regarding this in the twenty minute period before the interview began. At trial his counsel submitted that "something did happen in those twenty minutes, something which Mr Aribat has concealed [...] and that the only possible and proper inference to draw [...] is that something did take place, and it was oppressive, and it was designed to get him to agree not to have a lawyer." (Transcript, pp 4037-4039).

[900] *Tadić* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.

[901] Mucić Brief, Section 2, pp 14-15. The Appeals Chamber notes that such a finding would mean that all Prosecution employees must be viewed as being *prima facie* unreliable, simply by virtue of their job.

[902] This wish is also illustrated by the fact (referred to in paragraph 554 above) that although he was provided with the assistance of counsel, Mucić still preferred to continue un-represented.

[903] Exclusion Decision, para 63.

561. The Appeals Chamber agrees and finds that Mucić has failed to put forward any re. as to why the Trial Chamber erred in making this finding. Save for the so-called "ingenious speculations", he has failed to establish how the evidence of the interpreter could refute these findings and was necessary for the investigation or conduct of the trial, such that the Trial Chamber would be justified in issuing a subpoena under Rule 54 of the Rules.

562. Mucić also challenges the finding of the Trial Chamber that in principle an interpreter should not be called to give evidence as it could compromise his or her integrity or independence.[904] This independence is guaranteed by the requirement under Rule 76 of the Rules for an interpreter to solemnly declare to act independently and impartially.[905] The Appeals Chamber notes that in the Trial Judgement the Subpoena Decision was summarised as finding that:

> (1) the interpreter cannot be relied upon to testify on the evanescent words of the interpretation in the proceedings between the parties; and (2) it is an important consideration in the administration of justice to insulate the interpreter from constant apprehension of the possibility of being personally involved in the arena of conflict, on either side, in respect of matters arising from the discharge of their duties.[906]

Although the findings are summarised as being two-fold, the Appeals Chamber concludes that in fact the Trial Chamber's primary reason for refusing to issue the subpoena rested on its determination discussed above. That is, that save for a vague speculative assertion, Mucić had failed to put forward any reason as to why further investigation into the alleged previous conversation "was necessary to the proceedings," justifying the issuance of a subpoena to the interpreter.[907] It did however proceed to examine the circumstances in which an interpreter could in theory be called to give evidence. In doing so, it stated that although it was not the case that an interpreter could never be called to give evidence,

> [...] this would depend on one of the following factors. First, there should be a legal duty on [... the interpreter] to make a record of the interpretation between the parties; secondly, in the interest of justice, there should be no other way of obtaining the evidence sought other than through the testimony of the interpreter; or thirdly, the determination of the issue should depend entirely on the evidence to be given by the interpreter.[908]

563. The Appeals Chamber sees no reasons to dispute this finding. As pointed out by the Trial Chamber:

---

[904] Mucić Brief, Section 2, p 13.
[905] Rule 76 of the Rules provides in full: "Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality."
[906] Trial Judgement, para 59.
[907] Subpoena Decision, para 16.
[908] Subpoena Decision, para 17.

> [i]t would not only be undesirable but also invidious to compel an interpreter into the arena of conflict on behalf of either party to the proceedings, for the determination of an issue arising from such proceedings. It should not be encouraged where other ways exist for the determination of the issue.[909]

Although these findings may have contributed to the Trial Chamber's ultimate decision, they were secondary considerations. In view of the aforementioned primary reason for refusing to issue the subpoena, the Appeals Chamber finds that it is not necessary to discuss in detail Mucić's further submissions on this issue.

564. For these reasons, the Appeals Chamber can see no reason to find that the Trial Chamber abused its discretion in admitting into evidence the Second Interviews and in refusing to issue a subpoena to the interpreter. Further, it can find no error in the Trial Chamber subsequently relying *inter alia* on the Second Interviews to convict Muci}. The Appeals Chamber agrees with the overall finding by the Trial Chamber that the evidence illustrates that Mucić was fully informed of his right to have counsel present in the Second Interviews and that he voluntarily waived it. The Trial Chamber did not err in refusing to issue a subpoena to the interpreter and in admitting the Second Interviews. This ground of appeal is therefore dismissed.

IX. DIMINISHED MENTAL RESPONSIBILITY

A. Background

565. Landžo was found guilty of grave breaches of the Geneva Conventions by reason of his wilful killing of three detainees in the Čelebići prison camp – Šćepo Gotovac,[910] Simo Jovanović,[911] and Boško Samouković[912] – and of violations of the laws or customs of war by reason of their murders.[913] The Trial Chamber made findings that the death of each of these three detainees resulted from severe or brutal beatings.[914] The beating of Gotovac by Landžo himself was accompanied by the act of pinning a metal badge to the victim's head, and it was so merciless that the victim was unable to walk, and he died a few hours later as a result of his

[909] Subpoena Decision, para 20.
[910] Count 1.
[911] Count 5.
[912] Count 7.
[913] Counts 2, 6 and 8.
[914] Trial Judgement, paras 818, 841, 855.

injuries.[915] Landžo was found guilty as an accessory to the "prolonged and vicious" beating of Jovanović which caused his death, an accessory who had knowingly facilitated the beating inflicted by others.[916] The beating of Samouković by Landžo himself was carried out with a wooden plank about a metre long and five or six centimetres thick, and it lasted for about twenty minutes until Samouković fell down.[917] The beating caused broken ribs and the death of the victim shortly thereafter.[918] It was described by the Trial Chamber as merciless as well as brutal.[919]

566. Landžo was also found guilty of grave breaches of the Geneva Conventions by reason of his torture of Momir Kuljanin,[920] Spasoje Miljević,[921] and Mirko Đorđić,[922] and of violations of the laws and customs of war by reason of that torture.[923] The Trial Chamber made findings that Landžo had forced Kuljanin to hold a heated knife in his hand, causing a serious burn to his palm, and that he then cut the victim's hand with the knife twice, for the purposes of punishing and intimidating him.[924] Landžo put a gas mask on the head of Miljević (apparently to prevent his cries being heard by others), tightening the screws to such an extent that the victim felt suffocated, and then he repeatedly heated a knife and burnt the victim's hands, left leg and thighs. He next kicked and hit Miljević, and then he forced him to eat grass, as well as filling his mouth with clover and forcing him to drink water.[925] The Trial Chamber said that it was appalled by the cruel nature of Landžo's conduct.[926] Landžo forced open Đorđić's mouth and inserted a pair of heated pincers, burning the victim's mouth, lips and tongue.[927] He also forced Đorđić on a number of occasions to do push-ups, usually ten at a time but sometimes as many as fifty,[928] as well as subjecting him to more general mistreatment.[929]

567. Landžo was found guilty of grave breaches of the Geneva Conventions as well by reason of great suffering or serious injury to body or health caused to Slavko Šušić[930] and

---

[915] *Ibid,* paras 823, 1273.
[916] *Ibid*, paras 842, 845.
[917] *Ibid*, paras 851-852.
[918] *Ibid,* para 852.
[919] *Ibid*, para 855.
[920] Count 15.
[921] Count 24.
[922] Count 30.
[923] Counts 16, 25 and 31.
[924] Trial Judgement, paras 918, 921, 923.
[925] *Ibid,* paras 971, 974.
[926] *Ibid*, para 976.
[927] *Ibid*, para 995, 996.
[928] *Ibid*, para 995, 997.
[929] *Ibid,* para 998.
[930] Count 11.

Nedeljko Draganić,[931] and of violations of the laws or customs of war by reason of their treatment.[932] The Trial Chamber found that Landžo had taken part in the serious mistreatment of Šušić over a continuous period during the course of one day,[933] and that he had perpetrated "heinous acts which caused great physical suffering" to Šušić,[934] but it did not make clear precisely which acts of those alleged that it had accepted. Some of the evidence given in relation to the treatment of Šušić was criticised by the Trial Chamber, but it did not criticise evidence that Landžo pulled out Šušić's tongue with some kind of implement and that he beat him.[935] Landžo had been charged in relation to the death of Šušić, but the Trial Chamber was not satisfied that his death had resulted from the beatings and mistreatment of Landžo. These verdicts were entered in lieu of convictions upon the charges laid in the Indictment alleging wilful killing and murder, upon the basis that these lesser offences were included within those charged.[936] The Trial Chamber also found that on one occasion Landžo, with others, tied Draganić's hands to a beam in the ceiling of a hangar, and that the victim was hit with wooden planks and rifle butts. Thereafter, Draganić was beaten by Landžo almost every day, usually with a baseball bat, and he was forced, with other detainees, to drink urine. On another occasion, Landžo poured gasoline on Draganić's trousers when the victim was in a seated position, and he set the trousers alight. Draganić's legs were badly burnt.[937]

568. Finally, Landžo was also found guilty of grave breaches of the Geneva Conventions by reason of great suffering or serious injury to body or health caused to other detainees in the Čelebići prison camp,[938] and of violations of the laws or customs of war by reason of their cruel treatment.[939] These counts were expressed in general terms, alleging that the detainees at the Čelebići prison camp had been subjected to an atmosphere of terror created by the killing and abuse of a number of them.[940] In finding Landžo guilty of these charges, the Trial Chamber relied upon the findings which it had made against him in relation to the specific counts.[941] The Trial Chamber found that the other detainees had continuously witnessed the most severe physical abuse being inflicted on defenceless victims, and that they had been obliged to observe

---

[931] Count 36.
[932] Counts 12 and 37.
[933] Trial Judgement, para 861.
[934] *Ibid,* para 866.
[935] *Ibid,* paras 863-864.
[936] *Ibid,* para 866.
[937] *Ibid,* paras 1016-1018.
[938] Count 46.
[939] Count 47.
[940] Indictment, para 35.
[941] Trial Judgment, paras 1086-1087.

helplessly the horrific injuries and suffering caused by the mistreatment.[942] By their exposu these conditions, the Trial Chamber found, the detainees were compelled to live with the ever-present fear of being killed or subjected to physical abuse themselves.[943] Their sense of physical insecurity and fear was aggravated by threats made by the guards (including Landžo).[944] The Trial Chamber found that, through the frequent cruel and violent deeds which were committed, aggravated by the random nature of those acts and the threats made by guards, the detainees had been subjected to an immense psychological pressure which could accurately be characterised as "an atmosphere of terror".[945]

569. Landžo admitted having committed some of the acts which formed the basis of his convictions; he was unable to recall some others, and some acts he denied. These findings by the Trial Chamber leading to Landžo's convictions were not challenged by him on appeal.

570. The findings were repeated in substance when the Trial Chamber considered Landžo's sentence. It went on to describe the charges upon which he was convicted as being "clearly of the most serious nature".[946] Reference was made to the "savagery" of Landžo's killing of Gotovac, and the "sustained and ferocious" nature of his fatal attack upon Samouković.[947] In addition to the specific acts referred to in these findings, the Trial Chamber noted that Landžo also contributed substantially towards the atmosphere of terror prevailing in the Čelebići camp through his brutal treatment of the detainees. The beatings and other forms of mistreatment, the Trial Chamber said, were inflicted "in a manner exhibiting some imaginative cruelty as well as substantial ferocity".[948] Many of the victims of, and witnesses to, his conduct bore permanent physical and psychological scars of Landžo's cruelty.[949] The Trial Chamber commented that Landžo's apparent preference for inflicting burns upon detainees exhibited sadistic tendencies and clearly required premeditation,[950] and that he took some perverse pleasure in the infliction of great pain and humiliation.[951]

---

[942] *Ibid*, para 1086.
[943] *Ibid*, para 1087.
[944] *Ibid*, para 1089.
[945] *Ibid*, para 1091.
[946] *Ibid*, para 1272.
[947] *Ibid*, para 1273.
[948] *Ibid*, para 1272.
[949] *Ibid*, para 1273.
[950] *Ibid*, para 1274.
[951] *Ibid*, para 1281.

571. Landžo was sentenced to imprisonment for various periods, to be s[illegible] concurrently.[952] His effective sentence is imprisonment for fifteen years.

B. The Issues on Appeal

572. Landžo's principal defence to the charges was what has been described as the "special defence of diminished mental responsibility". Both Landžo and the Trial Chamber appear to have assumed the existence of such a defence in international law by reason of Rule 67(A)(ii)(b), an issue to which the Appeals Chamber will return.

C. The Trial Chamber's Refusal to Define Diminished Mental Responsibility

573. Landžo filed two grounds of appeal directed to the issue of diminished mental responsibility. The first was in these terms:[953]

> The Trial Chamber Erred in Law, Violated the Rules of Natural Justice, and the Principle of Certainty in Criminal Law, and Denied Appellant a Fair Trial, When It Refused to Define the Special Defence of Diminished Mental Responsibility Which the Appellant Specifically Raised.

574. During the trial, Landžo moved before the Trial Chamber for rulings as to the definition of this "special defence", where the onus lay and the burden (or standard) of proof involved.[954] He argued that "diminished capacity"[955] was a "prolific defence relied upon in many jurisdictions", and that it was "best known as having been derived from the Homicide Act of 1957 from England".[956] Then, having referred to a number of decisions in England concerning the Homicide Act, Landžo submitted that the English definition of diminished responsibility, its burden of proof and its standard of proof should be adopted by the Trial Chamber when considering the evidence proffered by him.[957] In his summary, he submitted:

> The special defence of diminished capacity as envisioned by the framers of the Statute and Rules of this Tribunal should be as follows: where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any

---

[952] *Ibid,* para 1286.
[953] Landžo Brief, p 4, Ground of Appeal 7.
[954] Esad Landžo's Submissions Regarding Diminished or Lack of Mental Capacity, 8 June 1998 ("Trial Submission").
[955] He considered that the terms "diminished mental capacity" and "diminished mental responsibility" were interchangeable: Trial Submission, footnote 2.
[956] *Ibid,* p 4.
[957] *Ibid,* p 13.

> inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omission in doing or being a party to the killing.[958]

575. The Trial Chamber, noting that the "special defence" was, by reason of Rule 67(A)(ii), "a plea offered by the Defence", ruled (in accordance with Landžo's submission) that a defendant offering such a plea carried the burden of proving it on the balance of probabilities,[959] but it reserved its decision as to the appropriate definition of that defence.[960]

576. This refusal by the Trial Chamber is said by Landžo to have violated the principles of certainty in the criminal law,[961] and of *nullum crimen sine lege*,[962] or *ex post facto* law (as it was described by counsel for Landžo).[963] These objections are misconceived. The law to be applied must be that which existed at the time the acts upon which the charges are based took place. However, the subsequent identification or interpretation of that law by the Tribunal, whenever that takes place, does not alter the law so as to offend either of those principles.[964]

577. Landžo also submitted that the refusal by the Trial Chamber to define the "special defence" in advance of evidence being given in relation to it denied him a fair trial.[965] It is, however, no part of a Trial Chamber's obligation to define such issues *in advance*. Its obligation is to rule upon issues at the appropriate time, after all of the relevant material has been placed before it and after hearing the arguments put forward by the parties. It may well be considered to be appropriate or convenient in the particular case to give a ruling of this type upon an assumed or agreed basis, but whether it is appropriate or convenient to do so in any case is a matter for the Trial Chamber in that case to determine in the exercise of its discretion. There is no basis for suggesting that the exercise of the Trial Chamber's discretion in the present case miscarried in its refusal to give in advance a definition of the "special defence".

578. Nor has any prejudice been demonstrated, as a result of that refusal, to show that Landžo's trial was unfair. First, the Trial Chamber substantially adopted the submission made by him as to the definition of the "special defence". After quoting Section 2(1) of the Homicide Act of 1957 of England and Wales the Trial Chamber said:

---

[958] *Ibid*, p 13.
[959] Order on Esad Landžo's Submission Regarding Diminished or Lack of Mental Capacity, 18 June 1998, p 2.
[960] *Ibid*, p 3.
[961] Landžo Brief, pp 88-89.
[962] Restated in Article 15 of the International Covenant on Civil and Political Rights, 1966: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed".
[963] Appeal Transcript, pp 590, 595, 627.

> Thus, the accused must be suffering from an abnormality of mind which has substantially impaired his mental responsibility for his acts or omissions. The abnormality of mind must have arisen from a condition of arrested or retarded development of the mind, or inherent causes induced by disease or injury.

And, later (after referring to an English authority):[966]

> It is, however, an essential requirement of the defence of diminished responsibility that the accused's abnormality of mind should substantially impair his ability to control his actions.[967]

Secondly, Landžo was not denied the opportunity of producing any evidence or making any submissions in relation to the "special defence". His counsel told the Appeals Chamber that, in effect, she had produced everything she had.[968] Thirdly, as will be seen when Ground 8 is considered, the "special defence" failed not through lack of evidence but because the Trial Chamber did not accept as true Landžo's evidence as to the facts upon which the psychiatric opinions were expressed.

579. This ground of appeal 7 is rejected.

D. Does Diminished Responsibility Constitute a Defence?

580. As stated earlier, both Landžo and the Trial Chamber appear to have assumed the existence of such a defence in international law by reason of Rule 67(A)(ii).[969] That sub-Rule is in the following terms:

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

---

[964] *Aleksovski* Appeal Judgement, paras 126-127, 135.
[965] Landžo Brief, p 89.
[966] *Ibid*, para 1169.
[967] Trial Judgement, para 1166.
[968] Counsel for Landžo said: "We have a saying back home that, when you are not given the parameters like that, you throw everything against the wall and see what sticks" (Appeal Transcript, p 589); and: "But they didn't give us any guidance. They didn't tell us which law to use at that point. So I had to just throw everything out there [...]" (Appeal Transcript, p 600).
[969] The Trial Chamber referred to "the special defence provided for in sub-Rule 67(A)(ii)(b)" in the Trial Judgement, para 1163. Landžo also referred to the special defence as having been provided for in the Rules of Procedure and Evidence, in the Landžo Brief, p 85, and Appeal Transcript, p 590.

The Rule is not happily phrased.

581. It is a common misuse of the word to describe an alibi as a "defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a *defence* in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.

582. On the other hand, if the defendant raises the issue of *lack* of mental capacity, he is challenging the presumption of sanity by a plea of insanity. That is a defence in the true sense, in that the defendant bears the onus of establishing it – that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong.[970] Such a plea, if successful, is a complete defence to a charge and it leads to an acquittal. It is submitted by Landžo that Rule 67(A)(ii) has also made *diminished* mental responsibility a complete defence to any charge (or has perhaps recognised it as such),[971] an argument which the Trial Chamber had accepted.[972]

583. Notwithstanding a claim by Landžo to the contrary,[973] there is no reference to any defence of diminished mental responsibility in the Tribunal's Statute. The description of diminished mental responsibility as a "special defence" in Rule 67(A)(ii) is insufficient to constitute it as such. The rule-making powers of the judges are defined by Article 15 of the Tribunal's Statute, which gives power to the judges to adopt only –

> [...] *rules of procedure and evidence* for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.[974]

The Appeals Chamber has held that this power does not permit rules to be adopted which constitute new *offences*, but only *rules of procedure and evidence* for the conduct of matters falling within the jurisdiction of the Tribunal.[975] It follows that there is, therefore, no power to adopt rules which constitute new *defences*. If there is a "special defence" of diminished responsibility known to international law, it must be found in the usual sources of international

---

[970] *M'Naghten's Case* (1843) 10 Cl & Fin 200 at 210-211; 4 St Tr (NS) 847 at 930-931.
[971] Landžo Brief, pp 85, 102; Appeal Transcript, p 590.
[972] Trial Judgement, para 1164.
[973] Landžo Brief, p 85.
[974] The emphasis has been added.
[975] *Prosecutor v Tadić*, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, para 24.

law – in this case, in the absence of reference to such a defence in established customary conventional law, in the general principles of law recognised by all nations.[976]

584. Landžo has submitted that such a "special defence" based upon the English model, with modifications, should be available in international law because it is "generally accepted as providing a fair and balanced defence",[977] it has been recognised in the domestic laws of many countries[978] and by the statute of the International Criminal Court adopted in 1998 ("ICC Statute").[979] An examination of the domestic laws referred to by the parties and of the ICC Statute does not support that submission.

585. The English *Homicide Act* 1957 provides that a person who kills or who is a party to the killing of another shall not be convicted of murder if he establishes that he was suffering from such an abnormality of mind (as defined) as substantially impaired his mental responsibility for his acts or omissions in doing so or being a party to the killing.[980] The section provides that, instead, he is liable to be convicted of manslaughter.[981] It is thus a partial defence, not a complete defence, to a charge of murder.

586. The partial defence of diminished responsibility originated in Scotland in the 19th century. It was developed there by the courts as a means of avoiding murder convictions for those offenders who were otherwise liable for murder but who did not satisfy the restrictive test for the defence of insanity, but whose mental state was nevertheless impaired.[982] The subsequent English statute, enacted in 1957, provided the model for largely identical legislation in some common law countries.[983] In most (if not all) such countries, the legislation, by

---

[976] Secretary-General's Report, para 58.
[977] Landžo Brief, p 96.
[978] *Ibid*, pp 102-107.
[979] *Ibid*, p 107.
[980] Section 2(1).
[981] Section 2(3).
[982] *See HM Advocate v Dingwall* (1867) 5 Irvine 466, as discussed in N Walker, *Crime and Insanity in England* (Edinburgh University Press, Edinburgh, 1968) Vol 1, chapter 8. *See* also Glanville Williams, *Textbook of Criminal Law* (2nd edition, Steven & Sons, London, 1983) at 685; Smith & Hogan, *Criminal Law* (9th edition, Butterworths, London, 1999) at 211; NSW Law Reform Commission, Partial Defences to Murder: Diminished Responsibility, LRC 82 (1997) ("LRC 82"), para 3.2.
[983] In Australia: *Crimes Act* 1900 (New South Wales), s 23A; *Criminal Code* 1899 (Queensland), s 304A; *Crimes Act* 1900 (Australian Capital Territory), s 14; *Criminal Code* 1983 (Northern Territory), s 37. Hong Kong: *Homicide Ordinance*, Cap 339, Section 3. Singapore: *Penal Code* Cap 224, section 300, Exception 7. Barbados: *Offences Against the Person Act* 1868, section 3A. The Bahamas: *Homicide Act* 1957, section 2(1). Landžo argued (Landžo Brief, pp 105-106) that it exists also in the United States. He relied upon Section 4.02 of the Model Penal Code (1962) which makes admissible, in relation to the defendant's state of mind where it is an element of the offence, evidence that the defendant suffered from a mental disease or defect. However, that does not constitute diminished responsibility as a defence to the offence, it simply denies one of the elements of that offence.

reducing the crime from murder to manslaughter, permitted the sentencing judge to impose a sentence other than the relevant mandatory sentence for murder, which was either death or penal servitude for life. The partial defence is in effect, then, a matter which primarily provides for mitigation of sentence by reason of the diminished mental responsibility of the defendant. A recent review of the partial defence of diminished responsibility in Australia concluded that, notwithstanding the abolition of mandatory sentences for murder, the partial defence should be maintained in order to assist in the sentencing process.[984]

587. The ICC Statute provides that a defendant shall not be criminally responsible if, at the relevant time, he or she –

> [...] suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.[985]

This is not the same as any partial defence of diminished mental responsibility, as it requires the *destruction* of (and not merely the *impairment* to) the defendant's capacity, and it leads to an acquittal. It is akin to the defence of insanity. There is no express provision in the ICC Statute which is concerned with the consequences of an impairment to such a capacity.

588. On the other hand, in many other countries where the defendant's total mental incapacity to control his actions or to understand that they are wrong constitutes a complete defence, his diminished mental responsibility does not constitute either a partial or a complete defence, but it is relevant in mitigation of sentence.[986]

589. The Prosecution has submitted that both the Tribunal's full name[987] and the terms of its Statute[988] oblige it to deal with the persons "*responsible* for serious violations of international humanitarian law"[989] according to the degree of their responsibility, so that there would be a

---

[984] LRC 82, paras 2.17-2.24.

[985] ICC Statute, Article 31(1)(a).

[986] In France: *Penal Code* (1992), Article 122-1. In Germany: *Penal Code*, Sections 20-21. In Italy: *Penal Code* (1930), Articles 88-89. In the Russian Federation: *Criminal Code* (1996) (translated by W Butler, *Criminal Code of the Russian Federation*, Simmonds and Hill Publishing, London, 1997), Articles 21-22. In Turkey: *Penal Code* (International Encyclopaedia of Law, ed Prof Blancpain, Kluwer, vol 3), Articles 46-47. In Japan: *Penal Code* (1907), Article 39(2). In South Africa: *Criminal Procedure Act*, 1977, Section 78(7). Notwithstanding the submission of Landžo to the contrary (Landžo Brief, p 107), the position in the former Yugoslavia is the same: *Criminal Code* (1976) of the SFRY, Article 12. *See* also Articles 40 and 42 of the Croatian *Penal Code* (1997).

[987] The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.

[988] Articles 1 and 5 ("the power to prosecute persons responsible for" various violations), and 7.1 ("shall be individually responsible for the crime").

[989] The emphasis has been added.

complete defence arising out of the defendant's mental state only where he could not be held legally responsible at all for his actions.[990] The defendant's mental state would otherwise be relevant in mitigation of sentence, in accordance with Article 24.2 of the Tribunal's Statute, as one of "the individual circumstances" of the convicted person.[991]

590. The Appeals Chamber recognises that the rationale for the partial defence provided for the offence of murder by the English *Homicide Act* 1957 is inapplicable to proceedings before the Tribunal. There are no mandatory sentences. Nor is there any appropriate lesser offence available under the Tribunal's Statute for which the sentence would be lower and which could be substituted for any of the offences it has to try.[992] The Appeals Chamber accepts that the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal. Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence. As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.

E. The Trial Chamber's Rejection of Diminished Mental Responsibility

591. The second ground of appeal filed by Landžo relating to diminished mental responsibility was in these terms:

> The Trial Chamber erred in law and made findings of fact inconsistent with the great weight of the evidence when it rejected clear evidence of diminished mental responsibility.[993]

---

[990] Prosecution Response, para 12.16.

[991] *Ibid*, para 12.21, relying upon *Prosecutor v Erdemović*, Case IT-96-22-T, Sentencing Judgement, 29 Nov 1996, ("First *Erdemović* Sentencing Judgement") p 20. Article 24.2 provides: "In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person".

[992] There is a discussion of these complexities in an article upon which both Landžo and the Prosecution relied in relation to different issues, "The Emerging Mental Incapacity Defense in International Criminal Law: Some Initial Questions of Implementation", Peter Krug, 94 the American Journal of International Law (2000) 317, at 331-333.

[993] Landžo Brief, Ground of Appeal 8.

This ground of appeal remains relevant, because Landžo also relied upon diminished m responsibility in mitigation of sentence.

592. Five psychiatrists gave evidence in relation to Landžo's mental condition. Four of them concluded that he suffered from a personality disorder (albeit described in different terms) and, in essence, that there was a substantial impairment of his mental responsibility for his actions in the Čelebići prison camp.[994] Their view was that his capacity to exercise his own free will when given orders was diminished.[995] Only one psychiatrist (who was called by the Prosecution) rejected the existence of a relevant personality disorder.[996] It was accordingly submitted by Landžo that the Trial Chamber's rejection of the evidence of the four psychiatrists in favour of the one dissentient called by the Prosecution (who had spent less time with the accused than had the others) was an arbitrary and capricious exercise of its discretion and an unreasonable one.[997]

593. This submission misconceives what the Trial Chamber concluded. It rejected the views of the four psychiatrists not because it preferred the views of the one psychiatrist called by the Prosecution, but because it did not accept the truth of the factual history given by Landžo upon which the four psychiatrists had based their opinions.[998] Specifically, it accepted the evidence that Landžo had admitted to one of the psychiatrists that he never had any difficulty inflicting pain and suffering on the prisoners and that he had enjoyed doing so.[999] The Trial Chamber rejected Landžo's evidence that he had committed the criminal acts with which he was charged on the direction of his co-accused Delić.[1000] The Trial Chamber was not persuaded that those

---

[994] Although the Trial Chamber purported (at para 1169) to follow the common law authorities relating to the partial defence of diminished mental responsibility, it nevertheless permitted the psychiatrists, contrary to authority, to express their own opinions as to whether there was a substantial diminution of Landžo's mental responsibility. The issue as to whether the impairment of the defendant's mental responsibility for his act was substantial has been held to involve questions of degree, and thus that it is essentially one for the tribunal of fact: *Regina v Byrne* [1960] 2 QB 396 at 403-404. As that is not merely a medical issue of whether there was an impairment but also whether that impairment can "properly" be called substantial, whether the diminution of a person's mental responsibility for an act is not a matter within the expertise of the medical profession; it involves a value judgement by the tribunal of fact representing the community, not a finding of medical fact or opinion: *Regina v Byrne* (at 404); *Walton v The Queen* [1978] AC 788 at 793; *Regina v Ryan* (1995) 90 A Crim R 191 at 196. However, no objection was taken to the psychiatrists expressing their opinions upon the issue.

[995] Their evidence is summarised in the Landžo Brief, pp 109-132.

[996] His evidence is partly summarised in the Landžo Brief, pp 132-138.

[997] Landžo Brief, pp 138-140.

[998] Trial Judgement, paras 1181-1185.

[999] *Ibid,* para 1185. Trial Transcript, p 15230, lines 10-18.

[1000] Trial Judgement, para 1185. Landžo admitted in his evidence that he had mistreated prisoners on his own initiative just because he was angry, and without orders to do so (Trial Transcript, pp 15055-15057, 15349-15351).

criminal acts by Landžo were not the product of his own free will.[1001] Although the Trial Chamber accepted the evidence of the psychiatrists that Landžo suffered from a personality disorder, it considered that the evidence relating to his inability to control his physical acts on account of an abnormality of mind was not at all satisfactory, and it concluded that, despite his personality disorder, Landžo was quite capable of controlling his actions.[1002]

594. All of these findings were clearly open to the Trial Chamber upon the evidence before it. An expert opinion is relevant only if the facts upon which it is based are true. It was nevertheless argued by Landžo that, as the psychiatrists have given evidence that they were trained to detect malingering by a patient, they were able to identify by the psychological testing they performed whether or not the patient was telling the truth,[1003] and that the contrary findings of the Trial Chamber were therefore unreasonable. This argument is rejected. It is for the Trial Chamber, and not for the medical experts, to determine whether the factual basis for an expert opinion is truthful. That determination is made in the light of all the evidence given. Notwithstanding their expertise, medical experts do not have the advantage of that evidence.

595. It has not been demonstrated that the rejection of the "special defence" of diminished mental responsibility was a conclusion which no reasonable tribunal of fact could have been reached. Ground of Appeal 8 is therefore rejected. Although it rejected the "special defence", the Trial Chamber did take into account Landžo's "personality traits" revealed by the psychiatrists when imposing sentence.[1004]

[1001] Trial Judgement, para 1185.
[1002] *Ibid*, para 1186.
[1003] Appeal Transcript, pp 597-598, 603-604.
[1004] Trial Judgement, para 1283.

X. SELECTIVE PROSECUTION

596. Landžo alleges that he was the subject of a selective prosecution policy conducted by the Prosecution.[1005] He defines a selective prosecution as one "in which the criteria for selecting persons for prosecution are based, not on considerations of apparent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience."[1006] Specifically, he alleges that he, a young Muslim camp guard, was selected for prosecution, while indictments "against all other Defendants without military rank", who were all "non-Muslims of Serbian ethnicity", were withdrawn by the Prosecution on the ground of changed prosecutorial strategies.[1007]

597. The factual background to this contention is that the Prosecutor decided in 1998 to seek the withdrawal of the indictments against fourteen accused who at that stage had neither been arrested nor surrendered to the Tribunal. This application was granted by Judges of the Tribunal in early May 1998. At that stage, the trial in the present proceedings had been underway for a period of over twelve months. The Prosecutor's decision and the grant of leave to withdraw the indictment was announced in a Press Release, which explained the motivation for the decision in the following terms:

> Over recent months there has been a steady increase in the number of accused who have either been arrested or who have surrendered voluntarily to the jurisdiction of the Tribunal. [...].
>
> The arrest and surrender process has been unavoidably piecemeal and sporadic and it appears that this is likely to continue. One result of this situation is that accused, who have been jointly indicted, must be tried separately, thereby committing the Tribunal to a much larger than anticipated number of trials.
>
> In light of that situation, I have re-evaluated all outstanding indictments *vis-à-vis* the overall investigative and prosecutorial strategies of my Office. Consistent with those strategies, which involve maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the [*sic*] exceptionally brutal or otherwise extremely serious offences, I decided that it was appropriate to withdraw

[1005] This ground of appeal states: "The Prosecutor's practice of selective prosecution violated Article 21 of the Statute of the ICTY, the rules of natural justice and of international law." Land'o Brief, p 13.

[1006] Landžo Brief, p 13.

[1007] Landžo Brief, p 15. The Prosecutor stated this change of strategy in an ICTY press release dated 8 May 1998, CC/PIU/314-E ("Press Release"). The Press Release is quoted in part in the Land'o Brief, p 16. The full statement was admitted into evidence by the Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, pp 5-6. The Press Release refers to fourteen accused named in the "Omarska" and "Keraterm" indictments (*Prosecutor v Sikirica*, IT-95-4 and *Prosecutor v Meaki}*, IT-95-8). Press Release, pp 1-2.

> the charges against a number of accused in what have become known as the Omarska and Keraterm indictments, which were confirmed in February 1995 and July 1995 respectively.[1008]

Although counsel for Landžo submitted that the Prosecution sought and obtained the withdrawal of indictments against *sixteen* accused, "some of whom were already in custody" of the Tribunal at the relevant time,[1009] this was not the case. Although three people[1010] were released from the custody of the Tribunal on 19 December 1997 pursuant to a decision granting the Prosecutor's request to withdraw their indictment,[1011] the withdrawal of those indictments was based on the quite different consideration of insufficiency of evidence. Landžo does not appear to have intended to refer to the withdrawal of any indictments other than those referred to in the Press Release, and the submissions proceeded upon that basis.

598. Landžo accordingly submitted, first at trial and now on appeal, that, because the indictment against him was not also withdrawn, he was singled out for prosecution for an impermissible motive and that this selective prosecution contravened his right to a fair trial as guaranteed by Article 21 of the Statute. Citing a decision of the United States of America's Supreme Court, *Yick Wo v Hopkins*,[1012] and Article 21(3) of the Rome Statute of the International Criminal Court, Landžo submits that the guarantee of a fair trial under Article 21(1) of the Statute incorporates the principle of equality and that prohibition of selective prosecution is a general principle of customary international criminal law.[1013]

599. The Trial Chamber, in its sentencing considerations, referred to Landžo's argument that, because he was an ordinary soldier rather than a person of authority, he should not be subject to the Tribunal's jurisdiction, and then stated:

> [The Trial Chamber] does, however, note that the statement issued in May this year (1998) by the Tribunal Prosecutor concerning the withdrawal of charges against several indicted persons, quoted by the Defence, indicates that an exception to the new policy of maintaining the investigation and indictment only of persons in positions of some military or political authority, is made for those responsible for exceptionally brutal or otherwise extremely serious offences. From the facts established and the findings of guilt made in the present case, the conduct of Esad Landžo would appear to fall within this exception.[1014]

[1008] Press Release, p 1.
[1009] Appeal Transcript, p 551.
[1010] Marinko Katava (*see* indictment in *Prosecutor v Kupre{ki} et al*, Case IT-95-16); Ivan Santi} and Pero Skopljak (*see* Indictment in *Prosecutor v Kordi} et al*, Case IT-95-14/2).
[1011] *Prosecutor v Kupre{ki} et al*, *Prosecutor v Kordi} et al*, Decision to Withdraw Indictment, 19 Dec 1997.
[1012] 118 U.S. 356, 6 S.Ct.1064 (1886).
[1013] Landžo Brief, pp 13-14.
[1014] Trial Judgement, para 1280, footnote referring to Press Release omitted.

600. The Prosecution argues that the Prosecutor has a broad discretion in deciding which cases should be investigated and which persons should be indicted.[1015] In exercising this discretion, the Prosecutor may have regard to a wide range of criteria. It is impossible, it is said, to prosecute all persons placed in the same position and, because of this, the jurisdiction of the International Tribunal is made concurrent with the jurisdiction of national courts by Article 9 of the Statute.[1016]

601. Article 16 of the Statute entrusts the responsibility for the conduct of investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 to the Prosecutor. Once a decision has been made to prosecute, subject to the requirement that the Prosecutor be satisfied that a prima facie case exists, Article 18 and 19 of the Statute require that an indictment be prepared and transmitted to a Judge of a Trial Chamber for review and confirmation if satisfied that a prima facie case has been established by the Prosecutor. Once an indictment is confirmed, the Prosecutor can withdraw it prior to the initial appearance of the accused only with the leave of the Judge who confirmed it, and after the initial appearance only with the leave of the Trial Chamber.[1017]

602. In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments. This is acknowledged in Article 18(1) of the Statute, which provides:

> The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and *decide whether there is sufficient basis to proceed.*

[1015] Prosecution Response, p 111.

[1016] Article 9(1) of the Statute reads: "The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."

[1017] Rule 51(A).

It is also clear that a discretion of this nature is not unlimited. A number of limitations on discretion entrusted to the Prosecutor are evident in the Tribunal's Statute and Rules of Procedure and Evidence.

603. The Prosecutor is required by Article 16(2) of the Statute to "act independently as a separate organ of the International Tribunal", and is prevented from seeking or receiving instructions from any government or any other source. Prosecutorial discretion must therefore be exercised entirely independently, within the limitations imposed by the Tribunal's Statute and Rules. Rule 37(A) provides that the Prosecutor "shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by the Prosecutor."

604. The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights.[1018]

605. One such principle is explicitly referred to in Article 21(1) of the Statute, which provides:

> All persons shall be equal before the International Tribunal.

This provision reflects the corresponding guarantee of equality before the law found in many international instruments, including the 1948 Universal Declaration of Human Rights,[1019] the 1966 International Covenant on Civil and Political Rights,[1020] the Additional Protocol I to the Geneva Conventions,[1021] and the Rome Statute of the International Criminal Court.[1022] All

[1018] Secretary-General's Report, para 106.

[1019] Article 7 provides: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

[1020] Article 14 provides: "[a]ll persons shall be equal before the courts and tribunals [...]." Article 26 provides explicitly that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[1021] Article 75 (fundamental guarantees) provides in para 1: "Insofar as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse

these instruments provide for a right to equality before the law, which is central to the principle of the due process of law. The provisions reflect a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law. Thus Article 21 and the principle it embodies prohibits discrimination in the application of the law based on impermissible motives such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin. The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to this requirement of non-discrimination.

606. This reflects principles which apply to prosecutorial discretion in certain national systems. In the United Kingdom, the limits on prosecutorial discretion arise from the more general principle, applying to the exercise of administrative discretion generally, that the discretion is to be exercised in good faith for the purpose for which it was conferred and not for some ulterior, extraneous or improper purpose.[1023] In the United States, where the guarantee of equal protection under the law is a constitutional one, the court may intervene where the accused demonstrates that the administration of a criminal law is "directed so exclusively against a particular class of persons [...] with a mind so unequal and oppressive" that the prosecutorial system amounts to "a practical denial" of the equal protection of the law.[1024]

607. The burden of the proof rests on Landžo, as an appellant alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly exercised in relation to him. Landžo must therefore demonstrate that the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants.

---

distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria."

[1022] Article 21(3) provides "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

[1023] *R v Inland Revenue Commissioners, ex parte Mead and Cook,* [1993] 1 All ER 772. It has also been accepted in Australia that there may be a principle pursuant to which proof of a selective prosecution may give rise to some relief, including, for example, the exclusion of evidence: *Hutton v Kneipp* [1995] QCA 203.

[1024] *Yick Wo v Hopkins* 118 US 356, 373 (1886); *United States v Armstrong* 517 US 456, 464-465 (1996).

608. The Prosecution submits that, in order to demonstrate a selective prosecution, Landžo must show that he had been singled out for an impermissible motive, so that the mere existence of similar unprosecuted acts is not enough to meet the required threshold.[1025]

609. Landžo submits that a test drawn from United States case-law, and in particular the case *United States of America v Armstrong,*[1026] provides the required threshold for selective prosecution claims. Pursuant to this test, the complainant must prove first that he was singled out for prosecution for an improper motive, and secondly, that the Prosecutor elected not to prosecute other similarly situated defendants. There is therefore no significant difference between the applicable standards identified by Landžo and by the Prosecution.

610. As observed by the Prosecution, the test relied on by Landžo in *United States of America v Armstrong,* puts a heavy burden on an appellant.[1027] To satisfy this test, Landžo must demonstrate clear evidence of the intent of the Prosecutor to discriminate on improper motives, and that other similarly situated persons were not prosecuted. Other jurisdictions which recognise an ability for judicial review of a prosecutorial discretion also indicate that the threshhold is a very high one.[1028]

611. It is unnecessary to select between such domestic standards, as it is not appropriate for the Appeals Chamber simply to rely on the jurisprudence of any one jurisdiction in determining the applicable legal principles. The provisions of the Statute referred to above and the relevant principles of international law provide adequate guidance in the present case. The breadth of the discretion of the Prosecutor, and the fact of her statutory independence, imply a presumption that the prosecutorial functions under the Statute are exercised regularly. This presumption may be rebutted by an appellant who can bring evidence to establish that the discretion has in fact not been exercised in accordance with the Statute; here, for example, in contravention of the principle of equality before the law in Article 21. This would require evidence from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with that principle. Because the principle is one of *equality* of persons before the law, it involves a comparison with the legal treatment of other persons who must be similarly situated for such a comparison to be a meaningful one. This essentially reflects the two-

[1025] Prosecution Response, p 111.
[1026] *United States v Armstrong* 517 US 456, 463-465 (1996) . *See* also *United States of America v Irish People, Inc.,* 684 F 2d 928, 932-3, 946 (DC Circuit 1983).
[1027] Prosecution Response, p 113.

pronged test advocated by Landžo and by the Prosecution of (i) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (ii) establishing that other similarly situated persons were not prosecuted.

612. Landžo argues that he was the only Bosnian Muslim accused without military rank or command responsibility held by the Tribunal, and he contends that he was singled out for prosecution "simply because he was the only person the Prosecutor's office could find to 'represent' the Bosnian Muslims". He was, it is said, prosecuted to give an appearance of "evenhandedness" to the Prosecutor's policy.[1029] Landžo alleges that the Prosecutor's decision to seek the withdrawal of indictments against the accused identified in the Press Release, without seeking the discontinuation of the proceedings against Landžo, was evidence of a discriminatory purpose. Landžo rejects the justification given by the Prosecutor in the Press Release of a revaluation of indictments according to changed strategies "in light of the decision to except the one Muslim defendant without military rank or command responsibility from the otherwise complete dismissal of charges against Defendants having that status."[1030]

613. The Prosecution argues that a change of prosecutorial tactics, in view of the need to reassign available resources of the Prosecution, cannot be considered as being significative of discriminatory intent. Furthermore, the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy had a discriminatory effect, so that other *similarly situated* individuals of other ethnic or religious backgrounds were not prosecuted. The Prosecution observes that those against whom charges were withdrawn had not yet been arrested or surrendered to the Tribunal, whereas Land'o was in custody and his case already mid-trial.[1031] The Prosecution adds that even if it was to be considered that the continuation of Landžo's trial resulted in him being singled out, it was in any event for the commission of exceptionally brutal or otherwise serious offences.[1032]

614. The crimes of which Landžo was convicted are described both in the Trial Judgement and in the present judgement at paragraphs 565-570. The Appeals Chamber considers that, in light of the unquestionably violent and extreme nature of these crimes, it is quite clear that the

---

[1028] *Chief Constable of Kent and Crown Prosecution Service, ex parte GL*, (1991) Crim App R 416; *R v Inland Revenue Commissioners, ex parte Mead and Cook*, [1993] 1 All ER 772; *R v Power* [1994] 1 SCR 601.
[1029] Land'o Brief, p 17.
[1030] Land'o Brief, p 16.
[1031] Prosecution Response, p 113.
[1032] Prosecution Response, p 114.

decision to continue the trial against Landžo was consistent with the stated policy of the Prosecutor to "focus on persons holding higher levels of responsibility, or on those who have been *personally responsible for the exceptionally brutal or otherwise extremely serious offences.*"[1033] A decision, made in the context of a need to concentrate prosecutorial resources, to identify a person for prosecution on the basis that they are believed to have committed *exceptionally* brutal offences can in no way be described as a discriminatory or otherwise impermissible motive.

615. Given the failure of Landžo to adduce any evidence to establish that the Prosecution had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute him, it is not strictly necessary to have reference to the additional question of whether there were other similarly situated persons who were not prosecuted or against whom prosecutions were discontinued. However, the facts in relation to this question support the conclusion already drawn that Landžo was not the subject of a discriminatory selective prosecution.

616. All of the fourteen accused against whom charges were withdrawn pursuant to the Prosecutor's change of policy, unlike Landžo, had not been arrested and were not in the custody of the Tribunal. None of the fourteen persons identified in the Press Release as the subject of the withdrawn indictments had been arrested or surrendered to the Tribunal so were not in the Tribunal's custody.

617. At the time at which the decision was taken to withdraw the indictments on the basis of changed prosecutorial strategy, the trial of Landžo and his co-accused had been underway for over twelve months. None of the persons in respect of whom the indictments were withdrawn were facing trial at the time. These practical considerations alone, which demonstrate an important difference in the situation of Landžo and the persons against whom indictments were withdrawn, also provide the rational justification for the Prosecutor's decisions at the time. The Appeals Chamber notes that the Prosecutor explicitly stated that accused against whom charges were withdrawn could still be tried at a later stage by the Tribunal or by national courts by virtue of the principle of concurrent jurisdiction.[1034] Had Landžo been released with the leave of the Trial Chamber, he would have been subject to trial upon the same or similar charges in Bosnia and Herzegovina.

[1033] Press Release, p 1 (emphasis added).
[1034] Press Release.

618. Finally, even if in the hypothetical case that those against whom the indictments were withdrawn were identically situated to Landžo, the Appeals Chamber cannot accept that the appropriate remedy would be to reverse the convictions of Landžo for the serious offences with which he had been found guilty. Such a remedy would be an entirely disproportionate response to such a procedural breach. As noted by the Trial Chamber, it cannot be accepted that "unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial".[1035]

619. This ground of appeal is therefore dismissed.

[1035] Trial Judgement, para 180.

XI. JUDGE KARIBI-WHYTE

620. Landžo filed a ground of appeal based on an allegation that the Presiding Judge at trial, Judge Karibi-Whyte, "was asleep during substantial portions of the trial".[1036] This ground of appeal was subsequently adopted by Mucić and Delić,[1037] but it was agreed that counsel for Landžo carried the burden of argument on this ground.[1038] The grounds of appeal are stated as follows:

> Landžo Ground 4
>
> The Participation, As Presiding Judge Of The Trial Chamber, Of A Judge Who Was Asleep During Substantial Portions Of The Trial, Denied Appellants The Right To the Full And Competent Judicial Decision Of Questions of Law, Fact, And Evidence, and Improperly Denied Appellants A Fair Trial, And The Appearance Of A Fair Trial.[1039]
>
> Mucić Ground 3, Delić Issue 20
>
> Whether Mucić and Delić were deprived of a fair trial due to the fact that the Presiding Judge at the Trial Chamber slept during substantial portions of the trial.[1040]

621. Landžo tendered a variety of material in relation to the issue of whether Judge Karibi-Whyte was asleep during the trial, including the audio-visual recordings taken by courtroom cameras during the proceedings, newspaper reports, and affidavits of persons who observed part of the proceedings.

622. The audio-visual records already formed part of the trial record, and thus were not admitted into evidence as such.[1041] However, the Appeals Chamber granted leave for tapes to be made, containing copies of those portions of the audio-visual recordings produced by the courtroom cameras generally focussed on the judges' bench nominated by Landžo and by the Prosecution ("Extracts Tapes"), for use by the Appeals Chamber as a convenient method of viewing the material relevant to this ground of appeal.[1042] The Appeals Chamber declined to admit the other material tendered by Landžo on the grounds that it was not admissible, or that it

---

[1036] Landžo Brief, Ground of Appeal 4, pp 1-2.
[1037] Notice to the Chamber Related to Landžo's Issue on the Presiding Judge Sleeping During Trial, 17 Feb 2000. Leave was granted to add this ground of appeal by the order on Appellants Hazim Delić and Zdravko Mucić's 'Notice' Related to Appellant Esad Landžo's Fourth Ground of Appeal, 30 Mar 2000.
[1038] Transcript of Pre-Appeal Conference, 12 May 2000, pp 29, 43.
[1039] Landžo Supplementary Brief, p 1.
[1040] Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, 31 May 2000; Appellant-Cross-Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, p 4.
[1041] Order, 12 Feb 1999, p 3.
[1042] Order on the Second Motion to Preserve and Provide Evidence, 15 June 1999; Order on Esad Landžo's Motion (1) to Vary in Part Order on Motion to Preserve and Provide Evidence, (2) to be Permitted to Prepare

was not relevant, or that it had no probative value in relation to the issues raised by the ground of appeal, or that it was repetitive as it would not advance Landžo's case beyond what was already shown in the Extracts Tapes.[1043]

623. Landžo also made an extremely late application for the Extracts Tapes to be viewed by an expert to see whether he could give an opinion as to –

> [...] Judge Karibi-Whyte's ability or inability to perform his duties as Presiding Judge in the manner necessary to afford Appellants and the other accused a fair trial.[1044]

The application was opposed by the Prosecution upon the bases that it was untimely, that a grant of the relief sought would cause delay, that the proposed expert witness testimony would be of uncertain value and that the Prosecution would not have the opportunity to call its own expert witness without delaying the hearing of the appeal.[1045] The application was refused by the Appeals Chamber upon the grounds that, even assuming Landžo's expert could give his opinion without delay, the absence of any reasonable opportunity for the Prosecution to respond with its own expert's evidence without further delaying the hearing of the appeal would be prejudicial to the Prosecution in the exercise of its prosecutorial role which it performs on behalf of the international community. The Appeals Chamber noted also that any further delay in the hearing would be contrary to the interests of justice, that Landžo, who could in the exercise of due diligence have sought relief at an earlier time, could not at that late stage complain of unfairness, and that, as the medical expert would not have access to any medical records relating to Judge Karibi-Whyte or the opportunity to medically examine him, the weight to be afforded to his evidence would not be such as to justify the prejudice to the Prosecution and the other appellants which would be caused by delaying the hearing of the appeal.[1046]

---

and Present Further Evidence, and (3) that the Appeals Chamber Take Judicial Notice of Certain Facts, and on his Second Motion for Expedited Consideration of the Above Motion, 4 Oct 1999, pp 3-5.

[1043] Order on Motion of the Appellant, Esad Landžo, for Permission to Obtain and Adduce Further Evidence on Appeal, 7 Dec 1999, p 5; Order in Relation to Witnesses on Appeal, 19 May 2000, pp 2-3; Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, pp 2-4 and 8-9.

[1044] Motion for Permission to Allow Expert Witness to View Extracts Tapes and to Admit Expert Opinion as to Sleep Disorders (Landžo's Fourth Ground of Appeal), 27 Apr 2000, paras 3-4.

[1045] Prosecution Response to Esad Landžo's Motion for Permission to Allow Expert Witness to View Extracts Tapes and to Admit Expert Opinion as to Sleep Disorders, and Prosecution Motion for Clarification, 3 May 2000.

[1046] Order on Motion for Permission to Allow Expert Witness to View Extracts Tapes and to Admit Expert Opinion as to Sleep Disorders, 9 May 2000, pp 4-6.

A. The Allegations as to the Presiding Judge's Conduct

624. Based upon what was said to be demonstrated by the Extracts Tapes, a number of allegations as to the conduct of Judge Karibi-Whyte during the trial were made in the Supplementary Brief filed on behalf of Landžo in relation to this ground of appeal. These allegations included the following:

> These portions [of the Extracts Tapes] clearly and unambiguously paint a disturbing picture of a Judge prone to fall asleep during all phases of the trial, at almost any time when he was not speaking, examining a document, or otherwise being actively engaged.[1047]
>
> This is a question of a Judge sleeping deeply, as if in his own bed, at all hours of the day, and regardless of the nature of the events unfolding around him.[1048]
>
> [...] the particulars [i.e. the portions of the audio-visual record in the Extracts Tapes] paint such a clear and unambiguous pattern of continuous sleep, it is not only a reasonable inference, but an almost irresistible one, that the Judge's sleeping in the courtroom continued while the relevant cameras were not trained on him [...].[1049]
>
> [...] the clear evidence provided by the relevant cameras of Judge Karibi-Whyte being deeply asleep [...].[1050]
>
> It was frequently necessary for members of the Registrar's office, and another member of the Trial Chamber, Judge Jan, to awaken the Presiding Judge.[1051]

B. Applicable Legal Principles

625. No precedent in the international context was cited in relation to the specific issue raised by this ground of appeal, and none has been discovered by the Appeals Chamber's own research. Guidance as to the legal principles relevant to an allegation that a trial judge was not always fully conscious of the trial proceedings may therefore be sought from the jurisprudence and experience of national legal systems. The national jurisprudence considered by the Appeals Chamber discloses that proof that a judge slept through, or was otherwise not completely attentive to, part of proceedings is a matter which, if it causes actual prejudice to a party, may affect the fairness of the proceedings to a such degree as to give rise to a right to a new trial or

---

[1047] Landžo Supplementary Brief, p 3.
[1048] *Ibid*, p 4.
[1049] *Ibid*, p 4
[1050] *Ibid*, p 5.
[1051] *Ibid*, p 2.

other adequate remedy.[1052] The parties essentially agreed that these are the principles which apply to the issue before the Appeals Chamber.[1053]

626. The jurisprudence of national jurisdictions indicates that it must be proved by clear evidence that the judge was actually asleep or otherwise not fully conscious of the proceedings, rather than that he or she merely gave the appearance of being asleep.[1054] Landžo accepted that it was necessary to prove by evidence the allegation upon which this ground of appeal is based.[1055]

C. Was the Allegation Proved?

627. The Extracts Tapes were viewed by the Appeals Chamber prior to the hearing of the appeal. Even accepting that the cameras nominated by Landžo were not *always* focussed on the judges' bench, and thus that there is not a complete record of Judge Karibi-Whyte's conduct throughout the trial, the Appeals Chamber is satisfied that the descriptions quoted above are both highly coloured and gravely exaggerated. The descriptions given in the particulars in Exhibit B to Landžo's Supplementary Brief, which identify what is to be seen in each portion of the Extracts Tapes upon which reliance is placed, are similarly coloured and exaggerated, and they appear to have been given with a reckless indifference as to the truth.

628. The appellants have manifestly failed to establish the allegation in the ground of appeal, that Judge Karibi-Whyte "was asleep during substantial portions of the trial". The Extracts Tapes do, however, demonstrate a recurring pattern of behaviour where Judge Karibi-Whyte appears not to have been fully conscious of the proceedings for short periods at a time. Such periods were usually of five to ten seconds only, but this pattern is repeated over extended periods of ten to fifteen minutes on a number of occasions. On very few occasions, this loss of attention lasted up to thirty seconds. On one occasion only, during the course of an excessively lengthy examination of a medical witness by counsel for Landžo, the judge appeared to be

---

[1052] Cases relating to jurors alleged to have been asleep during a trial are included in the present consideration.

[1053] Landžo Supplementary Brief, pp 7-8; Prosecution Response to Landžo Supplementary Brief, para 3.3.

[1054] *R v Caley* [1997] WCBJ 1714 (British Columbia Supreme Court), at para 25 (to grant relief on the basis of the inattention of the judge there must be "clear and overwhelming evidence"); *Sanborn v Commonwealth* 975 SW 2d 905 (1998), at 911 (Supreme Court of Kentucky); *Commonwealth v Keaton,* 36 Mass App Ct 81 (1994), at 87; *Bundesgerichtshof*, Vol 11, p 74, Judgement of 22 November 1957 (German Federal Supreme Court of Justice); *Bundesverwaltungsgericht*, Judgement of Supreme Administrative Court, 24 Jan 1986 at para 12; [1986] Neue Juristiche Wochenschrift 2721, at 2721; *Illinois v McCraven* 97 Ill App 3d 1075 (1981) (Appellate Court of Illinois), at 1076; *People v Thurmond* 175 Cal App 3d 865 (1985) (Court of Appeal, 2d District), at 874; *Commonwealth Bank of Australia v Falzon* [1998] VSCA 79, para 10 (Supreme Court of Victoria, Court of Appeal).

asleep for approximately thirty minutes. On a different occasion, Judge Jan leant over to touch Judge Karibi-Whyte when his head had dropped. Judge Karibi-Whyte can also be heard to be breathing very noisily at times, but such times include occasions where he is obviously very fully conscious of the proceedings.

629. Such behaviour revealed by the Extracts Tapes warrants an examination as to whether, notwithstanding their failure to establish the factual basis of these grounds of appeal, the appellants nevertheless have a valid cause for complaint as to the fairness of the trial. It must be said, firmly, that Judge Karibi-Whyte's conduct cannot be accepted as appropriate conduct for a judge. Even if, as may well be the position, he had no control over his loss of attention, litigants are in general entitled to the full attention of the judges who have to decide their case. The charges being tried in this case were extremely serious, and the consequences of conviction for the accused were equally serious. If a judge suffers from some condition which prevents him or her from giving full attention during the trial, then it is the duty of that judge to seek medical assistance and, if that does not help, to withdraw from the case.

D. Absence of Identifiable Prejudice

630. Such conclusions do not, however, automatically lead to the quashing of the judgement which was given in this case. As stated earlier, the national jurisprudence indicates that, before a remedy will be granted on the basis that a judge has been asleep or otherwise inattentive, it must be proved that some identifiable prejudice was caused thereby to the complaining party.[1056] In some continental systems where the sleeping or inattention of a judge may form the basis for a ground of appeal or revision of a judgement – for example, because the court was thereby not properly constituted[1057] – no separate reference is made to the necessity to demonstrate prejudice before such a ground would succeed. However, in order to establish a violation in those cases, a party must prove that the judge in question was unable to perceive

---

[1055] Landžo Supplementary Brief, p 7.

[1056] *R v Moringiello* [1997] Crim LR 902; *R v Edworthy* [1961] Crim LR 325; *R v Tancred* 14 April 1997, Court of Appeal (Criminal Division); *Kozlowski v City of Chicago* 13 Ill App 513 (the fact that a juror fell asleep during proceedings, absent an affirmative showing of prejudice to the complainant, is not a ground for a new trial); *State of Ohio v Dean*, Ohio App Lexis 3873, Judgement of 20 Sept 1988 (Court of Appeals of Ohio) (must be a showing of "material prejudice").

[1057] *See*, in Germany, the *Strafprozeßordnung*, which provides by Article 338 (1) that an absolute ground for revision of a judgement is that the trial court was not constituted as provided. Article 338 (1) may be violated where a judge or lay assessor is asleep or otherwise "absent".

"essential" or "crucial" events in the hearing.[1058] If such a standard of judicial inattention has been proved, some actual prejudice must necessarily have been incurred, or at least the proceedings must necessarily have been defective in a material way. The complaining party must prove the relevant prejudice by clear evidence.[1059] Indeed, it has been held that to grant a new trial on the basis of the inattention of a juror without clear proof of any prejudice caused thereby constitutes "a clear abuse of discretion".[1060]

631. The prejudice which must be proved may be manifested where the judge fails in some identifiable way to assess the evidence properly or expresses an incorrect understanding of the evidence which was given or the submissions which were put.[1061] Elsewhere, it has been held that what must be proved is that the judge is completely inattentive to such a substantial or significant part of the proceedings that there has been a "significant defect" in the proceedings.[1062] The failure of counsel to object or to call attention to a judge's sleeping or inattention during the proceedings is relevant to the question as to whether prejudice has been established. Failure of counsel to object will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto.[1063]

632. The necessity that an appellant establish that some prejudice has actually been caused by a judge's inattention before a remedy will be granted is simply a matter of common sense. It is clear that there are a number of legitimate reasons why a judge's attention may briefly be drawn away from the court proceedings before him or her, including taking a note of the evidence or of a particular submission or looking up the transcript to check evidence previously given. It has been recognised in national jurisprudence that instances of inattention of that nature do not cause prejudice or undermine the fairness of the trial, but are an integral part of a judge's task in assessing the case before him or her.[1064]

[1058] *Bundesverwaltungsgericht* (Supreme Administrative Court) Judgement of 24 January 1986, [1986] *Neue Juristiche Wochenschrift* 2721, at 2721; *Bundesgerichtshof* (Federal Supreme Court of Justice) Vol 2, p 14, Judgement of 23 November 1951.

[1059] *State of Ohio v Dean*, Ohio App Lexis 3873, Judgement of 20 Sept 1988 (Court of Appeals of Ohio); *United States of America v White and Keno* 589 F 2d 1283 (1979) (Court of Appeals, 5th Circuit), at 1289.

[1060] *Ferman v Estwing Manufacturing Company*, 31 Ill App 3d 229, at 233.

[1061] *See, e.g., Espinoza v The State of Texas,* Tex App Lexis 5343, Judgement of 21 July 1999.

[1062] *Stathooles v Mount Isa Mines Ltd* [1997] 2 Qd R 106 (Queensland Court of Appeal), at 113.

[1063] *The Chicago City Railway Company v John Anderson* 193 Ill 9 (1901), at 13.

[1064] *Bundesgerichtshof* (Federal Supreme Court of Justice) Vol 11 p 74, 22 November 1957, at 77: "There are numerous matters of behaviour and other circumstances by which a judge may give the impression to participants, especially to a defendant who is a layman in law, that he did not pay attention to a part of the

633. Moreover, where a judge of this Tribunal misses any evidence, there is not only a transcript to be read but also a video-tape to be viewed if the demeanour of the witness needs to be checked, and there are the observations of the other two judges to assist. Indeed, for these reasons it has been recognised in the Rules of Procedure and Evidence of the Tribunal that the short absence of a judge from trial proceedings need not necessarily prevent the continuation of the proceedings in the presence of the remaining two judges. Rule 15*bis*(A) states:

> If (i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Trial Chamber are satisfied that it is in the interests of justice to do so, those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than three days.

Although this rule was not in force at the time of the *Čelebići* trial proceedings,[1065] the fact of its adoption is a clear demonstration that the judges of the Tribunal meeting in plenary considered it to be consistent with the principles of a fair trial and with the Statute of the Tribunal to permit proceedings to be conducted in the temporary absence of one judge.

634. Again, the necessity of establishing some prejudice in order to be entitled to any remedy in relation to this ground of appeal is accepted by Landžo.[1066] However, no specific prejudice has been established by him. The only matter to which reference needs to be made is the fact that Judge Karibi-Whyte slept through thirty minutes of the evidence in chief of one of Landžo's medical witnesses – a psychiatrist who gave evidence upon the issue of diminished mental responsibility. If the Trial Chamber's rejection of the psychiatric evidence given on behalf of Landžo had depended upon a preference for the views of the psychiatrist called by the Prosecution over the views of the four psychiatrists called by Landžo, this fact could possibly have demonstrated a substantial prejudice to his case. However, as stated earlier, this was not the basis upon which the Trial Chamber rejected their views. The Trial Chamber rejected their views because it did not accept the truth of the factual history given by Landžo upon which the four psychiatrists had based their opinions.[1067]

---

events of the proceedings. Such an impression can even be made by actions to which the judge is legally obliged [*sic*]".

[1065] It was adopted at the Twenty-first Plenary Session, 15-17 Nov 1999, (Revision 17 of the Rules) and entered into force on 7 Dec 1999. The words "or for reasons of authorised Tribunal business" were inserted by Revision 19 of the Rules, with effect from 19 Jan 2001.

[1066] Landžo Supplementary Brief, p 7.

[1067] Trial Judgement, paras 1181-1185. *See* para 593 above.

635. Landžo nevertheless relied by way of analogy upon certain domestic cases which, he contended, established that prejudice is *inherent* in a party's counsel sleeping during trial.[1068] However, it is apparent from a reading of these cases that the view that a counsel's sleeping during trial is *inherently* prejudicial has been taken by only one appeals court, other courts having found it necessary to look at the record and the evidence to establish whether the client's interests were in fact "at stake" at the relevant times and therefore prejudiced by the counsel's inattention.[1069] Further, the fact of a *counsel* sleeping or being seriously inattentive to his or her client's case – and thereby providing ineffective assistance – during a trial differs from the issue of judicial inattention, in that defence counsel, who alone truly knows the interests of his or her client, is necessarily obliged to safeguard those interests at every moment during the trial, in order to avoid prejudice which cannot be remedied.

636. Landžo argued that he has proved "necessary and irreversible prejudice" because, as it was Judge Karibi-Whyte's duty to play a full part in the decision of all questions of fact, law and evidence, he had been "deprived of the right to have Judge Karibi-Whyte bring his independent judgment to bear on the conferences in which all three Judges participated [...]".[1070] Landžo and the other appellants were, however, unable to point to any evidence which supports this allegation or which indicates that Judge Karibi-Whyte did not in fact participate in all relevant deliberations during and after the trial. It was in fact acknowledged during oral submissions that the appellants did not know and could not now establish what participation Judge Karibi-Whyte would have had in deliberations with the other judges in relation to the proceedings.[1071] From the conclusions drawn by the Appeals Chamber on the basis of its review of the Extracts Tapes, it rejects the submission that the content of the tapes gives rise to "an almost irresistible inference that the Judge missed much of the evidence and argument".[1072]

637. Reliance was also placed by Landžo on the principle that there must be the appearance of a fair trial,[1073] with the implication that even proof of an *appearance* that a judge was sleeping during proceedings is an adequate foundation for relief without proof of prejudice. An English case, *R v Weston-Super-Mare Justices, ex parte Taylor*, was cited in support of this

[1068] *Javor v United States of America*, 724 F 2d 831 (1981) (Court of Appeals, 9th Circuit); *Tippins v Walker* 77 F 3d 682 (1996) (Court of Appeals, 2d Circuit).
[1069] *Tippins v Walker*, cited above, at 685 and 689.
[1070] Landžo Supplementary Brief, p 15.
[1071] Appeal Transcript, p 691.
[1072] Landžo Supplementary Brief, p 14.
[1073] Appeal Transcript, p 692.

contention.[1074] There, the Queen's Bench Divisional Court set aside a defendant's conviction on the basis that the chairperson of a bench of magistrates had appeared to be asleep for part of the trial. The defendant's solicitor, believing that the chairperson had been asleep, suggested to her through the clerk of the court that she retire and leave the remaining two magistrates to determine the case. The Divisional Court, having referred to evidence before it as to the magistrate's conduct, found that she had not in fact been asleep. However, it held that the magistrate should have withdrawn in response to the request because it was clear that the defendant's solicitor had formed a genuine view that she had been asleep, and that "the administration of justice required not only that justice was in fact done, but also that justice was seen to be done".[1075]

638. The conclusion in that case turned on the views formed, albeit genuinely, by a single observer, even though they were contradicted by the evidence of other observers which was ultimately preferred by the review court in its finding.[1076] The Appeals Chamber does not accept that this was the correct approach. In relation generally to the right to a fair trial under Article 6 of the European Convention on Human Rights, the European Court of Human Rights has held that, despite

> [...] the importance of appearances in the administration of justice, [...] the standpoint of the persons concerned is not in itself decisive. The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified [...].[1077]

639. Further, the proposition on which *ex parte Taylor* turned – that the perceived *appearance* of sleep means that justice is not being seen to be done, and therefore affects the fairness of the trial – is inconsistent both with other English jurisprudence on the issue of judicial inattention and with the other domestic jurisprudence referred to in paragraphs 625 and 626 above.[1078]

[1074] [1981] Crim LR 179, cited in Landžo Supplementary Brief, pp 9-10.

[1075] [1981] Crim LR 179.

[1076] In other cases in which counsel for a party gave evidence that they had formed the opinion that the trial judge was sleeping, this was dealt with by the review court as being one part of the relevant evidence on the issue, rather than as proof that, because one observer had formed the opinion that the judge was sleeping, justice was not being seen to be done. *See, e.g., R v Langham and Langham* [1972] Crim LR 457 (Court of Appeal, Criminal Division); *Stathooles v Mount Isa Mines Ltd* [1997] 2 Qd R 106, at 110 (Queensland Court of Appeal).

[1077] *Kraska v Switzerland*, Case No 90/1991/342/415, Judgement of 19 April 1993, para 32.

[1078] *See, e.g., R v Langham and Langham* [1972] Crim LR 457 (Court of Appeal, Criminal Division): "The complaint that the judge appeared to be asleep which if true was a matter which the court would certainly

E. Obligation to Raise the Issue at Trial

640. It was submitted by the Prosecution that the principle of "waiver" prevents the appellants from raising the subject matter of this ground of appeal. It contends that the appellants, not having raised the allegations that the Presiding Judge was sleeping during the trial, are now precluded from advancing them for the first time on appeal.[1079] The Appeals Chamber accepts that, as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party. This principle, established in many national jurisdictions, has been recognised in previous decisions of the Appeals Chamber.[1080]

641. In cases where it is alleged that a trial judge was sleeping or otherwise inattentive during proceedings, the jurisprudence in national systems demonstrates that there is another significant, and more important, reason for the requirement that the complaining party must raise the issue during the proceedings at the time of the judge's sleeping or inattention. The matter must be raised with the court at the time the problem is perceived in order to enable the problem to be remedied, first by ensuring that the judge's attention is restored to the relevant testimony or submissions, and secondly by having the relevant testimony or submissions repeated. Even if this is not possible, it enables the court or a subsequent review court to identify what portion of the proceedings have not received the attention of the trial judge in order to determine whether any significance should be attached to such inattention.[1081] Thus the requirement that the issue

---

deplore but was not a sufficient ground for saying that justice was not seen to be done". *See* also *R v George*, 12 June 1984, Court of Appeal (Criminal Division), where it is said that the appearance of sleep "[...] proves no basis for an appeal unless it can be shown that the learned judge may have been asleep or at any rate that his conduct during the trial had a bearing on the outcome of the trial".

[1079] Prosecution Response to Landžo Supplementary Brief, para 1.5.

[1080] *Furundžija* Appeal Judgement, para 174: "[The Appellant] could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On that basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss his ground of appeal". *Tadić* Appeal Judgement, para 55: In the context of a complaint on appeal that the Defence had not been able to call witnesses essential to the Defence case, the Appeals Chamber stated: "The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*, as the Defence seeks to do in this case". *See* also *Prosecutor v Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 20: "[...] no such complaint was made to the Trial Chamber [...] and it should not be permitted to be made for the first time on appeal".

[1081] *Chicago City Railway Company v Anderson* 193 Ill 9 (1901) (Supreme Court of Illinois), at 12-13; *Stathooles v Mount Isa Mines Ltd* [1997] 2 Qd R 106, at 113; *R v Grant* [1964] SASR 331, at 338; *R v Moringiello* [1997] Crim LR 902; *R v Tancred* 14 Apr 1997, Court of Appeal (Criminal Division).

must have been raised during the proceedings is not simply an application of a formal doctrine of waiver, but a matter indispensable to the grant of fair and appropriate relief.

642. No attempt was made to raise the issue formally before the Trial Chamber. Counsel for Landžo sought to explain her failure to do so by saying that she had approached "this sensitive issue in the most diplomatic way possible", by raising it with the Registrar and the then President of the Tribunal (Judge Cassese) rather than in court.[1082] She went on to say:

> Judge Karibi-White along with the other two Judges was the fact finder in the trial. He would be determining the guilt and/or innocence, and he would be determining the amount of sentence to be imposed. Direct confrontation with the fact finder at this point in the trial would not have benefited my client. Approaching the Registry and the President of the Tribunal regarding these issues was the direction that I considered most prudent at this juncture in the trial.

643. In another affidavit, counsel for Landžo said that, between August and November 1997, she had "informally" discussed the problem with the Trial Chamber's Senior Legal Officer, who had responded that "the matter was being addressed by the Tribunal".[1083] In August 1997, she had prepared a "Motion for Mistrial" and her "Resignation under Protest", "because of the sleeping of the Judge and the total disrespect by the Presiding Judge for all those attempting to perform their duties during the trial".[1084] She says that she met with the Registrar, who persuaded her not to resign and who arranged a meeting with President Cassese. President Cassese had assured her that he "would attend to the matter". She had thereafter continued to discuss the "continuing problem" with the Senior Legal Officer of the Trial Chamber.[1085]

644. To have made a complaint to the Trial Chamber itself, it is said, would have been "inappropriate and futile", because it "would necessarily have alienated one of the three triers of fact, causing potentially irreparable harm to Landžo's case".[1086] In pursuing the alternative course, it is said, she "acted in the highest traditions of the Bar".[1087]

[1082] Affidavit of Cynthia McMurrey Sinatra, sworn 25 Sept 1999, p 2, filed with Motion of Appellant, Esad Landžo, for Permission to Obtain and Adduce Further Evidence on Appeal, 27 Sept 1999 ("Motion to Obtain Evidence"), which is Exhibit C to Landžo Supplementary Brief.

[1083] Affidavit of Cynthia McMurrey Sinatra, sworn 20 Apr 2000, p 1, annexure to Appellant Esad Landžo's List of Witnesses on Appeal, Submission of Witness Statements and Motion for Issuance of *Subpoena Ad Testificandum*, 15 May 2000 ("Affidavit of 20 April 2000").

Affidavit of 20 April 2000, pp 1-2. The document in fact entitled "Resignation Under Protest" is described in the affidavit as a Motion for Withdrawal.

[1085] *Ibid*, pp 1-2.

[1086] Motion to Obtain Evidence, p 6.

[1087] Landžo Supplementary Brief, p 17.

645. The Appeals Chamber does not agree. Such an approach fails to recognise that raising the issue before the Trial Chamber is indispensable to the grant of fair and appropriate relief. Moreover, it clearly could be anticipated that, by taking her complaint to the President, it would necessarily be made known to Judge Karibi-Whyte. The issue was, indeed, made known to him.[1088] The "highest traditions of the Bar" require counsel to be considerably more robust on behalf of their client in such circumstances as these than counsel for Landžo was in this case. Co-counsel for Landžo on the appeal referred – for a somewhat different purpose – to his need in the present case to make his submissions on this and other grounds of appeal "in a somewhat more direct manner to the court – respectful, but direct", which he proceeded to do in a robust, but entirely appropriate, manner.[1089] Any counsel of experience will have had the embarrassing duty at some stage of his or her career of saying something unpleasant to a judge.[1090] Counsel for Landžo herself did not flinch from making very serious (although completely baseless) allegations of impropriety against the Appeals Chamber concerning the compilation of the Extracts Tapes in a filing prior to the hearing of the appeal.[1091]

646. In interlocutory proceedings, the Appeals Chamber held that the discussion between counsel for Landžo and both President Cassese and the Senior Legal Officer of the Trial Chamber fell within the scope of an adjudicative privilege or judicial immunity from compulsion to testify and that, as the evidence could be given by counsel herself, it was inappropriate to request either of them to waive that immunity and give evidence.[1092] It was also held that the discussions counsel for Landžo had with the Registrar were the subject of a qualified privilege, so that the Registrar's evidence could not be compelled if the evidence could be given by counsel herself.[1093] The assertions by counsel for Landžo in her affidavits were therefore uncontradicted. The Prosecution said that it had no knowledge of the facts asserted, and that it was willing to proceed on the basis that they are correct.[1094] It did not seek to cross-

---

[1088] A letter written by Landžo to President Cassese concerning Judge Karibi-White's conduct was treated by him as an application under Rule 15 ("Disqualification of Judges"), and it was communicated to the judge and then referred to the Bureau, which requested the judge to state his views on the matter. All this was disclosed to Landžo: Letter dated 3 Sept 1997, annexed to Motion to Obtain Evidence.

[1089] Appeal Transcript, p 641.

[1090] *Stathooles v Mt Isa Mines Ltd* [1997] Qd R 106 at 113.

[1091] Request of Appellant, Esad Landžo, for Information Regarding Certain Portions of the Extracts Tape Produced for Consideration by Appeals Chamber, 7 Apr 2000. The allegations were refuted by the Pre-Appeal Judge in his Decision on Request by Esad Landžo for Information Regarding Extracts Tape, 20 Apr 2000, at pp 3-4.

[1092] Order on Motion of the Appellant, Esad Landžo, for Permission to Obtain and Adduce Evidence on Appeal, 7 Dec 1999, pp 4-6.

[1093] *Ibid,* pp 5-6.

[1094] Prosecution Response to the Motion of Esad Landžo to Admit Evidence on Appeal and for Taking of Judicial Notice, 29 May 2000, para 10.

examine her upon them. Her evidence was admitted into evidence by the Appeals Chamber "without prejudice to the weight it would ultimately be afforded".[1095]

647. The Appeals Chamber does not place any particular weight upon the assertions of counsel as to what the Senior Legal Officer of the Trial Chamber said to her. It accepts that she complained to him about the judge's conduct (including his sleeping), but no more. There are no contemporaneous records to support the version which she now gives. The Appeals Chamber has not been impressed by her standards of accuracy in other documents filed with the Tribunal. The assertions she made in the particulars as to what is to be seen in each portion of the Extract Tapes upon which reliance is placed,[1096] when compared with what is in fact seen on the tapes themselves, are so coloured and exaggerated in nature and inaccurate in content that the Appeals Chamber does not accept that her assertions concerning the Senior Legal Officer are true.

648. When the documents prepared by counsel for Landžo for the purposes of her approach to the Registrar and President Cassese are examined,[1097] as well as the other relevant documents to which reference has been made, it is clear that the primary concern motivating counsel for Landžo was the manner in which she had been treated by Judge Karibi-Whyte, and that his sleeping was only of secondary concern. Allegations are made that Judge Karibi-Whyte made personal attacks on counsel, that he did not respect them and that he was spiteful; even in the secondary complaint that he had slept during the proceedings, reference is made to his "lack of judicial temperament, self restraint and common decency".[1098]

649. Such conduct towards counsel alleged against Judge Karibi-Whyte has not been made the subject of any ground of appeal, and it is not relevant to any issue which the Appeals Chamber must decide. The allegations are referred to only for the purpose of demonstrating that they were the primary source of counsel's complaints to the Registrar and to President Cassese, and that the allegations that the judge slept through the proceedings were only secondary. There is no suggestion that any complaints concerning the judge's alleged sleeping

---

[1095] Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice", 31 May 2000 ("Order on Evidence on Appeal"), p 4.

[1096] Exhibit B to Landžo Supplementary Brief.

[1097] (Draft) Esad Landžo's Motion for Mistrial, 26 Aug 1997 ("Draft Motion for Mistrial"); (Draft) Cynthia McMurrey's Resignation Under Protest, 26 Aug 1997; Exhibit C to Motion to Obtain Evidence.

[1098] Draft Motion for Mistrial, pp 3-4. The same is true of the letter written by Landžo to President Cassese (*see* footnote 1089). Reference is made to Judge Karibi-Whyte's "arrogant behaviour towards my defence counsel", whose conduct had been "subject to constant humiliation" and that she appeared to have been

were made following November 1997, notwithstanding that, according to the particulars supplied by Landžo,[1099] his sleeping continued throughout the trial (the last entry being 12 October 1998). For the reasons already given, the Appeals Chamber does not accept the explanation by counsel for Landžo for her failure to raise the issue before the Trial Chamber itself.

F. Conclusion

650. The Appeals Chamber is satisfied that the use now of the secondary complaint concerning the judge's inattention during the trial to found Landžo's fourth ground of appeal is opportunistic. The absence of any actual prejudice caused by the judge's inattention requires that this ground of appeal and the corresponding grounds of appeal by Mucić and Delić be dismissed.

XII. JUDGE ODIO BENITO AND VICE-PRESIDENCY OF COSTA RICA

651. Three of the appellants – Delić, Mucić and Landžo – filed grounds of appeal based upon the facts that, whilst still a judge of the Tribunal and engaged in hearing this case, Judge Odio Benito was elected as a Vice-President of Costa Rica and took an oath of office as such. The grounds were in the following terms:

> Delić Issue 1
>
> Whether the Trial Chamber was properly constituted after 8 May 1998 in that Judge Elizabeth Odio Benito was no longer qualified to serve as a judge of the Tribunal in that she did not meet the qualifications in Article 13(1) of the Statute of the Tribunal.[1100]
>
> Mucić Ground 1
>
> Whether Judge Odio Benito was disqualified as a judge of the Tribunal by reason of her election as Vice-President of the Republic of Costa Rica.[1101]
>
> Landžo Ground 2

---

singled out for unfair treatment. This reference to the judge falling asleep is referred to only briefly and as a secondary concern.

[1099] Exhibit B to Landžo Supplementary Brief.

[1100] Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, p 2.

[1101] Appellant Zdravko Muci}'s Final Designation of his Grounds of Appeal, p 1.

The Participation at Trial as a Member of the Trial Chamber of a Judge Ineligible to Sit as a Judge of the Tribunal Violated Articles 13 and 21 of the Statute of the ICTY, the Rules of Natural Justice and International Law and Rendered the Trial a Nullity.[1102]

These grounds raise two distinct issues:

(1) Was Judge Odio Benito no longer qualified as a judge of the Tribunal by reason of those facts?

(2) Should Judge Odio Benito have disqualified herself as a judge by reason of those facts because she was no longer independent?

A. Background

652. Judge Odio Benito was elected as a judge of the Tribunal in September 1993, and she was installed as such on 17 November 1993 for a term of four years.[1103] In the elections held on 20 May 1997, neither she nor the other two judges hearing this case were re-elected. On 27 August 1997, the UN Security Council passed a resolution endorsing a recommendation by the Secretary-General that these three judges, "once replaced as members of the Tribunal, finish the *Čelebići* case which they have begun before expiry of their terms of office [...]".[1104]

653. On 1 February 1998, and during the course of the trial in this case, Judge Odio Benito was elected as the Second Vice-President of the Republic of Costa Rica, and she took an oath of office as such on 8 May 1998. On 25 May 1998, the four accused jointly filed a "Motion on Judicial Independence", addressed to Judge Karibi-White, the Presiding Judge of the Trial Chamber. The four accused submitted that Judge Odio Benito should cease to take any further part in the trial, upon the grounds that, by having taken that oath of office and thereby become a member of the executive branch of the Government of Costa Rica:

(1) she had ceased to meet (a) the qualifications for a judge of the Tribunal, and (b) the criteria required for an independent judge in international law, and

(2) she had acquired an association which may affect her impartiality.[1105]

Pursuant to Rule 15(B) of the Tribunal's Rules, Judge Karibi-White conferred with Judge Odio Benito and then referred the Motion to the Bureau for its determination.[1106]

[1102] Landžo Brief, p 2.
[1103] Statute of the Tribunal, Article 13.4.

654. On 4 September 1998, the Bureau determined that Judge Odio Benito was not disqualified from sitting in the trial on the grounds referred to in Rule 15(A).[1107] Although the Bureau acknowledged that its competence conferred by the Rules did not extend to those aspects of the Motion on Judicial Independence which went beyond the scope of Rule 15(A),[1108] it did consider, and it rejected, the claim that Judge Odio Benito had ceased to possess the qualifications required for appointment to the highest judicial offices of her country (and therefore to be a judge of the Tribunal).[1109] There was no challenge at the time to either of these determinations.[1110]

B. Was Judge Odio Benito No Longer Qualified as a Judge of the Tribunal?

655. The qualifications for judges of the Tribunal are stated in Article 13 of the Tribunal's Statute:

> **Article 13**
>
> **Qualifications and election of judges**
>
> The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.[1111]

This provision is not stated in terms of qualification for *election* as judges, but rather in terms of continuous application ("The judges shall be [...]"). If, for example, a judge of the Tribunal were to be found guilty of some offence committed during his or her term of office which

---

[1104] Security Council Resolution S/RES/1126, 27 Aug 1997 ("Resolution 1126").
[1105] Motion on Judicial Independence, 25 May 1998, p 1.
[1106] Decision of the Bureau on Motion for Judicial Independence, 4 Sept 1998 ("Bureau Decision"), p 4. The four accused, apparently in ignorance of that referral, subsequently filed a request for a hearing of their joint motion or, alternatively, a request that the Presiding Judge refer the matter to the Bureau. This application was disposed of informally (Trial Transcript, pp 14930-14933).
[1107] Bureau Decision, p 11. Rule 15(A) provides: "A judge may not sit on a trial or appeal in any case in which the judge has a personal interest or concerning which the judge has or has had any association which might affect his or her impartiality".
[1108] Bureau Decision, p 11.
[1109] *Ibid*, p 6.
[1110] It was suggested during the hearing of the appeal that this was because the Bureau Decision of Sept 1998 "was not rendered until after the trial had been concluded" (Appeal Transcript, p 724). That is not so. The final submissions concluded on 15 October 1998 (Trial Transcript, p 16372), and Judgement in the trial was delivered on 16 November 1998.
[1111] This was the form of Article 13(1) of the Statute at the relevant time. It has since been amended by Security Council Resolution 1329, 30 Nov 2000, so that the opening sentence commences: "The permanent and ad litem judges shall be persons of high moral character [...]".

demonstrated a lack of high moral character or integrity, it could hardly be suggested that such a judge remained qualified within the terms of Article 13 simply because he or she was qualified at the time of election. The Appeals Chamber accepts that a judge must *remain* qualified within the meaning of Article 13 throughout his or her term of office.

656. The appellants have directed their arguments to the requirement of Article 13 that the judges of the Tribunal "possess the qualifications required in their respective countries for appointment to the highest judicial offices". Judge Odio Benito was elected as a judge of the Tribunal on the nomination of her country, the Republic of Costa Rica. The highest judicial office in that country is that of a magistrate of the Supreme Court of Justice of Costa Rica.[1112] The appellants argue that, by reason of her assumption of office as Vice-President of Costa Rica, Judge Odio Benito was constitutionally rendered disqualified for election as such a magistrate and therefore lost her qualifications as a judge of the Tribunal.

657. On the other hand, the Prosecution, in addition to disputing the appellants' interpretation of Article 13,[1113] argues that, by reason of the Security Council's resolution permitting Judge Odio Benito (and the other two members of the Trial Chamber) to finish this case notwithstanding that they had been replaced as members of the Tribunal, the provisions of Article 13 no longer applied to them.[1114]

658. For reasons which will be given later in this Judgement, the Appeals Chamber does not accept either of these arguments, but it believes that it is important to state first its interpretation of Article 13 of the Tribunal's Statute.

659. In the opinion of the Appeals Chamber, any interpretation of Article 13 must take into account the restriction imposed by Article 12 of the Statute, that no two judges may be nationals of the same State. The Statute envisages that judges from a wide variety of legal systems would be elected to the Tribunal, and that the qualifications for appointment to the highest judicial offices in those systems would similarly be widely varied. The intention of Article 13 must therefore be to ensure, so far as possible, that the *essential* qualifications do not differ from

---

[1112] Constitution of the Republic of Costa Rica ("Constitution"), Article 156. The Constitution was adopted in 1949. The parties (the Prosecution and Landžo, representing all three convicted appellants) have agreed upon an accurate English language translation of the Constitution (which is written in the Spanish language) as it was in force between 17 Nov 1997 (the date upon which Judge Odio Benito's original term expired) and 16 Nov 1998 (the date upon which the Judgement was delivered): Agreement Between the Prosecution and Appellant, Esad Landžo, Regarding the Constitution of Costa Rica, 28 Jul 2000, para 7. Article 156 provides: "The Supreme Court of Justice is the highest court of the judicial branch [...]".

[1113] Prosecution Response, para 13.42.

judge to judge. Those *essential* qualifications are character (encompassing impartiality and integrity), *legal* qualifications (as required for appointment to the highest judicial office) and experience (in criminal law, international law, including international humanitarian law and human rights law). Article 13 was *not* intended to include every local qualification for the highest judicial office such as nationality by birth or religion, or disqualification for such high judicial office such as age. Nor was Article 13 intended to include constitutional disqualifications peculiar to any particular country for reasons unrelated to those essential qualifications.

660. This is certainly the way the Security Council has interpreted Article 13 to date. Article 13(2) provides that, before the judges of the Tribunal are elected by the UN General Assembly, the Security Council must submit for consideration by the General Assembly a list of candidates reducing those nominated by the States to a lesser number which takes into due account the need for adequate representation of the principal legal systems of the world. It may safely be assumed that the Security Council would not include within that reduced list any candidate who did not satisfy the requirements of Article 13. Indeed there are concrete examples where the Security Council has interpreted Article 13 in the way set forth by this Chamber.

661. When Judge Odio Benito was included in the list of candidates for election in 1993, she was still (according to her *curriculum vitae* which accompanied her nomination)[1115] the Minister of Justice of the Republic of Costa Rica – which, if the appellants's argument were to be accepted, would have constitutionally rendered her disqualified for election as a magistrate of the Supreme Court of Justice and as a judge of this Tribunal.[1116] Judge Sir Ninian Stephen was already seventy years of age when elected as a judge of the Tribunal in 1993,[1117] and thus was to be seventy four years of age at the conclusion of his term. The highest compulsory retirement age for any high judicial office in his country (Australia) is seventy-two – being for the Supreme Court of New South Wales. In neither of these cases was the judge thought by the Security Council not to be qualified as a judge of the Tribunal for a four year term.

[1114] Prosecution Supplementary Brief, para 4.
[1115] General Assembly Document A/47/1006, 1 Sept 1993, p 57.
[1116] According to Judge Odio Benito's *curriculum vitae* which accompanied her nomination for election in 1997, she did not resign as Minister of Justice until 1994: General Assembly Document A/51/878, 22 Apr 1997, p 58.
[1117] ICTY 1994 Year Book, p 201.

662. It was accepted by the appellants that Judge Odio Benito at all times remained qualified as a judge of the Tribunal in relation to her character, legal qualifications and experience. The Appeals Chamber is accordingly satisfied that Judge Odio Benito did not lose her qualifications as a judge of the Tribunal by reason of her assumption of office as Vice-President of Costa Rica.

663. In any event, the Appeals Chamber does not accept the argument of the appellants that her assumption of office as a Vice-President of Costa Rica rendered Judge Odio Benito constitutionally disqualified for election as a magistrate of the Supreme Court of Justice under the Constitution of that country. It expresses this opinion as a matter of interpretation of the Constitution of Costa Rica, consistently with the jurisprudence of that country as identified by expert evidence during the appeal.

664. The Constitution states:

> The government of the Republic [...] is exercised by three distinct and independent branches: legislative, executive and judicial.[1118]

665. The Constitution has separate sections dealing with the legislative power,[1119] the executive power[1120] and the judicial power.[1121] It makes separate provisions as to the qualifications and disqualifications for election to a position within each of these three branches (or powers):

(1) Those *qualified* for election as deputies to the Legislative Assembly must be citizens of Costa Rica, Costa Rican by birth (or naturalised with ten years' residence after naturalisation), and twenty one years of age.[1122] Those *disqualified* as candidates for election as deputies include anyone occupying within six months prior to the date of the election the positions of President of the Republic, or a cabinet minister or a magistrate of the Supreme Court of Justice, or relatives of the existing President to the second degree of consanguinity or affinity inclusive.[1123]

[1118] Constitution, Article 9.
[1119] *Ibid*, Title IX.
[1120] *Ibid*, Title X.
[1121] *Ibid*, Title XI.
[1122] *Ibid*, Article 108.
[1123] *Ibid*, Article 109.

(2) Those *qualified* for election as the President or a Vice-President must be citizens of Costa Rica, Costa Rican by birth, laymen and over thirty years of age.[1124] Those *disqualified* for election as President or Vice-President include anyone occupying within twelve months prior to the date for election the positions of President, or a Vice-President, or magistrate of the Supreme Court of Justice or a cabinet minister, or certain relatives of the existing President by consanguinity or affinity.[1125]

(3) Those *qualified* for election as a magistrate of the Supreme Court of Justice must be citizens of Costa Rica, Costa Rican by birth (or naturalised with ten years' residence after naturalisation), laymen, over thirty five years of age and legally qualified as defined.[1126] The only persons *disqualified* for election as a magistrate are persons who are related by consanguinity or affinity to the third degree inclusive to a member of the Supreme Court of Justice.[1127]

666. It is significant that, whilst persons holding positions in both the administrative and the judicial supreme powers at the time of the election (or within six months prior thereto) are expressly disqualified as a candidate for election as a deputy to the Legislative Assembly, and persons holding positions in the judicial supreme power at the time of the election (or within twelve months prior thereto) are expressly disqualified as a candidate for election as the President or a Vice-President, *no* person holding positions with either the executive or the administrative supreme powers at the time of the election is expressly disqualified as a candidate for election as a magistrate. In particular, a Vice-President at the time of the election is not expressly disqualified for election as a magistrate of the Supreme Court.

667. In support of their argument, however, the appellants rely upon Article 161 which provides:

> The position of magistrate is incompatible with that of an official of the other supreme powers.

[1124] *Ibid*, Article 131.
[1125] *Ibid*, Article 132.
[1126] *Ibid*, Article 159. The Article defines the legal qualification as: "Holder of a lawyer's degree issued or legally recognised in Costa Rica, and must have engaged in the profession for at least ten years, except in the case of judicial [officials] with not less than five years of judicial experience". (The Spanish translator retained by the Tribunal's Conference and Languages Section prefers the word "officers" to "officials").
[1127] *Ibid*, Article 160.

The expression "supreme powers" is not defined in the Constitution, but it may be accepted that the reference is to the three "distinct and independent branches" which exercise the government of the Republic through the "powers" already identified.

668. Article 161 is one of similar but not identical provisions which relate to each of the three supreme powers:

> [Legislative power]
>
> Article 111 After taking the oath of office no deputy may accept a position or employment with the other powers of the State or the autonomous institutions, under penalty of losing his credentials, except as a cabinet minister. In the latter event, he will be reinstated in the Assembly when the position terminates. [...]
>
> Article 112 The legislative function is also incompatible with the holding of any other elective public office. [...]
>
> [Executive power]
>
> Article 143 The position of minister is incompatible with the exercise of any other public [charge, elective] or otherwise, except where special laws confer functions upon them. [...].[1128]
>
> The vice-presidents of the Republic may hold the position of minister.
>
> [Judicial power]
>
> Article 161 The position of magistrate is incompatible with that of an official of the other supreme powers.

The object of these provisions appears clearly to be to prevent the one person holding more than one of these positions at the one time. If a Vice-President at the time of the election of magistrates, who is otherwise qualified in accordance with Article 159 but not disqualified by Article 160, wishes to stand for that election, he or she is permitted to do so, but must, if elected as a magistrate, resign as Vice-President. Such an interpretation of the Constitution itself is consistent with the jurisprudence revealed in the expert opinion of Mr Alejandro Batalla,[1129] although it would appear to be inconsistent with his final conclusion.

[1128] The Spanish translator retained by the Tribunal's Conference and Languages Section prefers the phrase "post, publicly elected" to "charge, elective".

[1129] A Professor of Administrative Law in the Master and Doctoral Program of the Institute of Education and Research of Universidad Autónoma de Centro América.

669. Citing as authority a decision of the Costa Rican Constitutional Court,[1130] Mr B says:

> [...] the intention of the Constitutional Assembly was to provide the Magistrates with a special level of independence from the other branches to prevent any mixing of their political activity with the justice in order to guarantee impartiality.[1131]
>
> The Constitutional Court argues that holding both positions simultaneously might subordinate the Magistrate psychologically to a certain ideology that can affect and reduce his criteria in such a way.
>
> The body of laws of Costa Rica stipulates, in general terms, the incompatibility of the positions of magistrate and judge[1132] with those positions elected by popular vote such as the position of Vice-President, and the justification lies on the demand of the independence of the judge. In other of its precedents, the Constitutional Court has stated that:
>
> "The position of Judge or Magistrate is incompatible with any other position elected by popular vote or political designation. What is intended is to keep the officials administering justice away from the passions inherent to the political activity which, due to its nature, is very polemical. In this way, this prevents the possibility of establishing a link of psychological subordination of the judge, offering said circumstance, the temptation of adjusting his behaviour to a certain ideology or way of thinking detached from his self, since the freedom of opinion of the judge may be reduced by the influence of an ideological tendency. The system of incompatibilities and the system of prohibitions are guarantees that tend to prevent the creation of links – either of public or private nature – that may lead to the union of two simultaneous qualities in one person; that is, that the status of the Judge may be joined by another quality that may place him, in a submission relationship of any kind. It is possible to prevent the judge from performing any paid job in order to prevent him from establishing links that may restrict his independence".[1133]

670. Mr Batalla then concludes:

> In conclusion, the position of Magistrate of the Supreme Court of Justice has an express restriction on a Constitutional level to be *elected* if he holds another position in any other Supreme Power of Costa Rica.[1134]

If Mr Batalla's ultimate conclusion be correct, the Constitution would have expressed the disqualifications upon candidates for election as a magistrate in substantially different terms. Article 160 would have disqualified as candidates for such election those persons holding positions in both the executive and the administrative supreme powers, in the same way as Articles 109 and 132 have disqualified magistrates as candidates for election, respectively,

---

[1130] Constitutional Court, Decision N 2621-95, quoted in Mr Batalla's opinion at pp 2-3.
[1131] Opinion, pp 3-4.
[1132] [Mr Batalla's footnote] The Judge and the Magistrate are the only officials that may administer justice.
[1133] [Mr Batalla's footnote] Constitutional Court, Decision N 2883-96.
[1134] The emphasis has been added.

as deputy of the Legislative Assembly and as President or Vice-President. Significantly Constitution has not done so. [1135]

671. Article 161 does not therefore *disqualify* a Vice-President as a candidate for election as a magistrate of the Supreme Court of Costa Rica. It merely requires that such a Vice-President resign that position if *elected* as a magistrate and before assuming office as such.

672. The Prosecution's argument which the Appeals Chamber has not accepted was that the requirements of Article 13(1) of the Statute apply by their terms only to "the judges" of the Tribunal, which means the judges referred to in Article 12 who are elected pursuant to Article 13(2) or appointed pursuant to Article 13(3).[1136] The Prosecution contended that, when the term of office of Judge Odio Benito expired on 17 November 1997, she ceased to be one of "the judges" of the Tribunal, and that the Security Council Resolution 1126 which enabled the judges of the *Čelebići* Trial Chamber to finish hearing the case did not affect this.[1137] The terms of Resolution 1126, which authorised the three judges "once replaced as members of the Tribunal, to finish the *Čelebići* case which had begun before the expiry of their terms of office", was interpreted by the Prosecution as emphasising that the judges' terms of office had *expired* and that they had been replaced. Although the judges continued to exercise the functions of a judge, it was said, they no longer held the office of judges of the Tribunal.[1138] The source of Judge Odio Benito's authority after 17 November 1997 was not the Statute, but Resolution 1126. The resolution was said to prevail over the Statute in the event of inconsistency, as the Statute itself derives from a Security Council resolution and can be expressly or impliedly amended by a subsequent resolution.[1139]

673. However, if the submission that Judge Odio Benito was no longer a "judge" within the meaning of Article 13(1) after the expiry of her initial term of office be correct, it would follow that she was also not a "judge" for the purposes of other articles of the Statute. In that case, since Article 12 provides that the Trial Chambers consist of three "judges", the Trial Chamber would not have been validly composed. Moreover, since it is the "Trial Chambers" which are

[1135] An expert opinion by Francisco Villalobos Brenes (a member of the Bar of Costa Rica and Adjunct Professor in the Faculty of Law of the University of Costa Rica) was also tendered. None of the interpretative resources relied upon by Mr Brenes suggest a contrary interpretation of Article 161. Indeed, he expressly concludes (at para 5C) that Article 161 is one of various rules which specifically prohibit the possibility of a person *exercising* the judicial function at the same time as holding a post in the Executive or Legislative Branches (the emphasis has been added).

[1136] Prosecution Supplementary Brief, para 4.

[1137] *Ibid*, paras 6-9.

[1138] *Ibid*, paras 10-12.

to pronounce judgements and impose sentences and penalties,[1140] it would follow that the Judgement in this case was not delivered by the body authorised by the Statute to do so. The Appeals Chamber does not accept that this was the intention of the Security Council in adopting Resolution 1126. The Prosecution indeed denied that its interpretation of the resolution has the result that the Trial Chamber was not properly constituted,[1141] and it submitted at the oral hearing that the three judges continued to be judges of the Tribunal with limited functions but that Resolution 1126 nevertheless had the effect that the requirements of Article 13(1) did not apply to them.[1142] This submission is entirely without merit.

674. The words from Resolution 1126 relied upon by the Prosecution must be read in the context of the circumstances in which the resolution was passed. The then President of the Tribunal had written to the Secretary-General seeking from him "an extension of the three judges sitting in the *Čelebići* case", and had requested him to submit his letter to the members of the Security Council "for their consideration and approval of the extension of tenure of the three aforementioned judges for 12 months as from 17 November 1997".[1143] The Secretary-General had submitted the letter as requested, describing it in his letters to the Presidents of the Security Council and the General Assembly as requesting "an extension of the terms of office of the non-elected judges of the International Tribunal in order to allow them to dispose of ongoing cases".[1144] His letters continued:

> [...] in the absence of an explicit statutory provision providing for the extension of the term of office of Tribunal judges to complete ongoing cases, an approval of the Security Council, as the parent organ, and of the General Assembly, as the electing organ, would be desirable to preclude any question about the legality of such an extension.

Resolution 1126, having noted this correspondence, endorsed the recommendation of the Secretary-General in the terms already partly quoted.[1145]

675. A reading of Resolution 1126 in this context necessarily indicates that its effect was to extend the terms of the judges for the particular purpose of concluding the *Čelebići* trial. The

---

[1139] *Ibid*, paras 13-16.
[1140] Statute, Article 23.
[1141] Prosecution Supplementary Brief, para 19.
[1142] Counsel for the Prosecution told the Appeals Chamber that the judges had a "qualified qualification" (Appeal Transcript, p 714). The meaning of that phrase was not explained.
[1143] Letter of 18 June 1997, annexed to Document A/51/958 S/1997/605.
[1144] Letter of 1 Aug 1997, annexed to Document A/51/958 S/1997/605.
[1145] "Endorses the recommendation of the Secretary-General that Judges Karibi-Whyte, Odio Benito and Jan, once replaced as members of the Tribunal, finish the *Čelebići* case which they have begun before expiry of their terms of office [...]".

terms of office of the judges as extended, although limited in their defined purpose, otherwise left subject to the relevant provisions of the Statute. Any implied effect on the Statute was not to render Article 13(1) and those other provisions which refer to "judges" of the Tribunal inapplicable to the three judges, as argued by the Prosecution. It was limited to making a narrowly qualified exception to the four year term of office referred to in Article 13(4). The resolution indicates no intention to amend, modify or suspend any other provisions of the Statute, including Article 13(1), in any way.

676. The challenge to Judge Odio Benito's qualifications under Article 13 accordingly fails.

C. Should Judge Odio Benito Have Disqualified Herself as a Judge of the Tribunal?

677. The second issue raised by the appellants based upon the election of Judge Odio Benito as a Vice-President of Costa Rica and her assumption of that office was whether she was thereby disqualified as a judge of the Tribunal because she no longer possessed the necessary judicial independence required by international law.[1146] The appellants relied upon additional material and arguments in relation to this issue.

678. *Appointment as Minister of Environment and Energy:* After she took the oath of office as Second Vice-President, Judge Odio Benito was also appointed as Minister of Environment and Energy in the Government of Costa Rica.[1147]

679. *Membership of Board of Mediators:* A decree issued by the President of Costa Rica on 15 June 1998, dealing with a "Process of National Consensus", provided for a Board of Mediators to be composed of, *inter alia*, the two Vice-Presidents of the Republic. The functions and powers of that Board were to "judge, mediate and propose alternative solutions in those cases where the members of the Consensus Forum [another of the bodies in the Process of National Consensus] have such disagreements that they are unable to reach decisions by consensus".[1148]

[1146] Landžo Reply, para 6.18 (which incorporates the arguments in the Motion on Judicial Independence, 25 May 1998); Mucić Brief, para 3.

[1147] Agreement Between the Prosecution and Appellant, Esad Landžo, Regarding Evidence for the Purposes of the Appeal, 19 May 2000 ("Agreement on Evidence"), p 1.

[1148] Landžo Reply, para 6.13; Agreement on Evidence, p 1, and annexed extract from the official gazette.

680. *Exercise of Executive Functions:* Reliance was placed upon two media reports, the accuracy of which was not disputed,[1149] to claim that Judge Odio Benito exercised executive functions in Costa Rica whilst still a judge of the Tribunal:

(i) Meeting in April 1998

The first report, dated 28 April 1998, referred to a meeting of the President-elect of Costa Rica and "a group of former Costa Rican legal representatives and high officials" which had been held in order "to evaluate the process of a united national effort before the change in power the following week". The report focused on the release by the group of a communiqué which expressed "profound consternation" at the recent assassination of the Auxiliary Bishop of Guatemala.[1150] The report observed that "Vice-Presidents-elect, Astrid Fischel and Elizabeth Odio, who will assume office this coming May 8", also participated in the meeting.

(ii) Letter of protest

The second report, dated 1 June 1998, stated that an environmental and humanitarian organisation, Foro Emaus, had written to "the vice president of Costa Rica [...] who is furthermore the head of the Department of Environment and Energy" to protest at the deficient labour conditions in which women worked in banana packing plants.[1151]

681. *Separation of Powers:* The appellants assert that Judge Odio Benito exercised an executive function merely by holding the position of Second Vice-President as required by the Constitution of Costa Rica.[1152] They rely upon the doctrine of separation of powers, which is said to prevent a judge of the Tribunal from holding an executive position in a domestic government.[1153] The appellants rely upon the status of Costa Rica as a non-permanent member of the Security Council for a two year period from 1 January 1997 to submit that Costa Rica had "direct political and administrative control over the affairs of this Tribunal",[1154] and that Judge

[1149] The Prosecution denied, however, that the events reported constituted the exercise by Judge Odio Benito of executive functions: Agreement on Evidence, p 2; Prosecution Response, para 13.45.
[1150] "President Elect of Costa Rica Condemns the Assassination of Bishop Gerardi", 28 Apr 1998, translation filed by counsel for Landžo, 5 June 2000.
[1151] "Denunciation of Deficient Labor Conditions in Banana Packing Plants", 1 June 1998.
[1152] Appeal Transcript, p 721.
[1153] *Ibid*, p 654. The submissions made by the appellants in relation to Judge Odio Benito and her position as Vice-President did not always make a clear distinction between the first and second of these issues. This particular submission was described as being relevant to her qualification under Article 13 (the first issue), but the Appeals Chamber regards it as logically more relevant to her disqualification under Rule 15(A) (the second issue), and it has considered the submission upon that basis.
[1154] Appeal Transcript, p 672.

Odio Benito, as a Vice-President of Costa Rica, had the power to give instructions to Costa Rica's representative on the Security Council, placing her "in an executive capacity *vis-a-vis* this very Tribunal".[1155]

682. *Impartiality:* The requirement of a judge's impartiality is stated in Article 13 of the Tribunal's Statute, which has already been quoted. That requirement is reflected in Rule 15(A), which is in these terms:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

This Rule has been interpreted by the Tribunal as encompassing circumstances establishing both actual bias and an appearance or a reasonable apprehension of bias.[1156] No suggestion of actual bias has been made in the present case; the suggestion made is that the contemporaneous holding by Judge Odio Benito of the offices of a judge of the Tribunal and of Vice-President and government minister of Costa Rica carried the appearance of a lack of impartiality.[1157]

683. The relevant question to be determined by the Appeals Chamber is whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case.[1158] The apprehension of bias must be a reasonable one.[1159] Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold.[1160] A judge of the Tribunal makes a solemn declaration that he or she will perform the duties and exercise the powers of such an office "honourably, faithfully, impartially and conscientiously".[1161]

684. The fair-minded observer would also know of the circumstances surrounding Judge Odio Benito's election as Vice-President of Costa Rica. Prior to accepting a nomination as Vice-President, Judge Odio Benito wrote to the then President of the Tribunal (Judge Cassese) undertaking that, if elected, she would not assume any Vice-Presidential functions until the

---

[1155] *Ibid*, p 681.
[1156] *Furundžija* Appeal Judgement, para 189.
[1157] Mucić Brief, para 7; Landžo Reply, para 6.18.
[1158] *Furundžija* Appeal Judgement, para 189.
[1159] *Furundžija* Appeal Judgement, para 189.
[1160] *Ibid*, para 190.

completion of her duties as a member of the Trial Chamber hearing the *Čelebići* case ("the Undertaking"). President Cassese submitted that letter to the judges in a Plenary meeting, who unanimously determined, upon the basis of the Undertaking, that her proposed action would not be incompatible with her judicial duties. When she was elected as Vice-President, Judge Odio Benito informed the then President of the Tribunal (Judge McDonald), who submitted the matter again to the judges in a Plenary meeting, where approval was given for her to take the oath of office. The Undertaking given by Judge Odio Benito to the Tribunal was supported by the President of Costa Rica, who wrote to President McDonald to confirm that Judge Odio Benito would continue to discharge her functions as a judge of the Tribunal until the completion of the *Čelebići* case[1162] and that she would not assume any functions in the government of Costa Rica before 17 November 1998.[1163] These facts were set out by the Bureau in its decision of 4 September 1998,[1164] and their substance has not been contested by the appellants.[1165]

D. Conclusion

685. The Appeals Chamber does not accept that Judge Odio Benito exercised any executive functions in Costa Rica during the time she was also a judge of the Tribunal. Taking the matters upon which reliance was placed by the appellants by reference to the categories already referred to:

686. *Appointment as Minister of Environment and Energy:* At the same time as Judge Odio Benito was appointed as Minister of Environment and Energy, a substitute minister was appointed to be in charge of that ministry during her absence.[1166] No evidence was produced by the appellants that Judge Odio Benito had exercised any of the powers or functions as such minister during the relevant period.

[1161] Rule 14 of the Rules.

[1162] Letter from His Excellency Miguel Angel Rodriguez E, President-Elect of the Republic of Costa Rica, to the President of the Tribunal, 9 Mar 1998.

[1163] Letter from His Excellency Miguel Angel Rodriguez E, President of the Republic of Costa Rica, to the President of the Tribunal, 7 July 1998.

[1164] Bureau Decision, p 3.

[1165] Appeal Transcript, p 653. The Prosecution relied on the Bureau Decision and the facts found therein: Prosecution Response, para 13.45. The Appeals Chamber has not dealt with this matter as an appeal from the decision of the Bureau. The question whether a judge should have been disqualified from hearing a case is relevant to the fairness of the trial: *Prosecutor v Furundžija*, IT-95-17/1, Decision on Post-Trial Application by Anto Furundžija to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial, 11 Mar 1999, p 2; and it is therefore a valid ground of appeal from a conviction. The *Furundžija* Appeal Judgement proceeded upon the basis that this was a valid ground.

[1166] Agreement on Evidence, para 1.

687. *Membership of Board of Mediators:* No evidence was produced by the appellants to suggest that Judge Odio Benito had exercised any of the powers or functions of the Board of Mediators, nor even that the Board as an entity had been called upon to exercise its powers in the relevant period. Given the absence of any such evidence, it must be assumed that the Undertaking of Judge Odio Benito and the formal assurances of the President of Costa Rica, that she would not be assuming any functions of the government of Costa Rica (including those of Vice-President), were adhered to and that her membership of the Board of Mediators remained only a formal one during the relevant period.

688. *Exercise of executive functions*:

(i) Meeting in April 1998

This meeting took place before Judge Odio-Benito had assumed the office of Vice-President, and before she had any executive functions to perform. There is no suggestion that anyone else at the meeting was in a position to perform any such functions either. The "former" Costa Rican legal representatives and high officials could not have been there in any executive capacity. The purpose of the meeting – to evaluate "the process of a united national effort before the change in power the following week" – necessarily excluded any suggestion that the participants could have exercised any executive functions of government at that time. The only action which appears to have been taken by the group was the release of the communiqué, a gesture of the sort which is frequently made by public figures in the circumstances referred to. Judge Odio Benito was a prominent legal figure in Costa Rica – if for no other reason because she was a former Minister of Justice – and her participation in such a communiqué was perfectly natural. It was not an executive function.

(ii) Letter of protest

No evidence was produced by the appellants to suggest that Judge Odio Benito responded in any way to the letter or even that she had personally received it.[1167]

689. *Separation of powers:* It is beyond question that the principles of judicial independence and impartiality are of a fundamental nature which underpin international as well as national law. They are represented not only in numerous international and regional

[1167] Counsel for Landžo appeared to acknowledge the weaknesses in this material when he stated "I don't place much weight on those [two newspaper reports]": Appeal Transcript, p 673.

instruments – including the Universal Declaration of Human Rights[1168] and the International Covenant on Civil and Political Rights[1169] – but also in the Statute of the Tribunal itself, which requires by Article 12 that the Chambers be composed of independent judges and by Article 13 that the judges be impartial. The fundamental importance of the independence of the judiciary has been emphasised in the jurisprudence of the Appeals Chamber.[1170] This jurisprudence has also recognised that the principle of judicial independence in domestic and international systems generally demands that those persons or bodies exercising judicial powers do not also exercise powers of the executive or legislative branches of those systems.[1171]

690. The application of the principle of separation of powers to the factual situation underlying this ground of appeal is nevertheless misconceived. The doctrine applies principally to ensure the separate and independent exercise of the different powers within the same sphere or political system. The purpose of requiring a separation of judicial from other powers is to avoid any conflict of interest. Where the relevant powers arise in separate systems or on different planes – such as the national and the international – the potential for there to be any convergence in the subject matter of the powers, and therefore for a conflict of interest to arise, is greatly reduced.

691. The only basis upon which it is suggested that such a convergence has occurred in the present case relates to Costa Rica's membership of the Security Council at the relevant time. The assumptions necessarily involved in the proposition that, because of that fact, Judge Odio Benito was in an executive capacity *vis-à-vis* the Tribunal itself are, in the opinion of the Appeals Chamber, so remote as to be fanciful. Those assumptions are:

(a) that the Security Council would exercise its administrative functions in relation to the Tribunal in order to affect the judicial decisions of the Tribunal, contrary to the Statute which the Security Council itself had adopted by which the judges were required to be both independent and impartial;

(b) that Costa Rica, as one of the fifteen members of the Security Council,[1172] would be capable of influencing the Security Council in the exercise of such

[1168] Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him."

[1169] Article 14 provides, in part: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, every person shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

[1170] *Tadić Jurisdiction Decision,* para 45; *Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, Decision (On Prosecutor's Request for Review or Reconsideration), 31 Mar 2000, Declaration of Judge Rafael Nieto-Navia ("*Barayagwiza* Declaration"), paras 10-14.

[1171] *Barayagwiza* Declaration, para 9.

[1172] Charter of the United Nations, Article 23(1).

functions – notwithstanding the veto power of the five permanent memb relation to non-procedural matters[1173] – to such a degree that it would exercise direct political or administrative control over the affairs of this Tribunal; and

(c) that a Vice-President of Costa Rica has the power to *instruct* that country's representative in the Security Council how to exercise such control over the affairs of this Tribunal, and that Judge Odio Benito would exercise that power, notwithstanding the undertaking which she gave to the Tribunal and the confirmation by the President of Costa Rica, that she would not assume any functions as Vice-President until after her term of office as a judge of the Tribunal had concluded.

It should be noted that no suggestion has been made that the Republic of Costa Rica had any direct interest in the outcome of the present case.

692. The Appeals Chamber is not satisfied that the fair-minded observer would in all those circumstances consider that Judge Odio Benito had placed herself in a position of conflict of interest with her position as a judge of this Tribunal, and that she might therefore not bring an impartial and unprejudiced mind to the issues arising in the *Čelebići* case. It follows that no reasonable apprehension of bias has been established, and that there was no basis upon which Judge Odio Benito should have disqualified herself pursuant to Rule 15(A). The challenge to her independence accordingly also fails.

693. Delić Issue 1, Mucić Ground 1 and Landžo Ground 2 are therefore dismissed.

[1173] *Ibid*, Article 27(3).

XIII. JUDGE ODIO BENITO AND THE VICTIMS OF TORTURE FU[illegible]

694. Delić, Mucić and Landžo also filed grounds of appeal asserting that, because Judge Odio Benito was, while a judge of the Tribunal and engaged in hearing this case, a member of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture ("Victims of Torture Fund"), she was automatically disqualified from sitting as a judge in this case. The grounds were in the following terms:

> Delić Issue 2
>
> Whether Judge Elizabeth Odio Benito was disqualified in that she had an undisclosed affiliation which could have cast doubt on her impartiality and which might affect her impartiality.[1174]
>
> Mucić Ground 2
>
> Whether Judge Odio-Benito was disqualified as a member of the Trial Chamber by reason of her membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture.[1175]
>
> Landžo Ground 3
>
> The Participation as a Member of the Trial Chamber of a Judge Who Had an Actual or Apparent Conflict of Interest Affecting the Judge's Impartiality as a Member of the Trial Chamber Violated the Rules of Natural Justice and International Law, and, as a Matter of Law, Absent Disclosure by the Judge, and Informed Consent by the Defence, Automatically Disqualified the Judge From Sitting as a Member of the Trial Chamber.[1176]

695. The Victims of Torture Fund was established in 1981 by a resolution of the United Nations General Assembly to extend the mandate of an already existing fund, the United Nations Trust Fund for Chile, and it redesignated the fund by its present name. The mandate of the Victims of Torture Fund, as set out in that resolution, was:

> [...] receiving voluntary contributions for distribution, through established channels of assistance, as humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of torture and to relatives of such victims, priority being given to aid to victims of violations by States in which the human rights situation has been the subject of resolutions or decisions adopted by either the Assembly, the Economic and Social Council or the Commission on Human Rights.[1177]

The resolution also determined that the Victims of Torture Fund would be administered in accordance with Financial Regulations of the United Nations by the Secretary-General, with the

---

[1174] Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, p 2.
[1175] Appellant Zdravko Mucić's Final Designation of His Grounds of Appeal, 31 May 2000, p 2.
[1176] Landžo Brief, p 1.
[1177] General Assembly Resolution 36/151 of 16 December 1981.

advice of a Board of Trustees "composed of a chairman and four members with wide experi• in the field of human rights, acting in their personal capacity [...]." It was agreed between the parties that Judge Odio Benito was a member of the Board of Trustees of the Victims of Torture Fund throughout the *Čelebići* trial.[1178]

696. The appellants contend that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund gave rise to a reasonable apprehension of bias. The appellants argue that, by virtue of her membership of the Board, Judge Odio Benito had undertaken an obligation to further the goals of the Victims of Torture Fund. Since the Indictment in the *Čelebići* trial included allegations of torture, there was, it is said, a strong appearance of bias against those accused who were the subject of those allegations. (Landžo's earlier submission, that it was likely that Judge Odio Benito was *actually* biased against him as a person charged with torture,[1179] was abandoned during the oral submissions.)[1180] The appellants argued that Judge Odio Benito should therefore have disqualified herself pursuant to Rule 15(A) of the Rules or made a full disclosure of the association to the accused and their counsel and obtained their informed consent to proceed.[1181]

697. The relevant question to be determined by the Appeals Chamber is thus the same as that already stated in the previous Chapter: whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case. The apprehension of bias must be a reasonable one. Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold in the solemn declaration made when assuming office, that he or she will perform the duties and exercise the powers of such an office "honourably, faithfully, impartially and conscientiously".[1182]

698. The Appeals Chamber agrees that, by accepting a position on the Board of Trustees, Judge Odio Benito undertook in her personal capacity to further the mandate of the Victims of Torture Fund. However, given that the objects of the fund as expressed in its mandate are

---

[1178] Agreement on Evidence, para 1.
[1179] Landžo Brief, p 26: "[...] it is at least possible, and in reality very likely, that Judge Odio-Benito had an actual partiality against Appellant Landžo".
[1180] Appeal Transcript, p 685: "We do not for a moment suggest that there is evidence that Judge Odio Benito displayed actual bias towards Landžo or the other appellants".
[1181] Delić Brief paras 48 and 57; Landžo Brief, pp 35-36; Appeal Transcript, pp 645-646.
[1182] *See supra* para 683.

solely focussed on fundraising to enable material assistance to the victims of torture – i.e. the receipt and redistribution of donations for humanitarian, legal and financial aid to victims of torture and their relatives – the Appeals Chamber does not accept that a commitment by Judge Odio Benito to the objects and the activities of the Fund could reasonably be regarded as in any way inconsistent with the fair and impartial adjudication of charges of torture in her different capacity as a judge of the Tribunal.

699. As noted in the *Furundžija* Appeal Judgement, personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality.[1183] In relation to the particular subject of torture, it is difficult to accept that any judge eligible for appointment to the Tribunal – and thus a person of "high moral character, impartiality and integrity", as required by Article 13 of the Tribunal's Statute – would not be opposed to acts of torture. A reasonable and informed observer, knowing that torture is a crime under international and national laws, would not expect judges to be morally neutral about torture. Rather, such an observer would expect judges to hold the view that persons responsible for torture should be prosecuted.

700. It was nevertheless submitted that Judge Odio Benito, by reason of her membership of the Board of Trustees of the Victims of Torture Fund, "[...] had a clear identification with the victims of the alleged offences, and therefore, by an inescapable process of logic, against the alleged perpetrators of those offences".[1184] But, while an objective observer may reasonably infer from such membership that Judge Odio Benito sympathises with victims of torture, it is far from "inescapable logic" that she would therefore be biased against persons *alleged* to be perpetrators of torture. A person opposed to torture may be expected to hold the view that those *responsible* for committing that offence should be punished, but this is fundamentally different to bias against any person *accused* of torture. This is particularly so in the case of judges who, as discussed above, are presumed to be impartial,[1185] and are professionally equipped, by virtue of their training and experience, for the task of fairly determining the issues before them by applying their minds to the evidence in the particular case.[1186]

[1183] *Furundžija* Appeal Judgement, para 203.

[1184] Landžo Brief, p 26. *See* also Mucić Brief, para 5, p 5: "[...] it can reasonably be assumed that, by agreeing to be a trustee of the fund, Judge Odio Benito was sympathetic to its objectives and thus hostile to acts of torture and to those who were, or alleged to have been, engaged in those acts".

[1185] *Supra*, para 683, *see* also *Furundžija* Appeal Judgement, paras 196-197.

[1186] *Prosecutor v Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para 17.

701. The appellants submitted that, even though the activities of the Victims of Torture Fund are praiseworthy, they are nevertheless incompatible with judicial office because "[j]udges ... have an obligation to set themselves apart from the political fray and the activism on behalf of causes".[1187] Such a submission is wholly inapposite to the present case. The purposes of the Victims of Torture Fund are not even remotely political, and Judge Odio Benito's membership of its Board of Trustees, with its overseeing role in the receipt and redistribution of donations for victims of torture, cannot be characterised as activism on behalf of a cause in any natural sense of the term.

702. It is clear that the Statute of the Tribunal, by requiring that the "experience of the judges in criminal law, international law, including humanitarian law and human rights law" be taken into account in composing the Chambers,[1188] anticipated that a number of the judges of the Tribunal would have been members of human rights bodies or would have worked in the human rights field. As Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was included on her curriculum vitae submitted by the Secretary-General to the General Assembly prior to the election of judges of the Tribunal in 1993 and 1997,[1189] it was no doubt considered to be relevant to her experience in the field of human rights law and therefore to the judicial qualification requirements. As noted in the *Furundžija* Appeal Judgement, it would be an odd result if the fulfilment of the qualification requirements of Article 13 were to operate as a disqualifying factor on the basis that it gives rise to an inference of bias.[1190] Counsel for Landžo was obliged to argue that such membership was both a qualification and a disqualification at the same time and that, given the prevalence of allegations of torture in cases to be tried by the Tribunal, Judge Odio Benito should accordingly have spent four years as a judge of the Tribunal doing absolutely nothing.[1191]

703. The appellants placed heavy reliance in their submissions upon the decision of the United Kingdom House of Lords decision in the *Pinochet* case, in which it was determined that a member of the House of Lords (Lord Hoffman) was disqualified from hearing an earlier case because he was a director and chairperson of a charitable organisation which was controlled by

[1187] Appeal Transcript, p 686.
[1188] Article 13.
[1189] General Assembly documents A/47/1006, 1 Sept 1993, p 58; A/51/878, p 59.
[1190] *Furundžija* Appeal Judgement, para 205.
[1191] Appeal Transcript, pp 687-689.

Amnesty International, an intervenor in the case.[1192] It was submitted that the facts of the cases were "almost exactly the same",[1193] and that the result in both cases should be the same.[1194] The Appeals Chamber observes that a single decision from a national court does not (contrary to what was suggested by certain of the appellants' submissions) constitute any kind of definitive code for matters arising in the unique context of this international Tribunal. That said, the *Pinochet* Decision is nevertheless of some assistance in applying the law in the present case, because the legal principles it discussed in relation to judicial disqualification are substantially similar to the principles which the *Furundžija* Appeal Judgement has held to govern the issue of disqualification for bias in this Tribunal.[1195]

704. An examination of the reasoning of the members of the House of Lords in the *Pinochet* Decision, however, makes it quite apparent that it does not support the conclusions the appellants seek to draw from it. Contrary to the submissions of the appellants, it was critical to the actual result in that decision that Amnesty International was, as an intervenor in the earlier proceedings, a party to the litigation. The significance of the status of Amnesty International as a party to the proceedings lies in the fact that the House of Lords held that the circumstances in which a judge should be disqualified because of an appearance of bias encompass two categories of case. The first is that, where a judge is party to a litigation or has a relevant interest in its outcome, he is automatically disqualified from hearing the case. The second category is that a judge who is not party to the litigation, but whose conduct or behaviour in some other way gives rise to a reasonable suspicion that he is not impartial, is obliged to disqualify himself.[1196]

705. Lord Browne-Wilkinson, who gave the principal reasons for judgement and with whose reasons the other members of the House of Lords agreed,[1197] found that Lord Hoffman's circumstances fell within the first category of automatic disqualification. His Lordship held that automatic disqualification extended to any judge "who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit", and he found that Lord Hoffman "was disqualified as a matter of law automatically by

---

[1192] *R v Bow Street Metropolitan Stipendiary Magistrate and Others; Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272 ("*Pinochet* Decision").
[1193] Appeal Transcript p 684.
[1194] Landžo Brief, p 34.
[1195] The Appeals Chamber stresses that it does not intend in any way to depart from the principles expressed in the *Furundžija* Appeal Judgement on this issue.
[1196] *Pinochet* Decision, p 281.

reason of his directorship of AICL, a company controlled by a party, AI [Amnesty International]".[1198] Lord Browne-Wilkinson then reiterated the exceptional nature of the case, stating:

> The critical elements are (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) [and that] the judge was a director of a charity closely allied to AI and sharing, in this respect, AI's objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties.[1199]

In the present case, the Victims of Torture Fund was not a party to the *Čelebići* proceedings in any capacity. There was no evidence put forward by the appellants nor any indication of any kind that the Fund was allied to or acting with any party to the proceedings. Landžo submitted that, because both the Fund and the Tribunal are organs of the United Nations, the Fund has a common cause with the Office of the Prosecutor of the Tribunal.[1200] That submission is simply untenable. Even if it is accepted that, in the broadest sense of the concept, the Prosecutor and the Victims of Torture Fund have a common cause, that cause is simply one of opposition to the crime of torture. That is not a disqualifying common interest.

706. The second category of disqualification referred to by Lord Browne-Wilkinson, which substantially reflects the concept of reasonable apprehension of bias as expressed by the Appeals Chamber in relation to the Tribunal, is the only category relevant to the facts of the present case. Because of the conclusion that Lord Hoffman had been automatically disqualified by the application of the first category, Lord Browne-Wilkinson found it unnecessary to consider the question raised by the second category, namely whether the circumstances gave rise to a real danger or suspicion of bias.[1201] The decision is therefore of limited assistance in the present case.

707. The Appeals Chamber has already emphasised that, as there is a high threshold to reach in order to rebut the presumption of impartiality and before a judge is disqualified, the

---

[1197] *Pinochet* Decision, p 285 (Lord Goff of Chieveley); p 288 (Lord Nolan and Lord Hope of Craighead), p 291 (Lord Hutton).
[1198] *Pinochet* Decision, p 284.
[1199] *Pinochet* Decision, p 284. *See* also Lord Goff of Chieveley at p 286: "[...] we have to consider Lord Hoffmann [...] as a person who is, as a director and chairperson of AICL, closely connected with AI which is, or must be treated as, a party to the proceedings".
[1200] Landžo Brief, p 34; Landžo Reply, para 6.26.
[1201] *Pinochet* Decision, p 284.

reasonable apprehension of bias must be "firmly established".[1202] The reason for this threshold is that, just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias. As has been observed in a decision cited by the Appeals Chamber in the *Furundžija* Appeal Judgement:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party [....]. Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[1203]

708. The Appeals Chamber is not satisfied that a reasonable and informed observer would consider that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund would render her unable to consider and determine with an impartial and unbiased mind the matters, including charges of torture, which were before her in the *Čelebići* trial. There was therefore no basis upon which Judge Odio Benito should have disqualified herself, nor (taking the second limb of the appellants' argument) any requirement that she make a formal disclosure of her membership of the Board and obtain consent to proceed from the parties to the *Čelebići* case. Although the issue of disclosure is therefore not strictly relevant, the Appeals Chamber does note that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was a matter of public knowledge,[1204] published in three successive Year Books of the Tribunal,[1205] and in documents of the United Nations General Assembly.[1206]

709. Accordingly, Delić Issue 2, Mucić Ground 2 and Landžo Ground 3 are dismissed.

[1202] *Furundžija* Appeal Judgement, par 197.

[1203] Per Mason J, *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 (High Court of Australia), adopted unanimously by the High Court of Australia in *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448; cited in the *Furundžija* Appeal Judgement at para 197.

[1204] The Appeals Chamber has already observed in the *Furundžia* Appeal Judgement that because of the numerous public sources of information about the qualifications and associations of Judges of the Tribunal, such information is freely available to the parties: *Furundžia* Appeal Judgement, para 173.

[1205] Yearbook for 1994, p 200; Yearbook for 1995, p 355; Yearbook for 1996, p 23. The fact of Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was also in the Yearbook for 1997 (p 28) which was published after the conclusion of the *Čelebići* trial.

[1206] General Assembly documents A/47/1006, 1 Sept 1993, p 58; A/51/878, p 59. *See* above para 702.

XIV. GROUNDS OF APPEAL RELATING TO SENTENCING

A. Introduction

710. The Appeals Chamber has decided to quash certain of the convictions entered against Landžo, Mucić and Delić where there was more than one conviction imposed on the basis of the same facts. As noted above, it is therefore necessary to consider whether, in relation to those convictions quashed on the basis of cumulative convictions considerations, the sentences imposed upon them in relation to the remaining convictions should be adjusted.

711. Because the Appeals Chamber has had no submissions from the parties on these issues and, because there may be matters of important principle involved, it will be necessary for such consideration to be given after the parties have had the opportunity to make relevant submissions. As the Appeals Chamber cannot be reconstituted in its present composition, and as, in any event, a new matter of such significance should be determined by a Chamber from which an appeal is possible, the Appeals Chamber proposes to remit these issues for determination by a Trial Chamber.

712. As it will be an issue as to whether any *adjustment* should be made to the sentences because of the matters referred to above, and not a complete rehearing on the issue of sentence, it is appropriate that the Appeals Chamber consider and resolve the issues raised in the parties' grounds of appeal relating to sentence insofar as they allege the commission of errors in the exercise of discretion or other errors of law by the Trial Chamber in imposing those sentences, so that the new Trial Chamber will then be in a position to consider what, if any, adjustment should be made to what the Appeals Chamber considers would otherwise have been appropriate sentences.

713. In addition, the Appeals Chamber has determined that the conviction of Delić on Counts 1 and 2 of the Indictment must be quashed on the basis that it was not open to the Trial Chamber to have convicted him on those counts. It would be convenient, when the matter is remitted, for the new Trial Chamber also to consider what adjustments should be made to the sentence of Delić in relation to the reversal of his conviction on those counts.

714. Before turning to consider the issues raised in the parties' particular grou[illegible] appeal relating to sentence, as referred to above, the Appeals Chamber considers it appropriate to first address several general considerations.

715. The Prosecution submits that the Appeals Chamber should determine "basic sentencing principles which should be applied by the Trial Chambers."[1207] The Appeals Chamber notes that the Prosecution made similar submissions in the case of *Furundžija* before the Appeals Chamber, arguing that such principles would assist in order to achieve consistency and even-handedness in sentencing before the Trial Chamber.[1208] The Appeals Chamber in that case decided that, since only certain matters relating to sentencing were at issue, it was inappropriate to set down a definitive list of sentencing guidelines for future reference.[1209]

716. The benefits of such a definitive list are in any event questionable. Both the Statute (Article 24) and the Rules (Rule 101) contain general guidelines for a Trial Chamber to take into account in sentencing. These amount to an obligation on the Trial Chamber to take into account aggravating and mitigating circumstances (including substantial co-operation with the Prosecution), the gravity of the offence, the individual circumstances of the convicted person and the general practice regarding prison sentences in the courts of the former Yugoslavia.[1210] Other than these general principles, no detailed guidelines setting out, for example, what particular factors may be taken into account in mitigation or aggravation of sentence are provided in either the Statute or the Rules.[1211]

717. Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing. This is largely because of the over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime. To achieve this goal, Trial Chambers are obliged to consider

---

[1207] Prosecution Reply, para 5.8 and Appeal Transcript, p 730.

[1208] *Prosecutor v Anto Furundžija,* Prosecution Submission of Public Version of Confidential Respondent's Brief of the Prosecution Dated 30 Sept 1999, 28 June 2000, Case No IT-95-17/1-A, para 7.17.

[1209] *Furundžija* Appeal Judgement, para 238.

[1210] It is also obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute (Rule 101(B)(iv).

[1211] This was also the case with the implementing legislation for the post-World War II trials (including the International Military Tribunals held at Nuremberg and Tokyo). Article 27 of the Nuremberg Charter provided simply that "the Tribunal shall have the right to impose upon a Defendant on conviction, death or such other

both aggravating and mitigating circumstances relating to an individual accused. The m' circumstances taken into account by the Trial Chambers to date are evident if one considers the sentencing judgements which have been rendered.[1212] As a result, the sentences imposed have varied, from the imposition of the maximum sentence of imprisonment for the remainder of life,[1213] to imprisonment for varying fixed terms (the lowest after appeal being five years[1214]). Although certain of these cases are now under appeal, the underlying principle is that the sentence imposed largely depended on the individual facts of the case and the individual circumstances of the convicted person.[1215]

718. The Appeals Chamber accordingly concludes that it is inappropriate for it to attempt to list exhaustively the factors that it finds should be taken into account by a Trial Chamber in determining sentence.

719. It is noted that, in their submissions, each party urges the Appeals Chamber to compare their case with others which have already been the subject of final determination,

---

punishment *as shall be deemed by it to be just*" (Emphasis added). A similar provision is found in Article 16 of the Charter of the International Military Tribunal for the Far East.

[1212] *See e.g.*: *Prosecutor v Tadić,* Sentencing Judgement, Case No IT-94-1-T*bis*-R117, 11 Nov 1999 para 19 (reference to willingness to commit crimes, awareness and enthusiastic support for the attacks); *Prosecutor v Tadić,* Sentencing Judgement, Case No IT-94-1-T, 14 July 1997, paras 56-58 (reference in general to cruel and willing manner in which crimes carried out); *Blaškić* Judgement, paras 783-787 (reference to motive, number of victims, effect of the crime upon victims). Remorse has been considered in for example, the *Blaškić* Judgement at para 775 and *Prosecutor v Jelisić,* Case No IT-95-10-T, 14 Dec 1999 para 127.

[1213] No sentences of imprisonment for the remainder of life have been imposed by this Tribunal. However, they have been by the ICTR. *See Kambanda* Appeal Judgement; *Prosecutor v Rutaganda,* Judgement and Sentence, Case No ICTR-96-3-T, 6 Dec 1999; *Prosecutor v Musema,* Judgement and Sentence, Case No ICTR-96-13-T, 27 Jan 2000; *Prosecutor v Kayishema,* Sentence, Case No ICTR-95-1-T, 21 May 2000; and *Prosecutor v Akayesu,* Sentence, Case No ICTR-96-4-T, 2 Oct 1998.

[1214] In the case of *Dra'en Erdemović.* The sentence of 2 ½ years originally imposed by the Trial Chamber on *Zlatko Aleksovski* was revised by the Appeals Chamber to seven years. Other fixed terms include *Goran Jelisić*, who received 40 years, *Tihomir Blaškić*, who received 45 years, *Anto Furund'ija*, who received ten years (maximum sentence), *Duško Tadić,* who received 20 years (maximum sentence) and *Omar Serushago*, who received 15 years.

[1215] *Blaškić* Judgement, para 765: "The factors taken into account in the various Judgements of the two International Tribunals to assess the sentence must be interpreted in the light of the type of offence committed and the personal circumstances of the accused. This explains why it is appropriate to identify the specific material circumstances directly related to the offence in order to evaluate the gravity thereof and also the specific personal circumstances in order to adapt the sentence imposed to the accused's character and potential for rehabilitation. Notwithstanding this, in determining the sentence, the weight attributed to each type of circumstance, depends on the objective sought by international justice." *Prosecutor v Akayesu,* Sentence, Case No ICTR-96-4-T, 2 Oct 1998, para 20: "It is a matter, as it were, of individualising the penalty." *Prosecutor v Rutaganda,* Judgement and Sentence, Case No ICTR-96-3-T, 6 Dec 1999, para 457; *Furund'ija* Appeal Judgement, para 249: "In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness."; *Prosecutor v Musema,* Case No ICTR-96-13-T, 27 Jan 2000, para 987.

in an effort to persuade the Appeals Chamber to either increase or decrease the sentence.[1216] Although this will be considered further in the context of the individual submissions, the Appeals Chamber notes that as a general principle such comparison is often of limited assistance. While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results. They are therefore not reliable as the *sole* basis for sentencing an individual.

720. This question has already been considered twice by the Appeals Chamber, and it was concluded in the first such decision that, as the facts of the two cases in question were materially different, assistance from the first rendered was limited.[1217] In the case of *Anto Furund'ija,* the Prosecution submitted that "every sentence imposed by a Trial Chamber must be individualised as there are a great many factors to which the Trial Chamber may have regard in exercising its discretion in each case."[1218] The Appeals Chamber endorses the finding in that case:

> The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise a Trial Chamber is limited only by the provisions of the Statute and the Rules.[1219]

721. Therefore, while the Appeals Chamber does not discount the assistance that may be drawn from previous decisions rendered, it also concludes that this may be limited. On the other hand, it reiterates that, in determination of sentence, "due regard must be given to the relevant provisions in the Statute and the Rules which govern sentencing, as well as the relevant jurisprudence of this Tribunal and the ICTR, and of course to the circumstances of each case."[1220]

[1216] For example, the Prosecution refers to the case of *Zlatko Aleksovski* (Appeal Transcript, pp 734 and 735); Mucić refers to *Duško Tadić* (Delić/Mucić Supplementary Brief, paras 41-48); and Land'o and Delić both refer to *Dra'en Erdemović* (Land'o Brief, p 141 and Appeal Transcript, p 752 and Delić Brief, para 361) and *Duško Tadić* (Land'o Brief, pp 141–143 and Appeal Transcript, pp 752-754, Delić Brief, para 361 and Delić/Mucić Supplementary Brief, paras 36-40).

[1217] *Serushago* Sentencing Appeal Judgement, para 27, distinguishing the case of *Dra'en Erdemović*.

[1218] *Furund'jia* Appeal Judgement, para 222 (Footnote omitted).

[1219] *Furund'jia* Appeal Judgement, para 250.

[1220] *Furund'jia* Appeal Judgement, para 237.

722. Finally, the Appeals Chamber notes that each party has made some submissio[illegible] to the standard of review in an appeal against sentence under Article 25 of the Statute.[1221] Certain parties in particular appear to be requesting that the Appeals Chamber revisit the findings of the Trial Chamber, carrying out a *de novo* review of the sentence and factors taken into account by the Trial Chamber, without necessarily pointing to any abuse of discretion. Land'o requests that the Appeals Chamber essentially reconsider the evidence and mitigating circumstances submitted on his behalf before the Trial Chamber, including that provided orally by several defence witnesses. In doing so, he asks the Appeals Chamber to carry out a *de novo* review of his sentence on appeal.[1222] Although neither Delić nor Mucić make detailed submissions in relation to the standard of review to be applied in an appeal against sentence,[1223] it appears to the Appeals Chamber that they are also essentially requesting a similar *de novo* review of the sentence imposed by the Trial Chamber, despite the fact that they also point to several factors and arguments which they believe were wrongly decided by the Trial Chamber or to which they submit insufficient weight was attached.[1224]

723. The Prosecution submits that, in accordance with the Appeals Chamber decisions in the *Tadić* Sentencing Appeal Judgement[1225] and the *Aleksovski* Appeal Judgement,[1226] the test that should be applied is the "discernible error test." That is, before the Appeals Chamber may intervene, "there must be a discernible error in the exercise of the Trial Chamber's discretion in sentencing."[1227] Once this discernible error has been identified, the

---

[1221] Article 25 of the Statute provides: "1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) An error on a question of law invalidating the decision; or (b) An error of fact which has occasioned a miscarriage of justice. 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

[1222] Land'o Brief, p149, Appeal Transctipt, pp 756-7: "Mr Land'o requests this Trial Chamber now just to reconsider the evidence that we submitted in sentencing, reconsider the fragile mental condition of Mr Land'o before the outbreak of the aggression, his lack of ability to exercise his own free will, and also in light of Tadić, to revisit all of the evidence presented."

[1223] In the Delić Brief (paras 249-265) and Delić Reply (paras 3-12), Delić makes submissions on the standard of review on appeal in general. However, he does not clarify his submissions in relation to the standard of review to be applied on sentence. Mucić makes no submissions on the standard of review to be applied on appeal against either conviction or sentence, nor does he reply to the Prosecution submissions in this regard (Prosecution Response, paras 2.1-2.23). However, given the nature of his arguments (to be discussed *infra*), it also appears that he is requesting that the Appeals Chamber carry out a *de novo* review of sentence.

[1224] For example, Mucić submits that "taking all matters raised [...] the sentence of 7 years imposed upon him should be reduced to one that more properly and justly reflects any findings that remain unsubstantiated following the determination of his appeal against conviction, and the merits of his appeal against sentence." Mucić Brief, Appeal Against Sentence, pp. 7-8.

[1225] *Tadić* Sentencing Appeal Judgement, paras 20-22 and para 73.

[1226] *Aleksovski* Appeal Judgement, para 187.

[1227] Appeal Transcript, pp 729-730.

Prosecution submits that "the Appeals Chamber can revise the Trial Chamber's sen and substitute a new sentence."[1228]

724. The Appeals Chamber reiterates that "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing."[1229] Appeal proceedings are rather of a "corrective nature" and, contrary to *Land'o's* submissions, they do not amount to a trial *de novo.*[1230] Therefore, to the extent that the parties simply resubmit arguments presented at trial without pointing to a particular error, this misconceives the purpose of appellate review on sentence.

725. The test to be applied in relation to the issue as to whether a sentence should be revised is that most recently confirmed in the *Furund'ija* Appeal Judgement.[1231] Accordingly, as a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law."[1232] The Appeals Chamber will only intervene if it finds that the error was "discernible".[1233] As long as a Trial Chamber does not venture outside its "discretionary framework" in imposing sentence,[1234] the Appeals Chamber will not intervene. It therefore falls on each appellant, including the Prosecution in its appeal against Mucić's sentence, to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence it did.

[1228] Appeal Transcript, p 743. *See* also *Aleksovski* Appeal Judgement, paras 186 and 191. Although the Prosecution did make further submissions in the Prosecution Brief (paras 5.5-5.6) and in the Prosecution Response (paras 2.1-2.23), these are subsumed by the submissions made during the oral hearing on appeal, following the two decisions of the Appeals Chamber (referred to above).

[1229] *Prosecutor v Dra'en Erdemović,* Case No IT-96-22-A, Judgement, 7 Oct 1997, para 15.

[1230] *Prosecutor v Duško Tadić*, Case No IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 Oct 1998, paras 41 - 42.

[1231] *Furund'jia* Appeal Judgement, para 239.

[1232] *Serushago* Sentencing Appeal Judgement, para 32. *See* also *Aleksovski* Appeal Judgement, para 187 and *Tadić* Sentencing Appeal Judgement, paras 20-22.

[1233] *Tadić* Sentencing Appeal Judgement, para. 22. *Aleksovski* Appeal Judgement, para 187.

[1234] *Tadić* Sentencing Appeal Judgement, para. 20.

B. Prosecution's Appeal Against Mucić's Sentence

726. The Prosecution's fourth ground of appeal is that the Trial Chamber erred when it sentenced Zdravko Mucić to seven years' imprisonment, as this sentence was "manifestly inadequate".[1235]

727. Mucić was found by the Trial Chamber to have been directly responsible under Article 7(1) for the crimes of cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp, and of unlawful confinement of civilians (Counts 46, 47 and 48). He was also found guilty as a superior under Article 7(3) of the Statute, in relation to the following counts:[1236]

> Counts 13 and 14: the wilful killing and murder of nine people – Zeljko Ćećez, Petko Gligorević, Gojko Miljanić, Miroslav Vujičić and Pero Mrkajić, Sćepo Gotovac, Zeljko Milošević, Simo Jovanović and Boško Samouković – and cruel treatment and wilfully causing great suffering or serious injury to Slavko Šušic;
>
> Counts 33 and 34: the torture of six people – Milovan Kuljanin, Momir Kuljanin, Grozdana Ćećez, Milojka Antić, Spasoje Miljević and Mirko Đorđić;
>
> Counts 38 and 39: the cruel treatment and wilfully causing great suffering or serious injury to three people – Dragan Kuljanin, Vukašin Mrkajić and Nedeljko Draganić – and the inhuman treatment and cruel treatment of Mirko Kuljanin; and
>
> Counts 44 and 45: the inhuman treatment and cruel treatment of six people – Milenko Kuljanin, Novica Đorđić, Vaso Đorđić, Veseljko Đorđić, Danilo Kuljanin and Miso Kuljanin.
>
> Counts 46 and 47: the cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp

[1235] Prosecution Brief, para 5.4.

[1236] The Appeals Chamber has found that one of the two convictions which were entered cumulatively in respect of charges arising from the same facts should be vacated. However, for the purposes of determining whether the Trial Chamber erred as alleged by the Prosecution in relation to the determination of Mucić's sentence, the Appeals Chamber must proceed on the basis of the convictions which the Trial Chamber had entered. The effect of the quashing of particular grounds on the basis of cumulative convictions considerations is discussed further below.

(this finding being in addition to the finding of guilty on these counts pursu... Article 7(1) of the Statute.)

728. The Trial Chamber sentenced Mucić to seven years imprisonment in respect of each count for which he was found guilty, and ordered that those sentences be served concurrently.[1237] As a result, the overall sentence imposed was a period of not more than seven years.

729. The Prosecution contends that the Trial Chamber's approach in sentencing Mucić "involved errors of basic principle, and that the sentence it imposed on Mucić was so low that it fell outside the proper limits of the Trial Chamber's discretion".[1238] The errors alleged by the Prosecution were identified separately in relation to those convictions based solely on Article 7(3), the conviction based on Article 7(1) alone, and the convictions based on both Article 7(1) and Article 7(3) liability. The primary argument relates to the Trial Chamber's alleged failure to take into account the gravity of the crimes for which Mucić was convicted. It is also alleged that the Trial Chamber should have taken into account crimes not specifically alleged in the indictment in sentencing Mucić.[1239] Finally, the Prosecution argues that the Trial Chamber erred in determining that all of the sentences imposed on Mucić should be served concurrently.[1240] Mucić argued in relation to his own ground of appeal against sentence that his sentence was too high and did not take into account certain matters in mitigation, including the absence of his direct participation in acts of violence.[1241]

1. Failure to take into account the gravity of the offences

730. Article 24(2) of the Statute of the Tribunal provides:

> In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

[1237] Trial Judgement, para 1286.
[1238] Prosecution Brief, para 5.6.
[1239] Prosecution Brief, paras 5.34-5.43.
[1240] Prosecution Brief, paras 5.54-5.75.
[1241] Mucić Brief, Appeal Against Sentence, pp 1-2. This submission in respect of the absence of findings as to his direct participation is effectively incorporated in the Appeals Chambers' consideration of the Prosecution ground of appeal but in relation to other matters in mitigation is considered further below in relation to Mucić's ground of appeal.

731. The Trial Chamber found, in its general considerations before addressing the [illegible] relevant to each individual accused, that "[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence".[1242] In the subsequent *Aleksovski* Appeal Judgement, the Appeals Chamber expressly endorsed this statement of the *Čelebići* Trial Chamber, and also expressed its agreement with the following statement of the Trial Chamber in the *Kupreškić* proceedings:

> The sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[1243]

The Appeals Chamber reiterates this endorsement of those statements and confirms its acceptance of the principle that the gravity of the offence is the primary consideration in imposing sentence. It is therefore necessary to consider whether the Trial Chamber in fact gave due weight to the gravity of the offences for which Mucić was convicted in the sentence it imposed.

(a) Convictions under Article 7(3) alone

732. The Prosecution first submitted that there are two aspects to an assessment of the gravity of offences committed under Article 7(3) of the Statute:

> (1) the gravity of the underlying crime committed by the convicted person's subordinate; and
>
> (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes.[1244]

The Appeals Chamber agrees that these two matters must be taken into account. As a practical matter, the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a subordinate must

[1242] Trial Judgement, para 1225.
[1243] *Kupreškić* Judgement, para 852, cited in the *Aleksovski* Appeal Judgement at para 182.
[1244] Prosecution Brief, para 5.13.

be regarded as being of greater gravity than a failure to prevent or punish an act of plun[illegible] for example.[1245]

733. The Prosecution submits that the Trial Chamber failed to make the gravity of Mucić's offences the starting point in its determination of his sentence. It suggests first that this is demonstrated by the point at which the Trial Chamber referred to "gravity" in its discussion of the factors relevant to sentencing Mucić. It notes that, after referring to the crimes of which Mucić was found guilty, the Trial Chamber referred to a "wide range of matters relevant to sentencing" and then "almost as an afterthought" stated that it "had 'also' considered the gravity of the offences".[1246] The fact that as a matter of form the Trial Chamber's referred last to its consideration of the gravity of the offences is of no significance of itself, and it certainly does not demonstrate independently that the Trial Chamber did not in fact give appropriate consideration to that matter. It is necessary, in order to determine that question, to focus on matters relating to the substance of the Trial Chamber's Judgement.

734. In relation to those offences for which Mucić was convicted under Article 7(3) of the Statute, the Prosecution alleges that the Trial Chamber erred in law by proceeding on the basis that Article 7(3) liability is less serious than that under Article 7(1). The Prosecution stated in its written submissions:

> [...] it is evident that the Trial Chamber's sentence was premised on a view that the conduct of a superior convicted under Article 7(3) is *inherently less grave* than the conduct of the individual subordinates who committed the relevant offences.[1247]

It supports this interpretation of the Trial Chamber's judgement with a comparison between the sentences received by Mucić and Delić in respect of counts 13 and 14.

735. It would be incorrect to state that, as a matter of law, responsibility for criminal conduct as a superior is less grave than responsibility as the subordinate perpetrator. However, in the Appeals Chamber's view, and contrary to the Prosecution's submission,

---

[1245] Mucić contends that the Prosecution's approach indicates that it mischaracterises the offences of a superior as being the "same crime" as that of the subordinate upon which the superior's offence is based: Mucić Response, para 10. The Prosecution Brief does contain some references which could be understood in this way: *e.g.*, para 5.24. The Appeals Chamber's conclusion, however, is not based on any such reasoning but simply recognises the inevitable relationship between the gravity of the superior's failure to prevent or punish criminal conduct and the criminal conduct to which that failure relates.

[1246] Prosecution Brief, para 5.11.

nothing in the Trial Chamber's judgement indicates that it believed that responsibility for criminal conduct as a superior is *inherently* less grave than responsibility as the subordinate perpetrator. It appears from the Trial Chamber's Judgement that it considered that, *in the circumstances established by the evidence*, the conduct of *Mucić* in respect of the relevant counts was of a lesser gravity and therefore deserved a lesser sentence than that imposed on the subordinates. The Trial Chamber referred to these circumstances in noting that, in relation to the counts for which Mucić had been guilty under Article 7(3) alone, he was not found to have actively participated in the conduct underlying the offences.[1248]

736. In the opinion of the Appeals Chamber, proof of active participation by a superior in the criminal acts of subordinates adds to the gravity of the superior's failure to prevent or punish those acts and may therefore aggravate the sentence.[1249] The Trial Chamber explicitly acknowledged in its observations as to general sentencing principles that active abuse of a position of authority, which would presumably include participation in the crimes of subordinates, can aggravate liability arising from superior authority:

> The conduct of the accused in the exercise of his superior authority could be seen as an aggravating circumstance or in mitigation of his guilt. There is no doubt that abuse of positions of authority or trust will be regarded as aggravating.[1250]

737. It must also be recognised, however, that absence of such active participation is not a mitigating circumstance. Failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active participation in the crimes does not reduce that culpability.

738. In assessing the degree of Mucić's responsibility, the Trial Chamber evidently concluded that there was no reason for aggravation of Mucić's sentence on the basis of abuse of authority, apparently because of its finding that Mucić had not actively participated in the underlying offences.[1251] However, the Trial Chamber had also made findings that Mucić was camp commander, with overall authority over the officers, guards and detainees in the camp; that he was responsible for conditions in the camp; that he made "*no* effort to

---

[1247] Prosecution Brief, para 5.23 (emphasis added).
[1248] Trial Judgement, para 1239.
[1249] *Aleksovski* Appeal Judgement, para 183.
[1250] Trial Judgement, para 1220.
[1251] Trial Judgement para 1240.

prevent or punish those who mistreated the prisoners or even to investigate sr[illegible] incidents of mistreatment including the death of detainees"; and that he was regularly absent from the camp for days "in obvious neglect of his duty as commander and the fate of the vulnerable detainees".[1252] Importantly, the Trial Chamber found that Mucić's failures to prevent or punish the unlawful conduct in the camp were ongoing:

> In apparent encouragement, he tolerated these conditions over the entire period he was commander of the prison camp.[1253]

739. The Prosecution submits that a superior's failure over an extended period of time to prevent or punish crimes committed on an ongoing basis may be regarded as encouraging the commission of crimes, as the first failures to prevent or punish encourage the commission of subsequent crimes, and that such a failure should therefore be regarded as more serious than a single failure to prevent an isolated crime by a subordinate.[1254] The Appeals Chamber agrees that such an ongoing failure to exercise the duties to prevent or punish, with its implicit effect of encouraging subordinates to believe that they can commit further crimes with impunity, must be regarded as being of significantly greater gravity than isolated incidents of such a failure. The Appeals Chamber is of the view that, from the facts found by the Trial Chamber, Mucić's consistent failure to act in relation to the conditions and unlawful conduct within the camp must have had such an encouraging effect.

740. Although the Trial Chamber referred to the fact that Mucić's toleration of the unlawful conditions within the camp constituted apparent encouragement, the Appeals Chamber is not satisfied that the Trial Chamber took this factor adequately into account in its consideration of Mucić's sentence. This is suggested by the Trial Chamber's comments, made in relation to factors going to the mitigation of sentence, that:

> The scenario thus described would suggest the recognition of individual failing as an aspect of human frailty, rather than one of individual malice. The criminal liability of Mr. Mucić has arisen entirely from his failure to exercise his superior authority for the beneficial purpose of the detainees in the Čelebići prison-camp.[1255]

This description of Mucić's position – which suggests a purely "negative" liability by omission on Mucić's part - indicates no acknowledgement of the more influential effect of

---

[1252] Trial Judgement, para 1243. (Emphasis added).
[1253] Trial Judgement, para 1243.
[1254] Prosecution Brief, paras 5.16-5.17.
[1255] Trial Judgement, para 1248.

encouraging or promoting crimes and an atmosphere of lawlessness within the camp c[illegible] by Mucić's ongoing failure to exercise his duties of supervision. The Trial Chamber later stated that:

> In this particular case, the reason for staying away from the prison-camp at nights without making provision for discipline during these periods, which was to save himself from the excesses of the guards, is rather an aggravating factor.[1256]

This does not satisfy the Appeals Chamber that the degree of encouragement and reinforcement of the criminal conduct of his subordinates that arose from Mucić's ongoing failure to supervise was correctly taken into account. The statement quoted indicates rather that his efforts to save himself from further knowledge of the crimes, as a self-interested attempt at avoiding unpleasantness, was a matter independent of the fact that these absences also had the effect of reinforcing the atmosphere of lawlessness in the camp. It was certainly appropriate to characterise Mucić's absences from the camp in the way the Trial Chamber did, but this did not absolve the Trial Chamber of the need also to consider the serious effect of encouragement of the commission of crimes that was caused by Mucić's failure of supervision.

741. As noted above, a consideration of the gravity of offences committed under Article 7(3) of the Statute involves, in addition to a consideration of the gravity of the conduct of the superior, a consideration of the seriousness of the underlying crimes. The fact that the Trial Chamber did not take adequate account of the gravity of Mucić's offences, and specifically of the underlying crimes, is also demonstrated by the fact that the sentences imposed in respect of each count were identical: seven years for each count. The Trial Chamber imposed individual sentences in relation to each count rather than a single global sentence, as appears to have been contemplated by the Rules at that time.[1257] The process of determining the individual sentences for those counts requires a consideration of the particular offence in respect of which that count was charged and the evidence of the circumstances in which that offence was committed to enable a determination of the gravity

---

[1256] Trial Judgement, para 1250.

[1257] Rule 87 (C) provided at the relevant time "If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt." It has since been amended (Revision 19, effective from 19 Jan 2001) to read "If the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

of the offence. The imposition of exactly the same penalty for each count, whether in respect of the failure to prevent or punish the murders of nine people (counts 13 and 14) or the failure to prevent or punish the cruel treatment of four people (counts 38 and 39), and the order that they be served concurrently, demonstrates that the Trial Chamber made no attempt to distinguish between the gravity of each of the offences. It effectively simply imposed a global sentence of seven years to cover every offence, which was a manifestly erroneous assessment of the totality of Mucić's conduct. An alternative implication is that the Trial Chamber considered that the criminal conduct of Mucić was effectively the same under each count – a failure to prevent or punish. However, as the Appeals Chamber has made clear, such an approach fails to take account of the essential consideration that the gravity of the failure to prevent or punish is in part dependent on the gravity of the underlying subordinate crimes.

742. The Appeals Chamber is satisfied that the Trial Chamber did not take adequate account of the gravity of Mucić's offences under Article 7(3) in determining his sentence, and has therefore failed to have regard to a consideration it must have regard to, in imposing his sentence.

(b) Convictions on the basis of both direct and superior responsibility (Counts 46 and 47)

743. In relation to the offences for which Mucić was convicted pursuant to both Article 7(1) and Article 7(3) – wilfully causing great suffering or serious injury to body or health (Count 46) and cruel treatment, in respect of the inhumane conditions in the camp (Count 47) – the Prosecution contends that the Trial Chamber also failed to take into account the gravity of the crimes for the additional reason that his liability as a direct participant as well as a superior should have been taken into account as an aggravating factor.[1258]

744. The Trial Chamber found that:

> By omitting to provide the detainees with adequate food, water, health care and toilet [facilities] Zdravko Mucić participated in the maintenance of the inhumane conditions that prevailed in the Čelebići prison-camp. Accordingly, he is directly liable for these conditions, pursuant to Article 7(1) of the Statute. Furthermore, in his position of superior authority Zdravko Mucić knew, or had reason to know, how the detainees, by the violent acts of his subordinates, were subjected to an atmosphere of terror, but failed to prevent these acts or to punish the perpetrators thereof. Accordingly, the Trial

[1258] Prosecution Brief paras 5.45-5.46.

> Chamber finds that Zdravko Mucić is responsible pursuant to Article 7(3) of the Statute for the atmosphere of terror prevailing in the Čelebići prison-camp.[1259]

The Trial Chamber entered convictions against counts 46 and 47, each count encompassing both the Article 7(1) liability and the Article 7(3) liability. In sentencing, the Trial Chamber referred to the fact of Mucić's dual liability under each of counts 46 and 47,[1260] but did not refer to this matter in its consideration of the relevant aggravating factors in relation to Mucić's sentence.

745. Where criminal responsibility for an offence is alleged under one count pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[1261] The *Aleksovski* Appeal Judgement has recognised both such matters as being factors which should result in an increased or aggravated sentence. The accused in that case, also a prison commander, had been found guilty of certain crimes on the basis of Article 7(1) of the Statute, for others on the basis of Article 7(3), and for others under both Articles. In relation to those offences of which he was convicted for his direct participation, the Appeals Chamber observed that the accused's "superior responsibility as a warden seriously aggravated [his] offences."[1262] It proceeded to state:

> The Appellant did more than merely tolerate the crimes as a commander; with his direct participation he provided additional encouragement to his subordinates to commit similar

---

[1259] Trial Judgement, para 1123.

[1260] Trial Judgement, paras 1237 and 1240.

[1261] This observation applies only if the two types of responsibility are not independently charged under different counts, with separate sentences imposed on each. A different situation may arise of two separate counts against an accused, one alleging Article 7(1) responsibility for direct or accessory participation in a particular criminal incident, and another alleging Article 7(3) responsibility for failure to prevent or punish subordinates for their role in the same incident. If convictions and sentences are entered on both counts, it would not be open to aggravate the sentence on the Article 7(3) charge on the basis of the additional direct participation, nor the sentence on the Article 7(1) charge on the basis of the accused's position of authority, as to do so would impermissibly duplicate the penalty imposed on the basis of the same conduct.

[1262] *Aleksovski* Appeal Judgement, para 183.

> acts. The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.[1263]

746. Here, the Trial Chamber found Mucić guilty under each of counts 46 and 47 both for his direct responsibility for the inhuman conditions prevailing in the camp, and also for his superior responsibility for the atmosphere of terror created in the camp by the guards over whom he held authority. Although the absence of any specific reference in the Trial Judgement to the dual responsibility of Mucić for the offences encompassed by counts 46 and 47 is not determinative of the question as to whether the Trial Chamber actually took it into account in sentencing Mucić, the Appeals Chamber is not satisfied that, in determining a sentence of seven years for this count, it did so. Although the Trial Chamber clearly considered the severity of the conditions which Mucić directly participated in creating, and the violence and humiliation meted out to detainees by the guards,[1264] it is not apparent that the Trial Chamber fully recognised in its sentence that this conduct encompassed two types of criminal responsibility which were both individually of considerable gravity. The length of the sentence imposed strongly suggests that it did not do so.

(c) Gravity of the offence of unlawful confinement (Count 48).

747. Mucić was convicted of unlawful confinement of civilians (Count 48) pursuant to Article 7(1) alone, and was sentenced to seven years imprisonment on that count. The Prosecution submits that "the Trial Chamber gave virtually no consideration to the appropriate sentence in relation to this count".[1265] It points to the Trial Chamber's statement, made after its discussion of various aggravating and mitigating factors in relation to Mucić, that:

> The criminal liability of Mr Mucić has arisen entirely from his failure to exercise his superior authority for the beneficial purpose of the detainees in the Čelebići prison-camp.[1266]

The Prosecution says that this demonstrates that the Trial Chamber failed to take account, in sentencing Mucić, of his own conduct which directly resulted in the unlawful confinement of civilians.[1267]

[1263] *Aleksovski* Appeal Judgement, para 183.
[1264] Trial Judgement, para 1242.
[1265] Prosecution Brief, para 5.48.
[1266] Trial Judgement, para 1248.

748. The Trial Chamber's statement that Mucić's criminal liability arose "*entirely* from his failure to exercise his superior authority for the beneficial purpose of the detainees", understood to refer to "superior authority" in the sense of responsibility pursuant to Article 7(3) of the Statute (the most natural understanding of the phrase in this context), is clearly wrong. It fails to take into account the Trial Chamber's findings that Mucić's liability in relation to Count 48 was founded solely on his *direct* responsibility under Article 7(1), and that he was responsible for cruel treatment and wilfully causing great suffering or serious injury to body or health under counts 46 and 47 on the basis of Article 7(1), in addition to as a superior under Article 7(3). It is possible that the Trial Chamber was simply intending to refer to the fact that Mucić's criminal liability arose entirely from his conduct in his role as camp commander, or as counsel for Mucić contends, his "authority" in a general sense.[1268] That would not misstate the position, since Mucić's direct liability for unlawful confinement arose from his failures to exercise his power as camp commander to release detainees he was aware were unlawfully detained, and his Article 7(1) responsibility for the inhumane conditions in the camp arose from his failure as camp commander to provide adequate facilities for the detainees. Given the Trial Chamber's acknowledgement earlier in the section on the sentencing of Mucić that he was not found guilty of actively participating in the offences, "*with the exception of* counts 46 and 47 (inhumane conditions) and count 48 (unlawful confinement of civilians)", the Appeals Chamber is not satisfied that the reasoning in the Trial Judgement demonstrates that the Trial Chamber gave *no* consideration to the appropriate sentence on this count.

749. The Prosecution contends more generally, however, that, in light of the seriousness of the offence of unlawful confinement, a sentence of seven years was manifestly inadequate. It first argues in support of this submission that:

> [...] it is evident that all of the other crimes which were inflicted on the victims during their detention in the camp would not have occurred if they had not been unlawfully confined there. In imposing sentence in respect of Count 48, the fact that victims of the unlawful detention became the victims of other crimes while detained is a matter to be taken into account.[1269]

[1267] Prosecution Brief, para 5.50.
[1268] Mucić Response, para 14.
[1269] Prosecution Brief, para 5.50.

750. This submission overlooks the fact that those crimes against the detainees in Čelebići camp which the Prosecution determined could be proved beyond reasonable doubt had been independently charged in the Indictment. Mucić was charged with superior responsibility and, in the case of inhuman conditions under Counts 46 and 47, personal responsibility for many of those crimes. In this situation, there would be a danger of impermissibly penalising the accused more than once for the same conduct if the sentence in respect of the unlawful confinement count was to be aggravated by reference to the fact that these other crimes had been committed upon the detainees. In the circumstances of this case, the Appeals Chamber is not satisfied that there was any error in not taking the fact that crimes were committed on the detainees to be a matter in aggravation of sentence.

751. The Prosecution also supported its submission in relation to Count 48 by reference to the penalties for the offences of unlawful detention, unlawful confinement or false imprisonment in certain national jurisdictions. The domestic legal provisions identified provide sentencing ranges from three months to life with hard labour (depending on the presence of various aggravating circumstances such as torture or torture resulting in death) in Belgium,[1270] up to twenty years for a single victim or up to thirty in the case of multiple victims in France,[1271] and from five to twenty years in Rwanda, with the death penalty if the detained victim is tortured to death.[1272] The Prosecution also acknowledges, however, that other national systems do not impose such severe penalties, with ranges covering from one to twelve years.[1273]

752. Mucić submits that references to such sentencing ranges in the absence of examples of specific sentences given in relation to "virtually identical facts with the offender having virtually identical circumstances and mitigation [...] the value of such examples, although of some academic interest, is in practice very limited".[1274] The Appeals Chamber agrees that reference to these national provisions in the abstract is of very limited value.

753. The Prosecution's reference to the most severe penalties applicable to unlawful detention combined with aggravating factors such as torture or the death of the victim again

[1270] *Code Pénal* Articles 434-438.
[1271] *Code Pénal*, Articles 224-1 and 224-3.
[1272] *Code Pénal*, Article 388.
[1273] Prosecution Brief para 5.52, citing the relevant provisions of the law in Austria, Canada, Denmark, Finland and Zambia.

overlooks the fact that, in this case, those crimes have been independently charged and therefore not an appropriate reference point in seeking guidance on what may be a suitable range of sentences for the offence of unlawful confinement alone. Secondly, the provisions referred to by the Prosecution demonstrate in any event a very wide sentencing range within which the seven year sentence actually imposed on Mucić in respect of this offence (if otherwise appropriate) easily falls.

754. The Appeals Chamber is not satisfied that the sentence imposed on Mucić in respect of Count 48 falls outside of the sentencing range which is open to the Trial Chamber in the exercise of its discretion or that any other error in the exercise of the Trial Chamber's discretion has been demonstrated in relation to this particular count.

(d) Conclusion in relation to the gravity of the offences

755. For the reasons identified above, the Appeals Chamber has found that the Trial Chamber did not have sufficient regard to the gravity of the offences committed by Mucić in exercising its sentencing discretion, and that as a result the seven year sentence imposed on him did not adequately reflect the totality of his criminal conduct. The Appeals Chamber's conclusion is reinforced by reference to the *Aleksovski* Appeal Judgement. It is appropriate to explain why this is so.

756. Public confidence in the integrity of the administration of criminal justice (whether international or domestic) is a matter of abiding importance to the survival of the institutions which are responsible for that administration. One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that such public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that the punishments imposed would, in justice, be expected to be also generally similar.

[1274] Mucić Response, para 15.

757. This is not to suggest that a Trial Chamber is bound to impose the same sentence in the one case as that imposed in another case simply because the circumstances between the two cases are similar. As the number of sentences imposed by the Tribunal increase, there will eventually appear a range or pattern of sentences imposed in relation to persons where their circumstances and the circumstances of their offences are generally similar. When such a range or pattern has appeared, a Trial Chamber would be obliged to *consider* that range or pattern of sentences, without being *bound* by it, in order only to ensure that the sentence it imposes does not produce an unjustified disparity which may erode public confidence in the integrity of the Tribunal's administration of criminal justice.

758. At the present time, there does not exist such a range or pattern of sentences imposed by the Tribunal. The offences which the Tribunal tries are of such a nature that there is little assistance to be gained from sentencing patterns in relation to often fundamentally different offences in domestic jurisdictions, beyond that which the Tribunal gains from the courts of the former Yugoslavia in accordance with Article 24 of the Tribunal's Statute. At the present time, therefore, in order to avoid any unjustified disparity, it is possible for the Tribunal to have regard only to those sentences which have been imposed by it in generally similar circumstances as to both the offences and the offenders. It nevertheless must do so with considerable caution. As the Appeals Chamber discusses further below[1275] comparisons with sentences imposed in other cases will be of little assistance unless the circumstances of the cases are substantially similar. However, in cases involving similar factual circumstances and similar convictions, particularly where the sentences imposed in those other cases have been the subject of consideration in the Appeals Chamber, there should be no substantial disparity in sentence unless justified by the circumstances of particular accused.

759. Aleksovski, a commander of a prison in which detainees were mistreated, was convicted for one count of outrages against personal dignity under Article 3 of the Statute,[1276] encompassing liability under both Articles 7(1) and 7(3) for a number of crimes of violence, for aiding and abetting the creation of an atmosphere of psychological terror and for not preventing the use of detainees as human shields and for trench digging. He was

[1275] *Infra*, at para 798.
[1276] *Prosecutor v Aleksovski*, Case No IT- 95-14/1-T, Judgement, 25 June 1999, paras 228-230.

not convicted of the more serious crimes of murder and torture, or the additional distinct crime of unlawful detention of civilians, as Mucić was. The Trial Chamber's sentence of two and half years imprisonment[1277] was revised on appeal on the basis that it was "manifestly inadequate".[1278] The Appeals Chamber imposed a "revised sentence" of seven years, which took into account the "element of double jeopardy" in the process in that Aleksovski had been required to appear for sentence twice for the same conduct, "suffering the consequent anxiety and distress" after having been released.[1279] According to the Appeals Chamber, if it were not for these considerations, "the [revised]sentence would have been considerably longer". If Aleksovski would, but for the double jeopardy factor, have been sentenced to considerably more than seven years imprisonment, there is a serious disparity in Mucić also being sentenced to only seven years imprisonment in respect of more numerous crimes committed in similar circumstances, including crimes of undoubtedly greater gravity than those for which Aleksovski was convicted.

2. Failure to have regard to crimes not alleged in the Indictment

760. In relation to the crimes of which Mucić was convicted under Article 7(3) of the Statute, the Prosecution submits that, although those counts specified certain crimes against certain identified victims, "the wording of those paragraphs made clear that these lists of crimes and victims were non-exhaustive".[1280] It contends that, in sentencing Mucić on these counts, the Trial Chamber "erred in failing to have regard to the fact that those crimes specifically alleged in the relevant paragraphs of the Indictment for which Mucić was found responsible did not represent the totality of the relevant criminal acts committed against the detainees in the Čelebići prison-camp".[1281]

761. The counts referred to by the Prosecution charged crimes against specific individuals but introduced these charges with the phraseology of "including". For example, the introductory paragraph to Counts 33 and 34 commences with the words:

> With respect to the murders committed in the Čelebići camp, including: [...]

[1277] *Prosecutor v Aleksovski*, Case No IT- 95-14/1-T, Judgement, 25 June 1999, para 244.
[1278] *Aleksovski* Appeal Judgement, para 187.
[1279] *Aleksovski* Appeal Judgement, para 190.
[1280] Prosecution Brief, para 5.34.
[1281] Prosecution Brief, para 5.43.

The Trial Chamber acknowledged that this language was intended to encompass "refere to unspecified criminal acts alleged to have occurred in the Čelebići prison-camp".[1282] It continued:

> In consideration of the rights enshrined in Article 21 of the Statute, and in fairness to the accused, the Trial Chamber does not regard the unspecified acts referred to in the above-mentioned counts as constituting any part of the charges against the accused. Accordingly, in its findings in relation to those counts, the Trial Chamber will limit itself to a consideration of those criminal acts specifically enumerated in the Indictment.[1283]

762. The Prosecution submits generally that, when a superior is charged with responsibility under Article 7(3) of the Statute with unspecified criminal acts, "there is nothing to prevent the Trial Chamber from having regard to those acts, if proved at trial, when sentencing the superior".[1284] It refers to the statement of the Trial Chamber quoted above as a demonstration that the Trial Chamber must have had no reference to these unspecified acts in sentencing Mucić, even though "it was made clear in the Trial Chamber's Judgement that criminal acts apart from those individual acts specified in the Indictment were indeed committed in the camp during the relevant period".[1285] The Prosecution then refers to certain passages from the Trial Judgement which demonstrate the Trial Chamber's recognition that the crimes specified in the Indictment did not represent the totality of the criminal acts to which the detainees were subjected in the Čelebići camp.[1286] The Prosecution does not, however, identify any passages which contain any findings that Mucić specifically was responsible for such unspecified acts. The Appeals Chamber cannot find any indication from the Trial Judgement that the Trial Chamber had found beyond reasonable doubt that Mucić had committed any criminal acts additional to those specifically identified in the Indictment.

763. Mucić submits that the Prosecution's argument is in effect an appeal against acquittal under the mantle of an appeal against sentence because, if the Trial Chamber had not found the relevant matters proved beyond reasonable doubt against Mucić, there was no basis on which it could take those matters into account in sentencing.[1287] The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against

---

[1282] Trial Judgement, para 812.
[1283] Trial Judgement, para 812.
[1284] Prosecution Brief, para 5.38.
[1285] Prosecution Brief, para 5.37.
[1286] Prosecution Brief, para 5.37.

an accused may be the subject of an accused's sentence or taken into account in aggrave of that sentence. As was made clear during the hearing of oral submissions on appeal,[1288] the issue is primarily one of whether the Prosecution actually sought findings in relation to the other acts referred to in the Indictment. The Trial Chamber could not be expected to make findings in respect of matters which had not been specifically put before it, whether in the Indictment or during the trial. Another issue is whether the accused, in view of the very general wording used in the Indictment, had been sufficiently put on notice during the proceedings that such additional offences were alleged and of the nature of those offences so that he could meet the allegations in his own defence case.[1289]

764. As to the first issue, the Prosecution in its submissions on appeal was not able to direct the Appeals Chamber to any record of the Prosecution having sought, at trial, findings by the Trial Chamber in relation to other offences by Mucić not specifically alleged in the Indictment. The Appeals Chamber notes that, in its final written submission before the Trial Chamber, the Prosecution submitted that

> [...] the specific incidents referred to in the Indictment are not exhaustive but rather illustrative [...]. Thus for the purposes of superior responsibility, the Judges may consider other incidents not specifically described in the indictment but proved at trial.[1290]

No such "other incidents" were specified. The Prosecution also failed to identify any such acts during its closing oral arguments, submitting generally only that the Trial Chamber should convict the accused for violations of law proved beyond reasonable doubt.[1291] There is no indication that the Prosecution directed the Trial Chamber at any point during the proceedings towards any other specific criminal incidents upon which it sought findings as to Mucić's responsibility.

765. The Appeals Chamber considers that, in such circumstances, there was no error made by the Trial Chamber in failing to make findings in relation to matters not specifically

---

[1287] Mucić Response, p 12.
[1288] Appeal Transcript, pp 737-738
[1289] Statute of the Tribunal, Article 21(4)(a) refers to the right of an accused "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".
[1290] Closing Statement of the Prosecution, filed 25 August 1998, para 3.71.
[1291] Trial Transcript, pp 15525-15526. The Prosecution arguments seem to be directed (although not specifically described as such) solely towards the testimony relating to the specifically identified crimes and victims alleged in the Indictment. Trial Transcript, pp 15530-15534.

alleged in the Indictment. Given the generality with which those other incidents alleged in the Indictment, the Indictment itself did not impose an obligation on the Trial Chamber to make findings on those incidents. It was incumbent upon the Prosecution, if it did in fact seek findings as to those matters, to identify them clearly to the Trial Chamber and to request it to make findings upon them. For this reason, this argument of the Prosecution is not accepted.

766. Given this conclusion, it is unnecessary to consider whether the requirement, referred to above, that the accused was sufficiently on notice of the other criminal incidents which were alleged had been satisfied by the Prosecution. In any case, no material was put before the Appeals Chamber by the Prosecution to enable it to be satisfied that this requirement had been met.

3. The determination that all sentences should be served concurrently

767. The Prosecution finally submitted in relation to this ground of appeal that the Trial Chamber erred in ordering the Mucić's sentences all be served concurrently.[1292] The Trial Chamber stated, in relation to whether the sentences imposed should be served concurrently or consecutively, that:

> During the pre-trial stage of these proceedings, the Trial Chamber issued a decision on the motion by the Defence for Zejnil Delalić challenging the form of the Indictment. The decision considered, *inter alia*, the issue of whether it is permitted to charge an accused under several legal qualifications for the same act, that is, the issue of whether cumulative charging is permitted. The Trial Chamber agreed with a previous decision issued in the case of *Prosecutor v Duško Tadić,* and thus declined to evaluate this argument on the basis that the matter is only relevant to penalty considerations if the accused is ultimately found guilty of the charges in question. Accordingly, this challenge to the Indictment was denied. It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently. The sentence imposed shall not be consecutive.[1293]

768. The Prosecution submits that this reasoning could not justify the Trial Chamber's conclusion that *all* of the sentences imposed on Mucić should be served concurrently.[1294] It identifies two matters in support of this argument. The first is that many of the sentences imposed on Mucić related to crimes arising from *different* conduct, rather than from the

[1292] Prosecution Brief, para 5.55-5.56.
[1293] Trial Judgement, para 1286 (Footnote omitted).
[1294] Prosecution Brief, para 5.56.

same act as is suggested by the statement of the Trial Chamber quoted above. Seco[illegible] submits that:

> Even where two different crimes of which an accused has been convicted arise out of the *same* conduct, this should be *reflected* in sentencing, but this does not mean that the sentences imposed in respect of the different crimes arising out of the same conduct must always necessarily be made completely concurrent.[1295]

The Prosecution contends that "conduct which simultaneously constitutes more than one crime is more serious than conduct which constitutes one of those crimes only, and this is a matter which can appropriately be reflected in sentencing".[1296]

769. The Appeals Chamber has already found that, in relation to the crimes for which Mucić was convicted under both Articles 2 and 3 in relation to the same conduct, the charges under Article 3 must be dismissed. This requires that the sentencing consequences be considered by a reconstituted Trial Chamber, which will no doubt consider whether the remarks of the original Trial Chamber indicate that there should be no adjustment downwards in the sentences imposed. For that reason, it is unnecessary to consider further the submission insofar as it relates to convictions for the same conduct. It suffices for the Appeals Chamber to reiterate that the governing criterion of sentencing is that it must accurately recognise the gravity of the offences and must reflect the totality of the accused's criminal conduct.[1297] The fact that an accused's conduct may legitimately be legally characterised as constituting different crimes would not overcome the fundamental principle that he should not be punished more than once in respect of the same conduct. In the case of two legally distinct crimes arising from the same incident, care would have to be taken that the sentence does not doubly punish in respect of the same act which is relied on as satisfying the elements common to the two crimes, but only that conduct which is relied on only to satisfy the *distinct* elements of the relevant crimes.

770. In relation to those offences for which Mucić was convicted which relate to different conduct, the Prosecution submits that, where an accused has committed multiple crimes, the Trial Chamber must take into account "the higher degree of wrongdoing and the fact that a

[1295] Prosecution Brief, para 5.56(2).
[1296] Prosecution Brief, para 5.72.
[1297] *See* above, paras 429-430.

number of different protected values have been harmed".[1298] It summarises its positi[illegible] saying that "a person who is convicted of many crimes should generally receive a higher sentence than a person committing only one of those crimes".[1299]

771. Rule 101(C) of the Rules of Procedure and Evidence provided at the time relevant to the Trial proceedings in this case that:

> The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

The choice as to concurrent or consecutive sentencing is therefore a matter within the Trial Chamber's discretion. Rule 101(C) has now been removed from the Rules but the discretion of the Trial Chamber in relation to concurrent or consecutive sentencing is preserved in the amended Rule 87(C), which provides that the Trial Chamber will indicate whether separate sentences imposed in respect of multiple convictions shall be served consecutively or concurrently.[1300] However, it is clear that this discretion must be exercised by reference to the fundamental consideration, referred to above, that the sentence to be served by an accused must reflect the totality of the accused's criminal conduct. In this respect, the Appeals Chamber agrees with the Prosecution submission that a person who is convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes.

772. The Appeals Chamber has already found that the Trial Chamber erred in not adequately taking into account the gravity of certain of the offences for which Mucić was convicted, and that a sentence of seven years did not adequately reflect the totality of Mucić's criminal conduct. It is possible that, had the Trial Chamber taken adequate account of the gravity of the crimes in determining the individual sentences for those crimes, the choice of a concurrent rather than consecutive sentence would have been entirely appropriate. However, in light of the Appeals Chamber's general conclusion that the overall sentence did not adequately reflect the totality of Mucić's criminal conduct, it is unnecessary to determine whether the choice of concurrent rather than consecutive

[1298] Prosecution Brief, para 5.59.
[1299] Prosecution Brief, para 5.59.
[1300] These amendments to the Rules derive from Revision 19, effective 19 January 2001.

sentences was an additional cause of the Trial Chamber's error. The Appeals Cham view as to what would have been a more appropriate sentence is expressed below.[1301]

C. Mucić's Appeal Against Sentence

773. Mucić submits generally that the sentence of seven years was too long "in all the circumstances of the case."[1302] Mucić's primary argument is that the Trial Chamber erred in its consideration of both aggravating and mitigating factors, in that it failed to give due weight to the "strong [...] arguably unique, mitigating features" of his case,[1303] while taking into account certain aggravating matters which it should not. He also submits that the Trial Chamber erred in its dismissal of the *Wilhelm Von Leeb* case as an appropriate precedent in its determination of sentence and that it erred in the weight which it found should be accorded to the element of deterrence. While it is evident from the above that the Appeals Chamber consider that Mucić's sentence of seven years was in fact inadequate, it is appropriate to address these arguments since they contend specific legal errors made by the Trial Chamber.

1. Consideration of aggravating and mitigating factors

(a) Mitigating Factors

774. Mucić specifically alleges that his sentence did not properly reflect the mitigating effect of the Trial Chamber's finding that there was no evidence that Mucić had directly and actively participated in any acts, and that on the contrary he had prevented acts of violence.[1304] The first matter has been considered above when addressing the Prosecution arguments as to the Trial Chamber's consideration of the gravity of the offences. As to the second argument, Mucić submits that the Trial Chamber failed to take adequate account of the fact that he took steps to alleviate suffering and prevent acts of violence.[1305]

775. Mucić was convicted *inter alia,* under Article 7(3) of the Statute and hence as a commander. If a commander in charge of, as in this case, a prison-camp or detention

[1301] *See* below, para 853.
[1302] Mucić Brief, Appeal Against Sentence, p 1.
[1303] Mucić Brief, Appeal Against Sentence, p 2.
[1304] Mucić Brief, Appeal Against Sentence, pp 1-2.
[1305] Trial Judgement, para 1247.

facility, takes steps to alleviate the suffering of those detained, depending on the degree or level of this action, it may be that the seriousness of the overall offences can be mitigated. This would, however, depend on the circumstances of the case and the degree of assistance given. As seen above, a decision as to the weight to be accorded to such acts in mitigation of sentence lies within the discretion of the Trial Chamber. In the absence of a finding that the Trial Chamber abused its discretion in imposing a sentence outside its discretionary framework as provided by the Statute and Rules, this argument must fail.[1306]

776. The Appeals Chamber has already noted that the Trial Chamber expressly considered Mucić's submissions regarding "evidence of witnesses for the Prosecution who testified in glowing terms about the attitude of [...] Mucić towards the detainees".[1307] Further, it considered that there was "[...] a lot to be said for the evidence in mitigation, as there is for the aggravating circumstances".[1308] Although it does not appear to be disputed that Mucić may have carried out several benevolent acts during his command at the Čelebići camp,[1309] the Appeals Chamber considers that, in the circumstances of this case, it was within the Trial Chamber's discretion to conclude that these acts could not constitute significant mitigation.[1310] This is particularly so because of the fact that he was a commander who was in a position to take steps to control and prevent *all* acts of violence but who rather frequently absented himself "in obvious neglect of his duty as commander and the fate of the vulnerable detainees".[1311] As recently observed by Trial Chamber I, such acts "are all the less decisive when one notes that criminals frequently show compassion for some of their victims even when perpetrating the most heinous of crimes".[1312]

[1306] *Kambanda* Appeal Judgement, para. 124.
[1307] Trial Judgement, para 1247; Muci} Brief, Appeal Against Sentence, p 2.
[1308] Trial Judgment, para 1248.
[1309] Prosecution Brief, paras. 5.28 – 5.29.
[1310] It is the case that war crimes tribunals have taken into account efforts by an accused to reduce the suffering of the victims. However, the efforts taken in those cases and considered in mitigation, were considerably more substantial and noticeable than in the instant case and therefore were found to merit credit. *See* for example, the findings with regard to: Waldermar Von Radetzkty in *United States v Ohlendorf et al.* 4 T.W.C. 1, 558 (1948) at 578; Ernst Dehner in *United States v Wilhelm List et al., ("Hostage Trial"),* 11 T.W.C. 757, (1948) at pp 1299-1300; Flick and Steinbrinck in *United States v Friedrich Flick et al.,* 9 L.R.T.W.C. 1 (1949), at pp 29-30; and Albert Speer in *22 Trial of the Major War Criminals Before the Int'l Mil. Tribunal* 524 (1946), at p 579; Von Neurath in *22 Trial of the Major War Criminals Before the Int'l Mil. Tribunal* 524 (1946), at p 582. However, note also the finding regarding Karl Mummenthey, in the *Pohl* case, 5 T.W.C, p 1054: "It is not an unusual phenomenon in life to find an isolated good deed emerging from an evil man."
[1311] Trial Judgement, para 1243.
[1312] *Blaškić* Judgement, para 781.

777. As a matter of law, a Trial Chamber is obliged to take account of mitig circumstances in imposing sentence.[1313] However, the weight to be attached is a matter within its discretion. The Appeals Chamber is satisfied that the Trial Chamber clearly considered the mitigating factors presented on Mucić's behalf.[1314] The Trial Chamber was entitled to attach limited weight to such mitigation, and the Appeals Chamber accordingly finds that Mucić has failed to demonstrate any error by the Trial Chamber in this regard.

(b) Aggravating Factors

778. Mucić submits that the Trial Chamber erred in making the findings it did in relation to his conduct during the trial, including the references it made to allegations of fabrication of evidence and threats to a witness. He submits that this conduct could only be taken into account following a finding of guilt, and that such allegations could rather have been dealt with separately by the Trial Chamber under, for example, Rule 77 of the Rules.[1315] He submits that the Trial Chamber erred in considering his general attitude during the trial and the fact that he did not give oral evidence. He submits that the reference by the Trial Chamber to the latter, in its consideration of sentence, was "tantamount to a reversal of the burden of proof."[1316]

779. With regard to these specific allegations, the Trial Chamber found:

> The conduct of Mr. Mucić before the Trial Chamber during the course of the trial raises separately the issue of aggravation. The Trial Chamber has watched and observed the behaviour and demeanour of Mr. Mucić throughout the trial. The accused has consistently demonstrated a defiant attitude and a lack of respect for the judicial process and for the participants in the trial, almost verging on lack of awareness of the gravity of the offences for which he is charged and the solemnity of the judicial process. The Presiding Judge, has, on occasions, had to issue stern warnings reminding him that he was standing trial for grave offences. The Prosecution has also presented evidence of an exchange of notes between Zejnil Delalić and Zdravko Mucić conspiring about the fabrication of evidence to be given at the trial. There have also been allegations that Mr. Mucić participated in the threatening of a witness in the courtroom. Such efforts to influence and/or intimidate witnesses are particularly relevant aggravating conduct,

[1313] Article 24 of the Statute and Rule 101 of the Rules. Rule 101 (B) provides *inter alia*: "In determining sentence, the Trial Chamber shall take into account...(ii) any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction."
[1314] Trial Judgement, paras 1238-1239, 1245, 1247, 1248.
[1315] Mucić Brief, Appeal Against Sentence, pp 3-6. Rule 77 of the Rules relates to proceedings for "Contempt of the Tribunal."
[1316] Mucić Brief, Appeal Against Sentence, p 6.

> which the Trial Chamber is entitled to take into account in the determination of the appropriate sentence.[1317]

It also found:

> The general attitude of Mr. Mucić during the trial proceedings in and outside the courtroom would seem to be a repetition of his casual and perfunctory attitude to his duties in the Čelebići prison-camp. He made concerted and sustained efforts where he could to intimidate witnesses and to suborn favourable evidence from them. His demeanour throughout the proceedings suggests that he appears to have regarded this trial as a farce and an expensive joke. Zdravko Mucić has declined to give any oral evidence, notwithstanding the dominant position he played in the facts giving rise to the prosecution of the accused persons.[1318]

780. It has already been stated that the Statute and the Rules do not define exhaustively the factors which may be taken into account by a Trial Chamber in mitigation or aggravation of sentence, and Trial Chambers are therefore endowed with a considerable degree of discretion in deciding on the factors which may be taken into account. Nevertheless, it must be queried whether the Trial Chamber erred in taking these particular factors into account. A Trial Chamber's decision may be disturbed on appeal if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion.

781. It is alleged that the Trial Chamber erred in taking into account in aggravation of sentence the fact that Mucić failed to give oral testimony. In accordance with the position in many national jurisdictions, an accused before the Tribunal is not obliged to give oral testimony during the trial on his or her own behalf. Rule 85(C) of the Rules provides

> *If the accused so desires,* the accused may appear as a witness in his or her own defence.[1319]

Article 21(4)(g) of the Statute provides further guidance and provides that an accused shall be entitled to the right "not to be compelled to testify against himself or to confess guilt".[1320] This, however, does not explicitly identify the consequences of failure to testify at all, unlike the corresponding provision in the Rome Statute of the International Criminal

---

[1317] Trial Judgement, para 1244.
[1318] Trial Judgement, para 1251.
[1319] (Emphasis added).
[1320] *See* also the International Covenant on Civil and Political Rights (1966) ("the ICCPR"), Article 14 (3)(g) which provides that in the determination of a criminal charge, everyone shall be entitled to the right "not to be compelled to testify against himself or to confess guilt."

Court. Article 67(1)(g) of the Rome Statute expressly provides that an accused has the to refuse to testify, in which case no inference adverse to him or her may be drawn.[1321] The question remains whether failure to testify before the Tribunal can be held against an accused in either consideration of the merits of a case, or, as here, in aggravation of sentence.

782. Between national jurisdictions, there is no consensus as to an absolute right for an accused to remain silent at trial at no risk of adverse inferences being drawn, and in fact certain jurisdictions have taken steps to limit such right.[1322] This limitation has been considered by the European Court of Human Rights, which has found in principle that the fair hearing requirement in Article 6 of the European Convention[1323] implies that an accused has the right to remain silent and not contribute to incriminating himself or herself.[1324] However, it has also recognised that this right is not absolute, and that the drawing of an adverse inference from an accused's silence regulated by law is not contrary to Article 6 as long as there are other safeguards in place.[1325] In its view, therefore, particular caution is required before a domestic court can invoke an accused's silence against him or her.

[1321] Article 67(1)(g) of the ICC Statute provides that that an accused shall have the right: "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt of innocence."

[1322] For example, in the United Kingdom, although an accused still has the right to refuse to give evidence at trial, Criminal Justice and Public Order Act 1994, s 35 now provides that unless an accused shows good cause for the refusal to answer questions, a Judge may direct a jury that it can draw such inferences as appear proper from the failure or refusal to answer questions (s 38(3) provides that a conviction may not rest solely on such an inference). This was interpreted in *R v Cowan* [1996] 1 Cr App R 1 as not removing the right to remain silent. Lord Taylor C J held that such inferences can only be drawn if the jury is satisfied that the Prosecution has proved its case, and that the jury is told that, a) the burden of proof rests on the Prosecution throughout, b) the defendant has a right to remain silent and that an inference alone cannot prove guilt. *See* also Article 4 Criminal Evidence (Northern Ireland) Order 1988, *R v Murray,* [1993] 97 Cr App R 151. The right to remain silent with no adverse inferences drawn is still preserved in, for example, the United States. The self-incrimination clause of the *Fifth Amendment,* incorporated through the *Fourteenth Amendment* due process clause, provides that no person "shall be compelled in any criminal case to be a witness against himself." This has been interpreted to mean that a defendant is also not obliged to appear as a witness. *See Griffen v California,* 380 US 609, where it was held that comment on the failure to give evidence was impermissible as it was "a penalty imposed by courts for exercising a constitutional privilege" as it "cuts down on the privilege by making its assertion costly." In Australia, s*ee Woon v The Queen* (1964) 109 CLR 529, *Petty and Maiden v R,* (1991) 173 CLR 95.

[1323] Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the European Convention") provides for the right to a fair and public hearing.

[1324] *Funke v France,* Eur Ct H R, Judgement of 25 Feb 1993, A.256-A, para 44.

[1325] *John Murray v The United Kingdom,* Judgement of 8 Feb 1996, Reports 1996-I, Vol 1, paras 44-58. The decision was confirmed in the recent case of *Condron v The United Kingdom,* Eur Ct H R, Judgement of 2 May 2000, Application no 35718/97. In its reasoning the Court took into account safeguards designed to respect the rights of the defence, for example the warning that adverse inferences could be drawn, that it could only be drawn if a failure to express oneself might as a matter of common sense lead to the conclusion that the accused had been guilty and if there existed other very strong evidence against the accused.

783. Neither the Statute nor the Rules of this Tribunal expressly provide that an infer can be drawn from the failure of an accused to give evidence. At the same time, neither do they state that silence should not "be a consideration in the determination of guilt or innocence".[1326] Should it have been intended that such adverse consequences could result, the Appeals Chamber concludes that an express provision and warning would have been required under the Statute, setting out the appropriate safeguards. Therefore, it finds that an absolute prohibition *against* consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules, reflecting what is now expressly stated in the Rome Statute. Similarly, this absolute prohibition must extend to an inference being drawn in the determination of sentence. Accordingly, it is the case that the Trial Chamber would have committed an error should it be shown that it relied on Mucić's failure to give oral testimony as an aggravating factor in determining his sentence.[1327]

784. The Prosecution submits that the Trial Chamber's remark was no more than an indication by the Trial Chamber that, as Mucić did not plead guilty or co-operate with the Prosecution, there was no mitigating factor of the kind referred to in Rule 101(B)(ii) of the Rules.[1328]

785. It is difficult to accept such an explanation of the Trial Chamber's remark. It was made by the Trial Chamber when describing Mucić's conduct during the trial in its discussion of aggravating and mitigating factors. The Trial Chamber found that his general attitude during the proceedings reflected "his casual and perfunctory attitude to his duties in the Čelebići prison-camp", and it described his whole demeanour as suggesting that he regarded the trial as "a farce and an expensive joke".[1329] The Trial Chamber's reference to his failure to give evidence in that context indicates that it regarded the failure in an adverse light. Although it is not clear that the Trial Chamber treated Mucić's failure to testify as an aggravating circumstance, the Trial Chamber's remark leaves open the real possibility that it did so, and the Appeals Chamber accordingly finds that the Trial Chamber erred.

[1326] Article 67(1)(g) of the ICC Statute.

[1327] *See Carolina v Pearce* 395 US 711, where it was found that due process is violated where the sentencing court punishes' a convicted person for his exercise of a procedural right in the criminal justice process. However a defendant must be able to show that by reference to the sentencing record, the judge in fact sentenced vindictively seeking to punish for the exercise of a procedural right.

[1328] Rule 101(B)(ii) provides that a Trial Chamber shall take into account "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction."

[1329] Trial Judgement, para 1251.

786. With regard to Mucić's conduct during the trial in terms of his attitude demeanour, the Appeals Chamber can find no error in the fact that the Trial Chamber considered these as aggravating factors. As pointed out in the Trial Judgement, "[t]he nature of the relevant information required by the Statute is unambiguously provided in sub-Rule 85(A)(vi) [of the Rules]. It is 'any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment'".[1330]

787. Reference to the jurisprudence of the Tribunal and ICTR, [1331] and to guidelines and practice of national jurisdictions,[1332] illustrates that it is established practice that trial courts exercise a broad discretion in the factors they may consider on sentence. This indicates that all information relevant to an accused's character may be considered. As accepted by the Supreme Court of the United States, "modern concepts individualising punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial".[1333] Therefore there is a relevant distinction in the role of a fact-finder at trial and a sentencing judge, who is not restrained by the same rules.

[1330] Trial Judgement, para 1215.

[1331] *See e.g., Prosecutor v Kambanda,* Judgement and Sentence, Case No ICTR 97-23-S, 4 Sept 1998 at para 30; *Prosecutor v Akayesu,* Sentence, Case No ICTR-96-4-T, 2 Oct 1998, para 21. *Prosecutor v Kayishema and Ruzindana,* Sentence, Case No ICTR-95-1-T, 21 May 1999, para 3: "These enumerated circumstances, [contained in the Statute and the Rules] however, are not necessarily mandatory or exhaustive. It is a matter of individualising the penalty considering the totality of the circumstances."

[1332] *See e.g.*: In the former Yugoslavia, Article 41(1) of the SFRY Penal Code 1990. In the United Kingdom, the Magistrates Association Sentencing Guidelines issued in 1993 guide the Magistrates in setting out aggravating and mitigating factors in relation to specific offences. As in the United Kingdom, sentencing in the United States is assisted by Pre-Sentence Reports prepared by probation officers, who enjoy wide discretion in the information to include and present before the court. In *Williams v. New York,* 337 U.S. 241, (1949) it was noted that "the modern probation report draws on information concerning every aspect of a defendant's life." (p 250). It upheld what is described as "real offence" sentencing or, sentencing that goes beyond the elements of the offence and considers the gravity of the accused's conduct. It found that courts do not violate due process by considering unrelated criminal conduct, even if it did not result in a criminal conviction. *See* also *United States v Grayson,* 438 U.S. 41, where it was found that in a system of discretionary sentencing, it is proper and even necessary to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath. *See* also 18 UCSA, para 3553(1) which provides that the court should consider "the nature and circumstances of the offence and the history and characteristics of the defendant" and para 3661: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offence which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence". In Canada, s 726.1 of the Canadian Criminal Code provides: In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender. In Denmark, *See* ss 80, 84 and 85 of the Danish Criminal Code.

[1333] *Williams v New York,* 337 U.S. 241, (1949), p 247.

Rather, it is essential that the sentencing judge is in "possession of the fullest inform[illegible] possible concerning the defendant's life and characteristics".[1334]

788. The Trial Chambers of the Tribunal and the ICTR have consistently taken evidence as to character into account in imposing sentence. The Appeals Chamber notes that factors such as conduct during trial proceedings, ascertained primarily through the Trial Judges' perception of an accused, have also been considered in both mitigation and aggravation of sentence.[1335] The Appeals Chamber finds no error on the part of the Trial Chamber in doing so in this case. This behaviour is relevant to a Trial Chamber's determination of, for example, remorse for the acts committed or, on the contrary, total lack of compassion.[1336]

789. With regard to the reference by the Trial Chamber to the allegation that Mucić may have threatened witnesses as an aggravating factor, the Appeals Chamber again concludes that the Trial Chamber did not err. The Prosecution notes that evidence of both witness intimidation and the passing of notes were submitted to the Trial Chamber on sentencing and that this evidence was not refuted by the defence for Mucić.[1337]

790. The Appeals Chamber is not the forum for raising matters such as this for the first time.[1338] Should Mucić have been concerned that these matters should not be taken into account on sentence, then the appropriate forum to raise the concern was before the Trial Chamber.[1339] The Appeals Chamber finds no error in the fact that the Trial Chamber did consider these matters. Although it is possible (without finding as such) that these matters could have been dealt with under Rule 77 of the Rules as separate and independent

---

[1334] *William New York,* 337 U.S. 241, (1949), p 247.

[1335] For example, in the *Blaškić* Judgement, para 780: "...the Trial Chamber must take note of the exemplary behaviour of the accused throughout the trial, whatever the judgement as to his statements as a witness." In *Prosecutor v Kayishema and Ruzindana,* Sentence, Case No ICTR-95-1-T, 21 May 1999, para 17, the Trial Chamber noted: "The Prosecution cited one aggravating factor, Ruzindana's behaviour after the criminal act, and notably the fact that Ruzindana smiled or laughed as survivors testified during trial."

[1336] In the Second *Erdemović* Sentencing Judgement, para 16, the Trial Chamber considered remorse and compassion as mitigating factors.

[1337] Prosecution Response, para 20.26.

[1338] In his Brief, Mucić submits that "Fags to the "*exchange of notes*" it was never proved that the notes alleged to have been written by the Appellant were in fact written by him. An attempt by the OTP to have a handwriting sample taken from the appellant was rejected upon the basis that he could not be forced to assist in the collation of evidence against himself. *See the decision...Jan 19th 1998).* Thus, the exchange of notes remains an allegation only and cannot be a matter that the Trial Chamber should have taken into consideration in assessing sentence." Mucić Brief, Appeal Against Sentence, p 4.

[1339] As noted above, "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing." *Prosecutor v Erdemović,* Judgement, Case No IT-96-22-A, 7 Oct 1997, para 15. *See* also, *Furund'ija* Appeal Judgement, para 174.

offences, as pointed out by the Trial Chamber, these factors were equally pertinent to assessment of Mucić's character and of his attitude towards the offences. Accordingly, it was not inappropriate for the Trial Chamber to consider this behaviour as an aggravating factor and in its overall evaluation of the accused's character.[1340]

791. Finally, Mucić submits that there were "stated inconsistencies in the judgement," which raised confusion as to the basis for sentencing. These, he submits "should be resolved in ... Fhisğ favour."[1341] As pointed out by the Prosecution, Mucić in fact referred to only one alleged inconsistency in his brief, regarding the testimony of a Prosecution witness.[1342] Mucić essentially questions how the Trial Chamber could find that Mucić had "made no effort to prevent or punish those who mistreated the prisoners, or even to investigate specific incidents of mistreatment including the death of detainees",[1343] when at the same time it noted the positive testimony given by this witness. In his view this was contradictory. During the hearing on appeal, Mucić also submitted that the Trial Chamber failed to take into account properly the testimony of several other witnesses who had testified in similar terms.[1344] Although he does not allege that this raised inconsistencies, the Appeals Chamber considers these submissions in the same context.

792. The Appeals Chamber notes that the Trial Chamber amply considered this so-called positive testimony in the Trial Judgement. In doing so, it referred to the submissions by Mucić regarding the "evidence of witnesses for the Prosecution who testified in glowing terms about the attitude of Mr. Mucić towards the detainees".[1345] It concluded that it "had made very sober reflection on the submissions of the parties. There is a lot to be said for the evidence in mitigation, as there is for the aggravating circumstances".[1346]

793. The Appeals Chamber again states that "[t]he task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber".[1347]

[1340] Trial Judgement, para 1217, noting the reference to the federal courts of the United States where "obstruction of justice is regarded as an aggravating circumstance, providing for the enhancement of sentence. Included in this category are, *inter alia,* intimidation of witnesses or otherwise unlawfully influencing a co-defendant or witness, perjury or suborning perjury."
[1341] Mucić Brief, Appeal Against Sentence, p 3.
[1342] Appeal Transcript, pp 744-745, regarding the testimony of the Prosecution witness, Mr Golubović.
[1343] Trial Judgement, para 1243.
[1344] Appeal Transcript, pp 745-747.
[1345] Trial Judgement, para 1247.
[1346] Trial Judgement, para 1248.
[1347] *Tadić* Appeal Judgement, para 64.

The Trial Chamber must weigh and evaluate the evidence presented before it and unless shown that its conclusion was wholly unreasonable, such that no reasonable trier of fact could have arrived at the same conclusion, the Appeals Chamber will not intervene. The Appeals Chamber concludes that Mucić has failed to establish that the Trial Chamber erred in its assessment of this evidence by according it insubstantial weight. The Trial Chamber properly took the relevant testimony into account when considering mitigating factors. The decision as to what weight should be attached to this evidence was within its discretion. It was not obliged to accept this testimony as refuting its overall findings as to Mucić's culpability.[1348]

794. Mucić has failed to demonstrate any error in the Trial Chamber's exercise of discretion in weighing the mitigating factors in his case.

2. Comparison to the case of *Wilhelm Von Leeb*

795. Mucić submits that the Trial Chamber erred in dismissing, on the facts, the precedent set by the case of *Wilhelm Von Leeb,*[1349] when it should rather have had regard to the "relevant doctrinal principles" which can be drawn from that case.[1350] The Prosecution submits that this case was not a precedent binding on the Tribunal and constituted persuasive authority only, which the Trial Chamber was entitled to distinguish, if appropriate, as not being relevant.[1351]

796. The basis of Mucić's argument is that the Trial Chamber erred in failing to have regard to "relevant doctrinal principles." However, he fails to identify what these so-called principles are. He submits that he "does not presume to suggest that senior professional judges of an International Tribunal require to have basic principles of sentencing doctrine put before them as if they did not well apprehend them as a matter of their professional expertise and long experience."[1352] In the absence of any explanation as to what he perceives these "relevant doctrinal principles" to be, and how and why they should have been applied by the Trial Chamber to his case, Mucić fails to satisfy the burden on him to demonstrate how the Trial Chamber erred.

[1348] Trial Judgement, para 1243.
[1349] *United States v Wilhelm Von Leeb et al.*, Vol 11, TWC, pp 553-563 at 563.
[1350] Mucić Brief, Appeal Against Sentence, pp 6-7. *See* also Appeal Transcript, p 748.

797. The Appeals Chamber itself finds no error in the Trial Chamber's findings rega[illegible] this case. The Trial Chamber found that "[t]he only parallel with the instant case is that both Field Marshall *von Leeb* and Mr. Mucić exercised and enjoyed command authority and superior responsibility over subordinates in respect of whose wrongful acts they were and are criminally responsible".[1353] This being the only similarity (and a very general one in itself), it found that the facts of the two cases were by no means comparable and that "[t]he sentence of three years imprisonment [...] would not constitute an appropriate precedent on the facts of this case".[1354]

798. Although a Trial Chamber is entitled to refer for guidance in sentencing to precedents from the jurisprudence of the Tribunal and the ICTR, together with precedents from other jurisdictions, given the individual circumstances of each case and the varied factors which should be taken into account (as discussed above), such comparisons are frequently of little assistance. Mucić has provided no basis for establishing otherwise, and he has failed to show that the Trial Chamber erred in its interpretation of this case.[1355] Although arguing that principles which can be drawn from the case of *Wilhelm von Leeb* should have been applied in his own and that, if they had been, it would be established that the Trial Chamber had erred, he has failed to identify or elaborate as to how this is the case. The Appeals Chamber finds no reason to conclude that the Trial Chamber's conclusions were incorrect.

3. Weight to be given to the element of deterrence

799. Mucić submits that the Trial Chamber placed too much emphasis on the deterrent element in sentencing him. It is said that the Trial Chamber should have relied more on the rehabilitative element, which in his case would mean that he required no further incarceration than that which he has already served.[1356] He submits that "deterrence in

---

[1351] Prosecution Response, para 20.37.
[1352] Mucić Reply, p 17.
[1353] Trial Judgement, para 1249.
[1354] Trial Judgement, para 1250.
[1355] Indeed, the facts of the case and the mitigating circumstances differ to such a degree that the Appeals Chamber finds no basis for comparing the two cases.
[1356] Mucić Brief, Appeal Against Sentence, p 1.

sentencing in reality has little or no value in this case",[1357] and that the "lack of impact of deterrence cannot be more self-evident than to look at the situation in Kosovo".[1358] The Prosecution agrees with the Trial Chamber's finding that "[d]eterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law".[1359] It submits that future deterrence is both suppressive and educative, and that both aspects would be defeated if sentences were lower than those imposed in national jurisdictions for similar conduct.[1360] Similarly, this would defeat the aim of contributing to the peace and security in the former Yugoslavia.[1361]

800. The element of deterrence plays an important role in the functioning of the Tribunal. The Appeals Chamber has already determined that:

> [i]n adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, *thereby deterring future violations* and contributing to the re-establishment of peace and security in the region.[1362]

801. Therefore one of the purposes of the Tribunal, in "bringing to justice" individuals responsible for serious violations of international humanitarian law, is to deter future violations. With regard to the impact of deterrence on punishment, the Appeals Chamber has already accepted "the general importance of deterrence as a consideration in sentencing for international crimes".[1363] However, in accepting this importance, it did so with a proviso, concurring with its previous finding in the *Tadić* Sentencing Appeal Judgement, wherein it was found that:

> Fiğn determining the sentence to be imposed on the Appellant, the Trial Chamber took into account, as one of the relevant factors, the principle of deterrence. The Appeals Chamber accepts that this is a consideration that may legitimately be considered in sentencing, a proposition not disputed by the Appellant. Equally, the Appeals Chamber accepts that this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.[1364]

802. In the case of *Tadić,* the Appeals Chamber was considering a ground of appeal in which the appellant *Tadić* argued that the Trial Chamber had erred in relying on the general

---

[1357] Mucić Reply, p 14.
[1358] Mucić Reply, p 15.
[1359] Prosecution Response, para 20.10, referring to the Trial Judgement, para 1234.
[1360] Prosecution Response, paras 20.13-20.16.
[1361] Prosecution Response, para 20.17.
[1362] *Tadić* Jurisdiction Decision, para 72 (Emphasis added).
[1363] *Aleksovski* Appeal Judgement, para 185.

statement made by the Trial Chamber in Čelebići, that "Fdğeterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law".[1365] The Appeals Chamber in that case concluded: "In the circumstances of the present case, the Appeals Chamber is not satisfied that the Trial Chamber gave undue weight to deterrence as a factor in the determination of the appropriate sentence to be imposed on the Appellant."[1366]

803. Equally, in this case, although the Appeals Chamber is satisfied that this overall determination made by the Trial Chamber (that deterrence is the most important factor to consider in sentencing cases of this nature) was in fact in error because the importance of deterrence is subject to the above proviso, it is nevertheless not satisfied that the Trial Chamber erred by giving *undue* prominence to deterrence in this case. Although the Trial Chamber did not refer specifically to deterrence when considering the factors it took into account in sentencing Mucić, having referred to deterrence in general terms earlier, it may be assumed that it was taken into account to some extent. However, without more than a simple assertion of error put forward by Mucić, the Appeals Chamber is not persuaded that the Trial Chamber gave this factor *undue* weight in sentencing him.

804. Mucić also submits that the Trial Chamber should have placed more reliance on the rehabilitative element in sentencing. In his case he submits that this would have meant that he required no further incarceration than that which he had already served.[1367] Other than making this blunt assertion, Mucić fails to explain how this could be so.

805. The Appeals Chamber notes that the Trial Chamber referred to rehabilitation in a general way and found:

> The factor of rehabilitation considers the circumstances of reintegrating the guilty accused into society. This is usually the case when younger, or less educated, members of society are found guilty of offences. It therefore becomes necessary to re-integrate them into society so that they can become useful members of it and enable them to lead normal and productive lives upon their release from imprisonment. The age of the accused, his

---

[1364] *Tadić* Sentencing Appeal Judgement, para 48.
[1365] Trial Judgement, para 1234. In fact, the Trial Chamber in the case of *Tadić* relied on this precise finding in Čelebići. It was this finding which was appealed.
[1366] *Tadić* Sentencing Appeal Judgement, para 48.
[1367] Mucić Brief, Appeal Against Sentence, p 1.

> circumstances, his ability to be rehabilitated and availability of facilities in the confinement facility can, and should, be relevant considerations in this regard.[1368]

806. The cases which come before the Tribunal differ in many respects from those which ordinarily come before national jurisdictions, primarily because of the serious nature of the crimes being prosecuted, that is "serious violations of international humanitarian law".[1369] Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing,[1370] this cannot play a *predominant* role in the decision-making process of a Trial Chamber of the Tribunal.[1371] On the contrary, the Appeals Chamber[1372] (and Trial Chambers of both the Tribunal[1373] and the ICTR[1374]) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution. Accordingly, although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight. Given the findings which were made as to Mucić's culpability, the Appeals Chamber finds no error in the fact that the Trial Chamber does not specifically refer to rehabilitation in sentencing Mucić nor in its general statement cited above.

D. Delić's Appeal Against Sentence

807. Although Delić was charged with responsibility for crimes as both a direct participant and as a superior, he was convicted solely under Article 7(1) of the Statute as a direct participant, on fourteen counts of grave breaches of the Geneva Conventions and

---

[1368] Trial Judgement, para 1233.

[1369] Article 1 of the Statute. *See* also Resolution 808 (1993) S/RES/808 (1993) and Resolution 827 (1993) S/RES/827 (1993).

[1370] *See, e.g.*: Article 10(3) ICCPR: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation"; *General Comment* 21/44. U.N.GAOR, Human Rights Committee, 47th Sess, para 10, UN Doc. CCPR/C/21/Rev.1/Add.3(1992); Article 5(6) American Convention on Human Rights.

[1371] The Appeals Chamber notes that in *Prosecutor v Furund'ija,* Judgement, Case No IT-95-17/1-T, 10 Dec 1998, para 291, the Trial Chamber pointed out its "support for rehabilitative programmes in which the accused may participate while serving his sentence; the Trial Chamber is especially mindful of the age of the accused in this case." *See* also Second *Erdemović* Sentencing Judgement, para 16 and *Kupreškić* Judgement, para 849.

[1372] *Aleksovski* Appeal Judgement, para 185.

[1373] *Prosecutor v Anto Furund'ija,* Judgement, Case No IT-95-17/1-T, 10 Dec 1998, para 288; *Prosecutor v Duško Tadić,* Sentencing Judgement, Case No IT-94-1-T*bis*-R117, 11 Nov 1999, paras 7-9; *Kupreškić* Judgement, para 848.

[1374] *Prosecutor v Kambanda,* Judgement and Sentence, Case No ICTR-97-23-S, 4 Sept 1998, para 28; *The Prosecutor v Akayesu*, Sentence, Case No ICTR-96-4-S, 2 Oct 1998, para 19; and *The Prosecutor v Rutaganda,* Case No ICTR-96-3-T, 6 Dec 1999, para 456.

violations of the laws or customs of war, under Article 7(1) of the Statute.[1375] The convictions entered by the Trial Chamber were as follows:

Counts 1 and 2:	the wilful killing and murder of Šćepo Gotovac;[1376]
Counts 3 and 4:	the wilful killing and murder of Željko Milošević;
Counts 11 and 12:	the cruel treatment and wilfully causing great suffering or serious injury to body or health of Slavko Šušić;
Counts 18 and 19:	the torture by way of rape of Grozdana Ćećez;
Counts 21 and 22:	the torture by way of rape of Witness A;
Counts 42 and 43:	the inhuman treatment and the cruel treatment of detainees, including Milenko Kuljanin and Novica Đorđić;
Counts 46 and 47:	the cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp.

808. The Appeals Chamber notes that, in sentencing Delić, the Trial Chamber observed that "[t]he touchstone of sentencing is the gravity of the offence for which an accused has been found guilty, which includes considering the impact of the crime upon the victim". It referred to Delić's actions as, *inter alia,* "brutal and merciless", or "deplorable." It noted his "cruel" and "cold" premeditation and the "depravity" of his actions.[1377] It described the severe impact his behavior had on the victims,[1378] and his contribution to the atmosphere of

[1375] Trial Judgement, para 810: "...the Trial Chamber finds that the Prosecution has failed to establish beyond reasonable doubt, that Hazim Delić lay within the chain of command in the Čelebići prison-camp, with the power to issue orders to subordinates or to prevent or punish criminal acts of subordinates. Accordingly, he cannot be found to have been a "superior" for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute."

[1376] As noted above, these convictions will be quashed by the Appeals Chamber and a judgement of acquittal entered on both counts.

[1377] Trial Judgement, paras 1261–1268.

[1378] For example, the Trial Judgement refers to the testimony of Grozdana Ćećez describing the effect of the rape she suffered: "...he trampled on my pride and I will never be able to be the woman that I was." (Trial Judgement, para 1262).

terror that prevailed in the Čelebići camp due to both his acts and threats to detainees.[1379] It found that:

> [a]n examination of the [...] crimes and their underlying motivations, where relevant, demonstrates that they cannot be characterised as anything other than some of the most serious offences that a perpetrator can commit during wartime. The manner in which these crimes were committed are indicative of a sadistic individual who, at times, displayed a total disregard for the sanctity of human life and dignity.[1380]

809. Delić was convicted of fourteen offences and for each received a sentence of imprisonment, the maximum term being twenty years for wilful killing and murder under counts 1, 2, 3 and 4. Each sentence was ordered to be served concurrently.[1381] Delić submits that the Trial Chamber erred in violating the principle of *nulla poena sine lege* and failing to properly consider the sentencing practice of the courts of the former Yugoslavia.

1. Violation of the Principle *Nulla Poena Sine Lege* and failure to properly consider the sentencing practice of the courts of the former Yugoslavia

810. The first issue raises the question of whether or not a Trial Chamber is bound by the law of the former Yugoslavia in matters of sentencing and whether, in considering the practice of these courts, this Trial Chamber gave them due weight. Delić simply submits that, by application of the principles of legality and *nulla poena sine lege,*[1382] he could not be sentenced to a term greater than fifteen years. He submits that this was the maximum term which could be imposed in the former Yugoslavia, other than a term of twenty years which could be imposed in substitution for the death penalty.[1383] "To increase the

---

[1379] Trial Judgement, para 1266.
[1380] Trial Judgement, para 1268.
[1381] Trial Judgement, para 1286.
[1382] These principles are reflected in Article 15 of the ICCPR which provides:
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.
See also Article 7 of the European Convention on Human Rights.
[1383] The relevant provisions in the former Yugoslavia are contained in Chapter XVI of the SFRY Penal Code entitled "Crimes Against Peace and International Law." Article 142 prescribes in relation to certain crimes that they "shall be punished by no less than five years strict imprisonment or by the death penalty." In terms of imprisonment in general, Article 38 of the SFRY Penal Code provides that a punishment of imprisonment may not be longer than fifteen years, although the court may impose a sentence of twenty years in substitution for acts eligible for the death penalty, or if provided by statute for criminal acts committed with intent for which

punishment for an offence after it has been committed is a [...] basic violation of human rights."[1384]

811. Delić acknowledges that the Tribunal has stated that it is not bound by this law on punishment, but submits that nevertheless, until the sentence passed in his case, "the Trial Chambers ha[d] scrupulously avoided assessing penalties greater than that imposed under SFRY law for offences committed before the establishment of the Tribunal ...".[1385]

812. The Prosecution summarises its submissions by relying on the *Tadić* Sentencing Appeal Judgement and its finding that the Tribunal is not bound by the maximum sentences which could be imposed under the law of the former Yugoslavia.[1386]

813. Article 24(1) of the Statute provides that, in determining sentence, "Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".[1387] The question of whether or not this "recourse" should be of a binding nature has been consistently and uniformly interpreted by the Tribunal. It is now settled practice that, although a Trial Chamber should "have recourse to"[1388] and should "take into account"[1389] this general practice regarding prison sentences in the courts of the former Yugoslavia, this "does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice".[1390]

814. The Trial Chamber correctly followed this precedent and in doing so carried out a detailed analysis of the relevant provisions in the SFRY Penal Code, while also hearing testimony from an expert witness for the defence.[1391] It recognised the importance of the principle as being one of the "solid pillars on which the principle of legality stands",[1392] and found that the view that a higher penalty than that available under the SFRY would violate the principle of legality and *nulla poena sine lege* was "erroneous and overly

---

fifteen years may be imposed under statute and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences.

[1384] Delić Brief, para 356. *See* also Delić Reply, paras 156-163.

[1385] Delić Brief, para 357.

[1386] Appeal Transcript, pp 758-759.

[1387] *See* also Secretary-General's Report, para 111.

[1388] Article 24 of the Statute.

[1389] Rule 101(B)(iii) of the Rules.

[1390] *Serushago* Sentencing Appeal Judgement, para 30. *See* also *Tadić* Sentencing Appeal Judgement, para 21.

[1391] Trial Judgement, paras 1192-1212.

restrictive".[1393] It concluded that "[t]here is no jurisprudential or juridical basis for the assertion that the International Tribunal is bound by decisions of the courts of the former Yugoslavia".[1394] The Appeals Chamber finds no error in this approach.

815. Nevertheless, Delić submits that Trial Chambers have avoided imposing greater penalties than those imposed under SFRY law for offences committed before the establishment of the Tribunal, until it imposed the sentence on him.[1395] Although the Tribunal has the authority to impose a life sentence for offences committed after its establishment, he submits that those committed before its establishment (as in his case) are subject to the maximum under the law in the former Yugoslavia.[1396]

816. The Appeals Chamber disagrees. Trial Chambers are not *bound* by the practice of courts in the former Yugoslavia in reaching their determination of the appropriate sentence for a convicted person. This principle applies to offences committed both before and after the Tribunal's establishment. The Appeals Chamber can therefore see no reason why it should constitute a retrospective increase in sentence to impose a sentence greater than what may have been the maximum sentence available under domestic law in the former Yugoslavia at the time the offences were committed.

817. All of this is, however, subject to the proviso that any sentence imposed must always be, as stated by the Trial Chamber, "founded on the existence of applicable law".[1397] "[T]he governing consideration for the operation of the *nullem crimen sine lege* principle is the existence of a punishment with respect to the offence."[1398] There can be no doubt that the maximum sentence permissible under the Rules ("imprisonment for [...] the remainder of a convicted person's life"[1399]) for crimes prosecuted before the Tribunal, and any sentence up

---

[1392] Trial Judgement, para. 402.
[1393] Trial Judgement, para 1210.
[1394] Trial Judgement, para 1212.
[1395] Delić Brief, para 357.
[1396] Delić Reply, paras 159-163.
[1397] Trial Judgement, para 1210.
[1398] Trial Judgement, para 1212. *See* also the Nuremberg Judgement which found that it is "a principle of justice above all; where there can be do doubt that the defendants knew that they were committing a wrong condemned by the international community, it is not unjust to punish them despite the lack of highly specified international law." *1 Trial of the Major War Criminals Before the International Military Tribunal,* 218-223 (1947). *See Nuremberg Judgement*, at 49. Affirmed in Report of the Sixth Committee, UN GAOR, 1st Sess, pt. 2, 55th Plen mtg at 1144, U.N.Doc. A/236 (1946), GA Res. 95, UN Doc A/64/Add.1 (1946).
[1399] Rule 101(A) of the Rules.

to this, does not violate the principle of *nulla poena sine lege.*[1400] There can be no doubt that the accused must have been aware of the fact that the crimes for which they were indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties.[1401]

818. The Appeals Chamber finds that Delić has failed to show any error on the part of the Trial Chamber in concluding that it was not bound by the practice of the courts of the former Yugoslavia and, further, that there was no violation of the principle of *nulla poena sine lege.*

2. The sentence imposed was excessive

819. Delić asserts that the sentence imposed was excessive compared to the practice of the courts in the former Yugoslavia, which regularly gave sentences near the minimum prescribed by law. In addition, it was disproportionate in comparison to those imposed in the cases of *Tadić* and *Erdemović.*[1402]

820. As confirmed above, the Tribunal is not bound by the practice of the courts of the former Yugoslavia, but it may simply turn to them for guidance. Therefore, even if it had been shown by Delić (which it has not) that sentences were regularly imposed by the courts in the former Yugoslavia which were close to the minimum, the Trial Chamber would not have been *bound* to follow that practice. Delić has failed to point to any error committed by the Trial Chamber.

821. With regard to assistance from previous cases decided by the Tribunal, although a Trial Chamber may draw guidance from such jurisprudence in imposing sentence, the Appeals Chamber reiterates, in agreement with the Prosecution, that "every sentence imposed by a Trial Chamber must be individualised [...] and there are many factors to

[1400] The European Court of Human Rights has held that as long as the punishment is accessible and foreseeable, then the principle cannot be breached: *SW v The United Kingdom* and *CR v The United Kingdom,* Judgement of 22 November 1995, Series A, Vol 335-B, paras 34-36 and 43.

[1401] For example, it is noteworthy that the judgements rendered at Nuremberg and Tokyo and the other successor tribunals provide clear authority for custodial sentences up to and including life imprisonment (Nineteen defendants were convicted before the Nuremberg Tribunal, out of which seven received sentences of imprisonment ranging from ten years to life imprisonment). Similarly, sentences in national jurisdictions of up to life imprisonment for crimes of the nature being prosecuted before the Tribunal are clearly recognised as being available.

[1402] Delić Brief, paras 359-361.

which the Trial Chamber may appropriately have regard in exercising its discretion in each individual case".[1403] The guidance which may be drawn from previously decided cases, in terms of the final sentence imposed, is accordingly very limited.

822. Delić compares his case initially to that of *Erdemović*, and he submits that the accused there was a person responsible for over 700 execution-style killings but nevertheless only received a sentence of five years.[1404] Other than making this statement, he does not develop his argument. Nevertheless, for the reasons set out below with regard to Land'o, and considering the findings of the Trial Chamber in this case, the Appeals Chamber finds that the case of *Erdemović* is clearly distinguishable and no useful comparison can be made to Delić's case.

823. With regard to *Tadić,* Delić submits that he was convicted of eleven counts of crimes against humanity. "Even considering all aggravating circumstances for all of the counts of inhuman treatment and crue[l] treatment for which Tadić was convicted the most of sentences were placed at six and seven years."[1405]

824. Delić clearly errs in this comparison. The penalties imposed on *Tadić*, as finally confirmed by the Appeals Chamber,[1406] ranged from six years imprisonment to twenty years imprisonment (including those for wilful killing and murder). The sentences imposed on Delić ranged from seven years imprisonment to twenty years imprisonment (also for wilful killing and murder). Both accused were sentenced in relation to the gravity of their crimes and their individual circumstances. Even if one were to attempt to compare these cases as suggested by Delić, the range of sentences clearly falls within that which the Appeals Chamber has already confirmed is permissible.

825. The Appeals Chamber notes that, in sentencing Delić, the Trial Chamber referred to the brutality and premeditated fashion in which he committed the crimes for which he was convicted. It referred in particular to the tendency of Delić to threaten his victims before,

---

[1403] Prosecution Response, para 19.16.
[1404] Delić Brief, para 361.
[1405] Delić Brief, para 361. It is noted that the Delić Brief was filed on 2 July 1999, while the *Tadić* Appeal Judgement (in which the Appeals Chamber reversed the Trial Chamber decision and entered findings of guilt for nine counts on the indictment, including grave breaches (wilful killing), violations of the laws or customs of war (murder) and crimes against humanity (murder)) was issued on 15 July 1999.
[1406] *Tadić* Sentencing Appeal Judgement.

during and after the crimes,[1407] and the pleasure he derived from the use of an electric shock device on the detainees.[1408] The Appeals Chamber does not accept that the sentences imposed by the Trial Chamber in this case were disproportionate to the severity of the crimes committed, even when taking into account the mitigating factors.[1409] The sentence imposed was within the Trial Chamber's discretionary framework, and Delić has failed to advance any adequate reason to persuade the Appeals Chamber to the contrary.

E. Esad Land'o

826. The Appeals Chamber has already set out in detail the Trial Chamber's findings with regard to Land'o and his conviction for eighteen offences.[1410] The Appeals Chamber simply notes here the fact that the Trial Chamber found that his crimes were characterised by "substantial pain, suffering and injury" which he inflicted on each of his victims.[1411] The offences were described *inter alia* as having been committed with "savagery",[1412] and being "sustained and ferocious".[1413] It was further noted that he displayed "particularly sadistic tendencies [...] clearly requir[ing] premeditation".[1414]

827. In mitigation, Land'o put forward several circumstances,[1415] some of which the Trial Chamber considered could be taken into account in his favour when deciding on the appropriate sentence. These included his youth, "immature and fragile personality" and the harsh environment of the armed conflict as a whole.[1416] Nevertheless, he received several individual sentences of imprisonment, the maximum of which was fifteen years. As with his co-defendants, it was ordered that each sentence should be served concurrently.

[1407] *See,* e.g., in relation to the rape of Milojka Antić: "Delić threatened her and told her that, if she did not do whatever he asked, she would be sent to another prison-camp or shot .... [he] threatened her while raping her. The following day he compounded her fear and suffering by stating "...[w]hy are you crying? This will not be your last time."' (Trial Judgement, para 1263).

[1408] Trial Judgement, para 1264.

[1409] Trial Judgement, para 1270.

[1410] See *supra*, paras 565-571.

[1411] Trial Judgement, para 1273.

[1412] Trial Judgement, para 1273 (with regard to beating to death of Šćepo Gotovac).

[1413] Trial Judgement, para 1273 (with regard to his "sudden attack on Boško Somouković", also motivated "by vengeful desires.").

[1414] Trial Judgement, para 1274 (with regard to Land'o's "apparent preference for inflicting serious burns upon detainees in the prison-camp.").

[1415] These factors included: his youth; mental state; expressions of remorse; voluntary surrender; the fact that he was only an ordinary soldier and therefore should not be subject to the Tribunal's jurisdiction; his attempts to co-operate with the Prosecution. (Trial Judgement para 1277).

[1416] Trial Judgement, para 1283.

828. Land'o has appealed his sentence as being manifestly excessive when compared to the other sentences imposed by the Tribunal, while also alleging that the Trial Chamber failed to properly take account of the mitigating factors put forward at trial.

1. Comparison with other sentences imposed by the Tribunal

829. Land'o submits that comparison to previous sentences imposed by the Tribunal (in particular the cases of *Tadić* and *Erdemović*)[1417] illustrate that his sentence was unjust and manifestly excessive.[1418] He portrays himself as "a young boy sucked up in the invasion of his home",[1419] and a "mere boy with no military experience".[1420]

830. He submits that, although he had certain mitigating factors in his favour, *Dra'en Erdemović* was an officer with rank, responsible for over 700 execution-style killings.[1421] Similarly, *Duško Tadić*, whose case had many aggravating factors, was convicted of eleven counts of crimes against humanity.[1422] For those charges of cruel and inhumane treatment, the maximum sentence *Tadić* received was ten years (though most were between six and seven years). Land'o submits that he cannot be compared to *Tadić*. "The class of accusations and the class of aggravating circumstances are in no way comparable."[1423]

831. In the case of *Serushago* before the Appeals Chamber for the ICTR, the appellant attempted to rely on the case of *Erdemović*, and urged the Appeals Chamber to consider the disparity in the sentences imposed.[1424] The Appeals Chamber held that the cases were distinguishable, as "[t]he facts of the two cases are materially different [...]. There was no

---

[1417] In his written filings, Land'o also compared his case to that of *Zlatko Aleksovski,* whose sentence was at the time under appeal by the Prosecution (Land'o Brief, p 143). Since then, Aleksovski's sentence has been increased by the Appeals Chamber (*Aleksovski* Appeal Judgement). When comparing his case to others during the Hearing on Appeal, Land'o made no further reference to this case and in these circumstances, the Appeals Chamber assumes that the submissions in relation thereto are not pursued.

[1418] Land'o Brief, p 141.

[1419] Appeal Transcript, p 754.

[1420] Land'o Brief, p 143. *See* also Appeal Transcript, p 553, where he is referred to by his counsel as a "...boy who was brought into this conflict –he had not military training—he was brought into this conflict because his family, his home, and his very culture were under attack."

[1421] Land'o Brief, p 141.

[1422] Land'o's Brief was also filed before the *Tadić* Appeal Judgement.

[1423] Land'o Brief, pp 141-143.

[1424] *Omar Serushago* pleaded guilty to one count of genocide (Article 2(3)(a) of the Statute of the ICTR) and three counts of crimes against humanity (Articles 3(a), (b) and (c) of the Statute of the ICTR respectively). He was sentenced to fifteen years imprisonment on 5 February 1999 (*Prosecutor v Serushago,* Case No ICTR-98-39-S, 5 Feb 1999). *Dra'en Erdemović* pleaded guilty to one count of a violation of the laws or customs of war and was sentenced to five years imprisonment (Second *Erdemović* Sentencing Judgement).

evidence that Erdemović had a similar profile".[1425] Similarly, there is no evidence before the Appeals Chamber that Land'o had a similar profile such that any useful comparison may be made.

832. Land'o overlooks the findings of both the Appeals Chamber and the Trial Chamber in its final sentencing judgement in the case of *Erdemović*, both of which expressly highlight the clear distinguishing factor in that case. That is, the fact that the Appeals Chamber, and then the Trial Chamber, accepted the fact that *Erdemović* had been subjected to duress and committed the offences in question under real threat of death.[1426] The Trial Chamber found that "[t]he evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed".[1427]

833. This case is by no means comparable. The Trial Chamber found that Land'o's actions were premeditated, savage and brutal, and that he derived enjoyment from the infliction of pain on detainees. The case is further distinguishable by the fact that one can note the particular findings by the Trial Chamber in that case, when it referred to firstly the fact that *Erdemović* displayed "reluctance to participate and [secondly] his reaction to having to perform this gruesome task [...]. It is clear that he took no perverse pleasure from what he did".[1428] On the contrary, the Trial Chamber found with regard to Land'o that, even if it were accepted that he was "on occasion, ordered to kill or mistreat prisoners [...] the evidence does not indicate that he performed these tasks with reluctance [...] the nature of his acts strongly indicates that he took some perverse pleasure in the infliction of great pain and humiliation".[1429] His case is marked by many aggravating factors, limiting the weight which the Trial Chamber found could be attached to the mitigating factors presented.[1430]

[1425] *Serushago* Sentencing Appeal Judgement, para 27.
[1426] Second *Erdemović* Sentencing Judgement, para 14.
[1427] Second *Erdemović* Sentencing Judgement, para 16.
[1428] Second *Erdemović* Sentencing Judgement, para 20.
[1429] Trial Judgement, para 1281. Although Article 7(4) of the Statute provides that the fact an accused person acted pursuant to an order of a superior may be considered in mitigation of punishment, this is only "if the International Tribunal determines that justice so requires". The Trial Chamber therefore retains discretion to reject this as mitigation.
[1430] It can also be reiterated, that as was pointed out in the Trial Judgement, although Land'o may not have been highly placed in terms of rank, in terms of the new Prosecution policy at the time, it involved focusing on those

834. Similarly, with regard to any comparison to the case of *Tadić,* the Appeals Chamber can find no basis to conclude that the Trial Chamber erred. As noted above, the total sentence imposed on *Tadić* was finally confirmed by the Appeals Chamber at twenty years.[1431] Although this sentence was again decided on the basis of the particular facts and circumstances before that Trial Chamber, it may nevertheless be noted that both Trial Chamber sentencing judgements are marked by findings that the acts committed were brutal, wanton, sadistic and cruel.[1432] As already noted, Landžo's case is marked by similar findings and, although the Appeals Chamber does not directly compare these cases, it serves to point this out in light of Landžo's submissions. The Appeals Chamber accordingly finds that the sentence imposed was clearly within the Trial Chamber's discretionary framework.

2. Insufficient weight given to mitigating factors

835. Land'o effectively reiterates the submissions he made at trial with regard to mitigation, and submits that the Trial Chamber attached insufficient weight to the factors presented. He refers in particular to: his family background; good character; voluntary surrender; admission of guilt; the fact that he acted under superior orders; his mental condition; and attempts to co-operate with the Prosecution. Finally, he requests that the Appeals Chamber reconsider all of the evidence submitted in sentencing, in particular that provided by several defence witnesses before the Trial Chamber.[1433]

836. The Prosecution submits that "[t]here is no indication that the Trial Chamber did not consider all of the evidence and arguments placed before it by Land'o at the sentencing hearing."[1434] In any event, it submits that the purpose of appellate proceedings is not to reconsider all of the evidence, and that Land'o has failed to establish any legal principle that the Trial Chamber misapplied in sentencing.[1435]

---

high up in the chains of responsibility or "on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences." *Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused,* Office of the Prosecutor, Doc. CC/PIU/314-E, 8 May 1998.

[1431] *Tadić* Sentencing Appeal Judgement.

[1432] *Prosecutor v Duško Tadić,* Sentencing Judgement, Case No IT-94-1-T, 14 July 1997 and Case No IT-94-1-T*bis*-R117, 11 Nov 1999.

[1433] Land'o Brief, pp 148-150 and Appeal Transcript, pp 756-757.

[1434] Prosecution Response, para 21.13.

[1435] Prosecution Response, paras 21.10-12, Appeal Transcript, p 762.

837. The Appeals Chamber agrees. The purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and factors submitted before the Trial Chamber. In this case, the Appeals Chamber notes that the Trial Chamber did consider the mitigating factors presented by Land'o in determining the appropriate sentence. Further, the Trial Judgement shows amply that the Trial Chamber, having considered these factors and as it was entitled to do, both accepted some and rejected others. It falls on an appellant to convince the Appeals Chamber that the Trial Chamber erred in the exercise of its discretion, and that it failed to take account of or failed to give adequate weight to these factors.[1436] Landžo has failed to discharge this burden.

838. It is clear to the Appeals Chamber that the heinous nature of the crimes committed by Landžo was of overriding concern in the Trial Chamber's decision-making process on sentence. This has already been noted in greater detail above, and the Appeals Chamber finds that the Trial Chamber did not err.[1437]

839. Land'o specifically raised the issue of diminished responsibility and its impact on his sentence during the hearing on appeal. The Appeals Chamber rejected the argument that a finding of diminished responsibility constitutes a full defence.[1438] However, it has accepted that it may be a matter appropriately considered in mitigation of sentence.[1439] Land'o submits that the Trial Chamber did not "recognise that [his] responsibility was diminished with respect to the sentence. Merely stating that they took into account his mental traits does not recognise diminished mental responsibility even in application to mitigation of punishment".[1440] On the contrary, he submits that the Trial Chamber should have clearly stated that the sentence was reduced by a certain number of years, due to a finding of a state of diminished responsibility.[1441]

[1436] *Serushago* Sentencing Appeal Judgement, para 22.

[1437] Similarly, in other cases, Trial Chambers have expressly acknowledged matters submitted by a convicted person in mitigation but found that due to the serious nature of the crimes committed and the fact that often many accused share particular personal factors, their weight is either limited or non-existent in determining sentence. *Blaškić* Judgement, para 782. Also *Prosecutor v Furund'ija,* Judgement, Case No IT-95-17/1-T, 10 Dec 1998, para 284. *Prosecutor v Jelisić,* Judgement, Case No IT-95-10-T, 14 Dec 1999, para 124.

[1438] *See supra*, para 590.

[1439] *See supra*, para 590. The limited mental capacity of an accused at the time of the crime and during trial was also recognised as a mitigating factor in the trials conducted after the Second World War. *See e.g., Trial of Wilhelm Gerbsch,* 15 LRTWC at 185.

[1440] Appeal Transcript, pp 754-755.

[1441] Appeal Transcript, pp 755-756.

840. The Trial Chamber found:

> [...] there are certain features of Mr. Land'o's case that must be taken into account in his favour when deciding upon the measure of sentence to be imposed upon him [...] [including the following] While the special defence of diminished responsibility [...] has been rejected by the Trial Chamber above, the Trial Chamber may nonetheless take note of the evidence presented by the numerous mental health experts, which collectively reveals a picture of Mr. Land'o's personality traits that contributes to our consideration of appropriate sentence.[1442]

841. As has been seen above, although the Trial Chamber accepted evidence that Land'o suffered from a personality disorder, it considered that, despite this, he was able to control his actions, therefore rejecting any "defence" of diminished responsibility. However, it is clear from the above that the Trial Chamber nevertheless did take into account Land'o's "personality traits". In doing so, and in considering specifically those mitigating factors to which the Trial Chamber wished to attach weight, it expressly found that the evidence of "numerous" mental health experts had been taken into account and contributed to the consideration of an appropriate sentence. The Appeals Chamber can see no error nor ambiguity in such a finding. It is not incumbent on a Trial Chamber, as suggested by Land'o, to specifically indicate the reduction in years which it makes in relation to each mitigating factor put forward. On the contrary, it is for the Trial Chamber to make an overall assessment of the circumstances of the case and impose an appropriate sentence, taking into account all of the relevant factors. The Appeals Chamber accordingly finds that there has been no error demonstrated.

842. Weighed against the many aggravating factors noted above and in full in the Trial Judgement, the Appeals Chamber finds no error in the sentence imposed on Landžo by the Trial Chamber.

F. Significance of Respective Roles in the Broader Context of the Conflict – Ground of Appeal Submitted by Land'o, Delić and Mucić

843. Mucić, Delić and Land'o have each submitted that, in light of the decision in the *Tadić* Sentencing Appeal Judgement, the sentences imposed on each of them respectively were excessive. In the *Tadić* Sentencing Appeal Judgement, the Appeals Chamber found:

[1442] Trial Judgement, para 1283.

> In the opinion of the Appeals Chamber, the Trial Chamber's decision, when considered against the background of the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda, fails to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.
>
> Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.
>
> In the circumstances of the case, the Appeals Chamber considers that a sentence of more than 20 years' imprisonment for any count of the Indictment on which the Appellant stands convicted is excessive and cannot stand.[1443]

844. Each appellant argues that, like *Duško Tadić,* their place in the hierarchy and overall command structure was low and that the sentence imposed on each of them failed to reflect this. Mucić submits that the decision articulated an additional sentencing factor to be considered, in that a Trial Chamber must now determine an individual's significance in the broader context of the conflict in the former Yugoslavia.[1444] Although the Trial Chamber found that Mucić was a commander of the Čelebići camp, it did not categorise his role in the broader context of the conflict in the former Yugoslavia. Mucić submits that this role was insignificant[1445] and that this works as a mitigating factor in determining sentence.[1446]

845. Similarly, Delić submits that his sentence should be reduced substantially as a result of this decision. He portrays the Čelebići camp as a relatively small prison, holding relatively few prisoners.[1447] He submits that the *Tadić* Sentencing Appeal Judgement held that those who organised large-scale atrocities should be punished more harshly than those who, while guilty of some offences, are minor players in a much larger game controlled by others.[1448] The Trial Chamber failed to consider his position in the overall situation and his total lack of policy-making authority and lack of command authority. If they had, he submits that his twenty-year sentence would be reduced substantially.[1449] Finally, Land'o submits that the Trial Chamber failed to consider the significance of his role in the broader

---

[1443] *Tadić* Sentencing Appeal Judgement, paras 55-57.
[1444] Delić/Mucić Supplementary Brief, para 41.
[1445] Delić/Mucić Supplementary Brief, para 44. In particular Mucić submits that he had no authority for the conduct of the war, no responsibility for policy decisions, no authority to determine who was arrested, why they were arrested, how they were arrested or what happened to them before their arrival at the Čelebići camp. (paras 45-48).
[1446] Delić/Mucić Supplementary Brief, para 47.
[1447] Delić/Mucić Supplementary Brief, para 38.
[1448] Delić/Mucić Supplementary Brief, para 39.
[1449] Delić/Mucić Supplementary Brief, para 40.

context, and that "[t]here is no one who was a more minor player in the conflict in Yugoslavia than Esad Land'o was".[1450]

846. The Prosecution disputes these interpretations, and submits that determination of sentence should reflect the inherent gravity of an accused's conduct. This should not be made by comparison with other persons known or unknown to the Trial Chamber or by reference to the fact that there may have been others who committed many more or graver crimes during the conflict.[1451]

847. The Appeals Chamber is satisfied that the appellants' interpretation of the *Tadić* Sentencing Appeal Judgement is incorrect. That judgement did not purport to require that, in every case before it, an accused's level in the overall hierarchy in the conflict in the former Yugoslavia should be compared with those at the highest level, such that if the accused's place was by comparison low, a low sentence should automatically be imposed. Establishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime which "requires consideration of the particular circumstances of the cases, as well as the form and degree of the participation of the accused in the crime."[1452] In certain circumstances, the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless justified.

848. This interpretation was recently applied by the Appeals Chamber in the *Aleksovski* Appeal Judgement:

> While, therefore, this Appellant may have had a secondary role, compared with the alleged roles of others against whom charges have been brought, he was nonetheless the commander of the prison and as such the authority who could have prevented the crimes in the prison and certainly should not have involved himself in them. An appropriate sentence should reflect these factors. There are no other mitigating circumstances in this case.[1453]

[1450] Appeal Transcript, pp 752-754.
[1451] Prosecution Response to Supplementary Brief, para 7.5.
[1452] *Aleksovski* Appeal Judgement, para 182, citing *Kupreškić* Judgement, para 852.
[1453] *Aleksovski* Appeal Judgement, para 184.

849. Therefore, while the Appeals Chamber has determined that it is important to establish a gradation in sentencing, this does not detract from the finding that it is as essential that a sentence take into account all the circumstances of an individual case.

850. In this case, noting the circumstances of each appellant (with the exception already referred to of Mucić), the Appeals Chamber finds no error in the exercise of the Trial Chamber's discretion. Although it is not contended that the appellants held a senior role in terms of the command structure in the conflict as a whole, nonetheless the inherent gravity of their respective conduct (which have been considered in greater depth above) was noted repeatedly by the Trial Chamber.[1454] The Appeals Chamber accordingly finds that the sentences imposed on Delić and Landžo were not outside the discretionary framework available to the Trial Chamber.

G. Conclusion

851. For the reasons identified above, the Appeals Chamber has found that the Trial Chamber did not have sufficient regard to the gravity of the offences committed by Mucić in exercising its sentencing discretion, and as a result it imposed a sentence which did not adequately reflect the totality of Mucić's criminal conduct. The fourth Prosecution ground of appeal is therefore allowed to that extent. The Prosecution submits that:

> [...] where the Appeals Chamber upholds an appeal against sentence on the grounds that the sentence imposed was manifestly excessive or manifestly inadequate, it is unnecessary for the case to be remitted to a Trial Chamber for further sentencing proceedings.[1455]

The Prosecution says that it is appropriate for the Appeals Chamber to substitute its own sentence for that of the Trial Chamber. It is clear from the *Aleksovski* Appeal Judgement that, in the case of a successful appeal against sentence on such a ground, it is open to the Appeals Chamber to consider and substitute its own sentence without remitting the matter to the Trial Chamber.[1456] As noted above, however, in the present proceedings, the matter is to be referred back to a reconstituted Trial Chamber for reconsideration of sentence in light of the fact that certain convictions are to be quashed. That Trial Chamber must

---

[1454] As a whole the Trial Chamber found that "[a] mere cursory glance over the Indictment...provides a lasting impression of a catalogue of horrific events....To argue that these are not crimes of the most serious nature strains the bounds of credibility." Trial Judgement, para 178.

[1455] Prosecution Brief, para 5.76.

consider the appropriate sentence for Mucić on the basis of the reduced counts remaining against him and by reference to the Appeals Chamber's conclusion in relation to this ground of appeal that the original sentence did not adequately take into account the gravity of the crimes.

852. It will assist the Trial Chamber to which these sentencing matters are remitted if the Appeals Chamber indicates the revised sentence that it would have considered appropriate for Mucić, had there not been the intervening factor that certain of his convictions are to be quashed. This indication is made on the basis of the sentence which would have been appropriate in relation to the crimes for which Mucić was convicted by the original Trial Chamber.

853. Taking into account the various considerations relating to the gravity of Mucić's offences and the aggravating circumstances already referred to, as well as the mitigating circumstances referred to by the Trial Chamber and the "double jeopardy" element involved in subjecting Mucić to a revised sentence,[1457] the Appeals Chamber would have imposed on Mucić a heavier sentence of a total of around ten years imprisonment.

854. The Trial Chamber to which the sentencing issues are remitted may have reference to this indication in its own determination, which must be made in relation to the reduced number of counts following the quashing of those counts on the basis of cumulative convictions considerations.[1458] The new Trial Chamber should also consider the effect (if any) upon that indication of the original Trial Chamber's error in referring to the failure of Muci} to give evidence. That Trial Chamber will have the discretion under Rule 87(C) as to whether it will impose individual sentences in relation to each count for which a conviction is entered, in which case it has a further discretion as to whether to order that

---

[1456] *Aleksovski* Appeal Judgement, paras 186, 187 and 191.
[1457] *Aleksovski* Appeal Judgement, para 190.
[1458] Because the convictions on the Article 2 counts based on the same conduct as the quashed Article 3 counts remain, the adjustment required in relation to the quashing of convictions may not necessarily be a substantial one. It is for the Trial Chamber to which the sentencing matters are remitted to consider the totality of Mucić's criminal conduct in light of the convictions now entered against him.

those sentences be served concurrently or consecutively, or to impose a single sentence reflecting the totality of the accused's criminal conduct.[1459]

[1459] After the amendment of Rule 87(C) (Revision 19, effective from 19 Jan 2001) the Trial Chamber "shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

XV. DISPOSITION

For the foregoing reasons:

1. In relation to Counts 1 and 2 of the Indictment, the Appeals Chamber ALLOWS the ninth and tenth grounds of appeal filed by Hazim Delić,[1460] it QUASHES the verdict of the Trial Chamber accordingly, and it enters a verdict that Hazim Delić is NOT GUILTY upon those counts.

2. In relation to the grounds of appeal relating to cumulative convictions, the Appeals Chamber ALLOWS the twenty-first ground of appeal filed by Hazim Delić[1461] and the seventh ground of appeal filed by Zdravko Mucić; it DISMISSES Counts 14, 34, 39, 45 and 47 against Zdravko Mucić; it DISMISSES Counts 4, 12, 19, 22, 43 and 47 against Hazim Delić, and it DISMISSES Counts 2, 6, 8, 12, 16, 25, 31, 37, and 47 against Esad Landžo. It REMITS to a Trial Chamber to be nominated by the President of the Tribunal ("Reconstituted Trial Chamber") the issue of what adjustment, if any, should be made to the original sentences imposed on Hazim Delić, Zdravko Mucić, and Esad Landžo to take account of the dismissal of these counts.

3. In relation to the eleventh ground of appeal filed by Zdravko Mucić, the Appeals Chamber FINDS that the Trial Chamber erred in making adverse reference when imposing sentence to the fact that he had not given oral evidence in the trial, and it DIRECTS the Reconstituted Trial Chamber to consider the effect, if any, of that error on the sentence to be imposed on Mucić.

4. The Appeals Chamber ALLOWS the fourth ground of appeal filed by the Prosecution alleging that the sentence of seven years imposed on Zdravko Mucić was inadequate, and it REMITS the matter of the imposition of an

[1460] Designated "Issue Number Nine" and "Issue Number Ten" in Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000.
[1461] Designated "Issue Number 21 (Additional Issue Number Two)" in Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000.

appropriate revised sentence for Zdravko Mucić to the Reconstituted Trial Chamber, with the indication that, had it not been necessary to take into account a possible adjustment in sentence because of the dismissal of the counts referred to in paragraph 2 above, it would have imposed a sentence of around ten years.

5. The Appeals Chamber DISMISSES each of the remaining grounds of appeal filed by each of the appellants.

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

Judge David Hunt, Presiding

Judge Fouad Riad

Judge Rafael Nieto-Navia

Judge Mohamed Bennouna

Judge Fausto Pocar

Dated this twentieth day of February 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

XVI. SEPARATE AND DISSENTING OPINION OF JUDGE DAVID HUNT AND JUDGE MOHAMED BENNOUNA

A. Introduction

1. We append a separate and dissenting opinion in relation to the issue of cumulative convictions not only because we are unable to agree with some of the reasoning and part of the outcome in the majority opinion, but also because, in relation to those conclusions in the majority opinion with which we do agree, we believe it to be desirable to give a fuller explanation for those conclusions.

2. First, we intend to explain more thoroughly why we believe that the various approaches in the previous jurisprudence on this issue within the Tribunal, and the individual approaches of national systems, do not provide of themselves a satisfactory solution for this Tribunal. Secondly, we give our reasons as to *why* cumulative convictions in relation to the same conduct, as well as cumulative penalties in sentencing, are impermissible.

3. There are two matters of substance in relation to which we take a different view to that taken by the majority. The first relates to the application of the test to determine whether two crimes are legally distinct. The second relates to the way in which, when a choice must be made as to which of two or more possible cumulative convictions should be retained, that choice must be made.

B. Background

4. The ground of appeal of Mucić and Delić alleges that they were impermissibly convicted and sentenced under both Article 2 and Article 3 of the Statute in respect of the same acts.[1] The ground was described in the following terms:

[1] Appellants-Cross Appellee's Hazim Delić's and Zdravko "Pavo" Mucić's Motion for Leave to File Supplemental Brief and Supplemental Brief, 17 Feb 2000 ("Delić/Mucić Supplementary Brief"). This was treated as an application for leave to add an additional ground of appeal, which was granted by the Appeals Chamber's Order on Motion of Appellants Hazim Delić and Zdravko Mucić for Leave to File Supplementary

> Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches of the Geneva Conventions and for violations of the Laws and Customs of War based on the same acts.[2]

5. Mucić and Delić's submissions in support of this ground of appeal are essentially based on the discussion in the *Kupreškić* Judgement of the principles governing cumulative convictions.[3] The appellants interpret the *Kupreškić* Judgement as adopting the standard enunciated in the US Supreme Court decision in *Blockburger v United States*, *i.e.* that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of a fact that the other does not".[4] The appellants contend that, applying that test to their convictions under Article 2 and those under Article 3 (which rely on common Article 3 of the Geneva Conventions), that standard is violated:

> Setting aside the question of the applicability of Common Article 3 to international armed conflict and whether Common Article 3 imposes individual criminal liability, to obtain a conviction under Common Article 3, the elements are identical with one exception. An element of the grave breaches of the Geneva Conventions is that the complainant was a person protected by one of the Conventions [...]. Thus, judgements of conviction for both grave breaches of the Geneva Convention and violations of the laws and customs of war would violate the *Blockburger* standard.[5]

The relief sought is that, in the cases of duplicative convictions, one of the charges should be dismissed, without specifying which one.

6. The Prosecution responded to this ground of appeal with an extensive analysis of the jurisprudence of the Tribunal and of certain national jurisdictions relating to cumulative charging and cumulative convictions. The Prosecution's key contentions are, first, that the existing practice of this Tribunal and the International Criminal Tribunal for Rwanda permits cumulative convictions under Articles 2 and 3 of the Statute, and that the reasoning expressed in the *Kupreškić* Judgement is inconsistent with that practice. That Judgement's reference to the principles on concurrence of offences in national jurisdictions does not, it is

---

Brief, 31 Mar 2000. Although Landžo was also convicted under Article 2 and Article 3 of the Statute in respect of the same acts, he did not formally join in this ground of appeal. However, Landžo's convictions under both Article 2 and Article 3 were referred to in the Delić/Mucić Supplementary Brief, para 14 (c).

2 Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, 31 May 2000, Ground 7; Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, Issue 21.

3 *Kupreškić* Judgement, paras 637–748.

4 *Blockburger v United States* 284 US 299, 304 (1932).

5 Delić/Mucić Supplementary Brief, p 13.

said, support a departure from this practice, as the variations between the jurisdictions on this issue are so extensive that no general principles of international law can be drawn from them. The Prosecution does, however, appear to rely on concepts drawn from continental legal systems in arriving at the principles which it regards as applicable.

7. The Prosecution interprets the jurisprudence of the two Tribunals as disclosing four different tests on the issue. The Prosecution submits that the applicable principles may be arrived at by reconciling two of the tests – the first drawn from the *result* in the *Tadić* Appeal Judgement and the second from the *reasoning* in the *Akayesu* Judgement.[6] The question of cumulative convictions was not discussed by the Appeals Chamber in the *Tadić* Appeal Judgement, and it had not been raised as an issue on appeal. The Prosecution rather seeks to rely on the fact that, as a result of the Appeals Chamber's substitution of a guilty verdict for a not guilty verdict on certain counts, Tadić received multiple convictions under separate Articles of the Statute in respect of the same conduct. The test relied upon from the *Akayesu* Judgement is that cumulative convictions are acceptable where:

(i) the offences have different elements;
(ii) the provisions creating the offences protect different interests; *or*
(iii) it is necessary to record a conviction for more than one offence to fully describe what the accused did.[7]

8. The principles ultimately proposed by the Prosecution are that, in cases of "ideal concurrence", where a single act contravenes more than one provision, the accused can be charged with and convicted of multiple crimes. Their foundation on the same conduct is relevant only to sentencing. To determine whether crimes are in fact in a relationship of ideal concurrence, the test posited in the *Akayesu* judgement is to be used.

9. The question of cumulative *charging* had in fact been raised earlier in the *Čelebići* trial proceedings, in preliminary motions filed by Delalić and by Delić. The Trial Chamber dismissed the motion filed by Delalić on the basis that accumulation of offences is a matter

---

[6] *Akayesu* Judgement, paras 461-470.
[7] *Akayesu* Judgement, para 468.

which goes only to penalty and that it is not to be considered at the charging stage.[8] The Trial Chamber followed a decision of the Trial Chamber in *Tadić*, where it was held:

> In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon the technicalities of pleading.[9]

10. This conclusion was followed by the Trial Chamber in its decision on the Delić motion.[10] Leave to appeal was refused in respect of the decisions on both the Delić and Delalić motions.[11] Other Trial Chambers have reached different conclusions on the issue, both that cumulative charging is permitted only in certain limited circumstances and that cumulative charging is permitted without limitation, the issue only being relevant to the imposition of penalty.[12]

C. Analysis

11. In essence, the only issue to be determined by the Appeals Chamber arising from these grounds of appeal is whether an accused can be convicted of both an Article 2 and an Article 3 violation for the same conduct. However, the determination of this issue raises matters of legal principle which will have consequences in relation to convictions arising under other provisions of the Statute. Although these consequences are difficult to predict, we have attempted to take them into account in identifying the applicable legal principles.

---

8 *Prosecutor v Delalić and Others*, Case No IT-96-21-PT, Decision on Motion by the Accused Zejnil Delalić based on Defects on the Form of the Indictment, 2 Oct 1996, para 24.

9 *Prosecutor v Tadić*, Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, para 17.

10 *Prosecutor v Delalić and Others*, Case No IT-96-21-PT, Decision on Motion by the Accused Hazim Delić ased on Defects in the Form of the Indictment, 15 Nov 1996, para 22.

11 *Prosecutor v Delalić and Others*, Case No IT-96-21-AR72.5, Decision on Application for Leave to Appeal (Form of the Indictment), 15 Oct 1996; Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), 6 Dec 1996.

12 Compare, *e.g, Kupreškić* Judgement; the earlier Decision on Defence Challenges to Form of the Indictment, *Prosecutor v Kupreškić et al*, Case No IT-95-16-PT, 15 May 1998; *Prosecutor v Krnojelac*, Case No IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, paras 5-10; *Prosecutor v Naletilić and Martinović*, Case No IT-98-34-PT, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 Feb 2000, para 12; *Prosecutor v Tadić*, Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, paras 15-18.

1. Cumulative Charging

12. As a preliminary point, we agree with the majority that the cumulative *charging* should generally be permitted. As a practical matter, it is not reasonable to expect the Prosecution to select between charges until all of the evidence has been presented. It is not possible to know with precision, prior to that time, which offences among those charged the evidence will prove, particularly in relation to the proof of differing jurisdictional pre-requisites – such as, for example, the requirement that an international armed conflict be proved for Article 2 offences but not for those falling under Article 3. Further, as has been observed at the Trial Chamber level, the offences in the Statute do not refer to specific categories of well-defined acts, but to broad groups of offences, the elements of which are not always clearly defined and which may remain to be clarified in the Tribunal's jurisprudence.[13] The fundamental consideration raised by this issue is that it is necessary to avoid any prejudice being caused to an accused by being penalised more than once in relation to the same conduct. In general, there is no prejudice to an accused in permitting cumulative *charging* and in determining the issues arising from accumulation of offences after all of the evidence has been presented.[14]

2. Cumulative Convictions

13. We are not convinced that the prior practice of this Tribunal and of the ICTR, as interpreted by the Prosecution, provides the solution to the problem of cumulative *convictions*. We understand the majority opinion to state the same conclusion, but we wish to provide our reasons for that conclusion.

14. The Appeals Chamber has not yet had to pronounce on the issue of accumulation of convictions, and it is disingenuous for the Prosecution to put forward the result in the *Tadić* Appeal – where what appear to be cumulative convictions were imposed, but where the issue was neither raised by the parties nor expressly considered by the Appeals Chamber – as authority for continuing this practice. The refusal of benches of the Appeals Chamber to

[13] *Prosecutor v Radislav Krstić*, Case No IT-98-33-PT, Decision on the Defence Motion on the Form of the Indictment, Count 7-8, 28 Jan 2000, pp 6-7.

[14] *See Prosecutor v Naletilić and Martinović*, Decision on Defendant Vinko Martinović's Objection to the Indictment, Case No IT-98-34-PT, 15 Feb 2000, para 12. We acknowledge that there may be specific examples of obviously duplicative cumulative charging, where there is no reason in the particular circumstances that the

grant leave to appeal from determinations that an accused can be *charged* with two different crimes arising from the same conduct,[15] raised a different question from the one now in issue.

15. The jurisprudence of the Trial Chambers is far from uniform with respect to this issue. The Prosecution's use of the Tribunal jurisprudence and of certain domestic law concepts in arriving at what are described as the "relevant principles"[16] appears to be a selective exercise directed by a policy of entering the maximum possible convictions against an accused, rather than an analysis of any legal principle which actually dictates that result. Most decisions on the issue – with the exception of the *Kupreškić, Akayesu* and *Kayishema and Ruzindana* judgements[17] – have not been accompanied by reasoned consideration. The numerous Trial Chamber decisions on challenges to the form of the indictment generally concern the permissibility of cumulative *charging*, not cumulative convictions.

16. The one thing which is genuinely common to the cases which have dealt with the issue of cumulative convictions is the view that they are not permissible unless each of the relevant offences has a unique legal element. Since the function of this test is to determine whether two or more charged crimes are in fact *legally distinct offences*, this requirement, in its focus on the legal definition of the crimes, is a logical and appropriate one.

17. We are not convinced that the use of some kind of different values or different interests test, in conjunction with or in addition to a "different elements" test, can be said to be either a general principle of international criminal law or common to the major legal systems of the world. Various decisions of this Tribunal and the ICTR refer to the consideration that different criminal provisions may protect different societal interests or values as being an additional matter which may justify cumulative convictions. However, the consideration of societal interests or protected values is both the rationale for, and

---

Prosecution needs to see how the evidence turns out before selecting the most relevant charge. In those circumstances, it may be oppressive to allow cumulative charging.

[15] *Prosecutor v Delalić and Others*, Case No IT-96-21-AR72.5, Decision on Application for Leave to Appeal (Form of the Indictment), 15 Oct 1996; *Prosecutor v Delalić and Others*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment)", Case No IT-96-21-AR72.5, 6 Dec 1996.

[16] Prosecution Response to Delić/Mucić Supplementary Brief, para 4.83.

[17] *The Prosecutor v Kayishema and Ruzindana,* Case No ICTR-95-1-T, Judgement, 21 May 1999, paras 625-650.

inherent in, different acts being labelled different crimes, and it will therefore generally be given effect by the application of the "different elements" test.

18. We have considered the Prosecution submissions that Articles 2 and 3 protect different interests – that Article 2 governs specific types of conduct in order to protect individual members of specific protected groups and that Article 3, as a residual clause, ensures "full observance of all requirements of international humanitarian law" – and that for that reason otherwise identical crimes (such as murder or torture) should lead to convictions under both Articles 2 and 3.[18] However, we do not believe that the interests identified by the Prosecution are so genuinely different that they justify cumulative convictions for otherwise identical criminal conduct. It is not apparent from customary or conventional international humanitarian law that the bodies of law underlying these provisions protect different interests, and the simple fact that they are represented in different Articles of the Statute does not assist the Prosecution's contention. The values protected by Articles 2 and 3 are, at their base, essentially the same – the protection of individuals and certain groups from violations of international humanitarian law in the context of armed conflict.[19]

19. To rely on the practice of certain courts and tribunals that have cumulatively convicted persons accused of having committed crimes during World War II is unsatisfactory in our view. The issue was not directly in issue in the cases referred to by the Prosecution, and the IMT at Nuremberg and the various military courts sitting at Nuremberg no doubt had particular reasons for convicting accused of both war crimes and crimes against humanity which are not relevant at this time.[20]

20. Further, to have resort to national jurisdictions is also highly problematic in light of the lack of a uniform approach to this issue, which is complex even in well developed national jurisdictions, requiring solutions peculiar to a specific national system. No clear,

---

[18] Prosecution Response to Delić/Mucić Supplementary Brief, paras 4.85 and 4.88.

[19] The Prosecution describes the fact that Article 2 is directed at the protection of specific protected groups ("protected persons" under the Geneva Conventions) as being a distinguishing factor from Article 3: Prosecution Response to Delić/Mucić Supplementary Brief, para 4.85. However, this may also be said in respect of Article 3. Where offences under common Article 3 of the Geneva Conventions are charged under Article 3, they are also directed at the protection of a specifically defined group of persons – "Persons taking no active part in the hostilities" – *See* common Article 3(1). There may be, depending on the circumstances, a substantial overlap between the two groups.

[20] *Kupreškić* Judgement, paras 675 and 676.

useful, *common* principle can be gleaned from the major legal systems of the world. It is in any case doubtful, given the unique nature of the international crimes over which the Tribunal has jurisdiction, whether any national jurisdiction has had to face a problem similar in scope to the one at hand.

21. Nor is a solution to the issue to be found in the general nature of international humanitarian law, which is not primarily concerned with criminal proceedings against individuals. An argument that, because the various branches of international humanitarian law protect different societal interests, it therefore permits cumulative convictions is untenable. General international humanitarian law did not develop by reference to application of its various branches to criminal proceedings against individuals, and it does not purport to provide a solution to this substantive criminal law problem. The Statute itself also does not expressly or implicitly resolve the problem.

22. The majority has held that "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions" lead to the conclusion that cumulative convictions should not be permitted.[21] We agree that fairness to the accused dictates that cumulative convictions for offences which are not genuinely distinct should not be permitted in respect of the same conduct. It is appropriate to identify what these "reasons of fairness to the accused" are.

23. Prejudice to the rights of the accused – or the very real risk of such prejudice – lies in allowing cumulative convictions. The Prosecution suggests that cumulative convictions "do not cause any substantive injustice to the accused" as long as the fact that such convictions are based on the same conduct is taken into account in sentencing.[22] This does not take into account the punishment and social stigmatisation inherent in being *convicted* of a crime. Furthermore, the number of crimes for which a person is convicted may have some impact on the sentence ultimately to be served when national laws as to, for example, early release of various kinds are applied. The risk may therefore be that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend not only on the sentence passed but also on the number and/or nature of convictions. This may prejudice the convicted person notwithstanding that, under the Statute, the Rules

[21] At para 412 above.

and the various enforcement treaties, the President has the final say in determining whether a convicted person should be released early. By the time national laws trigger early release proceedings, and a State request for early release reaches the President, the prejudice may already have been incurred. Finally, cumulative convictions may also expose the convicted person to the risk of increased sentences and/or to the application of 'habitual offender' laws in case of subsequent convictions in another jurisdiction.

(a) Application of the "different elements" test to determine whether crimes charged are genuinely legally distinct

24. As to the 'test' to be applied in order to avoid cumulative convictions, we agree with the majority that an accused may only be convicted of more than one offence in respect of the same conduct where each offence has a unique element that the other offence or offences do not. We agree with the majority's conclusion that the pairs of offences for which Mucić, Delić and Landžo were convicted under Articles 2 and 3 were impermissibly cumulative. However, we disagree with the majority in relation to the way in which the 'test' should be applied.

25. The particular nature of offences within the Tribunal's jurisdiction – which have elements with no real equivalents of most crimes in domestic jurisdictions – gives rise to an issue as to which of the elements should be taken into account for this purpose. The majority has elected to include in that consideration the legal prerequisites relating to the circumstances of the relevant offences, or the *chapeaux* to the Articles, as well as the elements of the crimes which go to the *actus reus* and *mens rea* of the offences.

26. As we emphasised above,[23] the fundamental consideration arising from charges relating to the same conduct is that an accused should not be penalised more than once for the same *conduct*. The purpose of applying this test is therefore to determine whether the *conduct* of the accused genuinely encompasses more than one crime. For that reason, we believe that it is not meaningful to consider for this purpose legal prerequisites or contextual elements which do not have a bearing on the accused's conduct, and that the focus of the

---

[22] Prosecution Response to Delić/Mucić Supplementary Brief, para 4.89(3).
[23] *See* para 12.

test should therefore be on the substantive elements which relate to an accused's conduct, including his mental state. The elements relating to the international nature of the conflict and protected person status in relation to Article 2, or considerations which may arise under Article 3 such as the limitation of offences charged under common Article 3 to "persons taking no active part in hostilities" – are in practice not relevant to the conduct and state of mind of the accused. Although matters such as protected person status or the internationality of the armed conflict provide the *context* in which the offence takes place, it is, we believe, artificial to suggest that the precise nature of the conflict or the technical status of the victim (*i.e.* classification as a protected person as opposed to a person taking no active part in hostilities) has any bearing on the accused's conduct. Such technicalities are certainly not matters which would have been of any importance to the victim. We therefore consider that, although these matters must clearly be proved before an accused could be convicted under the relevant Articles, they are irrelevant to a test to be applied solely for the purpose of determining whether the *criminal conduct* of an accused in any given case can fairly be characterised as constituting more than one crime.

27. The fundamental function of the criminal law is to punish the accused for his criminal conduct, and only for his criminal conduct. We believe that taking into account such abstract elements creates the danger that the accused will also be convicted – with, as discussed, the penalty inherent in that conviction alone – in respect of additional crimes which have a distinct existence only as a purely legal and abstract matter, effectively through the historical accidents of the way in which international humanitarian law has developed in streams having distinct contextual requirements.[24] The fact that the Articles of the Statute encompass different, although frequently overlapping, crimes is a result mainly of the history of international humanitarian law rather than any indication that they are intended to describe genuinely distinct bodies of criminal law in *contemporary* international humanitarian law.

28. We again emphasise that, although we do not regard the contextual elements or *chapeaux* as being of assistance *for this purpose*, this does not undermine their undoubted

[24] For example, the two conditions set out in the Geneva Conventions of 1949 for the application of the "grave breaches" regime (*i.e.*, the international character of the conflict and protected persons status) relate to what was called the procedural aspect of this crime, in order to allow its prosecution in national jurisdictions. In other

importance for other purposes. They obviously remain matters to be proven in every case before any conviction can be entered. They are also matters which may become relevant at the second stage of selecting between cumulatively charged crimes, which we discuss below.

29. In the circumstances of this case, where only convictions under Articles 2 and 3 of the Statute are raised for consideration, the majority has determined that the relevant pairs of crimes do not each contain a unique element, because the requirement under common Article 3 in the Article 3 charges is not materially distinct from the unique "protected person" requirement of Article 2 crimes, as the latter requirement "includes, yet goes beyond what is meant by an individual taking no active part in the hostilities".[25] However, in relation to crimes charged under other combinations of Articles of the Statute, such as Articles 2 and 5 or Articles 3 and 5, taking into account the different contextual elements or legal prerequisites will have the result that crimes such as torture, rape, and murder/wilful killing will necessarily and in every case be considered to be distinct crimes when charged under the different Articles, and therefore two convictions will have to be entered for what is in reality the same offence.

30. An abstract but potentially common example may serve to explain our concerns more adequately. The rape of a "protected person" in a prison camp, in the context of both an international armed conflict and a widespread or systematic attack on the civilian population, could be charged by the Prosecution as rape as a grave breach under Article 2 of the Statute; rape as prohibited by common Article 3 under Article 3 of the Statute, and rape as a crime against humanity under Article 5 of the Statute. The application of the test as posed by the majority, in addition to a comparison of the elements relating to the *actus reus* and *mens rea* of the offence of rape, must take into account the following elements:

Article 2:
(i) the requirement that the victim be a protected person;
(ii) there must be an international armed conflict;[26]
(iii) the act must have a close nexus with the armed conflict.[27]

---

words, they were designed as a safeguard against any attempt by national jurisdictions to interfere in an internal conflict, or what would be considered as an issue falling within a State's sovereignty.

[25] *See* above, para 423.

[26] *Tadić* Jurisdiction Decision, paras 78 and 84.

Article 3 (common article 3):
(i) the victim must be a person taking no active part in hostilities;
(ii) there must be an armed conflict;[28]
(iii) the act must have a close nexus with the internal or international armed conflict.[29]

Article 5:
(i) there must be an armed conflict;[30]
(ii) there must be a widespread or systematic attack on the civilian population;[31]
(iii) the act must form part of the widespread or systematic attack.[32]

31. Taking the majority's analysis of the relationship between crimes charged only under Article 2 and Article 3 (common Article 3), there would be no reciprocal unique elements, and convictions could not be entered under both. A conviction would be entered under Article 2. However, in a case where rape is charged under Article 2 and Article 5, Article 2 has the unique requirements that there be an *international* armed conflict and that there be a nexus between the offence and that conflict, and Article 5 has the unique requirements that there be a widespread or systematic attack on a civilian population and that the offence forms part of that widespread or systematic attack. Applying the majority's test, convictions would therefore necessarily and in every case be entered on both counts. In a case where rape is charged under Articles 3 and 5, Article 3 has the unique requirement that the offence must have a nexus with the armed conflict, and Article 5 has the unique elements that there be a widespread or systematic attack on a civilian population and that the offence forms part of that widespread or systematic attack. Again, convictions would necessarily and in every case be entered on both counts. Where rape is charged under all three articles, the situation becomes more complex. Although it is not entirely clear, we assume that the offence under Article 3, despite having a unique element in relation to Article 5, would be rejected as a distinct offence as it has no unique element in relation to

---

[27] *Tadić* Jurisdiction Decision, para 70 states that the "required relationship" of the crimes (under Articles 2 and 3) to the conflict is that they were "closely related to the hostilities".
[28] *Tadić* Jurisdiction Decision, para 94.
[29] *Tadić* Jurisdiction Decision, para 70.
[30] *Tadić* Jurisdiction Decision, para 142 (note that there is no nexus with the crimes and the conflict; the proof of the armed conflict is required only as a "basis of jurisdiction": paras 141 and 142; *Tadić* Appeal Judgement, para 251).
[31] *Tadić* Appeal Judgement, para 248.

Article 2. Even if on that basis no conviction were entered under Article 3, convictions under both Article 2 and Article 5 would necessarily and in every case remain.

32. As a result, a single act of rape could give rise to convictions for two separate crimes under Articles 2 and 5 or Articles 3 and 5. This result is dictated solely on the basis of abstract legal concepts relating to the context of the offence which would have been of little or no practical significance to the accused or the victim.

33. Under the "different elements" test as we believe it should be applied, only those elements relating to the conduct and mental state of the accused would be taken into account. In relation to rape under Articles 2 and 3, these elements would be only the *actus reus* and the *mens rea* of the offence of rape, which are the same in both cases, with the result that the offences cannot be considered to be genuinely legally distinct. In relation to rape under Article 5 of the Statute, the relevant elements would be the *actus reus* and *mens rea* of rape, the latter including the additional requirement that the perpetrator have knowledge that the rape occurs in the context of an attack against a civilian population.[33] Rape under Article 5 would therefore have a unique element not found in the definition of rape under Articles 2 and 3. However, this is not reciprocated, as there is no unique element of rape under Article 2 or 3, and a conviction could therefore be entered under only one of the counts. We believe that this is the more appropriate outcome. It is, we believe, highly artificial to characterise one act of rape committed by a single accused against one victim as constituting two distinct crimes. The most rational and fair outcome is to impose *one* conviction which receives a sentence which recognises the grave seriousness of that crime.

34. Our final difficulty with the majority view that the legal pre-requisite or contextual elements must be taken into account for the application of the "different elements" test is that it is likely to cause practical problems in determining *which* legal pre-requisites or contextual elements will be taken into account, particularly in relation to Article 3. In the *Tadić* Jurisdiction Decision it was held that Article 3 of the Statute is:

---

[32] *Tadić* Appeal Judgement, para 248 ("the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population").

[33] *Kupreškić* Judgement, para 556; *Prosecutor v Tadić, Case No* IT-94-1-T, Judgement, 7 May 1997, para 659.

> [...] a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches' by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, *i.e.* agreements which have not turned into customary international law [...].[34]

Because Article 3 has been interpreted to be a residual clause, encompassing all of the various types of violations of the laws or customs of war not encompassed by other provisions of the Statute, it is not clear in advance what legal prerequisites or contextual elements may arise in relation to the various crimes that Article encompasses.

35. To take, as one example, the category of "violations of agreements binding on the parties on the conflict, considered *qua* treaty law":[35] would the existence of the agreement itself, as a legal prerequisite to jurisdiction over the crimes, be considered an element of the offence? If so, this may be considered to be a unique element that Article 2 offences do not have, with the result that torture outlawed under Article 2 and torture outlawed under a treaty between the parties and prosecuted under Article 3 could be considered to be two distinct crimes justifying two separate convictions. On the other hand, the requirement of the existence of the agreement may be considered not to be an element of the offence for this purpose, but the problem does not end there. The agreement may have limitations on its application, for example a regional or geographical limitation, or the limitation that it applies only to offences committed by combatants in the official armed forces of the State. Such matters are contextual elements or legal pre-requisites in the same way as the "protected persons" or "international armed conflict" requirements. It is unclear from the majority opinion whether it is intended that these would be taken into account but, as there is no basis in principle to distinguish them, presumably they must be. As a result, Article 3 offences with the same *substantive* elements as Article 2 offences (such as torture) will be considered in some circumstances, but not others, to be distinct crimes and therefore may be charged and convicted separately under Article 2 and Article 3. We do not accept that such an arbitrary result, entirely removed from the reality of the circumstances in which the offence was committed, is appropriate in the context of international criminal law.

---

[34] *Tadić* Jurisdiction Decision, para 89.
[35] *Tadić* Jurisdiction Decision, para 89.

(b) Selecting between possible cumulative convictions

36. As noted by the majority, where the "different elements" test is not met – the relevant elements of the offences are materially identical or one offence does not have a unique element – the relevant Chamber must decide in relation to which offence it will enter a conviction. The majority held that this choice must be made:

> [...] on the basis of the principle that that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional element, then a conviction should be entered under only that provision.[36]

The majority indicates that, in the case of charges under both Article 2 and 3 of the Statute, the offences charged under Article 2 must be selected as being the more specific on the basis of the protected person requirement, without reference to any other of the elements of the relevant offences which relate to the conduct and state of mind of the accused.

37. We agree with the majority's conclusion that, when a choice must be made between cumulatively charged offences, that choice should be made by reference to specificity, but only in the sense that the crime which more specifically describes *what the accused actually did* in the circumstances of the particular case should be selected. This cannot be done by a rigidly imposed choice of the charges laid under one of the Articles of the Statute with no reference to the substantive elements of the offences or to the evidence as to the actual circumstances under which they were committed. In our view, the choice should involve a consideration of the totality of the circumstances of the particular case and of the evidence given in relation to the crimes charged, in order to describe most accurately the offence that the accused committed and to arrive at the *closest* fit between the conduct and the provision violated. This would involve a consideration of *all* of the elements of the offences to determine whether one of the offences better or more specifically describes what the accused did.

38. It will often be a substantive element relating to the accused's conduct or state of mind which provides the basis on which a meaningful choice can be made as to the better description of the accused's conduct. For example, the deliberate infliction of pain or suffering, with the intention to do this for the purpose of obtaining information, or

punishing, intimidating or discriminating against the victim, constitutes the offence of wilfully causing great suffering or serious injury and the offence of torture. It is the unique additional element relating to the purpose of the perpetrator which makes torture the more specific offence but, under the majority's approach, that element would not be taken into account. Where consideration of the substantive elements of the offences does not provide a basis to determine that one offence more clearly describes what the accused did (such as in the case of torture charged under Articles 2 and 3), it would then be possible to have recourse to the legal pre-requisites, or the *chapeaux,* to ascertain whether they provide a distinguishing factor which makes the offence under one Article a more specific or appropriate description of what the accused did.

39. An assessment of the appropriateness of criminal charges, or (taking the majority's standard of specificity) of the most specific offence to encompass a piece of conduct, must always depend at least to some degree on the *actual circumstances of the case* as established by the evidence. A rigidly imposed preference for the crime charged under a particular Article of the Statute will obviously be less time consuming and more convenient. However, the rigidly imposed choice of Article 2 charges, made in isolation from the relevant conduct to be criminalised in the particular case, will not necessarily always produce the result which must be the ultimate function of criminal proceedings: to recognise and penalise with the most appropriate conviction the proven criminal conduct of an accused.

40. It would appear to follow, from the majority's conclusion that Article 2 convictions must always be upheld as against Article 3 convictions, that in future cases dealing with other combinations of charges – for example Article 2 and Article 5, or Article 3 and Article 5 – the charges under a particular one of those Articles must always be selected. This suggests the development of some sort of gradation of specificity among the Articles of the Statute.

41. We do not regard it as possible to derive from the Statute a hierarchy or gradation of specificity or seriousness amongst the various offences which would assist in any kind of rigidly imposed determination of the question of which possible cumulative convictions

---

[36] *See* above, para 413.

should be retained. Nor is it desirable to do so. As observed by the majority of the Appeals Chamber in the Judgement in Sentencing Appeals in *Prosecutor v Tadić*:

> After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or Rule of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the *circumstances of the case*.[37]

Although this observation relates to the determination of seriousness of crimes, the Appeals Chamber's emphasis on taking into account "the circumstances of the case" rather than any perceived distinctions in the Statute is an important caution.

42. A more specific problem with the method of choice provided by the majority and the way it is applied in this case – that specificity can be measured by the presence of an "additional element" in one of the offences[38] – is that it does not cover the full range of circumstances in which this choice must be made. Often, neither of the crimes determined by the application of the different elements test not to be legally distinct will have an "additional" element. All of the elements of each crime may simply be assessed not to be materially different. Indeed, on a proper analysis, neither of the offences in the pairs of offences which arise in this case have an "additional element". The same offences under Article 2 and Article 3 (common article 3) – torture for example – have, on the approach taken by the majority, the same number of elements, with neither having an additional one. The Article 2 offence, in addition to the substantive elements of torture, has the contextual elements that:

(i) there is an international armed conflict
(ii) there is a nexus between the crime and the conflict
(iii) the victim be a protected person.

43. The same offence charged under Article 3 (common article 3), in addition to the substantive elements, has the contextual requirements that:

(i) there is an armed conflict, internal or international

---

[37] *Prosecutor v Tadić*, Case No IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 Jan 2000, para 69 (emphasis added), followed in the *Furundžija* Appeal Judgement, paras 242-243.

[38] *See* above, para 413.

(ii) there is a nexus between the crime and the conflict
(iii) the victim is a person taking no active part in hostilities.

44. The conclusion that these offences are not legally distinct is based on the assessment that the elements are not materially distinct – ie that the Article 3 elements in (i) and (ii) are simply broader versions of those elements in the Article 2 offence. We therefore cannot agree with the majority's analysis that the Article 2 offences have an "additional element" (the protected person status of the victim) and should be automatically selected on that basis, as the Article 3 offence has a corresponding element relating to the status of the victim (taking no active part in hostilities).[39] The protected person status may in the circumstances be a more appropriate or specific definition of the victim, but it is not an "additional" element in comparison with the Article 3 offence.

45. The problems which we have attempted to identify in the majority's determination that it is possible to make a rigidly imposed determination in every case of the most specific crime demonstrate, we believe, that the perceived virtue of such an approach – certainty or predictability – is in fact illusory. In practice, it is likely to be an inflexible approach with the potential to produce outcomes which are, in the circumstances of any given case, arbitrary and artificial.

D. Application of these principles to the present case

46. The way in which we would apply the principles we have referred to above to the facts of the present case is obviously now a hypothetical matter. However, we consider that it may assist in an understanding of what we consider to be the applicable principles, and of our differences from the majority, to set out how we would have applied the principles to the present case.

47. Mucić and Delić were convicted of the following crimes: (a) wilful killing under Article 2 and murder under Article 3;[40] (b) wilfully causing great suffering or serious injury to body or health under Article 2 and cruel treatment under Article 3;[41] (c) torture under Article 2 and torture under Article 3;[42] and (d) inhuman treatment under Article 2 and cruel

[39] *See* above, paras 423, 424 and 425.
[40] Delić: Counts 3 and 4 (Counts 1 and 2 have been quashed – *See* above at para 460); Mucić: Counts 13 and 14.
[41] Delić: Counts 11 and 12; Counts 46 and 47; Mucić: Counts 13 and 14; Counts 38 and 39; Counts 46 and 47.
[42] Delić: Counts 18 and 19; Counts 21 and 22; Mucić: Counts 33 and 34.

treatment under Article 3.[43] Landžo was cumulatively convicted of the offences in the categories (a),[44] (b)[45] and (c).[46] We agree that, although Landžo did not formally join in this ground of appeal, it is appropriate to apply these legal principles to his convictions also.

1. Whether the crimes charged are legally distinct crimes

(a) Wilful killings and murder

48. The substantive elements of the offence of wilful killing have been defined as requiring an act or omission of the accused which causes the death of the victim, and that the accused intended to kill or to inflict serious bodily injury in the knowledge that such injury would be likely to lead to death while being reckless as to whether it would cause death.[47] Murder has been defined, in the context of a crime against humanity (which for present purposes makes no material difference), as consisting of the death of the victim because of an act or omission of the accused committed with the intention to cause death or to cause grievous bodily harm in the knowledge that such bodily harm would be likely to cause death.[48] The Trial Chamber in the Bla{kić proceedings and the *Čelebići* Trial Chamber have expressed the view that the two crimes are not materially different (the *Bla{kić* Judgement defining them as having identical elements).[49] We are of the same view; accordingly, the different elements requirement is not satisfied with respect to this category of convictions.

(b) Wilfully causing great suffering or serious injury to body or health and cruel treatment

49. The offence of wilfully causing great suffering or serious injury to body or health under Article 2 has been defined as an intentional act or omission which causes great

[43] Delić: Counts 42 and 43; Mucić: Counts 38 and 39; Counts 44 and 45.
[44] Counts 1 and 2; Counts 5 and 6; Counts 7 and 8.
[45] Counts 11 and 12; Counts 36 and 37; Counts 46 and 47.
[46] Counts 15 and 16; Counts 24 and 25; Counts 30 and 31.
[47] Trial Judgement, para 439; as referred to and essentially followed in the *Bla{kić* Judgement, para 153.
[48] *Akayesu Judgement,* para 589; In *Prosecutor v Jelisić,* Case No IT-95-10-T, Judgement, 14 Dec 1999, at para 35 described the mental element as "the intention to cause death", but cited the *Akayesu* Judgement's definition. It is therefore unclear whether the *Jelisić* Judgement's omission from the definition of the *mens rea* of intention to cause serious injury knowing that it is likely to lead to death and reckless as to whether death ensues was intentional, but we regard the *Akayesu* standard as the applicable one.
[49] Trial Judgement, para 422; *Bla{kić* Judgement, para 181.

suffering or serious injury to body or health, including mental health.[50] Cruel treatment is an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.[51] Even if the element of a serious attack on human dignity is additional to the elements of the offence of wilfully causing great suffering or serious injury to body or health, this is not reciprocated as the latter offence has no unique element.

(c) Torture

50. It is clear that this is an identical crime whether charged under Article 2 or 3.

(d) Inhuman treatment and cruel treatment

51. Inhuman treatment has been defined as an intentional act or omission which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity.[52] As noted above, cruel treatment has also been defined in substantially the same terms as an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The two crimes have essentially the same elements, with the possible qualification that the *actus reus* of inhuman treatment may be defined more broadly than cruel treatment, so that cruel treatment would be encompassed within inhuman treatment. The requirement that each offence have a unique element is therefore not satisfied.

2. The determination of which of the duplicative convictions should be retained

52. We therefore agree with the majority that, in the cases of the convictions under Articles 2 and 3, the elements of the relevant offences are materially identical or one offence does not have a unique element. Convictions cannot be entered for both, and it is necessary to decide which convictions should be retained. In doing so, as stated above, we consider that, through an examination of the circumstances of the case and of the evidence

---

[50] *Bla{kić* Judgement, para 156, effectively adopting the definition of the offence used by the *Čelebići* Trial Chamber: Trial Judgement, para 511.

[51] *Prosecutor v Jelisić,* Case No IT-95-10-T, Judgement, 14 Dec 1999, para 41, adopting the definition of the *Čelebići* Trial Chamber: Trial Judgement, para 552.

[52] *Bla{kić* Judgement, para 154, adopting the definition of the offence used by the *Čelebići* Trial Chamber: Trial Judgement, para 543.

given in relation to the crimes charged, the aim is to determine which of the crimes describes *most* accurately what the accused did.

(a) Wilfully causing great suffering or serious injury to body or health / cruel treatment

53. The only combination of charges in which we consider that there is a material difference in one of the elements (albeit not reciprocated) is the offence of wilfully causing great suffering or serious injury to body or health under Article 2 and that of cruel treatment under Article 3. The additional element is that cruel treatment may be not only an act or omission which causes serious mental or physical suffering or injury but it may also be characterised as constituting a serious attack on human dignity. The slightly different focus of the other offence is on the great suffering or serious physical injury caused by the relevant acts. In relation to these convictions entered against Delić and Landžo under Counts 11 and 12, the original charges had been wilful killing and murder, but the Trial Chamber had found that, although Delić had been involved in the beating of the victim, it could not be certain that these beatings were a direct cause of the victim's death. The Trial Chamber found that convictions could be entered instead for the offences of wilfully causing great suffering or serious injury to body or health and of cruel treatment, which were "lesser offences" of the same nature as the more grave crimes originally charged.[53] The same reasoning necessarily applied in relation to the responsibility of Mucić for these acts as a superior, which was charged under Counts 13 and 14.[54] Having reference then to the nature of the charging, which focussed on the physical consequences to the accused, and to the evidence of the physical injuries which resulted from the beatings, the crime of wilfully causing great suffering or serious injury under Article 2 more accurately describes what Delić and Landžo did and for which Mucić was responsible. That is also the conclusion reached by the majority.

54. The offences charged against Delić, Mucić and Landžo in Counts 46 (wilfully causing great suffering or serious injury to body or health) and 47 (cruel treatment) related to the inhumane living conditions in the camp, including the "atmosphere of terror" and the poor living conditions. In relation to these counts, the Trial Chamber found that the detainees in the camp "were exposed to conditions in which they lived in constant anguish

[53] Trial Judgement, paras 865-866.

and fear of being subjected to physical abuse" and were "subjected to an immense psychological pressure which may be accurately characterised as 'an atmosphere of terror'".[55] The Trial Chamber also found that the detainees were deprived of adequate food, sleeping facilities, toilet facilities, water and medical facilities, the latter two because of a deliberate policy.[56] These findings, reinforced by specific findings of Delić's humiliating and cruel taunting of prisoners,[57] suggest that it was a key part of this offence that it was intended to degrade and attack the dignity of the victims. Mucić, as a commander, was found to have been aware of these circumstances. For that reason, it is appropriate to select a conviction for cruel treatment under Article 3 against each accused under these counts. The inflexible majority approach produces the contrary conclusion, that the offence of wilfully causing great suffering or serious injury to body or health, being the Article 2 offence, should be upheld.

55. Mucić was also convicted of the same offences of wilfully causing great suffering or serious injury to body or health and of cruel treatment in relation to Counts 38 and 39, which related to his responsibility as a superior for acts of severe mistreatment of certain detainees. The mistreatment found by the Trial Chamber included acts which "necessarily entails, at a minimum, a serious affront to human dignity",[58] which suggests an emphasis on cruel treatment. However, the Trial Chamber also found in relation to another victim that the intentional placing of a burning fuse cord against the bare skin in the genital area of an accused caused "such serious suffering and injury" that it constituted both of the offences charged.[59] Thus, under the one count, there are different acts which because of their different emphases could be differently characterised. However, taken as a whole, the conduct encompassed by these counts appears to be violent mistreatment of such an unusually cruel nature that the offence of cruel treatment under Article 3, which emphasises both conduct which causes serious injury and conduct which constitutes a serious attack on human dignity, best describes the criminal conduct for which Mucić was found responsible under these counts. The inflexible majority approach produces the contrary conclusion, that

---

[54] Trial Judgement, para 912.
[55] Trial Judgement, para 1091.
[56] Trial Judgement, paras 1096, 1097, 1100, 1105, 1108, 1111.
[57] Trial Judgement, paras 1089, 1104, 1109.
[58] Trial Judgement, para 1026.
[59] Trial Judgement, para 1040.

the offence of wilfully causing great suffering or serious injury to body or health, being the Article 2 offence, should be upheld.

56. Landžo was also convicted of this combination of crimes under Counts 36 and 37 for beating a detainee on several occasions, setting fire to his trousers and burning his legs, and forcing him to drink urine. The Trial Chamber found that this caused serious mental and physical suffering to the victim. It is also obvious from the evidence that the particularly cruel and humiliating nature of the abuse inflicted by Landžo was intended to undermine the victim's dignity. Using the same reasoning as above, the offence of cruel treatment, which emphasises both conduct which causes serious injury and conduct which constitutes a serious attack on human dignity under Article 3, best describes Landžo's criminal conduct for which he was convicted under these counts. The inflexible majority approach produces the contrary conclusion, that the offence of wilfully causing great suffering or serious injury to body or health, being the Article 2 offence, should be upheld.

(b) Inhuman treatment / cruel treatment

57. The offence of inhuman treatment has been described as an umbrella provision which encompasses various conduct which contravenes the fundamental principle of humane treatment.[60] As cruel treatment under Article 3 is one of the varieties of conduct embraced by inhuman treatment, it may be regarded as more specific and therefore to some degree a more specific and accurate description of what the accused did, and may for that reason be preferred in selecting between Counts 44 and 45 against Mucić and Counts 42 and 43 against Delić. The inflexible majority approach produces the contrary conclusion, that the offence of inhuman treatment, being the Article 2 offence, should be upheld.

(c) Murder / wilful killing and torture / torture

58. In relation to the materially identical crimes of murder and wilful killing, and in the case of torture convicted under both Articles 2 and 3, reference to the substantive elements of the particular crimes does not provide a solution and it is necessary to look to any features of Articles 2 and 3 generally which may assist in determining the conviction to be retained. In the circumstances of this case, it is open to regard Article 2 as being more

[60] *Blaškić* Judgement, para 154, following the *Čelebići* Trial Chamber: Trial Judgement, para 543.

specific to the crimes committed by the appellants, in light of the international nature armed conflict, and the fact that in relation to *these* crimes and circumstances, Article 3 (based on common Article 3) functions in a residual capacity.[61] We would therefore regard a conviction for the offences under Article 2 to best describe the appellants' offences. That is also the conclusion reached by the majority.

E. Disposition

59. We therefore dissent from the conclusion that, of the offences charged cumulatively in respect of the same conduct, the convictions for all of the offences charged under Article 2 of the Statute should be confirmed and those for all of the offences charged under Article 3 should be dismissed. It is, in our view, unsatisfactory simply to "dismiss" the charges under one or other of the two Articles. There must be a finding on the indictment that the accused is either guilty or not guilty of the charge. An unqualified statement that the charge is "dismissed" may be misunderstood. In our view, where an accused is not found guilty of a particular charge for the sole reason that to find otherwise would produce a cumulative conviction, the disposition should be in terms such as "Not guilty on the basis that a conviction on this charge would be impermissibly cumulative".

60. For the reasons set out above, the convictions on the Article 3 charges should be retained in relation to certain of the counts. Thus, we dissent from the majority judgement in relation to the following charges, for which we would have entered the following disposition:

Mucić: **Count 38:** *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV* in respect of Dragan Kuljanin, Vukašin Mrkajić and Nedeljko Draganić and *inhuman treatment as a Grave Breach of Geneva Convention IV* in respect of Mirko Kuljanin: **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 39: *cruel treatment as a Violation of the Laws or Customs of War* in respect of Dragan Kuljanin, Vukašin Mrkajić, Nedeljko Draganić, and Mirko Kuljanin: **CONVICTION CONFIRMED.**

[61] *Tadić* Jurisdiction Decision, para 91.

Count 44: *inhuman treatment as a Grave Breach of Geneva Convention* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 45: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Count 46: *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 47: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Delić: **Count 42:** *inhuman treatment as a Grave Breach of Geneva Convention IV* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 43: *cruel treatment as a Violation of the Laws or Customs of War* **CONVICTION CONFIRMED.**

Count 46: *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 47: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Landžo: **Count 36:** *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 37: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Count 46: *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON**

THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE

Count 47: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

F. Sentencing Consequences

61. The majority noted that the Trial Chamber, in sentencing, referred to its earlier interlocutory decision in which it had held that the matter of accumulation of offences was relevant only to penalty considerations, and held:

> It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently.[62]

The Trial Chamber had earlier also specifically referred to the principle of avoiding imposition of double punishment for the same conduct in the context of convictions in respect of both Article 7(1) and Article 7(3) responsibility.[63] However, it was not apparent that this principle was applied in respect of the convictions which had been entered cumulatively under Articles 2 and 3 and which have been considered above. It appears from the statement of the Trial Chamber quoted above that it regarded this issue as being resolved merely by imposing the sentences concurrently, rather than consecutively, instead of a consideration of the effective length of the sentence actually to be served. However, it is not apparent that the imposition of concurrent sentences will in fact *necessarily* ensure that an accused is not punished more than once for the same conduct. The use of concurrent, rather than cumulative sentencing does not relieve a Trial Chamber of the obligation to impose the effective, appropriate sentence to be served in respect of the totality of the criminal conduct. Merely fixing a sentence for each count and making them concurrent rather than consecutive does not make it clear that the Trial Chamber has given consideration to the possibility of duplicative penalty when fixing individual sentences.

62 We therefore agree that it is necessary to have the matter of sentencing in respect of the remaining offences remitted to a Trial Chamber to be designated by the President.

---

[62] Trial Judgement, para 1286.
[63] Trial Judgement, para 1223.

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

Judge David Hunt, Presiding

Judge Mohamed Bennouna

Dated this twentieth day of February 2001
At The Hague
The Netherlands

ANNEX A

45785

A. Procedural Background

1. Notices of Appeal

1. Notices of appeal against the Trial Judgement were filed on behalf of Deli} on 24 November 1998,[1] Muci} on 27 November 1998,[2] and Land`o on 1 December 1998.[3] The Prosecution filed a notice of appeal on 26 November 1998.[4] Delali} filed a Notice of Cross Appeal on 1 December 1998,[5] which will be referred to as the Notice of Contention.[6]

2. Filings

2. The Prosecution filed its appeal brief on 2 July 1999[7] ("Prosecution Brief"). On the same date briefs were filed by Delali}[8] ("Delali} Brief"), Deli}[9] ("Deli} Brief"), Land`o[10] ("Land`o Brief"), and Muci}[11] ("Muci} Brief").

3. On 17 September 1999, briefs in response were filed on behalf of: Deli} ("Deli} Response");[12] Muci} ("Muci} Response");[13] Delali} ("Delali} Response");[14] and the Prosecution ("Prosecution Response").[15] Briefs in reply were filed on 25 October 1999 on

---

1 Defendant Hazim Deli}'s Notice of Appeal, 24 Nov 1998.
2 Notice of Appeal Pursuant to Rule 108 of the Rules of Procedure and Evidence, 27 November 1998.
3 Defendant Esad Land`o's Notice of Appeal, 1 Dec 1998.
4 Prosecution's Notice of Appeal, 26 Nov 1998.
5 Notice of Cross-Appeal, 1 Dec 1998.
6 Appeal Transcript, p 63-65.
7 Prosecution's Appeal Brief, 2 July 1999.
8 Brief of Cross-Appellant Zejnil Delali}, 2 July 1999.
9 Appellant-Cross Appellee Hazim Deli}'s Brief, 2 July 1999.
10 Brief of Appellant, Esad Land`o, on Appeal against Conviction and Sentence, 2 July 1999.
11 Appellant Zdravko Muci}'s (aka Pavo) Brief on Appeal against Conviction and Sentence, 2 July 1999. Supplemented by Particulars, at the request of the Appeals Chamber, Scheduling Order, 19 July 1999. Particulars of the Grounds of Appeal of the Appellant Zdravko Muci} dated the 2nd July 1999, 26 July 1999.
12 Cross Appellee Hazim Deli}'s Response to the Prosecutor's Appellate Brief of 2 July 1999, 17 Sept 1999.
13 Response of the Appellant Zdravko Muci} to the Prosecution's Fourth Ground of Appeal Brief, 17 Sept 1999.
14 Reply Brief [*sic*] of Appellee Zejnil Delali}, 17 Sept 1999.
15 Respondent's Brief of the Prosecution, 17 Sept 1999.

behalf of: Land`o ("Land`o Reply");[16] Deli} ("Deli} Reply");[17] Muci} ("Muci} Reply");[18] Delali} ("Delali} Reply");[19] and the Prosecution ("Prosecution Reply").[20]

4. On 15 June 1999, the Appeals Chamber granted leave for Land`o to file a supplementary brief in relation to his Fourth Ground of Appeal by 13 September 1999.[21] By order of 29 July 1999, Land`o was granted extension of time to file the supplementary brief by 15 October 1999,[22] due to the time required to view the videotapes of the Trial Chamber proceedings.[23] On 12 October 1999 the filing of the supplementary brief was suspended.[24] By order of 17 November 1999 the filing of the supplementary brief was set to 6 December 1999.[25]

5. On 7 December 1999, Land`o filed his supplementary brief ("Land`o Supplementary Brief"),[26] out of time, but by an order of the Pre-appeal Judge, it was considered as validly done pursuant to Rule 127 of the Rules.[27] On 28 January 2000 the Prosecution filed its brief in response ("Prosecution Response to Land`o Supplementary Brief").[28] Land`o submitted his brief in reply on 14 February 2000 ("Land`o Additional Reply").[29]

6. On 17 February 2000, Muci} and Deli} filed a notice to the Appeals Chamber relating to Land`o's Fourth Ground of Appeal, which clarified that they joined Land`o in this ground.[30]

7. By order of 31 March 2000, Deli} and Muci} were granted leave to add an additional ground of appeal and were ordered to file a document identifying their amended grounds of appeal as well as a supplementary brief. The Prosecution was also granted leave to file a supplementary brief on an additional argument in response to an existing ground of appeal

---

16 Reply of Appellant, Esad Land`o, to Respondent's Brief of the Prosecution, 17 Sept 1999, 25 Oct 1999.
17 Appellant-Cross Appellee Hazim Deli}'s Reply to the Respondent's Brief of the Prosecutor of 17 Sept 1999, 25 Oct 1999.
18 Response of the Appellant Zdravko Muci} to the Respondent's Brief of the Prosecutor of 17 Sept 1999, 25 Oct 1999.
19 Reply Brief of Appellee Zejnil Delali} to Response of the Prosecutor, 25 Oct 1999.
20 Brief in Reply of the Prosecution, 25 Oct 1999.
21 Order on the Appellant Esad Land`o's Second Motion for an Extension of Time to File Brief, 15 June 1999.
22 Order on Motion by Esad Land`o for Extension of Time to File Supplementary Brief, 29 July 1999.
23 The extension of time is linked to the Appeals Chamber permitting Land`o to view videotapes of the Trial Chamber proceedings in order to provide details with regard to his Fourth Ground of Appeal. *See* Order on the Second Motion to Preserve and Provide Evidence, 15 June 1999.
24 Order on Esad Land`o's Emergency Motion for Guidance Regarding the Filing of Particulars, 12 Oct 1999.
25 Scheduling Order, 17 Nov 1999.
26 Supplemental Brief of Appellant, Esad Land`o, in Support of Fourth Ground of Appeal (the Sleeping Judge), 7 Dec 1999.
27 Scheduling Order, 14 Dec 1999.
28 Respondent's Brief of the Prosecution in Relation to Esad Land`o's Fourth Ground of Appeal, 28 Jan 2000.
29 Reply Brief of Appellant, Esad Land`o, on Fourth Ground of Appeal (the Sleeping Judge), 14 Feb 2000.
30 Appellants-Cross Appellees Zdravko 'Pavo' Muci} and Hazim Deli}'s Notice to the Chamber Related to Land`o's Issue on the Presiding Judge Sleeping During Trial, 17 Feb 2000.

("Prosecutor's Supplementary Brief"). Land'o was granted leave to file a response to the Prosecutor's Supplementary Brief, which had been filed with Land'o's Response.[31] On 10 April 2000 Deli} and Muci} filed a joint response and identified two additional grounds of appeal.[32] Upon the request of the Prosecution, the Appeals Chamber granted an extension of time to file the Response until 25 April 2000 and accordingly extended the filing date of the Reply.[33] The Prosecution filed its response to the Supplementary Brief on 25 April 2000 ("Prosecution Response to Supplementary Brief").[34]

8. Deli} filed a final designation of his grounds of appeal on 17 May 2000[35] and Muci} filed his final designation of the grounds of appeal on 31 May 2000.[36]

3. Grounds of Appeal

9. As there is no right, under the Statute, to appeal from an acquittal, Delali}'s submissions which are made essentially as a response to the Prosecution's appeal against acquittal (Prosecution's grounds 1-3) will be referred to as grounds of contention, which will only be considered should the Prosecution succeed in its appeal with regard to Delali}.[37]

10. Delali} raised these grounds of contention: [38]

1. Whether the Security Council intended to incorporate common Article 3 into Article 3 of the Statute;

2. Whether common Article 3 is customary international law in respect of its application to natural person;

3. The Trial Chamber committed errors of both law and fact in its determination that the ^elebi}i detainees were persons protected by the Geneva Conventions of 1949.

11. Deli} raised the following grounds of appeal:[39]

---

[31] Order on Motion of Appellants Hazim Deli} and Zdravko Muci} for Leave to File Supplementary Brief and on Motion of Prosecution for leave to File Supplementary Brief, 31 March 2000.

[32] Appellants-Cross Appellees Zdravko Muci} and Hazim Deli}'s Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 10 April 2000.

[33] Order on Prosecution Motion for Extension of Time, 14 April 2000.

[34] Prosecution Response to the Appellants' Supplementary Brief, 25 April 2000.

[35] Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000.

[36] Appellant Zdravko Muci}'s Final Designation of his Grounds of Appeal, 31 May 2000.

[37] Appeal Transcript, p 63-65.

[38] Delali} Brief p 8.

[39] Appellant-Cross Appellee Hazim Deli}'s Designation of the Issues on Appeal, 17 May 2000 (footnote omitted). This was Deli}'s final designation of his grounds of appeal. Deli} first submitted his grounds of appeal in Appellant-Cross Appellee Hazim Deli}'s Brief, 2 July 1999 and Grounds 20 and 21 were added in Appellants-

Issue Number One:	Whether the Trial Chamber was properly constituted after 8 May 1998 in that Judge Elizabeth Odio Benito was no longer qualified to serve as a judge of the Tribunal in that she did not meet the qualifications in Article 13(1) of the Statute of the Tribunal.
Issue Number Two:	Whether Judge Elizabeth Odio Benito was disqualified in that she had an undisclosed affiliation which could have cast doubt on her impartiality and which might affect her impartiality.
Issue Number Three:	Whether Delić can be convicted of grave breaches of the Geneva Conventions of 12 August 1949 in that at the time of the acts alleged in the Indictment the Republic of Bosnia and Herzegovina was not a party to the Geneva Conventions of 12 August 1949.
Issue Number Four:	Whether the Trial Chamber erred in holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.
Issue Number Five:	Whether at the time of the acts alleged in the indictment, customary international law provided for individual criminal responsibility for violations of common Article 3.
Issue Number Six:	Whether the Security Council vested the Tribunal with jurisdiction to impose individual criminal sanctions for violations of common Article 3.
Issue Number Seven:	Whether common Article 3 constitutes customary international law in international armed conflicts to the extent that it imposes criminal sanctions on individuals who violate its terms.
Issue Number Eight:	Whether the Trial Chamber erred in holding that the conflict in Bosnia-Herzegovina was an international armed conflict at the times relevant to this indictment.
Issue Number Nine:	Whether the evidence is legally sufficient to sustain a conviction on Counts 1 and 2 of the indictment.
Issue Number 10:	Whether the evidence is factually sufficient to sustain a conviction on Counts 1 and 2 of the indictment.
Issue Number 11:	Whether the evidence is legally sufficient to sustain a conviction on Counts 3 and 4 of the indictment.
Issue Number 12:	Whether the evidence is factually sufficient to sustain a conviction on Counts 3 and 4 of the indictment.

Cross Appellees Zdravko Mucić and Hazim Delić's Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 10 April 2000.

Issue Number 13: Whether the evidence is legally sufficient to sustain a conviction on Counts 18 and 19 of the indictment.

Issue Number 14: Whether the evidence is factually sufficient to sustain a conviction on Counts 18 and 19 of the indictment.

Issue Number 15: Whether the evidence is legally sufficient to sustain a conviction on Counts 21 and 22 of the indictment.

Issue Number 16: Whether the evidence is factually sufficient to sustain a conviction on Counts 21 and 22 of the indictment.

Issue Number 17: Whether the evidence is legally sufficient to sustain convictions on Counts 46 and 47 of the indictment.

Issue Number 18: Whether the evidence is factually sufficient to sustain convictions on Counts 46 and 47 of the indictment.

Issue Number 19: Whether the sentences assessed violate the principles of legality and *nullum crimen sine lege*.

Issue Number 20 (Additional Issue Number One):

Whether Muci} and Deli} were deprived of a fair trial due to the fact that the Presiding Judge of the Trial Chamber slept during substantial portions of the trial.

Issue Number 21 (Additional Issue Number Two):

Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches of the Geneva Conventions and for violations of the Laws and [*sic*] Customs of War based on the same acts.

12. Land`o raised the following grounds of appeal.[40]

1. The Prosecutor's practice of selective prosecution violated Article 21 of the Statute of the International Tribunal for the former Yugoslavia (ICTY), the rules of natural justice and international law.

2. The participation at trial as a member of the Trial Chamber of a Judge ineligible to sit as a Judge of the Tribunal violated Articles 13 and 21 of the Statute of the ICTY, the rules of natural justice and international law and rendered the trial a nullity.

3. The participation as a member of the Trial Chamber of a Judge who had an actual or apparent conflict of interest affecting the Judge's impartiality as a member of the Trial Chamber violated the rules of natural justice and international law, and, as a matter of law, absent disclosure by the Judge, and informed consent by the Defence, automatically disqualified the Judge from sitting as a member of the Trial Chamber.

4. The participation as the Presiding Judge of the Trial Chamber of a Judge who was asleep during substantial portions of the trial, denied appellant [Land`o] the right to

[40] Brief of Appellant, Esad Land`o, on Appeal against Conviction and Sentence, 2 July 1999.

the full and competent judicial decision of questions of law, fact, and evidence, and improperly denied Appellant [Land`o] a fair trial, and the appearance of a fair trial.

5. The Trial Chamber erred in law and fact in finding that an international armed conflict existed with reference to the events alleged to have occurred at the ^elebi}i camp.

6. The Trial Chamber erred in law in finding that the victims of the alleged crimes were 'protected persons' for the purpose of the Geneva Conventions.

7. The Trial Chamber erred in law, violated the rules of natural justice, and the principle of certainty in criminal law, and denied the appellant [Land`o] a fair trial, when it refused to define the special defence of diminished mental responsibility which the appellant specifically raised.

8. The Trial Chamber erred in law and made findings of fact inconsistent with the great weight of the evidence when it rejected clear evidence of diminished mental responsibility.

9. The sentence imposed on appellant [Land`o] was unjust and manifestly excessive when compared to the other sentences imposed by this Tribunal and in light of the mitigating factors offered by Appellant [Land`o].

13. Muci} raised the following grounds of appeal:[41]

1. Whether Judge Odio-Benito was disqualified as a judge of the Tribunal by reason of her election as Vice-President of the Republic of Costa Rica.

2. Whether Judge Odio-Benito was disqualified as a member of the Trial Chamber by reason of her membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture.

3. Whether Muci} and Deli} were deprived of a fair trial due to the fact that the presiding judge of the Trial Chamber slept during substantial portions of the trial.

4. Whether the Trial Chamber erred in holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

5. Whether the Trial Chamber erred in holding that the conflict as described in this case in Bosnian-Herzegovina was an International Armed Conflict at the times relevant to this indictment.

[41] Appellant-Zdravko Muci}'s (aka Pavo) Brief on Appeal against Conviction and Sentence, filed 2 July 1999. Two additional grounds were submitted in Appellants-Cross Appellees Zravko Muci} and Hazim Deli}'s Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 10 April 2000. On 31 May 2000 Muci} submitted his final designation of his grounds of appeal, (Appellant Zdravko Muci}'s Final Designation of his grounds of appeal, 31 May 2000) in which Muci}'s grounds, including the two additional grounds, were consolidated and renumbered. The new numbering is used here. However, in the final designation of his grounds of appeal, the ground relating to unlawful confinement (12) was unintentionally left out, but was argued during the oral hearing, Appeal Transcript, p 468-474.

6. Whether at the time of the acts alleged in the Indictment, customary international law provided for individual criminal responsibility for violations of Common Article 3 of the Geneva Conventions.

7. Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches of the Geneva Conventions and for violations of the Laws and [*sic*] Customs of War based on the same acts.

8. Whether the OTP interviews of Mr. Muci} were properly admitted in evidence in the Trial Chamber.

9. Whether the Trial Chamber made the proper legal and factual determinations in convicting Mr. Muci} of command responsibility pursuant to Article 7(3).

10. Whether or not the Trial Chamber was unduly influenced as to their determinations by the acts or omissions of the then lead counsel as set out in the Judgement.

11. Whether the Trial Chamber gave Muci} an appropriate sentence.

12. Whether the Trial Chamber erred in law and in fact in finding that the detainees were unlawfully detained.

During the hearing on appeal, counsel for Muci} acknowledged that the ground numbered 10 above was not in fact relied on as an independent ground of appeal. Referring to certain criticisms of Muci}'s trial counsel contained in paragraph 75 of the Trial Judgement. Counsel stated:

> If there is any good reason or any merit in this Trial Chamber having so set out those criticisms, they are criticisms of his counsel, they are not criticisms of the appellant, and we would simply ask that when this judgment is read or reread, that this learned Appellate Tribunal ignores them completely.[42]

The Presiding Judge clarified this to the Prosecution in stating:

> I think, as Mr Morrison very frankly said, the only point of raising it is to make sure we take no notice [...] of what was said in the Judgement.[43]

The Appeals Chamber has therefore proceeded on this basis and the ground numbered 10 is not considered in this Judgement as an independent ground of appeal.

14. The Prosecution raised six grounds of appeal:[44]

1. The Trial Chamber erred in paragraphs 379-393 when it defined the mental element 'knew or had reasons to know' for the purposes of Superior Responsibility.

2. The Trial Chamber's finding that Zejnil Delali} did not exercise superior responsibility.

---

[42] Appeal Transcript, p 467.
[43] Appeal Transcript, p 486.
[44] Prosecution Brief, para 2.1, p 19, para 4.1, para 5.4, para 6.1, and para 7.2.

3. The Trial Chamber erred when it decided in paragraphs 1124–1144 that Zejnil Delali} was not guilty of unlawful confinement of civilians as charged in count 48 of the Indictment.

4. The Trial Chamber erred when it sentenced Zdravko Muci} to seven years imprisonment.

5. The Trial Chamber erred when it decided in paragraphs 776–810 that Hazim Deli} was not a 'superior' in the ^elebi}i Prison Camp for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute.

6. The Trial Chamber's finding that Hazim Deli} was not guilty as charged in Count 48.

4. Hearing

15. The Appeals Chamber heard oral argument from 5 to 8 June 2000.

5. Status Conferences

16. On 8 February 2000, Delali} filed a motion for clarification with regard to his participation in the status conference which is required to be held pursuant to Rule 65*bis* (B) of the Rules[45] as he was not in custody.[46] On 14 February 2000, the Appeals Chamber ruled that Delali} may but was not required to, attend the Status Conference, whereas his counsel was ordered to be present.[47]

17. Status conferences were held in accordance with Rule 65*bis* of the Rules on 23 February 2000, 12 May 2000 and 6 October 2000.

B. Issues Relating to the Composition of the Appeals Chamber

1. Assignment of Judges

18 On 21 December 1998, in order to deal with motions by Landžo for an extension of time limits,[48] a bench of three Judges, Judge Wang, Judge Shahabuddeen, and Judge Nieto-Navia, was assigned.[49] The assignment was vacated by an order on 9 February 1999.[50]

---

[45] This Rule was introduced at the 21st Plenary and entered into force on 7 Dec 1999.
[46] Motion for Clarification of the Scheduling Order Date [Dated] 2 February 2000, 8 Feb 2000.
[47] Order, 14 Feb 2000.
[48] Esad Landžo's Request for Extension of Time-Limits Pursuant to Rule 116, 9 Dec 1998 and Esad Landžo's Amended Request for Extension of Time-Limits Pursuant to Rule 116, 9 Dec 1998.
[49] Order of the Acting President for the Assignment of a Bench of the Appeals Chamber, 21 Dec 1998.
[50] Order on the Assignment of a Bench of the Appeals Chamber, 9 Feb 1999.

19. On 20 January 1999, Judge Shahabuddeen, Judge Wang, Judge Nieto-Navia, Judge Hunt and Judge Bennouna were assigned to sit on the appeal.[51] Judge Shahabuddeen withdrew himself from hearing the Appeal on 28 January 1999, and Judge Rodrigues was assigned to replace him.[52] On 19 May 1999 Judge Riad was assigned to replace Judge Rodrigues[53] and on 9 March 2000 Judge Pocar was assigned to replace Judge Wang.[54]

20. On 1 February 1999, in a confidential motion to the President of the Tribunal, Land'o requested the President to assign as Presiding Judge the acting President, Judge McDonald, Judge May "or another Judge from a major Common Law jurisdiction" with a background in a common law jurisdiction.[55] The President and the Vice-President withdrew from the matter pursuant to sub-Rule 15(A) of the Rules and on 12 February 1999 a decision was issued by Judge May who dismissed the motion on the basis that it is improper for Counsel to address the composition of any bench of the Tribunal.[56]

21. On 12 October 1999, Judge Hunt was appointed pre-appeal Judge and was entrusted to determine all pre-appeal motions of a procedural nature under Rule 73 as it applies to the Appeals Chamber as well as the power to refer any such motions to the Chamber. In addition, the pre-appeal Judge was mandated to conduct status conferences in order to determine the procedures to be followed in the hearing.[57]

2. Disqualification

22. On 30 July 1999, a joint motion was filed by Muci}, Deli} and Land'o requesting disqualification of certain judges, pursuant to Rule 15 of the Rules in connection with issues arising out of the appellant's grounds of appeal relating to the status of Judge Odio Benito during the trial. The motion requested that all Judges who either participated in the Plenary session which found that Judge Odio Benito's nomination as Vice-President of Costa Rica was not incompatible with her service as a Judge or who took part in the Plenary Session which approved her taking the oath of office as Vice-President of Costa Rica while remaining a Judge,

---

[51] Order of the Vice President for the Assignment of Judges to the Appeals Chamber, 20 Jan 1999.
[52] Order for the Assignment of Judges to the Appeals Chamber, 28 Jan 1999.
[53] Order for the Assignment of a Judge to the Appeals Chamber, 19 May 1999.
[54] Order for the Assignment of a Judge to the Appeals Chamber, 15 March 2000. (Original in French filed 9 March 2000.)
[55] Confidential Request to President, 1 Feb 2000.
[56] Order on the Request to the President on the Composition of the Bench of the Appeals Chamber, 12 Feb 1999.
[57] Order Appointing a Pre-Appeal Judge, 12 Oct 1999.

be disqualified from sitting on the Appeals Chamber in the present case or alternatively rec themselves.[58]

23. On 15 September 1999, the Presiding Judge issued a decision referring the matter to the Bureau for consideration pursuant to Rule 15(B) of the Rules.[59] On 17 September 1999 the Appeals Chamber denied the motion as incompetent, holding that the subject matter of the motion was not a matter for the consideration of the Appeals Chamber as it was instead to be regarded as an application to the Presiding Judge pursuant to Rule 15(B), who had referred the matter to the Bureau.[60]

24. On 25 October 1999, the Bureau - comprised of Judge McDonald, Judge Shahabuddeen, Judge Cassese, Judge Jorda and Judge May - decided that the Judges in question, Judge Riad, Judge Nieto-Navia and Judge Wang, were not disqualified from serving on the Appeals Chamber pursuant to the standard in Rule 15(A) of the Rules.[61] The Bureau held that a distinction must be drawn between the requirements for a person to serve as a Judge of the Tribunal and the issues relating to the grounds of disqualification of a Judge from sitting in a particular case. To serve as a Judge of the Tribunal a person elected by the General Assembly pursuant to Article 13(2) of the Statute must both possess the requirements set out in Article 13(1) and not exercise any political or administrative functions or engage in any other occupation of a professional nature. If there is a doubt or dispute as to whether a Judge meets the requirements, the President may seek to resolve the matter in conference with the Judges at a Plenary Session, in which the Judges exercise their administrative functions. Such consultation was sought twice with regard to Judge Odio Benito at the Fourteenth Plenary in October 1997 and at the Seventeenth Plenary in March 1998. On both occasions the Plenary endorsed the respective Presidents decisions that there was no incompatibility between Judge Odio Benito's status as Vice-President of Costa Rica and those of a Judge, as Judge Odio Benito would not assume the Presidential functions until her tenure terminated as a Judge of the Tribunal.

25. The decisions of the Plenary was not made with reference to any specific question as to whether Judge Odio Benito was disqualified pursuant to Rule 15 of the Rules. Further, it was

---

[58] Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 30 July 1999.

[59] Referral of Application to the Bureau under Rule 15(B), 15 Sep 1999.

[60] Decision on Motion to Disqualify Judges pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 17 Sept 1999.

[61] Decision of the Bureau on Motion to Disqualify Judges pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 25 Oct 1999.

only on 25 May 1998, more than two months after the decision of the Seventeenth Plenary Session that the motion before the Trial Chamber by Counsel in the present case was filed requesting Judge Odio Benito to take no further part in the proceedings. The Bureau and not the Plenary Session decided on the question of disqualification pursuant to Rule 15 and none of the three above-mentioned judges participated.[62]

C. Issues Relating to Defence Counsel

26. On 12 January 1999, the Defence for Delali} filed a motion pursuant to Article 13(A) of the Directive on Assignment of Defence Counsel[63] requesting the President to instruct the Registrar to assign Mr O'Sullivan as co-counsel, under the same terms and conditions with regard to remuneration as co-counsel was assigned during the trial.[64] The President denied the motion as counsel had failed to demonstrate exceptional circumstances for assignment of co-counsel as required by the Directive.[65]

27. On 1 February 1999, Land'o requested the removal of Mr Ackerman, the lead counsel for his co-accused Delali}, alleging a conflict of interest as Mr Ackerman had previously been assigned lead counsel for Land'o between April 1997 and March 1998.[66] By a decision of the Appeals Chamber on 6 May 1999, the motion for the removal of Mr Ackerman was dismissed.[67] The Appeals Chamber held that the material before it did not disclose any conflict of interest and that the retention of Mr Ackerman as lead counsel for Delali} did not obstruct the proper conduct of the proceedings within the meaning of sub-Rule 46(A) of the Rules.

28. On 17 June 1999, Mr Moran moved to be immediately relieved as co-counsel for Deli} on the basis that he would be unable to provide effective assistance without risking his employment.[68] The Appeals Chamber considered that it was not ordinarily appropriate for a Chamber to consider a motion for withdrawal of the assigned counsel where such motion had not been presented to and rejected by the Registrar and that decision subsequently reviewed and upheld by the President. However, under the particular circumstances in the present case, the Appeals Chamber found it appropriate to consider the motion on its merits. Further, the

---

62 Prosecutor v Zejnil Delali}, Zdravko Muci} also known as "Pavo", Hazim Deli}, Esad Land'o also known as "Zenga", Case No.: IT-96-21-T, "Decision of the Bureau on Motion on Judicial Independence", 4 Sept 1998.

63 Directive on the Assignment of Defence Counsel, IT/73/Rev.6.

64 Motion for Appointment of Co-Counsel on the Delali} Appeal, 12 January 1999.

65 Order on Appellant Zejnil Delali}'s Motion for Appointment of Co-Counsel, 8 Feb1999.

66 Esad Land'o's Request for Removal of John Ackerman as Counsel on Appeal for Zejnil Delali}, 1 Feb 1999.

67 Order regarding Esad Land'o's Request for Removal of John Ackerman as Counsel on Appeal for Zejnil Delali}, 6 May 1999.

Appeals Chamber found that there were no grounds for withdrawal as to permit Mr Moran withdraw on the basis of his personal interests would be contrary to counsel's obligations under the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal,[69] and to the interests of his client and of justice. [70]

1. Provisional Release

29. Muci} filed a motion seeking provisional and temporary release for the purpose of attending the funeral of his uncle in Konjic, Bosnia and Herzegovina on 18 February 1999.[71] A majority of the Appeals Chamber considered that it had jurisdiction to deal with the motion pursuant to Rules 65 and 107 of the Rules. However, that majority was not satisfied that the conditions for provisional release had been met and denied the motion.[72]

30. Deli} requested provisional release on 31 May 1999 for the purpose of attending the funeral of his mother, in Konjic, Bosnia and Herzegovina on, the following day, 1 June 1999.[73] On 31 May 1999 a majority of the Appeals Chamber found that it had jurisdiction to consider the request and further considered that the funeral of a close relative might constitute an exceptional circumstance within the meaning of Rule 65. However, the Chamber was not satisfied that the conditions for provisional release under Rule 65 had been met, namely that Deli} would appear for appeal proceedings and that he would not have posed a danger to any victim, witness or other person. A majority of the Appeals Chamber denied the motion.[74]

31. On 1 June 1999, Deli} filed an emergency motion reiterating his request for provisional release in order to participate in the funeral of his mother.[75] Finding that no new material facts

---

[68] Motion to Withdraw as Counsel due to Conflict of Interest, 17 June 1999.
[69] Code of Professional Conduct for Defence Counsels Appearing before the International Tribunal, IT/125.
[70] Order on the Motion to Withdraw as Counsel Due to Conflict of Interest, 24 June 1999.
[71] Motion of the Appellant for a Provisional and Temporary Release, 18 Feb 1999.
[72] Order of the Appeals Chamber on the Motion of the Appellant for a Provisional and Temporary Release, 19 February 1999. Judge Bennouna dissented from the finding that the Appeals Chamber had jurisdiction and declined to pronounce on the merits: Dissenting Opinion of Judge Bennouna – the Jurisdiction of the Appeals Chamber to hear Provisional Release matters, 22 Feb 1999.
[73] Request by Hazim Deli} for Provisional Release, 31 May 1999
[74] Order of the Appeals Chamber on the Request by Hazim Deli} for Provisional Release, 31 May 1999. Judge Bennouna dissented to the finding that the Appeals Chamber had jurisdiction and declined to pronounce on the merits.
[75] Hazim Deli}'s Emergency Motion to Reconsider Denial of Request for Provisional Release, 31 May 1999.

had been presented to warrant departure from the original decision the Appeals Chamb rejected the motion.[76]

32. On 17 December 1999, Mucić sought provisional release in order to return to Konjic, Bosnia and Herzegovina for one week to take care of his elderly father and to ensure that proper medical care and attention was provided to him.[77] The Prosecution objected to the release.[78] A majority of the Appeals Chamber denied the motion. The Appeals Chamber considered the crimes of which Muci} had been found guilty, his conduct during the trial and the fact that Muci} if released, would have needed to be transported to Bosnia and Herzegovina by a commercial airliner. The Chamber was not satisfied that Muci} would have appeared for appeal proceedings and that he would not have posed a danger to any victim, witness or other person.[79]

2. Severance

33. On 10 February 1999, Delalić filed a motion to sever his appeal from that of the others and a conditional motion to dismiss his cross appeal if severance was granted ("Motion to Sever").[80] Delalić argued that as he had been acquitted by the Trial Chamber and hence his situation was different from that of Mucić, Delić, and Landžo, a judgement pronouncing on the Prosecution's grounds of appeal should be issued as soon as possible. Delalić filed additional submissions on the Motion to Sever.[81] On 26 March 1999, the Appeals Chamber reserved its decision until after the briefs of the parties defining the grounds of appeal or cross-appeal had been filed.[82]

34. On 4 June 1999, Delalić requested the Appeals Chamber to review the Motion to Sever.[83] On 15 June 1999, the Appeal Chamber responded that it continued to reserve its decision until after the briefs defining the grounds of appeal had been filed.[84]

---

[76] Order of the Appeals Chamber on Hazim Deli}'s Emergency Motion to Reconsider Denial of Request for Provisional Release, 1 June 1999.
[77] Motion of Appellant Zdravko Mucić for Provisional and Temporary Release, 17 Dec 1999.
[78] Prosecution Response to Motion of Appellant Zdravko Muci} for Provisional and Temporary Release, 21 Dec 1999.
[79] Order on the Request by Zdravko Muci} for Provisional Release, 30 Dec 1999. Judge Bennouna dissented from the finding that the Appeals Chamber had jurisdiction and declined to pronounce on the merits.
[80] Motion to Sever the Appeal of Zejnil Delalić from that of the Other ^elebići Defendants, 10 Feb 1999; Conditional Motion to Dismiss Cross Appeal, 10 Feb 1999.
[81] Zejnil Delalić's Additional Submissions on his Motion to Sever the Appeal of Zejnil Delalić from that of Other ^elebići Defendants, 12 March 1999.
[82] Order Reserving Decision on Motion to Sever Appeals, 26 March 1999.
[83] Response of Zejnil Delalić to Motions for Continuance and Renewed Motion for Severance, 4 June 1999.
[84] Order on the Request of Zejnil Delalić to Determine his Previously Filed Motion for Severance, 15 June 1999.

35. Delalić also filed submissions on 28 July 1999, arguing that there were no grounds based in law or in fact for disturbing the Trial Chamber's decision of acquittal and therefore requested that his appeal be expedited and severed from the other defendants.[85]

35. On 29 July 1999, the Appeals Chamber denied the Motion to Sever as the issue of command responsibility had been raised in the Prosecution's Appeal Brief in relation to both Delalić and Mucić. The Appeals Chamber wished to reserve its judgement on the issue of command responsibility until the hearing of the appeals and therefore severance would not expedite judgement.[86]

D. Issues Relating to Evidence

1. Motions to "Preserve and Provide" Evidence

36. On 4 February 1999, Land'o moved to preserve and provide the daily video records which were made of the Trial Chamber proceedings by the Tribunal and which were in possession of the Registrar of the Tribunal.[87] These daily records would be used to support Landzo's Fourth Ground of Appeal. In its submissions in response, the Prosecution argued *inter alia,* that this motion should be dismissed *in limine*, as Land'o had not raised the issue at trial, and therefore such an objection should not be considered by the Appeals Chamber in the absence of compelling reasons.[88] In reply, Land'o argued that the issue was raised at trial, albeit not through a motion, and that even if it had not been, it raised an issue of "such a fundamental nature that the Tribunal should take cognisance of it in the interests of justice."[89] On 22 April 1999, the Appeals Chamber ruled that first-hand and detailed evidence citing specific instances in affidavit form is necessary before access to the record for the purposes of corroborating these assertions could be granted. As no such evidence had been provided by Land'o, the motion was denied.[90]

37. On 12 May 1999, Land'o filed a second motion seeking to preserve and provide evidence, offering evidence in the form of affidavits in order to demonstrate that the requested

---

[85] Submissions of Zejnil Delalić Regarding Severance, 28 July 1999.
[86] Order on Motion by Zejnil Delalić to Sever his Appeal from that of Other Čelebići Appellants, 29 July 1999.
[87] Motion to Preserve and Provide Evidence, 4 Feb 1999.
[88] Prosecution's Submissions Concerning Esad Land'o's Motion to Preserve and Provide Evidence, 26 Feb 1999.
[89] Response of Appellant, Esad Land'o, to Prosecution's Submissions Concerning Motion to Preserve and Provide Evidence, 11 March 1999.
[90] Decision on Motion to Preserve and Provide Evidence, 22 April 1999. Judge Hunt filed a Separate Opinion setting out the reasons for denying the Motion: Separate Opinion of Judge Hunt on Motion by Esad Land'o to Preserve and Provide Evidence, 22 April 1999.

access to the videotapes of the Trial Chamber proceedings were likely to materially ass Land'o in his appeal.[91] On 15 June 1999, the Appeals Chamber ordered, under conditions specified in the decision and consistent with orders for protective measures made by the Trial Chamber during the trial, that Land'o's counsel and co-counsel be given access to the videotapes of the Trial Chamber proceedings conducted in open session and produced in Courtrooms I and III ("Order on Second Motion").[92]

38. On 7 September 1999, Land'o moved to vary the Order on Second Motion[93] so as to permit his Counsel's legal assistant to also view video-recordings of portions of the Trial Chamber proceedings that were conducted in closed session. As the Prosecution did not oppose the motion[94] and sufficient guarantees for the maintenance of confidentiality existed, the Appeals Chamber granted the motion.[95] On 10 September 1999, Land'o filed another motion to vary in part the Order on Second Motion to enable copies to be made of portions of the Trial Chamber proceedings to prepare and present further evidence, and that the Appeals Chamber take judicial notice of certain facts.[96] On 20 September Land'o filed a motion for expedited consideration of the motion of 10 September 1999.[97] In the motions, Land'o sought permission to produce tapes containing portions of the trial and a compilation videotape of extracts for the purposes of oral argument. The Appeals Chamber ruled i) that the motion was premature until Land'o had filed particulars identifying the portions of the videotapes upon which he intended to rely; and ii) that the videotapes were not additional evidence pursuant to Rule 115, but rather were part of the trial record and as such could be called for pursuant to Rule 109(D) of the Rules by the Appeals Chamber.[98]

---

91 Second Motion to Preserve and Provide Evidence, 12 May 1999.

92 Order on the Second Motion to Preserve and Provide Evidence, 15 June 1999.

93 Motion of Appellant, Esad Land'o, to Vary Order on Second Motion to Preserve and Provide Evidence, 7 Sept 1999.

94 Prosecution's Response to Motion of Appellant, Esad Land'o, to Vary Order on Second Motion to Preserve and Provide Evidence", 10 Sept 1999.

95 Order on Esad Land'o's Motion to Vary Order on Second Motion to Preserve and Provide Evidence, 10 Sept 1999.

96 Motion of Appellant, Esad Land'o, (1) To Vary in Part Order on Motion to Preserve and Provide Evidence, (2) To Be Permitted to Prepare and Present Further Evidence, and (3) That the Appeals Chamber Takes Judicial Notice of Certain Facts, 10 Sept 1999.

97 Second Motion for Expedited Consideration of Motion of Appellant, Esad Land'o, (1) To Vary in Part Order on Motion to Preserve and Provide Evidence, (2) To Be Permitted to Prepare and Present Further Evidence, and (3) That the Appeals Chamber Takes Judicial Notice of Certain Facts, 20 Sept 1999.

98 Order on Esad Land'o's Motion (1) To Vary in Part Order on Motion to Preserve and Provide Evidence, (2) To Be Permitted to Prepare and Present Further Evidence, and (3) That the Appeals Chamber Takes Judicial Notice of Certain Facts, and on His Second Motion for Expedited Consideration of the Above Motion, 4 Oct 1999.

39. On 27 September 1999, Land'o filed a motion seeking to obtain and adduce further evidence relating to the issue of whether he should be held to have waived his right to assert the Fourth Ground of Appeal by reason of failure to raise the issue during trial.[99] The requested evidence consisted of testimony and written records of the President of the Tribunal, the Registrar and the Senior Legal Officer of the Trial Chamber. Considering that general principles of law recognise an adjudicative privilege or judicial immunity from compulsion to testify in relation to judicial deliberations and related matters, the Appeals Chamber dismissed the motion.[100] The Appeals Chamber also ruled that if counsel for Land'o were to appear as witness in the Fourth Ground of Appeal, pursuant to Article 16 of the Code of Professional Conduct for Defence Counsel appearing before the International Tribunal, counsel would not be allowed to act as an advocate for Land'o on that ground.[101]

40. Land'o sought clarification of the order[102] and on 16 December 1999, the Pre-appeal Judge clarified that Counsel for Land'o was permitted to act for Land'o in the appeal for all grounds other than the Fourth Ground of Appeal.[103]

41. On 25 January 2000, the Pre-appeal Judge ordered the Registry to make the necessary arrangements in order for the Defence for Land'o to view the extracts of the videotapes.[104]

42. On 10 May 2000, pursuant to a Prosecution motion for clarification, which observed that counsel for Land'o had continued to sign documents in relation to the Fourth Ground of Appeal, the Appeals Chamber reiterated its order that Counsel for Land'o remove herself from pleadings, both oral and written, with respect to the Land'o Fourth Ground of Appeal.[105]

---

[99] Motion of Appellant, Esad Land'o for Permission to Obtain and Adduce Further Evidence on Appeal, 27 Sept 1999.

[100] Order on Motion of the Appellant, Esad Land'o, for Permission to Obtain and Adduce Further Evidence on Appeal, 7 Dec 1999. Judge Bennouna submitted a Declaration to the Order, opining that Land'o's motion was premature and that the Appeals Chamber should have deferred a decision until it has had the benefit of reading the Appellant and Respondent Briefs in relation to this ground of appeal.

[101] Article 16 of the Code of Professional Conduct reads, "Counsel must not act as advocate in a trial in which the Counsel is likely to be a necessary witness except where the testimony relates to an uncontested issue or where substantial hardship would be caused to the Client if that counsel does not so act".

[102] Motion of Appellant, Esad Land'o, for Clarification of Order on Motion for Permission to Obtain and Adduce Further Evidence, 14 Dec 1999.

[103] Decision on Motion by Esad Land'o for Clarification of Order of 7 December 1999, 16 Dec 1999.

[104] Order on Emergency Motion of the Appellant, Esad Land'o, to be Permitted to View Extracts of Videotapes Selected by the Prosecution, 25 January 2000.

[105] Decision on Prosecution Motion for Further Clarification of Order of 7 Dec 1999, 10 May 2000.

43. On 31 May 2000, the Appeals Chamber issued an order[106] that admitted into evidence certain material in relation to Land'o's Fourth Ground of Appeal *inter alia*;

(i) certain evidence of Counsel for Land'o insofar as it related to matters other than a description of the conduct of the Presiding Judge of the Trial Chamber;

(ii) stated that in view of evidence already admitted, the Appeals Chamber would not hear oral evidence from Counsel for Land'o;

(iii) admitted into evidence certain correspondence between the Tribunal's President and Land'o's counsel concerning Land'o's Fourth Ground of Appeal; and

(iv) admitted into evidence certain motions drafted by Counsel of Land'o which had not been filed, but which were relevant to the Fourth Ground of Appeal. In the same order, the Appeals Chamber rejected the admission of certain press reports regarding the physical state of the Presiding Judge of the Trial Chamber as they reflected the subjective commentary of their authors and were therefore of no probative value to the appeal

2. Production of Documents

44. On 20 July 1999, Delali} filed a motion for the production of documents relating to efforts to obtain copies of proposed prosecution evidence excluded by the Trial Chamber.[107] In response, the Prosecution argued that there is no right on appeal to underlying documents in relation to facts accepted and relied upon by the Trial Chamber and that Delali}'s request was contrary to the principle of finality.[108] Persuaded that the Prosecution's analysis of the character of the evidence to this point was correct, Delali} moved to withdraw his motion for production.[109]

3. Admission of Evidence and Related Issues

45. On 14 February 2000, the Appeals Chamber admitted into evidence at the motion of Land'o the expert opinion of Mr Francisco Villalobos Brenes, interpreting certain articles of the

---

[106] Order on Motion on Appellant, Esad Land'o, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000.
[107] Motion by Cross-Appellant Zejnil Delali} for the Production of Documents, 20 July 1999.
[108] Prosecution's Response to Motion by Zejnil Delali} for Production of Documents, 23 July 1999.

Constitution of Costa Rica in relation to Land'o's Second Ground of Appeal.[110] The Appea' Chamber did not consider that Rule 115 of the Rules was applicable, as Land'o's Second Ground of Appeal related to the ineligibility of one of the members of the Trial Chamber to serve as a Judge of the International Tribunal and not to the issues already litigated at trial, but admitted the evidence pursuant to sub-Rule 89(C) of the Rules.

46. With respect to the same issue, the Appeals Chamber admitted at the motion of the Prosecution into evidence the expert opinion of Mr Alejandro Batalla who was described as an expert in the law of Costa Rica.[111]

47. In its 31 May 2000 Order on Admission of Evidence on Appeal and on Taking of Judicial Notice, the Appeals Chamber made various rulings with respect to the Second Ground of Appeal. The Appeals Chamber i) admitted into evidence the agreed facts set out in an agreement on evidence entered into between the Prosecution and Land'o relating to the Second Ground of Appeal;[112] ii) rejected the admission of English press reports because they had no probative value; iii) allowed the filing of an English translation of certain Spanish press reports submitted by Land'o so that the Appeals Chamber would be in a position to consider their admissibility; and iv) admitted into evidence Security Council Resolution 1126 and related correspondence concerning the terms of office of the members of the Trial Chamber hearing this case.[113]

48. On 28 July 2000, the Prosecution and Land'o filed a verified translation of the Constitution of Costa Rica.[114]

49. On 1 June 2000, the Appeals Chamber dismissed a motion by the Prosecution, filed confidentially, to adjourn oral argument on the appeal pending the translation and assessment of documents newly received from the Croatian Government that pertain to the ^elebi}i prison.[115]

---

[109] Withdrawal of Motion for Production, 27 July 1999. The Appeals Chamber granted the motion for withdrawal on 29 July 1999 in its Order on Withdrawal of Motion for Production of Documents.

[110] Order on Motion of Esad Land'o to Admit as Additional Evidence the Opinion of Francisco Villalobos Brenes, 14 Feb 2000.

[111] Order in Relation to Witnesses on Appeal, 19 May 2000.

[112] Agreement Between the Prosecution and Appellant, Esad Land'o Regarding Evidence for the Purposes of the Appeal, 19 May 2000.

[113] Order on Motion on Appellant, Esad Land'o, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000.

[114] Agreement Between the Prosecution and Appellant, Esad Land'o, Regarding the Constitution of Costa Rica, 28 July 2000.

50. On 8 June 2000, during the oral hearing the Prosecution made an oral motion to perm[illegible] the proceedings to remain open in order for it to retain the possibility of submitting an application for the admission of additional evidence: being documents just released to the Prosecutor by the Croatian Government.[116] The Prosecution was requested to submit a detailed list of the documents to be admitted during the oral hearing.[117] Counsel for Muci} also made an oral motion requesting the possibility to admit additional evidence at a later date.[118] Subsequently, the Prosecution decided not to proceed with an application to admit additional evidence, while Counsel for Muci} requested time to go through all the material disclosed by the Prosecution before making a final determination.[119] On 30 June 2000, Muci} sent a letter stating that no motion to admit additional evidence would be submitted.[120]

51. Following the hearing on 3 August 2000, Counsel for Deli} filed a "letter-brief", which included relevant cases which had been decided after the appeal had been submitted. Land`o joined in the letter brief.[121] The Prosecution responded on 10 August 2000.[122]

52. On 30 January 2001, Deli} filed a document seeking leave to file a second supplementary brief which discussed an article from the International Review of the Red Cross. He submitted that the analysis of certain issues in the article supported his arguments in relation to his fourth and eighth grounds of appeal.[123] The Appeals Chamber, noting that the date of delivery of this Judgement had been advised to the parties in a Scheduling Order issued on 24 Jan 2001, refused leave to Deli} to file the brief as it was clear that the submissions in the brief added nothing to the submissions which had already been made.

---

[115] Order on Prosecution Motion for Adjournment of Oral Argument of Appeal or Alternatively for Adjournment of Oral Argument of Certain Grounds of Appeal, 1 June 2000. The confidentiality of this motion was lifted by an order of the Appeals Chamber in the hearing on 6 June 2000. Appeal Transcript, pp 269-270.
[116] Appeal Transcript, pp 77-111.
[117] Appeal Transcript, pp 77-80, 180-187.
[118] Appeal Transcript, pp 106-11.
[119] Appeal Transcript, pp 636, 639-640.
[120] Letter addressed to the Presiding Judge Hunt from Counsel for Muci}, 30 June 2000.
[121] Joinder of Appellant, Esad Land`o, in "Letter Brief" of Appellant Deli} Dated 2 August, 2000, 7 Aug 2000.
[122] Prosecution Response to the "Letter Brief" filed on Behalf of Hazim Deli}, 10 Aug 2000.
[123] Appellant-Cross Appellee Hazim Deli}'s Motion for Leave to File Second Supplemental Brief and Supplemental Brief, 30 Jan 2001.

ANNEX B - GLOSSARY OF TERMS

Additional Protocol I	1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
Additional Protocol II	1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts
Akayesu Judgement	*Prosecutor v Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgement, 2 Sept 1998
Aleksovski Appeal Judgement	*Prosecutor v Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 Mar 2000
Appeal Transcript	Transcript of hearing on appeal in *Prosecutor v Delalić et al,* Case No IT-96-21-A. All transcript page numbers referred to in the course of this judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.
Blaški} Judgement	*Prosecutor v Tihomir Blaški},* Case No IT-95-14-T, Judgement, 3 Mar 2000.
Čelebići camp	Barracks used as a prison-camp in the municipality of Konjic in Bosnia and Herzegovina
Delalić	Zejnil Delalić
Delalić Brief	Brief of Cross-Appellant Zejnil Delalić, 2 July 1999
Delalić Response	Reply [*sic*] Brief of Appellee Zejnil Delalić, 17 Sep 1999
Delalić Reply	Reply Brief of Appellee Zejnil Delalić to Response of the Prosecutor, 25 Oct 1999
Delić	Hazim Delić

4605

Delić Brief	Appellant-Cross-Appellee Hazim Delić's B[illegible], 2 July 1999
Delić Response	Cross-Appellee Hazim Delić's Response to the Prosecutor's Appellate Brief of 2 July 1999, 17 Sep 1999
Delić Reply	Appellant-Cross Appellee Hazim Delić's Reply to the Respondent's Brief of the Prosecutor of 17 September 1999, 25 Oct 1999
Delić/Mucić Supplementary Brief	Appellants-Cross Appellees Hazim Delić's and Zdravko Mucić's Motion for Leave to File Supplemental Brief and Supplemental Brief, 17 Feb 1999
Eur Ct HR	European Court of Human Rights
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950
First *Erdemovi}* Sentencing Judgement	*Prosecutor v Dra`en Erdemovi},* Case No. IT-96-22-T, Sentencing Judgement, 29 Nov 1996
FRY	Federal Republic of Yugoslavia
Furundžija Appeal Judgement	*Prosecutor v Anto Furundžija* Case No IT-95-17/1-A, Judgement, 21 July 2000
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
ICC Statute	Rome Statute of the International Criminal Court, Adopted at Rome on 17 July 1998, PCNICC/1999/INF/3
ICCPR	International Covenant on Civil and Political Rights, 1966
ICRC Commentary (GC IV)	Pictet, (ed), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958
ICRC Commentary (Additional Protocols)	Sandoz et al. (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949.

	International Committee of the Red Cross, Geneva, 1987
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
ILC Report	Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, UNGA, Official Records, 51st Session, Supplement No.10 (A/51/10)
Indictment	*The Prosecutor of the Tribunal v Zejnil Delalić, Zdravko Mucić aka 'Pavo', Hazim Delić and Esad Landžo, aka Zenga*, Case No IT-96-21, Indictment, 20 March 2000
Kambanda Appeal Judgement	*Prosecutor v Kambanda* Case No.ICTR-97-23-A, Judgement, 19 Oct 2000
Kupreški} Judgement	*Prosecutor v Zoran Kupreški} et al*, Case No. IT-95-16-T, Judgement, 14 Jan 2000
Landžo	Esad Landžo
Landžo Brief	Brief of Appellant, Esad Landžo, on Appeal Against Conviction and Sentence, 2 July 1999
Landžo Reply	Reply of Appellant, Esad Landžo, to Respondent's Brief of the Prosecution, 17 September 1999, 25 Oct 1999
Landžo Additional Reply	Reply Brief of Appellant, Esad Landžo, on Fourth Ground of Appeal (The Sleeping Judge), 14 Feb 2000
Landžo Supplementary Brief	Supplemental Brief of the Appellant, Esad Landžo, in Support of the Fourth Ground of Appeal (Sleeping Judge), 7 Dec 1999
Law Reports of Trials of War Criminals	Law Reports of Trials of War Criminals (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office)
Mucić	Zdravko Mucić

Mucić Brief	Appellant – Zdravko Mucić's [aka Pavoğ Brief on Appeal Against Conviction and Sentence, 2 July 1999
Mucić Response	Response of the Appellant Zdravko Mucić to the Prosecution's Fourth Ground of Appeal Brief, 17 Sep 1999
Mucić Reply	Response of the Appellant Zdravko Mucić to the Respondent's Brief of the Prosecutor of 17 Sep 1999, 25 Oct 1999
Prosecution	Office of the Prosecutor
Prosecution Brief	Prosecution's Appeal Brief, 2 July 1999
Prosecution Reply	Brief in Reply of the Prosecution, 25 Oct 1999
Prosecution Response	Respondent's Brief of the Prosecution, 17 Sep 1999
Prosecution Response to Landžo Supplementary Brief	Respondent's Brief of the Prosecution in Relation to Esad Landžo's Fourth Ground of Appeal, 28 Jan 2000
Prosecution Response to Deli}/Muci} Supplementary Brief	Prosecution Response to the Appellants' Supplementary Brief, 25 April 2000
Prosecution Supplementary Brief	Supplemental Brief of the Prosecution annexed to the Prosecution Response to the Motion by Hazim Delić and Zdravko Mucić to File a Supplemental Brief and Prosecution Motion to File a Supplemental Brief, 28 Feb 2000
Rules	Rules of Procedure and Evidence of the International Tribunal
Secretary-General's Report	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993
Second *Erdemovi}* Sentencing Judgement	*Prosecutor v Dra`en Erdemovi},* Case No IT-96-22-T*bis,* Sentencing Judgement, 5 Mar 1998
Serushago Sentencing Appeal Judgement	*Omar Serushago v Prosecutor*, Case No ICTR-98-39-A, Reasons for Judgement, 6 April 2000
SFRY	Socialist Federal Republic of Yugoslavia

Statute	Statute of the International Tribunal
Tadi} Appeal Judgement	*Prosecutor v Du{ko Tadi}*, Case No IT-94-1-A, Judgement, 15 July 1999
Tadi} Jurisdiction Decision	*Prosecutor v Du{ko Tadi}*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995
Tadi} Sentencing Appeal Judgement	*Prosecutor v Du{ko Tadi}*, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 Jan 2000
Trial Judgement	*Prosecutor v Zejnil Delali} et al,* Case No. IT-96-21-T, Judgement, 16 Nov 1998
Trial Transcript	Transcript of hearing in *Prosecutor v Delalić et al,* Case No. IT-96-21-T. All transcript page numbers referred to in the course of this judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.
Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
TWC	Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (U.S. Govt. Printing Office: Washington 1950)

ANNEX 4:

Prosecutor v Aleksovski, Judgement, Case No. IT-95-14/1-A, Appeals Chamber, 24 March 2000.

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-95-14/1-A
	Date:	24 March 2000
	Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Richard May, Presiding**
Judge Florence Ndepele Mwachande Mumba
Judge David Hunt
Judge Wang Tieya
Judge Patrick Robinson

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **24 March 2000**

PROSECUTOR

v.

ZLATKO ALEKSOVSKI

JUDGEMENT

Office of the Prosecutor:

Mr. Upawansa Yapa
Mr. William Fenrick
Mr. Norman Farrell

Counsel for the Appellant:

Mr. Srdjan Joka for Zlatko Aleksovski

4612

TABLE OF CONTENTS

I. Introduction 3
A. Procedural Background 3
1. The Appeal 4
(a) Filings 4
(b) Grounds of Appeal 5
2. The Cross-Appeal 6
3. Relief Requested 6
(a) The Appeal against Judgement 6
(b) The Cross-Appeal 7
II. First Ground of Appeal by the Appellant: Lack of Requisite *Mens Rea* 8
A. Submissions of the Parties 8
1. Appellant's Brief 8
2. Prosecution's Response 9
3. Appellant's Reply 10
B. Discussion 10
C. Conclusion 16
III. Second Ground of Appeal of the Appellant: the Seriousness of the Violation and the Defence of Necessity 17
A. Seriousness 17
1. Submissions of the Parties 17
(a) Appellant's Brief 17
(b) Prosecution's Response 18
(c) Oral submissions of the Appellant 18
2. Discussion 19
3. Conclusion 21
B. Defence of Necessity 22
1. Submissions of the Parties 22
(a) Appellant's Brief 22
(b) Prosecution's Response 22
(c) Appellant's Reply 23
(d) Appellant's Additional Submissions 24
(e) Prosecution's Additional and Further Additional Submissions 25
2. Discussion 26
3. Conclusion 28
IV. Third Ground of Appeal of the Appellant: Failure to Correctly Apply the Standard of Proof beyond Reasonable Doubt 28
A. Submissions of the Parties 28
1. Appellant's Brief 28
2. Prosecution's Response 29
B. Discussion 30
C. Conclusion 31
V. Fourth Ground of Appeal of the Appellant: the Trial Chamber Erred in its Application of Article 7(3) of the Statute to the Facts in this Case 32
A. Submissions of the Parties 32
1. Appellant's Brief 32
2. Prosecution's Response 33

3. Appellant's Reply 33
B. Discussion 34
C. Conclusion 37
VI. First Ground of Cross-Appeal by the Prosecution: Internationality and "Protected Persons" 38
A. Submissions of the Parties 38
1. Cross-Appellant's Brief 38
2. Appellant's Response 39
3. Cross-Appellant's Reply 41
4. Prosecution's Additional Submissions 41
5. Appellant's Additional Submissions 42
B. Discussion 43
1. Whether the Appeals Chamber is Bound to Follow its Previous Decisions 43
2. Whether the Decisions of the Appeals Chamber are Binding on Trial Chambers 50
3. Whether the Decisions of the Trial Chambers are Binding on Each Other 51
4. The Ground of Appeal 52
(a) The Criteria for Determining the International Character of the Armed Conflict 52
(i) What is the applicable law on this issue? 53
(ii) If the "overall control" test is the applicable law, did the Trial Chamber fail to apply it? 58
(b) The Criteria for Determining Whether the Bosnian Muslim Victims were Protected Persons under Article 4 of Geneva Convention IV 61
(c) The Prosecution's Application to Reverse the Acquittal on Counts 8 and 9 63
C. Conclusion 64
VII. Second Ground of Cross-Appeal by the Prosecution: Responsibility for the Mistreatment of Prisoners outside the Prison 65
A. Submissions of the Parties 65
1. Cross-Appellant's Brief 65
2. Appellant's Response 68
3. Cross-Appellant's Reply 68
B. Discussion 69
C. Conclusion 75
VIII. Third Ground of Cross-Appeal by the Prosecution: Error in Sentencing 77
A. Background 77
B. Submissions of the Parties 80
C. Oral Hearing 81
D. Discussion 82
E. Conclusion 86
IX. Disposition 87
X. Declaration of Judge David Hunt 88
ANNEX 91

The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "Tribunal") is seised of two appeals in relation to the written Judgement rendered by Trial Chamber I *bis* ("Trial Chamber") on 25 June 1999 in the case of *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T ("*Aleksovski* Judgement" or "Judgement").[1]

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

HEREBY RENDERS ITS WRITTEN JUDGEMENT.

[1] "Judgement", *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T, Trial Chamber, 25 June 1999. (For a list of designations and abbreviations used in this Judgement, *see* Annex).

I. INTRODUCTION

A. Procedural Background

1. The indictment charged the accused, Zlatko Aleksovski, with three counts of crimes within the jurisdiction of the International Tribunal. Count 8 of the indictment charged the accused with a grave breach as recognised by Articles 2(b) (inhuman treatment), 7(1) and 7(3) of the Statute of the International Tribunal ("Statute"). Count 9 of the indictment charged the accused with a grave breach as recognised by Articles 2(c) (willfully causing great suffering or serious injury to body or health), 7(1) and 7(3) of the Statute. Count 10 of the indictment charged the accused with a violation of the laws or customs of war (outrages upon personal dignity) as recognised by Articles 3, 7(1) and 7(3) of the Statute.

2. At his initial appearance before Trial Chamber I[2] on 29 April 1997, the accused pleaded not guilty to all counts. The Trial Chamber rendered its oral judgement on 7 May 1999, finding the accused guilty on Count 10 and not guilty on Counts 8 and 9. The Trial Chamber rendered its written judgement on 25 June 1999.

3. Both Zlatko Aleksovski ("Appellant" or "Defence") and the Prosecutor ("Prosecution" or "Cross-Appellant") now appeal against separate aspects of the *Aleksovski* Judgement ("Appeal against Judgement" and "Cross-Appeal", respectively).[3] Combined, these appeals are referred to as "the Appeals".

4. The Appeals Chamber heard oral argument on the Appeals on 9 February 2000. On the same day, the Appeals Chamber denied all of the Appellant's grounds of appeal, reserved its judgement on two of the Prosecution's grounds of appeal and allowed the Prosecution's appeal against sentence.[4] The Appellant was detained on remand pending the Appeals Chamber's written judgement.[5]

---

[2] The President of the International Tribunal re-assigned the case to Trial Chamber I *bis* on 20 Nov. 1997: "Order of the President", Case No.: IT-95-14/1-T, 20 Nov. 1997.

[3] In the present proceedings, Zlatko Aleksovski is both appellant and cross-respondent. Conversely, the Prosecutor is respondent and cross-appellant. In the interest of clarity, however, the designations "Defence" or "Appellant" and "Prosecution" or "Cross-Appellant", respectively will be employed throughout this Judgement.

[4] Transcript of hearing in *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-A, 9 Feb. 2000, p. 85 (T. 85). (Unless otherwise indicated, all transcript page numbers referred to in the course of this Judgement are from

1. The Appeal

(a) Filings

5. A notice of appeal against the *Aleksovski* Judgement was filed on behalf of Zlatko Aleksovski on 17 May 1999.

6. Following an order for the variation of the time-limits for the filing of their respective briefs,[6] the Appellant filed his brief against the *Aleksovski* Judgement ("Appellant's Brief") on 24 September 1999.[7] The Prosecution responded to the Appellant's Brief ("Prosecution's Response") on 25 October 1999.[8] The Appellant filed his reply to the Prosecution's Response ("Appellant's Reply") on 10 November 1999.[9]

7. Following an order for the filing of additional submissions by both parties,[10] the Appellant filed his additional submissions on the doctrine of *stare decisis* and the defence of necessity ("Appellant's Additional Submissions") on 11 January 2000.[11] The Prosecution's additional submissions ("Prosecution's Additional Submissions") were filed on the same day.[12] The Appeals Chamber granted the Prosecution's request to file a reply to the

---

the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.)

[5] "Order for Detention on Remand", Case No.: IT-95-14/1-A, 9 Feb. 2000; T. 85-86.

[6] "Scheduling Order", Case No.: IT-95-14/1-A, 30 July 1999.

[7] "Zlatko Aleksovski's Appellant's Brief in Opposition to the Condemnatory Part of the Judgement dated 25 June 1999", Case No.: IT-95-14/1-A, 24 Sept. 1999.

[8] "Respondent's Brief of the Prosecution", Case No.: IT-95-14/1-A, 25 Oct. 1999.

[9] "The Appellant's Brief in Reply to the Respondent's Brief of the Prosecution", Case No.: IT-95-14/1-A, 10 Nov. 1999.

[10] "Scheduling Order", Case No.: IT-95-14/1-A, 8 Dec. 1999.

[11] "The Appellant's Additional Submissions on Doctrine of *Stare Decisis* and Defence of "*Necessity*"", Case No.: IT-95-14/1-A, 11 Jan. 2000.

[12] "Prosecution Response to the Scheduling Order of 8 December 1999", Case No.: IT-95-14/1-A, 11 Jan. 2000.

Appellant's Additional Submissions.[13] The Prosecution responded on 31 January 2000.[14]

(b) Grounds of Appeal

8. The Appellant's grounds of appeal have not been listed explicitly in the Appellant's Brief. At the oral hearing on 9 February 2000, the Appeals Chamber asked the Appellant to indicate whether the Appeals Chamber had correctly interpreted the grounds of appeal.[15] The Appellant's grounds of appeal as so interpreted are as follows:

(i) Ground 1: The Trial Chamber failed to establish that the accused had a discriminatory intent, which it is submitted, is necessary to convict him for the offences under Article 3 of the Statute.[16]

(ii) Ground 2: The conduct found proven against the Appellant, in particular the violence against the detainees, was not sufficiently grave as to warrant a conviction under Article 3, and the Appellant's conduct may have been justified by necessity, which the Trial Chamber failed to consider.[17]

(iii) Ground 3: The Trial Chamber erred in relying on witness testimony that was inherently unreliable and did not meet the standard of proof beyond reasonable doubt.[18]

(iv) Ground 4: The Trial Chamber erred in its finding that the Appellant was in a position of superior responsibility under Article 7(3) of the Statute.[19]

---

[13] "Scheduling Order", Case No.: IT-95-14/1-A, 24 Jan. 2000.
[14] "Prosecution Response to Zlatko Aleksovski's Additional Submissions in Relation to the Defence of 'Extreme Necessity'", Case No.: IT-95-14/1-A, 31 Jan. 2000 ("Prosecution's Further Additional Submissions").
[15] T. 2-4.
[16] T. 3; Appellant's Brief, paras. 1-6 and 10-11.
[17] T. 3; Appellant's Brief, paras. 3, 7 and 9.
[18] T. 3; Appellant's Brief, paras. 6 and 9.
[19] T. 3-4; Appellant's Brief, paras. 12-22.

2. The Cross-Appeal

9. The Prosecution filed a notice of appeal against the *Aleksovski* Judgement on 19 May 1999, and its brief against the Judgement ("Cross-Appellant's Brief") on 24 September 1999.[20] The Appellant responded to the Cross-Appellant's Brief ("Appellant's Response") on 25 October 1999.[21] The Cross-Appellant filed its reply to the Appellant's Response ("Cross-Appellant's Reply") on 10 November 1999.[22]

10. The Prosecution's grounds of appeal are set out in the Cross-Appellant's Brief. The grounds of appeal are as follows:

(i) Ground 1: The Trial Chamber erred in deciding that Article 2 of the Statute was inapplicable because it had not been established that the Bosnian Muslims held at Kaonik prison between January 1993 and the end of May 1993 were protected persons within the meaning of Article 4 of Geneva Convention IV.[23]

(ii) Ground 2: The Trial Chamber erred in holding that the Defendant did not incur responsibility under Article 7(1) of the Statute for the mistreatment suffered by the detainees while outside Kaonik prison.[24]

(iii) Ground 3: The Trial Chamber erred when it sentenced Aleksovski to two and a half years' imprisonment.[25]

3. Relief Requested

(a) The Appeal against Judgement

11. The Appellant seeks the following relief in relation to his various grounds of appeal referred to above:

---

[20] "Prosecution's Appeal Brief", Case No.: IT-95-14/1-A, 24 Sept. 1999.
[21] "The Appellant's Brief in Reply to the Prosecution's Appeal Brief", Case No.: IT-95-14/1-A, 25 Oct. 1999.
[22] "Brief in Reply of the Prosecution", Case No.: IT-95-14/1-A, 10 Nov. 1999.
[23] Cross-Appellant's Brief, paras. 1.8 and 2.11.
[24] *Ibid.*, paras. 1.8 and 3.6.
[25] *Ibid.*, paras. 1.8 and 4.6.

(i) The reversal of the finding of guilt under Count 10 for failure to establish the requisite *mens rea*.

(ii) The reversal of the finding of guilt under Count 10 for failure to establish the requisite *actus reus*.

(iii) The reversal of the finding of guilt under Count 10 for failure to correctly apply the standard of proof beyond reasonable doubt.

(iv) The reversal of the finding of guilt under Count 10 for failure to establish the responsibility of Zlatko Aleksovski as a commander.

(b) The Cross-Appeal

12. The Prosecution seeks the following relief in relation to its various grounds of appeal referred to above:

(i) The reversal of the finding of not guilty with respect to Count 8 and Count 9 and the substitution thereof with findings of guilt.[26]

(ii) The reversal of the finding in relation to Count 10 that the Appellant is not guilty of the mistreatment of prisoners outside Kaonik prison (other than their use as trench-diggers and human shields), and the substitution thereof with a finding of guilt. Further, should the Cross-Appellant's first ground of appeal succeed, the reversal of the findings with respect to this element of Counts 8 and 9, and the substitution thereof with findings of guilt on this element of each of the said counts.[27]

(iii) The revision of the sentence imposed to a sentence of not less than seven years.[28]

[26] Cross-Appellant's Brief, para. 2.78.
[27] *Ibid.*, para. 3.45.
[28] *Ibid.*, paras. 4.59-4.60.

II. FIRST GROUND OF APPEAL BY THE APPELLANT: LACK OF REQUISITE *MENS REA*

A. Submissions of the Parties

1. Appellant's Brief

13. The Appellant submits[29] that, as Article 3 of the Statute only deals with extremely grave crimes, the perpetrator of Article 3 offences is "evidently expected to manifest ... discriminatory conduct".[30] The Appellant construed the Trial Chamber's judgement as having accepted that a discriminatory intent is required under Article 3 of the Statute but says that the Trial Chamber failed to identify facts indicating the existence of this discriminatory intent.[31] The Appellant further contends generally that the perpetrator's motivation is a critical element of criminal liability under Article 3 and that a perpetrator must be "motivated by a contempt toward other person's dignity in racial, religious, social, sexual or other discriminatory sense".[32] The Appellant contends that the Trial Chamber, despite the Prosecutor's failure to prove the element of discriminatory intent, found that the Appellant's criminal liability was proved.[33] The Trial Chamber acted inconsistently in finding that certain of the Appellant's actions were not motivated by discrimination, but finding him guilty under Article 3, which implies the existence of discriminatory intent.[34]

14. The apparent confusion in these submissions was resolved during the oral hearing where the Appellant accepted the summary proposed by the Presiding Judge that this ground constituted an argument "that the Trial Chamber failed to establish that the accused had a discriminatory intent which you say is necessary to convict him for the offences under Article 3 of the Statute."[35]

---

[29] *See* Appellant's Brief and submissions made orally to the Appeals Chamber in the hearing of 9 Feb. 2000.
[30] Appellant's Brief, paras. 2-3.
[31] *Ibid.*, paras. 6 and 10.
[32] *Ibid.*, para. 4.
[33] *Ibid.*, paras. 5 and 10.
[34] *Ibid.*, para. 11.
[35] T. 3.

2. Prosecution's Response

15. The Prosecution interpreted the Appellant's Brief as contending that the Trial Chamber made an error of fact, in which case he would need to establish that the Trial Chamber's findings on *mens rea* are unreasonable.[36] Although the Appellant expresses agreement with the Trial Chamber's findings on the elements of Article 3 of the Statute, the elements of *mens rea* cited in his Brief do not correspond with these findings.[37] The Appellant also seems to allege an error of law in that the Trial Chamber did not require proof of discriminatory intent on the Appellant's part.[38] The Trial Chamber's reference to discrimination does not mean it considered discrimination a requirement: it is merely evidence relevant to a determination of whether *mens rea* is established.[39] This evidence was mainly relied on in determining sentence.[40] Under international law, proof of discriminatory intent is not required for outrages upon personal dignity.[41] The *Furund`ija* Judgement[42] at no point suggests that the relevant mental element requires proof of discriminatory intent.[43] The Prosecution contends that the Trial Chamber correctly held that the *mens rea* element of outrages upon personal dignity does not require proof of discriminatory intent.[44]

---

[36] Prosecution's Response, para. 2.3.
[37] *Ibid.*, paras. 2.4-2.5.
[38] *Ibid.*, para. 2.6.
[39] *Ibid.*, paras. 2.11 and 2.18.
[40] *Ibid.*, para. 2.12.
[41] The Prosecution observes that the Appellant cited no authority to support the contrary assertion (*ibid.*, para. 2.14). The text of common Article 3 of the Geneva Conventions does not pronounce on the mental element of Article 3(1)(c). Discriminatory intent can be evidence of inhuman treatment, but is not essential (*ibid.*, para. 2.18). A requirement of discriminatory intent is not supported in the text of common Article 3 nor that of Additional Protocol I, Article 75(2)(b) and Protocol II, Article 4(2)(e) (*ibid.*, para. 2.19), nor in customary international law. In Article 4(e) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR") and Article 8 (2)(c) (ii) of the Statute of the International Criminal Court ("ICC Statute"), there is no suggestion that discriminatory intent is required (*ibid.*, paras. 2.20-2.22).
[42] "Judgement", *Prosecutor v. Anto Furund`ija*, Case No.: IT-95-17/1-T, Trial Chamber, 10 Dec. 1998, para. 183 ("*Furund`ija* Judgement").
[43] Prosecution's Response, para. 2.23.
[44] *Ibid.*, para. 2.24.

3. Appellant's Reply

16. The Appellant responds that the Prosecution has misinterpreted its arguments, perhaps due to their different legal backgrounds.[45] The Appellant contends that discriminatory intent is a necessary motive (which is not the same as *mens rea*), and that there was no proof that the Appellant had a discriminatory attitude. Under civil law, it is not sufficient to establish the elements of an alleged crime by proof merely that the perpetrator wishes to commit the crime, but one must establish that he is willing to accept the consequences of the *actus reus*. Such an approach is, the Appellant contends, found in Article 30 of the ICC Statute.[46]

B. Discussion

17. The Appeals Chamber does not accept the assertion of the Appellant that the Trial Chamber found that a discriminatory intent is a necessary element of crimes under Article 3 of the Statute. The Trial Chamber's references to an intention to discriminate, upon which the Appellant relies,[47] were made in the context of whether poor standards of detention were the result of conduct for which the Appellant could be held culpable or were the result of circumstances beyond the Appellant's control.

18. The Appeals Chamber understands the main passage relied on by the Appellant,[48] read in context, to mean that, in determining whether the *mens rea* of the offence of outrages against personal dignity under Article 3 is present, it is relevant to consider whether poor conditions of detention have been proved to be a result of the deliberate intention, negligence, failure to act or intentional discrimination of the person responsible for detention. The Trial Chamber was not saying that a discriminatory intent is an essential element of the crime of outrages against personal dignity or of Article 3 offences more generally. The Trial Chamber explicitly set out earlier in its judgement "the elements of the

[45] Appellant's Reply, p. 5.
[46] *Ibid.*
[47] *Aleksovski* Judgement, paras. 214, 215 and 218.
[48] *Ibid.*, para. 214.

offence of outrages upon personal dignity within Article 3 of the Statute".[49] The Trial Chamber concluded that the *mens rea* of the offence is the "intent to humiliate or ridicule the victim" and did not refer to discrimination.[50] There is therefore no basis for the contention that the Trial Chamber found that a discriminatory intent was a necessary element of the offence of outrages upon personal dignity.

19. Counsel for the Appellant made the more general submission that an essential element of offences under Article 3 of the Statute is that the perpetrator is "motivated by a contempt towards other persons' dignity in racial, religious, social, sexual or other discriminatory sense".[51] However, he provided no authority to support this specific formulation or the existence generally of an international law requirement of discriminatory intent or "motive" for war crimes. The only apparent legal basis put forward for the submission is that, because of the extreme gravity of the crimes which fall within Article 3 of the Statute, not every assault on physical integrity and personal dignity is criminal and only proof of a discriminatory intent in committing those acts will establish that the acts are of adequate gravity.[52]

20. The Appellant's argument is unfounded. There is nothing in the undoubtedly grave nature of the crimes falling within Article 3 of the Statute, nor in the Statute generally, which leads to a conclusion that those offences are punishable only if they are committed with discriminatory intent. The general requirements which must be met for prosecution of offences under Article 3 have already been clearly identified by the Appeals Chamber in the *Tadi}* Jurisdiction Decision,[53] and they do not include a requirement of proof of a discriminatory intent or motivation. The Appeals Chamber recognised there that the relevant violation of international humanitarian law must be "serious" in the sense that it "must constitute a breach of a rule protecting important values and the breach must involve

[49] *Ibid.*, para. 55. *See also* para. 56.
[50] *Ibid.*, para. 56.
[51] Appellant's Brief, para. 4.
[52] *Ibid.*, paras. 2-4.
[53] "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *Prosecutor v Duško Tadić*, Case No.: IT-94-1-AR72, Appeals Chamber, 2 Oct. 1995, ("*Tadi}* Jurisdiction Decision"), para. 94.

grave consequences for the victim".[54] This in no way imports a requirement that the violation must be committed with discriminatory intent.

21. International instruments provide no basis for asserting a requirement of a discriminatory intent for violations of the laws or customs of war as referred to by Article 3 of the Statute. The crimes punishable pursuant to Article 3 include all violations of international humanitarian law other than those designated as "grave breaches" of the Geneva Conventions falling under Article 2 of the Statute or crimes falling under Articles 4 or 5 of the Statute.[55] There is nothing in the provisions of the major instruments encompassed by Article 3 of the Statute,[56] such as the 1907 Hague Convention IV and annexed Regulations[57] and the Geneva Conventions of 1949,[58] to suggest that violations must be accompanied by a discriminatory intent.

22. The specific offence of outrages upon personal dignity is found in common Article 3(1)(c) to the Geneva Conventions, Article 75(2)(b) of Additional Protocol I[59] and Article 4(2)(e) of Additional Protocol II.[60] Article 3(1)(c)[61] prohibits "outrages upon personal dignity, in particular humiliating and degrading treatment". Nothing in the language or the purpose of this provision, or any of the Additional Protocols' provisions, indicates that the offence of an outrage upon personal dignity is committed only if a discriminatory intent is proved. The acts prohibited by subsection (1) of common Article 3 are prefaced by the words:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

---

[54] *Ibid.*
[55] *Ibid.*, para. 87.
[56] *Ibid.*, para. 89.
[57] The 1907 Hague Convention IV Respecting the Laws and Customs of War on Land and Annexed Regulations Respecting the Laws and Customs of War on Land.
[58] 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.
[59] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977 ("Additional Protocol I").
[60] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977 ("Additional Protocol II").
[61] The provision on which the conviction in the present case was founded – *Aleksovski* Judgement, para. 228.

The reference in common Article 3 (1)(c) to "without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria" does *not* qualify the overriding requirement of humane treatment of all persons taking no active part in hostilities, and in particular does not restrict the acts prohibited by that article to acts committed with a discriminatory motivation. This interpretation of the article is confirmed by the International Committee of the Red Cross commentaries to the Geneva Conventions. In relation to common Article 3, the Commentary to Geneva Convention IV[62] notes the wide

[62] Pictet (ed.), *Commentary to the Geneva Conventions of 12 August 1949, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War*, ICRC (1958) ("ICRC Commentary to Geneva Convention IV").

terms of Article 3 and makes it clear that the reference to "without adverse distinction" was intended not to limit Article 3 to treatment motivated by discrimination but to remove any possible basis for an argument that inhumane treatment of a particular class of persons may be justified:

> All the persons referred to in (1) without distinction are entitled to humane treatment. Criteria which might be employed as a basis for discrimination against one class of persons or another are enumerated in the provision, and their validity denied.[63]

The ICRC Commentary to Geneva Convention I regarding common Article 3 observes that the formula "without any adverse distinction founded on..." is cumbersome, but that "in view of past atrocities the authors felt it desirable to enter into detail in order to leave no possible loophole".[64]

23. There was also no basis for the Trial Chamber to conclude that customary international law imposes a requirement that violations of the laws or customs of war that may be prosecuted under Article 3 of the Statute require proof of a discriminatory intent. It has been recognised by the Appeals Chamber in the *Tadić* Judgement that, at customary law, crimes against humanity do not require proof of a discriminatory intent.[65] Such an intent must be proved only for those crimes for which it is an express requirement, that is the various types of persecution falling under Article 5(h) of the Statute.[66] There is no evidence of State practice which would indicate the development in customary international law of such a restriction on the requisite *mens rea* of violations of the laws or customs of war, nor of the specific offence of outrages upon personal dignity; certainly the Appellant did not adduce any. In the opinion of the Appeals Chamber, it is the specific discriminatory intent required for the international crimes of persecution and genocide which distinguishes them from other violations of the laws or customs of war.

24. More recent instruments which define the offence of outrages upon personal dignity, including Additional Protocols I and II (Articles 75(2)(b) and 4(2)(e), respectively) and the

---

[63] *Ibid.* p. 40.
[64] Pictet (ed.), *ICRC Commentary to Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC (1952), p. 55.
[65] "Judgement", *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-A, Appeals Chamber, 15 July 1999 ("*Tadi}* Judgement"), paras. 288, 292; *see* generally paras. 287-292. *See also* "Judgement", *Prosecutor v. Kupreški} et al*, Case No.: IT-95-16-T, Trial Chamber, 14 Jan. 2000, para. 558 ("*Kupreški}* Judgement").
[66] *Tadi}* Judgement, para. 305. A type of discriminatory intent is also an express element of the separate crime of genocide under Article 4 of the Statute.

Statute of the ICTR (Article 4(e)) do not refer to discriminatory intent. Such a reference might have been expected if there had been a contemporary view that customary law had developed to impose such a requirement.

25. Finally, there is no suggestion in any Tribunal jurisprudence that offences under Article 3 of its Statute require proof of a discriminatory intent. Where this offence has been considered previously, it was the broader concept of human dignity that was emphasised. In the *Furundžija* Judgement, where Trial Chamber II was required to consider the nature of the offence of rape as an outrage against personal dignity, it held:

> The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or humiliating and debasing the honour, the self-respect or the mental well-being of a person.[67]

That judgement makes no reference to a need to prove any discriminatory intent in establishing the offence of outrages upon personal dignity. It speaks of human dignity as being the important value protected by the offence, but does not find that this imposes a requirement of a *specific* state of mind, discriminatory or otherwise.

26. As noted by the Trial Chamber and emphasised in the ICRC commentaries to the Geneva Conventions, the prohibition of outrages upon personal dignity is a category of the broader proscription of inhuman treatment in common Article 3.[68] The offence of inhuman treatment, punishable under Article 2(b) of the Statute as a grave breach of the Geneva Conventions, was described in the *Čelebići* Judgement as constituting:

> ...an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.[69]

That judgement also does not refer to discriminatory intention or motive.

---

[67] *Furund`ija* Judgement, para. 188.
[68] *Aleksovski* Judgement para. 54; ICRC Commentary to Geneva Convention IV, p. 38.
[69] "Judgement", *Prosecutor v Delalić et al*, Case No.: IT-96-21-T, Trial Chamber, 16 Nov. 1998 ("*Čelebići* Judgement"), para. 543.

27. In relation to the Trial Chamber's factual findings regarding *mens rea* in the present case, the Appeals Chamber is satisfied that the Trial Chamber found that the Appellant deliberately participated in or accepted the acts which gave rise to his liability under Articles 7(1) and 7(3) of the Statute for outrages upon personal dignity and was therefore guilty of these offences.[70] The Appeals Chamber should not, however, be understood as accepting the Trial Chamber's reasoning in relation to the mental element of the offence of outrages upon personal dignity, which is not always entirely clear, but is not the subject of this Appeal. In particular, the Appeals Chamber does not interpret the observation in the ICRC Commentary on the Additional Protocols, that the term "outrages upon personal dignity" refers to acts "aimed at humiliating and ridiculing" the victim,[71] as necessarily supporting a requirement of a *specific intent* on the part of a perpetrator to humiliate, ridicule or degrade the victims. The statement seems simply to describe the conduct which the provision seeks to prevent. The Trial Chamber's indication that the *mens rea* of the offence is the "intent to humiliate or ridicule" the victim[72] may therefore impose a requirement that the Prosecution was not obliged to prove and the Appeals Chamber does not, by rejecting this ground of appeal, endorse that particular conclusion.

C. Conclusion

28. For the above reasons, the Appeals Chamber finds that it is not an element of offences under Article 3 of the Statute, nor of the offence of outrages upon personal dignity, that the perpetrator had a discriminatory intent or motive. It was accordingly unnecessary for the Trial Chamber to find that the Appellant had a discriminatory intent in concluding

[70] *Aleksovski* Judgement, paras. 224, 229 and 237.
[71] Sandoz *et al.* (eds.), *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) ("ICRC Commentary on the Additional Protocols"), para. 3047. This statement was referred to by the Trial Chamber at paras. 55 and 56. There is no specific reference in the ICRC Commentaries to the Geneva Conventions to the mental element required in relation to the offence of outrages upon personal dignity.
[72] Judgement, para. 56. The Trial Chamber also observed that an outrage against personal dignity is motivated "by contempt for the human dignity of another person" - para. 56. Although this is no doubt true, it does not make such a motivation an *element* of the offence to be proved beyond reasonable doubt.

that he was guilty of the offence of outrages upon personal dignity.[73] This ground of appeal fails.

III. SECOND GROUND OF APPEAL OF THE APPELLANT: THE SERIOUSNESS OF THE VIOLATION AND THE DEFENCE OF NECESSITY

29. The Appellant's second ground of appeal appears in effect to consist of two grounds of appeal, namely, that the conduct proved, in particular the violence against the detainees, was not sufficiently grave as to warrant a conviction under Article 3 of the Statute, and, that the Appellant's conduct may have been justified by necessity.[74] The Appeals Chamber will deal with each of these in turn.

A. Seriousness

1. Submissions of the Parties

(a) Appellant's Brief

30. The Appellant submits that "outrages upon personal dignity" as defined in Article 3 of the Statute only refers to particularly horrible acts.[75] He contends that the Trial Chamber itself raised the question as to whether the different forms of violence had been so grave as

[73] This does not mean that evidence that an accused who had responsibility for detention conditions discriminated between detainees in the conditions and facilities provided would be irrelevant. If, because of deliberate discrimination between detainees, poor conditions of detention affect only one group or class of detainees, while other detainees enjoy adequate detention conditions, this is evidence which could contribute to a finding that the *mens rea* of the offence of outrages upon personal dignity is satisfied.
[74] T. 3.
[75] Appellant's Brief, para. 3.

to constitute offences recognised by the Statute of the Tribunal.[76] In his view, the intensity of the violence against prisoners at the Kaonik prison was not sufficient to establish criminal liability and no evidence was offered in support.[77]

(b) Prosecution's Response

31. The Prosecution submits that, to the extent that the Appellant claims that the Trial Chamber made a factual error in its assessment of the evidence of the requisite degree of suffering, his appeal should be dismissed for failure to demonstrate that the Trial Chamber's factual conclusions were unreasonable.[78] Furthermore, the explicit findings of the Trial Chamber refute the Appellant's claim that the *Aleksovski* Judgement failed to indicate the requisite degree of intensity.[79] These explicit findings are numerous.

32. The Appellant did not reply on this issue.

(c) Oral submissions of the Appellant

33. During the oral hearing of 9 February 2000, the Bench put three questions to the Appellant. The first question, to which the Appellant responded in the affirmative, was whether the conduct for which the accused was convicted was not a serious violation of international humanitarian law as provided in Article 1 of the Statute.[80] The second question was whether this is a point that can be raised at this stage of the proceedings, seeing that it is essentially a point relating to the jurisdiction of the Tribunal, the Appellant responded that "[w]e are not challenging the jurisdiction of the Tribunal".[81] It was the Appellant's position that, assuming that the conviction was correct, the conduct was indeed serious enough to constitute violations of international humanitarian law.[82]

---

[76] *Ibid.*, para. 7.
[77] *Ibid.*
[78] Prosecution's Response, paras. 2.35 and 2.36-2.38.
[79] *Ibid.*, paras. 2.35 and 2.38.
[80] T. 5.
[81] T. 5.
[82] T. 5-6.

34. When the Bench put the third question to the Appellant regarding the various acts of which he was convicted, he responded that such conduct was indeed a violation of humanitarian law, but his position was that this conduct had not been proven.[83] The Appellant also stated that:

> We never claimed, nor gave any indication that such conduct, speaking in abstract terms, can be permissible and acceptable, on the contrary.[84]

2. Discussion

35. The Appellant's oral submission, set out above, seems to amount to an abandonment, perhaps only in part, of this ground of appeal. Further, in his written submission, the Appellant gave no reasons as to why these crimes were not serious – it was simply submitted that they were not. The Appeals Chamber will nevertheless consider whether the conduct on which the Trial Chamber convicted the Appellant was serious enough to constitute a violation of Article 3 of the Statute.

36. The Trial Chamber found beyond reasonable doubt that the Appellant was guilty of a number of acts falling under Article 3 of the Statute. These are as follows:

(a) Under Article 7(1) of the Statute, for aiding and abetting the physical and mental mistreatment of several detainees during body searches on 15 and 16 April 1993 in the Kaonik prison. The mistreatment included insults, searches accompanied by threats, sometimes of killing, thefts and assaults carried out in his presence.[85]

(b) Under Article 7(1) of the Statute, for ordering or instigating and aiding and abetting violence on Witnesses L and M. These witnesses were beaten regularly during their detention (sometimes four to six times a day, day and night), after the Appellant initially led the guards who beat them to their cell. The frequent beatings occasionally took place in the presence of the Appellant or otherwise near his office. In one instance, the Appellant ordered guards to continue beating them when they stopped. Witness M was at one point

[83] T. 6-7.
[84] T. 7.
[85] Judgement, paras. 87, 185-186, 190, 226 and 228.

beaten with a "truncheon",[86] and in another instance, he fainted as a result of the beatings. In the words of the Trial Chamber, these witnesses were subjected to "recurring brutality".[87]

(c) Under Article 7(1) of the Statute, for aiding and abetting the mistreatment of detainees during their interrogation after the escape of a detainee.[88] One of the detainees, Witness H, the brother of the fugitive, was interrogated in the Appellant's office before he was taken back to his cell where he was beaten by three guards. Following the beating, the Appellant, escorted by the same three guards, came to Witness H's cell, asked the witness the same questions concerning the circumstances of his brother's escape, and left the cell when the witness failed to answer them. The three guards resumed the beating once the Appellant left the cell.[89] Another detainee, Witness E, was beaten with a truncheon; on another occasion, his nose was broken when a guard punched him while the Appellant nodded as a sign to continue the beating.[90] The Trial Chamber saw this as an isolated, but nevertheless "serious" incident.[91]

(d) Under Article 7(1) of the Statute, for aiding and abetting psychological abuse, such as nocturnal visits by soldiers demanding money and beating detainees, and the nocturnal playing of songs and screams of people being beaten over a loudspeaker.[92] The Trial Chamber found that this "clearly constituted serious psychological abuse of the detainees".[93]

(e) Under Article 7(1) of the Statute, for aiding and abetting the use of detainees as human shields in the villages of Skradno and Strane and for trench-digging in dangerous conditions.[94] In the case of the latter, the Appellant did not order his guards to deny entrance to HVO soldiers coming to get detainees for trench-digging purposes and he sometimes participated in the selection of detainees.[95]

---

[86] *Ibid.*, para. 196.
[87] *Ibid.*, para. 88.
[88] *Ibid.*, paras. 89, 205, 209-210 and 228.
[89] *Ibid.*, para. 209.
[90] *Ibid.*, para. 209.
[91] *Ibid.*, para. 210.
[92] *Ibid.*, paras. 187, 190, 203 and 226.
[93] *Ibid.*, para. 190.
[94] *Ibid.*, paras. 122, 125, 128-129 and 229.
[95] *Ibid.*, para. 129.

(f) Under Article 7(3) of the Statute, as prison warden, for the crimes committed by guards inside the Kaonik prison.[96]

37. The Trial Chamber, in making the above findings, considered the context in which the psychological and physical violence occurred. The Trial Chamber held that it:

> ... categorically rejects the idea that the existence of such situations [the precariousness of the detainees' situation and the existence of an armed conflict] justifies recourse to force as described by the former Kaonik prison detainees. Furthermore, the Trial Chamber considers that the commission of violent offences against vulnerable, helpless persons or those placed in a situation of inferiority constitutes an aggravating circumstance which, in this case, excludes the excuse which might derive from a situation of conflict which had itself led to unrest.[97]

The Trial Chamber also held that:

> In sum, the violence inflicted on the Muslim detainees of Kaonik prison appears to be a reprehensible infringement of international human rights which would be absolutely unacceptable in times of peace. The Trial Chamber considers that the existence of an armed conflict does not render it tolerable and that it constitutes a grave violation of the principles of international humanitarian law arising from the Geneva Conventions.[98]

The Appeals Chamber, having considered the various acts for which the Appellant was convicted, can find no reason whatsoever to doubt the seriousness of these crimes. Under any circumstances, the outrages upon personal dignity that the victims in this instance suffered would be serious. The victims were not merely inconvenienced or made uncomfortable – what they had to endure, under the prevailing circumstances, were physical and psychological abuse and outrages that any human being would have experienced as such.

3. Conclusion

38. This ground of appeal fails.

---

[96] *Ibid.*, paras. 104-106, 114, 117-118 and 228.
[97] *Ibid.*, para. 227.
[98] *Ibid.*, para. 228.

B. Defence of necessity

1. Submissions of the Parties

(a) Appellant's Brief

39. The Appellant submits that the Trial Chamber noted that inside the Kaonik prison not a single prisoner suffered any injury as a result of the armed conflict and that only a guard who protected the facility was injured, whilst outside Kaonik, many people suffered serious physical injury and even lost their lives due to the armed hostilities.[99] However, the Trial Chamber's failure to comment on the contradiction in form, degree and intensity of violence is a misapplication of law.[100]

40. The Appellant submits that the criminal law concept of extreme necessity had to be applied to the facts.[101] This concept excludes the perpetrator's unlawful actions since such actions are motivated by the intent to avoid a worse violation.[102]

(b) Prosecution's Response

41. The Prosecution submits that it should not be required to respond to paragraph 8 of the Appellant's Brief because of its incomprehensibility.[103] Had it been intended as a separate ground of appeal, it should be rejected for failing to indicate, in accordance with Article 25 of the Statute, the alleged errors of law or fact the Appellant wishes to invoke.[104] On the presumption that the Appellant wants to rely on extreme necessity, or duress,[105] the argument should be rejected since the Appellant does not identify where in the trial record or pre-trial proceedings this defence was raised, nor does it identify why the Trial Chamber was in error by rejecting it.[106] The Appellant is not entitled to raise such defences for the

---

[99] Appellant's Brief, para.7.
[100] *Ibid.*
[101] *Ibid.*, para. 8.
[102] *Ibid.*
[103] Prosecution's Response, para. 2.34.
[104] *Ibid.*
[105] *Ibid.*
[106] *Ibid.*, para. 2.61.

first time on Appeal.[107] The Trial Chamber also took account of the difficult circumstances of armed conflict in its assessment of the poor prison conditions and in determining sentence.[108]

42. The Prosecution further submits that the injuries and loss of life that occurred outside the prison are irrelevant to the Appellant's liability for the crimes with which he was charged.[109] The Trial Chamber found the prevailing conditions of armed conflict constituted "aggravating circumstances", and rejected the Appellant's arguments for a comparison between the violence inflicted on the detainees at the Kaonik prison with the casualties arising from the ongoing armed conflict.[110]

(c) Appellant's Reply

43. The Appellant submits that the concept of extreme necessity (*exceptio casu necessitatis*) is familiar to civil law.[111] In civil law procedure, the court is authorised to apply the concept on its own in accordance with the principle *iura novit curia.*[112] The parties only have to prove the facts and their legal claims or opinions do not bind the court.[113] In this regard, the applicable facts proved by the Defence are that: (a) an armed conflict existed outside Kaonik prison in the Busova~a municipality; (b) there was a large number of civilian casualties in that armed conflict; (c) not one of the prisoners in Kaonik was wounded or killed apart from the prison guards; and (d) the Appellant did not participate in the decision-making regarding the imprisonment of Bosnian Muslims, as he was forced into a situation with no proper options.[114] These factual findings could be interpreted under the legal principle *exceptio casu necessitatis.*[115]

44. The Appellant further submits that extreme necessity is not the same as duress, since the former has a broader meaning and could be used to exclude the guilt, illegality or

---

[107] *Ibid.*
[108] *Ibid.*, para. 2.62 (referring to Judgement, paras. 212, 213, 215, 216, 219, 221; paras. 235-36).
[109] *Ibid.*, para. 2.47.
[110] *Ibid.* (referring to Judgement, para. 227).
[111] Appellant's Reply, p. 6.
[112] *Ibid.*
[113] *Ibid.*
[114] *Ibid.*, pp. 6-7.

punishment of the perpetrator.[116] A provision similar to extreme necessity is found in Article 31(d) of the ICC Statute.[117] This concept, although absent from the Statute of the Tribunal, should be applied as a general principle of law from a national system, as provided for in Article 21(c) of the ICC Statute.[118]

(d) Appellant's Additional Submissions

45. The Appeals Chamber ordered the parties to file additional submissions on:

> (2) how the defence of "necessity" referred to in the Appeal of Zlatko Aleksovski was raised before the Trial Chamber and what evidence presented to the Trial Chamber relates to it.[119]

Only those arguments not raised in the Appellant's Brief and the Appellant's Reply will be mentioned here.

46. In the Appellant's Additional Submissions, it is pointed out that the Appellant did not emphasise this ground for excluding criminal responsibility at trial.[120] The reason is that this accords with the legal practice and rules of domestic legislation that is based on civil law where a court is bound only by the established facts of the case and is authorised and obliged to apply legal qualifications in line with the applicable law, in accordance with the Roman law maxims *da mihi facta, dabo tibi ius* and *iura novit curia*.[121]

47. At trial, the Appellant attempted to establish that by the time the Appellant became warden of Kaonik, he was faced with the *fait accompli* of interned civilians and a raging armed conflict in the region.[122] The Appellant attempted to protect the civilians from the greater harm outside the Kaonik facility by detaining them, proof of which was that none of

---

[115] *Ibid.*, p. 7.
[116] *Ibid.*
[117] *Ibid.*, p. 8.
[118] *Ibid.*
[119] "Scheduling Order", Case No.: IT-95-14/1-A, 8 Dec. 1999.
[120] Appellant's Additional Submissions, para. 11.
[121] *Ibid.*
[122] *Ibid.*

the interned persons were killed or wounded.[123] On the basis of these facts, the Appellant submits that the defence of extreme necessity should have been applied.[124]

(e) Prosecution's Additional and Further Additional Submissions

48. The Prosecution made further submissions on the defence of necessity in the Prosecution's Additional Submissions and the Prosecution's Further Additional Submissions.

49. Apart from the submissions already made on this point, the Prosecution asserts that an electronic search of the transcripts of the proceedings before the Trial Chamber using the expression "extreme necessity" has yielded no result.[125] The final trial brief of the Appellant also makes no mention of the expression.[126] On the assumption that the Appellant actually refers to duress,[127] the search of the transcripts and final trial brief using "duress" has also yielded no results.[128] The Appellant never expressly raised the defence of "extreme necessity" or "duress" at trial.[129]

50. In response to the Appellant's factual assertions relating to the defence of necessity, the Prosecution's position is that: (a) the Appellant did not raise the defence at trial; (b) the facts as alleged by the Appellant on this issue were not accepted; (c) the same general facts were considered by the Trial Chamber in relation to the liability of the Appellant; (d) the evidence relied on was relevant to the Defence position at trial that the Appellant was not responsible for the unlawful detention of civilians; and (e) the Appellant's allegations refer to a basis of liability for which he was not found guilty.[130] In response to the Appellant's legal assertions, the Prosecution's position is: (a) the proposition that there is no obligation on an accused to raise a defence upon which it is relying, and that the obligation is upon the Trial Chamber to apply any possible defence, is not consistent with the practice of the

---

[123] *Ibid.*
[124] *Ibid.*
[125] Prosecution's Additional Submissions, para. 11.
[126] *Ibid.*, para. 11.
[127] *Ibid.*, para. 12.
[128] *Ibid.*, para. 13.
[129] *Ibid.*, para. 14.
[130] Prosecution's Further Additional Submissions, para. 5.

Tribunal, is not directly applicable to the Tribunal and is not binding on the Tribunal; (b) even accepting the existence of this proposition in civil law systems, it is not uniformly accepted that the defence has no obligation to raise a defence available to him.[131] The Prosecution submits that the appeal should be dismissed because the facts relied upon do not raise the defence of necessity, and further, the facts invoked by the Appellant are related to allegations which are not before the Appeals Chamber.[132] Should the Prosecution's submission be accepted, consideration of the *iura novit curia* principle is moot.[133]

2. Discussion

51. The Appeals Chamber considers that, in general, accused before this Tribunal have to raise all possible defences, where necessary in the alternative, during the trial, and where so required under the Rules of Procedure and Evidence of the International Tribunal ("Rules"), before trial.[134] It follows that accused, generally, cannot raise a defence for the first time on appeal.[135] This general obligation to raise all possible defences during trial stems from the Rules – in particular Rules 65*ter* and 67 - as well as the obligation upon accused to plead to the charges against them.[136] It is also important that the Prosecution should be allowed the opportunity to cross-examine witnesses testifying in support of any defence put forward and to call rebuttal witnesses, if necessary. The Appeals Chamber may also have some difficulty in properly assessing a Trial Chamber's judgement where the Defence failed to raise a defence expressly, despite evidence having been led that may support such a defence. However, all of this is not to say that the right of accused to be presumed innocent is in any way impaired or that the Prosecution does not bear the burden

---

[131] *Ibid.*, para. 6.
[132] *Ibid.*, para. 7.
[133] *Ibid.*
[134] *See* Rule 67(A) and (B) of the Rules in relation to alibi and special defences. This Rule was in force at the time of the trial in this case. *Also see* Rule 65 *ter* (F) of the Rules, which came into force after the trial in this case and reads, in part: "...the pre-trial Judge shall order the defence ... to file a pre-trial brief addressing factual and legal issues, and including a written statement setting out: (i) in general terms, the nature of the accused's defence; (ii) the matters with which the accused takes issue in the Prosecutor's pre-trial brief; and (iii) in the case of each such matter, the reason why the accused takes issue with it."
[135] *Tadi}* Judgement, para. 55; *The Prosecutor v. Zlatko Aleksovski*, "Decision on Prosecutor's Appeal on Admissibility of Evidence", Case No.: IT-95-14/1-AR73, Appeals Chamber, 16 Feb. 2000, paras. 18-20.
[136] Rule 62 of the Rules ("Initial Appearance of Accused").

of proving its cases. In this Appeal, the Appeals Chamber will nevertheless consider the defence of necessity, as pleaded.

52. Assuming for the moment that necessity constitutes a valid defence and that the Appellant is entitled to raise it, the Appeals Chamber is of the view that this ground of appeal is entirely misplaced. The reasons for this conclusion are as follows.

53. During the oral submissions, the Appellant, in answer to a question from the Bench, indicated that the defence of necessity is raised only in relation to the Appellant's treatment of the detainees, not the fact of detention.[137] Having regard to the Trial Chamber's Judgement, the Appellant was neither convicted for having detained anyone[138] nor for having been the warden of the Kaonik prison. He was convicted of the mistreatment detainees suffered directly or indirectly at his hands or the hands of others over whom he had superior responsibility.

54. What the Appellant is in effect submitting is that the *mistreatment* the detainees suffered – not the fact of detention, with which he was not charged – should have been interpreted by the Trial Chamber as somehow having been justified by the assertion that they would have suffered even more had they not been treated the way they were while in detention. The Appellant does not and cannot argue, in the present case, that he was faced with only two options, namely, mistreating the detainees or freeing them. The Appellant, faced with the actual choice of mistreating the detainees or not, was convicted for choosing the former. This was intimated from the Bench when during the oral hearings on 9 February 2000, the counsel for the Appellant was asked:

> ...you said the accused chose a lesser evil, presumably as against the greater evil, but wouldn't it be open to him to have chosen no evil at all? Wouldn't that have been an option to him?[139]

55. In light of the misplaced basis of this aspect of the Appellant's appeal, the Appeals Chamber considers it unnecessary to dwell on whether necessity constitutes a defence under

---

[137] T. 11-12.
[138] Judgement, para. 102.
[139] T. 12.

international law, whether it is the same as the defence of duress or whether the principle *iura novit curia* should be applied in this case.

3. Conclusion

56. This ground of appeal fails.

IV. THIRD GROUND OF APPEAL OF THE APPELLANT: FAILURE TO CORRECTLY APPLY THE STANDARD OF PROOF BEYOND REASONABLE DOUBT

A. Submissions of the Parties

1. Appellant's Brief

57. The Appellant submits that the Prosecutor has not proved beyond reasonable doubt the *actus reus* element of outrages upon personal dignity under Article 3 of the Statute, and that, despite the absence of evidence in this regard, the Trial Chamber incorrectly convicted the Appellant on Count 10.[140] In particular, the Trial Chamber relied exclusively on the highly subjective testimony of witnesses, in the absence of objective medical documentation or a scientifically objective expert appraisal, to establish an objective element of the alleged crime, namely, that serious bodily harm or mental suffering occurred.[141] For example, the Trial Chamber rejected the testimony of Hamdo Dautovi}, despite the fact that this witness referred to the repeated occurrence of serious violence during the entire period of his stay at

[140] Appellant's Brief, para. 5.
[141] *Ibid.*, paras. 6 and 9.

the Kaonik prison.[142] The Trial Chamber was therefore aware of the unreliability and subjectivity of such testimony but did not consider this when evaluating the testimony of other witnesses.[143] This disadvantaged the Appellant and violated the standard of proof "beyond reasonable doubt".[144]

2. Prosecution's Response

58. The Prosecution submits that the Appellant raised the issue of reliance on mere witness testimony in the absence of medical or other scientifically objective evidence at trial, but that the argument was rejected in the Judgement where it was held that "the cumulative testimony was consistent enough and the number of witnesses sufficient, to be satisfied beyond reasonable doubt that acts of violence were committed".[145] The Appellant gives no reason why this finding is legally flawed and should therefore be dismissed.[146]

59. In addition, during the trial the Appellant admitted that many of the facts alleged by the Prosecution and confirmed by the witnesses had indeed taken place (for example, forced trench digging in dangerous circumstances during which some prisoners were killed; mistreatment by HVO soldiers outside the prison).[147] In relation to these admissions, the Appellant either disputed the legal characterisation of those facts or disputed that the Appellant played any culpable role in their commission.[148] In light of these admissions, the Appellant's arguments are misplaced, at least with respect to the events whose veracity was not disputed.[149]

60. In relation to facts not admitted, the Trial Chamber's factual and legal findings on events and facts are unassailable.[150] Unless the Rules or general international law provides otherwise, Trial Chambers are free to admit various types of evidence to determine whether

---

[142] *Ibid.*, para. 9.
[143] *Ibid.*
[144] *Ibid.*
[145] Prosecution's Response, paras. 2.49 and 2.50, with reference to Judgement, para. 223.
[146] *Ibid.*, para. 2.51.
[147] *Ibid.*, para. 2.52. "HVO" stands for the "Croatian Defence Council".
[148] *Ibid.*
[149] *Ibid.*, para. 2.53.
[150] *Ibid.*, para. 2.54.

or not a particular fact has been established beyond reasonable doubt.[151] Even a single credible witness may suffice: law does not require corroboration.[152]

61. With reference to the suggestion that the Trial Chamber should have discarded the testimony of witnesses other than Hamdo Dautovi} because of their unreliability and subjectivity, the Prosecution submits that it is the task of the trial Judges to determine whether one or all witnesses are reliable, whether their testimony is credible and whether further corroboration of a particular fact is required.[153] The findings indicate that the Trial Chamber correctly discharged its duties relating to the weighing of evidence.[154]

B. Discussion

62. Neither the Statute nor the Rules oblige a Trial Chamber to require medical reports or other scientific evidence as proof of a material fact. Similarly, the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration. The only Rule directly relevant to the issue at hand is Rule 89. In particular, sub-Rule 89(C) states that a Chamber "may admit any relevant evidence which it deems to have probative value", and sub-Rule 89(D) states that a Chamber "may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial".

63. Trial Chambers are best placed to hear, assess and weigh the evidence, including witness testimonies, presented at trial. Whether a Trial Chamber will rely on single witness testimony as proof of a material fact, will depend on various factors that have to be assessed in the circumstances of each case.[155] In a similar vein, it is for a Trial Chamber to consider whether a witness is reliable and whether evidence presented is credible. The Appeals Chamber, therefore, has to give a margin of deference to the Trial Chamber's evaluation of the evidence presented at trial. The Appeals Chamber may overturn the Trial Chamber's

[151] *Ibid.*, para. 2.55.
[152] *Ibid.*, para. 2.56.
[153] *Ibid.*, para. 2.58.
[154] *Ibid.*
[155] *Tadi}* Judgement, para. 65.

finding of fact only where the evidence relied on could not have been accepted by any reasonable tribunal[156] or where the evaluation of the evidence is wholly erroneous.

64. The Appeals Chamber is of the view that the Appellant has failed to show that the Trial Chamber erred in its evaluation of the evidence. In the present case, the Trial Chamber's reliance on witness testimonies without medical reports or other scientific evidence as proof of the suffering experienced by witnesses, has not been shown to be either wrong as a matter of law, or unreasonable. Similarly, despite not having been presented with any specific reasons why the Trial Chamber should have rejected the testimony of more witnesses, the Appeals Chamber is satisfied that the Trial Chamber did not err in the exercise of its discretion when it evaluated the testimony of the various witnesses. The Trial Chamber accepted such testimony as sufficient and credible, as it was entitled to do. The Trial Chamber, therefore, applied the standard of proof beyond reasonable doubt, in relation to this ground of appeal, correctly.

C. Conclusion

65. This ground of appeal fails.

[156] *Ibid.*

V. FOURTH GROUND OF APPEAL OF THE APPELLANT: THE TRIAL CHAMBER ERRED IN ITS APPLICATION OF ARTICLE 7(3) OF THE STATUTE TO THE FACTS IN THIS CASE

A. Submissions of the Parties

1. Appellant's Brief

66. Ground 4 of the Appellant's appeal alleges that the Trial Chamber erred in the application of Article 7(3) of the Statute. The Appellant accepts the interpretation of the Trial Chamber in respect of the constituent elements of criminal liability under Article 7(3).[157] But he does not accept the finding of the Trial Chamber that he had "factual authority over the guards".[158] In his view, for the application of Article 7(3), the existence

[157] Appellant's Brief, para. 22. The three elements identified by the Trial Chamber in paragraph 69 of the Judgement correspond to the findings of the *^elebi}i* Judgement.
[158] Appellant's Brief, paras. 15-16.

of authority to effectively control by giving binding orders and to sanction in cases of disobedience, must be established.[159] In respect of the prison guards, who were HVO military police, the Appellant submits that he did not have such authority, as his role was purely administrative and representative.[160] Further, he submits that he was a civilian prison warden, having no authority analogous to that of a military superior over the guards in the prison,[161] and that he only had power to inform the superiors of the guards of unlawful treatment, as a general duty for civilians under the former Socialist Federal Republic of Yugoslavia Law on Criminal Procedure, but had no power to punish.[162] He asserts that, since he showed at the trial by exhibits that he reported various incidents involving the guards to the Military Police Command and the President of the Travnik Military Tribunal, he could not be held responsible for the incidents.[163]

2. Prosecution's Response

67. The Prosecution responds that the Appellant has failed to identify a legal error, as he is challenging the existence of a superior-subordinate relationship and arguing that *de facto* authority is not sufficient.[164] It submits that both matters were argued and adjudicated at trial, and that the Trial Chamber applied the law correctly to the evidence before it.

3. Appellant's Reply

68. The Appellant replies that he indeed challenges the existence of a superior-subordinate relationship, which is the first of three principles for command responsibility under Article 7(3). [165] He repeats that he was not formally appointed as prison warden by

[159] *Ibid.*, para. 16.
[160] *Ibid.*, para. 17.
[161] *Ibid.*, para. 20.
[162] *Ibid.*, paras. 21-22.
[163] *Ibid.*, para. 22.
[164] Prosecution's Response, paras. 3.6 and 3.7.
[165] Appellant's Reply, para. Ad.6.

the authority that controlled the guards, i.e. the Ministry of Defence, but by the Ministry of Justice, and that he could not have *de jure* or *de facto* command over the guards. [166]

B. Discussion

69. Article 7(3) provides that:

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

70. In its Judgement, the Trial Chamber found that "the evidence did not establish beyond any reasonable doubt that the accused himself was a member of the military police".[167] However, in its view, "anyone, including a civilian, may be held responsible pursuant to Article 7(3) of the Statute if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations".[168] It went on to find that the Appellant had effective authority over the guards, as shown by his issuing orders to them and the availability to him of the means to report to superiors the situation in the prison, including incidents of mistreatment of prisoners.[169] The Trial Chamber found, however, that the Appellant failed to report to the superior authority the offences committed by the guards and HVO soldiers within the prison, and that he even joined in certain incidents of assault.[170]

71. The Appeals Chamber, on the basis of the submissions of the parties and the findings of the Trial Chamber, reaches the following conclusions regarding this ground of appeal.

---

[166] *Ibid.*
[167] Judgement, para. 103.
[168] *Ibid.*
[169] *Ibid.*, paras. 104 and 117.
[170] *Ibid.*, para. 117.

72. The Appeals Chamber notes that the Appellant has agreed with the Trial Chamber in respect of the constituent elements of liability under Article 7(3).[171] Three elements have been identified by the Trial Chamber: 1) the existence of a superior-subordinate relationship; 2) the fact that the superior "knew or had reason to know that a crime was about to be committed or had been committed"; and 3) his obligation to take all the necessary and reasonable measures to prevent or to punish the perpetrators.[172]

73. The Appellant claims to appeal against the way in which the Trial Chamber applied the law to his case, but this ground of appeal in essence questions the inferences drawn from facts found by the Trial Chamber regarding his authority within the Kaonik prison. The Appeals Chamber therefore considers this ground to be factual in nature.

74. The Appellant disputes two facts found by the Trial Chamber. The first fact is that he had authority over the prison guards who were HVO military police, as demonstrated by his powers to issue orders to them, his generally elevated status within the Kaonik prison, and his right to report to the Military Police command and the Travnik Military Tribunal within whose jurisdiction the prison was placed. The second fact is that he failed to report the offences by his subordinates to either of the superior authorities. Both facts

[171] The Trial Chamber referred expressly to the Appellant's acceptance of the elements at first instance: *ibid.*, para. 71.
[172] *Ibid.*, para. 69.

were found to be proved by the Trial Chamber after examining evidence and arguments specific to them. Like the Trial Chamber, the Appellant also construes the authority of a superior to mean that he has the power to order and to enforce his orders in certain ways.[173] The Appeals Chamber therefore takes the view that, unless there is good reason to believe that the Trial Chamber has drawn unreasonable inferences from the evidence, it is not open to the Appeals Chamber to disturb the factual conclusions of the Trial Chamber.[174] In this appeal, the Appellant has failed to convince this Chamber that unreasonable conclusions were drawn by the Trial Chamber in respect of the two facts.

75. The legal aspect of this ground of appeal consists of a single issue as to whether the Appellant was a commander of the guards, who were military police, for the purposes of Article 7(3) of the Statute.

76. Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision. In the instant appeal, the Appellant contends that, because he was appointed by the Ministry of Justice rather than the Ministry of Defence, he did not have such powers over the guards as a civilian prison warden,[175] whereas the Trial Chamber finds that he was the superior to the guards by reason of his powers over them.[176] The Appeals Chamber takes the view that it does not matter whether he was a civilian or military superior,[177] if it can be proved that, within the Kaonik prison, he had the powers to prevent or to punish in terms of Article 7(3). The Appeals Chamber notes that the Trial Chamber has indeed found this to be proven, thus

[173] Appellant's Brief, para. 16.
[174] *Tadi}* Judgement, para. 64.
[175] Appellant's Brief, para. 22.
[176] Judgement, paras. 101-106.
[177] The Appellant relies in this regard on the 1998 ICC Statute in particular: Appellant's Brief, para. 17. Article 28 of the Statute clearly envisages responsibility for both military and civilian superiors.

its finding that the Appellant was a superior within the meaning of Article 7(3).[178]

C. Conclusion

77. The Appeals Chamber therefore finds that the fourth ground of appeal of the Appellant must fail for lack of merit, for the following reasons: a) the facts disputed by the Appellant have all been argued and adjudicated at the trial, with no good cause having been shown on appeal to justify a re-examination of the factual findings of the Trial Chamber; and b) the Appellant does not challenge the Trial Chamber's interpretation of the elements of command responsibility, the application of which by the Trial Chamber has not been shown to be unreasonable.

[178] *Ibid.*, para. 106.

VI. FIRST GROUND OF CROSS-APPEAL BY THE PROSECUTION: INTERNATIONALITY AND "PROTECTED PERSONS"

A. Submissions of the Parties

1. Cross-Appellant's Brief

78. The Prosecution argues that the majority of the Trial Chamber[179] applied the wrong legal test to determine whether, for the purposes of Article 2 of the Statute, the armed conflict in the present case was international in nature.[180] With regard to the question whether the acts of the HVO could be imputed to the Government of Croatia, the correct test under international law is the "overall control" test, as set forth in the *Tadić* Judgement; that Judgement does not require evidence of specific orders or directions in respect of individual operations.[181] The Prosecution further contends that the factual findings of the Trial Chamber below satisfy the requirements of the "overall control" test,[182] and therefore, that the only reasonable conclusion is that the armed forces of the Bosnian Croats, the HVO, were acting under the overall control of Croatia.[183]

79. The Prosecution also contends that the majority of the Trial Chamber erred in applying a strict nationality requirement to determine whether the victims were protected persons within the meaning of Article 4 of Geneva Convention IV.[184] In its view, if the Appeals Chamber finds that the Bosnian Croat captors acted as *de facto* organs of Croatia, it follows that the Bosnian Muslim detainees had a different nationality from the detaining

---

[179] "Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, on the Applicability of Article 2 of the Statute Pursuant to Paragraph 46 of the Judgement", Case No.: IT-95-14/1-T, 25 June 1999 ("Majority Opinion").
[180] Cross-Appellant's Brief, paras. 2.11, 2.17-2.29.
[181] *Ibid.*, paras. 2.13-2.16.
[182] *Ibid.*, para. 2.32. Croatia exercised political influence and control over the Bosnian Croats (*ibid.*, paras 2.33-2.35); Croatia sent troops to Bosnia and Herzegovina ("BH") to serve Croatian interests (*ibid.*, paras. 2.36-2.38); Croatia exercised military control over the HVO (*ibid.*, paras. 2.39-2.49). In this regard the majority of the Trial Chamber failed to consider six documents showing the presence of HV in BH and their support for the HVO (*ibid.*, para. 2.47).
[183] *Ibid.*, para. 2.50.
[184] *Ibid.*, paras. 2.56 and 2.58.

power.[185] The Prosecution notes that in the *Tadi}* Judgement it was held that the primary purpose of Article 4 of Geneva Convention IV is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control of the State in whose hands they find themselves.[186] The Prosecution further notes that both the Appeals Chamber in *Tadi}*, and the Trial Chamber in *^elebi}i* held that ethnicity, rather than nationality, may be a more appropriate gauge of national allegiance in the context of modern armed conflicts.[187]

80. The Prosecution argues, therefore, that both requirements for the application of Article 2 of the Statute are met, and further that the criminal liability of the Appellant under Counts 8 and 9 (grave breaches) can be established on the basis of the record below, since these charges arise out of the same factual allegations as Count 10, on which the Appellant was convicted.[188]

2. Appellant's Response

81. The Appellant requests that the Appeals Chamber reject this ground of appeal.[189] The Appellant contends that in the present case, the evidence showed without any doubt that the Appellant and the alleged victims were citizens of B H.[190] The *^elebi}i* Judgement is inapplicable because in the present case the Bosnian Croats did not secede, like the Bosnian Serbs, but rather, they voluntarily joined the Bosnian Muslims in forming BH and actively supported the creation and preservation of that entity.[191] The Appellant argues that the attitude of the Prosecution towards Article 4 of Geneva Convention IV, that the Article should not be interpreted on formal bonds and purely legal relations, is inapplicable. Article 4 of the Geneva Conventions must therefore be strictly applied, in accordance with the principle of legality or *nullem crimen sine lege*.[192]

---

[185] *Ibid.*, para. 2.57.
[186] *Ibid.*, para. 2.59, with reference to the *Tadi}* Judgement, para. 168.
[187] *Ibid.*, para. 2.60.
[188] *Ibid.*, paras. 2.66-2.69.
[189] Appellant's Response, p. 22.
[190] *Ibid.*, p. 5.
[191] *Ibid.*
[192] *Ibid.*, pp. 5, 6 and 13.

82. With regard to the argument that the conflict was international in nature, the Appellant contends that there are four reasons why this should be rejected, namely: (a) any Croatian intervention took place in 1992 and was against the Serbian forces, not in the first half of 1993 against Bosnian Muslims;[193] (b) Croatia did not control the Bosnian Croat military forces in Central Bosnia;[194] (c) Croatia did not intervene militarily in Central Bosnia where the alleged violations took place and did not control the HVO military forces;[195] and (d) the conflict must be deemed internal to avoid unequal application of Article 2 as between Bosnian Croats and Bosnian Muslims.[196] The Appellant further argues that the International Court of Justice's ("ICJ") decision in the *Nicaragua* case[197] can be distinguished from the present case,[198] and that it set forth a stricter test for imputing acts to a State in relation to civil, not criminal liability, than that of the "overall control" test.[199] He further argues that, as these are criminal proceedings, the applicable test should be even more stringent.[200] In his view, if there was intervention by Croatia during the critical period (although, he argues, there is no evidence to support this), it was justified and should not be held to internationalise the conflict.[201] He asserts that there was no state of war between Croatia and Bosnia and Herzegovina,[202] that under Article 4(2) of Geneva Convention IV, Croatia and BH were co-belligerents, that they had normal diplomatic relations, and that, therefore, the victims were not protected persons.[203]

83. The Appellant also contends that the Trial Chamber did not err in omitting to apply the "overall control" test established in the *Tadi}* Judgement, as the *Tadi}* Judgement dealt with completely different factual and legal circumstances and was delivered after the Trial Chamber rendered judgement in this case.[204]

---

[193] *Ibid.*, pp. 7-8.
[194] *Ibid.*, p. 7.
[195] *Ibid.*
[196] *Ibid.* pp. 7 and 20.
[197] *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America), Merits, Judgement, ICJ Reports (1986) ("*Nicaragua*"), p. 14.
[198] *Ibid.*, pp. 9-11.
[199] *Ibid.*, pp. 8-9.
[200] *Ibid.*, p. 9.
[201] *Ibid.*, pp.10, 11 and 21.
[202] *Ibid.*, pp. 13-15 and 19.
[203] *Ibid.*, pp. 13-15.
[204] *Ibid.*, p. 21.

3. Cross-Appellant's Reply

84. The Prosecution argues in reply that the *Tadi}* Judgement establishes a precedent which should not be departed from unless the Appeals Chamber concludes that it was clearly erroneous.[205] The Appellant's arguments regarding a lack of evidence of Croatia's intervention and justifications for it are refuted.[206] The Prosecution furthermore argues that the Appeals Chamber's findings in *Tadi}* as to protected person status should be followed. The Prosecution contends that such an approach would not be inconsistent with principles of international criminal law, such as the principle of *nullum crimen sine lege*.[207]

4. Prosecution's Additional Submissions

85. The Appeals Chamber ordered the parties to file additional submissions on "[...] the doctrine of *stare decisis*, its applicability, if at all, to proceedings before the International Tribunal and in particular to this case [...]".[208]

86. The Prosecution submits that the doctrine, as such, exists in common law systems and is not a general principle of law.[209] The Prosecution argues that the term "precedent" is preferable to "*stare decisis*".[210] The use of precedents is common to courts in both common and civil law systems.[211] The Prosecution refers to its Cross-Appellant's Reply where its submissions are set out on the applicability of the *Tadi}* Judgement as to (a) the proper test to determine the existence of an international armed conflict and (b) the interpretation of the nationality requirement for civilians under Geneva Convention IV to be considered protected persons.[212]

---

[205] Cross-Appellant's Reply, paras. 1.5-1.18.
[206] The Prosecution refutes the following: (1) the Appellant's claim that the Prosecution relies on an "intervention theory" (*ibid.*, paras. 2.3-2.5); (2) the Appellant's claim that the conflict must be deemed internal to avoid unequal application of Article 2 of the Statute (*ibid.*, paras. 2.7-2.10); (3) the Appellant's claim that there was no evidence that Croatia was at war with BH (*ibid.*, paras. 2.11-2.44); (4) the Appellant's claim that the "effective control" test should be applied instead of the "overall control" test (*ibid.*, paras. 2.46-2.60).
[207] *Ibid.*, paras. 2.67-2.88.
[208] Scheduling Order, Case No.: IT-95-14/1-A, 8 Dec. 1999.
[209] Prosecution's Additional Submissions, para. 4.
[210] *Ibid.*
[211] *Ibid.*, para. 4.
[212] *Ibid.*, paras. 5-7.

5. Appellant's Additional Submissions

87. In the Appellant's Additional Submissions on the doctrine of *stare decisis*, he asserts that the application of the doctrine relates to the issue of the sources of law, rather than differences between civil and common law systems.[213] He submits that only international humanitarian law which is beyond any doubt part of customary law can be applied by the International Tribunal, and points to the Report of the Secretary-General, which makes no mention of precedent as a source of law.[214] The Appellant asserts that the judgements of the ICJ are only valid for the case under consideration, and that its Statute does not refer to precedents as a source of law.[215] Reference is also made to Article 21 of the ICC Statute, which prioritises the legal sources to which recourse may be had, and according to which the ICC may only apply principles and rules of law as interpreted in its previous decisions as a last resort.[216] The ICC Statute further explicitly prohibits the use of analogy in defining a crime.[217] The Appellant asserts that precedent represents an individual legal norm that resolves a particular case and is valid only for that case.[218] He notes that, while in some common law systems judgements are used as sources of law, in that the legal principle applied in a particular case is deemed compulsory for all future cases thereby becoming a general legal norm, neither the courts of the former Yugoslavia nor its successor States apply a system of precedents, as it runs counter to the principle of legality.[219]

88. The Appellant contends that, in a functional sense, judicial practice may only be applied as something akin to a legal source where the facts are identical or very similar.[220] The Appellant submits that, while the doctrine of *stare decisis* should not be excluded, it should only be applied on a restrictive basis, and that, as a prerequisite to applying a precedent, the similarity of the facts of the case must be established.[221] The Appellant asserts that the armed conflict between Serbian and Muslim ethnic groups in Bosnia and

[213] Appellant's Additional Submissions, paras. 3-8.
[214] *Ibid.*, paras. 4-5.
[215] *Ibid.*, para. 6.
[216] *Ibid.*, para. 7.
[217] *Ibid.*
[218] *Ibid.*, para. 8.
[219] *Ibid.*
[220] *Ibid.*

Herzegovina was basically different from that between the Croatian and Muslim ethnic groups.[222] All the other armed conflicts from 1992 to 1994 in Bosnia and Herzegovina were not identical or even similar by their general or internal features.[223] Since the facts of the present case are basically different from that of *Tadi}*, the Appellant asserts that the doctrine of *stare decisis* is not applicable in the present case.[224]

B. Discussion

89. The arguments advanced by the parties in this appeal raise directly the question whether decisions of the Appeals Chamber are binding on itself, and also indirectly, whether its decisions are binding on Trial Chambers and whether decisions of Trial Chambers are binding on each other.

90. The Prosecution contends that some of the arguments advanced by the Appellant can only be upheld if the Chamber does not follow its previous decisions, since those arguments are, in the Prosecution's submission, plainly inconsistent with those decisions.

91. The Appeals Chamber will now consider these questions.

1. Whether the Appeals Chamber is bound to follow its previous decisions

92. Traditionally common law jurisdictions have recognised the principle of *stare decisis*, or binding precedent, by which courts are bound by their previous decisions. However, in 1966, the House of Lords (the United Kingdom's highest court) decided that, while it would continue to treat previous decisions as "normally binding," it would "depart from a previous decision when it appears right to do so."[225] The trend which emerges from

---

[221] *Ibid.*, para. 9.
[222] *Ibid.*, para. 10.
[223] *Ibid.*
[224] *Ibid.*
[225] The practice statement was read by Lord Gardiner LC, on behalf of himself and the Lords of Appeal in Ordinary, before judgements were delivered on 26 July 1966. *See* Cross and Harris, *Precedent in English Law* (1991), p.104, n. 27.

an examination of common law jurisdictions is that their highest courts will normally consider themselves bound by their previous decisions, but reserve the right to depart from them in certain circumstances. The House of Lords puts the matter this way:

> Nothing could be more undesirable, in fact, than to permit litigants, after a decision has been given by this House with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected ... [D]oubtful issues have to be resolved and the law knows no better way of resolving them than by the considered majority opinion of the ultimate tribunal. *It requires much more than doubts as to the correctness of such opinion to justify departing from it.*[226]

The High Court of Australia (Australia's highest court) has similarly observed:

> No justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the court. A justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. *It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a justice may give effect to his own opinions in preference to an earlier decision of the court.*[227]

The United States Supreme Court (the highest court of the United States of America) has said:

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit ... [W]e recognise that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.[228]

In the same way that other common-law legal systems have limited the strict application of the doctrine of *stare decisis*, the United States Supreme Court does not view it as an "inexorable command."[229] Indeed, the Court recently delineated the following circumstances in which it would depart from a precedent:

(i) where a rule of law has proved unworkable in practice;

---

[226] *Fitzleet Estates Ltd. v. Cherry (Inspector of Taxes)*, [1977] 3 All ER 996, 999 (emphasis added).
[227] *Queensland v. Commonwealth* (1977) 16 ALR 487 at 497 (emphasis added).
[228] *Planned Parenthood of Southeastern Pennsylvannia et al. v. Casey*, 505 U.S. 833, 854 (1992).
[229] *Ibid.*

(ii) where related principles of law have so far developed as to have left the old rule "no more than a remnant of abandoned doctrine"; and

(iii) where facts, or the perception thereof, have changed so as "to have robbed the old rule of significant justification or application."[230]

93. Although, in general, civil law jurisdictions do not recognise the principle of *stare decisis* or binding precedent, as a matter of practice, their highest courts will generally follow their previous decisions. For example, one commentator has said of the French legal system:

> Despite the absence of a formal doctrine of *stare decisis*, there is a strong tendency on the part of the French courts, like those of other countries, to follow precedents, especially those of the higher courts ... The Cour de Cassation can, of course, always overrule its own prior decisions. *But it is equally certain that it will not do so without weighty reasons* ... The attitude of the lower courts toward decisions of the Cour de Cassation is in substance quite similar to that of lower courts in common law jurisdictions towards decisions of superior courts.[231]

94. Similarly, in the Italian legal system, "even though the decisions of the [Supreme Court of Cassation] are not 'binding' in theory, few judges would knowingly adopt a different interpretation ... [T]he fact is that courts do not act very differently toward reported decisions... in Italy than they do in the United States."[232]

95. While the doctrine of precedent does not operate formally in the European Court of Human Rights system, "as a matter of general practice and practical necessity, the Commission regards the Court's binding judgments as the final authority on the interpretation of the Convention."[233] In the *Cossey Case*,[234] the Court noted that, although not strictly bound, it would normally follow its previous decisions and would only depart from them if there were "cogent reasons" for doing so:

> It is true that ... the Court is not bound by its previous judgments ... However, it usually follows and applies its own precedents, such a course being in the interests of legal certainty and the orderly development of the Convention case-law. *Nevertheless, this would not prevent the Court from departing from an earlier decision if it was*

[230] *Ibid.*
[231] David and De Vries, *The French Legal System* (1958), p. 113 (emphasis added).
[232] Cappelletti, Merryman and Perillo, *The Italian Legal System: An Introduction* (1967), p.271.
[233] Reid, *A Practitioner's Guide to the European Convention on Human Rights* (1998), p. 43.
[234] European Court of Human Rights, Cossey Judgement of 27 September 1990, Series A, vol. 184.

> *persuaded that there were cogent reasons for doing so.* Such a departure might, for example, be warranted in order to ensure that the interpretation of the Convention reflects societal changes and remains in line with present-day conditions.[235]

96. Despite the non-operation of the principle of *stare decisis* in relation to the International Court of Justice, its previous decisions are accorded considerable weight. This may be due to their perceived status as authoritative expressions of the law. As Judge Zori~i} stated in his Dissenting Opinion in the *Peace Treaties* case, while "it is quite true that no international court is bound by precedents ... there is something which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so long as the principle retains its value."[236] This is confirmed by Judge Mohamed Shahabuddeen, who offers the view that "there is an acceptable sense in which, subject to a power to depart, decisions of the Court may be regarded as authoritative."[237]

97. The Appeals Chamber recognises that the principles which underpin the general trend in both the common law and civil law systems, whereby the highest courts, whether as a matter of doctrine or of practice, will normally follow their previous decisions and will only depart from them in exceptional circumstances, are the need for consistency, certainty and predictability. This trend is also apparent in international tribunals. Judge Shahabuddeen observes:

> The desiderata of consistency, stability and predictability, which underlie a responsible legal system, suggest that the Court would not exercise its power to depart from a previous decision except with circumspection... The Court accordingly pursues a judicial policy of not unnecessarily impairing the authority of its decisions.[238]

The Appeals Chamber also acknowledges that that need is particularly great in the administration of criminal law, where the liberty of the individual is implicated.

98. References to the law and practice in various countries and in international institutions are not necessarily determinative of the question as to the applicable law in this matter. Ultimately, that question must be answered by an examination of the Tribunal's Statute and Rules, and a construction of them which gives due weight to the principles of

---

[235] *Ibid.*, para. 35 (emphasis added).
[236] *Interpretation of Peace Treaties*, Advisory Opinion, ICJ Reports 1950, p. 65, at p. 104, Judge Zori~i}, Dissenting Opinion.
[237] Shahabuddeen, *Precedent in the World Court* (1996), p. 239.

interpretation (good faith, textuality, contextuality, and teleology) set out in the 1969 Vienna Convention on the Law of Treaties.[239]

99. There is no provision in the Statute of the Tribunal that deals expressly with the question of the binding force of decisions of the Appeals Chamber. The absence of such a provision, however, does not mean that the Statute is of no assistance in this matter. Article 25 of the Statute provides as follows:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:
>
> (a) an error on a question of law invalidating the decision; or
>
> (b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

100. The importance of the right of appeal is emphasised in the Report of the Secretary-General as follows:

> The Secretary General is of the view that the right of appeal should be provided for under the Statute. Such a right is a fundamental element of individual civil and political rights and has, *inter alia*, been incorporated in the International Covenant on Civil and Political Rights. For this reason, the Secretary-General has proposed that there should be an Appeals Chamber.[240]

The significance of this right is highlighted by the fact that there was no such right in the Nuremberg and Tokyo trials.[241]

101. The fundamental purpose of the Tribunal is the prosecution of persons responsible for serious violations of international humanitarian law.[242] The Appeals Chamber considers that this purpose is best served by an approach which, while recognising the need for

---

[238] *Ibid.*, pp. 131-2.
[239] Article 31(1), Vienna Convention on the Law of Treaties, 23 May 1969.
[240] Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), presented 3 May 1993, S/25704 ("Report of the Secretary-General"), para. 116.
[241] *See* Article 17 of the Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946 and Article 26 of the Charter of the International Military Tribunal at Nuremberg, Germany, 8 August 1945.
[242] *See* Article 1 of the Statute.

certainty, stability and predictability in criminal law, also recognises that there may be instances in which the strict, absolute application of that principle may lead to injustice.

102. The principle of the continuity of judicial decisions must be balanced by a residual principle that ensures that justice is done in all cases. Judge Tanaka in his Separate Opinion in the *Barcelona Traction (Preliminary Objections)* case[243] addressed the need for this balance between certainty and justice:

> I am well aware that some consideration should be given to the existence of precedents in regard to a case which the Court is called upon to decide. Respect for precedents and maintenance of the continuity of jurisprudence are without the slightest doubt highly desirable from the viewpoint of the certainty of law which is equally required in international law and in municipal law. *The same kind of cases must be decided in the same way and possibly by the same reasoning.* This limitation is inherent in the judicial activities as distinct from purely academic activities.
>
> On the other hand, the requirement of the consistency of jurisprudence is never absolute. It cannot be maintained at the sacrifice of the requirements of justice and reason. The Court should not hesitate to overrule the precedents and should not be too preoccupied with the authority of its past decisions. The formal authority of the Court's decision must not be maintained to the detriment of its substantive authority. Therefore, it is quite inevitable that, from the point of view of the conclusion or reasoning, the minority in one case should become the majority in another case of the same kind within a comparatively short space of time.[244]

103. Rosenne also speaks of the relative character of the requirement of consistency of jurisprudence:

> Corresponding to this is the care evinced by the Court not formally to overrule earlier decisions, but rather, where necessary, to try to explain away, usually on the ground of some factual particularity, an earlier decision which it feels unable to follow. The attitudes adopted in 1961 and 1964 in the *Temple of Preah Vihear* and the *Barcelona Traction* cases towards the 1959 decision in the Aerial Incident case are illustrative of this process, and of the relative character of the requirement of consistency of jurisprudence (which is probably the guiding element in this aspect of the Court's work).[245]

---

[243] *Barcelona Traction, Light and Power Company, Limited,* Preliminary Objections, Judgement, ICJ Reports 1964, p. 6, at p. 65, Judge Tanaka, Separate Opinion.
[244] *Ibid.*, p. 65 (emphasis added).
[245] Rosenne, *The Law and Practice of the International Court* (1985), p. 613.

104. The right of appeal is a component of the fair trial requirement[246] set out in Article 14 of the ICCPR, and Article 21(4) of the Statute. The right to a fair trial is, of course, a requirement of customary international law.[247]

105. An aspect of the fair trial requirement is the right of an accused to have like cases treated alike, so that in general, the same cases will be treated in the same way and decided as Judge Tanaka said, "possibly by the same reasoning."[248]

106. The right to a fair trial requires and ensures the correction of errors made at trial. At the hearing of an appeal, the principle of fairness is the ultimate corrective of errors of law and fact, but it is also a continuing requirement in any appeal in which a previous decision of an appellate body is being considered.

107. The Appeals Chamber, therefore, concludes that a proper construction of the Statute, taking due account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice.

108. Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."[249]

109. It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.

---

[246] Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary* (1993) comments that the bundle of rights which constitute the right to a fair trial are those set out in Articles 14 and 15 of the International Covenant on Civil and Political Rights 1966 ("ICCPR") (*ibid.*, Article 14, para. 19).
[247] *See* Article 6 of the 1949 European Convention on Human Rights, Article 8 of the 1969 American Convention on Human Rights and Article 7 of the 1981 African Charter on Human and People's Rights.
[248] *See* footnote 243, Judge Tanaka's Separate Opinion.
[249] *Black's Law Dictionary* (7th ed., 1999).

110. What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.

111. Where, in a case before it, the Appeals Chamber is faced with previous decisions that are conflicting, it is obliged to determine which decision it will follow, or whether to depart from both decisions for cogent reasons in the interests of justice.

2. Whether the Decisions of the Appeals Chamber are Binding on Trial Chambers

112. Generally, in common law jurisdictions, decisions of a higher court are binding on lower courts. In civil law jurisdictions there is no doctrine of binding precedent. However, as a matter of practice, lower courts tend to follow decisions of higher courts. As one commentator has stated:

> ... it is hardly an exaggeration to say that the doctrine of *stare decisis* in the Common Law and the practice of Continental courts generally lead to the same results... In fact, when a judge can find in one or more decisions of a supreme court a rule which seems to him relevant for the decision in the case before him, he will follow those decisions and the rules they contain as much in Germany as in England or France.[250]

113. The Appeals Chamber considers that a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on Trial Chambers for the following reasons:

(i) the Statute establishes a hierarchical structure in which the Appeals Chamber is given the function of settling definitively certain questions of law and fact arising from decisions of the Trial Chambers. Under Article 25, the Appeals Chamber hears an appeal on the ground of an error on a question of law invalidating a Trial Chamber's decision or on the

[250] Zweigert and Kotz, *An Introduction to Comparative Law* (1998), p. 263.

ground of an error of fact which has occasioned a miscarriage of justice, and its decisions are final;

(ii) the fundamental mandate of the Tribunal to prosecute persons responsible for serious violations of international humanitarian law cannot be achieved if the accused and the Prosecution do not have the assurance of certainty and predictability in the application of the applicable law; and

(iii) the right of appeal is, as the Chamber has stated before,[251] a component of the fair trial requirement, which is itself a rule of customary international law and gives rise to the right of the accused to have like cases treated alike. This will not be achieved if each Trial Chamber is free to disregard decisions of law made by the Appeals Chamber, and to decide the law as it sees fit. In such a system, it would be possible to have four statements of the law from the Tribunal on a single legal issue - one from the Appeals Chamber and one from each of the three Trial Chambers, as though the Security Council had established not a single, but four, tribunals. This would be inconsistent with the intention of the Security Council, which, from a plain reading of the Statute and the Report of the Secretary-General, envisaged a tribunal comprising three trial chambers and one appeals chamber, applying a single, unified, coherent and rational corpus of law. The need for coherence is particularly acute in the context in which the Tribunal operates, where the norms of international humanitarian law and international criminal law are developing, and where, therefore, the need for those appearing before the Tribunal, the accused and the Prosecution, to be certain of the regime in which cases are tried is even more pronounced.

3. Whether the Decisions of the Trial Chambers are Binding on Each Other

114. The Appeals Chamber considers that decisions of Trial Chambers, which are bodies with coordinate jurisdiction, have no binding force on each other, although a Trial Chamber is free to follow the decision of another Trial Chamber if it finds that decision persuasive.

---

[251] *See* para. 104, *supra*.

115. The Appeals Chamber will now turn to consider the question raised by the Prosecution's first ground of appeal.

4. The Ground of Appeal

116. The Prosecution's first ground of appeal is that the Trial Chamber erred in deciding that Article 2 of the Statute was inapplicable because it had not been established that the Bosnian Muslims held at the Kaonik prison compound between January and the end of May 1993 were protected persons within the meaning of Article 4 of Geneva Convention IV.[252]

117. This ground of appeal raises two substantial issues, both relating to the criteria for the applicability of Article 2 of the Statute. The first issue is the test for determining the internationality of an armed conflict and the second is the test for determining the status of the victims as protected persons under Article 4 of Geneva Convention IV.

118. The Prosecution contends that the Trial Chamber applied the wrong criteria for determining these issues, and that, had the correct tests been applied, the accused would have been convicted. Consequently, it seeks a reversal of the verdict of acquittal on Counts 8 and 9 of the Indictment.

119. The Appeals Chamber will address (a) the criteria for determining the international character of the armed conflict, (b) the criteria for determining whether the Bosnian Muslim victims were protected persons under Article 4 of Geneva Convention IV, and (c) the question of the reversal of the acquittal on Counts 8 and 9.

(a) The Criteria for Determining the International Character of the Armed Conflict

120. It is the contention of the Prosecution that the correct criterion for determining the nature of an armed conflict is the "overall control" test, enunciated by this Chamber in the *Tadić* Judgement. The Prosecution argues that, had that test been applied, the Trial Chamber would have concluded that the acts of the HVO, were attributable to Croatia. Instead, the

Trial Chamber "incorrectly decided that the Prosecution needed to demonstrate that Croatia had given a specific mandate or specific instructions to the Bosnian Croats with respect to the conflict in the La{va Valley area."[253] Specifically, the Prosecution argues that the Trial Chamber "did not adopt an appropriate framework when it set out to examine whether certain Bosnian Croat individuals and organisations, who, while not being official agents of the Croatian Government, received from the latter 'some power or assignment to perform acts on its behalf such that they become *de facto* agents'".[254] This test, the Prosecution says, is in effect, a "special instructions" test, as distinct from the "overall control" test.

121. The examination of this ground of appeal as argued by the Prosecution requires that the following issues be considered:

(i) What is the applicable law on this issue?

(ii) If the "overall control" test is the applicable law, did the Trial Chamber fail to apply it?

(i) What is the applicable law on this issue?

122. The Prosecution contends that the applicable criterion for determining the internationality of the conflict is the "overall control" test, as set out by the Appeals Chamber in the *Tadi}* Judgement. The following paragraph from the *Tadi}* Judgement is cited by the Prosecution in support of that contention:

> As the Appeals Chamber has already pointed out, international law does not require that the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as *de facto* organs of that State. It follows that in the circumstances of the case it was not necessary to show that those specific operations carried out by the Bosnian Serb forces which were the object of the trial (the attacks on Kozarac and more generally within op{tina Prijedor) had been specifically ordered or planned by the Yugoslav Army. It is sufficient to show that this Army exercised overall control over the Bosnian Serb Forces. This showing has been made by the Prosecution before the Trial Chamber. Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the

[252] Cross-Appellant's Brief, para. 2.4.
[253] *Ibid.*, para. 2.17.
[254] *Ibid.*, para. 2.18.

> VRS. This sort of control is sufficient for the purposes of the legal criteria required by international law.[255]

The Prosecution submits that the Appeals Chamber should not depart from its previous decision in *Tadi}* unless it decides that decision was clearly erroneous and cannot stand.[256]

123. The Defence, on the other hand, makes a general case against the application by the Tribunal of the doctrine of *stare decisis*, but concludes that, if it is to be applied, it "can be only exceptionally applied in the procedure before ICC [*sic*] and only after all priority legal sources have failed to direct to the decision with respect to the specific factual and legal question."[257] In particular, the Defence stresses that if the doctrine of *stare decisis* is to be applied by the Tribunal, it can only be applied in circumstances where the factual situations are the same or substantially similar.[258] The Defence contends that in the instant case, since "the armed conflict between Serbian and Muslim ethnicities in the territory of Bosnia and Herzegovina was basically different from the armed conflict between the Croatian and Muslim ethnicities",[259] the principle is inapplicable here. The Defence further argues that the doctrine of *stare decisis* or binding precedent is inconsistent with the principle of legality, or *nullem crimen sine lege*.[260]

124. The Appeals Chamber will now address the arguments advanced by the Defence.

125. The argument that the principle of *stare decisis* is only to be applied in circumstances where the facts are the same, is unmeritorious. As explained earlier in this Judgement,[261] what is followed in relation to a previous decision is the legal principle that it establishes, and the obligation to follow it only arises where, on the facts, the question settled by that principle is the same as the question that is raised by the facts of the subsequent case. Thus, it is irrelevant that the *Tadi}* Judgement dealt with an armed conflict between the Serbian and Muslim groups in Bosnia and Herzegovina, while the present case dealt with an armed conflict between the Croatian and Muslim groups. What is important is whether, in the subsequent case, the legal principle enunciated in the *Tadi}* Judgement as to

---

[255] *Tadi}* Judgement, para. 156.
[256] Cross-Appellant's Reply, para. 1.18.
[257] Appellant's Additional Submissions, para. 7.
[258] *Ibid.*, para. 8.
[259] Appellant's Additional Submissions, para. 10.
[260] *Ibid.*, paras. 7 and 8.
[261] *See* para. 110, *supra*.

"overall control" may be applied in relation to the conflict between the Bosnian Croats and the Bosnian Muslims in Bosnia and Herzegovina. In the *Tadi}* Judgement, that legal principle was derived from a factual situation in which there was a question of the level of control by a State (the Federal Republic of Yugoslavia (Serbia and Montenegro)) or entity (the Yugoslav Peoples's Army, "JNA") over a military group (the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska, "VRS") that was involved in an armed conflict that was *prima facie* internal. The same question arises from the facts of the instant case, that is, the level of control by a State or entity (Croatia or the Army of the

Republic of Croatia, "HV") over a military group (the HVO) that was engaged in an armed conflict that was *prima facie* internal. It is, therefore, perfectly proper in the instant case to recall and rely upon the legal principle enunciated in the *Tadi}* Judgement.

126. The Defence argument on the principle of legality or *nullum crimen sine lege*, is based on a misunderstanding of that principle. The Appeals Chamber understands the Defence to be saying that reliance cannot be placed on a previous decision as a statement of the law, since that decision would necessarily have been made after the commission of the crimes, and for that reason would not meet the requirements of the principle of legality. There is nothing in that principle that prohibits the interpretation of the law through decisions of a court and the reliance on those decisions in subsequent cases in appropriate circumstances. The principle of legality is reflected in Article 15 of the ICCPR.[262] What this principle requires is that a person may only be found guilty of a crime in respect of acts which constituted a violation of the law at the time of their commission. In the instant case, the acts in respect of which the accused was indicted, all constituted crimes under international law at the time of their commission. Inhuman treatment and wilfully causing grave suffering or serious injury to body or health under Article 2 of the Statute were violations of the grave breaches provisions of the Geneva Conventions, and outrages against personal dignity under Article 3 of the Statute constituted a violation of the laws or customs of war, at the time of the commission of the crimes.

127. There is, therefore, no breach of the principle of *nullum crimen sine lege*. That principle does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.

128. The Appeals Chamber now turns to a consideration of the *Tadi}* Judgement in order to determine whether it should be followed, applying the principle set out in paragraph 107, *supra*, that a previous decision of the Chamber should be followed unless there are cogent reasons in the interests of justice for departing from it.

---

[262] Article 15 of the ICCPR states in relevant part: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

129. The *Tadi}* Judgement was concerned, *inter alia,* with the legal criteria for determining the circumstances in which the acts of a military group could be attributed to a State, such that the group could be treated as a *de facto* organ of that State, thereby internationalising a prima facie internal armed conflict in which it is involved.

130. The Trial Chamber in *Tadi}* applied the "effective control" test enunciated by the ICJ *Nicaragua*, and interpreted it as requiring evidence of specific instructions.[263] The Appeals Chamber in *Tadi}* advanced two grounds on which the "effective control" test was not persuasive and should not be followed.

131. Broadly, the first basis identified by the Appeals Chamber in *Tadi}* for not following the effective control test in the *Nicaragua* case in the case of "individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels,"[264] is that, "normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group."[265]

132. Consequently, in the view of the Appeals Chamber in *Tadi},* once it is established that the group is under the "overall control" of a State, the responsibility of the State is engaged for the group's activities, irrespective of whether specific instructions were given by the State to members of the group.

133. The second ground on which the *Tadi}* Appeals Chamber found the *Nicaragua* test unpersuasive is that it was at variance with judicial and state practice. The *Tadi}* Judgement cites a number of cases from claims tribunals, national, regional and international courts, in which acts of groups were attributed to particular countries without any inquiry being made as to whether specific instructions had been issued by that country to members of the group.[266]

134. Applying the principle enunciated in paragraph 107 of this Judgement, the Appeals Chamber will follow its decision in the *Tadi}* Judgement, since, after careful analysis, it is

---

[263] *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-T, Opinion and Judgment, 7 May 1997.
[264] *Tadi}* Judgement, para. 120.
[265] *Ibid.*
[266] *Ibid.*, paras. 124–131.

unable to find any cogent reason to depart from it. Certainly the Appeals Chamber is unable to say that it was arrived at on the basis of the application of a wrong legal principle or arrived at *per incuriam*. The "overall control" test, set out in the *Tadi}* Judgement is the applicable law.

135. The Appellant argues that the *Tadi}* Judgement should not be relied on by this Chamber because it had not yet been delivered when the *Aleksovski* Judgement was rendered.[267] This argument is based on a misconception. The Appeals Chamber wishes to clarify that when it interprets Article 2 of the Statute, it is merely identifying what the proper interpretation of that provision has always been, even though not previously expressed that way.

136. The Appeals Chamber will now proceed to an examination of the *Aleksovski* Judgement, in order to ascertain what test was applied.

(ii) If the "overall control" test is the applicable law, did the Trial Chamber fail to apply it?

137. In the *Aleksovski* case, the question was whether the HVO forces, while not being official agents of the Croatian government, could be said to be acting as *de facto* agents of the Croatian State. In seeking to answer this question, the Majority Opinion made the following reference to the decision of the Appeals Chamber in the *Tadi}* Jurisdiction Decision:

> The Appeals Chamber in the *Tadi} Interlocutory Decision* did not specify the requisite degree of intervention by a foreign State in the territory of another State to internationalise an armed conflict. However, it did provide some guidance on the matter by indicating that the clashes between the Government of Bosnia and Herzegovina and the Bosnian Serb forces should be considered as internal, unless a "direct involvement" of the JNA could be proved, in which case the conflict should be considered to be an international one.[268]

Further indication of the majority's reasoning is garnered from the following paragraph:

---

[267] Appellant's Response, paras. 5 and 10. The *Tadi}* Judgement was delivered on 15 July 1999, approximately three weeks after the Judgement in *Aleksovski* had been issued, on 25 June 1999.
[268] Majority Opinion, para. 8,

> A State can act in international law directly through governmental authorities and officials, or indirectly through individuals or organisations who, while not being official agents of the government, receive from it some power or assignment to perform acts on its behalf such that they become *de facto* agents.[269]

138. The phrase "receive from it some power or assignment to perform acts on its behalf such that they become *de facto* agents," does, in the opinion of the Appeals Chamber, indicate that the position of the majority was that some kind of instruction was required in order for the requisite relationship between the Bosnian Croats and the Croatian State to be established. This is what the Prosecution refers to as the "specific instructions" test.

139. The Majority Opinion then referred to the ICJ decision in *Nicaragua* in this way:

> According to the International Court of Justice ("the ICJ"), where the relationship of a rebel force to a foreign State is one of such dependence on the one side and control on the other that it would be appropriate to equate the rebel force, for legal purposes, with an organ of that State, or as acting on behalf of that State, then in such a case the conflict can be seen to be an international one, even if it is *prima facie* internal and there is no direct involvement of the armed forces of the State.[270]

It made further reference to the reliance placed by the majority Judgement of Judge Stephen and Judge Vohrah in the *Tadi}* case (first instance), "on the high standard expounded by the ICJ in the *Nicaragua* case in the sense that the international responsibility of a State can arise only if control is exercised ("directed and enforced") with respect to specific military or paramilitary operations."[271]

140. In dealing with the relationship between the HV and HVO forces, the majority commented on a particular aspect of the evidence of the expert witness:

> The expert witness presented an order from the HVO (not the HV) – this distinction is very important – to their soldiers to remove the HV insignias (November – December 1992) because of potential problems to Croatia. While there is a document dated May 1993 which allowed the transfer/promotion of soldiers from the HVO to the HV, this does not in itself prove the dependency of the HVO on the HV.[272]

---

[269] *Ibid.*, para. 9.
[270] Majority Opinion, para. 11 (footnotes omitted).
[271] *Ibid.*, para. 12 (footnotes omitted).
[272] *Ibid.*, para. 23 (footnotes omitted).

141. The Appeals Chamber makes two observations about this paragraph. First, the fact that the Majority Opinion goes out of its way to mention that the order came from the HVO, and not the HV, and that the distinction was very important, highlights the weight the Trial Chamber attached to an order or instruction of the controlling State as a prerequisite for the attribution of acts of members of a military group to a State. Secondly, to the extent that the Majority Opinion uses dependency as a criterion, it is not consistent with the decision in the *Tadi}* Judgement.

142. Significantly, the Majority Opinion concludes by finding that "the Prosecution failed to discharge its burden of proving that, during the time-period and in the place of the indictment, the HVO was in fact acting under the overall control of the HV in carrying out the armed conflict against Bosnia and Herzegovina."[273]

143. The Appeals Chamber finds that, notwithstanding the express reference to "overall control", the *Aleksovski* Judgement did not in fact apply the test of overall control. Instead, the passages cited show that the majority gave prominence to the need for specific instructions or orders as a prerequisite for attributing the acts of the HVO to the State of Croatia, a showing that is not required under the test of overall control.

144. The test set forth in the *Tadi}* Judgement of "overall control" and what is required to meet it constitutes a different standard from the "specific instructions" test employed by the majority in *Aleksovski*, or the reference to "direct involvement" in the *Tadi}* Jurisdiction Decision.

145. The "overall control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control. Bearing in mind that the Appeals Chamber in the *Tadi}* Judgement arrived at this test against the background of the "effective control" test set out by the decision of the ICJ in *Nicaragua*,[274] and the "specific instructions" test used by the Trial Chamber in *Tadi},* the Appeals Chamber considers it appropriate to say that the standard established by the "overall control" test is not as rigorous as those tests.

---

[273] *Ibid.*, para. 27 (footnotes omitted).
[274] *See* in this regard, the reference to the "higher standard" of *Nicaragua* in the Majority Opinion, para. 12.

146. To the extent that it provides for greater protection of civilian victims of armed conflicts, this different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure "protection of civilians to the maximum extent possible."[275]

(b) The Criteria for Determining Whether the Bosnian Muslim Victims were Protected Persons under Article 4 of Geneva Convention IV

147. The Prosecution contends that the Trial Chamber erred in finding that the status of protected persons was not established because the Bosnian Muslim victims were of the same nationality, that of Bosnia and Herzegovina, as their captors. [276]

148. Article 4 of Geneva Convention IV, applicable here, defines protected persons as:

> those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the Conflict or Occupying Power of which they are not nationals.

149. Essentially, the Defence contends that the conflict was an internal one, between the Bosnian Croats and the Bosnian Muslims, who were both of Bosnian and Herzegovinian nationality, and, therefore, that the Bosnian Muslim victims were of the same nationality as their captors.

150. The Prosecution submits that, if it is established that the conflict was international by reason of Croatia's participation, it follows that the Bosnian Muslim victims were in the hands of a party to the conflict, Croatia, of which they were not nationals and that, therefore, Article 4 of Geneva Convention IV is applicable.

151. The Appeals Chamber agrees with this submission. However, the Appeals Chamber also confirms the finding in the *Tadi}* Judgement that, in certain circumstances, Article 4

[275] *Tadi}* Judgement, para. 168.
[276] Cross-Appellant's Brief, para. 2.56.

may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors.

152. In the *Tadi}* Judgement, the Appeals Chamber, after considering the nationality

criterion in Article 4, concluded that "not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test."[277] This formulation relies on a teleological approach to the interpretation of Article 4 of Geneva Convention IV, and correctly identifies as the object of that Convention, "the protection of civilians to the maximum extent possible."[278] In the words of the *Tadić* Judgement, the primary purpose of Article 4:

> is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.[279]

The Appeals Chamber considers that this extended application of Article 4 meets the object and purpose of Geneva Convention IV, and is particularly apposite in the context of present-day inter-ethnic conflicts.

(c) The Prosecution's application to reverse the acquittal on Counts 8 and 9

153. Although the Appeals Chamber finds that the Trial Chamber applied the wrong test for determining the applicability of Article 2, for the following reasons, it declines to reverse the verdict of acquittal on Counts 8 and 9:

(i) in relation to this ground of appeal, the substantive issues for determination are questions of law rather than fact, and the Chamber considers it important for the development of the Tribunal's jurisprudence that those issues be resolved, and it has made that determination in relation to the criteria for assessing the international character of an armed conflict and the status of a victim as a protected person;

(ii) the Chamber's conclusions as to those criteria necessarily mean that the Trial

[277] *Tadić* Judgement, para. 166.
[278] *Ibid.*, para. 168.
[279] *Ibid.*

Chamber applied the wrong tests and therefore, that its findings of fact were made on an erroneous basis;

(iii) the Chamber does not favour remitting the case to the Trial Chamber for re-examination, nor will it make its own determination of the facts, as neither course would serve a useful purpose. The material acts of the Appellant underlying the charges are the same in respect of Counts 8 and 9, as in respect of Count 10, for which the Appellant has been convicted. Thus, even if the verdict of acquittal were to be reversed by a finding of guilt on these counts, it would not be appropriate to increase the Appellant's sentence. Moreover, any sentence imposed in respect of Counts 8 and 9 would have to run concurrently with the sentence on Count 10.

C. Conclusion

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

VII. SECOND GROUND OF CROSS-APPEAL BY THE PROSECUTION: RESPONSIBILITY FOR THE MISTREATMENT OF PRISONERS OUTSIDE THE PRISON

A. Submissions of the Parties

1. Cross-Appellant's Brief

155. The Prosecution complains that the Trial Chamber failed to deal with part of its case in support of Count 10 (outrages on personal dignity amounting to a violation of the laws or customs of war). The count was based upon the assertion in the indictment that Bosnian Muslim civilians, who were detained in the Kaonik prison under the command of the Appellant, were subjected to physical and psychological harm, forced labour (digging trenches) and working in hazardous circumstances (being used as human shields).[280]

156. The Prosecution case was that (a) the outrages on personal dignity constituted by physical and psychological harm ("mistreatment") took place not only inside the compound but also outside it, where the prisoners worked under the control of HVO soldiers, and (b) those outrages on personal dignity constituted by forced labour and the use of the prisoners as human shields took place only outside the compound.

157. The Trial Chamber found that the Appellant was responsible as a superior pursuant to Article 7(3) of the Statute for the mistreatment of prisoners within the compound.[281] It also found that he was individually responsible pursuant to Article 7(1) of the Statute for the forced labour and the use of the prisoners as human shields outside the prison, in that he aided and abetted in the acts of the HVO soldiers there.[282] The basis upon which he was found to have aided and abetted in those acts was that he was aware of the use to which the prisoners were being put by the HVO soldiers, he was present sometimes when the prisoners

[280] Indictment, para. 31.
[281] Judgement, para. 228.
[282] *Ibid.*, para. 229.

were selected for that purpose and practically always when the prisoners returned to make sure that they were all there, and (having responsibility for the welfare of the prisoners) he

failed to take measures open to him to stop them from going out to work in dangerous circumstances.[283] On the other hand, the Trial Chamber found that it had not been proved that the Appellant "participated directly" in the mistreatment of the prisoners by the HVO soldiers outside the prison, saying that it had not been claimed by the Prosecution, so that he was not individually responsible for that mistreatment.[284]

158. The Prosecution says that, although it did not produce evidence that the Appellant had personally inflicted the mistreatment upon the prisoners outside the prison, it had pleaded an individual responsibility pursuant to Article 7(1) of the Statute which included an allegation that the Appellant had aided and abetted in unlawful treatment of the Bosnian Muslim detainees, in terms which included their treatment outside the prison.[285] The Prosecution says that the Trial Chamber had acknowledged that this was the Prosecution case in its Judgement.[286]

159. Finally, the Prosecution says that the factual findings made by the Trial Chamber in relation to the Appellant's responsibility for aiding and abetting the forced labour and the use of the prisoners as human shields outside the prison,[287] together with other factual findings that the Appellant was aware of the mistreatment of those prisoners outside the prison,[288] must inevitably have led to a finding that the Appellant was individually

---

[283] *Ibid.*, paras. 125 and 128-129.
[284] *Ibid.*, para. 130.
[285] Indictment, para. 37, which was in the following terms: "... individually, and in concert with others, planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the unlawful treatment of Bosnian Muslim detainees in the Lašva Valley area of the Republic of Bosnia and Herzegovina and, or in the alternative, knew, or had reason to know, that subordinates were about to do the same, or had done so, and failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."
[286] Cross-Appellant's Brief, para. 3.14. Reliance is placed upon para. 40 of the Judgement, which stated: "The allegations of inhuman treatment ... are based not only on the detention conditions in Kaonik compound ... but also on the treatment meted out to the detainees at trench-digging locations (forced labour, mistreatment, inadequate food) and the fact that they were used as human shields. In support of her charge of wilfully causing great suffering or serious injury to body or health under Article 2(c) of the Statute, the Prosecutor relies not only on mistreatment inside the Kaonik compound but also on suffering and injury to body or health resulting from mistreatment or hazardous circumstances in which prisoners were forced to dig trenches. In respect of outrages against personal dignity as recognised by Common Article 3 of the Geneva Conventions, the Prosecutor invokes unlawful detention ... forced trench-digging, use of detainees as human shields and, more generally, refers to the elements of breaches under Article 2 of the Statute. The facts submitted by the Prosecutor in support of the three charges therefore relate to events taking place both inside and outside the Kaonik compound."
[287] Judgement, para. 128.
[288] *See* para. 168, *infra*.

responsible for that mistreatment in that he aided and abetted the acts of the HVO soldiers there.[289]

2. Appellant's Response

160. The Appellant did not contest the argument of the Prosecution that, in the indictment, it had alleged his individual responsibility by aiding and abetting the mistreatment of the prisoners by the HVO soldiers outside the prison. He asserted, however, that it had not been proved that he had any connection with, or the possibility to control, the HVO soldiers (as their military commander or otherwise) or that he knew that they were going to mistreat the prisoners.[290] He also sought to argue that it had not been proved that the prisoners had been used as human shields, only that there had merely been an attempt to do so.[291] However, the finding by the Trial Chamber that the prisoners had been used as human shields was not challenged by him in his appeal.

3. Cross-Appellant's Reply

161. The Prosecution interpreted the Appellant's Response as asserting that, in the case of aiding and abetting, the *mens rea* of the accessory has to be the same as that of the principal.[292] The Appellant, however, has asserted no more than that the accessory must have known all the essential ingredients of the crime to be committed.[293] The Prosecution also denied that it was necessary for it to establish the Appellant had any connection with, or form of control over, the HVO soldiers who mistreated the prisoners when demonstrating his individual responsibility under Article 7(1) for their acts.

---

[289] Cross-Appellant's Brief, para. 3.16; T. 45-49.
[290] Appellant's Response, pp. 23-24; T. 80-81.
[291] Appellant's Response, pp. 23-24.
[292] Cross-Appellant's Reply, para. 3.5.
[293] Appellant's Response, p. 23. Although incomplete, the statement by the Appellant was not inaccurate: *see* paras. 162-164, *infra*.

B. Discussion

162. The liability of a person charged with aiding and abetting another person in the commission of a crime was extensively considered by Trial Chamber II in the *Furundžija* Judgement.[294] It stated the following conclusions:[295]

(i) It must be shown that the aider and abettor carried out acts which consisted of practical assistance, encouragement or moral support which had a substantial effect upon the commission by the principal of the crime for which the aider and abettor is sought to be made responsible.

(ii) It must be shown that the aider and abettor knew (in the sense of was aware) that his own acts assisted in the commission of that crime by the principal.

The Trial Chamber had earlier stated the conclusion that it is not necessary to show that the aider and abettor shared the *mens rea* of the principal, but it must be shown that the aider and abettor was aware of the relevant *mens rea* on the part of the principal.[296] It is clear that what must be shown is that the aider and abettor was aware of the essential elements of the crime which was ultimately committed by the principal.

163. Subsequently, in the *Tadić* Judgement, the Appeals Chamber briefly considered the liability of one person for the acts of another person where the first person has been charged with aiding and abetting that other person in the commission of a crime.[297] This was in the context of contrasting that liability with the liability of a person charged with acting pursuant to a common purpose or design with another person to commit a crime, and for that reason that judgement does not purport to be a complete statement of the liability of the person charged with aiding and abetting. It made the following points in relation to the aider and abettor:[298]

(i) The aider and abettor is always an accessory to the crime committed by the other person, the principal.

---

[294] *Furund'ija* Judgement, paras. 190-249.
[295] *Ibid.*, para. 249.
[296] *Ibid.*, para. 245.

(ii) It must be shown that the aider and abettor carried out acts specifically directed to assist, encourage or lend moral support to the specific crime committed by the principal, and that this support has a substantial effect upon the commission of the crime.

(iii) It must be shown that the aider and abettor knew that his own acts assisted the commission of that specific crime by the principal.

(iv) It is not necessary to show the existence of a common concerted plan between the principal and the accessory.

164. The Trial Chamber in the present case relied upon the *Furundžija* Judgement, amongst other decisions at first instance within the Tribunal (the *Tadi}* Judgement of the Appeals Chamber was given after the Trial Chamber had given its judgement).[299] The Trial Chamber expressed itself in various ways, but identified what it saw to be the two essential elements which had to be established in order to demonstrate liability for the acts of others, in these terms:

> The accused must have participated in the commission of the offence and "all acts of assistance by words or acts that lend encouragement or support" constitute sufficient participation to entail responsibility according to Article 7(1) whenever the participation had [a] "substantial effect" on the commission of the crime. It is unnecessary to prove that a cause-effect relationship existed between participation and the commission of the crime. The act of participation need merely have significantly facilitated the perpetration of the crime. The accused must also have participated in the illegal act in full knowledge of what he was doing. This intent was defined by Trial Chamber II as "awareness of the act of participation coupled with a conscious decision to participate". If both elements are proved, the accused will be held responsible for all the natural consequences of the unlawful act.[300]

The absence of any reference to an awareness by the aider and abettor of the essential elements of the crime committed by the principal (including his relevant *mens rea*) detracts from that passage as a reasonably accurate statement of the law, but that flaw did not disadvantage the Appellant in the circumstances of this case, where the relevant state of mind on the part of the HVO soldiers was obvious from the nature of the injuries seen by him.

---

[297] Judges Cassese and Mumba were members of the Trial Chamber in *Furundžija*, and of the Appeals Chamber in *Tadić*.
[298] *Tadi}* Judgement, para. 229.

165. The Prosecution must, of course, establish the acts of the principal or principals fo.

[299] *Aleksovski* Judgement, para. 60.
[300] *Ibid*, para. 61. The citations of authority have been omitted.

which it seeks to make the aider and abettor responsible. Considerable evidence was given by prisoners of mistreatment when digging trenches. Witness B gave evidence that, when he was digging trenches at Kula, he was beaten by HVO soldiers. A particular soldier threatened him with a rifle and scratched a bayonet across his neck and nose, leaving a visible mark. After digging all night, Witness B and the other detainees were taken back to the Kaonik prison where he and two other prisoners were taken for a medical examination because of the extent of the injuries they had received.[301] Witness B described his injuries as including knife wounds, a "broken up" nose, and two broken ribs.[302] Witness H gave evidence, unchallenged in cross-examination, that he had been hit by a soldier with a rifle butt while out digging trenches.[303] Witness L gave evidence, also unchallenged in cross-examination, that he saw prisoners being beaten by HVO soldiers when they were digging trenches in Strane,[304] and that he was beaten when digging trenches in Carica by a member of the HVO who also came to the Kaonik prison afterwards to mistreat him and other prisoners.[305]

166. Witness M gave evidence that he had been taken out for trench digging in Strane when he was already injured from being beaten in the camp. While out trench-digging, a soldier whipped him with a rope, hit and kicked him; he was then beaten and kicked by other HVO soldiers. He was unable to open his mouth because it was so swollen from being whipped with the rope.[306] At some point after being taken out for trench-digging, Witness M asked to see a doctor and was taken by the Appellant to a local clinic with two other detainees who had been beaten. The Appellant was present when he saw the doctor and, when Witness M told the doctor that he was suffering pains from the digging, the Appellant said: "Tell the truth. Tell her that there was a dance down there." Witness M then told the doctor that he had been beaten. Some days later, Witness M was taken out again for trench digging in Polom.[307] This account was not contradicted in cross-

[301] Trial Chamber Transcript (English), pp. 580-588.
[302] *Ibid.*, pp. 599-602.
[303] *Ibid.*, pp. 923-924.
[304] *Ibid.*, p. 1392.
[305] *Ibid.*, pp. 1396-1397.
[306] *Ibid.*, pp. 1445-1449.
[307] *Ibid.*, pp. 1457-1461.

examination, and the fact that the Appellant accompanied Witness M for the visit to the doctor was expressly confirmed.[308]

167. The Defence at the trial did not dispute that some of the prisoners were mistreated by the HVO soldiers while digging trenches.[309] The Prosecution submitted that, because the evidence already described was uncontradicted, the Trial Chamber had "by inference" accepted it as correct.[310] The Appeals Chamber, however, is not satisfied that such an inference should be drawn. The Trial Chamber apparently held the view that the Prosecution case did not include a charge that the Appellant was liable as having aided and abetted the HVO soldiers in mistreating the prisoners outside the compound.[311] On that view, it did not need to make any findings in relation to that evidence. It would not therefore be safe to infer that the Trial Chamber formed any particular view of that evidence beyond what was said expressly in relation to it. The Appeals Chamber now turns to what the Trial Chamber said.

168. The Trial Chamber made the following finding when considering the state of the Appellant's knowledge that the prisoners were being used unlawfully by the HVO soldiers to dig trenches:

> All this went to show that the accused knew not only that detainees were being sent off to dig trenches, but also that this practice was unlawful. Further, the detainees were very often used for this purpose and the accused, as he was usually present when the prisoners returned, could not have been unaware of the extremely difficult conditions and the repeated abuse prisoners were subjected to at the trench site the marks of which were clearly visible on them. [312]

And again:

> The evidence relating to ... the state in which some of the detainees returned from digging trenches, goes to establish that the accused was perfectly aware of the traumas suffered by the detainees.[313]

---

[308] *Ibid.*, p. 1494.
[309] Judgement, para. 33.
[310] T. 55-56.
[311] Judgement, para. 130. *See* para. 157, *supra*.
[312] Judgement, para. 128.
[313] *Ibid*, para. 224.

The Trial Chamber did not find, and the evidence does not appear to suggest, that the Appellant was aware of any psychological harm caused to the prisoners as a result solely of being mistreated when outside the prison.

169. Necessarily implicit in the findings which were made is the conclusion that the Appellant was aware that the prisoners were being mistreated by the HVO soldiers on a recurring basis over a period of time (without specifying the precise nature of that mistreatment), yet with that awareness he continued to participate in sending the prisoners out to work under those soldiers and (having responsibility for the welfare of the prisoners) he failed to take measures open to him to stop them from going out to work in such conditions.[314] The Prosecution says that, if that was regarded by the Trial Chamber as sufficient to find the Appellant liable for aiding and abetting in the forced labour and the use of prisoners as human shields outside the prison,[315] he should inevitably have been found liable also for aiding and abetting in the mistreatment of the prisoners whilst engaged in that forced labour.[316]

170. The Trial Chamber appears to have rejected such a finding upon two bases. First, in the context of discussing individual (not superior) responsibility, it said:

> He cannot be held responsible under Article 7(1) in circumstances where he does not have direct authority over the main perpetrators of the crimes.[317]

The original French version of the Judgement also refers to Article 7(1) of the Statute. The context precludes any explanation that this was a typographical error for Article 7(3) of the Statute. The statement is clearly wrong. Secondly, after finding that the Appellant was responsible under Article 7(1) for having aided and abetted in the use of prisoners as human shields and for trench digging, the Trial Chamber said:

> It was not proved, however, that the accused participated directly in the mistreatment meted out to the prisoners there. Nor was such mistreatment claimed by the Prosecutor. The accused cannot therefore incur responsibility under Article 7(1) for the mistreatment suffered by the detainees outside the Kaonik compound.[318]

---

[314] *See* Judgement, paras. 125 and 128-129. Also *see* para. 157, *supra*.
[315] Judgement, para. 229.
[316] Cross-Appellant's Brief, para. 3.16; T. 45-49.
[317] Judgement, para. 129.
[318] *Ibid*, para. 130.

There is some latent ambiguity in that statement. As previously stated, the Prosecution did not seek to make out a case of individual responsibility based upon the direct or personal participation by the Appellant in the mistreatment of the prisoners by the HVO soldiers. But Article 7(1) deals not only with individual responsibility by way of direct or personal participation in the criminal act but also with individual participation by way of aiding and abetting in the criminal acts of others.

171. The Trial Chamber appears to have thought that the Prosecution had restricted its case against the Appellant as having aided and abetted in the crimes committed by the HVO soldiers to using the prisoners as human shields and for trench digging only. The Appeals Chamber is satisfied that the Prosecution did charge the Appellant with individual responsibility by way of aiding and abetting for the mistreatment of the prisoners by the HVO soldiers, and that the Trial Chamber was in error if the second passage quoted in the last paragraph was intended to assert that no such claim had been made.[319] The passage of the Judgement upon which the Prosecution relies as demonstrating an acknowledgement by the Trial Chamber that such a claim had been made,[320] if read carefully, does appear to do so although this may well not have been the intention. Whatever may have been intended, it is clear that the Trial Chamber should have proceeded to make findings in relation to the individual responsibility of the Appellant for aiding and abetting the mistreatment of the prisoners by the HVO soldiers.

C. Conclusion

172. The Appeals Chamber accepts that the only finding which could reasonably have been made by the Trial Chamber, in the light of its other findings, is that the Appellant was individually responsible for the mistreatment by the HVO soldiers outside the prison by way of having aided and abetted in it. Any finding to the contrary would have been unreasonable in those circumstances. The Appeals Chamber accordingly makes that finding.

---

[319] The practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity, and it is preferable that the Prosecution indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged: "Decision on Preliminary

173. That finding does not alter the verdict of guilty entered by the Trial Chamber or Count 10, but the additional finding is, strictly, a matter to be taken into account when, as already announced, the Appeals Chamber comes to impose a revised sentence upon Count 10. In view of the limited finding possible, however, the Appeals Chamber does not believe that the additional finding of itself warrants any heavier sentence than would have been imposed without it.

Motion on Form of Amended Indictment", *Prosecutor v. Krnojelac*, Case No.: IT-97-25-PT, Trial Chamber, 11 Feb. 2000, paras. 59-60.

[320] Judgement, para. 40, quoted in footnote 286, *supra*.

VIII. THIRD GROUND OF CROSS-APPEAL BY THE PROSECUTION: ERROR IN SENTENCING

A. Background

174. The Appellant is aged 40, is married and has two young children. He is a university graduate and worked in the Zenica prison service before the conflict. Between January and May 1993, which was the relevant period in this case, he was commander of Kaonik prison.

175. The Trial Chamber found the Appellant responsible for the following crimes, committed while he was commander of the Kaonik prison:

> (i) The mistreatment of the detainees
>
> (a) aiding and abetting mistreatment of detainees during the body searches on 15 and 16 April 1993 by his being present during such mistreatment (which included insults, threats, thefts and assaults) and not objecting to it;[321]
>
> (b) ordering, instigating and aiding and abetting violence on Witnesses L and M, who were beaten regularly during their detention (sometimes four to six times a day), occasionally in the presence of Zlatko Aleksovski or otherwise near his office, both day and night; ordering the guards to continue beating them when they stopped; as a result of the beatings Witness M fainted and afterwards had traces of blood in his urine and at the time of trial he was still suffering from back and chest pains;[322]

[321] Judgement, paras. 87, and 185-186.
[322] *Ibid.*, paras. 88 and 196.

(c) aiding and abetting the mistreatment of detainees during their interrogation after the escape of a detainee;[323]

(d) aiding and abetting psychological terror, such as the playing of screams over the loudspeaker at night;[324]

(e) aiding and abetting the use of detainees as human shields and trench digging, in that

(i) he took part in designating detainees for trench digging and made sure that they returned;

(ii) he did not prevent HVO soldiers coming to get detainees and participated in picking out detainees;

(iii) he was present when detainees were taken to serve as human shields and thus manifested his approval of the practice.[325]

176. In its conclusions the Trial Chamber held that the violence inflicted upon detainees constituted an outrage upon personal dignity, in particular degrading or humiliating treatment within common Article 3 of the Geneva Conventions as a violation of the laws or customs of war for which the Appellant was responsible under Articles 7(1) and 7(3) of the Statute.[326] The Trial Chamber also held that the use of detainees as human shields and for trench digging constituted an outrage upon personal dignity for which the appellant must be held guilty under Article 7(1).[327] The Trial Chamber said of these offences that "the violence inflicted on the Muslim detainees of Kaonik prison appears to be a reprehensible infringement of international human rights which would be absolutely unacceptable in times of peace", and that "the commission of violent offences against vulnerable, helpless persons or those placed in a situation of inferiority constitutes an aggravating circumstance [...]".[328]

177. The Trial Chamber also found that the Appellant, as the commander of the prison, was responsible as a superior under Article 7(3) for the acts of violence committed by the

[323] *Ibid.*, paras. 89, 205, and 209-210. The Trial Chamber, however, treated this as "an isolated case which does not demonstrate a systematic resolve to mistreat the prisoners": *ibid.*, para. 120.
[324] *Ibid.*, paras. 187 and 203.
[325] *Ibid.*, paras. 122, 125, and 128-129.
[326] *Ibid.*, para. 228.
[327] *Ibid.*, para. 229.
[328] *Ibid.*, paras. 227-228.

guards inside the prison[329] since he knew that such crimes were committed but took no steps to prevent them.[330]

178. In determining sentence, the Trial Chamber took into consideration that the accused had not demonstrated the "repeated malice" alleged by the Prosecution and noted that many of the events took place during the peak of the relevant conflict.[331] The Trial Chamber also took into consideration the fact that the accused had no previous convictions, that his direct participation in the commission of acts of violence was relatively limited and that he had a secondary role in the totality of crimes alleged in the common indictment.[332] His guilt

[329] *Ibid.*, paras. 104 and 114.
[330] *Ibid.*, paras. 104-106, 114 and 117-118.
[331] *Ibid.*, para. 235.
[332] *Ibid.*, para. 236. The common indictment from which the counts against the Appellant were severed involved charges against (among others) a senior political official and the commander of the local operative zone.

rested in his knowing participation in, or acceptance of, violence contrary to international humanitarian law committed in a broader frame.[333] On the other hand, he made efforts to improve conditions in the compound and to secure medical services for detainees.[334] The Trial Chamber referred to Articles 41(1) and 142 of the former Socialist Federal Republic of Yugoslavia ("SFRY") Penal Code, but took the view that the more important factor to bear in mind was "the gravity of the criminal acts of which the accused had been found guilty and in the context of his individual circumstances".[335] The Trial Chamber said that it was strongly of the view that in order to implement the Tribunal's mandate it is crucial to establish a gradation of sentences, depending on the magnitude of crimes committed and the extent of the liability of the accused.[336] The Trial Chamber sentenced the Appellant to two and a half years of imprisonment. That sentence was pronounced on 7 May 1999 and given that the accused was entitled to credit for a longer period of time than that of the sentence imposed, the Trial Chamber ordered his immediate release.[337] The accused by that date had spent two years, ten months and twenty-nine days in custody.

B. Submissions of the Parties

179. The Prosecution submits that the Trial Chamber erred in imposing the sentence which it did on the Appellant.[338] The Prosecution advances several grounds for this submission which may be summarised as follows:

(a) The sentence of two and a half years' imprisonment was 'manifestly disproportionate' to the crimes committed and, accordingly, outside the limits of a fairly exercised discretion.[339]

(b) Such a sentence defeats one of the main purposes of the Tribunal, namely to deter future violations of international humanitarian law. Such a purpose is defeated if the

[333] *Ibid.*, para. 237.
[334] *Ibid.*, para. 238.
[335] *Ibid.*, para. 242.
[336] *Ibid.*, para. 243.
[337] *Ibid.*, para. 245.
[338] Cross-Appellant's Brief, para. 1.8.
[339] *Ibid.*, para. 4.6.

sentence imposed is lower than those typically imposed by national courts for simila conduct.[340]

(c) The Trial Chamber did not have sufficient regard to the gravity of the Appellant's conduct: his crimes were not trivial and would be regarded as serious in most legal systems.[341]

(d) The Trial Chamber should have considered the Appellant's superior responsibility as an aggravating circumstance and should have considered his conduct at least as grave as that of the individual perpetrators.[342]

(e) The Trial Chamber erred in treating factors as mitigating which could, in fact, be regarded as aggravating.[343]

The Prosecutor further submits that in these circumstances the Appeals Chamber should revise the sentence and impose a sentence of no less than seven years' imprisonment.[344]

180. In response the Appellant submits that the Trial Chamber should have acquitted him altogether.[345]

C. Oral Hearing

181. On 9 February 2000, after hearing the oral submissions of the parties, the Appeals Chamber dismissed the Appellant's appeal against conviction and allowed the Prosecution

[340] *Ibid.*, paras. 4.16-4.20.
[341] *Ibid.*, paras. 4.20-4.37.
[342] *Ibid.*, paras. 4.39-4.41.
[343] According to the Prosecution, the following factors could not reasonably have been regarded by the Trial Chamber as justifying a significant reduction in the sentence that would otherwise be warranted by the inherent gravity of the Appellant's conduct: (1) that the crimes were committed during two distinct periods and that they occurred at the peak of the conflict (*ibid.*, para. 4.48); (2) the good character of the accused (*ibid.*, para. 4.49); (3) the motive of the accused in taking up his post (*ibid.*, para. 4.50); (4) the accused's knowledge of the broader frame (*ibid.*, para. 4.51); (5) his efforts to improve conditions (*ibid.*, para. 4.52); and (6) his family life (*ibid.*, para. 4.54).
[344] *Ibid.*, para. 4.59.
[345] Appellant's Response, para. 16.

appeal against sentence.[346] Following this decision, the Appellant was remanded in custody.[347] The Appeals Chamber gives its reasons and its revised sentence below.

D. Discussion

182. The nub of the Prosecutor's appeal is to be found in the third ground as summarised above, namely the weight to be given to the gravity of the Appellant's conduct. Consideration of the gravity of the conduct of the accused is normally the starting point for consideration of an appropriate sentence. The practice of the International Tribunal provides no exception. The Statute provides that in imposing sentence the Trial Chambers should take into account such factors as the gravity of the offence.[348] This has been followed by Trial Chambers. Thus, in the *^elebi}i* Judgement, the Trial Chamber said that "[t]he most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence".[349] In the *Kupreški}* Judgement, the Trial Chamber stated that "[t]he sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime".[350] The Appeals Chamber endorses these statements.

183. The Appeals Chamber accepts the Prosecution argument in this connection and holds that the Trial Chamber erred in not having sufficient regard to the gravity of the conduct of the Appellant. His offences were not trivial. As warden of a prison he took part in violence against the inmates. The Trial Chamber recognised the seriousness of these offences but stated that his participation was relatively limited. In fact, his superior responsibility as a warden seriously aggravated the Appellant's offences. Instead of preventing it, he involved himself in violence against those whom he should have been protecting, and allowed them to be subjected to psychological terror. He also failed to punish those responsible. Most

---

[346] T. 85.
[347] "Order for Detention on Remand", IT-95-14/1-A, 9 Feb. 2000.
[348] Article 24(2) of the Statute.
[349] *^elebi}i* Judgement, para. 1225.
[350] *Kupreški}* Judgement, para. 852.

seriously, the Appellant, by participating in the selection of detainees to be used as human shields and for trench digging, as he must have known, was putting at risk the lives of those entrusted to his custody. Thus, the instant case is one of a prison warden who personally participated in physical violence against detainees when, by virtue of his rank, he should have taken steps to prevent or punish it. The Appellant did more than merely tolerate the crimes as a commander; with his direct participation he provided additional encouragement to his subordinates to commit similar acts. The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.

184. The Trial Chamber was right to emphasise the need to establish a gradation of sentencing. For instance, the Appeals Chamber in a recent decision said that, while the conduct of the accused in that case was "incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low".[351] While, therefore, this Appellant may have had a secondary role, compared with the alleged roles of others against whom charges have been brought, he was nonetheless the commander of the prison and as such the authority who could have prevented crimes in the prison and certainly should not have involved himself in them. An appropriate sentence should reflect these factors. There are no other mitigating circumstances in this case.

185. The Prosecution submits that a manifestly disproportionate sentence defeats a purpose of sentencing for international crimes, namely to deter others from committing similar crimes. While the Appeals Chamber accepts the general importance of deterrence as a consideration in sentencing for international crimes, it concurs with the statement in *Prosecutor v. Tadić* that "this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal".[352] An equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. This factor has been widely recognised by Trial Chambers of this International Tribunal as well as Trial Chambers of the International Criminal Tribunal

[351] "Judgement in Sentencing Appeals", *Prosecutor v. Tadić*, Case No.: IT-94-1-A and IT-94-1-A*bis*, Appeals Chamber, 26 Jan. 2000, para. 56.

for Rwanda.[353] Accordingly, a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question[354] and show "that the international community was not ready to tolerate serious violations of international humanitarian law and human rights".[355]

186. The Appeals Chamber is thus satisfied that the Trial Chamber was in error in sentencing the Appellant to two and a half years' imprisonment. The question then arises whether the Appeals Chamber should review the sentence. Appellate review of sentencing is available in the major legal systems but it is usually exercised sparingly. For example, in the United Kingdom the Attorney-General will appeal against a sentence if it appears "unduly lenient".[356] The Court of Appeal has stated that a sentence is unduly lenient where it falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate.[357] Similarly the New South Wales Court of Criminal Appeal in Australia has stated that "an appellate court will only interfere if it is demonstrated that the sentencing judge fell into material error of fact or law. Such error may appear in the reasons given by the sentencing judge, or the sentence itself may be manifestly excessive or inadequate, and thus disclose error".[358] In civil legal systems such as Germany and Italy the relevant Criminal Codes set out what factors a judge must take into consideration in imposing a sentence.[359] The appellate courts may interfere with the discretion of the lower court if its considerations went outside these factors or if it breached a prescribed minimum or maximum limit on sentence.

---

[352] *Ibid.*, para. 48.
[353] "Sentencing Judgement", *Prosecutor v. Erdemović*, Case No.: IT-96-22-T, 24 Dec. 1996, para. 64; "Judgement", *Prosecutor v. Delalić et al.*, Case No.: IT-96-21-T, 16 Nov. 1998, para. 1234; "Judgement", *Prosecutor v. Furundžija*, Case No.: IT-95-17/1-T, 10 Dec. 1998, para. 288; "Judgement and Sentence", *Prosecutor v. Kambanda*, Case No.: ICTR 97-23-S, 4 Sept. 1998, para. 28; "Sentence", *Prosecutor v. Akayesu*, Case No.: ICTR-96-4-S, 2 Oct. 1998, para. 19; Sentence, *Prosecutor v. Serushago*, Case No.: ICTR-98-39-S, 5 Feb. 1999, para. 20; "Judgement and Sentence", *Prosecutor v. Rutaganda*, Case No.: ICTR-96-3-T, 6 Dec. 1999, para. 456; "Judgement and Sentence", *Prosecutor v. Musema*, Case No.: ICTR-96-13-T, 27 Jan. 2000, para. 986.
[354] "Sentencing Judgement", *Prosecutor v. Erdemović*, 24 Dec. 1996, paras. 64-65.
[355] "Judgement", *Prosecutor v. Kambanda*, 4 Sept.1998, para. 28.
[356] Criminal Justice Act 1998 s.36.
[357] *Attorney-General's Reference* (No. 4 of 1989) [1990] 1 WLR 41; 90 Cr. App. Rep. 366; [1990] Crim LR 438.
[358] *Regina v. Ronald Trafford Allpass*, (1993) 72 A. Crim R. 561 at 562.
[359] Italian Criminal Code, Art. 133; German Criminal Code (StGB) s. 46.

187. The Appeals Chamber has followed this general practice. Thus in *Prosecutor v. Tadić*, the Appeals Chamber held that it should not intervene in the exercise of the Trial Chamber's discretion with regard to sentence unless there is a "discernible error".[360] In applying that test to the instant case the Appeals Chamber finds that there was a discernible error in the Trial Chamber's exercise of discretion in imposing sentence. That error consisted of giving insufficient weight to the gravity of the conduct of the Appellant and failing to treat his position as commander as an aggravating feature in relation to his responsibility under Article 7(1) of the Statute. The sentence imposed by the Trial Chamber was manifestly inadequate.

188. In this connection the Appeals Chamber also points out that Article 142 of the SFRY Criminal Code imposed a minimum term of imprisonment of not less than five years for "crimes against humanity and international law" such as "killing, torture, inhumane treatment of the civilian population, causing great suffering or serious injury to body and health ... use of measures of intimidation and terror and the unlawful taking to concentration camps and other unlawful confinement".[361]

189. The Appeals Chamber has now upheld the Prosecution's second ground of appeal and found that the Appellant aided and abetted the mistreatment by HVO soldiers of detainees outside the prison compound. This additional finding makes no difference to a revised sentence, as the Appeals Chamber has already held that the additional finding does not of itself warrant any heavier sentence than would have been imposed without it.[362]

---

[360] "Judgement in Sentencing Appeals", *Prosecutor v. Tadi}*, Case No.: IT-94-1-A and IT-94-1-A*bis*, 26 Jan. 2000, para. 22.

[361] In 1985 *Zdravko Kostić* was found guilty by the District Court of Sabac of war crimes against the civilian population, proscribed under Art. 142 of the SFRY Criminal Code, for his participation in beating up a civilian and molesting the victim's family. He was sentenced to five years imprisonment with his youth as the single mitigating factor, a sentence upheld by the Supreme Court of Serbia on appeal: District Court of Sabac, K-32/85, 2 Oct. 1985. The Appeals Chamber also notes the case of *Willy Zühlke*, a German prison warden who was convicted by the Netherlands Special Court of the beating of Jewish and other prisoners as a war crime and crimes against humanity in 1948. The Court took account of the fact that the accused had allowed himself to be carried along with "the criminal stream of German terrorism" rather than acting with intent on his own initiative and also found that the ill-treatment was not of a very serious nature. Willy Zühlke was sentenced to seven years of imprisonment. Judgement of the *Bijzonder Gerechtshof Amsterdam*, 3 Aug. 1948 (referred to in Judgement of *Bijzondere Raad van Cassatie*, 6 Dec. 1948, *Nederlandse Jurisprudentie*, 1949 No. 85): English translation in UN War Crimes Commission, *Law Reports of Trials of War Criminal,* Vol. XIV, p.139.

[362] *See* para. 173, *supra*.

190. In imposing a revised sentence the Appeals Chamber bears in mind the element of double jeopardy in this process in that the Appellant has had to appear for sentence twice for the same conduct, suffering the consequent anxiety and distress,[363] and also that he has been detained a second time after a period of release of nine months. Had it not been for these factors the sentence would have been considerably longer.

E. Conclusion

191. For these reasons the Appeals Chamber has decided to impose on Zlatko Aleksovski a sentence of seven years' imprisonment. Zlatko Aleksovski is entitled to credit for the time he has spent in detention, which amounts to three years and 12 days.

[363] In common law this double exposure to sentencing is referred to as "double jeopardy" which is applicable to all the different stages of the criminal justice process: prosecution, conviction and punishment: *Pearce v. R.*, (1998) 156 ALR 684. *See* also *Att-Gen.'s Ref. (No. 15 of 1991) (R. v. King)*, CA 13 CR. App R (S) 622, [1992] Crim L R 454; *Att-Gen. Ref. (No. 2 of 1997) (Neville Anthony Hoffman)* [1998] 1 Cr. App R (S) 27, [1997] Crim LR 611; *Att-Gen.'s Ref. (No. 40 of 1996) (R. v. Robinson)* [1997] 1 Cr. App. R (S) 357, [1997] Crim LR 69.

IX. DISPOSITION

192. For the foregoing reasons, **THE APPEALS CHAMBER, UNANIMOUSLY,**

(1) DENIES the Appellant's first ground of appeal against Judgement;

(2) DENIES the Appellant's second ground of appeal against Judgement;

(3) DENIES the Appellant's third ground of appeal against Judgement;

(4) DENIES the Appellant's fourth ground of appeal against Judgement;

(5) ALLOWS IN PART the Prosecution's first ground of appeal against Judgement, but DECLINES to reverse the acquittals on Counts 8 and 9;

(6) ALLOWS the Prosecution's second ground of appeal against Judgement;

(7) ALLOWS the Prosecution's third ground of appeal against sentence, and REVISES the sentence the Appellant received at trial to seven years' imprisonment as of today, subject to deduction therefrom of three years and 12 days for the time served in detention;

(8) DIRECTS that the imprisonment be served in a State to be designated by the International Tribunal in accordance with Article 27 of the Statute and Rule 103 of the Rules.

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

Judge Richard May
Presiding

Dated this twenty-fourth day of March 2000
At The Hague,
The Netherlands.

Judge Hunt appends a Declaration to this Judgement.

4700

[SEAL OF THE TRIBUNAL]

X. DECLARATION OF JUDGE DAVID HUNT

1. I agree with the disposition of these appeals as stated in the Judgement of the Appeals Chamber, and I am content to join in the reasons given therein for all but one of the issues determined during the course of the appeals. The exception is the issue of judicial precedent within the Tribunal. So important is that issue, which is being determined for the first time in the Appeals Chamber, that I prefer to state my own reasons for the conclusion which has been expressed in the Judgement. I should emphasise that the differences between us lie in emphasis rather than in substance.

2. Previous judicial decisions do not, in general, play an important part in international law. They rate no higher than the teaching of highly qualified publicists, as subsidiary means for determining what the international law is upon any issue.[1] Not even the International Court of Justice regards itself as bound by its previous decisions.

3. This Tribunal is unique even in the sphere of international law.[2] This is so in many ways. It is the only international court which has its own appellate structure,[3] so that issues arise not only in relation to the attitude which the Appeals Chamber should take towards its own previous decisions but also in relation to the attitude which the Trial Chambers should take towards the decisions of the Appeals Chamber and of the other Trial Chambers. Only the first of those issues arise for determination in the present appeal.

---

[1]Statute of the International Court of Justice, Article 38.1(d). Article 38 is generally regarded as a complete statement of the sources of international law. See also *Prosecutor v Kupreškić*, Case No.: IT-95-16-T, Judgement, 14 Jan. 2000, para 540.

[2]I equate the International Criminal Tribunal for Rwanda with this Tribunal for this purpose.

[3]The Rwanda Tribunal has its own appellate structure, but the members of this Tribunal's Appeals Chamber are members also of the Rwanda Tribunal's Appeals Chamber.

4. Another way in which the Tribunal is unique in the sphere of international law is that it is presently the only international criminal court, and, as such, it is necessarily subject to many of the same concerns that arise in relation to the criminal courts in domestic jurisdictions. There has always been recognised a special need for certainty in the criminal law. There is, however, a tension existing between that special need and another special need in the criminal law, the need for flexibility where adherence to a previous decision will create injustice. Both of these special needs apply equally to international criminal law as well.

5. A third matter of importance to consider in relation to the Tribunal is that, unlike in domestic systems, there is no legislative body readily able to fine-tune its Statute when a decision of the Appeals Chamber is subsequently seen to have produced an injustice. It is quite unrealistic to expect the Security Council of the United Nations to perform that task.

6. Finally, the Tribunal's Statute is not a self-contained code of the nature adopted in the civil law systems, and (as in the common law systems) it requires constant interpretation for its continuing application.

7. In all these circumstances, how then is the Appeals Chamber to respond to the tension between the special needs of certainty and flexibility? In my respectful view, the answer to that question is not to be found in the practices of other international courts (which are necessarily not criminal courts) or in the doctrine of judicial precedent in the domestic courts where the situation in which those courts operate is quite different to that in which this Tribunal operates.

8. The need for certainty in the criminal law means that the Appeals Chamber should never disregard a previous decision simply because the members of the Appeals Chamber at that particular time do not personally agree with it. The Appeals Chamber should depart from its previous decisions only with caution. It is unwise to attempt an exhaustive tabulation of specific instances when it would be appropriate to do so. The appropriate test, in my view, is that a departure from a previous decision is justified only when the interests of justice require it. Some examples may be given which illustrate the application of that

test. It would be appropriate to reconsider a previous decision where that decision has led to an injustice, or would lead to an injustice if its principle is applied in a subsequent case, or where a subsequent decision of the International Court of Justice, the European Court of Human Rights or a senior appellate court within a domestic jurisdiction has demonstrated an error of reasoning in the previous decision, or where, in the light of subsequent events, the previous decision can be seen to have been plainly wrong, or where the previous decision was given *per incuriam.*

9. I therefore agree with the Judgement where it says that the normal rule is that the Appeals Chamber follows its previous decisions and that a departure from them is the exception. The reference to a previous decision means the *ratio decidendi* of that decision, the precise principle upon which the decision depended. The *ratio decidendi* cannot be distinguished merely because the facts to which it is to be applied are different.

10. Although it is not necessary for the purposes of this appeal (and thus is not part of the *ratio decidendi* of the Judgement), I agree with the Judgement, largely for the reasons given, that a Trial Chamber is bound by the decisions of the Appeals Chamber directly in point, although it should be permitted at the same time to express a reasoned disagreement with that decision for the later consideration of the Appeals Chamber itself.

11. I also agree with the Judgement that a Trial Chamber is not bound by the decision of another Trial Chamber, although I believe that it should have respect for that decision and consider carefully whether it is appropriate to depart from it.

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

Dated this 24th day of March 2000,
At The Hague,
The Netherlands.

Judge David Hunt

4703

ANNEX

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 12 December 1977
Additional Protocol II	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Geneva, 12 December 1977
Aleksovski Judgement/Judgement	"Judgement", *Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-T, Trial Chamber, 25 June 1999
Appellant	Zlatko Aleksovski
Appellant's Additional Submissions	The Appellant's Additional Submissions on Doctrine of *Stare Decisis* and Defence of *"Necessity"*, Case No.: IT-95-14/1-A, 11 January 2000
Appellant's Brief	Zlatko Aleksovski's Appellant's Brief in Opposition to the Condemnatory Part of the Judgement dated 25 June 1999, Case No.: IT-95-14/1-A, 24 September 1999
Appellant's Reply	The Appellant's Brief in Reply to the Respondent's Brief of the Prosecution, Case No.: IT-95-14/1-A, 10 November 1999
Appellant's Response	The Appellant's Brief in Reply to the Prosecution's Appeal Brief, Case No.: IT-95-14/1-A, 25 October 1999

BH	Bosnia and Herzegovina
^elebi}i Judgement	"Judgement", *Prosecutor v. Zejnil Delali} et al.*, Case No.: IT-96-21-T, Trial Chamber, 16 November 1998
Cross-Appellant	Prosecutor
Cross-Appellant's Brief	Prosecution's Appeal Brief, Case No.: IT-95-14/1-A, 24 September 1999
Cross-Appellant's Reply	Brief in Reply of the Prosecution, Case No.: IT-95-14/1-A, 10 November 1999
Defence	Zlatko Aleksovski
Furund`ija Judgement	"Judgement", *Prosecutor v. Anto Furund`ija*, Case No.: IT-95-17/1-T, Trial Chamber, 10 December 1998
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
HV	Army of the Republic of Croatia
HVO	Croatian Defence Council
ICC Statute	Statute of the International Criminal Court, adopted at Rome on 17 July 1998, UN Doc. A/CONF. 183/9
ICCPR	International Covenant on Civil and Political Rights, 1966
ICJ	International Court of Justice
ICRC Commentary to Geneva Convention IV	Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958
ICRC Commentary on the Additional Protocols	Sandoz *et al.* (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987

ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
International Tribunal/ Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
JNA	Yugoslav People's Army
Kupreški} Judgement	"Judgement", *Prosecutor v. Kupreški} et al*, Case No.: IT-95-16-T, Trial Chamber, 14 January 2000
Majority Opinion	"Joint Opinion of the Majority, Judge Vohrah and Judge Nieto-Navia, on the Applicability of Article 2 of the Statute Pursuant to Paragraph 46 of the Judgement", Case No.: IT-95-14/1-T, 25 June 1999
Nicaragua	Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, ICJ Reports (1986), p. 14
Prosecution	Prosecutor
Prosecution's Response	Respondent's Brief of the Prosecution, Case No.: IT-95-14/1-A, 25 October 1999
Prosecution's Additional Submissions	Prosecution Response to the Scheduling Order of 8 December 1999, Case No.: IT-95-14/1-A, 11 January 2000
Prosecution's Further Additional Submissions	Prosecution Response to Zlatko Aleksovski's Additional Submissions in Relation to the Defence of "Extreme Necessity", Case No.: IT-95-14/1-A, 31 January 2000
Rules	Rules of Procedure and Evidence of the International Tribunal

4706

Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993
SFRY	The Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal
T.	Transcript of hearing in *The Prosecutor v. Zlatko Aleksovski*, Case No.: IT-95-14/1-A, which was held on 9 February 2000. All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.
Tadi} Judgement	"Judgement", *Prosecutor v. Du{ko Tadi}*, Case No.: IT-94-1-A, Appeals Chamber, 15 July 1999
Tadi} Jurisdiction Decision	"Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *Prosecutor v Duško Tadić*, Case No.: IT-94-1-AR72, Appeals Chamber, 2 October 1995
Trial Chamber	Trial Chamber I *bis*
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republica Srpska

4707

ANNEX 5:

Prosecutor v Vasiljevic, Judgement, Case No. IT-98-30-T, Trial Chamber, 29 November 2002.

4708

UNITED
NATIONS

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

Case: IT-98-32-T

Date: 29 November 2002

Original: English

IN TRIAL CHAMBER II

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

Registrar: Mr Hans Holthuis

Judgment of: 29 November 2002

PROSECUTOR

v

Mitar VASILJEVIĆ

JUDGMENT

Counsel for the Prosecution:

Mr Dermot Groome
Mr Frédéric Ossogo
Ms Sabine Bauer

Counsel for the Accused:

Mr Vladimir Domazet
Mr RadomirTanasković

4709

PROSECUTOR v Mitar VASILJEVIĆ

I. SUMMARY OF THE CHARGES 4

II. GENERAL CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE ... 8

III. GENERAL REQUIREMENTS OF ARTICLE 3 AND ARTICLE 5 OF THE STATUTE 13

A. GENERAL REQUIREMENTS OF ARTICLE 3 OF THE STATUTE 13
B. GENERAL REQUIREMENTS OF ARTICLE 5 OF THE STATUTE 14
C. FINDINGS OF FACTS RELEVANT TO THE GENERAL REQUIREMENTS OF ARTICLE 3 AND ARTICLE 5 OF THE STATUTE 17
D. CONCLUSIONS RELEVANT TO THE GENERAL REQUIREMENTS OF ARTICLE 3 AND ARTICLE 5 OF THE STATUTE 23

IV. INDIVIDUAL CRIMINAL RESPONSIBILITY 25

A. COMMITTING 25
B. JOINT CRIMINAL ENTERPRISE 25
C. AIDING AND ABETTING 27

V. THE ACCUSED'S RELATIONSHIP WITH THE PARAMILITARY GROUP LED BY MILAN LUKIĆ 29

VI. DRINA RIVER INCIDENT 40

A. THE EVENTS 40
B. THE FACTUAL FINDINGS 46

VII. PIONIRSKA STREET INCIDENT 48

A. THE EVENTS 48
B. THE "DEFENCE" OF ALIBI AND IDENTIFICATION OF THE ACCUSED 52
C. EVENTS EARLIER ON 14 JUNE 1992 68
D. FACTUAL FINDINGS 75

VIII. VIOLENCE TO LIFE AND PERSON 78

A. THE LAW 78

IX. MURDER 83

A. THE LAW 83
B. CONCLUSIONS BASED UPON FACTUAL FINDINGS RELEVANT TO THESE COUNTS AND RESPONSIBILITY OF THE ACCUSED 83
1. Drina River incident 83
2. Pionirska Street Incident 85

X. EXTERMINATION 87

A. THE LAW 87
B. CONCLUSIONS BASED UPON FACTUAL FINDINGS RELEVANT TO THIS COUNT AND RESPONSIBILITY OF THE ACCUSED 93

XI. INHUMANE ACTS 95

A. THE LAW 95
B. CONCLUSIONS BASED UPON FACTUAL FINDINGS RELEVANT TO THESE COUNTS AND RESPONSIBILITY OF THE ACCUSED 96
1. Drina River Incident 96
2. Pionirska Street Incident 97

Deleted: 4
Deleted: 7
Deleted: 11
Deleted: 11
Deleted: 12
Deleted: 15
Deleted: 21
Deleted: 23
Deleted: 23
Deleted: 23
Deleted: 25
Deleted: 27
Deleted: 38
Deleted: 38
Deleted: 42
Deleted: 45
Deleted: 45
Deleted: 49
Deleted: 64
Deleted: 71
Deleted: 74
Deleted: 74
Deleted: 79
Deleted: 79
Deleted: 79
Deleted: 79
Deleted: 81
Deleted: 82
Deleted: 82
Deleted: 88
Deleted: 89
Deleted: 89
Deleted: 90
Deleted: 90
Deleted: 91

XII. PERSECUTION **98**
A. THE LAW 98
B. CONCLUSIONS BASED UPON FACTUAL FINDINGS RELEVANT TO THIS COUNT AND RESPONSIBILITY OF THE ACCUSED 100
XIII. CONVICTIONS ENTERED **105**
XIV. SENTENCING CONSIDERATIONS **108**
XV. DISPOSITION **123**
A. SENTENCE 123
B. CREDIT FOR TIME SERVED 124
ANNEX I – PROCEDURAL BACKGROUND **125**
A. PRE–TRIAL PHASE 125
B. TRIAL PHASE 126
ANNEX II : GLOSSARY OF TERMS **127**

Deleted: 92
Deleted: 92
Deleted: 94
Deleted: 98
Deleted: 101
Deleted: 114
Deleted: 114
Deleted: 115
Deleted: 116
Deleted: 116
Deleted: 117
Deleted: 118

I. SUMMARY OF THE CHARGES

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

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

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

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

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

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

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

is further alleged that the Accused shone a light on people who tried to escape through the windows while the co-accused fired upon them with automatic weapons. Approximately 70 people died as a result of this incident, and a number of them survived, some with serious physical injuries.

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

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

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

---

[1] Pre-Trial Conference, 20 July 2001 (T 89).

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

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

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

II. GENERAL CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

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

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

21. The Trial Chamber has also taken into account the extent of the consistency between the oral evidence of the witnesses at trial and statements given prior to trial. The Trial Chamber

accepts that in most instances a witness's oral evidence will not be identical with the evidence given

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

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

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

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

---

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

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

A. General requirements of Article 3 of the Statute

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

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

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

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

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

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

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

---

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

4724

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

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

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

B. General requirements of Article 5 of the Statute

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

4723

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

[49] *Kunarac* Appeals Judgment, par 83; *Tadić* Appeals Judgment, pars 249 and 251; *Kunarac* Trial Judgment, par 413; *Kupreškić* Trial Judgment, par 71.

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

[51] VG-22 (T 134-135, 165-169); VG-14 (T 417); Omer Branković (Ex P 143, p 548789-91); Mehmed Tvrtković (Ex P 143, p 584584); Snezana Nesković (T 3616).

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

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

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

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

---

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

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

[54] VG-22 (T 136-138, 173); Omer Branković (Ex P 143, p 548791-3); Fikret Cocalić (Ex P 143, p 547043); Mehmed Tvrtković (Ex P 143, p 584586); Muharem Samardić (Ex P 143, p 584977); Dragan Simić (T 2521); VGD-24 (T 4681-4682).

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

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

[57] Fehrid Spahić (T 351); VG-14 (T 419); VG-21 (T 909-910); Mevsud Poljo (T 616); Mehmet Tabaković (Ex P 143, p 912758); Simeun Vasić (Ex P 143, p 645514); Muharem Samardić (Ex P 143, p 584977); Petar Mitrović (T 2770).

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

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

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

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

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

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

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

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

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

---

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

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

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

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

[68] VG-22 (T 187-188).

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

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

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

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

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

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

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

4727

Muslim civilians and that they were committing such crimes only because the victims were of Muslim ethnicity.[76]

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

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

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

---

[76] The Accused (T 2007-2008).

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

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

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

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

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

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

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

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

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

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

49. As early as June 1992, non-Serb civilians were arbitrarily killed.[87] In one such incident, on or about 7 June 1992, Milan Lukić, the Accused and two other men, took seven Muslim men to the bank of the Drina River where they were shot.[88] Five of them were killed.[89] This incident will be referred to as the Drina River Incident.[90]

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

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

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

53. The number of disappearances peaked in June and July 1992.[98] Sixty-two percent of those who went missing in the municipality of Višegrad in 1992 disappeared during those two months.

---

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

[88] *See* below, par 111 .

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

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

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

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

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

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

[95] VG-79 (T 328); Mevsud Poljo (T 617-646); VG-21 (T 920-930); Amor Masović (T 947, 997-998); VG-81 (T 1224, 1233); Zivorad Savić (T 2892-2894); Mehmed Tabaković (EX P 143, p 912758-60); Simeun Vasić (Ex P 143, p 645514-16).

[96] VG-21 (T 925-926).

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

[98] According to the ICRC list of missing persons, almost 200 persons disappeared in May while almost 300 disappeared in June 1992 in and around Višegrad (*see*, Ex P 41.1, *Change in the Ethnic Composition in the*

Most if not all of those who disappeared were civilians.[99] The pattern and intensity of disappearances in Višegrad paralleled that of neighbouring municipalities which now form part of Republika Srpska.[100] Disappearances in those various neighbouring municipalities occurred at approximately the same time.[101]

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

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

---

Municipality of Višegrad, 1991 and 1997, 17 Aug 2001, p 17-21, Annex B and Appendix A-B). The study states in particular that, from all places within the municipality of Višegrad, most people – 57% - who disappeared came from the town of Višegrad itself (p 19). It also states that the vast majority of persons missing in Višegrad were Muslim men, mainly aged 15 to 44 years (p 19). *See* also Mevsud Poljo (T 618); Mirsad Tokaca (T 848-849); VG-21 (T 920), VG-87 (T 1086).

[99] Amor Masović (T 996); John Clark (T 1548).

[100] *See* Ewa Tabeau (T 771-775); *See*, Ex P 41.1, *Change in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001, p 19.

[101] *See*, Ex P 41.1, *Change in the Ethnic Composition in the Municipality of Višegrad, 1991 and 1997*, 17 Aug 2001, p 19.

[102] VG-55 (T 572); VG-13 (T 1426, 1440-1442); VG-101 (T 1167); VG-18 (1587-1589); VG-80 (T 728); Fehrid Spahić (T 378-392); VG-55 (T 572); Mevsud Poljo (T 621); Zoran Djurić (T 4606-4608, 4611-4614).

[103] VG-32 (T 224-236, 250-252); VG-14 (T 419); VG-55 (T 568); VG-59 (T 663, 675); VG-77 (690-691); VG-21 (T 914).

[104] Radomir Vasiljević (T 3164-3179); Zivorad Savić (T 2907-2911).

[105] *Ibid.* In an effort to establish that Muslims continued to have equal access to medical treatment after June 1992, the Defence pointed at the name of *one* Muslim woman who, on three successive occasions, was treated for her cancer. Her name appears in the medical centre log-book among *hundreds* of Serb names (*see* entry 5558, 5622 and 5709 on Ex D 26.1).

[106] VG-32 (T 228); VG-55 (T 572); *see* also *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III A – Special Forces, par 544.

[107] VG-23 (T 2661-2663); Fehrid Spahić (T 361-378); VG-116 (T 582-596); VG-84 (T 1646-1649); Mirsad Tokaca (T 846-848); VG-105 (T 1121-1122); VGD-23 (T 2661-1664, T 1668-1685); VG-117 (T 4533); *see also* incident charged in the Indictment under pars 16-20 (Counts 10 through 13).

[108] VG-22 (T 148-152, 153-161); VG-55 (T 572); Fehrid Spahić (T 361-378); Mirsad Tokaca (T 846-848); VG-105 (T 1121-1122); VG-13 (T 1463).

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

culminated in one of the most comprehensive and ruthless campaigns of ethnic cleansing in the Bosnian conflict. Within a few weeks, the municipality of Višegrad was almost completely cleansed of its non-Serb citizens, and the municipality was eventually integrated into what is now Republika Srpska.[118]

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

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

---

[118] *See* pars 53-56 above.

[119] *See* The Accused, T 1882, 2103-2105 and pars 72 *et seq*, "The Accused's Relationship with the Paramilitary Group led by Milan Lukić".

[120] *See* The Accused, T 1882, 2103-2105. As stated under the incident charged in the Indictment under pars 12 and 13 (Counts 4 through 7), the Accused gained that knowledge not later than 7 June 1992, prior to the moment when the first acts charged in the Indictment were committed.

IV. INDIVIDUAL CRIMINAL RESPONSIBILITY

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

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

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

A. Committing

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

B. Joint Criminal Enterprise

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

[121] *Tadić* Appeal Judgment, pars 191-192; *Krnojelac* Trial Judgment, par 73.
[122] *Tadić* Appeal Judgment, par 188; *Kunarac* Trial Judgment, par 390; *Krstić* Trial Judgment, par 601; *Krnojelac* Trial Judgment, par 73.
[123] Pre-Trial Conference, 20 July 2001, T 52-56.

awareness, he participated in that enterprise.[124] Indeed, when asked, counsel for the Prosecution expressly disclaimed any intention to rely upon such a case.[125] The Trial Chamber will therefore consider only the first and second categories of joint criminal enterprise.

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

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

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

67. A person participates in a joint criminal enterprise by personally committing the agreed crime as a principal offender, or by assisting the principal offender in committing the agreed crime as a co-perpetrator (by undertaking acts that facilitate the commission of the offence by the principal offender),[131] or by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function, and with knowledge of the

---

[124] *Prosecutor v Brđanin and Talić*, IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001, ("*Brđanin and Talić* Decision on Form of Further Amended Indictment"), par 30.

[125] Pre-Trial Conference, 20 July 2001, T 52-55. *See* also Prosecution Final Trial Brief, pars 336-337, 341, 344-345, 350, 360, and Trial Transcript, pp 4824-4825.

[126] *Tadić* Appeal Judgment, par 190-206; *Delalić* Appeal Judgment, pars 365-366.

[127] *Krnojelac* Trial Judgment, par 78; *Brđanin and Talić* Decision on Form of Further Amended Indictment, par 26.

[128] *Krnojelac* Trial Judgment, par 78.

[129] *Tadić* Appeal Judgment, par 227.

[130] *Prosecutor v Brđanin and Talić*, IT-99-36-PT, Decision on Form of the Second Indictment, 11 May 2000 ("*Brđanin and Talić* Form of the Second Indictment Decision"), par 15; *see* also *Tadić* Appeal Judgment, par 227(ii); *Prosecutor v Furund`ija*, Case IT-95-17/1-A, Judgment, 21 July 2000 ("*Furundžija* Appeal Judgment"), par 119.

[131] The Trial Chamber understands the term "co-perpetrator" as referring to a participant in a joint criminal enterprise who was not the principal offender. The co-perpetrator shares the intent of the joint criminal enterprise and is distinguishable from a person who merely aids and abets a joint criminal enterprise; *see Krnojelac* Trial Judgment, par 77.

nature of that system and intent to further that system.[132] If the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission.[133]

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

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

C. Aiding and Abetting

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

---

[132] *Brđanin and Talić* Form of the Second Indictment Decision, par 15; *Krnojelac* Trial Judgment, par 81. The second part of that proposition is inapplicable in the present case.
[133] *Brđanin and Talić* Form of the Second Indictment Decision, par 15; *Krnojelac* Trial Judgment, par 82.
[134] *Krnojelac* Trial Judgment, par 83; *Brđanin and Talić* Decision on Form of Further Amended Indictment, par 26.
[135] *Krnojelac* Trial Judgment, par 83.
[136] *Furundžija* Trial Judgment, pars 235, 249.
[137] *Furundžija* Trial Judgment pars 223, 224, 249; *Prosecutor v Aleksovski*, Case IT-95-14/1-T, Judgment, 25 June 1999 ("*Aleksovski* Trial Judgment"), par 61; *Kunarac* Trial Judgment, par 391; *Kordić and Čerkez* Trial Judgment, par 399.
[138] *Aleksovski* Appeal Judgment, 24 Mar 2000 par 162; *Kunarac* Trial Judgment, par 391.

abetting unless it is demonstrated to have a significant encouraging effect on the principal offender.[139]

71. To establish the *mens rea* of aiding and abetting, it must be demonstrated that the aider and abettor knew (in the sense that he was aware) that his own acts assisted in the commission of the specific crime in question by the principal offender.[140] The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's state of mind. However, the aider and abettor need not share the intent of the principal offender.[141] The fact that the aider and abettor does not share the intent of the principal offender generally lessens his criminal culpability from that of an accused acting pursuant to a joint criminal enterprise who does share the intent of the principal offender.

[139] *Prosecutor v Furund'ija*, Case IT-95-17/1-T, Judgment, 10 Dec 1998 ("*Furundžija* Trial Judgment"), par 232; *Tadić* Appeal Judgment 7 May 1997, par 689; *Kunarac* Trial Judgment par 393.
[140] *Aleksovski* Appeal Judgment par 162; *Tadić* Appeal Judgment par 229; *Kunarac* Trial Judgment, par 392.
[141] *Aleksovski* Appeal Judgment 24 Mar 2000 par 162; *Kunarac* Trial Judgment, par 392.

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

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

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

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

---

[142] *See* above, par 46.
[143] The Accused (T 1853-1855, T 1988); VG-32 (T 297-298); VG-55 (T 565).
[144] *See*, for instance, VG-55 (T 566-576); VG-59 (T 661-663, 671-675); VG-115 (T 1011-1019, 1030-1037); VG-13 (T 1426); VG-84 (T 1654-1655); Simeun Vasić (Ex P 143, p 645515). *See* also, Ex P 49, *Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, Annex III. A – Special Forces, pars 246-250, 543-553.
[145] *See*, Defence Final Trial Brief, 28 Feb 2002, p 15.
[146] *See*, Prosecution Final Trial Brief, 28 Feb 2002, pp 21-30.
[147] *See*, Defence Final Trial Brief, 28 Feb 2002, pp 19-20, 30-37.

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

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

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

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

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

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

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

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

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

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

77. The Accused claimed that after the events at the Drina River he had tried to avoid the company of Milan Lukić.[159] However, he admitted that in 1995 or 1996 he was best man for Milan Lukić at his wedding,[160] and that in 1997 or 1998 he was the godfather at the baptism of Milan Lukić's child.[161] The Trial Chamber accepts the evidence that there were four other men who also had the same *kum* relationship to Milan Lukić who could have been best man to

---

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

[154] The Accused (T 1984).

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

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

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

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

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

[160] The Accused (T 1951).

[161] The Accused (T 1950).

Milan Lukić and the godfather of his child.[162] Even if these men had lived some distance away, the Accused gave evidence that a *kum* would travel great distances to christen a child or to be the best man.[163] The Trial Chamber also heard evidence that certain extreme circumstances may justify severing a *kum* relationship.[164] The Trial Chamber is satisfied that the incident on the Drina River, discussed later,[165] would qualify as such extreme circumstances. However, the fact that the Accused failed to sever his *kum* relationship with Milan Lukić after this incident does no more than raise a suspicion of a closer relationship with the paramilitary group, and then only because the Accused allowed it to continue despite his knowledge of Milan Lukić's very serious criminal activity.

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

79. The Prosecution also adduced evidence of other incidents in which the Accused is alleged to have participated with Milan Lukić and others in the commission of criminal acts in the Prosecution Final Trial Brief.[168] These incidents are specifically relied upon as rebutting the alibi "defence" raised by the Accused, and they are discussed later in that section of the Judgment.[169] They are

[162] The Accused (T 1959).
[163] The Accused (T 1950-1952).
[164] Dragisa Dikić (T 2106, 2335).
[165] *See*, pars 96-115.
[166] *See*, Prosecution Final Trial Brief, pars 54-69.
[167] *See* par 22 above concerning corroboration evidence.
[168] *See*, Prosecution Final Trial Brief, pars 233-249.
[169] *See* below, pars 157-164.

(g) the threats issued to VG-77, (h) the confinement of the Zljeb group in the fire station, (i) the killing of Kahriman, (j) the killing of Kupus, and (k) the killing of Nurka Kos in Kosovo Polje and of four other men in Sase.[170] For present purposes, it is sufficient to state that the Trial Chamber does not accept that the evidence of any of those other alleged incidents established the Accused's membership of Milan Lukić's group, or an association from which it can be inferred that the Accused shared the general homicidal intentions of that group.

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

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

81. VG-55 and VG-59 gave evidence that, one evening towards the end of May 1992, about seven to ten armed men came to their village, Musići. Amongst them were Milan Lukić and the Accused, who walked into the house of VG-59's father. In the meantime, the other paramilitaries took money and other valuables from other houses in that village.[174] The Accused stood in the doorway with his automatic rifle, preventing anyone in the house from leaving. At the same time, Milan Lukić searched the house.[175] There was no doubt in VG-59's mind that the role of the

[170] *See* pars 157-160, and 164.
[171] The Accused (T 1873, 2045, 2052).
[172] VG-59 (T 657-658, T 668); VG-55 (T 562-563).
[173] The Accused (T 2060): "FProsecution's questionğ There's no reason that you're aware of that VG59 would say anything false about you, is there? FThe Accused's answerğ No. I mean, that's exactly what I'm trying to say. Of course, the witnesses didn't enjoy the situation, I mean the fact that I was there, but I feel thankful because they could have said all kinds of things about me, that I had come there on the second or third occasion, that I had taken those women to be raped, and so on and so forth. I think that they were rather correct in their testimonies."
[174] VG-55 (T 566, 563); VG-59 (T 660-661, T 669).
[175] VG-59 (T 657, T 671, T 678); VG-55 (T 563).

Accused was to guard the entrance of the house.[176] During the search, VG-55 feared that she might be killed, and she attempted to start a conversation with the Accused, whose wife had been her school friend. She held this fear even though neither the Accused nor Milan Lukić expressly threatened anyone in the house or acted aggressively.[177]

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

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

---

[176] VG-59 (T 671).
[177] VG-55 (T 565, T 574).
[178] VG-59 called the group led by Milan Lukić the White Eagles, since they introduced themselves as such (T 656).
[179] VG-59 (661-662, T 680); *see* also VG-55 (T 566).
[180] The Accused (T 1873, 2045, 2052); *see* also: *Agreed fact by the parties to the effect that* "sometimes during May 1992 the Accused carried an automatic rifle that he was issued with in Prelovo. He was issued with a "smajser" rifle": Ex P 36-1 (x). The fact that the Accused was armed is corroborated by the witnesses giving evidence in respect of this incident (VG-55, T 657; VG-59, T 663, 665).
[181] The Accused (T 1869, 1873, 2042-2046, 2052); Ex P 15.1, pp 43-44.
[182] The Accused (T 2052).
[183] The Accused (T 2054).
[184] The Accused (T 2058-2062, 2067).

He said that, when Milan Lukić asked if there were weapons in the attic, he repeated the request to one of the people in the house and then assured Milan Lukić that he knew all of the people and that they were good people. He claimed that in this way he prevented the searching of the attic.[185] After the house of VG-59's father was searched, he left Musići together with Milan Lukić and the other armed men.[186] As already stated, the Trial Chamber rejects that version of the events.

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

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

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

---

[185] The Accused (T 1875, 2046, 2057).
[186] The Accused (T 1876, T 2067).
[187] VG-81 (T 1220-1222).
[188] The Accused (T 2260-2261).
[189] VG-81 (T 1223). Her evidence was, however, exaggerated, in that she claimed that she would see the Accused up to ten times a day. The Accused said that he knew the witness well (T 1945-1946, 2241-2242).
[190] VG-81 was a very unsatisfactory witness in many respects. Her evidence covered five separate incidents in which the Accused is alleged to have participated. When she was called in the Prosecution's case in reply, she volunteered a sixth such incident, in which the Accused was alleged to have confined a number of people in his house, including her half brother. She was obliged to admit that she had not herself witnessed this incident, and she said that she had been prompted by others to testify in relation to it (T 3913, 3963-3965). She also gave evidence in relation to an audio tape which she had made of a meeting with a Defence witness. (This is referred to later in relation to the alibi, see par 145). She gave as her reason for recording the conversation that she needed the information to assist others to locate the graves of their loved ones, yet she turned the tape recorder off as soon as the Defence witness commenced to discuss the fate of those people (T 3922-3965). Her evidence on many issues was inconsistent, and she appeared to have considerable animus against the Accused. The Trial Chamber is of the view that it is unsafe to accept any of her evidence unless it is corroborated in a material aspect by independent evidence.

(c) Abduction of Professor Rasim Torohan

86. VG-81 gave evidence that, on 9 June 1992, she saw Milan Lukić, the Accused and another person whom she did not recognise stop in a red Passat on the road in front of Kosovo Polje. They began arguing with Professor Rasim Torohan, a Muslim. VG-81 claimed that she saw them push him into the red Passat of Milan Lukić. She said that he has not been seen since.[191] A man of the same name is registered with the ICRC as missing since June 1992.[192] The Accused was not asked to comment on this allegation. For the reasons already given, the Trial Chamber is not satisfied that the evidence of witness VG-81 is of sufficient credibility to establish that the Accused participated in this incident.[193]

(d) Black flag incident

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

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

---

[191] VG-81 (T 1222).
[192] Ex P 41.1; Ex P 41.2.
[193] *See* above, par 85.
[194] VG-81 (T 1222-1223, 1270).
[195] *See*, Prosecution Final Trial Brief, 28 Feb 2002, p 25.
[196] The Accused (T 2071).
[197] VG-81 (T 3951).
[198] *See*, pars 129-166.

(e) The killing of the elderly Kurspahić couple

89. VG-115, who lived in Pionirska Street, gave evidence that, in the early summer, Milan Lukić, the Accused and another man arrived in the street at dusk one day in a Red Passat.[199] Milan Lukić asked VG-115 where her husband was and also whether there were any Muslims around. The three of them went into the Kurspahić house. VG-115 said that she could see the Kurspahić house because on that particular evening she was staying in a house very close by and she noticed that the lights were off. The red Passat was parked below the Kurspahić house. She said that Milan Lukić, the Accused and another person searched the house with flashlights. They found the old people on the first floor. The old people begged for their lives. The witness then heard a burst of gunfire and the screams of the old woman. The old man was killed first and the old woman afterwards. The next morning, the witness saw the door of the Kurspahić house open and the legs of the old people sticking out. The bodies were lying there for five or six days before they were taken away.[200] The Accused was not asked to comment on this incident.

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

(f) The evidence of other relevant behaviour

91. VG-80 gave evidence that, during the month of June, she saw the Accused from her apartment window in Višegrad. She said that he was armed and in the company of other armed men in the vicinity of a garage outside her window. It appeared to her that they were looking for people or property in the garage. The Accused was dressed in dark clothing, wore a cowboy hat

[199] VG-115 knew the Accused before the war as a waiter in the Panos Restaurant (T 1013-1014). The Accused gave evidence that he had known VG-115 by sight for at least five years (The Accused, T 1947-1948, 1573).

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

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

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

and had a red coloured ribbon around his arm.[203] She also claimed to have seen the Accused shortly before 3 July 1992.[204] On this occasion, she saw him come out of her building dragging one leg. She was unable to tell whether he was wearing a cast.[205] VG-80 claimed to have known the Accused by sight before the war. She identified him in the photo array,[206] the probative value of which has already been discussed.[207] Her evidence appears to have been coloured by subsequent knowledge that the accused was alleging that he injured his leg at about this time, so to give it greater verisimilitude. The Trial Chamber is not satisfied that her identification of the Accused on either occasion is sufficiently reliable to establish the Accused's association with Milan Lukić's group.

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

[203] VG-80 (T 732-734).
[204] VG-80 gave evidence that she saw the Accused at a distance of between 9 feet 10 inches and 16 feet 1 inch (the estimate in imperial measurements results from the use of a plan of the courtroom in the construction of which the United Kingdom had been involved, as she estimated the distance by reference to the courtroom; the metric equivalent is between about 3 and 5 metres) (VG-80, T 735; Ex P 57).
[205] VG-80 (T 734).
[206] VG-80 (T 728).
[207] *See* above, pars 17-18.
[208] Defence Final Trial Brief, 28 Feb 2002, p. 18.
[209] The Accused (T 2266-2267); *see* also, Defence Final Trial Brief, 28 Feb 2002, p. 18.
[210] The Accused (T 1978, T 1985).

camouflage military, or police uniforms which were mostly blue, whilst the Accused wore a dark single-coloured SMB uniform which was used by the former JNA.[211]

93. The Trial Chamber is satisfied that the Accused's commitments during the period from mid-May until mid-June 1992 did not prevent him from being associated with the paramilitary group to the limited extent already accepted. The Accused admitted that in late May, while he was deployed by the TO in the field kitchen in Prelovo, he was with Milan Lukić and other members of the paramilitary group when they searched the houses in the village of Musići.[212] Moreover, the Trial Chamber is satisfied that the fact that the Accused spent around three days in the detention facility in the Užamnica barracks, for a reason which was not made clear during trial,[213] does not exclude the Accused's association with the paramilitary group before and after this short period. Also, the task of cleaning the street did not prevent the Accused from acting together with Milan Lukić and his men to the extent already accepted. The Accused gave evidence that he would carry out this task for only one hour per day, that no one set his timetable, that he was not supervised and that he was not required to report back to anyone.[214]

94. The Trial Chamber rejects the Defence argument that the Accused could not have been a member of the paramilitary group because the other members were outsiders and much younger than he was or because he was a drunk. This was mere speculation by the Accused, not evidence. Moreover, the Accused gave evidence that Mitar Knežević was, within the paramilitary group, the right hand of Milan Lukić.[215] It has been established that Mitar Knežević, who was from the area of Višegrad, was even older than the Accused and was also prone to alcohol abuse.[216] The Trial Chamber also rejects the argument of the Defence that the fact that the Accused wore another type of uniform to that worn by the other members of the paramilitary group implies that he was not associated with them.[217] The SMB uniform the Accused wore was a uniform of the former JNA,

---

[211] The Accused (T 1873, T 2045, T 2052); VG-14 (T 425); VG-32 (T 217, 238-239, 260-261); VG-14 (T 453-455, 431-432); VG-13 (T 1428-1429). The parties further agreed that the Accused would wear an olive grey (SMB) JNA type uniform with a double-headed eagle insignia. Occasionally he also wore a black military hat with the same insignia, *see*, Ex P 36-1 (w).

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

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

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

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

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

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

which had been issued to him about ten years earlier as a member of the reserve forces. The Accused had worn this uniform since his mobilisation by the TO in mid-May 1992.[218]

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

VI. DRINA RIVER INCIDENT

A. The Events

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

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

[218] The Accused (T1863-1864).
[219] *See* below, pars 251-262.
[220] *See*, Prosecution Final Trial Brief, 28 Feb 2002, pp 30-45.

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

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

100. The Trial Chamber is satisfied that, once at the Vilina Vlas Hotel, the seven men were taken into the reception area, where the Accused, already present at the hotel, was standing near the hotel counter.[232] The Trial Chamber is satisfied that, while Milan Lukić began to search for some keys, the seven unarmed men stood in a semi-circle inside the lobby of the hotel. One of the unidentified armed men guarded them, pointing his automatic rifle at them, preventing any of them from leaving

---

[221] VG-32 (T 279-284, 287); VG-14 (T 443). The Defence did not dispute this fact; *see* Defence Final Trial Brief, 28 Feb 2002, p 20.
[222] VG-32 (T 282); VG-14 (T 441, 448).
[223] VG-32 (T 279-280, 283); VG-14 (T 440).
[224] VG-32 (T 233); VG-14 (T 423); VG-79 (T 321-322); The Accused (T 2047, 2087).
[225] VG-32 (T 238-239, 241-242); VG-14 (T 423-424).
[226] VG-32 (T 230, 247-249, 253); VG-14 (T 427, 429).
[227] VG-32 (T 230, 237-240, 242-245, 247-249); VG-14 (T 423-428).
[228] VG-32 (T 254-258, 268, 274, 286-287); VG-14 (T 429, 433, 436).
[229] The Defence during its closing arguments accepted this fact to be true (T 4848).
[230] VG-59 (T 663-666); VG-32 (T 260); The Accused (T 1890).
[231] VG-32 (T 226, 241, 256, 268, 274, 286-287); VG-14 (T 433, 440).
[232] VG-32 (T 260); VG-14 (T 431, 445). Both witnesses clearly identified the Accused VG-32 (T 260-264, 266, 268); VG-14 (T 432). *See* also, Ex P 101/32.

the lobby of the hotel.[233] When one of the Muslims asked about their fate, this unidentified man answered that they were to be exchanged for some Serb captives.[234]

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

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

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

---

[233] VG-32 (T 268-270); VG-14 (T 431).
[234] VG-32 (T 268).
[235] VG-32 (T 268-270).
[236] VG-32 (T 303, 268-70).
[237] VG-32 (T 270-271); VG-14 (T 435).
[238] VG-32 (T 271-272).
[239] VG-14 gave evidence that he saw the Accused with an automatic rifle inside the lobby of the hotel (VG-14, T 433, 440, 457), while VG-32, although he did not see him with a weapon before they left the hotel, did not suggest that he did not have one at an earlier stage. All he said was that he did not see him with a weapon inside the hotel (VG-32, T 261, 271, 275). The Accused claimed that he returned the weapon issued to him by the TO when he was arrested at Bikavac on 29 May 1992 and, after his release on 1 June 1992, he was not issued with any weapon (The Accused, T 1878, 1888); Ex P 15.1, p 77.
[240] VG-32 (T 261, 271, 275); VG-14 (T 433, 440, 457). VG-79 gave evidence that the three and sometimes four people walking towards the Drina River behind the seven Muslim men were all armed (T 324).
[241] VG-14 (T 467). The Trial Chamber does not attach significance to the fact that one of the two witnesses during a prior statement given to the investigators of the Prosecution identified the weapon of the Accused as a semi-automatic rifle.

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

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

[242] VG-32 (T 273); VG-14 (T 436).
[243] VG-32 (T 275, 277); VG-14 (T 436).

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

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

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

108. The Trial Chamber is satisfied that Milan Lukić, the Accused and the other two unidentified men pointed their guns, which had their safety catches off, at the Muslim men, as they walked towards the bank of the Drina River.[251] The Trial Chamber is satisfied that the Accused followed

---

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

the men to the banks of the Drina River, and it rejects as untruthful the Accused's evidence that, when he realised that he could not persuade Milan Lukić to spare the men, he turned away from the group and stopped some 10 to 15 metres away from the river.[252]

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

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

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

---

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

B. The Factual Findings

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

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

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

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

weapons being fired. The conclusion of all three members of the Trial Chamber in relation to the intent of the Accused that those seven men be killed is thus identical.

114. The Prosecution made it clear in its Pre-Trial Brief that the Accused was charged with inhumane acts in relation to that incident only in relation to the two survivors, and not the five murdered men.[265] The Trial Chamber is satisfied that the Accused intended that the two survivors of the shooting, VG-32 and VG-14, were also to be killed. The Trial Chamber is satisfied that the participation of the Accused in the attempted murder of VG-32 and VG-14 constitutes a serious attack on their human dignity, and that it caused VG-32 and VG-14 immeasurable mental suffering. The Trial Chamber is satisfied that the Accused, by his acts, intended to seriously attack the human dignity of VG-32 and VG-14 and to inflict serious physical and mental suffering upon them.

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

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

VII. PIONIRSKA STREET INCIDENT

A. The Events

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

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

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

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

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

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

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

---

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

[297] Ex D 44 established that, on 14 June 1992, the sunset in Visegrad was at 8.24 pm. The reliability of this exhibit was seriously called into question by the Trial Chamber (Defence closing arguments, T 4936-4937). Ex P 148, the Muslim calendar for the year 1992, established that sunset was at 8.36 pm. The difficulty with this exhibit lies in that it is not known where the measurements were taken from (Defence closing arguments, T 4938). Moreover, it reflects the time of sunset, not necessarily the time when it gets dark, bearing in mind the longer Summer twilight

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

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

126. The Trial Chamber is satisfied that the house had been prepared in advance for the fire. The carpet in the room was wet and smelt like glue,[309] and the smoke from the fire was of unusual thickness.[310] The fire was high and it spread quickly, demonstrating that some type of flammable

---

(T 4938-9). In any case, it would appear that what is clear from the evidence is that the armed men returned to transfer the group in the dark, so that it would have necessarily been sometime after 8.30pm.

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

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

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

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

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

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

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

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

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

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

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

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

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

substance had been used.[311] Apart from the entrance door, two windows to the side of the room facing the creek provided the only escape routes.[312]

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

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

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

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

---

[311] VG-18 (T 1597); VG-84 (T 1754); VG-13 (T 1453).
[312] VG-38 (T 1379-1380); VG-13 (T 1448).
[313] Ex P 145 (T 896); VG-38 (T 1383); VG-18 (T 1598); VG-84 (T 1754).
[314] VG-18 (T 1598, 1601); VG-84 (T 1755-1756, 1764); VG-13 (T 1454); VG-38 (T 1386).
[315] Ex P 145 (T 897).
[316] VG-18 (T 1598); VG-13 (T 1454).
[317] VG-38 (T 1358); VG-13 (T 1454).
[318] VG-13 (T 1455-1456).
[319] The Trial Chamber is satisfied that the Accused was present, as he admitted, in the region of Pionirksa Street prior to this incident (VG-87, T 1090, 1105). Given the admission of the Accused that he was present in Pionirksa Street,

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

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

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

133. There was considerable evidence given in support of the alibi, by Petar Mitrović, Ratomir Simsić, Zivorad Savić, Dr Loncarević, Miloje Novaković and Dobrivoje Sikirić, all of whom corroborated the evidence of the Accused to differing degrees. Ratomir Simsić and Petar Mitrović said that they saw the Accused fall from the horse, and that the horse fall on the Accused's leg between 3.40 and 5.15 pm.[328] Zivorad Savić, the ambulance driver, said that he arrived at the scene at about 5.00 pm and drove the Accused to the Višegrad Health Centre.[329] Dr Goran Loncarević said that he treated the Accused when he was admitted at the Višegrad Health Centre

---

and that he did meet with the Kortinik group, it is unnecessary for the Trial Chamber to consider in detail the evidence of witnesses that claimed to have seen the Accused in that vicinity on the day in question. However, to the extent that the evidence of those witnesses impacts upon other issues in the Prosecution case, the Trial Chamber will make some findings with respect to its reliability. *See* pars 168-178.

[320] The Accused (T 2146-2147, 2197-2198).
[321] The Accused (T 1905, 2190).
[322] The Accused (T 1905–1910, 2190).
[323] The Accused (T 1910, 2199).
[324] The Accused (T 1910-1911, 2146).
[325] The Accused (T 1911).
[326] The Accused (T 1912).
[327] The Accused (T 1912).
[328] Petar Mitrović (T 2771-2772); Ratomir Simsić (T 2818, 2831).
[329] Zivorad Savić (T 2870, 2873).

sometime between 4.00 and 6.00 pm.[330] Zivorad Savić said that he transported the Accused from the Višegrad Health Centre to the Užice Hospital, leaving the Health Centre between 6.00 and 7.00 pm.[331] Miloje Novaković said that he accompanied the Accused and Zivorad Savić to Užice Hospital, and he corroborated the times given in evidence.[332] Dobrivoje Sikirić, the uncle of the Accused, said that the Accused, Miloje Novaković and Zivorad Savić stopped at his coffee bar in Vardiste on their way to Užice Hospital.[333] Zivorad Savić and Miloje Novaković said that they arrived at the Užice Hospital between 8.40 and 9.00 pm.[334]

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

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

---

[330] Dr Loncarević (T 2991). Zivorad Savić gave evidence that when he arrived to the Health Centre with the Accused it was about 5.15 pm (T 2870, 2873).

[331] Zivorad Savić (T 2875, 2924).

[332] Miloje Novaković (T 3037-3038).

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

[334] Zivorad Savić (T 2876, 2879); Miloje Navaković (T 3039).

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

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

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

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

136. The Trial Chamber does, however, accept the accuracy of the medical records from the Užice hospital, of which some had been seized from Dr Aleksandar Moljević on 1 November 2000 pursuant to an order of the Tribunal,[339] and that these records give rise, at the least, to the reasonable possibility that the Accused was present at the Užice hospital as stated in those records.[340] Amongst the records which were seized were two ledgers, and a four-page medical history.[341] The first of the four pages of the case history bore the name and surname of the Accused, and recorded the date of his admission to Užice hospital as 14 June 1992.[342] The two ledgers - the protocol of patients admitted to Užice Hospital,[343] and the protocol of patients from the war zone admitted to Užice hospital[344] - both had entries bearing the name of Mitar Vasiljević and showed the admission date to the orthopaedic ward in Užice hospital as 14 June 1992. The later protocol recorded the time of admission as 9.35 pm.[345] These ledgers appeared to have been stored for quite a long time. They were covered in dust and dirt and smelt unpleasant.[346]

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

138. The Trial Chamber is satisfied that there was no evidence to suggest that these hospital records had been interfered with. The Prosecution conceded that, after subjecting them to extensive and repeated forensic analysis, the protocol of patients admitted to Užice Hospital, the protocol of patients from the war zone admitted to Užice hospital, and the four pages that made up the case history showed no sign of forgery.[349] The Prosecution also subjected the protocol of registration of patients to the Višegrad Health Centre for the relevant period to forensic analysis, and conceded

---

[339] Order granting Prosecutor's application for an order authorising the seizure of evidence *(under seal)*, 30 Oct 2000. *See* Annex I, par 3. The investigators seized, *inter alia*, the following: Ex P 136, Ex P 137 and Ex P 138.
[340] Ex P 136; Ex P 137; Ex P 138; Ex D 29; Ex D 30; Ex D 31; Ex D 32.
[341] Ex P 136; Ex P 137; Ex P 138.
[342] Witness identified Ex P 138 as the case history (Milena Tomasević, T 3213-3214; Dr Simić, T 3270; Slavica Pavlović, T 3400; Dr Martinovic, T 3494; Dr Jovanović, T 3634; Dr Moljević, T 3728).
[343] Dr Moljević identified Ex P 136 as the protocol of patients admitted to Užice hospital in 1992 (Dr Moljević, T 3698).
[344] Dr Moljević identified Ex P 137 as the protocol of patients admitted to Užice hospital from the war zone from 6 April 1992 onwards (Dr Moljević, T 3706).
[345] Ex P 137.
[346] Ib Jul Hansen (T 3737-3738).
[347] Slavica Pavlović identified ExD31 as the nurses' notebook from the orthopaedic department of Užice Hospital, covering the period from 9 January 1992 until 10 July 1992 (Slavica Pavlović, T 3381).
[348] Slavica Pavlović (T 3383).

again that, aside from an evident overwriting in one of the entries, bearing the name of a co-accused, there was nothing to suggest this record had been tampered with.[350]

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

[349] Ex P 136; Ex P 137; Ex P 138. An expert report was admitted into evidence (Ex D 52).
[350] Ex D 26. Its reliability has been addressed elsewhere (*see* par 135).

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

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

---

[351] The Accused (T 2022).
[352] Dr Jovanović (T 3657).
[353] Dr Jovanović (T 3637); Dr Moljević (T 3712); Dr Simić (T 3292-3293).
[354] Dr Moljević (T 3759); Ex P 138; Ex P 137.
[355] Dr Vučetić (T 4065).
[356] Furthermore, the referral diagnosis is the diagnosis on the basis of which the patient would have been referred to Užice Hospital, and which would have appeared in the referral paper pursuant to which the patient would have been received in the Užice Hospital from the Višegrad Health Centre (Dr Loncarević, T 3014; Zivorad Savić, T 2874; Dr Moljević T 3731-2).
[357] Its reliability has been addressed elsewhere. *See* par 135.
[358] Moreover, the blood group of the Accused coincided with the blood group that appeared under the Accused's name in the records that were seized from Dr Moljević. The Trial Chamber finds this last circumstance to be of limited significance insofar as the parties agreed that the frequency of the blood type of the Accused is 32.3 per cent of the population (T 4647-4649).

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

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

---

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

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

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

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

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

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

---

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

care to which he would have been entitled as a refugee.[371] The date of issue of the refugee card was September 1998.[372] At the time of his arrest, Dragan Nikolić was living in Serbia,[373] and it appears that the refugee card had been issued in Republika Srpska.[374]

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

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

147. **Looting** - The Trial Chamber is not satisfied that the Prosecution has established beyond reasonable doubt the presence of the Accused during the looting of the Koritnik group. Three witnesses claimed that the Accused was involved in the looting; of these, two witnesses said that they observed the Accused during the looting of the group. VG-61 said that the Accused was involved,[380] but VG-61 was not present and, insofar as he may have been relying upon what his

[371] Gary Selsky (T 3980-3981); Ex P 144; Ex P 114.1.
[372] Gary Selsky (T 3992).
[373] Gary Selsky (T 3994).
[374] Gary Selsky (T 3994-6).
[375] Ex P 109; Ex P 109.1; Ex P 109.2; Ex P 109.3.
[376] VGD-30 (T 2947, 2953). *See* VG-81 (T 3878, 3881, 3894) and VG-97 (T 4483). *See* also pars 84-88.
[377] Tom Broeders (T 4339-4340).
[378] The tape was allegedly recorded surreptitiously by Prosecution witness VG-81 during a conversation that she and VG-97 amongst others purportedly held with the ambulance driver (VG-81, T 3876). The Prosecution expert witness found a discontinuity within the relevant excerpt of the tape which he could not account for (Tom Broeders, T 4302-4305).
[379] Par 16.
[380] VG-61 (T 791).

father told him, there is no mention of this in his father's statement.[381] VG-13 said that the Accused was standing in the doorway during the looting,[382] but this was not mentioned in her 1998 statement to the Prosecution.[383] VG-38 said that the Accused was standing outside when the looting occurred.[384] The evidence of identification of those witnesses is not sufficiently reliable as to warrant the conclusion that the Accused was present at the time when the Kortnik group was being looted.

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

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

---

[381] Ex P 145. VG-61's father died before the trial took place.

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

[383] Ex D 4.

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

[385] VG-61 (T 793).

[386] Ex P 145.

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

[388] VG-78 (T 1295).

[389] VG-101 (T 1171). **VG-101** said that she had seen the Accused pass through Prelovo, that his wife's name was Milojka, that his wife had a shop in Prelovo, and that she had seen the two of them walking together (VG-101, T 1155-1156, 1195). The wife of the Accused said that she had worked in Prelovo (Milojka Vašiljević, T 2559). VG-101 identified the Accused in the photo array (Ex P 55-101). The Accused said that he did not know VG-101 (The Accused, T 1945, 2169). During the time they earlier travelled from Kortinik to Vi{egrad, **VG-101 and VG-78** who were sisters were never separated, and VG-78 agreed that they would have seen the same things during the course of their travels (VG-78, T 1298). However, their evidence did differ in relation to significant details (*see*

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

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

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

VG-101, T1153-1154, 1157, 1160, 1194, 1197, 1199; VG-78, T 1284-1286). *See* also **VG-13** (T 1443-1445, 1496), whose evidence is discussed at par 151, and **VG-38** (T1377-1378), whose evidence is discussed at par 152.

[390] VG-101 (T 1169-1170).

[391] VG-101 (T 1171).

[392] VG-101 (T 1173).

[393] VG-101 (T 1173-1134).

[394] VG-78 (T 1290-1291; Ex D 3). VG-78 gave evidence that she saw the Accused several times as a passenger in the bus to Prelovo. She also said that she knew his wife by sight, and that his wife used to work in a shop at Banja (VG-78, T 1280-1281). The wife of the Accused said that she worked in various places in Vi{egrad, Prelovo, Sase and elsewhere (Milojka Vasiljević, T 2558-2259). VG-78 identified the Accused in the photo array (Ex P 55-78). The Accused said that he did not know VG-78 (The Accused, T 1945, 2169). In her statement to the MUP in 1995, VG-78 was able to refer only to "A certain Mitar, whose surname I do not know" as having been in front of the Hotel and in Pionirska Street during the afternoon when, as she put it, he gave a "safety certificate", but did not mention his presence in the evening during the transfer of the Koritnik group (VG-78, T 1300, 1307).

[395] VG-78 (T 1307).

[396] VG-78 (T 1294).

[397] VG-78 (T 1294).

[398] VG-78 (T 1290-1294).

[399] VG-13 (T 1443-1445, 1496).

[400] Ex D 4. *See* however Ex P 59.1 and Ex P 59.2.

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

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

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

---

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

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

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

---

[408] Zivorad Savić (T 1936); Dobrivoje Sikirić (T 3066).

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

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

[411] *Ibid.*

[412] *See* par 15.

records of the Užice hospital already accepted by the Trial Chamber.[413] The Trial Chamber is not satisfied that the evidence of any of these Prosecution witnesses is sufficiently reliable to establish that the Accused was not in Užice Hospital at the times recorded in the Užice Hospital records.

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

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

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

---

[413] The Accused (T 1920); Milojka Vasiljević (T 2554); Ex P 138. *See* further Ex D 30.
[414] VG-77 (T 719-720).
[415] VG-77 (T 747-748, 750). There is evidence that another person by the same first name, Mitar Knežević (also known as "Chetnik"), participated in the crimes in Višegrad in 1992, but VG-77 gave evidence she had not heard about him (VG-77, T 749).
[416] VG-77 (T 757).
[417] VG-105 (T 1132-1134).
[418] VG-105 (T 1121, 1133).
[419] VG-105 (T 1121).
[420] Exhibit P 55-105. VG-105 (T 1139-1140).
[421] VG-105 (T 1137).
[422] *See* pars 89-90.
[423] VG-115 (T 1013). No photo array has been tendered into evidence.
[424] The Accused (T 1947, 1948, 2169).

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

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

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

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

---

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

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

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

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

---

[436] VG-117 (T 4553).
[437] The Accused (T 4706-4711, 4724).
[438] Defence witnesses gave evidence that they did not see the Accused in the Vuk Karadžić school on 22 June 1992: Zoran Djurić (T 4587, 4590, 4599-4560); VGD-24 (T 4658-4659, 4653).
[439] *See* pars 84-88 where the reliability of her evidence is discussed.
[440] VG-81 (T 1232).
[441] VG-81 (T 1233).
[442] VG-81 (T 1235).
[443] VG-81 (T 1235).
[444] VG-81 (T 1233, 1235).
[445] *See* par 91.

166. In summary, as stated earlier,[446] the Trial Chamber is not satisfied that the Prosecution has eliminated the reasonable possibility that the Accused was not at the scene of the crime at the time of the looting, transfer and fire, nor is it satisfied in any case that the identifications made by the witnesses are sufficiently reliable to establish that the Accused was present at the time of the looting, of the transfer or at the time of the fire.[447]

C. Events Earlier on 14 June 1992

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

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

169. VG-87 said that the Accused was alone, and walked around Pionirska Street in the direction of Vuk Karad'ić School. Between the hours of 1.00 and 2.00 pm, he saw the Accused calling out to

---

[446] *See* par 130.
[447] *See* par 146.
[448] VG-87 (T 1090, 1105).
[449] VG-87 (T 1086).
[450] The witness had known the Accused before this day, since the Accused was a child. The witness frequented the Panos' restaurant, and knew the Accused quite well (VG-87, T 1082-1083, 1107). The witness identified the Accused in the photo array (Ex P 55-87). The Accused confirmed that he knew VG-87 well, and that they had spoken a number of times (The Accused, T 1947, 2169).

the residents of the street to come out and clean the street.[451] He said that the Accused was wearing a camouflage uniform with turned up trousers, that he was carrying a megaphone and a bottle but that he was not armed with a rifle. [452] VG-87 claimed that he heard the Accused speak into a megaphone when calling out for residents to clean the street.[453] VG-87 said that the street was relatively clean at the time, and he formed the view that the Accused was trying to discover how many Muslims remained in the area.[454] The Accused denied that he was engaged in cleaning the streets at that time or that he had a megaphone. He said that he had only ever used a megaphone once during the first day that he organised the cleaning of the town.[455] The Trial Chamber is of the view that whether or not the Accused was in possession of a megaphone is of little significance, and that the particular activities in which VG-87 said that the Accused was engaged at the time are not of great importance. What is of importance here is that VG-87 placed the Accused in Pionirska Street for a substantial part of the afternoon, for about four hours from midday, on 14 June 1992.

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

---

[451] VG-87 (T 1090, 1105, 1092).
[452] VG-87 (T 1107).
[453] VG-87 (T 1091, 1107).
[454] VG-87 (T 1082, 1090-1094).
[455] The Accused (T 1898, 1904, 2147, 2154-2155, 2157).
[456] *See* par 119-120 and footnote 286.
[457] Further evidence strongly suggests that members of the Koritnik group were familiar with the Mahala settlement: VG-101 (T 1158); VG-38 (T 1365, 1339); VG-84 (T 1659); VG-18 (T 1574).
[458] Prosecution Final Trial Brief, par 136.
[459] Prosecution Final Trial Brief, par 137.
[460] Prosecution Final Brief, par 138. However, VG-18, who was at the back of the column, gave evidence that the group had walked unaccompanied to Pionirska Street (VG-18, T 1573, 1609). *See* further VG-101 (T 1198); VG-

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

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

173. VG-101 said that she saw the Accused get out of the driver's seat of a car before the Vi{egrad Hotel, and that he told them to go to the abandoned houses in Pionirska Street.[473] Both

---

18 (T 1573, 1609); VG-87 (T 1105). The Prosecution argued that this evidence was erroneous (Prosecution Final Trial Brief, par 138).

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

the Accused and his wife gave evidence that the Accused did not drive.[474] No-one else gave evidence of having seen the Accused drive a vehicle. VG-101 said that, when she saw the Accused, he was wearing a former JNA uniform and a large black hat and a black raincoat. He was wearing a large chain and cross over his uniform,[475] which no-one else has described.

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

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

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

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

178. VG-84 gave evidence that he could not remember whether the group had or not been escorted to Pionirska Street,[486] and he said that he saw the Accused when the group arrived at the

---

[474] Milojka Va{iljević (T 2537).
[475] VG-101 (T 1155-1157, 1164, 1194-1195).
[476] VG-115 (T 1020, 1046). VG-115 estimated that it must have been about 7 pm (VG-115, T 1052).
[477] *See* above, pars 90-90.
[478] VG-61 (T 790, 876).
[479] Ex P 145.
[480] VG-13 (T 1432-1435, 1484).
[481] VG-13 (T 1433, 1502).
[482] VG-13 (T 1433).
[483] VG-18 (T 1573, 1609).
[484] VG-18 (T 1574, 1578).
[485] VG-18 (T 1577).
[486] VG-84 (T 1659).

house of Jusuf Memić. He gave evidence that the Accused was wearing a black suit and a hat, and that he was not armed.[487]

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

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

181. The Trial Chamber is satisfied that the Accused did address the group and that he did hand a piece of paper to Mujo Halilović which he suggested was as a guarantee of their safety. VG-38,[489] VG-13,[490] VG-18[491] and VG-84[492] all gave evidence that they saw the Accused give Mujo Halilović a piece of paper. VG-101 saw the Accused give the piece of paper to one of the men.[493] In his statement, VG-61's father stated that Mujo Halilović showed him the "safety guarantee" given to him by "Naka Mitar".[494] VG-78 gave evidence that he had been told that the Accused was calling

---

[487] VG-84 (T 1761). VG-77, who gave evidence that she had spoken to the Koritnik group before the Memićs' houses, also said that she later saw the Accused, together with another man, in the area (VG-77, T 697, 709). He was wearing a big yellow straw hat (VG-77, T 711). The reliability of her identification evidence has already been discussed. *See* par 157.

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

[489] VG-38 (T 1405).

[490] VG-13 (T 1432).

[491] VG-18 (T 1578).

[492] VG-84 (T 1664).

[493] VG-101 (T 1160).

[494] VG-61 (T 895).

people to come out in order to give out some certificate which someone subsequently picked up.[495] She did not see the document.

182. The Prosecution asserts that VG-13 saw the reference to the Red Cross on that piece of paper. That assertion is not borne out by her evidence. She said that she was next to Mujo Halilović and he showed the document to her. It was handwritten and signed by the Accused, but she described it as having said only "Do not be afraid. Nobody is going to harm you", and then her evidence proceeded: "And Mr Vašiljević, my neighbour, he explicitly told us that the following morning we would be taken over by the Red Cross".[496] VG-13 did not mention the Accused handing out the document in her 1998 statement to the Prosecution,[497] but even if her evidence may be correct it does not establish that the Accused held himself out to be a representative of the Red Cross.

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

---

[495] VG-78 (T 1287).
[496] VG-13 (T 1436).
[497] Ex D 4.
[498] The Accused (T 2182-2183).
[499] VG-87 (T 1091, 1107).
[500] VG-87 (T 1091).
[501] VG-13 (T 1487). VG-13 also said that the Accused was wearing ribbons on his hat (VG-13, T 1502).
[502] VG-13 (T 1486); VG-18 (T 1579).

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

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

[503] A number of Defence witnesses, including the Accused himself, gave evidence that he was wearing a red ribbon when he fell off the horse. *See* Ratomir Simsić (T 2816); Zivorad Savić (T 2920); Miloje Novaković (T 3034); Petar Mitrović (T 2759-2760). The Accused testified that he was wearing a red ribbon to note that he was working in the task of cleaning the town (The Accused, T1897-1898, 2081). The Accused denied ever wearing the Red Cross insignia (The Accused, T 2184-2186). Other Defence witnesses gave evidence that the red ribbon that the Accused regularly wore at the time had some white in it and was reminiscent of the Red Cross emblem (VGD-22, T 2361; Dragisa Lindo, T 2433). Miloje Novaković mentioned the sign of the Red Cross in his statement to the Defence but not during his testimony (Miloje Novaković, T 3042-3045). Other witnesses were asked what the Accused was wearing and they did not mention any armband, although they were not specifically asked about it (VG-61, VG-101, VG-78, VG-38, VG-13, VG-18, VG-77, VG-115). None of the Prosecution witnesses relevant to this incident mentioned the red arm band in their testimonies. Only VG-80, who purported to identify the Accused in the month of June, said that she saw him with a red-coloured ribbon around his arm (VG-80, T 732-734). For a discussion of the reliability of this identification evidence, *see* par 91. VG-87 and VG-84 were expressly asked about it; the former denied having seen a red ribbon on the Accused, and the latter could not remember (VG-87, T 1107; VG-84, T 1762).

[504] VG-18 (T 1610-1611).

[505] VG-18 (T 1609).

[506] VG-18 (T 1574).

[507] VG-101 (T 1197-99).

[508] VG-101 (T 1159).

told them to go into the Memićs' houses and to spend the night there.[509] VG-61's father stated that his sons owned houses in the vicinity, but that he had been unable to find a neighbour willing to protect them there, so that he and his relatives did not dare go and stay in these houses but settled with the rest of the group.[510]

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

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

D. Factual Findings

188. The Prosecution alleges that the Accused incurred individual criminal responsibility for the murder and mistreatment of the Muslim civilians locked in the house as a participant in a joint criminal enterprise to kill or mistreat them, as charged in the Indictment them pursuant to Article 7(1) of the Statute. To establish the Accused's responsibility on this basis, the Prosecution

---

[509] VG-78 (T 1285-1286). However she had also given evidence that he had, together with others, accompanied the group there (VG-78, T 1285). *See* par 171.
[510] Ex P 145 (T 894).
[511] VG-13 (T 1431); VG-38 (T 1366); Ex P 145 (Ex P 146) (T 894); VG-78 (T 1285-1286).
[512] Ex P 145 (T 895).
[513] VG-13 (T 1435).
[514] VG-38 (T 1367).
[515] VG-78 (T 1287).
[516] VG-18 (T 1580); VG-84 (T 1661); VG-101 (T 1160-1161).

must establish that the Accused entered into an agreement with the group led by Milan Lukić to murder or mistreat these people, and that each of the participants, including the Accused, shared the intent of this crime.[517] The Trial Chamber is not satisfied that the Prosecution has established that the Accused either entered into such an agreement or had the intent to kill these persons or to inflict inhumane acts against them.

189. The Trial Chamber does not accept the Prosecution's assertion that the plan to kill or mistreat the group as charged in the Indictment was first conceived when the Accused approached the group and sought to persuade them to remain together in the Memićs' houses in Pionirska Street.[518] Such a submission appears to suggest that the plan was conceived by the Accused, rather than by Milan Lukić. There is no basis in the evidence for that submission. It is pure speculation. The Prosecution's case is that everything said by the Accused to the group was intended to trick the group into remaining at the Memićs' houses so that he could go and find Milan Lukić and his accomplices to commit the crimes against the victims he identified and selected.[519] The Prosecution submits that the Accused's criminal intent is obvious from the fact that it was the Accused who wanted the group to remain together and that there can be no other reason for that fact other than the Accused had murder in mind.[520] Again, this is pure speculation on the Prosecution's part.

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

191. In the present case, the Trial Chamber is satisfied that the Accused deliberately tried to keep the Koritnik group together. The Trial Chamber is also satisfied that the Accused knew that, for lack of a better expression, some evil would befall on them. The Prosecution has failed, however, to identify that evil and to establish what the Accused knew was to happen. As already stated, the Trial Chamber can only make a finding of guilt if its conclusion is the only reasonable conclusion

[517] *See* pars 63-69.
[518] Prosecution Closing Arguments (T 4778).
[519] Prosecution Closing Arguments (T 4825).

available. The Trial Chamber does not accept that the only reasonable conclusion in this case is that the Koritnik group would be subjected to murder, extermination or inhumane acts as defined above.[521] To give just one reason why it cannot draw such a conclusion, the Trial Chamber points out that, at the relevant time, ethnic cleansing of non-Serb residents in the form of forced transfer and deportation was widespread in the Višegrad area, the Accused may well have thought that those people would likewise be forcibly transferred or deported, rather than being killed or subjected to inhumane acts as charged in the Indictment. Furthermore, and for the sake of completeness, had the Trial Chamber been satisfied that the Accused knew that those people would be mistreated, there was no evidence that he contributed thereto otherwise than by convincing them to stay together. There is no evidence that the Accused went to Milan Lukić to tell him of the whereabouts of the Koritnik group, as the Prosecution has suggested.[522] It is certainly not the only reasonable inference available.

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

---

[520] Prosecution Closing Arguments (T 4819-4825).
[521] "Persecution" will be discussed in a separate section below, pars 244 *et seq*.
[522] *See* above, par 189.
[523] *See* above, par 191.

VIII. VIOLENCE TO LIFE AND PERSON

A. The Law

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

194. The *Blaškić* Trial Chamber defined "violence to life and person" as "a broad offence which, at first glance, encompasses murder, mutilation, cruel treatment and torture and which is accordingly defined by the cumulation of the elements of these specific offences".[529] The Trial

---

[524] Counts 7 and 13 of the Indictment.

[525] *See*, Common Article 3(1)(a) of the Geneva Conventions of 12 August 1949. *See*, also, Article 4(2)(a) of Additional Protocol II to the Geneva Conventions of 12 August 1949 and Article 75(2)(a) of Additional Protocol I to the Geneva Conventions of 12 August 1949.

[526] *Tadić* Appeal Jurisdiction Decision par 134.

[527] The Trial Chamber makes no definite finding in that respect.

[528] *See*, eg, *SW v. United Kingdom*, Judgment of 22 Nov 1995, Ser A 335-B, p. 42; *G v France*, Judgment of 27 Sept 1995, Ser A 325-B, p 38; *Kokkinakis v Greece*, Judgment, 25 May 1993, Ser A 260-A (1993), p 22. Those three decisions are from the ECHR.

[529] *Blaškić* Trial Judgment par 182.

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

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

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

[530] *Blaškić* Trial Judgment par 182.

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

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

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

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

far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal.

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

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

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

---

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

international law, in particular that of customary international law.[546] The requirement of sufficient clarity of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context.[547]

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

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

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

---

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

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

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

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

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

IX. MURDER

A. The Law

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

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

   to kill, or

   to inflict grievous bodily harm, or

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

Formatted: Indent: Left: 0.3", Hanging: 0.3", Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 0" + Tab after: 0.25" + Indent at: 0.25"

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

1. Drina River incident

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

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

[552] *Ibid.*

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

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

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

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

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

211. Accordingly, the Trial Chamber finds that the Accused incurred individual criminal responsibility for the crime of murder (as a crime against humanity) under Count 4 of the Indictment, and of the crime of murder (as a violation of the laws or customs of war) under Count 5

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

of the Indictment in respect of Meho Džafić, Ekrem Džafić, Hasan Kustura, Hasan Mutapčić and Amir Kurtalić.

2. Pionirska Street Incident

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

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

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

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

---

[556] *See* above, pars 116-117.
[557] *See* above, pars 65-68.

[558] *See* above, par 63.
[559] *See* above, pars 70-71.

X. EXTERMINATION

A. The Law

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

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

218. The meaning and function of that phrase was clarified to some extent in the pronouncements made by the then US Chief Prosecutor, Mr Justice Jackson. In his Opening Speech, Mr Justice

---

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

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

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

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

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

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

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

220. This interpretation of "extermination" as killings committed on a mass scale is further supported by the 1948 *History of the United Nations War Crime Commission*, which stated that the

---

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

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

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

[568] *Ibid*, p 26.

[569] *Ibid*, p 25.

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

phrase "extermination" as it appeared in Article 6(c) of the Nuremberg Charter "is apparently to be interpreted as murder on a large scale – mass murder".[571] The Commission went on to add that -

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

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

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

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

---

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

[572] *Ibid.*

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

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

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

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

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

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

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

---

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

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

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

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

refers to killing on a vast scale; it is directed towards members of a collection of individuals (*eg*, the Jews); the method used to carry out the killing is irrelevant; knowledge of the vast murderous enterprise is required.

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

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

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

---

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

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

[582] *See* above, par 205.

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

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

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

[586] The Trial Chamber notes that the definition of "extermination" in the "elements of crimes" which supplement the Statute of the ICC does not contain such a requirement. It was thought during the discussions of these "elements"

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

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

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

1. The material element of extermination consists of any one act or combination of acts which contributes to the killing of a large number of individuals (*actus reus*).

---

that such a requirement would be over-burdensome for the Prosecution, and that it was therefore undesirable (*see*, eg, R. Lee *et al* (eds), *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, p 83). Such concern must remain, for the purpose of *this* Tribunal, beyond the scope of its consideration, particularly when, as in the present case, the adoption of a more lenient definition would be prejudicial to the accused. The International Tribunal must apply the law as it finds it, not as it would wish it to be. Furthermore, the definition eventually adopted in the elements of crimes for the ICC is directly inspired by the definition of "extermination" given in the *Kayishema and Ruzindana* Trial Chamber Judgment, where it is stated that a limited number of killings or even one single killing could qualify as extermination if it forms part of a mass killing event (*Kayishema and Ruzindana* Trial Judgment, par 147). This Trial Chamber notes that the *Kayishema and Ruzindana* Trial Chamber omitted to provide any state practice in support of its ruling on that point, thereby very much weakening the value of its ruling as a precedent. No state practice has been found by this Trial Chamber which would support the finding of the *Kayishema and Ruzindana* Trial Chamber. Although the *Kayishema and Ruzindana* Trial Judgment went on appeal, the definition of "extermination" was not the subject of an appeal nor was it dealt with by the Appeals Chamber in any way (*Prosecutor v Kayishema and Ruzindana*, ICTR-95-1-A, Judgment (Reasons), 1 June 2001).

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

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

[589] In Nuremberg, the International Military Tribunal made reference to "extermination", *inter alia*, in relation to mass murders committed for ideological reasons (Jews), political reasons (political opponents, communists and

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

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

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

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

232. In addition, as pointed out above,[594] "extermination" supposes the taking of a large number of lives. It is unnecessary in the present case to determine whether sixty or seventy deaths alone

---

intelligentsia in occupied territories), economic reasons (creation of a *lebensraum*), military reasons (resistance members).

590 *See* above, par 189.

591 *See* above, par 190.

592 *See* above, par 63.

593 *See* above, pars 190-191.

satisfy this requirement of scale. The Prosecution has in any event failed to establish that the Accused knew that his acts were part of a vast collective murder in which a large number of individuals were systematically marked for extermination or were in fact exterminated. As far as the evidence in this case is concerned, the Accused is showed to have intended to kill only the seven Muslim men who were the victims of the Drina River incident.

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

---

[594] *See* above, pars 225, 227 and 229.

XI. INHUMANE ACTS

A. The Law

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

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

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

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

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

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

---

[595] *Delalić* Appeal Judgment, par 426; *Tadić* Trial Judgment, par 723; *Prosecutor v Jelisi}*, Case IT-95-10-T, Judgment, 14 Dec 1999 ("*Jelisić* Trial Judgment"), par 52; *Delalić* Trial Judgment, par 552; *Kordić and Čerkez* Trial Judgment par 265; *Krnojelac* Trial Judgment, par 130.

[596] *Krnojelac* Trial Judgment, par 130 and references given therein.

[597] *Delalić* Trial Judgment, par 536; *Jelisić* Trial Judgment par 57; *Kunarac* Trial Judgment, par 501; *Krnojelac* Trial Judgment, par 132.

[598] *Kunarac* Trial Judgment, par 501; *Krnojelac* Trial Judgment, par 144.

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

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

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

1. Drina River Incident

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

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

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

---

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

2. Pionirska Street Incident

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

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

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

---

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

XII. PERSECUTION

A. The Law

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

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

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

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

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

---

[610] *Krnojelac* Trial Judgment par 431.
[611] *Krnojelac* Trial Judgment par 432.
[612] *Krnojelac* Trial Judgment par 432.
[613] *Tadić* Trial Judgment, par 694; *Kupreškić* Trial Judgment, pars 567-568; *Blaškić* Trial Judgment, pars 218-219; *Kordić and Čerkez* Trial Judgment, par 192; *Krnojelac* Trial Judgment par 433;
[614] *Kupreškić* Trial Judgment, par 605; *Kvočka* Trial Judgment, par 185; *Krnojelac* Trial Judgment par 433;
[615] *Tadić* Trial Judgment par 703; *Kupreškić* Trial Judgment pars 581, 614; *Blaškić* Trial Judgment par 233; *Kordić and Čerkez* Trial Judgment, pars 193-194; Kvočka Trial Judgment, par 185; *Krnojelac* Trial Judgment, par 433.
[616] *Blaškić* Trial Judgment, par 233; *Krnojelac* Trial Judgment par 433.
[617] *Kupreškić* Trial Judgment, par, 624; *Krnojelac* Trial Judgment par 432;

persecution, the principle of legality requires the Prosecutor to identify particular acts amounting to persecution rather than persecution in general.[618]

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

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

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

---

[618] *Kupreškić and Others* Trial Judgment, par 626; *Krnojelac* Trial Judgment par 433;
[619] *Kupreškić* Trial Judgment, pars 618 and 621; *Kordić and Čerkez* Trial Judgment, par 198; *Kvočka* Trial Judgment, par 185; *Krnojelac* Trial Judgment, par 434.
[620] *Kupreškić* Trial Judgment, pars 615, 622; *Krnojelac* Trial Judgment, par 434.
[621] *Kvočka* Trial Judgment, par 186; *Kupreškić* Trial Judgment 622; *Krnojelac* Trial Judgment, par 434.
[622] *Kordić and Čerkez* Trial Judgment, par 217; *Blaškić* Trial Judgment, par 235; *Tadić* Appeal Judgment, par 305; *Krnojelac* Trial Judgment, par 435.
[623] *Kordić and Čerkez* Trial Judgment, par 217; *Krnojelac* Trial Judgment, par 435.
[624] *Krnojelac* Trial Judgment, par 436.

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

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

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

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

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

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

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

---

[625] Indictment, par 9.
[626] Pre-Trial Conference, 20 July 2001 (T 88-89)
[627] *See* above, pars 75 and 95.
[628] *See* above, par 75.

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

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

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

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

[629] *See* above, pars 238-240.

fact discriminatory in that inhumane acts were inflicted against these men only because they were Muslims.

256. The Trial Chamber has already stated that it was satisfied that the Accused knew that some evil would befall the Koritnik group when they were being encouraged to stay together in Pionirska Street.[630] The Trial Chamber is satisfied that the Accused in doing so acted with the intent to discriminate on religious or political grounds. As already stated, the Trial Chamber has not been satisfied that the Accused shared the intent of Milan Lukić's group that the Koritnik group be killed.[631]

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

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

---

[630] *See* above, pars 180, 187 and 191.
[631] *See* above, par 214.
[632] Prosecution Pre-Trial Brief, par 165.
[633] *Ibid.*, par 166. As stated above, the scope of the charges was subsequently narrowed down by the Prosecution (*see* footnote 560).

Accused in seeking to convince the Koritnik group to stay together in one place does not, on its own, amount to inhumane acts in the context of this case.[635]

259. Count 3 of the Indictment provides finally that persecution took the form of the "theft and destruction of personal property of Bosnian Muslims and other non-Serb civilians". The Prosecution Pre-Trial Brief does not contain any indication as to what role the Accused is alleged to have performed in that respect. As stated above, there is no satisfactory evidence that the Accused was present at the time of the looting.[636] Nor was there any evidence that he was part of a joint criminal enterprise to loot those people or destroy their property. For the reasons already given above,[637] it is not the only reasonable inference available that, when directing them into the Memić house, the Accused intended or knew that they would be robbed of their property or looted.

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

261. Accordingly, the Trial Chamber is satisfied that the Accused incurs individual criminal responsibility under Article 7(1) of the Statute for the crime of persecutions pursuant to Article 5(h) of the Statute for his participation in the underlying crimes of murder (a crime against humanity) and inhumane acts (a crime against humanity) in relation to the shooting of the seven Bosnian men,

---

[634] *See* above, pars 190, 230 and 241.
[635] *See* above, par 242.
[636] *See* above, pars 147.
[637] *See* above, pars 190 and 258.
[638] *See* above, pars 63, 230 and 241.

including the killing of five of them, at the Drina River on 7 June 1992 as described above.[639] However, the Prosecution failed to establish that he was also liable for persecution in relation to the Pionirska Street incident.

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

[639] *See* above, pars 96 *et seq*.

XIII. CONVICTIONS ENTERED

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

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

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

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

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

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

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

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

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

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

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

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

265. Each of the offences for which the Accused has been found to have incurred individual criminal responsibility relate to his participation in the Drina River incident. Cumulative convictions (convictions for different crimes charged in the indictment based on the same conduct)

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

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

267. Persecution on political, racial or religious grounds pursuant to Article 5(h) of the Statute requires the materially distinct elements of a discriminatory act and discriminatory intent.[649] It is therefore the more specific provision vis-à-vis both murder as a crime against humanity and inhumane acts as a crime against humanity. The Trial Chamber is satisfied that the crimes

---

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

committed by the Accused at the Drina River were committed on political or religious grounds.[650] As a consequence, a conviction is to be entered for persecution pursuant to Article 5(h) of the Statute, but not for murder and inhumane acts pursuant to Article 5 of the Statute, with respect to the relevant conduct found to constitute the persecution charge.

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

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

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

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

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

[650] *See* above pars 251 and 254.

XIV. SENTENCING CONSIDERATIONS

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

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

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

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

---

[651] Article 23(1) provides: "The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law."
[652] Article 24(1) provides: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. [...]."
[653] Rule 101(A) provides: "A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life."
[654] Rule 87(C) provides: "If the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."
[655] *See* Rule 101(B).
[656] Article 24(1) of the Statute and Rule 101(B); *Prosecutor v Tadi}*, Case IT-94-1-A & IT-94-1-A*bis*, Judgment in Sentencing Appeals, 26 Jan 2000 ("*Tadi}* Appeal Sentencing Judgment"), par 21; *Delali}* Appeal Judgment, par 813; *Jelisi}* Appeal Judgment, par 117.
[657] *Delali}* Appeal Judgment, par 820.
[658] *Kupre{ki}* Appeal Judgment, par 418.
[659] Article 41(1) of the SFRY Criminal Code (adopted on 28 Sept 1976, entered into force on 1 July 1977 (unofficial translation)).

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

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

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

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

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

---

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

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

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

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

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

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

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

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

Aggravating factors

---

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

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

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

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

[670] *Tadi}* Appeal Sentencing Judgment, par 69 ("The Appeals Chamber has taken account of the arguments of the parties and the authorities to which they refer, inclusive of previous judgments of the Trial Chambers and the Appeals Chamber of the International Tribunal. After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case. The position is similar under the

276. The Accused has been found criminally responsible as a participant in a joint criminal enterprise to persecute the seven Bosnian Muslim men at the Drina River by killing or attempting to kill them. The Prosecution submits that there are several factors that aggravate the Accused's participation in this crime. It identifies the fact that there were multiple victims involved, who were killed "efficiently" by the side of the Drina River to avoid the problem of having to bury them, the fact that the victims were verbally abused before being killed, and the trauma still suffered by the survivors of the shooting.[671] The Trial Chamber accepts that each of these factors constitutes an aggravation of the crime.

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

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

Statute of the International Criminal Court, Article 8(1) of the Statute, in the opinion of the Appeals Chamber, not importing a difference. [...]."); and *Furund'ija* Appeal Judgment, pars 243 and 247.

[671] Prosecution Final Trial Brief, pars 476-478.

[672] Prosecution Final Trial Brief, par 478.

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

Mitigating factors

280. The Accused maintained throughout the trial that he had not participated in the killing of the seven Bosnian Muslim men. However, he submitted that, if the Trial Chamber found him to be criminally responsible for the killing, any sentence to be imposed should be mitigated on the basis that at the time of the Drina River incident he had a diminished mental responsibility.

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

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

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

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

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

---

[673] The seven defenceless men were forced at gunpoint to march to their deaths towards the bank of the Drina River and to stand at the edge of the River as their executioners discussed whether to shoot them with single shots or rounds.
[674] Prosecution Final Trial Brief, par 480.
[675] *Delalić* Appeal Judgment, par 590.

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

284. The defence case was that, at the time the Drina River incident occurred, the Accused's mental responsibility was significantly diminished by the chronic alcoholism of the Accused and his reaction to the death of his cousin. There was no acceptable evidence to support that case. The Trial Chamber rejects the evidence of Dr Vasiljević that, upon his observations of the Accused at the beginning of June, he formed the view that the Accused was psychotic at that time. Dr Vasiljević claimed that, in May or early June 1992, he was summoned to the Užamnica barracks by Captain Kovačević to attend to the Accused, who (it was alleged) was undergoing a psychological crisis.[678] It was alleged that the Accused was refusing to eat, was behaving in a strange way and was in need of medical assistance. The Accused had been present at the Užamnica barracks for several days and was being held there as a prisoner for differences he had had with his superiors. Dr Vasiljević said that he went to the barracks and, after talking to the Accused, he advised Captain Kovačević that it would be better that the Accused were released. His evidence was that the Accused was released either that evening or the following day, and that the next time he saw him was seven to eight days later.[679] At this time, Dr Vasiljević saw the Accused in the street with a group of men, and he had the impression that he was organising these people to work in cleaning the streets.[680] Dr Vasiljević said that, at the time he saw the Accused, he did not note down the exact diagnosis anywhere, but he said that, if he had entered the diagnosis, it would have been a reactive psychoneurosis, a condition following intoxication and exhaustion. His evidence was that the Accused was visibly agitated, the fingers of his hands were trembling and he was

---

[676] *Delalić* Appeal Judgment, par 590.

[677] The same principle has been adopted in Article 31(1)(a) of the ICC Statute (which talks about the "destruction" of criminal responsibility), which reflects the general intent of the "partial defence" of diminished responsibility adopted in some common law countries, as discussed in the Appeals Chamber's Judgment in *Delalić et al* (pars 586-590) The formulation also reflects the concept of diminished responsibility leading to mitigation in sentencing in some civil law countries, identified in the same Judgment: In France: *Penal Code* (1992), Article 122-1. In Germany: *Penal Code*, Sections 20-21. In Italy: *Penal Code* (1930), Articles 88-89. In the Russian Federation: *Criminal Code* (1996) (translated by W Butler, *Criminal Code of the Russian Federation*, Simmonds and Hill Publishing, London, 1997), Articles 21-22. In Turkey: *Penal Code* (International Encyclopaedia of Law, ed Prof Blancpain, Kluwer, vol 3), Articles 46-47. In Japan: *Penal Code* (1907), Article 39(2). In South Africa: *Criminal Procedure Act*, 1977, Section 78(7). In the former Yugoslavia: *Criminal Code* (1976) of the SFRY, Article 12; Croatian *Penal Code* (1997). The specific extent of the impairment required before mitigation becomes available in some countries in both systems (for example, "substantial") has been ignored for the sake of identifying the relevant *general* principles, as has the requirement in some common law countries that the impairment result from an abnormality of mind.

[678] Dr Vasiljević (T 3081).

[679] Dr Vasiljević (T 3083-3084).

[680] Dr Vasiljević (T 3085).

disinterested and indifferent and did not feel like talking. The doctor, who is related to the Accused and who has known him since he was born, found this behaviour to be unusual. When asked what treatment he gave the Accused at that time, he said that he was put on a drip of 5 percent glucose solution, a sedative and some vitamins. He could not recall whether he was treated in any other way.[681] He did not refer the Accused to a neuropsychiatrist for further treatment.[682]

285. The Trial Chamber accepts the evidence of Dr Folnegović-Smalc (who was called by the Prosecution) that, if Dr Vasiljević had diagnosed the Accused as suffering from a reactive psychoneurosis, the mandatory course of action for a doctor diagnosing such a condition would be to ensure hospitalisation of the patient. This action is necessary because, by definition, a psychotic patient is one who is not able to take care of themselves or to control his or her actions.[683] Furthermore, she said that it is very unlikely that a patient in such a condition would be released without some follow-up, or that a reasonable doctor would have made such a recommendation.[684] Accordingly, the Trial Chamber rejects the evidence of Dr Vasiljević that the Accused was suffering from such a disorder at the relevant time.

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

[681] Dr Vasiljević (T 3118-3120).
[682] Dr Vasiljević (T 3123).
[683] Dr Folnegović-Smalc (T 4414).
[684] Dr Folnegović-Smalc (T 4413-4417).
[685] Dr Lopicić (T 4134-4155, 4167-4171, 4181-4199).

the analysis and conclusions of Dr Lopicić, primarily the failure of Dr Lopicić to identify a specific diagnosis of the Accused or to list the symptoms upon which her conclusion had been based.[686]

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

[686] Dr Folnegović-Smalc (T 4430-4431).
[687] Concerning the date of his transfer to the psychiatric ward, *see* Borislav Martinović (T 3497), Slavica Jevtović (T3554-3555), Milena Tomasević (T3200-3201), and Ex D 29.
[688] Dr Simi} (T 3170-3171).

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

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

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

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

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

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

and upon the medical records of the Accused. The only defects which she could find from which

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

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

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

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

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

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

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

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

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

---

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

[698] *See* above, par 292.

[699] *See* above, par 283.

[700] Defence Final Brief, page 122.

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

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

mitigation the general spirit of co-operation very properly shown by lead counsel for the Accused, who trod a careful path in assisting the Trial Chamber without in any way compromising his obligations to the Accused, conduct for which the Accused himself should be given credit.

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

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

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

---

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

301. The Trial Chamber has considered the relative significance of the Accused in the broader context of the conflict in the former Yugoslavia, and it has taken into account the fact that the position of the Accused in the hierarchy was a low one.[705] The Trial Chamber does not accept that the Accused played any particularly significant role in the broader context of this conflict, but it notes that an accused's level in the overall hierarchy in the conflict is not ultimately decisive of the sentence given:[706]

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

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

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

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

305. The Trial Chamber is satisfied that the Accused took part in the commission of those crimes voluntarily. There is no acceptable evidence that he was influenced in any significant way by reason of his relationship with Milan Lukić. There was no suggestion made in relation to sentence that he was acting under duress, nor was there any evidence to that effect. The Accused may have been a weak-willed person, but he was one who was happy to be led. There are, however, degrees of culpability within the concept of intention, and the Trial Chamber has taken into account the fact

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

that the Accused did not appear to take part in the planning of the execution of the five Muslim men, but only became involved at the time when these men were brought to the Vilina Vlas Hotel a short time before they were killed.

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

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

XV. DISPOSITION

A. Sentence

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

307. Mitar Vasiljević is convicted upon the following counts:

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

308. Mitar Vasiljević is acquitted upon the following counts:

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

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

B. Credit for Time Served

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

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

Judge David Hunt
Presiding

Judge Ivana Janu

Judge Chikako Taya

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

[Seal of the Tribunal]

ANNEX I – PROCEDURAL BACKGROUND

A. Pre-trial phase

Formatted: Indent: Left: 0", First line: 0", Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 0" + Tab after: 0.25" + Indent at: 0.25"

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

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

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

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

---

[710] Confidential Review of the Indictment, 26 Oct 1998; Confidential Order for Non-disclosure, 26 Oct 1998; Warrant of Arrest, Order for Surrender, 26 Oct 1998. *Prosecutor v Milan Lukić, Sredoje Lukić, Mitar Vasiljević*, Indictment, Case IT-98-32-PT, 21 Oct 1998.

[711] Confidential and Ex Parte Order to Partially Unseal an Indictment, 25 Jan 2000.

[712] Order of the President Assigning Case *Prosecutor v Mitar Vasiljević* to Trial Chamber II, 26 Jan 2000; Corrigendum, 27 Jan 2000.

[713] T 3-5. Order for Detention on Remand, 28 Jan 2000.

[714] *Prosecutor v Mitar Vasiljević*, Indictment, Case IT-98-32-I, 27 Jan 2000.

[715] Order of the President Assigning a Judge to a Trial Chamber, 1 Feb 2000.

[716] Order of the President Assigning a Judge to a Trial Chamber, 3 Apr 2000.

[717] Order Granting Prosecutor's Application for an Order Authorising the Seizure of Evidence (Under Seal), 30 Oct 2000; Seizure Order, 30 Oct 2000.

[718] Confidential Order authorising the Forensic Examination of Documents, 17 Nov 2000; Confidential Second Order Authorising the Forensic Examination of Documents, 22 Feb 2001. Confidential Order for Medical Examination of the Accused, 24 Jan 2001; Order Authorising the Medical Examination of the Accused, 24 July 2001.

[719] Decision to Vacate in full the Order for non-disclosure of 26 October 1998, 30 Oct 2000. Prosecution's Motion to Amend Indictment, 12 July 2001. *Prosecutor v Milan Lukić, Sredoje Lukić, Mitar Vasiljević*, Amended Indictment, Case IT-98-32-I, 12 July 2001.

[720] T 97.

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

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

B. Trial phase

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

Formatted: Indent: Left: 0", First line: 0", Numbered + Level: 1 + Numbering Style: 1, 2, 3, ... + Start at: 1 + Alignment: Left + Aligned at: 0" + Tab after: 0.25" + Indent at: 0.25"

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

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

---

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

ANNEX II : GLOSSARY OF TERMS

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

	Muslim men were killed
European Commission	European Commission of Human Rights
European Court	European Court of Human Rights
Ex	Exhibit
Federal Commission for Missing Persons	Federal Commission for the Search of Missing Persons in the Federation of Bosnia-Herzegovina
FRY	Federal Republic of Yugoslavia
Furund`ija Trial Judgment	*Prosecutor v Furund`ija*, Case IT-95-17/1-T, Judgment, 10 December 1998
Furund`ija Appeal Judgment	*Prosecutor v Furund`ija*, Case IT-95-17/1-A, Judgment, 21 July 2000
Geneva Convention III	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
ICC Statute	Statute of the International Criminal Court, adopted at Rome on 17 July 1998, UN Doc A/CONF. 183/9
ICCPR	International Covenant on Civil and Political Rights, 16 December 1966
ICRC Commentary to Geneva Convention IV	Pictet (ed), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1958
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994
ICTY, International Tribunal or Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
Indictment	Amended Indictment, *Prosecutor v Vasiljević*, Case IT-98-32-PT, 12 July 2001
Jelisić Trial Judgment	*Prosecutor v Jelisi}*, Case IT-95-10-T, Judgment,

	14 December 1999
JNA	Yugoslav National Army
Kayishema and Ruzindana Trial Judgment	*Prosecutor v Kayishema and Ruzindana*, Case ICTR-95-1-T, Judgment, 21 May 1999
Kordić and ^erkez Trial Judgment	*Prosecutor v Kordić and Čerkez*, Case IT-95-14/2-T, Judgment, 26 February 2001
Koritnik	The village of Koritnik
Koritnik group	Approximately 60 Muslim civilians from the village of Koritnik, together with five from the area of Sase, who were involved in the Pionirska Street incident
Krnojelac Trial Judgment	*Prosecutor v Krnojelac*, IT-97-25-T, Judgment, 15 March 2002
Krstić Trial Judgment	*Prosecutor v Krsti}*, Case IT-98-33-T, Judgment, 2 August 2001
Kum	Serbian word which describes a very close relationship between two families or men
Kunarac Trial Judgment	*Prosecutor v Kunarac et al*, Case IT-96-23-T & IT-96-23/1-T, Judgment, 22 February 2001
Kupreški} Trial Judgment	*Prosecutor v Kupreški} et al*, Case IT-95-16-T, Judgment, 14 January 2000
Kvočka Trial Judgment	*Prosecutor v Kvočka et al*, Case IT-98-30/1-T, Judgment, 2 November 2001
Marti} Rule 61 Decision	*Prosecutor v Martić*, Case IT-95-11-R61, Decision on the Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 8 March 1996
Mrkšić and Others Rule 61 Decision	*Prosecutor v Mrkšić and Others*, Case IT-95-13-R61, Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, 3 April 1996
MUP	Ministry of the Interior
Musema Trial Judgment	*Prosecutor v Musema*, Case ICTR-96-13-T, Judgment, 27 January 2000
Nikoli} Rule 61 Decision	*Prosecutor v Nikolić a/k/a "Jenki"*, Case IT-94-2-R61, Decision on the Review of Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, 20 October

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

Tadi} Appeal Judgment	*Prosecutor v Tadić*, Case IT-94-1-A, Judgment, 15 July 1999
Tadi} Jurisdiction Decision	*Prosecutor v Tadić*, Case IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995
Tadić Trial Judgment	*Prosecutor v Tadić,* Case IT-94-1-T, Judgment 14 July 1997
Tokyo Charter	Charter of the International Military Tribunal for the Far East, Tokyo, 19 January 1946
TO	Territorial Defense
Torture Convention	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984
U'ice Corps	U'ice Corps of the Yugoslav People's Army
VG	Witness in *Prosecutor v Vasiljević* – Case IT-98-32-T
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska
White Eagles	Serbian paramilitary organisation

ANNEX 6:

Prosecutor v Kupreskic et al., Judgement, Case No. IT-95-16-T, Trial Chamber, 14 January 2000.

UNITED
NATIONS

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

Case No.: IT-95-16-T

Date: 14 January 2000

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Antonio Cassese, Presiding**
Judge Richard May
Judge Florence Ndepele Mwachande Mumba

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **14 January 2000**

PROSECUTOR

v.

Zoran KUPRE[KI],
Mirjan KUPRE[KI],
Vlatko KUPRE[KI],
Drago JOSIPOVI],
Dragan PAPI],
Vladimir [ANTI], also known as "VLADO"

JUDGEMENT

The Office of the Prosecutor:

Mr. Franck Terrier
Mr. Michael Blaxill

Counsel for the Accused:

Mr. Ranko Radovi}, Mr. Tomislav Pasari}, for Zoran Kupre{ki}
Ms. Jadranka Slokovi}-Gluma}, Ms. Desanka Vranjican, for Mirjan Kupre{ki}
Mr. Borislav Krajina, Mr. Želimar Par, for Vlatko Kupre{ki}
Mr. Luko [u{ak, Ms. Goranka Herljević, for Drago Josipovi}
Mr. Petar Puli{eli}, Ms. Nika Pinter, for Dragan Papi}
Mr. Petar Pavkovi}, Mr. Mirko Vrdoljak, for Vladimir Šanti}

4841

CONTENTS

I. INTRODUCTION 2

A. The International Tribunal 2

B. Procedural Background 2

II. THE CHARGES AGAINST THE ACCUSED 10

III. GENERAL BACKGROUND 13

A. The Origins of the Muslim-Croat Conflict (October 1992 - March 1994) 13
1. The Case for the Prosecution 13
(a) General 13
(b) The Vance-Owen Plan 14
(c) Croat Nationalism, Militancy and Propaganda 16
2. The Case for the Defence 17
3. Findings of the Trial Chamber 18

B. The Stages in the Muslim-Croat Conflict 19
1. The Fall of Jajce to the Serbs and the Influx of Muslim and Croat Refugees 19
(a) The Case for the Prosecution 19
(b) The Case for the Defence 19
(c) Findings of the Trial Chamber 20
2. Attacks on Bosnian Croats in the La{va River Valley 20
(a) The Case for the Prosecution 20
(b) The Case for the Defence 20
(i) Dusina 20
(ii) Busovača 21
(iii) Kidnapping of Zivko Toti} and the Killing of his Bodyguards 21
(iv) Attacks on Croats in Stari Vitez (Mahala) 22
(v) Attacks on Croats in Zenica 22
(vi) Croat Propaganda and Preparation for an Attack by Bosnian Muslim Forces 23
(c) Findings of the Trial Chamber 23

C. Muslim-Croat Relations in Central Bosnia 24
1. The Case for the Prosecution 24
(a) Good Muslim-Croat Relations before October 1992 24
(b) Deterioration in Relations after October 1992 and the Separation of the Village Guards 26
2. The Case for the Defence 27
3. Findings of the Trial Chamber 28

D. Persecution – Alleged Facts 28
1. The Case for the Prosecution 28
(a) General 28
(b) Discriminatory Acts from October 1992 until April 1993 29
2. The Case for the Defence 33
(a) General 33
(b) Croat Nationalism 34
(c) Muslim Nationalism and Persecution of Croats 36

(d) Absence of an Official Plan or Policy on the Part of the Bosnian Croat Political and Military Institutions to Persecute Muslims 37
(e) Whether the Croatian Community of Herceg-Bosna had a Separatist Agenda 38
(f) Whether the Bosnian Croat Authorities Condoned Persecution of Muslims by Private Individuals 38
(g) Whether State Enterprises Discriminated Against Muslims 40
(h) Whether Relief Supplies were Distributed Equally to Muslims 41
(i) The Fact that Croat Civilians were also the Victims of Attacks by Bosnian Muslims 42
3. Findings of the Trial Chamber 43

E. Governmental and Armed Forces in Bosnia and Herzegovina in 1992-1993 44
1. General 44
2. The Bosnian Croat forces 45
(a) The Bosnian Croat Leadership in Vitez 45
(b) The HVO and the Vitez Brigade 45
(c) Croatian Paramilitary Formations 46
(d) The Military Police and "The Jokers" 47
3. The Bosnian Muslim Forces 49
(a) The Army of Bosnia and Herzegovina (BiH army) 49
(b) Muslim Paramilitary Formations 50
(c) Mobilisation of Muslims 50
(d) The Territorial Defence 51
(e) Bosnian Muslim Roadblocks and Checkpoints 51
(f) HOS 51
4. Comparative Strength of the Muslim and Croat Forces 52
(a) The Prosecution Case 52
(b) The Defence Case 52
5. Findings of the Trial Chamber 53

F. The Events of 19-20 October 1992, in Particular in Ahmi}i 53
1. The Case for the Prosecution 54
2. The Case for the Defence 57
(a) The Muslims in Ahmi}i Caused the Conflict of 20 October 1992 57
(b) The Conflict of 20 October 1992 58
(c) Croat Neighbours Helped Muslims to Return to Ahmi}i after 20 October 1992 59
(d) Muslim-Croat Relations from October 1992 to April 1993 60
(e) Findings of the Trial Chamber 60

G. The Events of 16 April 1993 in Ahmi}i 61
1. The Case for the Prosecution 61
(a) Croat Preparations for the Attack of 16 April 1993 61
(i) The Croats' Military Preparations 61
(ii) Signs of Impending Danger 63
(b) The Attack on Ahmi}i on 16 April 1993 64
(i) International Observers 64
(ii) Bosnian Muslim Eye-witnesses 75
(c) Burial of the Victims of the Attack on Ahmi}i of 16 April 1993 104
(d) Detention of Bosnian Muslims Following the Conflict of 16 April 1993 105
(i) Vitez Cinema 105
(ii) Dubravica School 106
2. The Case for the Defence 107
(a) Croat Unpreparedness for an Offensive on 16 April 1993 107
(b) Bosnian Army Offensive on Kuber on or around 16 April 1993 109
(c) Bosnian Army Attacks on Croatian Villages in the Vicinity of Ahmi}i on 16 April 1993 . 111
(d) The Attack on Ahmi}i 114

(i) The Eve of the Attack – 15 April 1993 114
a. The Kidnapping of Zivko Toti} and the Killing of his Escorts 114
b. 15 April 1993 in Ahmi}i 114
(ii) That the Attack on Ahmi}i was not Planned by the HVO in Advance 115
(iii) The Attack as a Military Operation 116
(iv) Bosnian Croat Eye-witnesses to the Events in Ahmi}i of 16 April 1993 116
(e) Casualties on Both Sides in Vitez and Ahmi}i on 16 April 1993 120
(f) The Jokers and/or a Special Unit Committed the Attack on Ahmi}i 120
3. Findings of the Trial Chamber 123

IV. THE ROLE OF THE ACCUSED 127

A. Dragan Papić 128
1. Introduction 128
2. Background 128
3. His Conduct During the Armed Conflict on 20 October 1992 130
(a) Prosecution Evidence 130
(b) Defence Evidence 131
4. His Conduct in the Period Between the Armed Conflicts 132
5. His Conduct During the Attack of 16 April 1993 135
(a) Prosecution Evidence 135
(b) Defence Evidence 136
6. Dragan Papi}'s Military Service: Records 137
7. Findings of the Trial Chamber 138

B. Zoran Kupre{ki} and Mirjan Kupre{ki} 140
1. Introduction 140
2. Background 141
(a) Introduction 141
3. Involvement of the Accused in the HVO Prior to 16 April 1993 143
(a) Prosecution Evidence 143
(b) Defence Evidence 145
4. Their Role in the Events of 16 April 1993 147
(a) Prosecution Evidence 147
(i) Their Alleged Participation in Murder and Arson at the House of Witness KL 147
(ii) Their Alleged Participation in Murder and Arson at the House of Suhret Ahmi} 150
(iii) Other Evidence Relating to Their Presence in Ahmi}i on 16 April 1993 152
(b) Defence Evidence 153
5. Findings of the Trial Chamber 163

C. Vlatko Kupre{kić 166
1. Introduction 166
2. Background 167
3. Events Prior to April 1993 167
(a) Prosecution Evidence 167
(b) Defence Evidence 167
4. His Role on 15 April 1993 169
(a) Prosecution Evidence 169
(b) Defence Evidence 169
5. His Role on 16 April 1993 171
(a) Prosecution Evidence 171
(b) Defence Evidence 175
6. Findings of the Trial Chamber 182

4844

D. Drago Josipović and Vladimir Šantić 186
1. Introduction 186
2. Background 186
(a) Drago Josipović 186
(b) Vladimir Šanti} 187
3. Their Alleged Participation in the Killing of Musafer Pu{}ul and Burning of the Pu{}ul House 189
(a) Prosecution Evidence 189
4. Their Alleged Participation in Other Incidents on 16 April 1993 193
(a) Drago Josipovi} 193
(i) Prosecution Evidence 193
(b) Vladimir Šantić 195
(i) Prosecution Evidence 195
5. Defence Evidence concerning Events on 16 April 1993 197
(a) Drago Josipović 197
(b) Vladimir Šanti} 199
6. Findings of the Trial Chamber 201

V. THE APPLICABLE LAW 204

A. Preliminary Issues 204
1. General 204
2. The *Tu Quoque* Principle is Fallacious and Inapplicable: The Absolute Character of Obligations Imposed by Fundamental Rules of International Humanitarian Law 206
3. The Prohibition of Attacks on Civilian Populations 209
4. The Importance the International Tribunal can Attach to Case Law in its Findings of Law 218

B. Crimes Against Humanity 222
1. Objective and Subjective Elements of the Crimes Under Article 5 222
2. The Requirement of an Armed Conflict 222
3. 'Directed Against a Civilian Population' 223
4. Can Crimes Against Humanity Comprise Isolated Acts? 224
5. The Policy Element 225
6. Knowledge of the Context Within Which the Perpetrator's Actions are Taken: the *Mens Rea* Requirement 228
7. The Constituent Offences 229
(a) Article 5(a): Murder 229
(b) Article 5(i): Other Inhumane Acts 230

C. Persecution as a Crime Against Humanity 233
1. The Alleged Need for a Link Between Persecution and Other International Crimes 235
2. The *Actus Reus* of Persecution 239
(a) Arguments of the Parties 239
(b) Discussion 241
(c) Can the Acts Covered by the Other Subheadings of Article 5 Fall Within the Notion of Persecution? 244
(d) Can Persecution Cover Acts not Envisaged in one of the Other Subheadings of Article 5? 251
3. The Definition of Persecution 255
4. The Application of the Definition set out above to the Instant Case 260
5. The *Mens Rea* of Persecution 261

D. The Question of Cumulation of Offences (*Concursus Delictorum*) 262
1. The Issue in Dispute 262

(a) Prosecutor's Submissions 262
(i) General 262
(ii) Murder as a Crime Against Humanity (Article 5(a) of the Statute) and Persecution as a Crime Against Humanity (Article 5(h) of the Statute) 265
(iii) Murder as a Crime Against Humanity (Article 5(a) of the Statute) and Murder as a War Crime (Article 3 of the Statute, Incorporating the Prohibition on Murder Contained in Common Article 3) 266
(iv) Inhumane acts as a Crime Against Humanity (Article 5(i) of the Statute) and Cruel Treatment as a War Crime (Article 3 of the Statute) 267
(b) Submissions of the Defence 268
2. Discussion 273
(a) General 273
(b) Issues of Substantive Criminal Law 274
(i) Principles on Multiple Offences in International Criminal Law 274
(ii) Relationship Between the Various Offences Charged in the Indictment 284
a. Relationship Between "Murder" under Article 3 (War Crimes) and "Murder" under Article 5(a) (Crimes Against Humanity) 285
b. Relationship Between "Persecution" under Article 5(h) (Crimes Against Humanity) and "Murder" under Article 5(a) (Crimes Against Humanity) 286
c. Relationship Between "Inhumane Acts" under Article 5(i) (Crimes Against Humanity) and "Cruel Treatment" under Article 3 (War Crimes) 288
d. Relationship Between the Charges for Inhumane Acts (or Cruel Treatment) and the Charges for Murder 289
(iii) The Sentence to be Imposed in the Event of More Than One Conviction for A Single Action 289
(c) Issues of Procedural Criminal Law 292
(i) The Power of the Prosecutor to Opt for Cumulative or Alternative Charges 292
(ii) The Obligations of the Prosecutor When She Decides to Change the Legal Classification of Facts in the Course of Trial and the Power of a Trial Chamber When it Disagrees with the Prosecutor's Legal Classification of the Facts. 294

VI. LEGAL FINDINGS 305

A. General 305

B. Existence of an Armed Conflict 308

C. The Persecutory Nature of the Croatian Attack on Ahmi}i on 16 April 1993 -Ahmi}i as an undefended village 308

D. Irrelevance of Similar Conduct by Muslims against Croats in Other Villages 310

E. The Accused 310
1. Dragan Papi} 310
2. Zoran Kupre{ki} 311
(a) Count 1 311
(b) Counts 2 - 11 314
3. Mirjan Kupre{ki} 315
(a) Count 1 315
(b) Counts 2 - 11 315
4. Vlatko Kupre{ki} 316
(a) Count 1 316
(b) Counts 12 – 15 318
5. Drago Josipovi} 318

4846

(a) Count 1 318
(b) Counts 16 - 19 320
6. Vladimir [anti} 322
(a) Counts 16 – 19 322

VII. SENTENCING 324

A. Introduction 324

B. Sentencing Provisions 324

C. Factors to be Considered in Sentencing 325
1. SFRY Criminal Code Provisions 325
2. General Sentencing Policy of the International Tribunal 328
3. Factors Relevant to Sentencing in Respect of Each Accused 329
(a) Zoran Kupre{ki} and Mirjan Kupre{ki} 329
(b) Vlatko Kupre{ki} 330
(c) Drago Josipovi} 330
(d) Vladimir [anti} 331

D. The Sentence to be Imposed for a Multiple Conviction 332

VIII. DISPOSITION 334

A. Sentences 334
1. Dragan Papi} 334
2. Zoran Kupre{ki} 334
3. Mirjan Kupre{ki} 335
4. Vlatko Kupre{ki} 335
5. Drago Josipovi} 336
6. Vladimir [anti} 336

B. Concurrence of Sentences 337

C. Credit for Time Served 337
1. Zoran Kupre{ki} 337
2. Mirjan Kupre{ki} 338
3. Vlatko Kupre{ki} 338
4. Drago Josipovi} 338
5. Vladimir [anti} 338

D. Enforcement of Sentences 339

E. Immediate Release of Dragan Papi} 339

ANNEX A - The Amended Indictment 341

ANNEX B – Map of the Ahmići Region ..... **Error! Bookmark not defined.**

ANNEX C – Aerial Photograph of Ahmići with Highlighted Landmarks..... **Error! Bookmark not defined.**

The trial of Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi}, Dragan Papi}, Vladimir [anti}, hereafter the "accused", before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, hereafter "International Tribunal", commenced on 17 August 1998 and came to a close on 10 November 1998.

Having considered all of the evidence presented to it during the course of this trial, along with the written and oral submissions of the Office of the Prosecutor, hereafter "Prosecution", and the Defence for the accused, the Trial Chamber

HEREBY RENDERS ITS JUDGEMENT.

I. INTRODUCTION

A. The International Tribunal

1. The International Tribunal is governed by its Statute, adopted by the Security Council of the United Nations on 25 May 1993, hereafter "Statute",[1] and by the Rules of Procedure and Evidence of the International Tribunal, hereafter "Rules", adopted by the Judges of the International Tribunal on 11 February 1994, as amended.[2] Under the Statute, the International Tribunal has the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.[3] Articles 2 through 5 of the Statute further confer upon the International Tribunal jurisdiction over grave breaches of the Geneva Conventions of 12 August 1949 (Article 2); violations of the laws or customs of war (Article 3); genocide (Article 4); and crimes against humanity (Article 5).

B. Procedural Background[4]

2. On 2 November 1995 the Prosecutor of the International Tribunal for the Former Yugoslavia ("the Tribunal") issued an indictment charging Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Vladimir [anti}, Dragan Papi}, Drago Josipovi}, Stipo Alilovi} and Marinko Katava with grave breaches under Article 2(a), (c), (d) and (g) as well as violations of the laws or customs of war under Article 3 of the Tribunal's Statute. The basis of the indictment was the accused's alleged participation in the two conflicts in the village of Ahmi}i in the Lašva River Valley in Bosnia and Herzegovina on 20 October 1992 and 16 April 1993. During those conflicts, a large number of the Muslim citizens of that village were killed and expelled from their homes as part of a campaign of "ethnic cleansing" by the Croatian military.

---

[1] S/RES/827 (1993).
[2] IT/32/Rev. 17.
[3] Art. 1 of the Statute.
[4] When the Trial Chamber speaks of Croatian or Croat forces in this Judgement it means the Bosnian Croatian forces and not those of the Republic of Croatia.

3. The indictment was reviewed and confirmed by Judge Gabrielle Kirk McDonald on 10 November 1995 against all accused. The Judge also issued an order for non-disclosure of the indictment on the same date. The latter order was vacated in part on 8 December 1995 by Judge Lal Chand Vohrah to allow the service of the arrest warrants against the accused and orders for surrender, signed by Judge Vohrah on the same day, on the Republic of Bosnia and Herzegovina. The non-disclosure order was further vacated by Judge McDonald on 3 April 1996 to allow the disclosure of the witnesses' names to law enforcement agencies designated by the Prosecution for purposes of the protection of those witnesses. On 26 June 1996 the non-disclosure order was fully vacated by Judge McDonald.

4. Due to difficulties with respect to the service of the indictments on the accused, Judge McDonald on 20 November 1996 issued an order under Rule 61 of the Rules of Procedure and Evidence, inviting the Prosecutor to submit a written report on the measures taken to effect the personal service of the indictment up until 4 December 1996. The time limit was extended by an order of 4 December 1996 until 13 December 1996.

5. The Registrar publicised the indictment on 11 December 1996 under Rule 60 of the Rules of Procedure and Evidence. On 13 December 1996 the Prosecution submitted its report on the measures taken. Judge McDonald then ordered the Prosecutor on 6 January 1997 to submit the indictment to Trial Chamber II for public examination.

6. The accused Marinko Katava (on 14 May 1997), the accused Mirjan and Zoran Kupre{ki} and the co-accused Drago Josipovi} (on 15 May 1997) and the accused Dragan Papi} (on 28 May 1997), through their counsel, requested the Tribunal to quash the arrest warrants and declared their preparedness to come to The Hague; they were, however, fearful that they would have to spend a long time in detention before their case came to trial. They thus expressed their willingness to be questioned in Vitez. These applications were denied by an order of Judge McDonald of 16 June 1997.

7. On 3 October 1997, the Prosecutor applied to the Tribunal for an order for the detention of the accused. The order was granted on 3 October 1997 with regard to all

accused by Judge Saad Saood Jan. On 4 October 1997, the Prosecutor applied for an order under Rule 59 *bis* of the Rules of Procedure and Evidence to allow her representatives to take any of the accused into custody and to transport them to the seat of the Tribunal. The application was granted by Judge Jan on the same date. The accused, with the exception of Vlatko Kupre{ki}, surrendered themselves on 6 October 1997.

8. On 8 October 1997 the accused, again with the exception of Vlatko Kupre{ki}, appeared before Trial Chamber I in accordance with Rule 62 of the Rules of Procedure and Evidence. They pleaded not guilty to the charges against them. Vlatko Kupre{ki} was arrested on 18 December 1997 and had his initial appearance before Trial Chamber II on 16 January 1998; he pleaded not guilty to all charges against him.

9. The Prosecution moved that the indictment against Marinko Katava be withdrawn, and leave to withdraw was granted on 19 December 1997 by a decision of Trial Chamber II of the same date, on the grounds that there was insufficient evidence against the accused to justify proceeding with his prosecution. On 23 December 1997, the Trial Chamber issued an order holding all pre-trial motions in abeyance on the grounds that the Prosecutor wished to amend the indictment. On the same date, the Trial Chamber granted leave to the Prosecution to withdraw the indictment against Stipo Alilovi}, because the accused had since died.

10. On 16 January 1998, a status conference was held before Trial Chamber II. It resulted in the scheduling order of 21 January 1998 regarding the filing of the Prosecution's pre-trial brief and other documents, as well as the Defence's response to them. On 22 January 1998 the Trial Chamber issued an order for the protection of five of the Prosecution witnesses under Rule 75 of the Rules of Procedure and Evidence.

11. On 9 February 1998, the Prosecutor filed a motion for leave to amend the indictment, in which she replaced the previous charges under Article 2 of the Tribunal's Statute with charges under Article 5(a), (h) and (i) of the Statute (murder, persecution and other inhumane acts) and changed the charges under Article 3 of the Statute by referring to Common Article 3(1)(a) of the Geneva Conventions (murder and cruel treatment).

12. Objections against the form of the indictment based on lack of specificity and cumulative charging were filed by counsel for the accused Dragan Papi} on 25 March 1998, for Vlatko Kupre{ki} on 29 March 1998, for Vladimir [anti} on 30 March 1998, for Zoran Kupre{ki} on 31 March 1998, for Drago Josipovi} on 2 April 1998 and for Mirjan Kupre{ki} on 16 April 1998. The Prosecutor replied to these motions on 21 April 1998. On 29 March 1998, the accused Vlatko Kupre{ki} moved to be provisionally released, and on 15 April 1998 requested a severance of the case against him. A motion for severance was also filed by counsel for the accused Mirjan and Zoran Kupre{ki} on 17 April 1998. The Prosecutor replied to these on 28 April 1998. By a decision of 15 May 1998, the Trial Chamber rejected the accused's motions as to defects in the form of the indictment. On the same day, the motions for severance of trials were also rejected and the motion of the accused Vlatko Kupre{ki} dismissed.

13. On 6 April 1998, the Prosecutor filed a motion to delay the disclosure of witness statements and witness identities on the grounds that some of the Prosecution witnesses had complained about being approached by persons on behalf of the accused and asked to provide exonerating witness statements in exchange for money; some witnesses were also fearful of reprisals. On 28 April 1998, the Trial Chamber issued a scheduling order setting 15 May 1998 as a hearing date on which oral argument was heard in closed session on the Prosecutor's motion of 6 April 1998 concerning the disclosure of witness statements and identities. On 21 May 1998, the Prosecution's motion for delaying the disclosure of witness statements and identities was denied, but certain safeguards for the witnesses and a procedure for contact with these witnesses by the Defence were established, including requests for assistance to the International Police Task Force (IPTF), SFOR and Bosnia and Herzegovina of 12 June 1998 in order to ensure compliance with the abovementioned decision.

14. A scheduling order of the Trial Chamber of 20 May 1998 set 17 August 1998 as the date for the commencement of the trial and requested the parties to finalise their pre-trial preparations.

15. On 13 July 1998 the Prosecution filed its pre-trial brief in which it summarised the factual allegations against the accused and their legal evaluation.

16. On 15 July 1998 the accused Vlatko Kupre{ki} moved that the indictment against him be withdrawn on the basis of insufficient evidence. The motion was dismissed by a decision of 11 August 1998, on the grounds that the issues raised by the accused could only be dealt with by a full hearing on the merits.

17. The trial began with the case for the Prosecution on 17 August 1998 before Trial Chamber II composed of Judges Cassese (presiding), May and Mumba. The case for the Prosecution in chief ended on 15 October 1998.

18. On 21 September 1998 the Trial Chamber handed down a guideline decision on communication between parties and witnesses, stating that as a matter of principle, once a witness had made the solemn declaration, none of the parties must approach him or her except with the leave of the Trial Chamber.

19. The President of the Tribunal authorised an on-site visit of the Trial Chamber to Ahmi}i by a decision of 29 September 1998. However, due to security concerns, this visit did not take place.

20. On 7 December 1998, counsel for the accused Vlatko Kupre{ki} filed a motion for withdrawal of the indictment against his client on the basis that the evidence of the Prosecution was insufficient. The Trial Chamber construed this request as a motion for a judgement of acquittal under Rule 98 *bis* of the Rules of Procedure and Evidence, and denied the motion by a decision of 18 December 1998. The accused repeated his motion on 21 December 1998, and this motion was also rejected by a decision of the Trial Chamber of 8 January 1999.

21. On 11 January 1999, the presentation of the Defence case in-chief began, ending on 23 July 1999. The Prosecution presented rebuttal evidence between 27 September and 4 October 1999, and the Defence led rejoinder witnesses on 5 and 6 October 1999.

22. The Trial Chamber issued a decision on the order of the presentation of the evidence on 21 January 1999, setting out the procedure for examination-in-chief, cross- and re-examination of witnesses, which restated the oral ruling of the Trial Chamber in the hearing of 15 January 1999.

23. On 3 February 1999, the Trial Chamber in a decision of the same date addressed the question put forward by the Defence as to whether the defence of *tu quoque* was available under international humanitarian law, answering the question in the negative, on the grounds that the obligations under humanitarian law were applicable *erga omnes*. The Trial Chamber restated its position in a decision of 17 February 1999.

24. On 11 February 1999, with the consent of the parties, the Trial Chamber issued a decision to proceed by way of deposition with the hearing of witnesses on 11 and 12 February 1999, as for medical reasons, Judge Cassese was temporarily indisposed. As Judge May was also temporarily indisposed on medical grounds on 24 February 1999, the Trial Chamber on 25 February 1999, at the request of the Prosecution but against the objections of counsel for Dragan Papi}, issued a further decision to proceed by way of deposition with the hearing of witnesses on 24, 25 and 26 February 1999. This latter decision was appealed by counsel for Dragan Papi} and reversed by the Appeals Chamber in its decision of 15 July 1999.[5] However, counsel for Dragan Papi} subsequently waived his right granted under the Appeals Chamber's decision to have the respective witnesses re-heard before the full Trial Chamber.

25. On 6 May 1999, the Trial Chamber granted provisional release to the accused Drago Josipovi} to attend the funeral of his mother who had died on 5 May 1999. The accused left the detention unit on 7 May 1999, accompanied by a staff member of the Tribunal, and returned there on 10 May 1999. Subsequently, the other accused also applied for provisional release: Drago Josipovi}, Mirjan and Zoran Kupre{ki} by an oral motion during the hearing of 22 July 1999 and Dragan Papi} by a written motion on

[5] IT-96-16-AR73.3 - Judge David Hunt appended a separate opinion, joining in the decision of the majority, but dissenting on some of the reasoning.

26 July 1999. All motions were denied by the Trial Chamber in its decision of 30 July 1999 on the grounds that while a majority of the Trial Chamber (Judge May dissenting) would be prepared to take exceptional circumstances into account, it nevertheless insisted that safety concerns be adequately addressed. In this regard, the relevant authorities of Bosnia and Herzegovina had refused to sign undertakings guaranteeing the return of the Kupre{ki} brothers to the detention unit and their arrest should they try to abscond, and thus the Trial Chamber could infer that such undertakings would also not be forthcoming with regard to the other two accused. Counsel for Drago Josipovi} sought leave to appeal this decision by a motion of 4 August 1999 and counsel for the accused Kupre{ki} by a motion of 6 August 1999. The Appeals Chamber, in two decisions of 18 August 1999,[6] denied leave to appeal, no exceptional circumstances having been shown, but stated that the Trial Chamber had erred in inferring from the refusal of Bosnia and Herzegovina to give undertakings for the accused Kupre{ki} that no such undertakings would therefore have been given for the appellant Josipovi} either.

26. The accused Vlatko Kupre{ki} applied anew for a judgement of acquittal under Rule 98 *bis* of the Rules of Procedure and Evidence on 23 July 1999; the request was denied by a decision of the Trial Chamber of 28 July 1999, which stated that Rule 98 *bis* only applied to a submission of no case to answer following the close of the case for the Prosecution, but was inapplicable once the evidence for the Defence had been put before the Court.

27. By decisions of 6 August 1999, the Registrar withdrew the assignment of defence counsel for all accused, on the basis that she had received information from the media that there had been an auction of paintings by Croat detainees organised by a Croatian support group, and that the revenues from this auction amounted to DM 4.300.000. From this the Registrar concluded that the accused were now able to pay for their own counsel. The accused objected to the withdrawal on the grounds that they had not received any

[6] IT-95-16-AR65 for the accused Drago Josipovi}; IT-95-16-AR65.2 for the accused Mirjan and Zoran Kupre{ki}.

significant financial support from that Croatian organisation apart from pocket money for the detention unit and support for their families. The Trial Chamber reversed the decisions of the Registrar by a decision of 3 September 1999; in the opinion of the Trial Chamber the burden of proof for the fact that the accused were no longer indigent was on the Registrar, and media reports alone could not be regarded as sufficient evidence for a court of law.

28. The accused Mirjan Kupre{ki} and Zoran Kupre{ki} filed another motion for provisional release on 3 September 1999, to which the application of Drago Josipovi} was joined on the same date. Their motions were denied by the Trial Chamber in its decision of 13 September 1999 for lack of exceptional circumstances under Rule 65 of the Rules of Procedure and Evidence. For the same reasons, the Trial Chamber denied the requests for provisional release of Dragan Papi} of 10 September 1999 and Vladimir [anti} of 9 September in its decisions of 14 September 1999.

29. The Trial Chamber, over 111 days, heard a total of 56 witnesses for the prosecution during their case in chief and another 4 during rebuttal, 96 witnesses for the Defence and one court witness. The accused Mirjan Kupre{ki}, Zoran Kupre{ki} and Vlatko Kupre{ki} also gave sworn testimony as witnesses in their own case between 14 and 23 July 1999. The three other accused chose not to testify on their own behalf.

30. The final trial briefs of the Prosecution and of all Defence counsel were submitted on 5 November 1999. Closing arguments were heard between 8 and 10 November 1999.

II. THE CHARGES AGAINST THE ACCUSED

31. The Prosecutor alleged the following facts and charged the following counts:

32. The accused helped prepare the April 1993 attack on the Ahmi}i-Šanti}i civilians by: participating in military training and arming themselves; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village of Ahmi}i-Šanti}i; preparing their homes and the homes of their relatives as staging areas and firing locations for the attack, and by concealing from the other residents the fact that the attack was imminent.

33. Under COUNT 1 all six accused are charged with a CRIME AGAINST HUMANITY, punishable under Article 5(h) (persecution) of the Statute of the Tribunal, on the grounds that from October 1992 until April 1993 they persecuted the Bosnian Muslim inhabitants of Ahmi}i-Šanti}i and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove all Bosnian Muslims from the village and surrounding areas. As part of this persecution, the accused participated in or aided and abetted the deliberate and systematic killing of Bosnian Muslim civilians, the comprehensive destruction of their homes and property, and their organised detention and expulsion from Ahmi}i-Šanti}i and its environs.

34. Under COUNTS 2-9 the accused Mirjan and Zoran Kupre{ki} are charged with murder as a CRIME AGAINST HUMANITY, punishable under Article 5(a) (murder) of the Statute of the Tribunal, and a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions. When the attack on Ahmi}i-Šanti}i commenced in the early morning of 16 April 1993, Witness KL was living with his son, Naser, Naser's wife, Zehrudina, and their two children, Elvis (aged 4) and Sejad (aged 3 months). Armed with an automatic weapon, Zoran and Mirjan Kupre{ki} entered Witness KL's house. Zoran Kupre{ki} shot and killed Naser. He then shot and wounded Zehrudina. Mirjan Kupre{ki} poured flammable liquid onto the furniture to set the house

on fire. The accused then shot the two children, Elvis and Sejad. When Witness KL fled the burning house, Zehrudina, who was wounded, was still alive, but ultimately perished in the fire. Naser, Zehrudina, Elvis and Sejad all died and Witness KL received burns to his head, face and hands.

35. Under COUNTS 10 and 11 Zoran and Mirjan Kupre{ki} are charged with a CRIME AGAINST HUMANITY, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal and a VIOLATION OF THE LAWS OR CUSTOMS OF WAR, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions, on the grounds of killing Witness KL's family before his eyes and causing him severe burns by burning down his home while he was still in it.

36. Under COUNTS 12-15 the accused Vlatko Kupre{ki} is charged with murder and inhumane and cruel treatment as CRIMES AGAINST HUMANITY, punishable under Article 5(a) (murder), and Article 5(i) (inhumane acts) of the Statute of the Tribunal, as well as VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder and cruel treatment) of the Geneva Conventions. Before the 16 April 1993 attack, HVO soldiers armed with automatic rifles congregated at the residence of the accused in Ahmi}i. When the attack commenced, several HVO units used his residence as a staging area. Other HVO soldiers shot at Bosnian Muslim civilians from the accused's house throughout the attack. Members of the Pezer family, who were Bosnian Muslims, decided to escape through the forest. As they ran by the accused's house toward the forest, the accused and other HVO soldiers in front of his house, aiding and abetting each other, shot at the group, wounding D'enana Pezer, the daughter of Ismail and Fata Pezer, and another woman. D'enana Pezer fell to the ground and Fata Pezer returned to assist her daughter. The accused and the HVO soldiers shot Fata Pezer and killed her.

37. Under COUNTS 16-19, Drago Josipovi} and Vladimir [anti} are charged with CRIMES AGAINST HUMANITY, punishable under Article 5(a) (murder) and 5(i) (inhumane acts) of the Statute of the Tribunal, as well as with VIOLATIONS OF THE

LAWS OR CUSTOMS OF WAR, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder and cruel treatment) of the Geneva Conventions. On 16 April 1993, numerous HVO soldiers, including the accused, attacked the home of Musafer and Suhreta Pušćul, while the family, which included two young daughters, was sleeping. During the attack, the accused and other HVO soldiers, aiding and abetting one another, forcibly removed the family from their home and then killed Musafer Pušćul whilst holding members of his family nearby. As part of the attack, the HVO soldiers, including the accused, vandalised the home and then burned it to the ground.

III. GENERAL BACKGROUND

A. The Origins of the Muslim-Croat Conflict (October 1992 - March 1994)

1. The Case for the Prosecution

38. The events which are the subject of this judgement concern the Muslim-Croat conflict of 1992-1993 which took place in central Bosnia during the war of dissolution of the former Yugoslavia. Muslims, or Bosniacs, and Croats initially fought side-by-side to resist the Serb/JNA attack in eastern and western Bosnia and Herzegovina in 1992.[7] In central Bosnia, they maintained a front line against the Serbs in Turbe, near Travnik. As the conflict with the Serbs wore on, however, "ethnic cleansing" by Serb forces in Bosnia and Herzegovina drove Croat and Bosniac refugees into the interior of Bosnia, creating overcrowding and tension between the two nationalities and leading to a conflict between these former allies. The Muslim-Croat conflict ended only with the signing of the Washington Agreement on 2 March 1994, which created the Muslim-Croat Federation, an entity which exists to this day in the form of the Federation of Bosnia and Herzegovina, one of the two entities of Bosnia and Herzegovina under the Dayton Peace Agreement.

(a) General

39. The Prosecution contends that the attack on Ahmi}i of 16 April 1993, which is the principal subject of this judgement, took place as part of a campaign of "ethnic cleansing" waged by the Bosnian Croats during the Muslim-Croat conflict in order to create ethnically homogenous regions which could be united in an independent Bosnian Croat state. This autonomous region, under the control of the Bosnian Croat authorities and independent from the central control of the Government of the Republic of Bosnia and Herzegovina in Sarajevo, could eventually be annexed to the Republic of Croatia as part of a "Greater Croatia" in the mirror image of the "Greater Serbia" plan.

40. Croatia and Serbia's designs on the territory of Bosnia appear to be long-standing.[8] When, in April 1992,[9] the Republic of Bosnia and Herzegovina gained its independence, it appears that Serbia and subsequently Croatia put these designs into effect, with the use of their respective Bosnian Serb and Bosnian Croat agents.

41. The Prosecution has argued in this case that the Bosnian Croats pursued a separatist agenda through their political and military authorities.[10] As regards the evidence adduced in this case of Bosnian Croat aspirations to statehood, a Prosecution witness, **Witness Q**, referred to a conversation with one of the accused, Vlatko Kupre{ki}, after an October 1992 attack on the Muslims in Ahmi}i, in which the accused stated that the Croats would now get their own State.[11] Similar evidence indicates that Bosnian Croats sought autonomy from the central government of the Republic of Bosnia and Herzegovina, based in Sarajevo.[12] Another witness, **Vlado Alilovi}**, said that while the so-called Croatian community of Herceg-Bosna was not conceived of as a State, it was thought of as a Croat community.[13]

(b) The Vance-Owen Plan

42. The Prosecution has suggested that one cause of the Muslim-Croat war was the Vance-Owen Agreement, which was formulated by the negotiators Cyrus Vance and David Owen in an attempt to solve the Yugoslav crisis. The Vance-Owen plan, which

---

[7] **Witness T**, Transcript page (hereafter abbreviated as "T.") 2978.
[8] "The concept of a Greater Serbia has a long history", Section II(A)(4) ("Greater Serbia"), *Prosecutor v. Tadić, (*IT-94-1-T), Opinion and Judgement, Trial Chamber, 7 May 1997 (hereafter *Tadić,* Trial Chamber Judgement, 7 May 1997), at para. 85.
[9] The Republic of Bosnia and Herzegovina was recognised by the European Community on 6 April 1992 (UN Doc. S/23793, Annex) and was admitted as a member of the United Nations on 22 May 1992 (GA Resolution 46/237).
[10] For example, see the Prosecution's cross-examination of **Zvonimir Cili},** T. 5317-5319, in which the Prosecution referred to the separatist thesis put forward by a Croat writer, Anto Valenta, notably in his book "The Partition of Bosnia and its Political Future", published in 1991. The witness denied, however, that Valenta's ideas were representative of those of the Croatian people as a whole: "In other words, it reflected his own positions, and this was not the position of any institution or organisation of Croatian people". **Zvonimir Cilić**, *ibid.*, p. 5319.
[11] T. 2751.
[12] **Payam Akhavan**, T. 1341.

envisaged the partition of Bosnia into ethnically-based cantons, is said to have provided Bosnian Croats with the motive to "ethnically cleanse" Muslim minorities from what would be, under the Vance-Owen plan, Croat-dominated cantons. The Vance-Owen plan, it is claimed, was regarded by the Croats as lending the stamp of legitimacy to "ethnic cleansing" for territorial gain.

43. Ahmi}i, the village in which the events that form the subject of this judgement took place, was situated in the Croat-dominated Canton 10. Certain witnesses have seen in this a motive for Bosnian Croat forces to attack it and to expel or kill its Muslim inhabitants.[14] As the witness **Lt. Col. Watters** explained, there was not only the motive but also the opportunity to do so on 16 April 1993.[15]

44. The attack on Ahmi}i, the Prosecution argues, represented one part of a coordinated plan of the Bosnian Croat authorities to "ethnically cleanse" Bosnian Muslims from the La{va River Valley,[16] and to secure a Croat-controlled route through Kiseljak.[17]

45. In April 1993, an ultimatum was addressed by the Croatian authorities of Bosnia to the authorities in Sarajevo to implement the Vance-Owen Plan immediately and to withdraw the Muslim troops from the provinces attributed to the Croats under the Geneva plan. Exhibit P333 is the report by Reuters of this ultimatum of 15 April 1993:

> "If Izetbegovi} does not sign this agreement by the 15th of April, the HVO will unilaterally enforce its jurisdiction in cantons three, eight and ten".[18]

---

[13] T. 5579-5580.
[14] **Lt. Col. Watters**, T. 202; see also T. 233-234 and **Payam Akhavan**, T. 1340.
[15] **Lt. Col. Watters**, T. 202-205. See also **Payam Akhavan**, T. 1336.
[16] **Witness Y**, T. 3298-3299, mentioning the villages of Strane, Merdani, Loncari, Pezići, Rovna, Putis, Jelinak, all in the La{va Valley, in the Busovača municipality, and the villages of Pezići, Rovna, Kovacevac, bordering on the municipality of Vitez, which were attacked by the HVO. The HVO expelled all the Muslims and burned their houses.
[17] **Lt. Col. Watters**, T. 202.
[18] Ahmi}i is in what would have been canton ten under the Vance-Owen Plan.

46. Exhibit P339 is a Joint Statement by the Representatives of the Croats and Muslims in the Vitez Municipality. Paragraph 4 states that "Fbğoth sides agree that in Vitez and Province 10, the Vance-Owen plan should be implemented even before it is signed by the Serbian side".

(c) Croat Nationalism, Militancy and Propaganda

47. The Prosecution has also sought to demonstrate that the attacks by Croats in Ahmi}i and in the La{va River Valley were committed in the context of an ideology of Croatian hegemony and that Bosnian Croats grew more militant and nationalistic from the spring of 1992 onwards. Young Croats allegedly began to appear in camouflage uniforms with the insignia of the HVO and its units,[19] sometimes with that of the "Usta{a", a Croatian fascist army unit during the Second World War. Croatian flags were said to have come to be prominently displayed by Croats in Ahmi}i.

48. The Prosecution explained the rise in discriminatory attitudes on the part of Bosnian Croats towards the Bosnian Muslims as, in part, the product of a campaign of virulent anti-Bosniac propaganda by the Bosnian Croat TV stations and authorities.[20] **Witness S** testified to the pro-Croatian and anti-Bosniac propaganda spread by Vitez TV under the patronage of the HVO, and the increasing emphasis on the division between Bosniacs and Croats.[21] **Witness DD** testified that once the Bosnian Croat political party was founded, the Bosniacs began to notice subtle changes, e.g. the fact that even small Croatian children had camouflage uniforms, made for them by their mothers.[22] **Witness S**, who had spent all his life in Ahmi}i until 16 April 1993, described the rise of Croat chauvinism in his area:

[19] **Fahrudin Ahmi}**, T. 1111-1112.
[20] **Abdulah Ahmi}**, T. 269. See also **Witness S**, T. 2878.
[21] T. 2878-2882.
[22] T. 3895.

> "When they started calling us *balijas* ... as soon as we started having different names in comparison to our previous names, we knew what was in store".[23]

This attitude in turn provoked Bosnian Muslim propaganda, as is described by **Witness S**.[24]

2. The Case for the Defence

49. The Defence - with the exception of Vlatko Kupre{ki} - has presented an account of the Muslim-Croat conflict and its causes which is quite different from that presented by the Prosecutor. The Defence deny that the Bosnian Croats had any plan to create their own State and that they attacked or persecuted their Muslim neighbours to achieve this end. Witness **Vlado Alilovi}** said that Croats and Muslims voted overwhelmingly (99%) in favour of the integrity of Bosnia and Herzegovina in the referendum of February 1992, while the Serbs voted against.[25] Moreover, the Defence argue that it was the Muslims who, following the initial Serbian and JNA aggression, attacked the Croats in order to seize territory and to create a Muslim state:

> "They wanted to take Vitez and the surrounding villages, that is to say this central part of the state as we would call it, this strategic part of the territory. Because they needed this territory so that they could link up. If you look at the map, before and after that, these Muslim villages were all around, Muslim towns and villages and it was only Central Bosnia that was missing. That was the only thing they needed, Vitez, Busovača, part of Novi Travnik. [...T]here wasn't much tension or hostility at the very outset. After all, we had lived together for many years. For example, the place where I lived, it was quite natural that we would go and visit each other. However, these tensions mounted after various minor incidents, after Slimena fell, when people got all these weapons. After the refugees came from Krajina and Jajce, the Muslims remained in our territory, whereas Croats mainly left and went to Herzegovina and further on. They probably felt that they were stronger

[23] T. 2881 (emphasis added).
[24] T. 2883.
[25] T. 5598.

> than we were, and that they had outnumbered us, and it is only logical that they thought that they could take this territory for themselves".[26]

50. Other witnesses have found the origins of the conflict in the allegedly different attitude taken by the Croats to the conflict with the Serbs from that taken by the Bosniacs, as was explained by witness **Vlado Alilovi}**:

> "A deterioration of relations between the Croats and the Muslims occurred [...] when quite opposing views were taken regarding the aggression on Croatia. The Croatian side thought that after the aggression against Croatia, Bosnia-Herzegovina would become the target of aggression. The official authorities of Bosnia-Herzegovina, or at least the high-level leaders, upheld the view that that was not Bosnia's war and that they were not interested in it but, rather, that this was a war exclusively between Serbs and Croats".[27]

3. Findings of the Trial Chamber

51. The Trial Chamber is only able to make very limited findings on these background aspects, as the trial did not focus on whether or not there was a "Greater Croatia" project or whether or not the conflict between the Croats and Muslims could be characterised as an international armed conflict.

52. Given the paucity of evidence adduced by the Prosecutor in this trial, the Trial Chamber is unable to find that there existed a "Greater Croatia" project or that Bosnian Croats nurtured aspirations to statehood at the relevant time.

53. As regards the nature of the armed conflict, it is not necessary for the purposes of this trial to determine whether the armed conflict was international or internal, since the indictment contains no counts relating to grave breaches of the Geneva Conventions, which would require proof of an international armed conflict.

54. By contrast, the Trial Chamber is satisfied that Croat nationalism and discrimination against Muslims was on the increase in central Bosnia in 1992-1993, due

---

[26] **Dragan Stojak**, T. 6311-6312.
[27] T. 5446.

4866

to a variety of factors, and that this may have contributed to the commission of the crimes forming the subject of this indictment. Whether there was equally a species of Muslim nationalism being preached does not affect this finding.

B. The Stages in the Muslim-Croat Conflict

1. The Fall of Jajce to the Serbs and the Influx of Muslim and Croat Refugees

55. In late autumn 1992, Jajce, a Muslim-Croat town fell to the Serbs. "Ethnic cleansing" of Croats and Muslims by Serb forces followed and led to a surge of refugees into central Bosnia.[28] The fall of Jajce, moreover, gave Serb forces access to the road to La{va and Central Bosnia, where there were important military installations and factories which the Serbs were anxious to seize.

(a) The Case for the Prosecution

56. The Prosecution has cast doubt on the causal nexus that the Defence has sought to establish between the influx of Muslim refugees and the genesis of fear and mistrust between the Croats and the Muslims, which would be the precursor to the attacks of October 1992 and April 1993.

(b) The Case for the Defence

57. The Defence has maintained that the displacement of several thousand Muslims and Croats, who entered Vitez and its environs, added to the already substantial influx of refugees who had fled the Serb aggression in eastern and western Bosnia and exacerbated pre-existing tensions between the two nationalities.[29]

---

[28] **Vlado Alilovi}** testified T. 5539 that, when Jajce fell, "most of the territory of Bosnia-Herzegovina was cleansed of Croats and Muslims by the JNA, that is, by the Serbs".

[29] **Zvonimir Cili}, T. 5141-5143; Ivica Kupre{ki}**, T. 8014-8015; **Vlado Alilovi},** T. 5460 and T. 5535; **Mirko Saki}**, T. 7606-7607; **Gordana Cui}, née Vidovi}**, T. 8181; **Dragan Vidovi}, T. 8418; Mirko Saki}**, T. 7606-7607 and T. 7683; **Gordana Cui}**, T. 8180-8181.

4867

(c) Findings of the Trial Chamber

58. The fall of Jajce to the Serbs undoubtedly did contribute to mutual fears and suspicions among the Muslims and Croats in the Vitez area. For the purposes of the present judgement, however, it is not necessary to dwell on these matters extensively.

2. Attacks on Bosnian Croats in the La{va River Valley

(a) The Case for the Prosecution

59. The evidence adduced here was only led by the Defence; it appears that the Prosecution does not contest this evidence as to the facts.

(b) The Case for the Defence

60. The Defence contends that the Muslim-Croat war, and in particular events in the La{va River Valley, can only be truly understood in the light of certain, specific attacks perpetrated by Muslim forces against Bosnian Croats in early 1993,[30] chief among which was an attack on the village of Dusina, as one of the defence counsel explained.[31]

(i) Dusina

61. On 25 January 1993, Muslim forces massacred some fourteen captured Croat soldiers and several civilians in Dusina. **Željka Raji}**,[32] whose husband was among those killed, testified concerning the attack. A videotape showing the victims' bodies was also admitted into evidence.[33]

62. On 25 January 1993, the village of La{va was attacked by the Muslims. Women, children and elderly persons left La{va because they were warned of the attack, but men, including the witness's husband, stayed. The women and elderly, including the witness,

[30] See e.g. Defence's Closing Brief of Counsel for Mirjan Kupre{ki} at p. 12; Defence's Closing Brief of Counsel for Dragan Papi}, at p. 5 – 7.
[31] T. 6119-6121.
[32] T. 6097-6134.

went to Dusina, where at 5 a.m., on 26 January 1993, the village was attacked by rocket-propelled grenades. There were many Muslims, in two groups. First, there was one group of 50 or so who spoke Serbo-Croatian, and then a group who seemed to be Mujahedin. All were in uniform and had the insignia of the BiH army. They took their captives to the Muslim part of the village, using them on the way as "human shields".[34] The group of captives which included the witness were mistreated by the Muslims. Elderly Croats were taken out in groups and beaten. Then five men were executed.[35] According to the witness, a BiH soldier called out Augustine Rados Raji} and executed him, and then boasted of having killed the witness's husband.[36] The witness's husband had indeed been murdered while trying to negotiate the release of the captives.[37] Others were killed in this same way. One at least was savagely tortured before being killed.[38] Subsequently, Croat houses in the village were torched. Today – it is alleged - not a single Croat lives in La{va or Dusina. In La{va where the Croats lived, Muslims moved into their houses. Many other Croat witnesses for the defence testified that the events in Dusina traumatised the Croat community.[39]

(ii) Busovača

63. According to defence witnesses, there was also fighting between Muslims and Croats in Busovača in 1992-1993. **Zvonimir Cili}** testified that all the Croats from that municipality were expelled at the end of a conflict between the BiH army and Croats.[40] This was confirmed by **Ljuban Grubesi}**.[41]

(iii) Kidnapping of Zivko Toti} and the Killing of his Bodyguards

---

[33] The videotape is Exhibit D62/2; the transcript of the videotape is D62 A/2 and the list of those killed in the incident is D63/2.
[34] T. 6112-6113 and T. 6115.
[35] T. 6116-6118.
[36] T. 6122-6123.
[37] See Exhibit D62/2 (video of the witness's husband and other dead and mutilated bodies).
[38] **Željka Raji}**, T. 6125.
[39] E.g. **Rudo Kurevija**, T. 5894.
[40] T. 5174-5175.
[41] T. 6235.

64. In addition to the events in Dusina, La{va and Busovača which occurred around January 1993, the kidnapping of Zivko Toti} and the killing of his escort on 15 April 1993 is said to have had a seriously destabilising effect on Muslim-Croat relations. Zivko Toti} was the head of the HVO Military Police in Zenica.[42] Four or five of Toti}'s bodyguards were killed during his kidnapping, allegedly by Muslim forces.[43] Zivko Toti} himself was not killed, however, and was eventually released.[44]

(iv) Attacks on Croats in Stari Vitez (Mahala)

65. The Defence have also pointed to the alleged militancy of the Muslims living in the Muslim quarter of Vitez (Stari Vitez) and Muslim attacks on Croats in Vitez. **Zvonimir Cili}** testified that the Muslims in Stari Vitez were literally digging in for a confrontation with the Croats.[45] He claimed that Vitez was shelled from Muslim positions on 16 April 1993.[46] He also produced several "Operations Reports" (Exhibits D40/2 and D41/2) during his testimony, which described a situation of complete panic in Vitez on 16 April 1993. A further Operations Report of 17 April 1993 (Exhibit D42/2) reported that Muslim forces were regrouping and fighting, in [anti}i among other places.

(v) Attacks on Croats in Zenica

66. Finally, the Defence have pointed to Zenica as a bastion of Muslim nationalism where Croats were mistreated, in order to demonstrate that Muslims were not, or not uniquely, the victims of dicrimination and persecution. **Witness HH**, an investigator for Tadeusz Mazowiecki, the Special Rapporteur on the Human Rights situation in Bosnia and Herzegovina, testified that there were reports of harassment and arbitrary executions

[42] **Lt.-Col. Watters**, T. 147.
[43] The videotape relating to this episode is D34/2 the Croatian translation, D34A/2, and the English translation D34B/2.
[44] **Jadranka Toli}**, T. 6156-6158.
[45] **Zvonimir Cili}**, T. 5425.
[46] An exhibit was produced to the witness (D39/2), which was allegedly a list of HVO soldiers killed and wounded (23 killed and 63 wounded) in Vitez. It emerged during cross-examination that not all the soldiers mentioned in the document were, however, from the Vitez brigade.

of Croats in Zenica.[47] **Jadranka Toli}**,[48] a nurse in Zenica general hospital and a Croat, testified about persecution of Croats in Zenica, where they were in a minority. Croats therefore began to leave Zenica.[49] **Zvonimir Cili}** also testified to the persecution of Croats in Zenica in 1992-1993.[50]

(vi) Croat Propaganda and Preparation for an Attack by Bosnian Muslim Forces

67. The Defence has produced evidence that the Croat forces feared an attack by Muslims in 1993.[51]

(c) Findings of the Trial Chamber

68. The Trial Chamber finds that there were undoubtedly attacks by Muslim forces on Croat villagers in early 1992, which contributed to a background of mutual fear. The Trial Chamber, however, does not find that compelling evidence has been produced to show that the BiH army or the Muslims in general were planning to launch an attack on the Croats on 15-16 April 1993.

69. The evidence of defence witness **Zvonimir Cili}**, who was a good friend of Mario Čerkez and who joined the latter on the municipal staff as a political officer to provide information for the troops and the members of the municipal staff of the HVO, is instructive in this regard. His testimony reveals a tendency on the Croat side to spread alarm among the Croat population. Exhibit D34/2, a videotape of a news programme reporting the kidnapping of Zivko Toti}, is also instructive. The broadcaster recites all the alleged crimes committed by the Muslims against the Croats in an apparent attempt to

---

[47] *Second Periodic Report on the Situation of Human Rights in the Territory of the Former Yugoslavia,* by Mr. Tadeusz Mazowiecki (hereafter the *Mazowiecki Report*), UN Doc. E/CN.4/1994/4, 19 May 1993, Conclusions, paras. 37 and 40.
[48] T. 6142-6180.
[49] T. 6151"... the life conditions were intolerable, but the main reasons were the attack on Dusina and the crimes in Dusina, and this horrified the citizens, Croats in Zenica, and other citizens. Then the attack on Busovača. Then from that time Croats in Zenica felt very insecure. They were afraid for their own lives and the lives of their children".
[50] T. 5191-5199.

incite hatred against the Muslims and BiH army. This vitiates Zvonimir Cili}'s assertion that the Croat leadership was trying to achieve conciliation among ethnic groups.

70. Moreover, the "Operations Report" dated 16 April 1993, produced by **Zvonimir Cili}**, appears to be one-sided in that it only mentions attacks on "*Croatian* houses in Krčevine and Nadioci", and nothing about the assault on Ahmi}i and massacres of Muslim civilians. The Report complains of Muslim forces attacking from Preočica and states, *inter alia*, that "attacks by Muslim forces are becoming more ferocious and bestial". The Trial Chamber finds that this evidence is not conclusive in as much as it could prove either that the Muslims *were* preparing for an attack or that the Croat forces were creating misinformation and propaganda to prepare their own population for an attack on the Muslims. The correct interpretation depends on the true situation: whether the Muslims *were indeed* preparing for an attack or not.

C. Muslim-Croat Relations in Central Bosnia

1. The Case for the Prosecution

(a) Good Muslim-Croat Relations before October 1992

71. All the evidence shows that before the Muslim-Croat conflict in 1992-1993, Muslims and Croats got on very well together in Ahmi}i and its environs. Muslims and Croats would visit each other, go to each other's weddings and help each other out as good neighbours. **Witness KL** testified to this effect of his Croat neighbours Zoran Kupre{ki}, Mirjan Kupre{ki} and Vlatko Kupre{ki}.[52] Prosecution witnesses **Mehmed Ahmi}**,[53] **Fahrudin Ahmi}**,[54] **D**,[55] **L**,[56] **N**,[57] **S**,[58] **V**,[59] **W**[60] and **FF**[61] testified in a like manner.

---

[51] **Zvonimir Cili}**, T. 5206-5207.
[52] T. 1893-1894.
[53] T. 640-641.

4872

72. An expert witness who testified at the request of the Trial Chamber, the Norwegian anthropologist **Dr. Tone Bringa**, pointed out that before 1992, relations between Croats and Muslims were good. Except for religious practices, where they of course followed different habits and rituals, they did share aspects of their daily lives. They co-operated in the running of their villages, they visited one another at life-cycle events (weddings, funerals, etc) and they took an interest in each other's lives. Normally neighbours got along well, irrespective of whether they were Croats or Muslims. There were of course misunderstandings or quarrels, but they did not have to do with the ethnic community to which the neighbours belonged.[62]

73. According to the same expert witness, there was nevertheless potential for conflict. The Muslims and the Croats did not intermarry. There was therefore potential for having two opposite groups, each based on kinship ties, which coincided with ethnic ties or ethnic identification. As the witness put it:

> "...so in a conflict, which could be anything from a quarrel about sheep that run into your property, these kinds of conflicts, relatives would often have strong loyalties to each other and they would stand up for each other. So you would have conflicts where people who were related sided with each other against the person that they were then in conflict in (sic)".[63]

---

[54] T. 1150-1151.
[55] T. 1015.
[56] T. 2340.
[57] T. 2538.
[58] T. 2877-2878.
[59] T. 3180-3181 and T. 3202.
[60] T. 3164.
[61] T. 4311.
[62] T. 10921-10924.
[63] T.10923.

4873

(b) Deterioration in Relations after October 1992 and the Separation of the Village Guards

74. According to Prosecution witnesses, it was chiefly the Croats who were to blame for the split between the Muslims and Croats in 1992. **Fahrudin Ahmi}** said it was the Croats who started to arm themselves and appeared menacing. **Witness F** said that Croats told him that Ahmi}i would be "another Vukovar", i.e. that it would be destroyed and its inhabitants killed.[64]

75. **Dr. Bringa**, the expert witness called by the Trial Chamber, testified as to her experiences and conclusions from the times she had spent with a Muslim family in a village in central Bosnia. Dr. Bringa visited the former Yugoslavia several times between 1987 and 1997 for a total of 15 months. She noticed the gradual shifting of allegiance from the neighbourly relations between Muslims and Croats to a more ethnicity-oriented affiliation and self-identification of sections of the Bosnian population.[65]

76. When asked for an explanation of whether and in what manner she had noticed the beginnings of ethnic divisions, the witness stated that originally it was not so much ethnic hatred as a growing fear of the events which were threatening the villagers from outside their close-knit community.[66] As Yugoslavia disintegrated, nationalist ideologies gradually brought about a change in the attitude of each group. Nationalist propaganda fuelled a change in the perception and self-identification of members of the various ethnic groups. Gradually the "other" persons, i.e. members of other ethnic groups, who were originally perceived merely as "diverse", came to be perceived as "alien" and then as "enemy". More specifically, they were perceived as potential enemies who were threatening to the identity or future prosperity of one's group.[67] The witness also felt

[64] **Fahrudin Ahmi}**, T. 1128–1129; **Witness F**, T. 1373.
[65] T. 10923–10925.
[66] T.10937.
[67] T. 10938-10940 and T. 10957-10961.

48874

that oppressive tactics such as checkpoints and interrogations were being used predominantly by the Croats and less by the Muslims.[68]

77. Other prosecution witnesses testified that the Bosnian Croat authorities set up checkpoints, for example at Dubravica, where they arrested Bosniacs, and otherwise tried to provoke them, that they would seize humanitarian aid bound for Tuzla, and do all they could to undermine the Bosniacs. The authorities would not investigate murders of Bosniacs, thus creating a culture of impunity and lawlessness.[69] Linked to this deterioration in relations was the separation of the joint village guards into Muslim and Croat guards in the spring of 1992.

2. The Case for the Defence[70]

78. Witnesses for the Defence agreed with prosecution witnesses that Muslims and Croats in Ahmi}i had excellent neighbourly relationships prior to the events which are the subject of the indictment.[71]

79. Where prosecution and defence witnesses differ is on the question of who bore the responsibility for the split between the two nationalities. The majority of defence witnesses (who were mostly Croats) maintained that it was the Muslims who wished to separate themselves from the Croats.[72]

---

[68] T. 10963-10964.

[69] **Witness B**, T. 737-741; **Witness AA,** T. 3735-3738 saw Miroslav Bralo when they were both in prison; Bralo being in prison for the Salkić slaying in Nadioci. He related how Bralo was permitted a considerable degree of freedom and was allowed to assault some Arabs who were there in the prison. Shortly after his release, the witness was sent back to Kaonik prison on somewhat trumped-up charges. This second time he was again in prison with Miroslav Bralo, who was still there. The witness and Bralo were sent on trench digging details but they did not really dig the trenches – the Muslims did this - with the witness and Bralo sitting by, drinking and joking. The witness provoked the Muslims by saying things to them. Bralo beat them with his hands and spade. Bralo couldn't understand why he was in prison "only because of one Balija". Bralo was in prison for some two months, but he was allowed to visit his wife, drink, etc. The cell was never locked.

[70] See e.g. Closing Argument of the Counsel of the Accused Zoran Kupre{ki}, 5 Nov. 1999, at p. 43.

[71] **Niko Saki}**, T. 8224; **Jozo Alilovi}**, T. 8332; **Vlado Alilovi}**, T. 5442.

[72] **Dragan Stojak**, T. 6322; **Vlado Alilovi}**, T. 5551.

3. Findings of the Trial Chamber

80. The Trial Chamber finds that there *was* a split between Croats and Muslims in 1992, no doubt for a combination of the reasons adduced by prosecution and defence witnesses, the precise cause of which it is not necessary to determine for the purposes of this Judgement.

D. Persecution – Alleged Facts

1. The Case for the Prosecution

(a) General

81. The Prosecution maintains that the attacks on Ahmi}i in October 1992 and April 1993 were part of a systematic attack on the civilian population of the La{va River Valley intended to "cleanse" the area of Muslims.

82. **Witness AA**, a Muslim member of the "Jokers" i.e. of the Croatian Military Police, provided key evidence for this contention:

> Q. And what was the purpose of the Busovača campaign by the HVO as you understand it?
> A. My conclusion was that it should be cleansed, and at that time I believed it too. Later on, my colleagues with whom I was, and we said that the air should be rid of Balijas, you know, that it should be ethnically cleansed, and we talked about it, and that we would go to Vitez the next time.
> Q. Vitez would be the next target, is that what you're saying? That was the understanding?
> A. Yes. Yes, this is what we talked about, we in the Military Police.
> Q. When you talked about Vitez being the next place to be ethnically cleansed, did that include Ahmići as well? Was that also understood?
> A. Yes, of course.
> Q. Why do you say "of course"?
> A. Because Ahmići was practically on the road between Busovača and Vitez, and there were Muslims there too, the majority was Muslim, it had to be cleansed or removed. They simply had to be removed from there. Something had to be done, because they were a hindrance.

48876

Q. Was the BiH army in Ahmići?
A. I never saw a single member of the BiH army in Ahmići, never. I say that because I passed there many times. So never. But I do know that most of them went to fight against the Serbs in Vlaši}, Visoko, somewhere else, but not -- they were not stationed in Ahmići.
Q. When BiH soldiers came home on leave, what would they do with their weapons, as far as you knew?
A. Most of them would leave them at the front, leave the weapons at the front. I know that, because I talked to some of the members that I knew, and they always complained that they didn't have enough weapons. And they even went in civilian clothes.
Q Now, you say that you knew that the BiH army was not in Ahmići. Did you think that was common knowledge in your group, in the Military Police, that there was no threat from the BiH army in Ahmići?
A. Yes. Yes. Had there been a Bosnian army in Ahmići, we would have known of it, or we would have at least seen someone in uniform or some other side, a member of the other side, but I never saw them, and everybod knew that. It was common knowledge.
Q. Which army was all around Ahmići at this time?
A. The HVO, on all sides more or less...[73]

(b) Discriminatory Acts from October 1992 until April 1993

83. The Trial Chamber has reviewed Prosecution evidence, which tends to show various factual elements that may be taken to constitute persecution of Muslims. In addition to these elements, the following material should be taken into account.

84. After the October 1992 attack, the HVO allowed Bosniacs to return to Ahmi}i, but the situation was evidently very tense. It would seem that the local Croats provoked and discriminated against the Muslim population. The Croats were in control of Ahmi}i after the October 1992 attack,[74] and "everything became Croatian". As **Witness G** testified: "... when we were allowed to go back home, everything was according to the Croats. For instance, at school I had to study the Croatian language, history was called Polviest, the Croatian term for it, instead of the subject musical culture, it was given an another name. The money that was used was the Dinar, the Croatian money, instead of

[73] T. 3717-3719.
[74] **Abdulah Ahmi}**, T. 270.

the previous currency".[75] The HVO demanded the total surrender of Muslim forces and the right to re-locate, to disarm and to impose a curfew on them.[76] The Jokers, a special HVO unit referred to above, was notable for its persecution of the local civilian Muslim population.[77]

85. According to the Prosecution, Bosnian Croat persecution of the Bosnian Muslim population was designed to dehumanise the latter so that it would be easier to commit acts of violence against them. Croats started to call Muslims by the derogatory term "balijas", expel them from their homes, threaten them and otherwise harass them on the sole basis of their ethnicity.[78]

86. In the view of the Prosecution the following examples of persecution of Muslims during this time are illustrative.

87. **Fahrudin Ahmi}** testified that he was told by Dragan Papi} and Vinko Vidović, when he tried to return to his home following the attack of October 1992, that he needed permission to do so. The following day, Papi} and Vidovi} threatened Fahrudin Ahmi}. Dragan Papi} approached Ahmi} holding the fuse of a bomb, and addressed him with the words "Why don't you monkeys surrender?" in reference to the Muslims. As a result of this intimidation, Fahrudin Ahmi} left his home the next day, fearing that it might be bombed if he stayed.[79]

88. Other instances of provocation were recounted by **Witness A,** who recalled a conversation which he had at the house of Ivo and Dragan Papi}, in which the Papi}s

---

[75] **Witness G**, T. 1544.
[76] **Witness FF,** T. 4329–4330, testified that her husband had to surrender his weapons to Nenad Šantić, the local HVO commander and the brother-in-law of Drago Josipović. She testified that Nenad Šantić took weapons from others too. Witness CA, T. 4577–4579, testified that her son was told to hand his weapon – one of the burnt weapons from Slemenj - to Nenad Šantić, and to tell others to hand in their weapons in Pirići.
[77] **Lee Whitworth**, T. 4271–4274.
[78] **Witness D**, T. 1013-1019; **Witness I**, T. 1778 (generally), T. 1783 (freedom of movement was restricted), T. 1799 (witness was threatened by a Croat soldier who put a knife to his neck and said "This is what is going to happen to your neighbours [...]"); **Fahrudin Ahmi}**, T. 1113: Muslims were intimidated and insulted in order to force them to leave Ahmi}i.
[79] T. 1113.

blamed the Muslims for the war-time problems.[80] **Abdulah Ahmi}** referred to a conversation with Dragan Papi} in which the latter expressed admiration for Adolf Hitler and said that Hitler's methods should be applied to Bosnia.[81] **Witness G** told of the appearance of Croatian flags flying above Ivo and Dragan Papi}'s house, as if to suggest that Ahmi}i was now part of the territory of Croatia.[82] Conversely, the flag of the Republic of Bosnia and Herzegovina was dragged along the road behind a motorcycle ridden by two HVO soldiers, according to the testimony of **Fahrudin Ahmi}**, whose sister-in-law witnessed this incident.[83]

89. **Witness I**, a Muslim who lived in the part of Ahmi}i known as [anti}i, where about 80% of the houses were owned by Croats, referred to the fact that Muslims were discriminated against in petrol rationing. The witness would have to go to the Hotel Vitez in order to get a certificate from the HVO for petrol. Other Muslims would not go to the Hotel Vitez for such a certificate, as they were afraid.[84]

90. **Witness U**, a Bosniac refugee who left Karaula because of Serb aggression, arrived in a village adjoining Ahmi}i around February 1993. This neighbouring village consisted mostly of Croat inhabitants, and he was forced to leave there after only 45 days due to Croat harrassment. He described the pressures put on Bosnian Muslims by the Bosnian Croats in the village, who stole from the Muslims, seized their property, searched their houses for weapons and generally mistreated them in such a way as to make it impossible for them to continue to live in the village.[85] His house was searched three times by the HVO Military Police. The witness also described the murder in the village of a Bosniac, Esad Salki}, which finally provoked his flight to Ahmi}i in February 1993. He went to Ahrni}i precisely because it was a Muslim village. There were approximately 150 other refugees in Ahmi}i, all of whom were Bosnian Muslims.

---

[80] T. 542-545.
[81] T. 262.
[82] T. 1544-1545.
[83] T. 1212.
[84] T. 1790-1791.
[85] T. 2990-2991.

During this period in Ahmi}i, the Bosnian Croats would say that they could not guarantee the Muslims' safety because of "extremist" Croats, who wore HVO insignia.

91. **Witness V** referred to regular "drive-by" shootings by Bosnian Croats in Ahmi}i before the conflict of April 1993.[86] **Witness Y** confirmed this pattern of harrassment of Bosniacs in the period from October 1992 until April 1993 in Ahmi}i and surrounding villages – with houses being burnt, Bosniacs expelled, and drive-by shootings in Ahmi}i practically every night at dusk. Muslims were also expelled from surrounding villages such as Strane, Merdani, Pezići, Kovacevac, Rovna and Loncari.[87] The witness explained that the BiH army did not defend those villages because "all those who were armed and uniformed and members of the army were up at the frontlines towards the Serbs".[88]

92. **Witness AA**, a Muslim who served in the HVO, was 23 years old in 1993. He had known Vlado [anti} since childhood. Vlado [anti} had most recently been his superior in the police force. The witness grew up in the municipality of Vitez, in a mostly Croat village with mostly Croat friends despite the fact that he was himself a Muslim. Suprisingly for a Muslim from a Muslim family, Witness AA joined the HVO in the spring of 1992. He joined the 4th battalion of the Military Police, assigned to provide security to the Hotel Vitez, which was being used as the Headquarters for the HVO in central Bosnia and where [anti} had an office. [anti} wore a uniform and was in charge of investigating crimes committed by HVO soldiers. The HVO stole from Serbs, Muslims and the BiH army. Vlado [anti} knew these crimes were being committed but he did not investigate them.

93. From late 1992 until early 1993, when Witness AA was sent by Vlado [anti} to Busovača, he saw in Kaonik, 2-3 km from Busovača, Muslim houses which had been set on fire and that Muslim civilians had been sent to dig trenches. On the same trip, the witness saw that the village of Strane had been "ethnically cleansed" of Muslims: "not a

[86] T. 3209.
[87] T. 3291-3292.

4840

single Muslim man, woman or child had remained there. All of them were expelled" by the HVO.[89] The same was true of Busovača[90] and Merdani.[91] The witness, who participated in the campaign, stated that the purpose of the Busovača campaign was "ethnic cleansing" – "to rid Fthe placeğ of Ftheğ Balijas".[92]

94. **Captain Stevens** attested to the climate of persecution in the Vitez area in April 1993. After Easter 1993, Zenica, overwhelmingly a Muslim town, was shelled by the HVO. Also in mid-April 1993, a petrol tanker exploded in the Muslim part of Vitez. Captain Stevens arrived on the scene the day after this explosion and heard that the tanker had been placed near what was thought to be a munitions dump. Local militia-type forces told him that two Muslims had been strapped into the cab of the tanker and that the HVO fired RPG 7 rounds to cause the explosion. Captain Stevens saw the effects of the explosion, namely massive destruction to the Muslim part of town (the western part of Vitez). These can be seen in Exhibit P160. This incident, referred to also in Lt.-Col. Watters' testimony, led immediately to a mass exodus of some 400 Muslims from Stari Vitez. Captain Stevens also saw the results of "ethnic cleansing" by local HVO forces in Nova Bila towards the end of his tour of duty.

2. The Case for the Defence

(a) General

95. The Defence and defence witnesses have frequently pointed out, as the Prosecution did, that prior to October 1992, relations between Muslims and Croats in the La{va River Valley were very good.

---

[88] T. 3292-3293.
[89] T. 3712-3713.
[90] T. 3713-3714.
[91] T. 3715-3716.
[92] T. 3717-3718.

(b) Croat Nationalism

96. Defence witnesses have downplayed the significance of Croat nationalism, for example the flying of the Croat checkerboard flag from Croat houses, including the Papi} house, in Ahmi}i. **Ivo Vidovi}** said that flags were flown simply to celebrate religious holidays, and that the Muslims also displayed flags.[93] This statement is supported by other witnesses. Several Croats flew a Croat flag in Ahmi}i, as **Ljubica Milicevi}** testified,[94] including Ivo Papi}, Slavko Milicevi} and Dragan Papi}. She also explained that even though Ivo Papi} flew a Croatian flag and never a Muslim one, the sympathy of the Papi} family lay with both communities.

97. By the same token, defence witnesses placed less emphasis upon the importance of Bosnian Croats donning uniforms. **Goran Papi}**, the younger brother of the accused Dragan Papi}, testified that Dragan Papi} wore a black uniform – which was a gift – simply in order to make it easier for him to pass the black-shirted HOS checkpoints in Zenica.[95]

98. **Zvonimir Cili}** testified that the Press Service of the Muslim-Croat Crisis Staff,[96] where he worked after the break-up of the SFRY in 1991, was composed of three Croats and two Muslims. The purpose of the Staff was to deal with the crisis which had arisen due to attacks being launched on Bosnian Croats and Muslims by the Serb-dominated JNA in 1991-1992. The crisis staff was staffed in proportion to the nationalities present in the Vitez municipality, i.e. Muslims, Croats, Serbs, Yugoslavs and others.

---

[93] T. 6977.
[94] T. 7325 and 7351.
[95] T. 7056–7057: "Q. Are you aware that he owned and occasionally wore a black uniform? A. Yes, he did own a black uniform. It was given to him as a present by somebody whose vehicle he had prepared, because it was useful if he went to Zenica or somewhere else, he would not be stopped at the checkpoints, and that's why he would wear it sometimes though it was too small for him. So I saw him wearing it very rarely. Q. So it was a good idea to wear a black uniform if you went to Zenica? A. Yes, because the HOS was the only organised force in Zenica at the time, and all of them were wearing black uniforms. Q. And why did he wear the camouflage uniform? A. He wore it because everybody was wearing it. All young men were wearing uniforms. It was the fashion at the time just before the war. Q. So young people who were not members of any particular units -- A. Yes, they would get them from their friends and they would wear them".
[96] T. 5076-5077.

4882

99. In her everyday life, **Gordana Cui}** stated that she never noticed any intolerance towards Muslims, nor a desire to "cleanse" Ahmi}i of Muslims or to burn their houses.[97]

100. The Defence for **Zoran and Mirjan Kupre{ki}** has also emphasised that both accused did not only have generally good relations with Muslims, but that they were especially friendly with a number of Muslims who, like the accused, were members of a folklore society. Both accused have testified that this society and socialising with the other members meant very much to them. **Zoran Kupre{ki}** explained at length how he kept up his interest and involvement in folklore from secondary school until 15 April 1993.[98] The group had performances on the occasion of Muslim and Croatian festivities (Bajram and Easter) up until March and April 1993.[99] Counsel for the accused submitted four photographs showing both accused in the company of the other members of the society and during performances.[100]

101. The accused **Mirjan Kupre{ki}** told the Trial Chamber that even a number of marriages across ethnic divides originated in that society.[101] He himself had very close personal contacts with members of the folklore society who came from a different ethnic background, namely Fahrudin Ahmi}, a Muslim, who was his best friend, and two Serbs

---

[97] T. 8171.

[98] T. 11179 and T. 11182–11183: "Q. Did you go on with your folklore activities while you were in the JNA? A. Yes. I was a dancer, a folklore dancer, and I was at the head of this folklore section in the JNA, and I also played in the orchestra."

[99] T. 11192-11193: "Can you tell us when your folklore group had a performance at a Muslim celebration last? When was the last time, a purely Muslim celebration? A. Well, I remember we had a performance, it was to celebrate the Muslim festival of Bajram, and it was in March 1993 at the fire brigade building at the Mahala in Vitez. I remember that. Q. When was Bajram? A. It was March 1993, at the end of March sometime. Q. After that, did you have performances of any kind together with your Muslim members at an exclusively Croatian celebration? A. Not for a long time afterwards. I remember several days before the conflict, we had a performance with the same group in Mosunj to celebrate the Catholic holiday of Easter. That was in April, the 10th or 11th of April, somewhere around there".

[100] Exhibits D16/1 to 19/1.

[101] T. 11564: "Q. When you got married and the rest of them married, were you best men to one another? A. Yes, of course, particularly those of us who were together in this folklore company, and we were together. Yes, of course, we were best men to one another, and, of course, we married between us. I could mention three or four marriages which were the product of that friendship in that folklore company. Q. You mean marriages between Croats and Muslims; is that so? A. Between Croats and Croats, and Croats and Muslims, and Croats and Serbs. They all intermarried, all variations".

4883

who were the best men at his wedding.[102] In his view, the first conflict in October 1992 brought the members of the society even closer together.[103]

(c) Muslim Nationalism and Persecution of Croats

102. In contrast to the Prosecution case, the Defence have also painted a picture of Muslim nationalism and belligerence.

103. **Witness DB/1,2,** who lived in Krušcica, near Vitez, stated:

> "Ever since the SDA party came into beginning () and when I stopped working and they would turn their heads away from us and they would wave their flags and call out, "Alija, SDA, this will be a Muslim state". They started this kind of thing from May, 1992, which is when I first began to be afraid".

104. **Jadranka Toli}** testified at length[104] about the persecution of Croats by Muslims in Zenica.[105]

---

[102] T. 11565–11566: "Q. Who were those closest friends? A. Fahrudin Ahmi}, the late Fahrudin Ahmi}. I don't think I should waste any words about that. He was not only a friend from the folklore company, but he was also a man who was in the band with me together, that is, we had various things that we did together, which brought us together. ... There was also Ibrahim Salkić, another dancer, Veljko Cato, who was my best man, and he's a Serb. Miro Vujinović, another Serb, and he was also my best man".

[103] T. 11566: "Q. Did any changes happen in your relations after the first conflicts in 1992? A. I can say that after that first conflict, that those--that it may have brought us even closer together. Because of all those events, we simply did not want anything like that to affect us in any way, and we were all very eager to come even closer together in view of that".

[104] T. 6135-6228.

[105] T. 6194: "Q. You said that in the Croatian areas homes were usually torched after the Croats were expelled. Did I understand you right? A. Yes. The houses were torched after the Croats were expelled, but this happened on the 18th of April. Q. Okay. So now we see that you don't know anything about the 16th. So now we're going to talk about the conduct of Muslim forces after they captured Croatian villages. What happened with the Croatian churches after the Muslims captured a Croatian village? A. Well, they would shoot at the churches. The church in Cajdras is full of bullet holes. The priest and two nuns were abused in Cahrcici".

4884

(d) Absence of an Official Plan or Policy on the Part of the Bosnian Croat Political and Military Institutions to Persecute Muslims

105. Defence witnesses testified that the official organs of the Croatian community of Herceg-Bosna did not systematically or as a matter of policy discriminate against Bosnian Muslims. [106]

106. **Vlado Alilovi}** testified that the Croatian Community of Herceg-Bosna was not intended to be a separate State and nor did it aspire to be a State. Alilovi} conceded that the Croatian Community of Herceg-Bosna was, at a minimum, a Croatian autonomous region, but referred to the referendum on the integrity of Bosnia and Herzegovina in which 99% of the Muslims and Croats voted in favour of the integrity of Bosnia and Herzegovina, with Serbs voting against. This would, in his view, tend to demonstrate that the Croats of Bosnia and Herzegovina were not opposed to the existence of Bosnia and Herzegovina as a State and did not have designs on parts of Bosnia and Herzegovina as prospective Croatian autonomous regions.

107. **Zvonimir Cili}** stated that Ivan [anti}, head of the HVO in Vitez and commander of the crisis staff of Vitez municipality,[107] was working to achieve peaceful co-existence with the Muslims. The Defence produced various exhibits to **Zvonimir Cili}** to show that attempts were continually made to promote inter-ethnic harmony.[108]

108. **Rudo Vidovi}** testified that there was no discrimination against the Muslims at the Post Office, a public service in Vitez, where he was chief. After the incident of 20 October 1992 – which he said resulted from a "misunderstanding" between the Muslims and Croats - the Muslims did not show up at work for seven days, because they

---

[106] See e.g. the Defence's Closing Brief of Counsel for Dragan Papi}, section D.
[107] Exhibit D17/2.
[108] T. 5132-5133 and T. 5135; Exhibit D25/2 (minutes of meeting signed by Blaškić); Exhibit D26/2 (document of a meeting between representatives of the UNHCR, UNPROFOR, SDA, BiH army, the HVO government, the HVO headquarters, and public security station in Vitez. "From this document, we can see that attempts were continually made to re-establish the joint police station and joint government. Yes. This is one of these attempts and attempts were made continuously ... the municipal war government which is mentioned in item 3, it was not called Croatian or HVO? A. No, it was literally called Vitez municipality - the municipal war government of Vitez, so it was ethnically neutral".

were afraid, but they were not disciplined for not showing up, even though by law an employee could be fired for being absent without leave for five days. Moreover, Vidovi}'s deputy was a Muslim who remained employed throughout 1992-1993. There was no attempt at the Post Office to impose an HVO oath of loyalty on employees.[109]

(e) Whether the Croatian Community of Herceg-Bosna had a Separatist Agenda

109. In cross-examination, **Zvonimir Cili}** was asked about the separatist ambitions of Herceg-Bosna. The witness admitted that he was familiar with the arguments of a book by Anto Valenta entitled THE PARTITION OF BOSNIA AND THE FIGHT FOR ITS INTEGRITY, which advocated the creation in Bosnia, through re-settlement, of ethnically pure and homogenous regions in order to prevent civil war. Cili} said that the Vance-Owen plan proposed the same arrangement, but he averred that this was never the policy of the HVO and nor was it official policy. While the money and language and so forth in the Croatian Community of Herceg-Bosna was to be Croatian, this was only in contradistinction to the Cyrillic script and Serbian symbols, which the people did not wish to have imposed on them by the Serbs. The aim of the Croat authorities, he said, was not secession, although differences between Croats and Muslims were created by the Vance-Owen plan, which was accepted by the Bosnian Croats but rejected by the Bosnian government.[110] The witness added that "they [the Bosnian Muslims] felt, and this is my personal view, of course, they felt that they could gain from Croats what they had lost from the Serbs", and because of that they refused to sign the Vance-Owen plan.[111]

(f) Whether the Bosnian Croat Authorities Condoned Persecution of Muslims by Private Individuals

110. The Defence introduced evidence to rebut the Prosecution's allegation that the Bosnian Croat authorities condoned atrocities committed against Bosnian Muslim

[109] T. 6640–6641 and T. 6656-6657.
[110] T. 5328–5329.
[111] T. 5330.

civilians. Exhibit D51/2 – produced to Vlado Alilović[112] – shows the HVO authorities trying to conduct an investigation into violations of international humanitarian law on 24 April 1993. Under item 2, it is stated that the HVO government of Vitez unanimously condemns all recorded crimes committed during the conflict between the BiH army and the HVO by any party.

111. **Zvonimir Cili}** stated that at this time, the civilian police were not functioning, as they did not have the necessary power. Nevertheless, they tried to enforce law and order and to protect Muslims and Croats alike. In this connection, the Defence produced Exhibit D29/2, a public announcement that a Croat had been killed in Novi Travnik while resisting arrest by Novi Travnik HVO for seriously wounding a Muslim citizen.

112. Similar evidence was led as to the diligence of the HVO civilian police in investigating offences against Muslims in relation to the Salki} slaying.

113. **Zoran Strukar**, a civilian police officer in Vitez at the relevant time, testified at length on this point. He stated that there was an atmosphere of general lawlessness in Vitez, and that explosions and other such occurrences were happening practically every evening, with Croat houses being blown up as well as Muslim houses.[113]

114. As mentioned above, before October 1992, the police forces in Vitez were jointly Croat and Muslim, but thereafter they split into Muslim and Croat police forces. Strukar said that the "Vitezovi", a special unit, took over the Vitez police station.[114] There were then plans to once again merge the two police forces. As part of the negotiations, the Muslims demanded that Pero Skopljak resign. In return the Croats asked the Muslim police chief to resign. Skopljak resigned because he did not want to be an obstacle to

---

[112] Hearing of 20 Jan. 1999.

[113] See Exhibits D31/2, D78/2, T. 6795: "Q. Also, they mention here what you mentioned as well, that there is armed robbery, people are being wounded, and also sabotages in the town, in cafes, and so far there have been armed robberies in six houses (two Croats, one Serb, and three Muslims). Did the military police make any kind of attempt to deal with the security situation? Did you reach any kind of agreement with them? A. There were some discussions to the effect that there should be a ban on carrying weapons in town. I know that the chiefs talked about this, but agreement was never reached on this matter. Perhaps there was something on paper, but it was not carried out".

[114] T. 6783–6785.

reconciliation. According to the witness, the Muslims did not, however, sack their chief, as promised, so an end was put to this *rapprochement*. The Muslim and Croat forces were severed, and the witness started to receive his salary from Mostar rather than from Sarajevo. Consequently, investigations split up – Croat police dealt with Croat areas and Muslim police with Muslim areas. Nevertheless, Muslims and Croats continued to conduct some investigations together.

115. The witness said that the situation was out of control. Everyone was in danger and afraid. In village areas, both Muslims and Croats, and some Serbs, set up a village guard at night, to ensure safety, because people realised that the police could not do much. As regards the killing of Muslims, Strukar stated that there were Croats killing Muslims, but also Muslims killing Muslims, and Croats killing Croats. Where Muslims were killed by Croats, investigations *were* carried out. An example was the Salki} slaying. The perpetrator was a Croat - Miroslav Bralo, alias Cicko – who was arrested and imprisoned in Kaonik. However, in the event he was treated leniently during his incarceration, as other witnesses have testified.[115] In short, Strukar testified that in his work as a civilian policeman, he did not have a different attitude towards a situation when the victim was a Croat from when the victim was a Muslim.[116]

(g) Whether State Enterprises Discriminated Against Muslims

116. In the geographical area of Vitez and Ahmi}i, a large segment of the population was employed in the times relevant to this indictment in large State-run factories and enterprises, such as the Princip factory in Vitez, or Vitezit, and Impregnacija. The evidence is that these factories, though allegedly under Bosnian Croat control, did not discriminate against Bosnian Muslims, but on the contrary, throughout the war maintained equitable proportions of Muslim and Croat workers in the workforce.

[115] See the testimony of **Witness AA**, at T. 3735-3738, who was imprisoned with Bralo, and saw that Bralo was allowed to move about freely and to abuse Muslim prisoners while incarcerated.
[116] T. 6874.

117. Defence witness **Vlado Divkovi}** was general manager of the Vitezit factory at the relevant time. He testified that there was no discrimination in lay-offs at the Vitezit factory against Muslims or on any ethnic or national basis. Lay-offs were occasioned by the Serb aggression, since Serbs bombed the factory complexes and cut off the supply of raw materials from eastern Bosnia (e.g. Gorazde), reducing output. The ethnic make-up of the factory reflected the national make-up in terms of percentage of Muslims, Croats and Serbs right through until 15 April 1993.[117] Divkovi} added that Muslim workers did not have to sign an oath of allegiance to the HVO.[118]

(h) Whether Relief Supplies were Distributed Equally to Muslims

118. **Vlado Alilović** stated that Muslims and Croats were equally able to obtain goods in Vitez in 1992-1993.[119] Defence witnesses also pointed out that Caritas, the Catholic charity, treated Muslims and Catholics, i.e. Croats, completely equally. **Zeljko Blaz,**[120] for example, a resident of Vitez who worked for Caritas from 1991 after he was made redundant by the Princip factory in Vitez, testified that Caritas helped all of those in need – refugees, old people - regardless of their ethnicity or religion. Merhamet, on the other hand, was a religious organisation which tended only to help Muslims. Blaz testified that Caritas continued to help both Muslims and Croats after Merhamet had been established. After the Muslim-Croat conflict started, Caritas still helped some 50 Muslim families in Vitez. Moreover, there was no attempt by any political or military body to influence Caritas to refuse assistance to Muslim families. **Vlado Alilovi}** testified to the same effect – that Caritas helped everyone, Muslims and Croats alike, but that Merhamet only helped Muslims - adding that Ivan [anti}, the HVO President in Vitez, requested aid for villages, e.g. Preočica, which were exclusively Muslim.[121]

---

[117] T. 5784–5785.
[118] T. 5789–5790.
[119] T. 5457.
[120] T. 6895-6896.
[121] T. 5458 and T. 5556–5557.

(i) The Fact that Croat Civilians were also the Victims of Attacks by Bosnian Muslims

119. Defence counsel emphasised that atrocities were also committed against Croat civilians by Muslim forces. In particular, they drew attention to a particularly horrendous episode which took place in Miletići, a remote Croat hamlet in the mountains of central Bosnia, in April 1993. This was testified to by **Witness HH**[122] **and Mr. Kujawinski.**

120. **Witness HH** visited Mileti}i during his fact-finding mission for the United Nations Special Rapporteur Tadeusz Mazowiecki. In Mileti}i, he entered a room which was badly damaged, and which had blood on the floor and walls. He was told by locals that apparently five foreign Mujahedin had stayed there. These Mujahedin had tortured and killed five young Croats. As a consequence, most of the Croatian inhabitants of the village had fled.[123]

121. **Witness HH** also testified that there were reports of harassment and arbitrary executions of Croats in Zenica.[124]

122. **Mr. Kujawinski**, a British army NCO, visited Miletici on 27 April 1993. He was dispatched with two Warriors and a UNHCR Land Rover. It was very high in the hills, a "very, very small village". He saw dried blood by the entrance to a pink house in the village. The villagers were reticent, but eventually said that soldiers had come to the village, rounded everyone up and separated the few men of fighting age, who were then taken into the pink house. Eventually Kujawinski gained access to the house and found congealed blood everywhere, pillows that had been used, he thinks, to muffle shots, and clumps of hair and bone strewn on the walls. He was told that five men had been tortured or killed there.

123. Kujawinski went back to the hamlet the next day with a van and coffins and crosses. He managed to get the bodies, which had been there for several days and were

[122] In this connection, see section 2, para. 37 of the *Mazowiecki Report.*
[123] T. 4531-4536; See also *ibid.*, at paras. 37, 40 and Conclusions and Exhibit P. 82.

therefore in a state of decomposition. He noted their names and took the bodies to a Catholic Church in Guca Gora, where he handed over the bodies to a monk for burial. The bodies were in a "shocking state" - one had his neck cut all the way around with a blunt instrument. Another had his fingers bent all the way backwards. On the second day, the witness was told that Mujahedin had been to the area – people whom they had never seen before. Mileti}i is 15-20 km from Ahmi}i.

124. It would appear that the events in Mileti}i may have been in reprisal for the events in Ahmi}i.

3. Findings of the Trial Chamber

125. The Trial Chamber considers that there is compelling evidence to the effect that, starting in mid-1992, tensions and animosity between Croats and Muslims rapidly escalated. This mutual animosity came to the fore in October 1992, when the episodes referred to earlier occurred. Between October 1992 and April 1993, relations between the two groups worsened and each group increasingly engaged in a policy of discrimination against the other. Whether the Croats pursued this policy in a more fierce and ruthless way and on a larger scale is a question that may be left unresolved for the purpose of this case: as the Trial Chamber has stated below in the section on the applicable law, the fact that the adversary engages in unlawful behaviour and persecutes or kills civilians cannot be a justification for similar and reciprocal conduct. As these trial proceedings concern Croats accused of having taken part in such a policy, the issue of the extent to which the Muslims also persecuted Croats is not material.

---

[124] T. 4539.

E. Governmental and Armed Forces in Bosnia and Herzegovina in 1992-1993

1. General

126. There were three principal governmental or quasi-governmental entities in Bosnia and Herzegovina in 1992-1993: the Government of the Republic of Bosnia and Herzegovina based in Sarajevo, the Croatian Community of Herceg-Bosna based in Mostar and the Republika Srpska based in Pale. Although the Sarajevo government was the legitimate government of Bosnia and Herzegovina, many Croats perceived it as Muslim-dominated.[125] Corresponding to these governmental or quasi-governmental divisions, there were various armed forces, Military Police, civilian police, paramilitary formations and village guards operating in central Bosnia in 1992-1993, which were at different times either joint or formed along ethnic lines. There was, first, the Army of the Republic of Bosnia and Herzegovina, or the BiH army, which was perceived by certain Croats and Serbs to be Muslim-dominated. On the Croat side was the HVO and its armed forces. The Serbs fought in Bosnia through the JNA and later through their own Bosnian Serb army. There was also the Territorial Defence of Bosnia and Herzegovina which was essentially a Muslim force and which was later incorporated, at least on paper, into the BiH army. The Muslims then had some irregular formations, such as the Mujahedin. There were also special units of the Croats such as the Vitezovi. There was also a Croat Military Police (which included special units such as the Jokers), the Muslim Military Police, the Croat civilian police and the Muslim civilian police. In addition to the various armies, there were the village guards or patrols, which were initially joint

[125] A defence witness, **Vlado Divkovi}**, T. 5791-5794, believed there were problems with the Government of Bosnia-Herzegovina in 1992 in that it was not really operating because it was not possible to reach Sarajevo and also because the BiH government was boycotted by the Serb representatives. Accordingly a directive from the Government of Bosnia and Herzegovina sent to the witness as manager of the Vitezit factory and directing that those who sided with the aggressor against Bosnia and Herzegovina, i.e. nationalist Serbs, should be fired, was ignored. The witness felt that the Government did not have the right to issue such a directive because Vitezit was socially-owned, rather than a public corporation, so only the Workers' Council of the enterprise could make such a move. **Vlado Divkovi}**, T. 5794: "Q. You said that that is why you did not pay attention to this document. A. Yes, of course. In view of the composition of the government at the time, it could not be respected throughout the territory of Bosnia-Herzegovina. And, anyway, the document was passed without any legal grounds. Vitezit was never declared a public corporation. It was not an enterprise that the government could appoint the managers of".

Muslim-Croat operations but which split shortly before the conflict of October 1992 into separate patrols.

2. The Bosnian Croat forces

(a) The Bosnian Croat Leadership in Vitez

127. The two most important positions in the political leadership of Vitez were divided between the Croats and Muslims. Ivan [anti}, HVO President in Vitez and a Croat, was President of the municipality and Head of the Crisis Staff as a representative of the HDZ, while Fuad Kaknjo, a Muslim, was the President of the executive body. The other positions were shared out to correspond to the results in the elections. Ivan [anti}'s deputy was Pero Skopljak, a Croat, who was thus Vice-President of the HVO in the Vitez municipality.[126] According to **Alilovi}**, harmonious relations were maintained between the Croats and Muslims between October 1992 and April 1993.[127] However the Muslims and Croats eventually split up and formed parallel governments, the Croats basing theirs in Vitez, the Muslims in Mahala (Stari Vitez).

(b) The HVO and the Vitez Brigade

128. The HVO (Croatian Defence Council) was formed on 10 July 1992 in Vitez as a civil authority in order to most effectively organise defences against possible aggression. It was an executive authority.[128] While the Prosecution has portrayed the HVO as an instrument of Muslim oppression, the Defence has argued that it was primarily a defence council formed because of regional insecurity and the threat from the Serbs. The Defence have also argued that the HVO soldiers received instruction on the laws of war.[129] The HVO had various brigades in central Bosnia, including the Vitez brigade,

---

[126] **Vlado Alilovi}**, T. 5451.
[127] T. 5488-5489.
[128] **Vlado Alilovi}**, T. 5450-5451.
[129] **Zvonimir Cili}**, T. 5152-5153: "A. Fifteen days after I joined the command as a political officer, on orders of Colonel Tihomir Bla{ki} which went through the municipal staff and other staffs, Mario Čerkez, the chief of staff, I was sent on this date, 19 Oct., to a seminar in Busovača which was organised by the

with Mario Čerkez as its Commander, while Tihomir Bla{ki} was Commander of the HVO Central Bosnia Operative Zone.

129. The Defence has called a number of witnesses to show that the Vitez brigade, into which several of the accused were apparently conscripted on or after 16 April 1993, was barely operational and still in the process of being set up on 16 April 1993. The Defence therefore submits that it could not, and did not, have any role in the atrocities committed in Ahmi}i, which were instead the work of the Military Police, and in particular a specialist anti-terrorist unit thereof known as the Jokers.[130]

(c) Croatian Paramilitary Formations

130. In addition to regular HVO units, such as the Vitez brigade, there were Bosnian Croat paramilitary formations and Special Purpose Units (PNNs) such as the Vitezovi.[131] The Jokers – a special anti-terrorist unit of the Croat Military Police headquartered in the Bungalow in Nadioci – were also an élite unit functioning outside the traditional HVO

---

representatives of the Red Cross in Geneva. Q. What was the topic of this seminar? A. This seminar was held for the representatives of the HVO, and as I found out -- and this was a full-day seminar; a similar one had been also organised for the representatives of the BiH army, and the topic of the seminar was the International Conventions on the Laws of War. We received a lot of promotional material in English and Croatian. We also saw films on the activities of the Red Cross, and many of us, for the first time, learned more about the history of the Red Cross and its goals and ... Q. Did the seminar also include a discussion of the Geneva Conventions? A. Yes. It was about the rights of prisoners, about the rights of prisoners of war, and I have to say that this seminar left a great impression on me. I asked myself, why are they showing us this? Because they were showing us a number of films from countries in Africa, South America, and they were very disturbing images. Q. And you thought that this could not happen in your region? A. Yes. I thought that it was very far removed and I thought that it could never happen in our country".

[130] **Witness DA/5**, T. 5639; **Dragan Stojak**, T. 6277-6278; **Mario Rajić**, T. 6374 and T. 6384; **Vlado Alilovi}**, T. 5542. Several defence witnesses had difficulty explaining why their names appeared on HVO membership lists (Exhibit P353), when they did not consider themselves to have been members of the HVO. It seems they signed these lists simply in order to receive shares. As **Zdenko Raji}** testified, T. 7431: "A. Honesty was not at issue here. What was at stake here was to match the number of shares which the BiH army members were getting. [...] By including the names of elderly and women in this list as if they had been mobilised, meant increasing the number of people receiving shares. [...] Q. What is the relationship with the compensation that was received by the army of Bosnia-Herzegovina? A. Because of the fact that [...] they received many more shares. We tried to get as close to that number, to increase the number, to match their numbers, so that when these shares were distributed, that we would get as close to the number that they were getting".

[131] **Mario Rajić**, T. 6385; **Zoran Strukar**, T. 6762.

structure, in this case operating through the command of the Military Police rather than the HVO. The Defence asserts that these private armies and paramilitary groups were responsible for much of the lawlessness rampant at the time in Vitez and its environs.[132]

131. The Defence argued that even Tihomir Bla{ki}, the regional commander of the HVO, could not issue orders to forces such as the Vitezovi. The Defence contends that the general situation was anarchic, with crimes being committed by both Muslims and Croats, but generally in the pursuit of petty criminality rather than for reasons linked to the struggle for ethnic hegemony.

(d) The Military Police and "The Jokers"

132. It appears that the Jokers were a specialist, anti-terrorist unit of the Croatian Military Police based locally in the Bungalow in Nadioci. Both the Jokers and HOS members wore black shirts and appeared to have assumed a "special operations" profile, replete with face paint, advanced weaponry, etc.

133. Both prosecution and defence witnesses have testified to the presence of members of the Jokers in Ahmi}i on 16 April 1993, and prosecution witnesses in particular also witnessed individual Jokers committing killings of unarmed civilians. A prosecution witness, **Mr. Kujawinski**, an non-commissioned officer in the British army, saw a large group of soldiers celebrating at the Bungalow on 16 April 1993, and inferred that they were responsible for what had happened there that day. Members of the Jokers also

[132] **Zoran Strukar,** T. 6761–6765, T. 6851-6852 and T. 6855-6858, emphasised that the Vitez police force was multi-ethnic: the commander of the police was a Muslim and the chief of police was a Croat (Pero Skopljak). The ethnic composition of the police more or less reflected the ethnic composition of the population, roughly 50-50. See Exhibit D75/2: "What occurred reflects negatively among the Croatian population and is perceived as powerlessness of the legal organs and institutions of the HVO to counteract crime and criminals. In the ranks of [the] BiH [army] they could hardly wait for this, and it is commented upon as an open clash among the divided HVO forces. They follow further developments with satisfaction and expect such further clashes, which influences their morale considerably and they offer their "help". Signed by Pasko Ljubici}, Commander of IV Battalion VP, Vitez. The Seal of the communiqué is "Republic of Bosnia and Herzegovina/Croatian Community Herceg-Bosna". See also Exhibits D30/2 and D31/2, which are Reports on these crimes.

confirmed to **Captain Lee Whitworth** that they had been involved in the assault on Ahmi}i.[133]

134. **Witness AA**, a member of the Jokers, testified that he was invited to join this unit in January 1993 by the accused Vladimir [anti}, who was the commander of the company to which the unit belonged - the 1st company of the 4th battalion of the HVO. [anti} told him that the unit would be better armed, equipped, paid and trained than the regular HVO and that it would be based in the "Bungalow" in Nadioci. The witness went to report there after the Busovača campaign, where he witnessed the destruction of Muslim villages.[134] He saw [anti} at the Bungalow virtually every day. On the instructions of [anti}, the members of the unit equipped the Bungalow by looting from Muslim houses in Busovača. [anti} also told them to find a name for the unit and they came up with the name Jokers which he approved; the Jokers could do nothing of significance without the orders of Vladimir [anti}.[135] The Jokers came from Vitez, Busovača, Nadioci, Vidovici, etc. As far as **Witness AA** knew, none of the Jokers were from Ahmi}i. The Bungalow itself was 5-10 minutes on foot from Ahmi}i.

135. **Lee Whitworth**, who served in the British army in Bosnia from May to November 1993 also spoke of the Jokers as an élite police unit based in the Bungalow. The witness was a liaison officer, tasked with building rapport with the local political, military and civilian leaders in the Bosnian government army and HVO. In that capacity, the witness met Vladimir [anti} as a senior military policeman in Vitez, at the 4th Battalion Military Police Headquarters of the HVO in the Hotel Vitez.[136] The witness also had occasion to pass by the Bungalow – which he referred to as the "Swiss Cottage" – and to converse with eight to ten soldiers. These soldiers described themselves as an élite police unit that was active in all the military successes of the HVO in the La{va

---

[133] **Lee Whitworth**, T. 4271-4273.
[134] T. 3810-3811.
[135] T. 3724-3728 .
[136] T. 4269. **Captain Stevens**, T. 2143, among many others, testified that the HVO commanders were based in the Hotel Vitez, which does not seem to be in dispute. **Witness B**, T. 740-742, who was a 37-year old ex-JNA captain (1st class), also testified, *inter alia*, that the directives and orders for the HVO seemed to come from the Hotel Vitez and the Commander, Mario Čerkez.

River Valley. They were predominantly dressed in black. They referred to themselves as Jokers – "Jokeri" – and they were very aggressive at first and made the witness's Muslim interpreter very fearful. Lee Whitworth wanted to meet the commander of the Jokers, and thus went to the Hotel Vitez. Vladimir [anti} came out in response to Whitworth's request to meet a senior police chief. He was introduced as the senior military police commander in the area. It later became apparent to the witness, throughout his tour, that in each of the municipalities - Vares, Zepce, Busovača, Travnik, Novi Travnik and Vitez - there would be a company group of the 4th Battalion. Hotel Vitez, it appears, was both a Battalion Headquarters and a Company Headquarters. Vladimir [anti} was head of the Company Headquarters, with the Jokers a part of that Company, while Pasco Lubici} was head of the Battalion Headquarters. The Jokers were set up as an anti-terrorist unit; they were part of the Military Police.[137]

3. The Bosnian Muslim Forces

(a) The Army of Bosnia and Herzegovina (BiH army)

136. The Republic of Bosnia and Herzegovina had its own army, namely the army of Bosnia and Herzegovina or the government forces. The Bosnian army was overwhelmingly deployed during the relevant period in the front-line against the Serbs, while the HVO was engaged to a lesser extent against the Serbs, being deployed instead in the La{va River Valley.[138] In Ahmi}i, there were no BiH battalions before April 1993.

---

[137] **Zvonimir Cili}**, T. 5143-5144: "... there was the civilian police as well, as well as the municipal authorities who sought in every possible way to maintain law and order, because this situation put the citizens in a very difficult position, and many of them sought ways to abandon the area. I think it was in January that the municipal government, the Croatian government in Vitez, took the decision to form an intervention squad. This intervention squad was composed of selected young men who had been tested in terms of their morals and also physically, they were mentally in good health, they had no criminal record, and they were ready to intervene physically and with force of arms to maintain law and order. A decision was even taken that they should have (*sic*) certain compensation. At the time it was quite considerable, because salaries were very low, whereas I think the members of the squad received up to 400 or 500 German marks, which was an extremely high salary for a month. For comparison's sake, the regular salaries in enterprises were about 50 marks".

[138] **Witness Y**, T. 3321: "Q. So according to this map, there were some HVO forces along the frontline with the Chetniks? A. Yes, as you can see, but very few. Q. Does the map indicate where the majority of

137. This characterisation of the BiH army and HVO deployment has been contested by the Defence. [139]

(b) Muslim Paramilitary Formations

138. Defence witnesses have described several Muslim defence forces: the Patriotic Legion, the Green Legion, the 7th Muslim Brigade, and the MOS (Muslim Defence Forces) which was formed by the Mujahedin.[140] The genesis of these organisations coincided with what the defence witnesses perceived to be the formation of the BiH army by the Muslim people.[141] It has also been contended by defence witnesses that these structures acted in concert[142] and fell under the mandate of the BiH army.[143]

(c) Mobilisation of Muslims

139. After the events of October 1992 described below, the Croats saw signs of what they perceived to be Muslim militancy. [144, 145]

HVO forces were during this time period which is marked on the map Dec. '92 and Jan. '93? A. Yes. Q. Where does this map indicate that the majority of the HVO forces were located? A. (Indicating). The La{va Valley". See also Exhibit P227, which shows the deployment of the BiH army, HVO and Serb forces.

[139] **Vlado Alilovi},** T. 5476-5478, testified that on 16 April 1993, the BiH army tried to capture Vitez, the La{va River Valley and central Bosnia, as they did in Bugojno, Gornji Vakuf and other places. Muslim forces wanted to divide Busovača.

[140] **Jadranka Tolić,** T. 6148.

[141] **Jadranka Tolić,** T. 6148.

[142] **Jadranka Tolić,** T. 6149, testified that "All the units being formed, I would call them altogether by one name, Muslim forces, including the BiH army, the Green Legion, the Patriotic Legion, and the MOS, Mujahedin organisation. These were all Muslim forces. They operated together in coordination and that's how they carried out their tasks".

[143] **Jadranka Tolić**, T. 6154: "Q. So the BiH army carried out the negotiations and exchanged Zivko Toti} for Mujahedins. What does this tell you? A. Well, I said already earlier that these were Muslim forces, and they did everything in coordination. Both the Mujahedin and the BiH army. These were not separate structures. The Mujahedin were part of the BiH army".

[144] **Gordana Cuić**, T. 8144-8147.

[145] **Jozo Alilovi},** T. 8335–8336, testified that the situation was very dangerous. The young men would shoot at anything. The witness had to inform his superiors that he no longer felt safe as a gamekeeper because of the possibility that he would be shot by these youths. Under cross-examination, he stated that the youths would take the automatic rifles with them while tending sheep, and shoot at birds.

(d) The Territorial Defence

140. The Bosniac Territorial Defence was incorporated into the BiH army in December 1992, but this produced no real change in how the Ahmi}i patrols were conducted.[146] There was some military training in the BiH army, but it was not a sophisticated military operation and it lacked equipment, supplies and manpower.[147]

(e) Bosnian Muslim Roadblocks and Checkpoints

141. The Prosecution has argued that Croat forces erected roadblocks at which Muslims were systematically harassed.[148] The Defence has sought to establish, however, that the practice of setting up roadblocks,[149] at which civilians were subject to harassment, was as much a practice of the Bosnian Muslim forces as of Bosnian Croat forces. The Prosecution has not disputed the latter fact.

(f) HOS

142. **Zvonimir Cili}** stated that, at least until 15 April 1993, the HOS was a joint Muslim and Croat force. HOS members, like the Jokers, wore black uniforms. However, after the Muslim-Croat split in October 1992, the Muslim part of the HOS remained as

---

[146] **Abdulah Ahmi}**, T. 341-342; **Fahrudin Ahmi}**, T. 1099-1102.

[147] This was confirmed by several witnesses. See for example **Abdulah Ahmić**, T. 341. **Witness V**, T. 3050-3051, who was on leave from the front-line with the Četniks, above Turbe, at the time of the events the subject of this indictment, and said that the Bosniac territorial defence was simply a patrol. Bosniac soldiers coming home from the frontline on leave would initially take their weapons home with them, but they ceased to do so as relations with the Croats grew tense, because the weapons were needed at the frontline for the next shift and because at checkpoints the HVO would confiscate the weapons from Bosniacs. **Zvonimir Cili}**. T. 5202, testified that, due to a shortage of uniforms on the Muslim side, it was common to come across people who were armed but not in uniform or only partly in uniform, and **Witness V**, T. 3085-3086 also confirmed that few Bosniacs had uniforms and that some went to the front in civilian clothes.

[148] See for example Prosecutor's Pre-Trial Brief of 13 July 1998, at para. 18.

[149] See for example the opening statements of Counsel Radovi}, T. 5031, counsel [u{ak, T. 5051, and of counsel Puli{eli}, T. 5061.

the HOS while the Croat element of the HOS became the Vitezovi, as distinct from the regular HVO's Vitez brigade.[150]

4. Comparative Strength of the Muslim and Croat Forces

(a) The Prosecution Case

143. **Major Michael Dooley,** an UNPROFOR Platoon Commander in Bosnia from October 1992 to 1993, noticed that the army of Bosnia and Herzegovina was very poorly armed compared to the HVO.[151] There were no BiH army soldiers in the region of Ahmi}i, and very few in Vitez. The majority of the BiH army soldiers were towards Travnik on the Serb front.[152]

(b) The Defence Case

144. The Defence, on the other hand, claim that the BiH army was better equipped than the HVO, and certainly had more manpower due to the greater concentration of Muslims in central Bosnia than Croats.[153, 154]

145. Defence witnesses also claimed that the Vitez armaments factory, Vitezit, continued to supply *both* the HVO and the BiH army during the conflict.[155] Defence witness **Anto Raji}** alleged that after the dissolution of the Anti-aircraft Defence (PZO), the Muslim contingent, which was apparently reabsorbed by the Territorial Defence, obtained two anti-aircraft guns from the Impregnacija explosives factory in Vitez and was

---

[150] **Zvonimir Cili}**, T. 5429: "Q. Did members of HOS ever become members of the Vitez Brigade? A. No, they never did. Q. Which unit did they become members of, which special purpose unit? A. They all became members of the Vitezovi special purpose unit".
[151] T. 2468.
[152] **Payam Akhavan**, T. 1336.
[153] **Vlado Alilović**, T. 5550-5551.
[154] **Witness DA/5,** T. 5648-5649.
[155] See Exhibit D55/2 – invoices of supplies. Defence witness **Ivan Taraba**, T. 8734-8735, a worker at the SPS company in Vitez, also testified that the ethnic composition of the factories in Vitez was balanced to reflect the ethnic composition of the general population - approximately 50% Croats, 50% Muslims, and a few Serbs – and remained so throughout the conflict.

allocated half of the cannons.[156] Nonetheless, defence witness **Divkovi}** conceded that Vitezit was, after 16 April 1993, exclusively under HVO control and indeed that its production and supply to the HVO had a decisive impact on the latter's war effort against the BiH army.[157] Defence witnesses did not contest that it was easy for the Bosnian Croats to arm themselves.[158]

5. Findings of the Trial Chamber

146. The Trial Chamber finds that, in the La{va River Valley, the HVO was, by and large, better armed and equipped, and was able to set up more checkpoints than the Bosnian Territorial Defence. The Defence contention that the BiH army was better equipped than the HVO is contradicted by all the UN observers who testified, and the Chamber does not find it to be a credible assertion.

F. The Events of 19-20 October 1992, in Particular in Ahmi}i

147. Ahmi}i is located in central Bosnia, in the La{va River Valley, between Vitez and Zenica. The area of Ahmi}i is approximately 6 km^2 and falls within the Vitez Municipality. Adjacent to its boundaries are the villages of Nadioci to the south-east, [anti}i to the south-west, and Piri}i to the north-west. In the La{va Valley the town of Vitez is at the centre. It is approximately four kilometres from the centre of Vitez to the Ahmi}i area.

---

[156] T. 8681.

[157] T. 5806-5807: "Q. Did you at any time receive orders to stop deliveries of material to the Muslim side, meaning to the armed forces of Bosnia and Herzegovina? A. I never received such an order. I don't know if anybody amongst my colleagues received such an order. Q. And according to your information, deliveries continued until the beginning of the war? A. Yes. Deliveries went on until April '94 -- excuse me, '93". T. 5836-5837: "Q. [...] what is the main reason that the La{va Valley or the part that remained under HVO control was not captured by the BiH army during the conflict? A. Probably the main reason which contributed to the defence of this area was this factory and the vast amount of explosives in it, so that we could continue to produce those military ammunitions during the war, and that was the main factor that made it possible for the people there to defend themselves. Q. Even though the superiority of the BiH army was quite significant in manpower? A. Yes, five, six, or seven times superior in numbers".

[158] **Dragan Vidović**, T. 8412-8413.

148. There exist traditional names for the various parts of the village. Lower Ahmi}i is referred to as Donji Ahmi}i, the most commonly referred to landmarks are the Catholic cemetery along the main Busovača/Vitez road, the primary school and the lower mosque on the secondary road leading off into Ahmi}i. This road goes up towards to Upper Ahmi}i or Gornji Ahmi}i, but between the upper and lower parts of Ahmi}i is an area called the Sutre or Grabovi, where the Kupre{ki} houses and the Sutre warehouse are situated. The upper mosque, which did not have a minaret is the landmark of Upper Ahmi}i. The area of Zume around [anti}i was predominantly an area inhabited by Croats and the landmark most frequently referred to is the Pican café. In Nadioci, the principal landmark is the Bungalow.

149. In the 1991 census, the population of Ahmi}i-[anti}i-Piri}i-Nadioci was 2173. Of these 4 villages, Muslims represented 32% of the population, Croats 62%, and minority groups made up 5%. A number of Muslim refugees came to the village in 1992. The total Muslim population of the Ahmi}i area was around 600 at the time. Ahmi}i is a small rural village similar to many others in the La{va Valley. It is a village where entire families live under one roof. Children attend primary school there, but due to its rural character, most residents at the time of the events covered here worked in the larger towns of Zenica and Vitez. Many of them worked in the Slobodan Princip Seljo factory (SPS) in Vitez which employed 2,400 persons, constituting 50% of the workforce in Vitez, with an estimated 70% of the population of Ahmi}i working there. Around the village, employment consisted mainly of manual labour and small-scale agriculture, mainly for the support of the families, many of whom would have a cow or two for milk, a few hens for eggs, and other livestock.

1. The Case for the Prosecution

150. On 19 October 1992, the Bosniacs in Ahmi}i erected a road-block by order of the Headquarters of the Territorial Defence in Vitez to prevent the HVO from going to Novi

Travnik.[159] As was stated by **Witness Z**, "we established this checkpoint in the evening. It was dusk, rather, in order to prevent a large concentration of the Croatian Defence Council, and they started from Počulica, Kiseljak, Busovača towards Novi Travnik".[160] The barricade was not heavily guarded. This act nevertheless provoked the fury of the HVO and led to an attack.[161]

151. Around 4.30 a.m., on 20 October 1992, a shell was fired from the direction of Zume and hit the top of the minaret. Heavy shooting then broke out. This went on until about 12 p.m. Houses, sheds and barns were set alight. The Bosniacs returned fire.[162]

152. During the attack, Upper Ahmi}i was shelled and the minaret, among other buildings, was hit by shells.[163] A Muslim boy was killed, apparently by a sniper bullet. The attack was mostly one-sided, with the Croatian assault predominating, although according to Abdulah Ahmi} there were some 30-40 armed Bosniacs resisting, and some unarmed Bosniacs, as well as some assistance from the BiH army. Due to conflicting accounts, it is difficult to estimate precisely how many Bosniacs were defending the barricade that day. It was also rumoured that some Croats were killed.[164]

153. During the attack, **Mehmed Ahmi}**'s house was destroyed. Mehmed Ahmi} was awakened that morning by the sound of an explosion. His house lay across the road from the Papi} house on the main road in Ahmi}i. By gaining control of the house, Bosnian Croat forces could thus control the main road from both sides.[165] A burst of gunfire was directed at Mehmed Ahmi}'s house, apparently from the direction of Ivo and Dragan Papi}'s house. His house was directly hit and set on fire with inflammable bullets. He crawled out of his house with his family, whilst being shot at by several soldiers from the direction of the Papi} house and the woods, including, allegedly, by Dragan Papi}

---

[159] **Witness B**, T. 816 and T. 827-828. See also **Witness V**, T. 3196-3198.
[160] T. 3643.
[161] **Abdulah Ahmi}**, T. 327-331.
[162] **Witness Z**, T. 3646-3647 and T. 3680.
[163] **Witness B**, T. 918; **Mehmed Ahmi}**, T. 642.
[164] **Abdulah Ahmi}**, T. 336-339. **Mehmed Ahmi}**, T. 643–645.
[165] T. 646.

himself from both locations, who used, *inter alia,* an anti-aircraft gun.[166] The witness and his family managed to escape without fatalities.

154. **Witness D** was also a victim of this attack. Bosnian Croat forces burned down her house and severely beat her husband for trying to save his cows. Witness D and her husband abandoned the village after their house was burned down.[167]

155. **Fahrudin Ahmi}** heard a detonation and an explosion, and saw that a fellow Muslim's barn had been set alight. He noticed shots being fired from the direction of the forest and the Papi} house.[168] The witness himself was seriously wounded in the arm by a gunshot during the attack.

156. Anti-aircraft guns were evidently used by the Bosnian Croats in the attack, fired from the vicinity of the Papi} house. According to **Witness Y**, the HVO seized the anti-aircraft guns from the Princip factory.[169] **Witness Z** confirmed that there was shooting from an anti-aircraft gun mounted on a flat-bed truck.[170]

157. More than half the Muslim population of the village fled Ahmi}i after the attack.[171] **Witness B** testified that the Bosniac population which was chased out came back between then and April 1993,[172] pursuant to an agreement reached with the Bosnian Croat authorities. Despite this, however, Muslim-Croat relations significantly worsened after the attack.[173]

---

[166] T. 646–650.
[167] T. 1018.
[168] T. 1103-1104 and T. 1133-1134.
[169] Photographic Exhibit P228 shows the damage done to a building by an anti-aircraft gun, namely large holes in the walls of the building. **Witness Y**, T. 3317–3318, testified that this same kind of weapon caused damage to the witness's house and the Kermo house.
[170] T. 3680.
[171] **Fahrudin Ahmi}**, T. 1107-1108.
[172] T. 775.
[173] **Witness G**, T. 1557-1558; **Witness D**, T. 1013-1020, recounting how, between Oct. 1992 and April 1993, relations deteriorated: " [...] Especially we in the lower part of Ahmi}i, we were in very great danger. [...T] here would be an incident almost daily. They would insult us if they meet (sic) a woman wearing pantaloons, they would say, "You balija woman". [...]. He would come by in the car and shout, "We will not have pantaloons walking here". They would call out "Balijas". In the evening, we would be sitting together, then they would throw grenades into our meadows [sic]. The people closer to the road

2. The Case for the Defence

(a) The Muslims in Ahmi}i Caused the Conflict of 20 October 1992

158. The Defence, by contrast, have argued that the conflict of 20 October 1992 was the Muslims' fault,[174] on the basis that they had erected a barricade to prevent Bosnian Croat forces from travelling on the Vitez-Busovača road to fight the Serbs in Jajce, with the eventual result that Jajce fell to the Serbs.[175] Another reason for the conflict was given by defence witness **Pero Papi}**. He was allegedly told by Muris Ahmi} that the latter had been ordered to chase out the Croats, with permission to remove anything and to set the Croat's houses on fire so that the Croats could not return.[176] Hence, it would seem that the Croats of Ahmi}i claim that the 20 October 1992 attack was a pre-emptive strike against their Muslim neighbours, who for their part were preparing an attack on their Croat neighbours. According to **Goran Males**,[177] a further possible rationale for the roadblock was that the Vitez-Busovača road on which the roadblock was situated is the main communication route, and "just at the crossroads near Kaonik it links on to the Sarajevo to Zenica main road".

---

would have their windows broken. We were sorrowful, we didn't know what was happening. And so on, it went on like that. We saw that relations were not what they used to be. Before, we would exchange visits, and then suddenly, they somehow separated. They were doing something in secret. We didn't know what they were doing. But we saw that things were not what they used to be" (T. 1014).

[174] **Goran Papi}**, T. 7047, the younger brother of the accused Dragan Papić, starkly blamed the Muslims for this conflict: "the Muslims caused the conflict on that day and that conflict is their fault".

[175] This view was expressed by defence witnesses **Ivo Vidovi}**, T. 6945; **Ivica Kupre{ki},** T. 7944; **Zdenko Raji},** T. 7440; **Anto Raji}** T. 8681–8682 and **Zdravko Vrebac,** T. 7763 (who stated that local Croats from Ahmi}i-[anti}i were not involved in the conflict). **Goran Males** passed through the roadblock in question on 19 Oct. 1992, on his way from Podjele to Rijeka, although he had been warned by some Croats not to go towards Ahmi}i, because the road was blocked. He saw approximately 100 men at the roadblock, most of whom wore camouflage uniforms. He identified them as armed members of the BiH army, as well as a few civilians. The men at the roadblock insulted and threatened him, saying, "Let's kill him. [...] Gouge his eyes out," until a person went to fetch the commander, whom he identified as Fikret Ahmi}. The witness answered when the latter asked his first and last names, and he was let through. The roadblock consisted of fences and was built to prevent circulation from Busovača to Jajce. He confided these occurrences to a friend who corroborated the statement. Although Goran Males, T. 7261–7267, acknowledged that he did not know why the roadblock had been erected, he stated that he believed that the reason for the roadblock was to prevent people from Busovača from going to Jajce.

[176] T. 7202.

[177] **Goran Males,** T. 7296–7297.

4905

(b) The Conflict of 20 October 1992

159. Croat witnesses have presented a largely uniform account of the 20 October 1992 attack. They maintain that it occurred as a result of the establishment of the barricade by the Muslims and that it was considered as the first serious conflict between the HVO and the BiH army.[178] They say that the attack took the local Croats by surprise. Before dawn, there was heavy gunfire which woke them up and which continued for about ten minutes, with bullets flying everywhere. The shooting appeared to come from the HVO positions in Hrasno, which forms part of the municipality of Busovača, across the La{va River.[179] They also heard explosions.[180] A number of Croat witnesses state that around 5 a.m., they heard music from the mosque followed by an announcement: "Croats surrender – this is a holy war – jihad – you are surrounded, you have no chance".[181] This broadcast could be heard from 5-10 kilometres away, implying that some loudspeaker device must have been used.[182] Explosions lasted until around 9:30 a.m., and gunfire stopped in the afternoon.[183] The mosque's minaret was hit. Around 7:30 p.m., when there was a lull in the shooting, the local Croats were able to move to a shelter in Mirko Saki}'s basement[184] and Anto Bralo's shelter.[185] The Military Police of the HVO were involved in dismantling the barricade, assisted by members of the unit that was going to Jajce from Busovača and Kiseljak. There were approximately 15 soldiers defending the barricade, assisted by about 50 soldiers constituting "outside help".[186] The Croats from Ahmi}i,

[178] **Zvonimir Cili}**, T. 5158–5160.
[179] **Anto Rajić**, T. 8678–8679.
[180] **Dragan Vidović**, T. 8403; **Ivica Kupre{ki}**, T. 7930; **Pero Papić**, T. 7195.
[181] **Milutin Vidović**, T. 7491; **Ivica Kupre{ki}**, T. 7929–7930; **Ljubica Milicević**, T. 7301; **Pero Papić**, T. 7195; **Zdenko Rajić**, T. 7386.
[182] **Zdenko Rajić**, T. 7386-7387. The witness stated that he was given a telephone order around 5.00 am from Grabovac to go to Ahmi}i to prevent the forces from the BiH army should they start moving from the direction of Gornja Rovna, Kovacevac and Pezići towards the barricade which had been set up by the Muslims. He was in charge of a squad of about ten men, which was deployed in the forest near the Topola cemetery, but he did not take part in the conflict. He did not actually see the barricade. (T. 7382–7388).
[183] **Dragan Vidović**, T. 8407; **Milutin Vidovi}**, T. 7495; **Ivica Kupre{ki}**, T. 7940.
[184] **Mirko Sakić**, T. 7600-7601: His father woke him around 4:30 a.m., and later on people came to his shelter which had been used previously during air attacks.
[185] **Ljubica Milicević**, T. 7303.
[186] **Zvonimir Cili}**, T. 5158–5159.

[anti}i and Pirići did not take part in the conflict.[187] Some houses were damaged, including the houses of Pero Papi} and Mehmed Ahmi},[188] and some barns were set on fire. A few Croats fled in the direction of Donja Rovna. They saw Muslims fleeing towards Upper Ahmi}i.[189] There were not too many casualties during this conflict, although they heard that a Muslim and a Croat had been killed.[190]

(c) Croat Neighbours Helped Muslims to Return to Ahmi}i after 20 October 1992

160. After the attack, the Muslims from Ahmi}i fled, some of their houses and barns having been damaged or destroyed. They started to come back, however, only four days after the conflict.[191] According to the Defence, the Croats did all they could to assist their former Muslim neighbours to return in peace. **Ivica Kupre{ki}** testified that the Croats protected the homes of the Muslims while they were away and that they arrested and reported a thief who tried to steal from one of the temporarily abandoned Muslim houses.[192] **Ljubica Milicevi}** testified that the mayor of Vitez insisted that the Muslims come back. She was never aware of any complaints from the Muslims that their property had been plundered.[193] A coordination commission was formed to protect the interests of citizens and which assisted in the reconstruction of destroyed houses.[194] Meetings were

[187] **Anto Rajić**, T. 8682.
[188] **Milutin Vidović**, T. 7521 and T. 7546. He saw smoke coming from Mehmed Ahmi}'s house which was on fire.
[189] **Mirko Sakić**, T. 7603–7604; **Milutin Vidovi}**, T. 7496.
[190] **Milutin Vidović**, T. 7495; **Anto Raji}**, T. 8682.
[191] **Mirko Sakić**, T. 7604; **Zdravko Vrebac**, T. 7759.
[192] **Ivica Kupre{ki}**, T. 7915 and T. 7942-7943.
[193] **Ljubica Milicevi}**, T. 7304.
[194] **Zvonimir Cili}**, T. 5167-5168: "A. I said that the conflict was very fierce, a number of houses were damaged, mostly Bosniac houses because most of the houses there were Bosniac, and the first task of that coordination body for the protection of citizens was to issue an appeal to the public and to institutions of the civilian government in Vitez, and people with means to collect funds and material assistance to repair the damages (sic) done in the conflict, and this applied to homes and business premises, and the response was beyond many expectations. A large number of people, and I must underline this, these were damaged Muslim houses, but a large number of Croat citizens whole-heartedly contributed to this collection campaign to repair those houses and a number of those houses were repaired".

4907

held in the village to create peace between Muslims and Croats. Every attempt was made to find a solution and to return to the situation as it had been before the first conflict.[195]

(d) Muslim-Croat Relations from October 1992 to April 1993

161. Despite these efforts, it appears from the entirety of the testimony that Croat-Muslim relations deteriorated significantly after the first conflict.[196] The two communities no longer trusted each other and tensions remained high.[197]

(e) Findings of the Trial Chamber

162. In the view of the Trial Chamber, it is apparent from the evidence that the establishment of the road-block by the Muslims on 19 October to prevent the passage of HVO troops heading toward Novi Travnik was the act that sparked the armed conflict of 20 October. In this regard, the Defence assertion that the conflict was caused by the Muslims seems to be persuasive. It would also seem to be established that the armed conflict occurred primarily between HVO armed forces from outside Ahmi}i and Muslim soldiers belonging to the BiH army. Nevertheless, some local Muslims and Croats either took part in the conflict or assisted those who were fighting.

163. The evidence also shows that the principal victims of the armed confrontation of 20 October were the Muslims. A number of their houses and barns were destroyed or set on fire or damaged, while fewer Croatian houses were damaged. That the local Muslims suffered most from the shelling and firing is borne out *inter alia* by the fact, admitted by both parties, that at the end of the armed clashes, most of the Muslim population of Ahmi}i fled the village, whereas no Croats left.

---

[195] **Zdravko Vrebac**, T. 7759–7761; **Mirko Saki}**, T. 7604–7605; **Ivica Kupre{ki}**, T. 7941–7942.
[196] **Milutin Vidovi},** T. 7502: "After the first conflict the Croatian-Muslim relations became more tense, and there was a certain amount of mistrust, the one towards the others. The village guards were separated. There were separate Croat-Muslim guards and Muslim village guards, and each separate group would stand guard in front of their own houses. The people working with me at the market I felt of a certain amount of distrust towards me. You couldn't do any work with them (sic) as you could before the conflict".
[197] **Zdravko Vrebac**, T. 7760.

164. The Trial Chamber also finds that when the conflict was over, the Croatian population of the village endeavoured to encourage the Muslims of Ahmi}i to return and actually helped them to do so.

G. The Events of 16 April 1993 in Ahmi}i

1. The Case for the Prosecution

(a) Croat Preparations for the Attack of 16 April 1993

165. The Prosecution alleges that the attack on Ahmi}i was carefully planned and that local Croats knew that it was going to take place and were evacuated before the offensive was launched. Many Muslim witnesses testified that on 15 April 1993, they saw many signs of a possible forthcoming attack or the harbingers of forced expulsion from the village. However, almost none of the Muslims took any precautionary measures, nor was the population evacuated, because, as **Witness B** put it, no-one expected the Croats to attack the Bosniacs in such a brutal manner.[198]

(i) The Croats' Military Preparations

166. **Major Woolley**, a British army officer in UNPROFOR, said that there was "tangible evidence that clearly there was a Croatian aggression starting"[199] on 15 April 1993 – a general offensive which preceded the assault on Ahmi}i - when HVO soldiers in Putis, a village about 7 km to the east of Vitez and far from the Serb frontline, fired over his troops' heads.

167. **Esad Rizvanovi}** testified that on 15 April 1993, in the early morning, he saw many vehicles moving about on the road from Vitez to Busovača. He saw men in uniform, but did not see any women or children.[200] **Witness B** said that he noticed a lot of activity in the Bungalow on 15 April 1993. He heard that a young ex-HVO soldier,

---

[198] **Witness B**, T. 786.
[199] **Major Woolley**, T. 3476.
[200] **Esad Rizvanović**, T. 465.

Zoran [anti}, stated that he heard that Vladimir [anti} had said, before the attack of 16 April 1993, that no men from 12 to 70 years of age should be left alive during the attack.[201]

168. **Witness I** noticed the signs of an imminent attack on 13-15 April 1993. On 13 April 1993, he was stopped and provoked by men in uniform, who would not let him go home. He was called into a bar by Nikica Plavci} who threatened him with a knife and then tried to shoot at him with an automatic rifle.[202]

169. **Witness L** described how, on 15 April 1993, he was working in Zume, in the direction of [anti}i. He passed by the Sutre shop of Vlatko Kupre{ki}, between 4 p.m. and 7 p.m. that evening, where he saw Ivica Kupre{ki}, Vlatko Kupre{ki} and two other men who he did not know standing outside the shop. As he passed by Vlatko Kupre{ki}'s house that evening, the witness saw 20 to 30 uniformed soldiers on his lower balcony.

170. **Witness M** referred to the fact that on 15 April 1993, she saw 5-6 soldiers going into the basement of Vlatko Kupre{ki}'s house.[203]

171. On 15 April 1993, **Witness O** went to Zume, where he saw an anti-aircraft gun covered by tarpaulin. He also saw 5-6 soldiers in front of Vlatko Kupre{ki}'s house.

172. **Witness T** related how, on 15 April 1993, her husband was in Stari Vitez. That evening he made a telephone call to the wife of her husband's uncle to find out about the situation in Ahmi}i, because in Vitez the Croats were arresting Muslims and taking them away. He passed the message to his family that they should not go anywhere out of the house and to take care. He also asked whether they had noticed anything. Witness T said

---

[201] T. 791.

[202] **Witness I**, T. 1799. "When I turned around, he pulled out a knife, which was a large knife, and placed it on the left side of my neck. I slapped him on the wrist and I said, "What are you doing with this?" And he told me, "This is what is going to happen to your neighbours, and as you worked at my brother's, you and your children will not be touched". I got up. I saw what the situation was. I never experienced anything like that before, and I started for the exit door. He pointed an automatic rifle at me, and I thought, "This is the end". He pulled the trigger, but, fortunately for me, there was no bullet in it, and I went out".

[203] **Witness M**, T. 2440-2441.

4910

that it was the only night which was so quiet that nothing could be heard. By contrast, on every other night shooting could be heard, but not on that particular night.[204]

173. **Witness V** recounted how his suspicions were aroused on 15 April 1993, when, around 5 p.m., he saw a group of approximately ten soldiers wearing camouflage uniforms and with weapons, as well as two civilians, between the houses of Zoran Kupre{ki} and Ivica Kupre{ki}. The witness did not, however, see Zoran or Mirjan Kupre{ki}.[205]

174. **Witness X** on one occasion saw Croat soldiers in Ahmi}i. When she asked where they were going, they replied, "We're going to Busovača, to take care of the balijas there".[206] On 15 April 1993, a Croat came and urinated on her fence and laughed at her family.[207]

175. **Witness Y** did not notice anything on 15 April 1993, but Nermin Kermo and Suad Ahmi} came to his place and said that they had noticed a large number of HVO soldiers in uniform around the Kupre{ki} houses and that as a result they had decided to double the night patrols to four men.[208]

176. **Witness CA** testified that, on 15 April 1993, she was drinking coffee with her husband at 3.30 p.m., and watching a television programme on which Dario Kordi} and Tihomir Bla{ki} were saying that their combatants had been attacked in the Bungalow, that there would be no more negotiations and that they "had only to wait for the order". Her son came to her house at 9 p.m., and said that Vitez television was showing the same provocative material.[209]

(ii) Signs of Impending Danger

---

[204] **Witness T**, T. 2958.
[205] T. 3041-3042.
[206] T. 3238-3239.
[207] T. 3240.
[208] T. 3303.
[209] T. 4555-4556.

177. **Witness F** noticed certain unusual and disturbing events on 15 April 1993. His Croat friends did not come to play football as usual that evening. He also saw Ivo Papi} leaving Ahmi}i with some women in a red Lada and Ivica Kupre{ki} leaving Ahmi}i with his wife and children at 4-5 p.m., on 15 April 1993.[210] **Witness G** said that many students, mostly Croatian, were not at school on 15 April 1993. That day he also overheard his parents saying that vehicles were constantly coming and going from the Papi} house.[211] Some Croats hinted to their Muslim neighbours of what lay ahead. **Witness EE**, for example, related how, before 16 April 1993, Drago Josipovi} had said to Fahrudin Ahmi}, "Pity about these two houses down here", indicating the witness's houses and thereby displaying that he knew in advance of the attack and that he knew that it would involve the unnecessary destruction of civilian dwellings.[212]

178. **Witness Z** described an ominous atmosphere on 15 April 1993:

> "FOğn the 15th of April [...] The silence was unbearable. One cannot describe it, this atmosphere, the way it was, as if there were no birds around. You could only hear a car or two pass by. F...ğ We were all tense. We were all nervous. We were all afraid as to what would happen, what would not happen, whether there would be a war, whether there would not be a war. No one trusted anyone anymore".[213]

The witness went to bed in uniform around 2 a.m.

179. **Witness FF** noticed that on the evening of 15 April 1993, there were no lights in the Croat houses, which was unusual. The Muslim houses were lit as usual.[214]

(b) The Attack on Ahmi}i on 16 April 1993[215]

(i) International Observers

---

[210] T. 1373-1377.
[211] T. 1445-1448.
[212] T. 4094.
[213] T. 3602-3603.
[214] T. 4314.
[215] The factual descriptions which follow are restatements of what the witnesses testified. Even though some of them may be phrased in the indicative, only the Trial Chamber's findings are relevant as to the facts underlying the judgement.

180. **Lt.-Col. Bryan Watters** stated that the attack on Ahmi}i seemed to be part of a pre-emptive attack by Croat forces up and down the La{va River Valley against Muslim civilians and Muslim forces, which proved to be very successful as it took the Bosniacs completely by surprise.[216] The witness was in Ahmi}i on 16 April 1993 and was an eye-witness to the total destruction of the village and the massacre of civilians. In particular, he saw the bodies of 20-30 men, women and children on the roads, in the fields and outside the houses, including in an area across from the Catholic cemetery which BRITBAT designated as "the killing field" due to the number of bodies found there. He also saw 4-5 bodies placed nearby in a neat line by the road, as he drove towards the Busovača junction.[217] Lt.-Col. Watters noticed that despite the almost total destruction of the village of Ahmi}i, the Croat houses had been left untouched. By contrast, the Muslim houses had been "systematically destroyed"; the inhabitants killed and the houses then burned. Not only had the people and houses been destroyed but also crops, animals, etc. The witness concluded that, without a doubt, what had happened was a systematic and organised attempt to "ethnically cleanse" the village.[218] Lt.-Col. Watters also noticed the destruction of the two mosques in Ahmi}i in the lower and upper parts of the village.[219] Lt.-Col. Watters averred that Ahmi}i was not a military target; [220] there were no barracks or military installations in the village. In spite of this, the village was attacked with an arsenal of heavy weaponry, including at least one anti-aircraft weapon.[221] Lt-Col. Watters concluded that the significance of Ahmi}i was more symbolic than real, and lay within its tradition of producing a great number of Muslim leaders or Imams and teachers in Bosnia.[222]

181. **Payam Akhavan**, an international human rights lawyer who at the time was working for the United Nations Centre for Human Rights, now a Legal Adviser in the

---

[216] T. 160. See also **Payam Akhavan**, T. 1313 (stating that the operation was not a small one but rather was a concerted and organised military operation).
[217] T. 160-162.
[218] T. 199-202.
[219] T. 186-188.
[220] T. 216–217.
[221] T. 229–230 and T. 238–239.

Office of the Prosecutor of this Tribunal, was in Ahmi}i on 1, 2 and 6 May 1993 as part of an investigative team, with witness HH, to compile information for a report of the Special Rapporteur on Human Rights, Tadeusz Mazowiecki. Akhavan spoke of the degree of destruction inflicted upon Ahmi}i as "total and all-embracing":

> "I believe that from approximately 150 to 200 homes in the village, there were fewer than 20 which had not been destroyed. The scale of destruction was extensive, there were homes which some 2 weeks after the attack ... were still smouldering. And there was also a real -- what would I describe as a smell of death really in the village. One could sense that there were still many bodies which had not been recovered from underneath the rubble. There was virtually not a living creature in the village. Even dogs and cats and cattle had been killed and were lying all over the roads. So I think on the whole, what struck me was the total and all-embracing form of the destruction of this village and its inhabitants".[223]

182. Payam Akhavan also visited the "killing field" described by Lt.-Col. Watters, which lay across the road from the Catholic cemetery and where the bodies of some 20 civilians had been found who had apparently been killed on the spot. He also noticed what appeared to be a sniper's nest with spent cases strewn about. Akhavan inspected various houses in Ahmi}i. On average, he found 30-50 shell casings in the vicinity of each destroyed home, as well as spent casings of anti-aircraft guns and casings of grenade launchers. He also found broken bottles that had apparently been used to carry gasoline or another flammable liquid for setting homes on fire. He concluded on the basis of the extensive incendiary damage that the houses had been deliberately set on fire, since the houses showed signs of small arms fire, not of heavy artillery, which would not in themselves spark a fire. Akhavan, and his colleague Witness HH, spoke to various survivors in Zenica of the attack on Ahmi}i and heard their stories of "ethnic cleansing". The survivors recounted that the attackers had been soldiers in HVO uniforms. When he tried to speak to Croatian inhabitants of Ahmi}i, however, Akhavan and his group came

---

[222] T. 200-201. Some witnesses, however, denied that there was anything significantly Islamic about Ahmi}i *vis-à-vis* other villages. See, for example, **Witness EE**, T. 4240-4241.
[223] **Payam Akhavan**, T. 1227-1228.

under sniper fire. Subsequently, in order to hear the explanation of the Bosnian Croat authorities, Akhavan met the military and political leaders of the Bosnian Croat community - Tihomir Bla{ki}, Mario Čerkez and Dario Kordi} – who admitted to being in control of the area, but denied responsibility for the attack on Ahmi}i, claiming that the attack had been committed by the Serbs or by the Muslims themselves in order to attract international sympathy. Since Ahmi}i was only 4 kilometres from the HVO military Headquarters in Vitez, however, Akhavan concluded it was not the Serbs or the Muslims who had carried out the assault, but the HVO.

183. Akhavan shared the view of Lt.-Col. Watters that Ahmi}i was not a military target but an undefended village and that the civilian inhabitants who were victims of the attack offered no military resistance. The attack on Ahmi}i lasted only one day, with the take-over and destruction completed on 16 April 1993. The exact number of victims was impossible to determine with certainty since many bodies could not be recovered from the rubble due to the danger of unexploded mines and booby-traps. Three hundred of the original Muslim inhabitants were still missing and in addition to these locals there had also been a large number of refugees in Ahmi}i on the day of the attack who had yet to be accounted for. Akhavan stated in cross-examination that although there were atrocities against Croats, for instance the beheading of a Croat in Mileti}i apparently committed as a reprisal for Ahmi}i by rogue Mujahedin, looking at central Bosnia as a whole, the Muslims were disproportionately victimised. There was a climate of fear and terror in the region that everyone experienced, but allegations of large-scale atrocities committed against Croats, for example in Zenica, were not credible at the time.[224] The attack on Ahmi}i was part of a pattern, according to Akhavan, namely that of establishing control by means of "ethnic cleansing" and there had been simultaneous and concerted attacks on Ahmi}i and surrounding villages.

184. **Witness HH** was at the time working at the United Nations Centre for Human Rights in Geneva and was fluent in Bosnian/Croatian/Serbian. The witness visited Ahmi}i on 2 May 1993 with BRITBAT. He saw that most of the homes in Ahmi}i were

destroyed, except for what he was told were Croat homes. He and Akhavan attempted to speak to a woman with two children but they were shot at and fled. One soldier was wounded in this incident. Witness HH investigated one incident in particular, namely the attack on the house of Witness KL. Witness HH was told that he would find bodies at KL's house,[225] which he visited with BRITBAT. The house was gutted by fire and there were human remains – a charred backbone and other fragments that appeared to be human.[226]

185. **Captain Charles Stevens**, who was in central Bosnia from November 1992 to May 1993, provided personal security to Colonel Bob Stewart, the commander of BRITBAT. Captain Stevens accompanied Col. Stewart to Ahmi}i on three occasions at the end of April and early May 1993. The first visit took place on or around 17 April 1993. As BRITBAT arrived in Ahmi}i, the place was totally devastated, to an extent which was worse than the witness had hitherto seen elsewhere in central Bosnia. The minaret of the mosque had been destroyed by explosive charges which had been placed at its base in such a way as to cause it to fall onto and damage the mosque. There was no sign of life in Ahmi}i at all. As Captain Stevens moved up towards Upper Ahmi}i, where there were some fires still burning and some smouldering. Around the houses there were, in general, a large number of spent AK-47 cases. In the doorway of one house, he found two burnt bodies, one of a man and one that appeared to be a child.[227] On further investigation, he found the bodies of at least two other adults and a number of children in the cellar of the building.

186. During this visit, Captain Stevens met someone called "Dragan", who was armed with an AK-47 and who, by means of sign language and by drawing with a stick in the sand, intimated proudly that he, or he and his friends, had killed thirty-two Muslims.

---

[224] **Payam Akhavan**, T. 1330-1331. and T. 1241-1242.
[225] **Witness HH**, T. 4477-4479.
[226] See video Exhibit P83, which shows Witness HH and Akhavan visiting the house with Col. Bob Stewart.
[227] T. 2148-2149.

"Dragan" wore a camouflage jacket and darker civilian trousers, and was clean-shaven. The witness could not conclude whether "Dragan" claimed to have killed the thirty-two Muslims in Ahmi}i or elsewhere, for example, on the battlefield.

187. The next day, the witness went back to Ahmi}i in the light of reports that BRITBAT had received from people who had fled. Captain Stevens went to Witness KL's house. The building was totally gutted, fire damage having destroyed the roof. There were red tiles covering the floor, charred wooden beams, and the witness saw the burnt upper body of an adult, and further back in the room, on the other side, what appeared to be the body of a smaller person, perhaps a child.[228] Overall, Captain Stevens got the impression of a pure "ethnic cleansing" operation having taken place in Ahmi}i on 16 April 1993.[229]

188. **Corporal Skillen**, a member of the British army who was based in Vitez as a United Nations peacekeeper from November 1992 to May 1993, went to Ahmi}i twice on or around 22 April 1993 when he heard rumours of killings. The witness noticed the fallen minaret of one of the Ahmi}i mosques. He saw that the majority of the houses in Ahmi}i were totally destroyed or damaged beyond repair. Corporal Skillen visited one house, slightly above the mosque, which contained burnt bodies. On the outside of the house were two burnt bodies, one small[230] and one large male.[231] Downstairs there were the burnt corpses apparently of one adult and two small humans, the gender of which could not be determined due to the carbonisation of the bodies.[232] The whole cellar of the house was burnt and the windows smashed. Based on his expertise, the witness thought that the damage had been caused by a blast. The only people whom Corporal Skillen saw alive in Ahmi}i that day were a woman and a small child, sitting on the balcony of a house which stood out because it had sustained no damage at all, although the house was surrounded by buildings which had been destroyed. The woman and child were acting as

---

[228] T. 2160-2161.
[229] T. 2154-2155.
[230] Exhibit P22 (photograph of burnt body (child) by the steps of the house).
[231] Exhibit P17 (photograph of burnt body (adult) by the steps of the house).

if everything was normal and they were ignoring UNPROFOR. They did not ask for any assistance. The witness identified the house from photographs as Vlatko Kupre{ki}'s house.[233] Passing the same house later, Corporal Skillen noticed two males in their mid-twenties, in matching uniform, casually passing the time of day. Corporal Skillen considered that the operation on Ahmi}i of 16 April 1993 transgressed all the principles and rules of warfare.[234]

189. **Mr. Kujawinski**, a Non-Commissioned Officer in the British Army was stationed in Vitez from November 1992 to April/May 1993 as a Platoon Sergeant in charge of a platoon equipped with four Warrior armoured fighting vehicles. He was sent to Ahmi}i on the afternoon of 16 April 1993, around 2.40 p.m. His mission was to recover a broken-down "Scimitar" (a light-weight vehicle used for reconnaissance). He saw palls of smoke from the turn-off to the mountain road to Zenica and many houses destroyed or on fire. Women and children who appeared to be dead were lying out in the open. He saw about 13 bodies. Then as he passed the cemetery, a woman, whom he later evacuated, jumped out with her hands in an imploring gesture. Kujawinski then went up past the Bungalow where he saw many soldiers, more than he had hitherto seen in one group during his tour in Bosnia. He estimated it was a company group, i.e. 100 soldiers. Everyone was dressed in very dark uniforms. They also bore an insignia which he was unable to identify – a red, white and blue shield, with an arch across the top - which he did not recognise as an HVO patch. He only recalled seeing that one unidentifiable patch that day. The soldiers had a lot of weapons and were very joyful, drinking beer and waving their weapons in the air as if to toast or celebrate what had happened. The witness "put one and one together" and concluded that these soldiers, who were 400-500 metres from the scenes of recent killings of women and children and of the destruction of the houses which he had just seen, had committed those acts.

---

[232] Exhibits P18-21 (photographs of burnt bodies being removed from the cellar). Corporal Skillen was not present during the clearing-up operation shown in these photographs, which took place later.
[233] See Exhibit P32.
[234] T. 2655-2656.

190. The witness carried a camera everywhere with him and took photographs.[235] From the Bungalow, the witness drove through Ahmi}i, noticing dead cattle on the way and finding the broken-down Scimitar. At this point he could hear gunfire behind his soldiers and could see cattle being shot in a cruel manner in the fields. The witness towed the Scimitar back to the garage, and then returned to the village to rescue four women and a child, and in the event picked up 13 women and 2 children. Another vehicle accompanying him also collected a number of people with their belongings, including one man in civilian clothes who crawled out from behind a chained fence and boarded the vehicle. The witness did not hear shots at that time. He took the refugees to Travnik Hospital. The witness concluded that there had not been two sides to the conflict in Ahmi}i that day - merely one group of soldiers at the Bungalow and no defences in the village. The witness did not see any men in uniform or armed in Ahmi}i that day, neither of the HVO nor of the BiH army.

191. **Major Michael Dooley**, UNPROFOR Platoon Commander in Bosnia, testified that he went to Ahmi}i to investigate the situation there around noon on 16 April 1993. He led four armoured vehicles into the village. He saw many dead people by the side of the road and no signs of life, much less of resistance. Occasional shots were to be heard, which Major Dooley determined, on further passes through the village, represented a one-sided shooting into the village, rather than fighting between two sides. Major Dooley further ascertained that, despite the absence of any armed resistance, an anti-aircraft gun appeared to have been used in the attack: he saw large holes in the buildings from 0.5 calibre fire and 0.5 calibre shells, which is the calibre used by either a light anti-aircraft gun or the heaviest automatic fire.

192. As Major Dooley and his armoured vehicles continued to move through the village, the shooting around them intensified. Major Dooley and his soldiers themselves came under fire. He also saw ten HVO soldiers, lying in a ravine, who looked like a

[235] See Exhibit P53.

"cut-off" group.[236] Major Dooley and his troops collected some twenty bodies in the three passes, but they saw many more dead, perhaps as many as fifty, who were civilian men and women, and included elderly persons, who appeared to have been shot at close range.[237] He considered that the initial attack was over by the time he arrived at noon. In his opinion, the assault on Ahmi}i was a very well coordinated attack by the Croats, executed by someone with a good grasp of military tactics.

193. The witness denied that there was any resistance by the Muslims in Ahmi}i. He did not see any BiH army soldiers in Ahmi}i, only Croat soldiers, and the victims he saw were all civilians, without weapons by their bodies. The witness conceded that he knew from Northern Ireland that terrorists could wear civilian clothes, but in these circumstances he believed the victims were not soldiers in civilian clothes because many had no shoes and none had any weapons besides them.

194. Under cross-examination, the witness admitted that it was strategically important to control the road to Travnik which cut through Ahmi}i. There were Mujahedin trying to get to Travnik; therefore it was important to the Croats to cut them off. Ethnically, the region was "like a dart-board – enclave followed by enclave". The witness admitted that it was a legitimate military tactic to cut the opponent's lines of communication to stop reinforcement. He also agreed that surprise is always condoned in warfare; "surprise is the name of the game".

---

[236] **Major Dooley**, T. 2480 and T. 2509, determined that the soldiers were of the HVO on the basis of their uniforms. The soldiers were wearing the American-style camouflage uniforms worn by the HVO. The American-style camouflage uniforms of the HVO were different from those of the BiH army, which were more like the Malaysian camouflage outfits. The witness said that these soldiers were unquestionably members of the Croatian army.

[237] T. 2481–2482: "A. The ones that we collected were male and female. All of them were in their civilian clothes. ... I saw no children killed, but there were certainly male and female, and quite a few older people. Q. Did you see any weapons close to those bodies? A. They were all civilians. And perhaps an important point to note here was that the number of bullet wounds in each of the victims was great, which would suggest to me that the shooting was from a very close proximity". - When challenged on this last point under cross-examination, T. 2500, the witness clarified: "A. ... Obviously a great deal of our training is shooting at wooden targets and so you get a feel for grouping for shooting. These victims all had maybe half a dozen rounds in each and the bullet wounds were maybe two to three inches apart straddling their bodies. Now, to get such a grouping in one area as a line, you would have to be very close, and I would say "very close" would be maybe within ten feet of them. You'd be very close, as close as maybe you and I are together, in order to do that".

195. **Major Woolley** was deployed to Bosnia in November 1992 as a British army captain with UNPROFOR. During his stay in Bosnia, Major Woolley was mostly based in Vitez. On the morning of 16 April 1993, he was informed by a colleague that Vitez was a battle zone and that there were dead civilians and soldiers in the streets. Up until then, there had been nothing which indicated a Muslim-Croat conflict. He was despatched to Ahmi}i, with 2 Scimitars and a Warrior. He arrived at the village at around 11.30 a.m., and saw plumes and pillars of smoke.[238] He did not form an impression of what had happened until he spoke to a survivor, a Muslim woman, in a Muslim house by the lower mosque.[239] From what she told Major Woolley and from what hehad seen, he gathered that there had been a Croat offensive, starting around 6 a.m. Major Woolley saw an injured man who had suffered a gunshot wound to the back and elbow and who had lost a lot of blood. He spoke to survivors in one house. The people were all old women and children, in a state of shock, panic and fear. Major Woolley administered first-aid, and then went up the road. He saw that about 20% of the houses were burning, while the road and entire area appeared to be deserted. He did not see any military activity until he reached location II on Exhibit P229, where he saw soldiers dressed in green and carrying Kalashnikovs, whom he assumed belonged to the HVO because of their positioning outside the village.

196. Major Woolley then went into house no. 2 on Exhibit P229, where he saw a woman on a makeshift stretcher. She had a head wound evidently inflicted by a gunshot. He dressed the wound but she died. The other persons in the house were in great distress. The witness then went to the house belonging to Nermin Kermo where some thirty people were gathered:

> "The cellar was very dark, there was no lighting. There was an awful smell generally of, I suppose, wounds, and there was also smoke from people smoking. There were people crying, there was a woman breastfeeding, there were elderly people, women and children, and there

[238] See Exhibit P229, showing six points of interest in Major Woolley's tour of Ahmi}i: two burnt out houses (points a & b), the point where he rescued five casualties (at IV), and the point where he picked up five dead bodies (at VI).
[239] Point I – House 14 – on Exhibit P229.

was about up to 30 people probably in the cellar, five of whom had significant injuries".[240]

197. There was a wounded 12 or 13 year old girl, two elderly men and some other wounded, all in civilian clothing. All were very scared and in shock. None of the men in the cellar had weapons. The most severely wounded were evacuated in the Warrior, while the others stayed in the house.[241] At one point, Major Woolley saw a wooden barn burning which he estimated had been set on fire around 3 p.m. A photograph taken by the witness[242] shows the minaret of the mosque still intact at 3 p.m., on 16 April 1993, which supports the conclusion that the minaret had been deliberately dynamited after and not during the morning offensive.

198. Based on his own observations, on the report of a woman in the village, and on the fact that "most deliberate offensives conducted by military men are done at dawn, because that's the time when the people are at least alertness, probably in their beds," Major Woolley believed that the attack on Ahmi}i was a dawn raid. He also confirmed that the dead bodies he found were all civilians. For example, at location VI on his map, he found five civilian bodies, which included elderly persons, who had died from multiple wounds.[243] These dead bodies were not in uniform, nor "mixed dress", i.e. with one or two items of uniform, which the witness was accustomed to seeing on Bosnian soldiers. Nor were there any guns anywhere near any of the victims. Moreover, each victim appeared to have sustained more than one gunshot wound, one looking as if he had been shot with automatic fire. Besides these evacuations, Major Woolley affirmed that

---

[240] T. 3507-3508.

[241] **Major Woolley**, T. 3507-3508, identified Exhibit P193 (showing the entrance to the cellar, from the back, and the Warrior vehicle as they prepare to evacuate the wounded), Exhibit P74 (also showing the scene of the wounded in the cellar), Exhibit P194 (showing the witness by the cellar), and Exhibit P195 (showing the evacuation of the girl, D'enana Pezer). Each photograph which was produced to the witness as a prosecution exhibit was taken either by the witness or the military photographer using his camera, so as to keep a record of what was occurring. See also Exhibits P134, P137, P155, P235, P236, P237, P238, and P239 (showing two Muslim men of fighting age with rifles, who were not soldiers as such. There were approximately five victims around that house).

[242] Exhibit P235.

[243] See Exhibits P56 and P57.

he had picked-up many other bodies. Major Woolley's conclusion was that what happened in Ahmi}i was not a military operation but a "slaughter".[244]

(ii) Bosnian Muslim Eye-witnesses

199. The Chamber heard evidence from more than thirty-five Bosnian Muslims, former inhabitants of Ahmi}i who were victims of the attack of 16 April 1993. Their testimony, while each describing separate tragedies and losses, converges on the major points of the offensive and tells one coherent story. In general, witnesses were awoken around dawn, between 5 a.m. – 5.30 a.m., on 16 April 1993 by the sound of loud detonations followed by gunfire, often in the immediate vicinity of the witness's house. The witness would typically look out the window and see houses burning – notably the house of Witness KL which seems to be one of the first set alight – and HVO soldiers running around in camouflage uniforms and with heavy weapons. A common description was that bullets were flying everywhere and many witnesses testify that an anti-aircraft gun was used in the attack. The victims either managed to flee or were forced out of their houses by heavily armed HVO soldiers, often using insulting and threatening language, who would then proceed systematically to burn down the house, barns or any other outbuildings, killing the livestock in the process. At this point, many witnesses lost family members, who were either killed at close range by the soldiers in or around their houses, or gunned down as they ran from house to house. Those who survived either fled to the upper village and thence to Vrhovine and then Travnik or Zenica, or were rescued by UNPROFOR or collected by local Croats and deported to Dubravica School, where the Bosnian Croats ran a camp for Bosniac refugees. At Dubravica School, persons were mistreated, and there were accounts of rape and of refugees being used to dig trenches at the front lines.

[244] **Major Woolley,** T. 3554: "...whether there had been any soldiers in this village at all, [...] at the end of the day, these houses, these civilian houses, had been burnt down, were on fire - these were not houses that had any signs of being defended by soldiers or had any fortifications - and I think when you see 12 year old girls with bullet wounds and even men who could fight with gunshot wounds in their backs or women with gunshot wounds in their heads, it tells me that this is a slaughter of civilians".

200. The witnesses' accounts also agree on this point: that the conflict on 16 April 1993 was a one-sided offensive by heavily-armed HVO soldiers or paramilitaries against mostly unarmed civilian men, women and children. The witnesses all agree that there was no Bosnian Army in Ahmi}i on 16 April 1993, that the village was undefended and that the only defence which took place that day were some gunshots from 2 or 3 Bosniacs around Nermin Kermo's house to defend that house and, more importantly, the many refugees in the basement, from massacre.

201. **Abdulah Ahmi}** was awakened before dawn by loud detonations which went on for approximately 15 minutes.[245] He heard one extremely loud detonation which possibly killed his brother, Muris, outside their house. Then his father and he were led out of their house by Bosnian Croat soldiers and shot at point-blank range, following a repeated command by one soldier to another to carry out his orders. The witness's father died – the witness saw his father's brains blown out before his eyes - but the witness himself miraculously survived when the bullet entered one cheek and passed out the other side.

202. The witness stated that both he and his father were wearing civilian clothes at the time and were clearly not soldiers. The Bosnian Croat soldiers who shot them were well-armed, with automatic rifles and bullet-proof vests. The witness and his father offered no resistance at all.

203. After being shot, Abdulah Ahmi} played dead, and then ran off and hid, semi-submerged, in a river under a bridge. From that position, he saw HVO forces being deployed in accordance with what appeared to be a plan, with 80-100 men moving in from the north side and 50-60 men from the south side. The witness saw both HV (army of the Republic of Croatia) and HVO soldiers among these men.

204. Subsequently, Abdulah Ahmi} left his position under the bridge and hid in a house, where he was attacked with a grenade which a soldier threw into the house. The

[245] T. 279-290.

witness was eventually rescued by Ivo Papi} and then taken to Dubravica school. While he was held in the Dubravica school, some Bosniac men were killed and he heard rumours of Bosniac women being raped.

205. The witness lost his father, mother and 3 sisters, who were 24, 23 and 16 years old.

206. **Witness A** was also a refugee in Ahmi}i, who had been driven away from Fo~a,[246] in eastern Bosnia, by the Serbs. He heard explosions and bombs and bullets flying about. Then he heard a loud banging on the door of his house. Soldiers entered, who were heavily armed and wearing camouflage uniforms, with painted faces and ribbons on their sleeves., A soldier asked Witness A's brother-in-law how old he was and left him alone when he replied that he was only fourteen years old. The soldiers, however, took the witness, who was older, with them.

207. As Witness A left the house, he saw houses burning and heard non-Muslims taunting dispossessed Bosniacs, saying that the "Balijas" were "burning down their own houses". The witness was made to put on a uniform and to walk ahead of a soldier who was wearing a Jokers patch. As he walked along, the witness saw five bodies lying against a fence: his father, the Paca family – a father and two sons - and a refugee from Zenica.[247] Witness A himself was, however, spared. He was told to identify the Croat houses and the Muslim houses, for the purposes of their selective destruction.[248]

208. **Witness B** testified that he heard a loud explosion and falling shells from 6 a.m. onwards. He saw HVO troops shooting, killing, and torching houses. The witness saw the slogan "48 hours of ashes" written by Croats as graffiti on the fallen minaret shown in Exhibit P66, and elsewhere.[249] He testified that the BiH army was not in the La{va River Valley at all on 16 April 1993. There were no Bosniac military units, because they were all away fighting the Serbs, nor were there any Bosniac civilian police.

---

[246] T. 524.
[247] These bodies were shown in the photographic exhibits, Exhibits P53-56.

209. **Witness C** was 13 years old in April 1993 and lived in the lower part of Ahmi}i with his family, two boys, two girls and his mother and father. The witness and his brother were woken by the sound of gunfire. Bullets broke the window of their room and plaster fell on them. The family took refuge in the larder. Soldiers then came into the front yard and set everything on fire, including the stable where the family cow and sheep lived. A soldier then entered the house. He was wearing a Jokers patch, and the HVO insignia with checkerboard flag and a "U" for Usta{a. The soldier took the witness's brother to the balcony of the house. The witness then heard 3-4 gunshots being fired. Next the witness was taken out to the balcony with his mother and told to jump, whereupon he saw his dead brother on the ground below the balcony. The witness jumped next to his dead brother and then ran off. As he ran away, the witness saw a soldier trying to force the mother to jump by threatening her with a knife. Other soldiers in camouflage uniforms stood below the balcony, armed with knives and guns, and laughed and shouted, "Jump, jump" at the witness's mother.[250] As the witness ran towards the road, shots were fired at him, but he survived by zig-zagging and thus managed to reach the road where he was rescued by a man driving a Lada and was subsequently helped to flee by a Croat called Jozo.

210. **Witness D**, witness C's mother, said that the first thing she heard was bullets whizzing into her house. She fled to the larder. She then heard someone in the yard saying, "Burn everything here". The stable was set alight, and the animals burnt alive. Soldiers then entered the house and made her elder son jump from the balcony and shot him dead in the process. The soldiers then tried to make the witness jump, using the insulting term, "Balija", shouting "Jump, balija, jump!" A gun was put to her temple to force her to jump onto her murdered son and the soldiers were "laughing as if they were

---

[248] T. 566.
[249] T. 802.
[250] T. 964.

having fun".[251] She told the soldiers to kill her there and then, if they were going to kill her as she was not able to jump. However, the soldiers did not shoot her.

211. Among her family members, the witness's husband was shot in the shoulder and one son was murdered. Her daughter was slapped with a Koran and later was in a state of shock, trembling and covered in sweat. The soldiers looted the witness's house and shouted at her family, "Give me your money!" and "If I find more money, I'll cut you into pieces!"[252] Later the witness managed to escape to the Upper Ahmi}i with her daughter. Witness D did not see a single armed Muslim in Ahmi}i on 16 April 1993.

212. **Fahrudin Ahmi}** testified that he awoke to the sound of gunfire. Shells were falling and all kinds of weapons were being fired. As he ran from his house, he was shot. Women and children were with him when he was shot, and thus also in the line of fire. The witness went into a house where UNPROFOR administered first-aid to him, but he was not taken to hospital because UNPROFOR said that the Croatian army had ordered that no-one was to be helped.[253] Shortly after UNPROFOR left, the house was nearly set on fire by incendiary bullets. The injury sustained by the witness was very serious: his hand was almost blown off and he remained in intense pain for months. He still has severe problems with his arm.

213. Fahrudin Ahmi}, like all the other victims of the attack who testified before the Trial Chamber, testified that he was not in uniform, nor had he any weapon with him; he had never possessed a weapon. The witness did not hear of any Croatian soldier being killed on 16 April 1993. He affirmed that there was neither a BiH army presence in Ahmi}i in April 1993, nor any Bosniac combat lines. The Croats, on the other hand, were well organised.

214. **Witness E** was 15 years old in 1993 and a refugee from Travnik. He was woken by shooting at 5.50 a.m. Soldiers threw grenades into his house, whereupon he left the

[251] T. 1030.
[252] T. 1041.
[253] T. 1135.

house with his mother, sister and father, seeing two dead bodies as he emerged. He and his family members were told by soldiers to put their hands up and to keep their heads bowed. The witness then saw a further two dead bodies. The soldiers whom the witness saw were in camouflage uniforms, with automatic rifles and anti-tank rocket launchers. The witness's father, an elderly man, was called out of the line as they walked along and the witness never saw him again. The witness then saw another two soldiers, one wearing a balaclava, the other with his face painted black and both in camouflage uniforms. The soldiers had Military Police insignia. The witness walked very slowly with his mother and sister amidst heavy shooting from both sides, and from Croatian houses, to Upper Ahmi}i, from where they were later evacuated with women and children to Zenica.

215. **Witness F** was 14 years old in 1993, and lived in Ahmi}i with his 4-year-old sister, 8-year-old brother and his mother. Witness F lost his mother and brother. On that morning, he was awakened by heavy shooting. A grenade was thrown into the house. His mother tried to throw the grenade back but it exploded in her hand, blowing off her arm and at the same time killing the witness's brother. Another grenade was then thrown in which exploded and injured the witness in the lower part of his body, followed by a third grenade. Next, a soldier came in, dressed in a camouflage uniform and with his face painted black, carrying an automatic rifle and a rocket launcher on his back. The soldier had an orange armband, which was identified through Exhibit P103 as HVO insignia.[254] This soldier asked Witness F where his father was. Explosions erupted upstairs and the witness and his family hid in the pantry. The witness's mother was then hit by a bullet in the stomach. The family fled to the barn, with the witness carrying his dead brother and his sister. His mother joined them in the barn and died there some fifteen minutes later. The witness passed out in the barn, which was set on fire by soldiers.

[254] **Witness F**, T. 1388–1389. These were identified via Exhibit P103 (HV insignia), Exhibit P104 (HVO insignia), and Exhibit P118 (Vitezovi insignia). The witness recalled the Jokers insignia on soldiers in Ahmi}i on 16 April 1993, although not necessarily in the form of Exhibit P45.

216. While the witness was in the barn, he heard a soldier outside saying that they had killed everyone in Lower Ahmi}i (around the lower mosque) and that they should move to the upper mosque. The soldiers saw the witness and his sister in the barn, next to the corpses of his brother and mother. The soldiers threw in a grenade to kill the livestock; they threw a grenade under the cow and then killed it with a rifle. The soldiers also killed a lamb. The witness testified that the soldiers were using a radio or mobitel to stay in touch with each other.

217. The witness sustained 18 injuries from the three grenades, including shrapnel wounds all over his body.

218. Later the witness returned to his house and collected some food and clothes. As he left, he saw Melissa Zec, a young child, lying next to her dead mother. She refused to leave her mother's side. Witness F also saw the body of Husein Ahmi} lying in his backyard. Witness F tried to go to Upper Ahmi}i, but he was turned back by a large group of soldiers with Jokers insignia, camouflage uniforms and automatic rifles, who said, "You cannot go up there. [The] HVO is up there. They don't distinguish between women, children and men. They kill everyone". Later, walking through the woods, he saw the dead body of Fata Pezer. The witness was taken to Dubravica school with his sister and Melissa Zec. There he saw HOS and other HVO soldiers. In the school, the witness saw Dzemila Ahmi} who was taken out and came back an hour later crying and saying she had been raped. Like other witnesses, Witness F did not see or hear of any Bosniac line of defence. If any such line existed, the witness said, it was a spontaneous defence – people standing before their homes to defend their families.

219. **Witness G** was thirteen years old in April 1993 and lived in Lower Ahmi}i with his father, mother and two sisters. The witness and his family were all asleep when they were woken by heavy fire, explosions, and bullets coming through the windows of their rooms and through the roof tiles. The witness heard his parents running down the hallway yelling, "Children, get up and get dressed!" The whole family ran downstairs to avoid the bullets coming through the ceiling. They went into a little room on the ground floor. An incendiary bullet then hit the house, but his mother managed to extinguish the

fire. His father then said that they should go to the next-door neighbours' house. His father was unarmed and the whole family was in civilian clothes.

220. Witness G's family left the house one-by-one, with the witness in front. The witness ran towards their barn and some other houses. He heard a very loud burst of gunfire as he ran. He saw a neighbour, Zahir, lying dead in his garden, in civilian clothes – possibly in pyjamas - and a soldier in camouflage uniform and with insignia, and his face painted black, standing over Zahir with a rifle.

221. The witness next saw three soldiers wearing camouflage clothing and carrying rucksacks who were shooting at the upper village. These soldiers had insignia, possibly of the HV. The witness also saw Dragan Papi} standing with a rifle. The soldiers told the witness to run back and as he turned to run, they shot him in the back of the legs and he fell. He could see his parents and sisters running from the house.[255] His father, mother and elder sister were all killed.

222. The witness lay where he was and played dead all day. During that time he heard several explosions and sounds of attack and saw soldiers in camouflage uniforms, with rifles and rucksacks, passing by, including Dragan Papi}. He noticed insignia of the Vitezovi, the Jokers, the HVO and the HV. Some soldiers were in black uniforms. None of the soldiers tried to assist the witness, his parents or his sisters. While lying there, among other things, the witness saw two soldiers setting a house on fire and heard female screams and other sounds of people being killed, some of whom, he subsequently discovered, were his relatives. He saw a man killed in cold blood at close range, after his wife, son and daughter had been told to walk away. This happened right in front of the

[255] T. 1469-1470. "As I fell, my parents had more or less reached these spots marked with the Xs, and my father spotted this soldier who was next to Zahir's house, who had come out to the corner of Zahir's house. He spotted him and these other soldiers, and he said, "Men, what are you doing? Let me pass. Let the women and the children pass and kill me". However, one of these who had shot at me who were behind my back ordered three times this person, this soldier who was there, to shoot at them, and he said, "Kill them. Kill them. Kill them". And he cursed at him, as if saying, "What are you waiting for?" And he fired two short bursts of fire, and my parents fell. I just managed to raise myself on my elbow, after which I fell to the ground altogether and stayed there immobile. I was conscious but I wasn't quite all there. Q. Did you see what happened to your sisters? A. Yes, I could see that they just fell together with my parents, and they were all on the ground. They were all lying down.

witness. The witness saw incendiary bullets being shot at a Bosniac, Hidajet's, house, which set it on fire. That night Witness G saw about 30 soldiers. The soldiers set Elvir's house on fire. On the radio he heard the soldiers saying: "How are you doing in Piri}i? Do you need any assistance? There's plenty of us over here", and then, "Please send us explosives for the lower mosque in Ahmi}i".[256]

223. When the soldiers had gone, the witness staggered over to a barn where he lost consciousness. He was woken by a powerful explosion which he believed was the mosque being blown up. The witness then went into another smouldering house – Elvir's - and collapsed there. According to his watch, he spent two days and two nights on the landing of the house, unconscious, and stayed in the house seven days in total, leaving on the eighth day. While in the house, he survived on water from a pipe and some marmalade. From the house he could see several bodies, including the bodies of his father, mother and older sister (the witness's little sister had disappeared but had not, in fact, been killed as the witness had believed), and the bodies of two others whom he believes were refugees. From his vantage point in Elvir's house, the witness also saw the Croatian families coming back to Ahmi}i after the assault with their livestock and belongings and continuing to live normal lives among the carnage as if nothing had happened. The witness could see that the Muslim houses had been destroyed while the Croat houses remained intact. The witness was finally rescued by UNPROFOR on the eighth day following the attack on Ahmi}i, and he was later reunited with his only surviving family member, his youngest sister.

224. **Witness H** was thirteen years old in April 1993 and belonged to a family of five, comprising herself, her father, mother, and two twin sisters who were five years old at the time. The witness was a next-door neighbour of Zoran, Mirjan and Vlatko Kupre{ki}.

225. Between 5.15 - 5.30 a.m., the witness was woken by a burst of gunfire which shattered the glass of the children's room. Her parents told her to go down into the basement, which was a shelter in which they had previously hidden during air-raids by

[256] T. 1481.

the Serbs in 1992. From the shelter, the witness heard people running about in their house. Two grenades detonated; one in the kitchen and one in the living-room. The witness heard voices in front of the garage, telling her father to open the door. The witness thought the voices were friends wanting to enter the shelter, because they had fine relations with their neighbours, so she told her father to open the door. Her father went to open up the garage door. As he did so, there was a burst of gunfire in the hallway and a scream. The voices outside then said "Balija, come out", and her father started crying, saying "Please don't kill me". She then heard a burst of gunfire. The lid of the basement was then lifted and a voice said, "Is there anyone down there?" The witness replied, "Yes, me and my sisters".

226. Besides the Kupre{ki} brothers, there were three other soldiers, one of whom began to set the witness's house on fire by pouring petrol and setting it alight with a match while another soldier was looking through their closets. The witness got on her knees, begging Zoran Kupre{ki} for mercy. She tried to put the fire out but was abruptly ordered to stop and sent out of the house. As the witness left the house, she had to step over the corpse of Meho Hrustanovi}, a neighbour, who had been killed. She saw blood on his chest and realised that he had been killed by gunfire. The witness also saw the corpse of Hrustanovi}'s wife, Zafra, lying in front of her own house where she had been killed. She then saw the corpse of her own father. The witness, with her mother and sisters who were barefoot and in pyjamas, escaped to Upper Ahmi}i; then, amidst much shooting and shelling, to Vrhovine, and finally on foot to Zenica.

227. **Witness I** was woken in his home in Zume, a part of Ahmi}i, on 16 April 1993 by a powerful explosion. He saw that all the Muslim houses in Ahmi}i were on fire. He also noticed that his Croatian neighbours were hiding in Jozo Vrebac's shelter. An HVO soldier ordered him out of his house. The soldier had an automatic rifle and a "Scorpio", and wore a white belt. The witness surrendered two hand grenades to the soldier. The soldier said, "You see this house? ...This is no longer yours, and don't you dare come back here". The witness locked up his house and gave the keys to the soldier and left Zume. A Croat from Busovača now lives in his house.

228. **Witness J** testified that she awoke at 5.15 a.m. At 5.25 a.m., shelling started, and the mosque was fired upon. Around 5.30 a.m., she saw that Witness KL's house was on fire, as well as neighbouring houses, including that of Fahrudin Ahmi}. She heard a lot of shooting and hid in her pantry. Then soldiers broke down her door and started breaking everything. There were five soldiers, including Nenad [anti}, who was a neighbour, and whose face was painted black. The other soldiers did not have their faces painted. The soldiers were in camouflage uniforms, with HVO patches, and had rifles. They killed her husband and left. The witness then saw that the house was on fire, as well as all the surrounding Muslim houses, but apparently it did not burn down. She came out of her house towards dusk to feed the cow and saw her husband's body. She spent the night there. The next day, she was taken by Bosnian Croats to Dubravica, where there was rape and "a lot of terrible things going on".[257]

229. **Hendrikus Prudon**, a crime scene officer, corroborated Witness KL's account of what happened in his home on the morning of 16 April 1993. Prudon was commissioned by the Office of the Prosecutor to compile a ballistic-incendiary report on Witness KL's house amongst others, and he investigated the ruins for signs of fire damage, gunfire and explosives. During his investigation, Prudon found bullets and cartridge cases in various parts of the house, including anti-aircraft projectiles (Exhibit P170). He also found textiles and bone fragments. Prudon's Report concluded that the bones were of a child (of ten or eleven years of age) charred by a temperature of 1,000° – 1,600° celsius. In three areas of the house, there were holes in the floor, which appear to be where the sofas and table had burned and fallen through the floor.[258]

230. **Witness K** lost her husband and son on 16 April 1993. Her family consisted of her husband and three children: a son aged ten and two daughters aged six and four years. She was awoken by gunfire in the morning. Bullets were coming into the room in which she and her husband slept with all their children. She heard gunfire outside, as well as whispers and general noise. There was a banging on the door. At this point,

[257] T. 1866-1872.
[258] **Hendrikus Prudon**, T. 2246-2254.

bullets were flying about everywhere inside the house. The witness struggled over the door for about ten minutes to stop the soldiers outside from opening it, with the help of her husband. She screamed, saying, "There's only me and the children here! There's nobody else here! Stop shooting! Don't fire! Don't shoot my children!" Her son then said that he was wounded and her husband started shouting for the first time. A gun was pointed through the window and a blond soldier appeared, shouting "Out, out, out!" Her husband put his son on his shoulder and went out to the hallway and out the front door. There was a burst of gunfire, and the witness's husband and son fell down. Her son was dead, with bullets in his stomach while her husband was covered in blood, in great pain but alive. She tried to clean him up and lift him, but he died. The witness then went back into her house with her two daughters and stayed in the house. From there she saw Witness KL's and others' houses burning and the corpse of Munib Ahmi} and others. She realised that the soldiers were killing everyone and burning all the houses. She and her daughters eventually crawled out of the house to safety.

231. The witness estimated that the gunshots fired at her house came from the direction of the Croat houses in Lower Ahmi}i, the Kupre{ki} houses. She assumed they were attacked by their Croatian neighbours since the Muslims' properties were destroyed and Muslims were killed, whereas the Croatian houses were left untouched and their children were unharmed.

232. **Witness L** was wounded in the left arm during the attack as he ran from his home towards Upper Ahmi}i. Nevertheless he reached Vrhovine, where he was reunited with the rest of his family. His house was burned by the Croats that day. The witness was treated in Zenica.

233. **Witness N**, who was born in 1957 in Prijedor, was a former inmate of Keraterm camp and a refugee, expelled from Prijedor by the Serbs. He arrived in Ahmi}i on 20 August 1992, and settled in Upper Ahmi}i, living next door to the mosque. His family went to Austria and he stayed in Ahmi}i alone. Witness N participated in the village guard in Ahmi}i; his duty was to guard the people while they were praying in the mosque at dawn and evening. He possessed a short-barrelled weapon, which he carried

on his person. The witness recalled that the assault of 16 April 1993 began with a direct hit on the minaret at 6.15 a.m. It was dawn, daylight had broken, but at the same time it was misty. There was then shooting from all quarters. Next came an infantry attack from the direction of the Catholic cemetery. As the attack went on, the witness helped to evacuate the wounded. He noticed shooting from Vlatko Kupre{ki}'s store. The witness himself came under fire from a bunker consisting of sandbags piled up one on top of the other, from the direction of Vlatko Kupre{ki}'s store,[259] at around 10 a.m. He thought it was a small anti-aircraft weapon firing at him. The witness succeeded in leaving Ahmi}i around 2 p.m. He escaped to Zenica, with the assistance of UNPROFOR.

234. **Witness O** was a refugee who came to Ahmi}i in November 1992. His family comprised his wife, three sons and two daughters. On 16 April 1993, the witness rose at around 3.45 a.m.; at 4 a.m., he saw lights at Vlatko Kupre{ki}'s house. He rose again around 5 a.m. At 5.30 a.m., there was considerable shooting. He then saw six soldiers in "motley" uniforms and with weapons going from house to house, who he believed had killed the local Muslims called Kurja, Sukrija, Naser and Huso, because he had seen the six soldiers going to their houses.[260] The witness, as he fled with his family to Vrhovine, saw the village ablaze and the houses of Muslims burning.

235. **Witness P** was 19 years old in April 1993 and lived in Lower Ahmi}i, where she had lived since her birth. Her family comprised her mother, father (Witness Q), a younger sister (Witness R), who was 16 years old, an elder sister and a brother (who was in Stari Vitez at the time of these events). Her brother lived with his family – his wife (Witness T) and three small children (aged 1½, 2½, and 4½ years) - on the ground floor of the same house. On 16 April 1993, a friend was also present in her house, and her family was also joined by her paternal uncle (Witness S) and his wife, and by two refugees, a man and woman, from Prijedor; thus making fourteen persons in total. Her closest Croatian neighbours were Vlatko Kupre{ki}, and Dragan, Gordana and Mirko Vidović.

---

[259] The location is circled on Exhibit P182.
[260] **Witness O**, T. 2617-2626, who saw the killing of Meho Hrustanović, at T. 2629.

236. Witness P's account of what transpired on 16 April 1993 is corroborated by the accounts of the members of the family who also testified – Witnesses Q, R, S, T and their evidence will, therefore, be treated together.

237. According to **Witnesses P, Q, R, S and T**, there was a loud detonation or explosion and shooting broke out between 5 - 5.30 a.m. The father Witness Q and the mother of the family told the children to get out of their beds. The family went down to the basement of the house. In the basement, the family was joined by Witness S who lived next door and who had also been woken by the sound of loud shooting from heavy weaponry. Witness S had seen houses burning near Vlatko Kupre{ki}'s house and noticed shooting from Dragan Vidović's house and had seen wounded people passing by. The family continued to wait in the basement and in the brother's garage. The shooting intensified and they saw houses on fire and a wounded man. Witness T also saw shooting from heavy weaponry from Ivica Kupre{ki}'s house; loud detonations could be heard from the lower part of Ahmi}i. Witness Q noticed soldiers manoeuvring in a forest below the school, and other HVO soldiers in camouflage uniform advancing towards his house. The group in the basement then saw that they had no option but to flee to the upper village, which they did at around 8 – 8.30 a.m. They left the house together and climbed an elevation where the group hid in a shelter for ten minutes, discussing the escape route they should take.[261] This shelter was too small, however, for everyone to hide in, so they left for Nermin Kermo's house, as pre-arranged in the event of an air attack. They took a very narrow path with which Witness R was familiar from her childhood.

238. On their route, there was a plateau with a large clearing free of any growth. As the group of fleeing persons traversed this area and came to the edge of the hill, they heard people swearing at them. Witness Q then turned around and saw three soldiers and Vlatko Kupre{ki} in front of the latter's house, all holding automatic weapons. The

[261] This location was marked by Witness R on Exhibit P203, an aerial photograph, on the side of the hill facing Vlatko Kupre{ki}'s house. Witness R also indicated with an arrow on Exhibit P205 the route taken by the group of persons with whom she fled; the route is to the left of the ridge of the hill, i.e. the side of the hill facing Vlatko Kupre{ki}'s house.

soldiers cursed the group as "Balijas", asking why they had not been killed and where they had been hiding and telling them to give themselves up. According to Witness Q, the soldiers said "Fuck you balija mothers. Where were you? Where have you been so far?"[262] Witness R, who did not see the soldiers nor recognise the voices, testified that the voices she heard said, "Fuck you balija mothers, how come you're still alive?" Witness S heard the cursing of a group of soldiers, calling from the direction of Vlatko Kupre{ki}'s house, 50-70 metres away, and cast a momentary glance towards them. He saw a group of soldiers there, and one man who was not wearing a uniform, but Witness S was not sure that Vlatko Kupre{ki} was among them. According to Witness S, the soldiers shouted, "Balija mothers, where have you been hiding? How come you haven't been killed yet?"

239. The soldiers then began to shoot at the family and the other refugees. From the damage caused to surrounding trees, they appeared to be using fragmentation bullets. Witness T described how the bullets prevented her from helping her two and a half year old child, Maida, who had been shot and was apparently injured, with blood running down her face: "... from the shooting I couldn't help her, because bullets were falling all around her, and the bullets -- the earth would be -- shot up into the air when the bullet touched it. There were bullets all around and bullets going into the tree trunks".[263] As the shooting started, everybody ran. Witness T fell to the ground to protect her child.

240. When the soldiers started shooting from Vlatko Kupre{ki}'s house, Witness R lay down, at which point a bullet hit her in the leg, by the knee. Witness Q, the father of witness R, heard his daughter cry out and saw blood coming from her leg. The other members of the fleeing group ran "every which way" in order to save their lives and to escape the shooting. As his daughter cried out, "Mother, dear, I've been wounded. I'll die. You will lose me", her mother returned to help her and as she came to within three to four metres of the place where her daughter was, she fell, herself hit by a bullet. At the time she was hit, according to Witness Q, she was turned with her chest facing towards

[262] **Witness Q**, T. 2763.
[263] **Witness T**, T. 2961.

the direction from Vlatko Kupre{ki}'s house whence the shooting was coming. Witness Q then had to save his child by pulling her to the other side of the hill where she could not be hit by any more bullets coming from Vlatko Kupre{ki}'s house. After he had pulled Witness R out, crawling on the plain, he came to the place where his wife was and pulled her by the legs to one side. He lifted her head and watched to see whether she gave any signs of life, but she did not. Her mouth was full of dirt and she was dead. Then a neighbour approached them from the other side of the hill, and Witness R cried out to him to help them. They took Witness R and carried her away to Nermin Kermo's house. All this time, there was shooting coming from Vlatko Kupre{ki}'s house.

241. There was a basement in the lower section of Nermin Kermo's house where many other people from the lower section of the village had already gathered and were crying.[264] There Witness R received first aid; shirts were used to dress her wounds. After an hour's time, UNPROFOR came, and also administered first aid to Witness R and then removed her, and the other seriously wounded, in an Armoured Personnel Carrier.[265] Witness T noticed that when UNPROFOR arrived, the shooting stopped, but that once UNPROFOR left, there was intensive shelling of Nermin Kermo's house.

242. Witness P stayed at Nermin Kermo's house until midnight due to the constant shooting. Then she and others escaped in small groups to Vrhovine and Zenica via Dobrila. Witness S told the court how his father did not want to leave, thinking that he would not be hurt as he was an old man of 83 years, but that he was later killed, as was his mother, who was 70 years old.[266]

243. **Witness U** remembered hearing a strong blast at the time of the morning call to prayer on 16 April 1993. He heard shooting and saw four young uniformed soldiers

---

[264] **Witness T**, T. 2963.

[265] See Exhibits P195 and P196. Witness Q produced the jacket he was wearing on 16 April 1993 which sustained a whole from a piece of shrapnel. This jacket can also be seen on photograph 196.

[266] See Exhibit P187, produced to Witness S, showing a burnt out house with dead bodies, which was Jamal Ahmi}'s house (house # 205), where his mother was killed. The bodies in the house were burnt and decayed beyond recognition, but Witness S was able to identify his mother by a piece of cloth that remained. Later, knee caps, which withstand fire best, and spines and ribs, were retrieved from the site and buried.

bearing HVO insignia running past. People were fleeing – men, women and children – and those who did not flee were killed. The witness fled with his family, including his sister who was an invalid, in a group of 15-20 civilians, mostly women and children. They stopped between two hills, where they were blocked. Before his eyes, one woman, Nadira, was shot in the head and died from the wound.[267] The witness was himself wounded in the left arm, and remains disabled in that arm to this day. His sister, 37 years old at the time and bedridden, whom he was carrying in his arms, was also wounded. Another woman, Hajra, was at the same time shot in the chest and died instantly. Her sister, Zela, was also wounded. The shooting was coming from the direction of the Sutre store, owned by Vlatko Kupre{ki}. Witness U described how a female refugee, whose young son and husband had been killed, told them that they should hide "because they were killing all males, all males indiscriminately". She said, "Hide even in a mouse hole, but just hide".[268]

244. The witness hid in a pit for a while, until some HVO soldiers came along and ordered his family out. The witness's family was taken away, but the witness managed to remain concealed and, when soldiers started burning the garage where the pit was located, he and others managed to run out and returned to his house for four to five days, hiding under a concrete staircase, which had not burned. Then the witness and the others surrendered to four soldiers. One soldier bore the HVO insignia, while the others were in blue uniforms which had led him to believe they were UNPROFOR soldiers. The soldiers took the witness to a collection centre near a soccer stadium. On the way to the collection area, Witness U saw that most of the houses in the Muslim area of town were damaged or burnt down, while not a single house was damaged in the Croatian section.

245. **Witness V** lived in Upper Ahmi}i in April 1993 with his wife and two sons. He was on patrol on the evening of 15 April 1993. He went to bed at 4.30 a.m., but was woken by shooting.[269] He left the house with his gun to find out what was going on and

[267] See photographic Exhibits P214-216; see also **Witness U**, T. 3003-3012.
[268] T. 3008.
[269] T. 3052.

went towards the main road. There was heavy shooting coming from the direction of Vlatko Kupreškić's house. The witness saw houses burning, notably from the direction of Sukrija or Witness KL's house. The witness, his brother and some others gathered by a stable. Then he retreated towards his house. He saw the wife of Sukrija "running with her children and crying, and she was so distraught. She cried out to us, 'Run for your life. They have killed Sukrija, they have set my house on fire'. She looked so terrible it defies description".[270] The witness said he had the impression that they "wanted to kill every living thing in sight".[271]

246. **Witness V**'s cellar became crowded with civilians.[272] The witness and Mirhad Berbi} took up a position in order to defend the civilians in his cellar and because they had no means of retreat. The witness exchanged gunfire with HVO soldiers who were running towards his house, and one of whom was armed with a grenade launcher. Being outgunned, the witness then took up a position between his house and the upper mosque, behind some construction material, until UNPROFOR came. As soon as UNPROFOR arrived the shooting stopped. When UNPROFOR left, the shooting started again, and indeed intensified, particularly in a vengeful burst directed towards the witness's house, which had served as a haven for the wounded.[273] The witness stayed in his position – between the mosque and his house - until it became dark, and then he and the civilians in his basement decided to withdraw towards Vrhovine and Zenica. Those who stayed behind were killed and burned.

247. **Witness W**'s mother, wife, sister and son were all murdered on 16 April 1993. That day, he was woken at 5.30 – 5.40 a.m. by an explosion. The witness saw soldiers running past and heard heavy shooting. The soldiers swore at Sefik Pezer, a Bosniac, cursing his "balija mother" and threatening to set his house on fire, which they eventually did. The witness and his whole family left the house due to the falling mortar shells and went towards Upper Ahmi}i. The witness caught up with his family by Vlatko

[270] T. 3052-3057.
[271] T. 3058.
[272] T. 3061-3062.
[273] T. 3067-3078.

Kupre{ki}'s house. His wife was severely wounded in the head. Other Bosniacs were also wounded, while the daughter of a friend of his, Esad, was killed.[274]

248. The witness waited with his wife, by Vlatko Kupre{ki}'s store, amidst heavy shooting for 3-4 hours. A group of five HVO soldiers, wearing camouflage uniforms with the Croatian checkerboard flag, then came from towards Vlatko Kupre{ki}'s house, and saw the witness and his wounded wife. The soldiers searched the witness and his family and started mistreating them. In the end, the witness said, "they came to some kind of compromise, that they wouldn't liquidate us".[275] From what the witness said, it is clear there was an order to exterminate the Muslims:

> "Some of them were in favour of liquidating us and others were not in favour of that, and then a man who was probably the leader of this group said, 'The job has been finished. You're free. Run. But as soon as you can. The commander should be coming in. If he sees that I've let you go, I will be liquidated too because no Muslim foot should tread on this soil."[276]

249. Another soldier who said that he was from Nesrovici said that the witness and his family "should all be slaughtered".[277] The witness managed to improvise a makeshift stretcher in which he took his wife to Ahmi}i. She was evacuated by UNPROFOR to Travnik, where she died.

250. **Witness X** lost her husband and one daughter that day. The witness heard a loud detonation from the direction of the Kupre{ki} houses. Then shooting started from all sides. Her family went down into their cellar. She saw people shooting at the Pezer house from Jevco Vidovi}'s, Ivica Vidovi}'s, Niko Vidovi}'s and Slavko Papi}'s houses. The witness saw a total of eight Bosniac houses burning.[278] She was told by a neighbour, "Run away, because they're taking everybody prisoner and killing people". She sent her

[274] T. 3149-3154.
[275] T. 3154-3158.
[276] T. 3158.
[277] T. 3167.
[278] T. 3242.

children off with the neighbours and then heard her children crying from the direction of Vlatko Kupre{ki}'s house and then a burst of gunfire.

251. Next, four HVO soldiers who had just set Cazim Ahmi}'s house on fire stopped her and her husband. One of these HVO soldiers killed her husband in front of her eyes with a bullet through his forehead. The witness saw his brain spurting out. Her husband was wearing civilian clothes and had no weapon. The soldier then said to Witness X, "I'm going to set your house and barn on fire, so escape".

252. The witness fled and reached a spot below Vlatko Kupre{ki}'s house where she found her children. One of her daughters had been killed by the shooting, another daughter had been wounded from shrapnel from a mortar shell and another woman had been killed. She was told "to get away from that open space because there was sniper fire coming from Vlatko's [Vlatko Kupre{ki}'s] house and that they would kill [her]".[279] Eventually, after some three and a half hours, the witness surrendered to HVO soldiers and, seeing Franjo Kupre{ki}, Vlatko Kupre{ki}'s father, asked for help.[280]

253. Franjo Kupre{ki} and two or three other soldiers stood over the witness and said, "We kill our own wounded, let alone yours", and "This is all for the village of Nezirovici. We'll kill you or we'll slaughter you, but we should rape you first, and you tell us that we can do what we like with you".[281] The Muslims had to agree that they were at the soldiers' mercy.[282] The HVO soldiers told them to go to Upper Ahmi}i to the upper mosque.[283] The witness walked to Upper Ahmi}i and emerged at Vrhovine with her

---

[279] T. 3244.
[280] T. 3245. - "When they came up to us, it was the HVO army, in fact. They stopped there, they cursed 'our balija mother', and they said 'How come you're alive?' I called out to Franjo (sic), Vlatko's father, and I said, 'Franjo, what's this happening here? What have I done to you?' And I said that they had killed [...] my husband and that they had killed one of my daughters, that they had injured my other daughter. What have we done to deserve this?' I said. And he just laughed."
[281] T. 3246.
[282] T. 3246. On re-examination, T. 3263, **Witness X** repeated that the soldiers said, "if we want to rape you, we can rape you, if we want to slaughter you, we can slaughter you. You can choose. "We said: You can do whatever you want with us".
[283] T. 3266-3268.

children. She spent the night at Vrhovine and was transferred to Zenica the next morning.

254. On re-examination, Witness X referred to the fact that she heard soldiers calling for brandy and celebrating the fact that "they were all killed down there" (in Lower Ahmi}i), and saying "we've done a good job".[284] The voices were coming from Vlatko Kupre{ki}'s yard and house. When the witness walked past Vlatko Kupre{ki}'s house, it "was full of HVO soldiers in the yard". She also added that she saw that day the bodies of Sukrija and Meho and Meho's wife – all killed, all in civilian clothes.

255. **Witness Y** rose at 5 a.m., to go to work at the Princip factory. He was having coffee when he heard two bursts of gunfire from the direction of the Kupre{ki} houses. He told his wife to hide beneath the staircase. He saw Sukrija Ahmi}'s house on fire and five to ten uniformed soldiers in front of the house, armed with rocket-propelled grenades and with helmets on their heads. He ran back into his house, put on his uniform and took his rifle. He ran to Upper Ahmi}i to report to the command in Preočica. He telephoned the command and told them that the village had been attacked and was on fire and asked for assistance. The communication lines went dead, while they were talking. When the witness returned from Upper Ahmi}i, he saw that almost all the houses were burning, apart from his house and those of Nasid Ahmi} and Nermin Kermo.

256. The witness then joined Nermin Kermo and his brother and took cover in a thicket, near the upper mosque, and started to return fire. Witness Y said that 5-7 Bosnian Muslims – he, Nermin Kermo and a few others - defended the Bosniacs from the Croat attack in the upper village, and approximately the same number defended the lower village. They did not receive any assistance. The weapons the Bosniacs had were mostly burnt out rifles from Slimenje, of very poor quality and not very accurate.[285] They shot at the soldiers to stop them from burning his house and thus killing Witness Y's wife, and to protect the civilians who were in Nermin Kermo's basement. The witness shot about

[284] T. 3263-3264.
[285] T. 3316-3317.

three magazines with his automatic rifle, i.e. 90 bullets, that day. UNPROFOR came at around noon with 3-4 vehicles. The witness went over to speak to them. He saw Nadira Ahmi} lying dead. UNPROFOR put some wounded people into the vehicles. At that point, the witness's wife broke cover and ran for Kermo's basement. The shooting died down when UNPROFOR came. Once UNPROFOR left, however: "there was a cannonade. There was shooting from all kinds of weapons, mortars, RPGs, PAMs, PATs, anti-aircraft guns, all kinds of weapons, artillery pieces. Whatever they had, they used to shoot all over Ahmi}i".[286]

257. Witness Y and Nermin Kermo stayed in their position until dusk. There was shooting all day. As dusk fell, more survivors from the lower part of the village appeared and they were transferred to Vrhovine. Some old people stayed and were all killed.[287]

258. **Witness Z** woke to the sound of shooting. His mother was in the hallway, "beside herself". Witness Z ran out with his rifle. He saw the Ahmi} houses on fire, bullets flying from anti-aircraft guns and shooting directed towards the lower mosque and surrounding houses. The witness said he did not use his gun that day, because he was afraid for the safety for his wife and mother. Moreover he took off his uniform, in which he had slept, and hid his weapon. His house was hit with bullets, so he ran with wife and mother to Galib Imsirevi}'s house, which was also already completely "drilled" with bullets. Galib was lying dead outside. Next the witness ran with a group of people to the house of Vlado [anti} (a neighbour, not the accused, who lived in Vitez). There was shooting all around and bullets flying all around them. Eight of them hid in a shed by Vlado [anti}'s house from 8.30 a.m. until approximately 4.30 p.m. When UNPROFOR came by, he flagged them down, and disguised himself as a woman in order to get on board. As they drove off, he saw Drago Josipovi} in camouflage uniform, with an automatic rifle but without face paint, in the company of four other soldiers with rifles.

---

[286] T. 3314-3315.
[287] T. 3315-3316.

259. **Witness BB** woke up at 5-5.30 a.m., when she heard a detonation. She and her family hid in the pantry. Then a female neighbour came by and said, "Let's run. We're being attacked. They are torching everything. They are killing everyone". The witness went with the neighbour and the neighbour's daughter to Ahmi}i, leaving her husband and son behind. They reached the Kupre{ki} houses, where they had to stop because the Grabovi houses were all burned. She saw the HVO running everywhere and she hid under a hill. There was shooting from all sides, from the Kupre{ki} houses as well as from Piri}i. After some time, a neighbour, Nadira Ahmi}, was hit in the back of the head and killed, then a 18-year old girl, Zirafeta Ahmi}, Hajra and Kemo were all hit by gunfire. They went with Kemo into a house and hid there, nine women and children. The shot which killed Nadira Ahmi} came from either Vlatko Kupre{ki}'s house or Franjo Kupre{ki}'s house; according to the witness, it could not have come from anywhere else.[288]

260. In the same group as the witness were a dozen or so persons, including three men and a very young boy. None were in uniform and none had guns. HVO soldiers burst into the house in which they were hiding and harassed them.[289] They took them to a swamp called Dolina and kept them there for 2-3 hours. They then led the witness to the main road. They asked her where her husband and son were. When she said that she did not know, the soldiers said: "Well, we know where they are. We killed them and we sent them to God's garden to pick tangerines".[290] But in fact her son lived and she found him in Travnik hospital.

261. The witness was evacuated in an UNPROFOR vehicle. While waiting for UNPROFOR, she met a large number of refugees in a shed who had had members of their families killed before their very eyes.[291]

---

[288] T. 3818-3831.
[289] T. 3821-3822.
[290] T. 3821-3822.
[291] T. 3823–3824: "Somebody had called out my name, and I was looking all around, and I noticed in Vlado's shed, some of our people. I went across the field between Vlado's house and Drago's house. There's a field there. I went to the shed and I saw a neighbour of mine, her daughter-in-law, her son, two

262. **Witness CC** was woken at approximately 6 a.m., by the sound of shooting and explosives. She saw houses on fire and decided to stay indoors with her family. Then soldiers arrived and started kicking and breaking the window with rifle butts. At that point, the witness and her family left the house. Outside, there were two soldiers - in black uniforms, with rifles and rucksacks, standing in front of the house of Husein Ahmi}. They told them to put their hands up, to bend their heads and not to look around, which they did. The witness saw two soldiers by Husein Ahmi}'s house brutally evicting a woman and her children from their house.[292] She saw another two soldiers on the other side of the house. One soldier had his face painted with black lines and the other had some sort of mask on his face so that only his eyes could be seen. As she left the house, she saw dead bodies lying on the ground two metres from their front door. At the front of the house, she left her father, as she was told to run wherever she could. So she ran by the mosque towards central and Upper Ahmi}i.[293]

263. **Witness DD** lost both her husband and son on 16 April 1993. She awoke to the sound of heavy shooting. She saw flashes outside the window and Muslim houses on fire. Looking out of the window, she saw three or more soldiers, including Drago Josipovi} with a rifle, shooting in the direction of her house. Soldiers started banging on the door, shouting "Nazif, come out, Nazif you balija motherfucker". Children were screaming. Bullets were flying everywhere, and there was a lot of smoke. The witness tried to find some clothes to dress the children, and her husband went downstairs and then came back and said, "Amir, Elma, you should go out too. They are calling you too". At this time, the soldiers, some of whom were masked, broke into the house. They took the family downstairs. The witness's son was then taken aside. The witness jumped at a

---

refugees, also, that was a mother-in-law and a daughter-in-law with two young children, they had killed her husband and son too. They killed them before their very own eyes. I said that UNPROFOR would come and that we could all get out of there. At that time, we heard the UNPROFOR coming".

[292] T. 3873: "Q. The two soldiers in the vicinity of Husein's house, what were they doing? A. One of them stood in front of the house and talked to his sister-in-law, and she was crying and screaming and begging him to allow her to get clothes for her children so that she could change them. He hollered at her and said, "No way. Leave everything behind and run".

[293] T. 3869, Exhibits P259 and 260 show the destruction of Witness CC's house.

person who was not wearing any mask - a very thin man with some black paint on his face - and yelled, "Do not take my Amir away, please, my Amir". She started struggling with the soldier. At that point, Drago Josipovi} came from around the house. He had taken off his mask to wipe off some sweat but then he put it on again. The soldier with whom the witness was struggling became very angry and pointed his rifle at the witness. He was about to shoot the witness, when Drago Josipovi} shouted, "Leave her alone".[294]

264. Next, Witness DD's husband, Nazif, was led away. The witness herself was told to "get lost". She was led away to a barn, where her daughter and some other women were. They were locked in the barn. The soldiers then set fire to her house. The group was told to leave the barn and to go to the house of Slavko Vrebac. Witness DD asked a Croat if she could go to her son, Amir, who may have been killed or wounded, and she did not want him to suffer. But he would not let her. They reached the house of Slavko Vrebac. The wife of Vrebac was "very merry".[295] They stayed there when night fell. They were not allowed even to go to the toilet. They were given wooden frames of couches and sofas, without cushions or other comforts, to sleep on. It was damp. Later they were taken to Sivrino Selo, and then on towards Zenica.

265. **Witness EE** lived in Lower Ahmi}i until 16 April 1993. Her family comprised her husband, daughter (12 years old) and son (9 years old).[296] The first thing the witness remembered was a loud detonation, followed by shooting. She grabbed her children and with her husband tried to go to the bathroom, but the moment she opened the bathroom door, bullets flew through. She returned to the hallway. Then there were "terrible voices" calling on them to open up. They repeated several times "Open the door, this is the police", but the witness and her family kept quiet because they were terribly afraid by now. Then a burst of gunfire shattered the glass and the door. The witness's husband unlocked the other door. She saw soldiers in full military uniform. She recognised the soldiers as the accused Vladimir [anti}, Drago Josipovi}, as well as Zeljo Livanci},

[294] T. 3897-3900.
[295] T. 3901-3904.
[296] Exhibit P274 shows the house's destruction after 16 April 1993.

Marinko Katava and Karlo Cerkez. Vladimir [anti} and Zeljo Livanci} were in camouflage uniform, with the HVO patch and helmets. They took her husband away, whereupon she heard a burst of gunfire. She never saw or heard from her husband again. As her husband was led away he said, "Don't kill my wife and children". The husband was in the clothes he slept in, namely an under-vest, underwear, vest and short pants.

266. One HVO soldier, Stipo Alilovi}, was left to guard her and her children as they went and stood in the corner. Then the other soldiers came back and stared at her and the children. Stipo Alilovi}, holding a grenade, said "What do I do with this grenade?" Zeljo Livanci} told her and her children to "get lost". The witness's mother had also been evicted from her house and was crouching outside, suffering from burns. The witness then went with her mother and two children to hide in a shed. She saw various soldiers around, some of whom were jumping from her verandah. Her house was on fire. She and her mother ran back into the house and managed to put out the fire with a hose. She then ran back and joined her children in the shed. But then her house was again set on fire with incendiary bullets and began to cave in. At this point, the witness saw soldiers outside Ramiz Ahmi}'s house saying, "Come out you balijas so that we can cut your throats. Come out you balijas, we're going to slaughter you".[297] She heard Ramiz Ahmi} telling his wife to come out and saw his house on fire.

267. The witness and her children stayed in the shed until dusk. There was shooting the whole day. Some soldiers came up to the shed, including Drago Josipovi} and Anto Papi}, both in full military gear. They called her out of the shed. Drago Josipovi} said, "Your shed is going to be set on fire now". Drago Josipovi} then told them to go to Anto Papi}'s house, where there were other Muslims, ostensibly for their own safety. She said she did not dare go and asked them to escort her there, which they did. At Anto Papi}'s house, the witness saw men, women and children who were crying, describing how their

[297] T. 4077-4106.

loved ones had been killed. Drago Josipovi} said, "Ah, Musafer has been killed too". Muslim men were sent out to go pick up their dead.[298]

268. Subsequently **Witness EE** was told to leave Anto Papi}'s house and to go in the direction of Zume. She ended up in a house in [anti}i which was a sort of camp. There were Muslims there, full of fear, who had learned of their relatives who had been killed. At one point, two HVO soldiers came in and selected the men from the group, took them out and – as it later emerged – pursuant to orders, killed them.[299] Fatima Ahmi} asked Nika Plavci} what had happened to her husband, Hasim. He told her, "Orders were issued and they were all killed". Then the witness had to go by foot to the Dubravica school where she stayed until 1 May 1993. At the Dubravica school, Usta{a propaganda was prominently displayed on the walls, including the sign of the black legion of the Usta{a.[300]

269. **Witness FF** was awoken at around 5.20 a.m., by two loud detonations. Her husband got up and woke the children. The witness looked out of a window and saw Muslim houses on fire. A bullet came through the window. Then her father-in-law and mother-in-law were at the entrance to their house. A voice told them, "If there are any men in there, they should come out". They left the house. She saw her brother-in-law standing in front of his house. A group gathered. She heard five shots from the shed. It all went quiet after that. A soldier said, "This is Alija Izetbegovi}'s fault for the war breaking out". The witness went to the cellar of Zdravko Vrebac. Women were there

---

[298] T. 4109-4120.

[299] T. 4126–4128: "Two HVO soldiers entered the room. They had the black socks over their heads with just slits for the eyes. All you could see were their eyes. One of them was fairly tall, the other one was a little shorter in build, and as we knew him personally, we concluded that it was Nika Plavci}. We called him Nika ^, that being a picture, and he was a photographer, in fact. ... As Fatima was in the corner with her husband, Ahmi} Hasim, he said, "You, you, you, you, you, let's go". Fatima jumped up and hugged Hasim, and she said, "Please don't take him away. He has a bad kidney and he has to have dialysis. Please don't take him away". "Don't worry about that," they said, "He'll be cured very quickly". Ramic Zenur, his brother Amir, and Mr. Engineer Helug Munir went out. A little boy from Loncari, he was fairly tall and thin, he managed, as the door was here, and the women had lined up against this door, when he left, he hid behind the women and crouched down. And that's how he stayed. He stayed alive by crouching and hiding behind the line of women. ... Q. Did Hasim and the other Muslim men who were taken, did they return at any time? A. No, never".

[300] Shown in Exhibits P277 and 277A., T. 4129-4138.

crying, saying that their husbands and sons had been killed. She stayed the night there. Later she fled, eventually reaching Zenica.

270. **Witness GG** was 28 years old and living with her father (who was away on 16 April 1993), mother and sister on the upper storey of a 2-storey house in Ahmi}i (Zume). She was awoken by shooting. An incendiary bullet entered their living-room and set the sofa on fire, which she tried to put out with water. She tried to telephone for help but the telephone was not working. The witness moved with her family down to the lower storey, via the outside staircase. There they were seen by five armed soldiers, who harassed them by pushing them into the lower storey apartment and cursing their "balija mothers". One of the soldiers was Anto Furund`ija, wearing camouflage uniform with a Jokers emblem on his sleeve, and one black line painted on both of his cheeks. The witness was told to go out to call her neighbours and to see if there were any menfolk. She protested, as there was shooting outside but the soldiers told her and her mother to get out. As she left, she heard one soldier saying into a walkie-talkie, "Everything is going to plan". The witness's mother turned around at one point, whereupon a soldier fired a burst of gunfire at her feet to make it clear to her that she had to keep going.

271. Witness GG walked in the direction of [anti}i. She saw Muslim houses burning. She also saw a soldier pouring something from a canister and flames rising in another part of the house. The witness then stayed at Mira's house. That evening, a Croat neighbour came by and said that it was not safe to stay there and that she should go to her daughter's house. That neighbour and her husband stayed the whole evening with them for their protection. The next day, the witness's mother went back to see her house, and after she had come back she told them that she had seen terrible things.[301]

[301] T. 4360. - "..., she came back all in tears, lost, she was trembling. Then we asked her what she had seen and what had happened. She said that the house had burned down, that she saw corpses in the yard, in our yard. She saw Muhamed Neslanović's corpse there. Behind our house she saw Ibrahim Pezer's corpse, and in front of house, since she went in front of the house of Sefik Pezer, she saw his corpse too".

272. The witness then had to move on to another house, where there were a lot of women and children, and a few men.[302] Anto Papi}, a Croat, was there as a guard, in uniform and with a rifle. While they were there, soldiers came in and took men out to kill them.[303] Then Nikica Plavci}, with a uniform and a gun, came and took them all to Dubravica school, where the witness was held from 18 April 1993 – 1 May 1993.

273. **Witness CA**, who was 58 at the time, heard a detonation at around 5.20 a.m., and immediately thought it had to be connected to what Dario Kordi} had said on the television the day before about waiting for orders. The witness called to her husband to get up. She saw four soldiers coming into her yard, in camouflage uniforms and carrying weapons. They stopped her and asked where her son and husband were. A soldier then threw a bomb into the larder. The witness noticed fire around her son's home. Then a soldier kicked down her door and said "I'll fuck your mother". Two other soldiers entered the house. One soldier took a lighter and set fire to the curtains. When she came back later, her house had burnt down.

274. The soldiers then told her husband to come out and got ready to kill him. The witness pleaded for mercy, and the soldiers let both of them go. They went to their son's house, being pushed along by a soldier with a rifle. There she found her son's children in tears. Her daughter-in-law said, "they're going to kill my children". The witness assured her that they would not. The youngest child was afraid, and said "they killed Dad". The witness went outside and saw her son, Fahran, lying there dead. A soldier said, "I didn't kill him. Alija killed him". The soldiers then said, "Go fuck yourselves". The witness and her husband went towards the La{va River.

275. The witness then saw Drago Josipovi} and Anto Papi}, both in camouflage uniforms and armed. Drago Josipovi} was crying, saying that the witness's deceased son had been like a brother to him. She asked him who did this, and Drago Josipovi} replied

[302] T. 4362.
[303] T. 4362-4364.

that it "must be some higher force" or somebody higher up. Drago Josipovi} arranged for the witness, her husband and grandchildren to be taken to Anto Papi}'s house.[304]

276. Later Witness CA went back to her son's house to collect her son's things and chickens. There was a pool of blood where her son had lain. She asked Drago Josipovi} if she could live in the summer kitchen. Josipovi} replied ".... As far as I am concerned don't go anywhere. But people will come and kill you. I can't do anything, I can't save you. Go and follow your people". She then saw some soldiers, one of whom spoke into his radio saying, "Yes, the operation was successful, they're lying in front of every house like pigs". The soldiers then took away her husband. She tried to stop them but he was taken away with other Muslims. She insisted that a person she knew named Nikica Slikica, who was passing by, tell her what happened to her husband, and Nikica replied that "the order came and they were all killed. Don't even ask, they were all killed".[305]

(c) Burial of the Victims of the Attack on Ahmi}i of 16 April 1993

277. Scores of victims were buried in a mass grave in Vitez on 28 April 1993. **Stephen Hughes**, an UNPROFOR officer, was involved in this mass burial. Three Croat bodies and approximately 96 Muslim bodies were buried. He assumed they had died violent deaths, either from gunshot wounds or from mortar blasts. Of the 96 bodies, he could see only two with camouflage jackets. The rest were civilian males and females of a variety of ages. He also saw some small packages which contained either heads of decapitated bodies or children; he could not see inside the sacks so he did not know which. The burial in the mass grave went on all day and into the evening.[306] The details of the mass grave burial were fully corroborated by **Nihad Rehibi}**, a former member of the JNA, who organised the burial in Stari Vitez on 28 April 1993. Rehibi} testified that the bodies buried were received from the HVO, via UNPROFOR, who acted as an

[304] T. 4557-4577and T. 4592
[305] T. 4565–4568.
[306] Exhibits P299, P300, P301, P302 and P303 show bodies being laid out for identification. Exhibit P299 is a general view of the burial site. Exhibits P295, P296, P297 and P298 show bodies being put into the mass grave. Exhibit P294 shows the mass grave after it had been filled.

intermediary. The corpses were from the Vitez area, mainly from Ahmi}i. Ninety-four bodies arrived that day, although there were more bodies on the list compiled by the HVO.[307] Initially, the bodies would be examined before burial and an attempt made to verify their identities from documents, for example identity cards, found on the bodies. However, as the day went on and darkness began to fall, they had to speed up the burials and the identities of the corpses could not always be verified and it was necessary to rely upon the HVO list alone. Some bodies were in a shocking state, with crushed skulls or knife marks on the necks. There were also a number of burnt or carbonised bodies. According to this witness:

> "Among the bodies, there were very many women. They were aged from all -- I mean, from the youngest to the eldest, there were children of three months, a child of seven years of age, a 12-year-old child, there were old men of 70 and more".[308]

278. In May 1993, UNPROFOR brought additional bodies, which appear on the list of corpses, including the carbonised corpses of Naser Ahmi} (#95 on the list), 7 years old, Elvis Ahmi} (#97 on the list), Edina Ahmi} (#96 on the list) and 3 month old Sejo (#98 on the list).[309] Not all the bodies buried that day were from Ahmi}i, but at least 70 bodies were. Nor were all the people who died in Ahmi}i buried in that mass grave.[310]

(d) Detention of Bosnian Muslims Following the Conflict of 16 April 1993

(i) Vitez Cinema

279. In Vitez, Muslims were detained in the local cinema following the attack of 16 April 1993. Defence witness **Zvonimir Cili}** testified that the conditions of detention of Muslim able-bodied men in Vitez cinema were worse than the accommodation usually

---

[307] Exhibits P307 and P307A are lists of persons buried.
[308] T. 4737.
[309] Exhibit P309 is a video showing the burial. Exhibit P312 shows the names of some of the victims on the memorial: Sukrija Ahmi}, Meho Hrustanović, Aziz Pezer, Sabahudin Zec, Rasim Ahmi}, Nazif Ramiza Ahmi}, Ramiz Seho Ahmi}, Musafer Pušćul, Fahrudin Ahmi}, Naser Ahmi}, Elvis Ahmi}; Edina Ahmi}, Sejo Ahmi}, Abdulah Mehmed Brko.

provided, but not excessively poor and there was no mistreatment. For example, relatives were allowed to bring food to detainees. Other defence witnesses were equally reluctant to admit that Muslims were unlawfully detained and mistreated by the Croats after the events of April 1993.[311] They also pointed out that able-bodied Croats were detained by Bosnian Muslim forces, in Zenica and Mahala (Stari Vitez).[312]

(ii) Dubravica School

280. Those persons who survived the attack on Ahmi}i were moved to a prison camp which had been set up in Dubravica school, where they were mistreated and used, *inter alia,* to dig trenches in contravention of the laws of war.[313] **Witnesses F**,[314] **J**[315] and **Abdulah Ahmi}**[316] spoke of rapes occurring at the Dubravica school. According to **Witness U**, the HVO was in charge of Dubravica school. 150-200 men, women and children, all Bosnian Muslims, were detained in a hall there. They were not free to leave. Witness U stayed in Dubravica school for six days, before he was evacuated by UNHCR because of his wounds.[317]

281. **Witness CA** spent ten days at Dubravica school, where horrible pictures were displayed showing the killing and raping of women.[318] The living conditions were

---

[310] T. 4792: "Q. I just want to clarify one last thing. This list does not contain, as far as you know, does it, the entire list of people who were killed in Ahmi}i on April 16, 1993, does it? A. Yes, that is correct. It doesn't contain all the names".

[311] See, for example, **Vlado Alilovi}**, under cross-examination by the Prosecutor, T. 5586-5587: "Q. But you would concede, therefore, sir, that these numbers of Muslim persons were held in those locations and were not allowed to leave of their own will? A. Yes, I will agree. Q. Did you hear subsequently about such things as detainees being taken to the lines to dig trenches? A. No, I didn't hear that. Q. You didn't hear that? A. No. Q. Did you hear of the transfer of Muslim detainees to the Kaonik camp where they were further detained? A. No, I didn't hear about that. Q. Did you hear about searches and seizures in civilian apartments in Vitez during that period? A. No, I didn't hear about that at an official meeting, but this is possible".

[312] **Vlado Alilovi}**, T. 5608-5609.

[313] **Lt.-Col. Watters**, T. 205-206.

[314] T. 1401.

[315] T. 1872.

[316] T. 307.

[317] T. 3029-3031.

[318] T. 4569-"So when we came up to that classroom it was horrible to see what was written on the pictures. There was a head drawn with the knife through the neck saying we will kill the balijas like this".

terrible. Someone threatened to carve a cross into her forehead. Although she was not beaten, she said "there was lots of fear and we barely survived".[319]

2. The Case for the Defence

282. The Defence have argued that the Muslim forces planned and prepared for attacks on the Croats – both in October 1992 and April 1993 – creating fear on the part of the Croats. By contrast, the Defence maintain that Croat forces – the HVO at least – did not plan, and were not prepared for, any offensive on 16 April 1993.

(a) Croat Unpreparedness for an Offensive on 16 April 1993

283. **Dragan Stojak** testified that the HVO was unaware of imminent armed conflict in Vitez on 16 April 1993. On 15 April 1993, he was at the Information Centre, while his family – his wife, two children and mother - was in Mahala, in Stari Vitez, which was under the control of the BiH army. There were only five Croatian houses in Mahala. Therefore if he, who worked in the information centre, had known there would be hostilities in Mahala, he would have taken his family out and evacuated them to the Croatian part of Vitez. However, **Ivan Taraba** recalled seeing a bunker built, presumably by Muslims, in Mahala, on the outskirts of town, a few days before the conflict of 16 April 1993,[320] which would have warned Croats in Vitez of the possibility of an impending conflict. **Dragan Grebenar**, who worked under Mario Čerkez, the commander of the Vitez brigade, testified that, when he spoke to Mario Čerkez on 15 April 1993, there was no mention of a possible conflict. He said that the Bosnian army launched an assault on 16 April 1993 from the direction of Kuber and Zenica, but that the Croats were unaware that such an assault would be launched.[321] **Witness DA/5** worked for the staff of the Muslim-dominated Territorial Defence of Vitez from May-June 1992.

---

[319] T. 4570.
[320] T. 8745.
[321] T. 6052: "Q. And you had no knowledge of a specific attack or intended attack coming from the Bosnian army prior to being shelled on the morning of the 16th, had you? A. No, no, we hadn't noticed a thing and we hadn't received any kind of information from anyone that there would be an attack that morning. Q. You were completely surprised when the shelling occurred? A. Exactly that way".

She noted, however, that the other Croats were, little by little, leaving the Territorial Defence. She felt that she was being by-passed and that information which she ought to receive as part of her job was being withheld from her, simply because she was a Croat. On one occasion, she was told to leave a meeting of the command of the Territorial Defence because she was the only Croat there.[322] She stated that the HVO Vitez brigade had not even begun to be organised on 16 April 1993. When the conflict did break out on that day, she was sent home, despite her important organisational role in deploying officers to the front line.[323]

284. The Prosecution suggested that this picture of HVO unpreparedness did not fit with HVO directives from Dario Kordi} and Tihomir Bla{ki}, which had been produced in evidence as exhibits and which placed Croat units on a "higher state of readiness".[324] An order entitled "Combat command" dated 16 April 1993 (Exhibit D38/2), 0130 hours, had been presented to Zvonimir Cili}. This order, which warned of the threat of incursion and attack on Vitez itself from "enemy (extremist Muslim forces)", was signed by Tihomir Bla{ki} and was addressed to the commander of the HVO brigade in Vitez, Mario Čerkez. The order stated that the task of Čerkez's HVO forces was "to occupy the defence region to block the villages and prevent all entrances to and exits from the villages". The order went on to state: "In the event of an open attack by the Muslims, neutralise them and prevent their movement with precise fire from P/N (small arms). Time of readiness at 0530 hours on 16 April 1993". Exhibit P336, a report prepared by Zvonimir Cili} on the night of 16-17 April 1993, refers to the "... regrouping of Muslim forces, whereby we could conclude that they will make an attempt at a breakthrough from the direction of Vrhovine in the [anti}i-Ahmi}i direction ... We are doing our best to

[322] T. 5633-5636.

[323] T. 5472-5743: "Q. In that case, Madam, how can we understand that, on the 16th of April, you were at home at a crucial moment for the HVO, when it was apparently in an armed conflict, exposed to a very violent offensive, and you, you were at home? A. Yes, that is exactly right. I was at home. Regardless of the fact that I held a very responsible post, I basically had not started to carry out these duties fully. I simply -- I assume that the people in the brigade command were also taken by surprise by the situation, and I simply at that moment, in order to do something, somebody had to help me to do that. In order to structure the brigade, in order to mobilise. I assume, when the conflict broke out, everybody thought that this was something of a small scale and it would stop in a few days and we would continue to work, so I don't know".

thwart these intentions". However, **Zvonimir Cili}** stated categorically that the crimes committed in Ahmi}i were not committed by members of the Vitez brigade. No Croatian official ever said which individuals or unit were responsible. There were different theories as to who did it. In his report, though, he referred to what happened in Ahmi}i as "combat".

(b) Bosnian Army Offensive on Kuber on or around 16 April 1993

285. The Defence has also submitted[325] that Muslim forces initiated offensives around Kuber – an elevation in the vicinity of Vitez - on 15 April 1993. Several witnesses testified to this effect: **Zvonimir Cili}**, **Dragan Grebenar**,[326] **Rudo Kurevija**,[327] **Ljuban Grubesi}**,[328] **Dragan Stojak**[329] and **Anto Plavci}**[330].

---

[324] Exhibit P343. See also **Witness Rudo Kurevija**, T. 5890–5891.
[325] T. 5034
[326] T. 6080–6081.
[327] T. 5890-5891: "A. On the 15th of April I was at home. Yes, I was at home. In the evening -- this was already in the early morning hours of the 16th of April, the commander called me to the command office by telephone, called me to come to Stara Bila. I think this happened between 2.30 or 3.00 a.m., and all the other members of the command arrived there too. We received information that an attack by the Muslims was expected, and then on that day in the evening of that day, the attack on Kuber took place against HVO positions. The Muslims carried out this attack. So that an attack was expected, and I was instructed, together with the commander of the platoon in my village Mali Mosunj to establish a line of defence in between the houses facing the Muslims. So that's where I went, together with the commander. I engaged some men. We established points among our houses as the border of our houses and Muslim houses. [...] A. Upon my arrival at the command, I think Slavko was there and two more members of the command staff. I think Marinko came later. The commander verbally told us all the information, that he had received orders from the command of the brigade for lines of defence to be set up, and also, he informed us that an attack by Muslims was expected, as well as information that already in the evening hours an attack was carried out by Muslims in the region of Kuber. We were also told at that time that the commander of the Zenica HVO, Zivko Toti} had been arrested, together with his escort, that four members of the escort were killed, and I think there was an eyewitness, a Muslim, that Zivko was still being detained".
[328] T. 6243–6244.
[329] T. 6307–6308: "The elevation of Kuber is on the crossroads between Busovača, Vitez and Zenica, and it is very important because it dominates the entire valley, and from it it is easy to exercise control over the entire town of Vitez and along the communications line between Vitez and Busovača, and it's also easy to reach Zenica from there. Q. Are you aware of the fighting on Kuber in April of 1993? A. Yes. I mostly heard about it and I also read reports of the civilian structures. There was sporadic fighting on the 15th of April in Kuber, and later, of course, it intensified during the 16th and the 17th, and according to Civil Defence reports, there were four persons killed in that area. Q. Did you know any of the persons who were killed? A. Yes, I did. I knew Mr. Livančić".
[330] T. 6915.

286. **Anto Plavci}** testified[331] as to a Muslim attack on Jelinak on 15 April 1993. Jelinak, Loncari and Putis are all on the slopes of Mount Kuber. Jelinak consisted of approximately 100 households – 50 Muslim, 50 Croat. Putis has about 80 households, 20-30% Croat. Loncari has about 70-80 households, comprised of Muslim as well as several Serb or orthodox households. Bakija was inhabited exclusively by Croats and there were about 20 households. These villages are directly adjacent to Ahmi}i.

287. Plavci} testified that the HVO had control of Kuber in 1993, but that there were BiH forces nearby and members of the Territorial Defence. On 15 April 1993, there was shooting from the Kuber area, which resulted in the wounding of some HVO members from Jelinak, who were evacuated. The witness heard that the BiH army had attacked the HVO from Zenica.

288. On 16 April, the fighting in Kuber intensified. The village of Jelinak came under fire from mortar shells. The village was surrounded and the only escape was toward Kaonik. People started fleeing Jelinak on 16-17 April 1993 – there had been fighting all night. On 17 April, the shooting was from all directions, and very close. All the Croats fled towards Kaonik, apart from two old men, one of whom was killed, whilst the other lost part of his leg from an explosion.

289. The BiH army took control of Jelinak on 18 April 1993, and it has been under Muslim control ever since. The same is true of Putis and Loncari. While Muslims who fled the conflict have returned, the Croats have not.

290. When the witness went back to his house in Jelenak on All Saint's Day, he saw that all the Croat houses had been burnt, and that they were abandoned and destroyed. The witness further pointed out that in Jelinak, it was the Croats who kept pigs, not the Muslims, who traditionally do not keep pigs. Thus if pigs were killed in Jelinak,[332] a plausible inference is that they were killed by Muslim forces. The witness also heard that Muslims had set houses in Putis and Bakija on fire around 18 April 1993. He, the

[331] T. 6918–6919.

witness, has not returned to his house to this day. The Prosecution submitted that his testimony was consistent with the whole Kuber area being one big battle-zone between Croats and Muslims, rather than one-sided "ethnic cleansing".[333]

(c) Bosnian Army Attacks on Croatian Villages in the Vicinity of Ahmi}i on 16 April 1993

291. The Defence further argues that the Bosniacs attacked the villages of Počulica, Krušcica, Brdo, Sivrino Selo and Bukina Kuca (Kuca) on 16 April 1993. The following witnesses testified concerning this: **Zvonimir Cili}**,[334] **Vlado Alilovi}**,[335] **Rudo Kurevija**[336] and **Zeljko Papi}**.[337]

292. **Dragan Grebenar** testified[338] that Počulica was shelled by the Muslims on 16 April 1993. Počulica was a village bordering on Ahmi}i with a majority Croat population, surrounded by Muslim villages. Prnjavor and Vrhovine were exclusively Muslim, whereas the upper part of the village of Počulica was mixed and the lower part of the village was populated exclusively by Croats. On 16 April 1993, around 5 a.m., a Croat woman called villagers to warn them that Počulica would be attacked by the Muslims from Vrhovine, Prnjavor and Veternica.[339] Subsequently, the witness testified, Počulica was shelled. The witness then heard the Hodža from the Mosque declaring, "Croats, you have five minutes to surrender or there'll be a slaughter".[340] The Muslims entered the village and the Croats tried to flee. The witness evacuated his house, under

---

[332] See for Počulica, for example, **Dragan Grebenar**, T. 6066.
[333] T. 6934–6935: "Q. In fact, would it -- to the best of your knowledge, Mr. Plavcić, wasn't there, in fact, just the area becoming a large battle zone with damage to both Croatian and Muslim properties? A. That is correct, that on the 18th all houses in the village of Jelinak and Putis, in Putis the Croatian houses and in the village of Jelinak all the houses were burning on the 18th, that's what I heard in Busovača that all the houses were on fire".
[334] T. 5380.
[335] T. 5608–5609.
[336] T. 5930–5931.
[337] T. 6601-6602.
[338] T. 6017–6020.
[339] T. 5948-5961.
[340] T. 5979.

very heavy fire and was hit by shrapnel. He then reached Krizancevo Selo. One Croat was killed "in action", whilest other Croats were taken prisoner by the Mujahedin and killed by them.[341] All forty-two Croat houses, in the lower, Croat part of Počulica were burned down. Some houses were also burned down in the upper part of the village and towards the border with Visnjica.[342]

293. **Grebenar** testified that no Croat houses have since been rebuilt in Počulica nor have any of the 400 Croats who lived in Počulica returned after having been evacuated on 16 April 1993.[343] However, he did not himself see any Muslim soldiers on 16 April 1993 in the lower part of the village nor did he see where the shelling of his village came from; he relied on what people told him to form his opinion that the shelling came from certain Muslim positions; from trenches which had been dug around Tolovići.

294. The witness also admitted that his house had been burned down about a week after the attack of 16 April 1993, and therefore that the Croat houses might have been burned down later in reprisal for the massacres and destruction of property committed against the Muslims in Ahmi}i.

295. The witness testified that the Mujahedin forced Croat captives to dig trenches. He also admitted that he heard that the Croats made Muslim captives do the same.[344]

296. **Zeljko Papi}** also testified concerning the "ethnic cleansing" of Croats by Muslims in Počulica. On 16 April 1993, around 5.30 a.m., the witness was awoken by large explosions coming from the direction of Vitez. He went and hid in his basement with his family.[345] He could not identify who was shelling whom.[346] During the attack,

---

[341] Anto Kristo was killed in action, apparently by a sniper within the village; the witness's neighbours Pero Papi}, Ivo Vidovi} and Jozo Vidovi} were killed while prisoners, T. 5994-5995. A Muslim from the village was also killed on 16 April 1993.

[342] The burnt houses are shown in videotape D60/2. The English translation is D60A/2, and the Bosnian-Croatian-Serbian ("B/C/S") translation is D60B/2.

[343] T. 6017.

[344] T. 6066.

[345] T. 6572-6573.

[346] T. 6601-6602: "Q. ... throughout that particular period when you heard these detonations, for the most part you could not identify who was firing at who or from where, would that be correct? A. I was not able

the witness saw armed soldiers going around "clearing" the Croat houses. He believed from the insignia that they were Muslim armed forces.[347]

297. The Croats were ordered out of their basement with their hands up. Some old people were left in the basement, where conditions were terrible. The witness's grandmother, who was over 80, died there. The others were marched in a column to Prnjavor. There the witness was imprisoned in the Community Centre. The army and police took him from there to dig trenches in Sivrono Selo. The Croats were occasionally used as human shields against shooting from the Croatian side.

298. The food and conditions at the community centre were terrible – the detainees had to lie on a concrete floor and there were insufficient blankets for the thirty people incarcerated there. They had to lie down in their clothes. They were often provoked by the soldiers. One soldier beat them up and made them shout Muslim prayers.

299. On 23 or 24 April 1993, in the community centre the witness was shot and was eventually taken to hospital, where he stayed until 13 May 1993 when he was exchanged.

300. The witness never returned to Počulica because Muslim refugees were now living in the Croat houses there. The Catholic church and graveyard in Zvisda were desecrated – the chapel was burnt, the gravestones broken.

301. The witness declared that he had seen foreign Mujahedin on 16 April 1993.[348]

---

to identify them, no. I just heard detonations from the direction of Vitez, but I did not know what was happening".

[347] T. 6574. "At that moment uniformed soldiers of the Muslim nationality, in groups of about five to six men, there were quite a few groups made up of five to six men, and they took control and surrounded the Croatian houses, and their tactics were first to throw devices which led to strong detonation. From these explosions you could hear glass being shattered and things being destroyed in the houses".

[348] T. 6592-6593: "Q. And how did you know they were Mujahedins? A. Well, they didn't hide the fact. They had the scarfs that they wore. They did not understand Serbo Croatian and they were dark skinned compared to us that is. But, as I was born there, I knew, at least by sight, all the locals, including Počulica and Prnjavor from Vrhovine and Vjetrenica and further afield as well. Q. Did they instil fear in the Croats? A. Yes. Q. In what way did they do this? A. Well, they made us afraid of them because when they would

(d) The Attack on Ahmi}i

(i) The Eve of the Attack – 15 April 1993

a. The Kidnapping of Zivko Toti} and the Killing of his Escorts

302. In addition to the attacks on the villages, the kidnapping of Zivko Toti} and the killing of his bodyguards on 15 April 1993 is said to have had a disruptive effect on relations between Muslims and Croats. Toti} was the head of the HVO Military Police in Zenica.[349] Four or five of his bodyguards were killed during his kidnapping, allegedly by Muslim forces.[350] Toti} himself was, however, eventually released. [351]

b. 15 April 1993 in Ahmi}i

303. According to the Defence, and contrary to the assertions of Prosecution witnesses, there were no harbingers of the attack on Ahmi}i on 15 April 1993. Defence witnesses stated that everything was as normal that day. One witness (**DC/1,2**) described how her children went to school as usual, and that she went to Ankica Kupre{ki}'s house to greet her upon her return to the village after being in Germany where, again, everything was normal.[352] Most defence witnesses testified that they were not aware of the impending conflict.[353]

304. **Ankica Kupre{ki}** returned from Germany to Ahmi}i on 15 April 1993, following reports from her husband that the situation in Bosnia had returned to normality. She said there were no real fears of a Muslim offensive in Vitez at the time, even though she had heard about the Toti} kidnapping incident, and had seen a lot of Muslim roadblocks *en route* to Ahmi}i. That night people came to visit her and the party went on

---

pass by our houses, they would very frequently express their type of greeting, and other forms of religious exclamations. So that part I understood".

[349] **Lt.-Col. Watters**, T. 147.

[350] The videotape showing this episode is D34/2 the Croatian translation, D34A/2, and the English translation D34B/2.

[351] **Jadranka Toli}**, T. 6156-6158.

[352] **Witness DC/1,2** , T. 8523.

until midnight. No Muslim neighbors visited her but the witness did not know why this was so. During the conversations of that night, nobody mentioned any possible danger.[354] **Gordana Cui},** who visited Ivica and Ankica Kupre{ki} that night, also testified that there was no discussion of an imminent attack.[355] **Mirko Saki}** testified that the men at the party did speak about the problems in central Bosnia, including the kidnapping of Commander Toti}.

305. **Ivica Kupre{ki}**,[356] the husband of Ankica Kupre{ki}, picked up his wife at the airport on 15 April 1993. He was warned of the tensions caused by the Toti} kidnapping on 15 April 1993 when he passed through HVO and BiH army roadblocks. He arrived home around 6:30 p.m., and subsequently the above-mentioned gathering took place at his home until around midnight.

306. **Niko Saki}** testified that he had no idea that there would be an attack on 16 April 1993, otherwise he would have warned his Muslim neighbours.[357]

(ii) That the Attack on Ahmi}i was not Planned by the HVO in Advance

307. The Defence have called witnesses to prove that the HVO had no foreknowledge of the attack which was launched on 16 April 1993.

308. **Witness DA/5**, who at the relevant time was working to organise the HVO's Vitez brigade testified that on 15 April 1993, she had heard no mention of an imminent attack by the HVO.[358]

---

[353] **Ljubica Milicevi},** T. 7305; **Zdenko Raji},** T. 7402; **Dragan Vidovi},** T. 8403; **Zdravko Vrebac,** T. 7817-7818.
[354] T. 7860–7862.
[355] T. 8154: "Q. So when you were in that room where everyone was, what was the discussion about? Were they talking about that there's going to be a war tomorrow, they need to cleanse Muslims from Ahmi}i, or were they discussing some other topics? A. Well, these were just casual topics. We remained in Ivica's house for a short while".
[356] T. 7961-7967.
[357] T. 8312–8313.
[358] T. 5715.

(iii) The Attack as a Military Operation

309. In contradiction to the depiction of the Ahmi}i massacre as the product of a Muslim assault for which Croat forces were unprepared, the Defence has at the same time argued that Ahmi}i was of strategic value, and therefore a legitimate military target. **Vlado Divkovi}** said that Vitez was of strategic value to the BiH army, in particular because of the Vitezit factory, of which he was the manager, which supplied both the HVO and the BiH army in 1992-1993 with *materiél* such as casings.[359] Similarly, it would have been very dangerous had the Vitez factory been shelled or fallen into enemy hands.[360]

310. The Defence denied that Ahmi}i was targeted because of its religious significance. **Zvonimir Cili}** stated that Ahmi}i was not special in terms of Islam. If anything, the town was known merely as being more urban than other villages in the area.[361]

(iv) Bosnian Croat Eye-witnesses to the Events in Ahmi}i of 16 April 1993

311. A large number of defence witnesses have been called to testify as to what happened in Ahmi}i on 16 April 1993. While the Muslim inhabitants of Ahmi}i uniformly relate a story of violent eviction from their houses and the murder of their loved ones, the Croat inhabitants have a different, but equally uniform, account of the conflict. The Croat inhabitants of Ahmi}i were generally warned of an impending attack in the very early hours of 16 April 1993, if not earlier. **Dragan Vidovi}** explained that around 2-2:30 a.m., on 16 April 1993, he had a telephone call from Nenad [anti} saying that there was a problem and he should go to the house of Jozo Livanci}. When he arrived there, various people were already gathered. Ivica Vidovi}, who was in charge of civil defence in Ahmi}i-[anti}i-Pirići, said that there was some information that the

[359] T. 5795: "Q. Do you consider Vitez to be of particular significance for the BiH army because of this strategically important factory? A. That is quite evident. There can be no question that it was an extremely important locality strategically". See also Exhibit D55/2 (invoices).
[360] T. 5812-5813 and T. 5836-5837.
[361] T. 5252.

Muslims were about to attack and that the Croats should take themselves and their families to a safe place.[362] Dragan Vidovi} then went and woke up various Croats and told them to go to the shelters. He took his family to the shelter in Niko Saki}'s house.

312. **Ivica Kupre{ki}** was awoken by Dragan Vidovi} at 4 a.m., and warned of a possible attack by the Muslims; he was told that he should take his family to a shelter. He woke his wife, Ankica Kupre{ki}. She packed some clothes and food and left for the shelter at about 4:55 a.m. She went to the house of Dragan and Jelena Trajanovski (the so-called Vrebac shelter). She was one of the first to arrive there. Mirjan Kupre{ki} arrived five to ten minutes later, pushing his sick mother in a wheelbarrow, accompanied by his wife and their two children. Zoran Kupre{ki} also came to the shelter. **Ankica Kupre{ki}** stayed there until 17 April 1993 when she was evacuated to Donja Rovna.[363] She was told the conflict was the result of an attack by the Muslims on Mahala. According to the witness, the shooting continued on 17 April 1993 as well[364]; in other words, it went on for two days.

313. **Ivica Kupre{ki}** returned to his house after having taken his family to the shelter, and he could see smoke and flames everywhere. He saw soldiers going in the direction of Vlatko Kupre{ki}'s house. He also saw Zoran Kupre{ki} and Mirjan Kupre{ki} evacuating their families. He hid in a boiler room near the Kupre{ki} houses. Two soldiers ran in, one in black, one in a camouflage uniform.[365] The soldiers told him to run to his house to get brandy for them. They said they were Jokers.

---

[362] T. 8424-8425: "Q. Can you tell us what Ivica Vidović, Jevco, told you what (sic) to do? A. He explained that there was some problems, that it was possible that we would be attacked by the Muslims, and that I should go and tell my family and my other neighbours and that I should take them to shelters. He told me, since it was on my way, to drop in to Niko Sakić's house and tell him that he should do the same in his area, to do what I was to do in my area".

[363] T. 7871: "Q. Then when did you leave this shelter and where did you go to? A. Then they told us that the Muslims, the Mujahedin had barged into Krtina Mahala, and many women and children down there were running. They were crying and screaming, and they were barefoot and hardly -- they hardly had any clothes on. [...All] these people who ran out of Krtina Mahala were evacuated to Donja Rovna".

[364] T. 7875–7876.

[365] T. 7979-7980: "They had automatic rifles with them, and they had rounds of ammunition and several hand grenades. They had black bands over their foreheads, and they had paint on their faces. One of them had an M-48 rifle slung over his shoulder".

314. **Milutin Vidovi}** was awoken at 4.30 a.m., on 16 April 1993 by his father. He thought it was a false alarm as there had been many before. All his Croat neighbours were gathering in front of his house. Zoran and Mirjan Kupre{ki} passed with their families, moving in the direction of Zume, and then returned. After the shooting started, the witness, Zoran Kupre{ki} and others went in the direction of a depression below the Kupre{ki} houses referred to as Dolina.[366] Several local Croats are alleged to have spent most of the day there, including Milutin Vidovi}, Zoran Kupre{ki}, and Mirjan Kupre{ki}.[367]

315. After about fifteen minutes in the depression, the group of men saw smoke rising from the direction of the Kupre{ki} houses. Between 9 a.m. and 10 a.m., Zoran Kupre{ki} and the witness went to see their families. They stopped by Milutin Vidovi}'s house first and went to the cellar. Milutin Vidovi} saw his and other families there. Zoran Kupre{ki}, Mirjan Kupre{ki} and Milutin Vidovi} then went in the direction of Zume to see the Kupre{ki} families. They met Anto Vidovi} on the way, who told them that one of their friends, Fahran Ahmi}, had been killed and "Mirjan Kupre{ki} literally started to cry, because they played in the band together and they were practically inseparable".[368]

316. On 18 April 1993, the group in the depression was taken by military policemen to some sort of front line in Pirići to dig trenches. It was the first time that they saw that the Muslim houses had been burnt down and that there were dead Muslims. Enver Sahi} was one of them. Zoran Kupre{ki} cried because they had been friends.[369]

---

[366] T. 7493. **Witness BB,** T. 3821.
[367] See video produced in evidence by **Dragan Vidovi}** showing the depression (Exhibit D105/2, D106/2).
[368] **Mirko Saki}**, T. 7628.
[369] **Dragan Vidovi}**, T. 8446: "Q. Did you talk with the Military Police who brought you up there? A. Yes. About 20 metres before we reached the place where we stopped, one of those two said to us to guard that line well, and I quote him: "Because if the Muslims break through that line they will do to you the same that we did to them". Q. When you say "we", who do you mean? A. Those two military police members". - The witness dug in there and stayed there until the end of the war. The group of armed soldiers that went by had white belts, so he assumed they were military police. All had their faces painted, apart from Mirjan [anti}, a local whom he recognised. On 18 April 1993, they received instructions from the Military Police to dig trenches in Piri}i.

317. Croat inhabitants of Ahmi}i who had not been warned earlier of the impending conflict stated that they had been woken around 5:30 a.m., on 16 April 1993 by heavy gunfire. According to Croat witnesses, the gunfire apparently came from the direction of Busovača and Ahmi}i.[370] **Ivo Vidovi}** went out to the street where he could see people fleeing and he asked them what was going on. They replied that Muslim units had attacked Ahmi}i and that they were fleeing to a shelter. He fetched his family and also went towards a shelter.[371] Ljubica Milicevi} also took her children and left her house, first towards the woods, and then to a shelter. Goran Males was woken up by his mother, who had heard the shooting. Realising the seriousness of the situation, Males went to Rijeka to protect his farm. He went to the area called Cerveno Brdce, a defence line on a hill, where he stayed throughout the war.

318. **Zdenko Raji}** received a telephone call from Karlo Grabovac informing him that a conflict had broken out in Ahmi}i. He was ordered to go to Cerveno Brdce, on high ground some 200-300 metres from his house. He was tasked with seeing that the Muslims did not advance from the Vraniska area. The line of defence was established at Cerveno Brdce and covered about four kilometres. There were approximately 130 men at the defence line, including Goran Males. **Zdenko Raji}** pointed out the importance to the Croats of holding Radak bridge near Rijeka, since the Muslims blocked the road between Busovača and Vitez at Buhine Kuce.[372] Traffic had therefore to go through Rijeka and pass over Radak bridge, as the only way to get to Busovača via Nadioci. The witness stated that the Croats in the area would have been completely cut off if the bridge was inoperable, so units were sent to protect it from sabotage by the BiH army.

---

[370] **Ivo Vidović,** T. 6949.

[371] T. 6950: "Q. Where did you go with your wife and children, to which shelter? A. I started toward the house of Jozo where all the others had been going because this had been our shelter before. When the Serbian planes flew over, we always took shelter there. ... I stayed for about ten minutes, then I went out to see what was going on and I met other people coming to the shelter. I talked to them about what was going on, because we didn't know what was happening. Q. Did you meet anyone who told you to go somewhere? A. I met Nenad Šantić, the commander of my village guard. Q. What did Nenad Šantić say to you? A. Nenad told me that I had to go and defend the bridge, Radakov Most, immediately'.

[372] T. 7407.

(e) Casualties on Both Sides in Vitez and Ahmi}i on 16 April 1993

319. **Dragan Stojak** testified that 1,300 – 1,400 Croats were killed during the conflict in Vitez and that almost 5,000 were wounded.[373] This figure, however, was for the whole war period, so it included those killed in the war with the Serbs. Under cross-examination by the Prosecution, it appeared that very few Croats died on 16 April 1993,[374] despite the witness's contention that the fighting on that day in Mahala was very intense and that Croats were killed there, including one who had had his throat slit.

320. **Rudo Vidovi}** and other defence witnesses consistently emphasised that there were casualties on both sides in Ahmi}i on 16 April 1993. However, while no defence witness contested that more than one hundred Muslims died in Ahmi}i on that day, only one Croat death is consistently mentioned, namely that of Mirjan [anti}.[375] **Vlado Alilovi}** testified that five Croats were killed in Ahmi}i on 16 April 1993; however, he could name only Mirjan [anti}, whom he knew. Moreover, whereas the vast majority of Muslim victims were civilians, Mirjan [anti} was a soldier.

(f) The Jokers and/or a Special Unit Committed the Attack on Ahmi}i

321. Many defence witnesses from Ahmi}i testified to having seen a large group of 30-40 armed soldiers in Ahmi}i on the morning of 16 April 1993, moving about at around 5 a.m., from Zume in the direction of the Kupre{ki} houses.

322. **Milutin Vidovi}** described seeing thirty well-armed individuals as he went to Niko Saki}'s shelter at 5 a.m., on 16 April 1993. The soldiers were in camouflage uniforms, with blackened faces and automatic rifles. The witness said they "looked like

[373] T. 6319.
[374] Exhibit P337 shows that only 2 HVO soldiers died in Vitez on 16 April 1993.
[375] See #435 on Exhibit P337.

something out of a ninja film".[376] The soldiers also had white belts and Military Police insignia.

323. **Dragan Vidovi}** testified that he saw a group of soldiers that morning which appeared to be Military Police.[377]

324. **Witness DC/1,2** saw a smaller group of soldiers: "They were all wearing camouflage uniforms. They were all in black, their faces were painted, all smeared. And I was so frightened [...]".[378]

325. Other defence witnesses who testified to seeing this group of soldiers in the early hours of 16 April 1993 moving from Zume towards the Kupre{ki} houses include **Mirko Saki}** [379] and **Niko Saki}**.[380]

---

[376] T. 7513.

[377] Note that **Witness E** recognised a soldier who worked in Vlatko Kupre{ki}'s Sutre store. T. 1270: "[...] Q. Can you please tell this Court where you felt you had seen that person before? In what circumstances? A. Well, this person that I have just described, I went to the Sutre shop cellar twice, three times, and there I met a similar person. [...]. **Dragan Vidovi}** said that Mirjan [anti}, whom he saw in the group of armed soldiers, used to work at Vlatko Kupre{ki}'s store, T. 8428 - 8429: "He was in the warehouse often. He would come to Vlatko Kupre{ki}'s warehouse often, and he knew the place. He moved around a lot. [...] Q. Could you tell us whether that shop, [which] was in Vlatko Kupre{ki}'s warehouse was the only shop that operated in those three villages of [anti}i, Pirići, and Ahmi}i? A. Yes, at that time, it was the only one that was working, so almost all the neighbours would come to the shop and buy the food that they needed".

[378] T. 8529.

[379] **Mirko Saki},** T. 7614–7615, said that on the morning of 16 April 1993, shortly after he saw Zoran and Mirjan Kupre{ki} pass with their families moving in the direction of Zume, maybe five or ten minutes after that a group of about 25 or 30 armed men appeared. Some were camouflaged, some were in black uniforms. They were fully armed, with RPGs, some with their faces painted in dark paint. The witness recognised one man, Mirjan Šantic. Some had white belts, which suggested a Military Police unit. They came from the direction of Zume, and went towards the Kupre{ki} houses.

[380] **Niko Saki},** T. 8263–8265, saw 30-35 well-armed, uniformed soldiers pass by his house around 5.30 a.m., on 16 April 1993. Their faces were painted; each had two weapons. They went in the direction of the warehouse of Vlatko Kupre{ki}. They had white belts and pistol casings, holsters and some kind of coloured bands tied to their shoulders. Saki} also mentioned that there were Muslim as well as Croat families in the shelter of Niko Vidović on 16 April 1993 (the witness moved from the Vrebac shelter to the Vidovi} shelter at around 5 p.m., on 16 April 1993 because they were told it was safer) and thus the Muslims were not discriminated against: "Q. Who did you see in the shelter? Did you see both Croats and Muslims, and who were they? A. There were both Muslims and Croats in the basement. From the Muslims, there were three families. ... Q. Were the Muslims who were in the shelter with you also afraid, in the shelter of Niko Vidović, the Bilici and the Strmonja families? A. They were not afraid of us, the neighbours, but they were afraid just because of the gunfire, but I don't think that they would have been there if they had been afraid of us. Q. Did they know that the family -- the Ramic and the Strmonja families were in that shelter? A. Yes, they did, and from my house, from Mirko's apartment on the first

326. **Ivica Kupre{ki}** saw two soldiers possibly belonging to this group as he hid in the boiler room near the Kupre{ki} houses.[381] "They had automatic rifles with them, and they had rounds of ammunition and several hand grenades. They had black bands over their foreheads, and they had paint on their faces. One of them had an M-48 rifle slung over his shoulder".

327. The accused **Zoran Kupre{ki}** gave evidence before the Trial Chamber. He stated that by April 1993 the situation was not good: there had been talk about crimes against Croats in Dusina and La{va and he had heard rumours that there were Muhajedin in the vicinity of Piri}i. There were numerous refugees in Ahmići. Soldiers fired weapons in the air. There was apprehension but Zoran Kupre{ki} was not afraid of his neighbours.[382]

328. He said that he was at work until 2 p.m. on 15 April 1993 and then went into Vitez for a coffee with Senad Topoljak and Dragan Grebenar. Just before dusk his uncle Ivica brought his wife from Split. The accused and his wife went to Ivica's house that evening after 8 p.m., and stayed for half an hour. Zoran Kupre{ki} then went home, and to bed about midnight.[383]

329. When cross-examined about the evidence of Witness V, Zoran Kupre{ki} said he saw nothing of what Witness V claimed to have seen outside Zoran Kupre{ki}'s house; nor did anyone else mention it. None of the Kupre{ki}s left that night.[384]

330. **Mirjan Kupre{ki}** also gave evidence. He testified that on 15 April 1993 he was at work in the Sutre shop in Vitez. Friends came to the shop, such as Zdravko Vrebac and Veljko Cato. Mirjan Kupre{ki} finished work at 5 p.m. and went to the café where

---

floor, Mirko came and Zoran came, and they called some woman called Ranka who used to work in UNPROFOR with ^, to make the Bilic and Strmonja families, to get them out of there. I don't know if they succeeded in that. Q. Who told them to call UNPROFOR? A. Because they could see them there -- I don't know who told them. I talked to them and I said it would be good to get those families out of there".

[381] T. 7979–7980.

[382] T. 11273-11275 and T. 11458-11459.

[383] T. 11264-11271.

the musicians usually met. He noticed nothing unusual. About an hour and a half later he was taken home by Zdravko's cousin. There was only the regular checkpoint on the road and nothing out of the ordinary. When he arrived at home he found his son was ill. He went to Ivica's house and returned at 11 p.m.[385]

331. The accused **Vlatko Kupre{ki}** testified that he left with Ivica on 14 April 1993 for Split in the latter's car.[386] They arrived at Split at about 12 noon and bought salt, jeans and sneakers, all of which they put in the boot of the car. At about 9 p.m., they met Ivica's wife Ancika at the airport and spent the night in Baska Voda.[387]

332. On 15 April 1993, Vlatko Kupre{ki} arrived in Ahmići at about 6.30 p.m. He unloaded and prepared the goods which were to be delivered to Travnik the next morning. There were no soldiers at Vlatko Kupre{ki}'s house or the shop that evening.[388] He had nothing to do with the attack and in no way helped with the preparations.[389] He denied having been outside the Hotel Vitez on 15 April or having been,[390] on 15 April, in the company of a group of soldiers, in front of his shop with soldiers, or on the balcony of his house.[391]

3. Findings of the Trial Chamber

333. The Trial Chamber considers that the Prosecution has adduced convincing evidence to show that the attack on Ahmići on 16 April 1993 was planned by HVO forces and the special unit of the Croatian Military Police called the Jokers. The Croatian inhabitants of Ahmići, or at least those of them who belonged to the HVO or were in contact with Croatian armed forces, knew that in the early morning of the 16 April 1993,

---

[384] T. 11470 and T. 11472.
[385] T. 11599-11603.
[386] T. 11867.
[387] T. 11764-11766.
[388] T. 11767-11769.
[389] T. 11797-11798.
[390] T. 11810.
[391] T. 11802 and T. 11817.

Croatian forces would initiate a massive military attack. It is plausible to maintain that they acquired the conviction that an attack would be carried out at least on the occasion of the meeting that was held around 2.30 a.m., on 16 April, in Jozo Livancić's house. The Trial Chamber regards as credible the evidence led by the Prosecution to the effect that by 15 April many signs already indicated that a military operation was in the offing, and that many Croats were aware of this.

334. The Trial Chamber finds that the attack was carried out by military units of the HVO and members of the Jokers. The able-bodied Croatian inhabitants of Ahmići provided assistance and support in various forms. Some of them took part in the military operations against the Muslims. It is also true, however, that a few Croatian inhabitants of Ahmići endeavoured to save Muslim friends or neighbours by prompting them to escape and helping them in such attempts, or at any rate by providing them with suggestions as to how to avoid being killed.

335. The attackers targeted Muslim civilians and their houses. The Trial Chamber considers it to have been proved that there were no Muslim military forces in Ahmići nor any military establishment belonging to the BiH army. In addition to the men not of military age, the elderly, women and children, there were also able-bodied Muslims who were members on leave from the BiH army, or reservists who participated in the village guards. When the Croatian forces initiated the attack, not more than 10-15 Muslims in the upper part of Ahmići and not more than 10-15 Muslims in the lower part of the village responded by the use of arms. Given the patent disparity in number and in military equipment between the combatants, the Muslim response was clearly directed only toward the protection of a few houses where some survivors of the initial attack had taken shelter. Possibly the Muslim combatants also hoped to limit as much as possible the massacre of civilians.

336. The purpose of the attack was to destroy as many Muslim houses as possible, to kill all the men of military age, and thereby prompt all the others to leave the village and move elsewhere. The burning of the Muslim houses and the killing of the livestock were clearly intended to deprive the people living there of their most precious assets. It should

be noted that, as convincingly proved by the testimony of a court expert witness, the Norwegian anthropologist **Dr. Bringa**,[392] the house and livestock had for their owners not only economic value, but also and probably even more importantly, emotional, psychological and cultural significance. The house represented the moral unity of the household and the moral character of its members. For the man as a father, the house he managed to build symbolised his social value, his commitment to his family and to their future well-being. For the women in particular, due to the communist tradition of repression of public religious life, the house was also the place where religious and ritual life could unfold. In addition, the house was a very important place for socialising; the seat of social links with other people. In short, to attack one's house meant to attack one's whole being.[393] Also the livestock, in addition to their economic value, took on a symbolic significance (for instance because Croats had pigs and Muslims did not).[394]

337. The Trial Chamber also finds that the attacks carried out on the Muslim inhabitants of Ahmići constituted a form of "personalised violence", as defined by Dr. Bringa; that is, violence directed at specific persons because of their ethnic identity.[395]

338. In short, the Trial Chamber finds that the Croatian attack of 16 April 1993 in Ahmići was aimed at civilians for the purpose of "ethnic cleansing". Whether the forced expulsion of Muslims from Ahmići was motivated by the strategic purpose of removing a Muslim pocket as the route between Busovača and Vitez, or was instead conceived of as a retaliation against the attacks by Muslim armed forces on Kuber and a few

---

[392] T. 10928-10933.

[393] As **Court Witness Bringa** put it, "the house you managed to build throughout your lifetime, when that's destroyed it's not only a physical thing that's destroyed, but it feels -- it's an attack on your whole being because you put so much into it" (T.10932).

[394] T. 10933-10934.

[395] **Court Witness Bringa** illustrated this type of violence by citing a Muslim woman of another village who had told the witness that she was not scared of shells or grenades, "because there is just death and it is immediate. What I am terrified of are the *pjesadija*, the foot soldiers who come into my house, force themselves into my house. Maybe they rape, they kill your children in front of your eyes. F...ğ Shells don't ask me my name" (T. 10985-10986). "That's the point" -- observed the witness --"because from your name you can usually tell which ethnic identity you have" *(ibid.)*. According to this witness, the foot soldiers mentioned by the Muslim woman "attack their F...ğ very being F...ğ the sense of their identity, by going in and attacking them personally" (T. 11016).

predominantly or exclusively Croatian villages of the area is a question that the Trial Chamber may leave unresolved for the purposes of this case.

IV. THE ROLE OF THE ACCUSED

339. In determining the role of the accused, the Trial Chamber has kept at the forefront of its consideration the following:

(a) The presumption of innocence embodied in Article 21 of the Statute which provides that the accused should be presumed innocent until proved guilty. This means that the burden of proof is on the Prosecution and before the defendant may be convicted of any offence the Prosecution must convince the Trial Chamber (beyond any reasonable doubt) of the defendant's guilt.

(b) The principle that the case against each accused must be considered separately. The fact that the accused have been tried together does not mean that their cases should not receive separate consideration. Accordingly the Trial Chamber has given separate consideration to the case of each accused.

(c) In cases where the Prosecution relies upon identification evidence, the Trial Chamber bears in mind the need to proceed with caution in connection with such evidence, particularly in cases where a witness obtained no more than a fleeting glance of a suspect. For instance, in the leading English case, the Court of Appeal pointed out the danger inherent in such evidence: i.e. that a witness can easily be mistaken about identification and that an honest but mistaken witness can be a convincing one.[396]

(d) All the accused are of good character and have called evidence to this effect. Due weight has been given in each case to this factor.

(e) The accused, Drago Josipović, Vladimir Šantić and Dragan Papić, did not give evidence. It is their right not to do so. As already noted the Statute encapsulates the presumption of innocence in Article 21(3). The Statute also provides that an accused

shall not be compelled to testify against himself: Article 21(4)(g). Accordingly, no inference is to be drawn from the fact that these accused did not give evidence.

340. The Trial Chamber will now consider the case involving each accused.

A. Dragan Papić

1. Introduction

341. Although named fifth in the indictment, it will be convenient to deal with the case involving this accused first since he is charged only in Count 1. The Prosecution case against Dragan Papi} is that he played an active role in the armed conflict in October 1992, and that thereafter he was an active participant on the Croatian side, that he made preparations for the conflict on 16 April 1993 and that he took part in that conflict. The Defence case is that the accused was non-partisan, and that he played no active part in either conflict.

2. Background

342. Dragan Papi} is aged 32, having been born on 15 July 1967. A forester before the war, he lived with his family (including Ivo, his father) on the main road in Ahmi}i, not far from the junction of the road leading to Lower Ahmi}i. He is listed in the Register of the HVO Vitez Brigade as being a reservist between 8 April 1992 and 15 January 1996.[397] He was described by **Witness D** as a "good neighbour" before the war,[398] but another neighbour, **Abdulah Ahmi}**, testified that during the war he "changed completely".[399]

---

[396] *R v. Turnbull* [1977] QB 224.
[397] Exhibit P353.
[398] T. 1026.
[399] T. 261.

343. **Abdulah Ahmi}** testified that during a conversation in 1991, Dragan Papi} told him that he was studying German fascist literature, and that he supported the fascist method of destroying Jews and other nations; that he admired Hitler as a military leader who had organised the army and people well. Dragan Papi} said that it was necessary to apply this among the Croats.[400]

344. Prior to 16 April 1993, Dragan Papi} invited one of the refugees in Ahmi}i, **Witness A**, to his house for a chat and told him that he had been at the front as a sniper in the Blackshirts Unit. Dragan Papi} reproached Witness A and his family for being in Ahmi}i as refugees.[401]

345. On the other hand, his younger brother, **Goran**, said that Dragan Papi} was not a member of the HVO, and was not interested in politics. He was friendly with Muslims.[402] This evidence was supported by that of Dragan Papi}'s cousin, **Pero Papi}**[403] and **Goran Males**.[404] Another witness said that he had not heard Dragan Papi} express any negative attitude towards Muslims, who were willing to have their cars repaired by him, and that he went to Muslim funerals.[405] Statements were also produced from a family friend and a Franciscan friar, a parish priest in Vitez. They speak of Dragan Papi} as a friendly man with an easy-going nature, on good terms with his neighbours.[406] Another witness who knew him said that he was a hard worker who joked a lot and was not violent.[407]

---

[400] T. 261-262.
[401] T. 539-545.
[402] T. 7040-7045.
[403] T. 7208-7210.
[404] T. 7268.
[405] Testimony of **Ivo Vidović**, T. 6974-6977, supported by **Pero Papić**, T. 7208 and T. 7241.
[406] Exhibits D29-30/5.
[407] Evidence of **Rudo Vidović**, T. 6683.

3. His Conduct During the Armed Conflict on 20 October 1992

(a) Prosecution Evidence

346. Several witnesses gave evidence concerning the participation of Dragan Papi} in the armed conflict in October 1992. **Mehmed Ahmi}** gave evidence that Dragan Papi} fired at him and his house with an automatic weapon. The witness owned a shop on the main road opposite the Papi} house where he lived with his family above the shop: he and Ivo Papi} had been close as the latter was his neighbour and plumber. On 20 October 1992 at 5.30 a.m., the witness awoke to an explosion. At 7.30 a.m., he and his wife opened the shutters of their house to be met with a burst of gunfire from the Papi} house. The witness saw Dragan Papi} open fire from the front right upper floor window of his house. Dragan Papi} was wearing a black uniform and was using an automatic rifle.[408] Firing then started from all sides and the roof was set on fire with tracer bullets. At about 4 p.m., there was a lull in the shooting and the witness escaped to his father's house. To do so he crawled with a four-year-old child under his arm, following female relatives. Soldiers opened fire on him from the wood near the Papi} house (about 150 metres from the witness's house). Among the soldiers who were shooting at him he saw Dragan Papi}, who was using an anti-aircraft machine gun.[409] In cross-examination, it was pointed out that in his statement, the witness had said that it was the HVO who were firing the anti-aircraft guns at him, and not Dragan Papi}. However, the witness stated that he could observe and crawl with his child at the same time.[410]

347. The same day, after the shooting, when another prosecution witness, **Fahrudin Ahmi}**, a neighbour of the Papi}'s, was on his way to his house, he was stopped by Dragan Papi} and another man and told that he had to ask Slavko Skoro for permission to return home. They were dressed in camouflage uniform and were standing near a bunker

[408] T. 646, T. 650-652 and T. 670.
[409] T. 654-655, T. 674-677 and T. 692-693.
[410] T. 695-696, T. 692-693.

and a machine gun. [411] The next day Dragan Papi} and the other man came to the witness's house and asked "Why don't you monkeys surrender?"[412] Dragan Papi} had a bomb fuse with him. He said to the witness that unless weapons were handed over they would be shelled.[413]

(b) Defence Evidence

348. The Defence case is that Dragan Papi} was not involved in the fighting that day. When the firing started, he fled with his family into the wood behind their house. From there he went to Rovna where he spent the day.

349. Four witnesses gave evidence about the events of that day concerning Dragan Papi}:

(a) His brother, **Goran**, said that the family were awoken by gunfire and heard a voice from the mosque calling on the Croats to give themselves up, together with their weapons. He and his family fled from their house and hid in the wood behind the house and then went to Rovna. There was no anti-aircraft gun in the wood.[414]

(b) Dragan Papi}'s cousin, **Pero Papi}**, said that he saw Dragan Papi} in the wood at about 5.30 a.m. with his wife and that Dragan Papi} went to Rovna. When cross-examined about Mehmed Ahmi}'s evidence about seeing Dragan Papi} and others armed in the wood, the witness said that this was incorrect and that Dragan Papi} only passed through the wood early on. Dragan Papi} spent the whole day in Rovna. The witness spent most of the day in the woods and testified that nobody opened fire from the woods or shot at Mehmed Ahmi}'s house.[415]

(c) **Zdenko Raji}**, a policeman from Vitez, was sent to Ahmići in command of a detachment of soldiers to guard the approaches to the barricade while other troops

[411] T. 1787.
[412] T. 1113.
[413] T. 1110-1114 and T. 1125-1126.
[414] T. 7050-51.

were attacking it. They went via an old railway line from the road to Rovna to the wood behind the Papi} houses where they remained all day until 4 p.m. On their way to the wood from the railway line between 5 - 5.30 a.m., they met a group of women, children and elderly people together with Dragan Papi}. They said that they were going to Donja Rovna. Dragan Papi} said that he was to take over an M60 mortar to send signals if the BiH Army started to move. The witness also said that nobody shot from the wood and that no PAT anti-aircraft gun was located there.[416]

(d) **Zvonimir Šanti}**, a resident of Donja Rovna and commander of the village guard said that in Rovna at about 8 a.m., he saw Dragan Papi} wearing a camouflage jacket and carrying an M60 mortar and bag. Dragan Papi} said that he did not know what was happening but there appeared to be a conflict between the Muslims and Croats and Nenad Šanti} had given him orders to go to Niva (about 100 metres from the witness's house).[417] Dragan Papi} remained at Niva until 4 p.m., when he called at the witness's house and asked if he could leave the mortar and bag until Nenad Šanti} sent someone to pick them up.[418]

4. His Conduct in the Period Between the Armed Conflicts

350. Several prosecution witnesses gave evidence of Dragan Papi}'s conduct in the period between the armed conflicts. In particular, they testified as to his role as a supporter of the Croat side and that he was a member of Croat forces in charge of a checkpoint:

(a) During this period Dragan Papi} was seen in the village armed and in uniform and going to the Bungalow.[419] He was seen in uniform carrying a sniper rifle with target

---

[415] T. 7198-7200, T. 7214 and T. 7230.
[416] T. 7387-94 and T. 7398-99.
[417] T. 7144.
[418] T. 7146.
[419] **Witness D**, T. 1022, T. 1025; **Witness G**, T. 1444.

sights and a strangulation device.[420] **Witness V** saw him wearing a black uniform many times.[421] **Witness Z** also saw him in a black uniform and on one occasion carrying a sniper rifle.[422] **Abdulah Ahmi}** saw him climbing into a truck carrying an anti-aircraft gun and firing the gun in the air.[423]

(b) Another witness saw a vehicle with an anti-aircraft machine gun in the driveway outside Dragan Papi}'s house.[424]

(c) Shortly after the October conflict, **Witness B** was stopped at a checkpoint outside the village. Dragan Papi} (who was armed with an M48 rifle) told him that he could not enter the village. Some days later Witness B went to Ahmi}i with Mario Čerkez (an HVO Commander): they came upon a checkpoint on the main road near the Papi} house with a dug-out and machine gun. After a conversation with Mario Čerkez, Dragan Papi} ordered the soldiers to remove all the obstacles.[425] In the witness's opinion, the checkpoint was under the command of Dragan Papi}.

(d) A checkerboard flag was flown outside the Papi} house.[426]

(e) Dragan Papi} was seen with others carrying military crates from Mario Papi}'s house.[427]

(f) **Witness N** testified that a man whom he was told was Dragan Papi}, wearing a black uniform, threatened him at the Bajram Festival.[428]

351. Others saw Dragan Papi} make specific preparations on 15 April 1993:

---

[420] **Abdulah Ahmi}**, T. 273-274; **Esad Rizvanovi}**, T. 456-459; **Witness T**, T. 2949.
[421] T. 3043.
[422] T. 3601.
[423] T. 274-275.
[424] **Witness B** T. 799-801 and T. 820.
[425] T. 759-767.
[426] **Esad Rizvanovi}**, *ibid.*; **Witness G**, *ibid.*
[427] **Fahrudin Ahmi}**, T. 1128-1129.
[428] T. 2539.

(a) **Witness A** saw Dragan Papi} leaving in a red Lada car with his wife and mother from his house and returning alone about 40 minutes later without them.[429] On 15 April 1993 **Witness G** overheard his parents saying that Dragan Papi}'s family were leaving and that vehicles were constantly coming and going from his house.[430]

(b) **Abdulah Ahmi}** was on his way home at 10 p.m. when he heard Ivo Papi} calling for Dragan. The witness noticed a large number of people at the Papi} house but did not pay much attention because people would gather quite frequently at Dragan Papi}'s house and sometimes there would be as many as 30 cars in the yard: friends of his would come to visit and he repaired their cars.[431]

352. On the other hand **Goran Papi}** gave evidence that Dragan Papi}'s work included the preservation of game; for this work he wore a green uniform and sometimes a camouflage jacket and carried an M48 rifle.[432] Dragan Papi}'s employment book was produced, showing him to have been in employment until 15 April 1993.[433] **Ivo Vidovi}** said that he saw Dragan Papi} often in forestry uniform and a camouflage jacket, or a camouflage jacket and jeans.[434] Goran Papi} also said that Dragan Papi} had a black uniform (given to him as a present) which he wore so that he would not be stopped at checkpoints: he wore camouflage because everyone was doing it as it was the fashion.[435] Dragan Papi} had neither a rifle with a telescopic sight nor a sniper rifle.[436] There was never a machine gun nor an AA-gun anywhere near the family home.[437] A checkerboard flag was flown on the house on religious holidays – as on other houses.[438]

---

[429] T. 547-550.
[430] T. 1447.
[431] T. 275 and T. 386-387.
[432] Evidence of **Goran Papi}**, T. 7038-7039.
[433] Exhibit D12/5.
[434] T. 6976.
[435] T. 7056.
[436] Evidence of **Pero Papi}**, T. 7242-7243; **Goran Papi}**, T. 7067.
[437] **Goran Papi}**, T. 7067.
[438] **Ivo Vidovi}**, T. 6974-6977; **Pero Papi}**, T. 7241.

5. His Conduct During the Attack of 16 April 1993

(a) Prosecution Evidence

353. The Prosecution case is that Dragan Papi} was present in Ahmi}i on 16 April 1993 and was involved in the attack. When the shooting started **Fahrudin Ahmi}** and his family fled towards Upper Ahmi}i. Their route took them across the main road near Dragan Papi}'s house. The witness noticed two soldiers bending down next to Ivo Papi}'s house and saw a "glimmer (sic) of the fire from a firearm coming from Dragan Papi}'s window".[439] Shortly after, the witness was shot and wounded in the arm; he saw that the gunfire was coming from Mehmed Ahmi} and Dragan Papi}'s houses.[440]

354. **Witness A** saw a machine gun in front of Dragan Papi}'s house at one corner facing the road.[441] **Witness Z** heard gunfire coming from an anti-aircraft gun in a thicket owned by Dragan Papi} and his father.[442]

355. **Witness G** testified as to Dragan Papi}'s presence, armed and in uniform, in the vicinity of soldiers carrying out executions on 16 April 1993 in Ahmi}i, near the lower mosque. He knew Dragan Papi} because they were neighbours; their parents were close and he saw Dragan Papi} frequently. On the morning of 16 April the family fled their house and Witness G ran ahead of the rest. He came across three soldiers firing towards the village: he saw Dragan Papi} in the doorway of the house of Husein Ahmi} near the soldiers. Dragan Papi} was leaning against the door frame and carrying a rifle and the witness (who knew him) was 100 per cent certain it was him. The witness tried to run, but was cut down by a burst of gunfire. His parents and sisters were running towards him His father asked a soldier to let them pass, but the soldier ordered another soldier to kill them: the order was repeated twice, two bursts of gunfire followed and his parents and one sister (aged 11) were killed. His younger sister (aged 5) miraculously survived.[443]

---

[439] T. 1134.
[440] T. 1134 and T. 1138-1139.
[441] T. 568 and T. 570.
[442] T. 3607-3608.
[443] T. 1464-1470 and 1475

During the day Witness G remained motionless where he lay, but was able to look around. He saw Dragan Papi} once or twice passing by wearing a camouflage uniform and a hat and in the company of soldiers.[444]

356. **Captain Charles Stevens**, then Regimental Sergeant-Major of the Cheshire Regiment, was in Ahmi}i some days after the massacre, and met a man who called himself "Dragan" and carried an AK47 rifle. The man indicated that he had killed 32 Muslims by drawing his hand across his throat. Captain Stevens subsequently identified Dragan Papi} in court, stating that "When someone tells you they have killed 32 people, you don't forget their face in a hurry".[445]

(b) Defence Evidence

357. The Defence case is that Dragan Papi} was not involved in any fighting that day. Having taken the women of the family to Rovna early in the morning, he stayed to guard the bridge over the Lašva River where he remained for the next ten days. Accordingly, he was not in Ahmići during the day of 16 April. The following evidence was given in support of this case.

358. **Goran Papi}** testified that the family again fled to the woods on being awoken by gunfire. Their father told Dragan to take his wife (who was pregnant at the time), mother and the other women to Rovna.[446] Dragan Papi} was seen in the woods by a neighbour who also saw him leaving and going in the direction of Rovna.[447]

359. **Zvonimir Šanti}** was on Radak bridge over the Lašva River between Ahmići and Rovna. He saw Dragan Papi} with his wife, mother and sister. Dragan Papi} asked the witness if he could put the family up. The witness already had two families in his house and so he put them with his brother, Anto Šanti}.[448] Dragan Papi} took them there and

[444] T. 1475-1477.
[445] T. 2152-2154 and T. 2181-2190.
[446] T. 7059.
[447] Evidence of **Ljubica Milicevi}**, T. 7307.
[448] T. 7148-7149.

returned twenty minutes later and joined Dragan and Ivo Vidovi} guarding the bridge on the left (i.e., Ahmići) bank. The witness, meanwhile, was on the other side guarding the bridge with three other men. Dragan Papi} was dressed in a camouflage jacket and jeans and had an M48 rifle.[449] Dragan Papi} remained guarding the bridge for 7-10 days and then left.[450]

360. This evidence was supported by that of **Ivo Vidovi}** who said that he was told by Nenad Šanti} to guard the bridge. He went to the bridge and ten minutes later, at 6.30–7 a.m., Dragan Papi} arrived, coming from Donja Rovna and saying that he had taken his wife, mother and sister to a shelter there.[451] The witness said that he and Dragan Papi} kept guard all day: they had strict orders not to move away. Dragan Papi} did not leave for ten days or so, when Nenad Šanti} allowed him to go home because his wife had had a baby.[452] The witness said that he was one hundred per cent certain that Dragan Papi} did not leave his position for the first eight days of the conflict.[453]

6. Dragan Papi}'s Military Service: Records

361. A Mobilisation Report, an HVO Defence Department Report on Mobilisation in Vitez for the Period 16-28 April 1993, shows that 498 conscripts were mobilised.[454] The list includes all the accused except Vladimir Šanti}: none were on special duty for the elderly or disabled. However, there are no entries showing the date of mobilisation for the accused.

362. According to one witness, the document was produced for the purpose of distributing shares for wartime remuneration and service in the HVO.[455] This was supported by the evidence of a policeman from Vitez, **Zdenko Raji}**, who said that the purpose was to boost the number of shares received by Croats compared with Muslims;

---

[449] T. 7154-7155.
[450] T. 7149.
[451] T. 6951-6953.
[452] Birth certificate, Exhibit D18/5; T. 7017.
[453] T. 6972-6973 and T. 7027.
[454] Exhibit P335.

thus it contained a number of women and elderly persons although some women did work in the non-combatant department of the HVO.[456]

363. In the Register of Members of 1992 Viteska Home Guard Regiment[457], Dragan Papi}'s time of service is shown as being from 8 April 1992 – 15 January 1996. His brother Goran disputed the correctness of this entry.[458]

364. In the List of Members of the 2nd Battalion of the Vitez Brigade of the HVO,[459] Dragan Papi} is described as a courier, having enrolled on 23 June 1992.

7. Findings of the Trial Chamber

365. In the light of the records relating to the accused's military service, it is difficult not to conclude that he was mobilised in the HVO during some of the time relevant to this indictment, although his precise role is not clear. Also, it is not disputed that he wore a uniform and carried a rifle in the village, although the Defence contends that the reason for doing so was connected with his work. The prosecution evidence indicates that he was active on the Croatian side; that he was seen firing an anti-aircraft gun and was active at a checkpoint. However, this evidence is an insufficient basis upon which to convict the accused on Count 1. What must be established is that he took an active part in either (or both) of the armed conflicts in October 1992 and April 1993.

366. In relation to the armed conflict on 20 October 1992, the Prosecution relies on one crucial witness, **Mehmed Ahmi}**, who identified the accused as shooting from his house early that morning and firing an anti-aircraft machine gun in the afternoon. It has already been noted that there were flaws in this witness's evidence, i.e. his claim to have been able to identify the accused, although he was crawling with his child at the time, and the

---

[455] **Goran Males**, T. 7279.
[456] T. 7424, T. 7430 and T. 7433.
[457] Exhibits P351/353.
[458] T. 7091; see also evidence of **Zdenko Raji}**, T. 7438-39.
[459] Exhibit D18/2.

fact that he did not mention this identification in his statement. In these circumstances the Trial Chamber is unable to accept Mr. Ahmi}'s evidence. There being no other evidence that the accused participated in the armed conflict that day this part of the Prosecution case is not made out.[460]

367. In relation to the attack on 16 April 1993, one witness, **Witness G**, gave direct evidence for the Prosecution concerning the accused's involvement in the attack. If the Trial Chamber accepts this witness's evidence, it would establish the accused's presence among the attacking forces in the village. However, the Trial Chamber does not find that it can rely on this evidence. This is because the witness made no mention of the presence of Dragan Papi} in any statement to the Office of the Prosecutor until his third witness statement, made only six months before the trial, although he did mention the accused, Dragan Papi}, in his first statement to the authorities of Bosnia-Herzegovina.[461] In cross-examination the witness testified that he had been afraid to do so.[462] He was also very hesitant in his description of the accused's uniform.[463] Witness G was an honest witness who had been through a dreadful ordeal on 16 April 1993. However, he was under the most stressful conditions imaginable and there must be some doubt about the accuracy of his identification of Dragan Papi}.

368. None of the remaining Prosecution evidence is sufficient to establish that Dragan Papi} was an active participant in the conflict, i.e. the evidence to the effect that he was seen driving his wife and mother from his house on 15 April or that people and vehicles were gathered there that evening, or that gunfire was seen coming from his room on 16 April. As for the evidence of **Captain Stevens**, the Trial Chamber cannot be sure that the witness identified the correct man in court five years after the event. Therefore, the Trial

[460] The evidence of Fahrudin Ahmi} in this connection does not, by itself, establish that the accused was an active participant. Even if it did, it would not be safe to rely on it in the light of the evidence of the four witnesses, called by the Defence, to the effect that the accused was not involved in the armed conflict.
[461] T. 1530-1531, T. 1548-1549 and T. 1587.
[462] T. 1589.
[463] T. 1552-1553; on a previous occasion the witness had said the accused always wore a black uniform. In his testimony, however, the witness said he was wearing a camouflage uniform on 16 April.

Chamber finds that there is a reasonable doubt as to whether Dragan Papi} participated in the conflict that day.

B. Zoran Kupre{ki} and Mirjan Kupre{ki}

1. Introduction

369. It is convenient to summarise the evidence concerning Zoran Kupre{ki} and Mirjan Kupre{ki} together since their cases are closely connected. These two accused are brothers. At all material times they lived with their families in adjoining houses in a cluster of houses referred to as Grabovi in the centre of the village between Upper and Lower Ahmi}i. The cluster also included the houses of their relatives Vlatko and Ivica Kupre{ki} and their families. The Prosecution case against them may be briefly set out here: (a) Zoran Kupre{ki} was an HVO Commander; (b) on 16 April 1993 they both took an active part in the assault on the Bosniac population of Ahmi}i. In particular, they took part in the murders of their neighbours, the family of Witness KL, of Suhret Ahmi} and Meho Hrstanovi}. They were also seen that same day in Ahmi}i, armed and dressed in camouflage uniforms.

370. Zoran Kupre{ki} is aged 41, having been born on 23 September 1958 in Vitez. He is married with three children. He is a former member of the League of Communists of the SFRY. He was an employee of the Slobodan Princip Seljo factory in Vitez, where he was in charge of maintenance of one of the units.[464]

371. Mirjan Kupre{ki} is 36, having been born on 21 October 1963; he is married with two children. He was employed as a mechanical technician until February 1992 in the Slobodan Princip Seljo factory and from August 1992 until 15 April 1993 he worked for his cousin Ivica, first in the Sutre store in Ahmi}i and then, ten days before the

[464] **Zoran Kupre{ki}**, T. 11170-11171, T. 11180 and T. 11183.

conflict, at the store in Vitez. In April 1994 when he was demobilised he returned to work for Sutre.[465]

2. Background

(a) Introduction

372. There is no dispute that these accused are of good character. Evidence to this effect was given by prosecution witnesses. They and their cousin Vlatko were described as growing up as fine, decent, well-behaved young men.[466] A neighbour, **Witness D**, knew both brothers: she said that they were good neighbours and did nothing bad to the Muslims nor showed them hatred. However, she also said that when they started talking of "Herceg-Bosna" the old intimacy was gone.[467] **Witness S** said that he had very good relations with Zoran with whom he socialised, and that Mirjan showed no signs of extremism.[468] At the Muslim feast of Bajram, held in March of 1993, Zoran and Mirjan Kupre{ki} and their families celebrated at Fahrudin ("Fahran") Ahmi}'s house.[469]

373. The Defence called evidence to similar effect. Zoran Kupre{ki} was a member of the SPS Cultural Association, a multi-ethnic folklore society which performed dances of all ethnicities and to all groups. Zoran Kupre{ki} resisted pressure to join a purely Croatian association. At the end of March 1993 the folklore group performed at the Muslim festival of Bajram; several days before the conflict in April, the group performed in Mosunj to celebrate the Catholic holiday of Easter.[470]

374. Mirjan Kupre{ki} said he was brought up with Muslims and was on good terms with them. Muslims were close friends to his parents, including some close neighbours: Witness KL was one, but there were misunderstandings about the boundary. Mirjan

---

[465] **Mirjan Kupre{ki}**, T. 11556-11559.
[466] **Witness KL,** T. 1893.
[467] T. 1080.
[468] T. 2884.
[469] **Witness CA**, T. 4613. The Trial Chamber notes that this is a different Fahrudin Ahmić than the witness in this case: it was common in Ahmići for several people to share the same name.
[470] Photo, Exhibits D16-19/1; **Zoran Kupre{ki}**, T. 11186-11193.

4989

Kupre{ki} was also a member of the folklore society and was close friends with some members including Fahran Ahmi} and other Muslims and Serbs.[471]

375. Much evidence was given of the activities of Zoran Kupre{ki} and Mirjan Kupre{ki} within this folklore or Cultural and Arts Society, in which they were described as leading figures.[472] For instance, **Zdravko Vrebac** said that in 1993 the Society was half Muslim and half Croat with some Serbs. Zoran Kupre{ki} was the main choreographer; Mirjan Kupre{ki} saw to the music together with the witness and Fahrudin Ahmić. These four were the principals.[473] The Society held frequent rehearsals and performed at weddings and other events in Vitez. In 1993 they performed for UNPROFOR.[474] **Rudo Vidovi}**, Director of the Telecom Centre for Central Bosnia, whose family home is in Ahmići and who grew up with Zoran Kupre{ki}, described him as having similar characteristics to the witness himself; a competitive spirit, upright, hardworking. The witness said that Mirjan Kupre{ki} was younger and had the same characteristics as Zoran Kupre{ki}.[475] Zoran Kupre{ki} was a member of the League of Communists but was not active after the elections. They did not express extremist views.[476] Zoran Kupre{ki}'s superior at work in the Princip factory, **Ivan Tabara**, said that Zoran Kupre{ki} as Head of Maintenance for machinery used for military production had 28 machine operators of mixed ethnicity under him: he had a correct attitude towards them and was responsible and regular in his attendance at work.[477] **Adil Fafulovi}**, a Muslim folk-dancer, a fellow member of the Society, gave evidence that Zoran Kupre{ki} and Mirjan Kupre{ki} did not differentiate on grounds of ethnicity and invited Muslims to join the Society.[478] **Veljko Cato**, a Serb, and another member of the

[471] **Mirjan Kupre{ki}**, T. 11560-11565.
[472] **Rudo Kurevija**, T. 5895-5897.
[473] **Zdravko Vrebac**, T. 7786.
[474] **Zdravko Vrebac**, T. 7787-7788, **Dragan Vidovi}**, T. 8419.
[475] T. 6654-6655.
[476] T. 6660-6661.
[477] T. 8737.
[478] T. 8796.

Society described Zoran and Mirjan Kupre{ki} as honest family men, interested in folklore, dancing and socialising.[479]

376. According to another witness, Zoran Kupre{ki} was apolitical and did not express extremist views: he gave priority to family and the cultural society with its Muslims, Croats and Serbs, all singing and dancing together. He was popular among Muslims and Serbs. Mirjan Kupre{ki} held similar views.[480]

3. Involvement of the Accused in the HVO Prior to 16 April 1993

(a) Prosecution Evidence

377. Both Zoran and Mirjan Kupre{ki} have military experience, both having completed their military service in the JNA, in which Zoran became a reserve officer[481] and in which Mirjan was trained as an infantry man.[482] Both are listed in the Register of the HVO Vitez Brigade as being reservists between 8 April 1992 and 22 and 23 January 1996.[483] It was disputed that the signature against Mirjan Kupre{ki}'s name was his.[484] However, he does not dispute that prior to and after the war he was a reservist.[485]

378. According to **Witness JJ**, a friend and work colleague of Zoran Kupre{ki}, the latter was a member of the HVO prior to 16 April 1993. He was absent from work at times and went to the front line. The witness saw him in uniform and he did not try to conceal the fact. He was present at an HVO oath-taking ceremony at Vitez stadium. She witnessed the oath-taking ceremony briefly: Zoran Kupre{ki} was a participant and took the oath, wearing a military uniform. He went to the front line for some time in the

---

[479] T. 8816-8817.
[480] Evidence of **Dragan Grebenar**, T. 6023-25 and T. 6028.
[481] T. 11237 and T. 11388-11390.
[482] T. 11659.
[483] Exhibit P353 at pp. 75 and 30 respectively.
[484] **Ivica Kupreškić**, T. 7997.
[485] T. 11667.

period between January to March 1993. About a month before 16 April 1993, Zoran Kupre{ki} told her that he was an HVO Commander.[486]

379. Evidence was given by two other witnesses that Zoran Kupre{ki} was an HVO Commander in the Grabovi area:

(a) **Witness B** was a Bosniac and former JNA Captain who became Security Officer for the Territorial Defence in Vitez. After the first conflict in October 1992 he visited Ahmi}i in connection with the return to the village of the Bosniac population who had fled. On this visit the witness spoke to Nenad Šanti} (whom he described as in command of the HVO in the area from Vitez to Ahmi}i). Nenad Šanti} told the witness that Zoran Kupre{ki} was the Commander of one area. The witness and Šanti} went to Zoran Kupre{ki}'s house and spoke to him. Šanti} said that Zoran Kupre{ki} should provide security and should guarantee that there would be no problems concerning the return of the Bosniac population. Zoran Kupre{ki} promised that there would be no problems and said that he would personally take action to ensure that there would be none.[487]

(b) **Abdulah Ahmi}**, a resident of Ahmi}i at the material time, said that he had learned that Zoran Kupre{ki} was the HVO Commander: he learned this because people went to Zoran Kupre{ki}'s house for negotiations concerning the return of the Muslims. He saw Zoran Kupre{ki} often, armed and in full gear: Zoran Kupre{ki} went to the front at Busovača and was in charge of village watches. The witness said that there were 5 or 6 Croatian families in Grabovi consisting of 20-30 people.[488]

380. According to **Witness Y**, who was the organiser of Muslim night patrols in Ahmi}i, Zoran Kupre{ki} called a meeting in the school and asked Witness Y to stop the Muslim watches. When the witness suggested joint patrols, Zoran Kupre{ki} said that he

[486] T. 12288-12292, T. 12357-12358 and T. 12367.
[487] T. 769-773.
[488] T. 366-370.

4992

had no orders from his command to accept. Zoran Kupre{ki} also said that he was taking up a new post and would not be responsible for the area.[489]

381. According to **Witness S,** in 1992 and 1993 he saw both Zoran and Mirjan Kupre{ki} in uniform, but Zoran wore his more often than Mirjan.[490]

(b) Defence Evidence

382. **Zoran Kupre{ki}** denied that he was a Commander or was ever addressed as such: his role for a time was to assign the village guards.[491] He had not participated in the HVO oath-taking parade in the stadium but had witnessed it as a member of the audience.[492]

383. According to Zoran Kupre{ki}, the Kupre{ki}'s started a watch in February 1992. Dragan Vidovi} had contacted him to see whether he would be in favour of a village guard. Zoran Kupre{ki} then went out every night on a two-hour shift. At first he wore civilian clothes: he was later given a uniform top which he then wore and he carried Ivica Kupre{ki}'s hunting carbine.[493] After the conflict on 20 October it was decided to place the guards on a more formal footing and it was agreed on 20 or 21 October that Zoran Kupre{ki} should be in charge of this. Zoran Kupre{ki} compiled these lists until late January 1993 when Dragan Vidovi} took over.

384. **Mirjan Kupre{ki}** said that in February or March 1992 Zoran asked him to join the village guard, which he did: he was one of about ten men. This guard duty continued until the first conflict. Mirjan Kupre{ki} did not have a rifle; he was given an old M48 rifle and two boxes of ammunition. He did not have a uniform, but sometimes used Zoran's camouflage jacket.

---

[489] T. 3299-3301.
[490] T. 2948-2955; **Witness T** also saw Zoran Kupre{ki} in uniform; T. 2949; as did **Witness V**, T. 3072.
[491] T. 11533.
[492] T. 11201-11209.
[493] **Zoran Kupre{ki}**, T. 11216-11224.

385. According to Zoran Kupre{ki}, Witness Y's evidence concerning a meeting was wrong as to the date. The meeting was in late January or early February 1993. He asked Witness Y not to maintain a checkpoint at the entrance to the village and not to patrol the main road. He said that Dragan Vidovi} would be in charge from now on. Zoran Kupre{ki} had no written or oral order from anyone telling him not to accept a Muslim proposal since he was not subordinate to anyone.[494]

386. According to their evidence, Zoran and Mirjan Kupre{ki} took no active part in the armed conflict on 20 October 1992. Summarising their evidence, they said that shortly after the shooting started, they took their families to a shelter in Šantići and then returned to the neighbourhood of their own houses to a feature which was referred to as "the Depression" where they felt safer and where they remained until the afternoon.[495],[496] Others in the Depression at the time gave evidence of the presence of the accused there.[497] The Depression was a sizeable hollow in the ground, not far from the Kupre{ki} houses and next to the house of Niko and Mirko Saki}: it had always been a kind of shelter and was used as a gathering point for citizens in cases of emergency in the former Yugoslavia as well as a shelter from Serb air attacks.[498] They were not armed.[499]

387. According to Zoran Kupre{ki}, he took part in negotiations to ease tensions after the conflict of 20 October 1992. He took notes on one occasion[500] and signed an agreement[501] on another because he was told to do so. He took part in a discussion about people returning to their houses but had no say in anything else.[502]

---

[494] **Zoran Kupre{ki}**, T. 11460-11463 and T. 11465.
[495] This evidence was supported by **Milutin Vidovi}**, T. 7493; **Zdravko Vrebac**, T. 7754–7759, and **Mirko Saki}**, T. 7602.
[496] T. 11247-11251 and T. 11585-11590.
[497] Evidence of **Niko Saki}**, T. 8231; **Mirko Saki}**, T. 7602; **Zdravko Vrebac**, T. 7809; **Dragan Vidovi}**, T. 8405; **Mirko Vidovi}**, T. 8583.
[498] Evidence of **Zdravko Vrebac**, T. 7752; **Mirko Saki}**, T. 7692
[499] **Ivica Kupre{ki}**, T. 7938.
[500] Exhibit D26/1.
[501] Exhibit D27/1.
[502] T. 11256-11258 and T. 11443-11445.

4. Their Role in the Events of 16 April 1993

(a) Prosecution Evidence

388. The prosecution evidence against either accused concerning events on 16 April 1993 begins with the evidence of **Witness V** who testified that on 15 April at about 5 p.m., he saw a group of 10 soldiers and two civilians in front of Zoran Kupre{ki}'s house. The soldiers were in camouflage uniforms and carried weapons.[503]

389. The Prosecution case against these two accused arising from their roles in the events of 16 April relates to three separate allegations:

(a) their alleged participation in murder and arson at the house of Witness KL;

(b) their alleged participation in murder and arson at the house of Suhret Ahmić; and

(c) their presence in Ahmi}i that day.

These matters will be considered separately.

(i) Their Alleged Participation in Murder and Arson at the House of Witness KL

390. **Witness KL** was an immediate neighbour of the Kupre{ki}'s in Grabovi (his house being nearest to that of Vlatko Kupre{ki}, but no distance from those of Mirjan and Zoran Kupre{ki}: he had known all three since their births). His evidence was that following the morning call to prayer there was an explosion. Zoran Kupre{ki} then appeared in Witness KL's house at the door of the living room (with a rifle, his face blackened and in a black uniform). Zoran Kupre{ki} shot and killed Witness KL's son (Naser). He then shot Witness KL's daughter-in-law (Zehrudina) and her son (Elvis, aged six or seven). The witness testified that he had been standing in the doorway to the living room, but "lost control" and fell behind the couch on which Elvis had been

[503] T. 3041-3042.

4995

sleeping. According to the witness, shots were then fired at him but he was not hit. The witness's grandson (Sejad or 'Sejo', aged 3 months) was also shot and killed. Mirjan Kupre{ki} came into the room immediately after his brother, poured liquid from a bottle and set a couch on fire.[504] The men then left and Witness KL went into his bedroom. By this time, the house was on fire, the ceiling came down and eventually the witness made good his escape, running through the fire and sustaining burns to his hands and face as he did so.

391. Initially Witness KL hid in a hay-stack and woodpile near his house; finally he fled to Vrhovine, stopping on the way at his mother's house. On 17 April 1993 he was admitted to a hospital in Zenica were he was treated for severe burns to his face and hands. He remained in the hospital until 1 May 1994.

392. In cross-examination, Witness KL stated that both he and his six children had good relations with the Kupre{ki} brothers. Medical, divorce, and employment records were put to him but he denied that he had problems with his eyesight or alcoholism.[505] When asked why he did not tell his mother who the perpetrators were, the witness stated that he had not dared tell her, because she was an old woman (born in 1909) and could let it "slip out unintentionally, and then later on this could have cost me a lot".[506] He saw his granddaughter and his daughter-in-law in the hospital but did not discuss the events of 16 April 1993 with them. He said that he did tell another daughter, Witness EE.[507]

393. In some of his previous statements such as that made to Witness HH (a United Nations investigator), Witness KL said he was in the other room during the attack.[508] When confronted with such discrepancies he maintained that these were due to mistakes. In re-examination, Witness KL said that he was 100 per cent sure that Zoran and Mirjan Kupre{ki} were responsible for the killings.

---

[504] T. 1905-1906, T. 1913-1914 and T. 1917-1922.
[505] Exhibits D 3/1-8/1.
[506] T. 2006-2007.
[507] T. 2009-2010.
[508] Exhibit P82, para. 17.

394. It may be noted that at first the witness did not identify Zoran and Mirjan Kupre{ki} as the killers and did not do so until February 1994. However, according to the evidence of **Witness EE**, when she saw him in hospital in Zenica he told her that Zoran and Mirjan Kupre{ki} did the killing.[509]

395. It has not been disputed that these killings took place. On 6 May 1993 **Payam Akhavan** of the United Nations Centre for Human Rights and EEC Ambassadors visited the house and found the four bodies; two adults, an infant and a child.[510] Forensic examination of the house in July 1998 by a Dutch Crime Scene Investigator and subsequent forensic analysis showed that 20 cartridge cases and an anti-aircraft projectile were recovered, together with the bones of a child under some bed springs at the place where Witness KL described Elvis's bed.[511] No traces of inflammable liquids or other propellants were found but the fact that they were not found does not mean that they were not used.

396. On 7 May 1993 Witness KL spoke to **Witness HH**, an Officer of the United Nations Centre for Human Rights and told him that he knew those responsible: he said that they were his neighbours from the first house down the road. He also said that he was in the room and his family were killed in an adjacent room.[512]

397. The difficulty concerning the credibility of this witness's evidence is that it was not until ten months after the incident that he firmly identified Zoran and Mirjan Kupre{ki} as the perpetrators of the massacre of his family. Despite the horror of what had happened and his supposed knowledge of those responsible, he did not divulge the fact when interviewed on 18 and 19 April for a local television station or (more significantly) when interviewed by investigators on 22 April 1993, when he said that he did not recognise the perpetrators. On 1 October 1998, when interviewed by an investigating judge, the witness said only that the figures resembled Zoran and Mirjan

[509] T. 4245-4249; Statement dated 14 May 1993, Exhibit D10/1.
[510] T. 1235-1237 and T. 1244-1248; Video Exhibit P83; Photo Exhibits P84-96.
[511] Exhibit P169.

Kupre{ki}. His explanation for these omissions is that he dared not identify the killers because of the wartime situation. However, the investigators and the investigating judge were Bosniacs and it is difficult to see why he should feel that identifying the perpetrators to them would have put him at risk.

398. It must also be noted that there is a further major discrepancy between his earlier accounts and those he gave subsequently. Initially he said he was in his bedroom when the killings took place whereas later he said that he was in the living room.

399. A possible explanation for the omissions and discrepancies may be that after conversations with others (notably his granddaughter), he had convinced himself that this is what he saw. He did not appear to the Trial Chamber to be an untruthful witness or one who had set out to lie deliberately; however he may have been mistaken.

(ii) Their Alleged Participation in Murder and Arson at the House of Suhret Ahmi}.

400. It is alleged that Zoran and Mirjan Kupre{ki} participated in the murders of Suhret Ahmi} and Meho Hrstanovi} and the arson of Suhret Ahmi}'s house. Evidence concerning this was given by **Witness H**, who lived with her father Suhret and her family in a house adjacent to that of Witness KL who is her grandfather. Her evidence was as follows. She knew Zoran Kupre{ki}, Mirjan Kupre{ki} and Vlatko Kupre{ki} (the former two she saw practically every day and she played with Vlatko Kupre{ki}'s daughter). On 16 April 1993, she was awoken by gunfire which shattered the glass in her bedroom. The family took refuge in a shelter constructed next to the garage. A grenade was thrown into the house and her father was told to open the door. When he went outside he was shot and killed. Their neighbour, Meho Hrstanovi}, was killed in a burst of gunfire at their front door.[513] Witness H left the shelter when the trapdoor was lifted.

---

[512] T. 4489-4491, T. 4521-4524, T. 4641-4648 and T. 4662. Witness HH's notes of interview, Exhibit P292.
[513] T. 1631-1640 and T. 1653-1654.

She was confronted by Zoran Kupre{ki} whom she recognised immediately (he was one metre away and she also recognised his voice): he told her that he had orders to kill everyone. Mirjan Kupre{ki} was in the hallway and the witness saw him climbing the stairs to the top floor. Zoran Kupre{ki} asked "What are we going to do with them, shall we kill them?" Mirjan Kupre{ki} said that he did not know. Soldiers then set fire to the house and the family left.[514] Zoran Kupre{ki} had black polish in lines on his face, he was in uniform, carrying a rifle and had a rocket launcher on his back. Mirjan Kupre{ki} was wearing a uniform with a line on each cheek and forehead. He was one metre from her and she had no difficulty identifying him. He too had a rifle and a rocket launcher. She looked at Mirjan Kupre{ki} and he looked at her and she could see his face clearly. She was positive that it was him.

401. In cross-examination, Witness H said that she was one thousand per cent sure that she had seen Zoran Kupre{ki}. She saw him for a couple of seconds and although the lights were not on, visibility was good since it was morning.[515]

402. She was cross-examined about a statement made to an investigating Judge on 17 December 1993.[516] Discrepancies between this statement and her evidence were pointed out. The statement said that her father had a rifle, that she saw him killed with a burst of gunfire, and that Zoran and Mirjan Kupre{ki} were setting fire to the upper floor.[517] The witness, however, denied meeting the investigating Judge and denied that the signature on the statement was hers.[518]

403. This witness appeared confident and forceful. She was in no doubt at all about her identification of the three accused whom she knew well as they had been her neighbours all her life.[519] Although the circumstances could not have been more

---

[514] T. 1641-1652.
[515] T. 1723-1724 and T. 1729.
[516] Exhibit D1/2.
[517] T. 1706-1708.
[518] T. 1705. In order to contradict the evidence of Witness H, the Defence called the Investigating Judge, **Mrs. Dijana Ajanović**, who took the statement from the witness and confirmed that the signature was that of the witness; T. 8988-92.
[519] She also saw the accused Vlatko Kupreškić that day: see below.

stressful, she had a good opportunity to identify all three accused since they were in close proximity to her.

404. Another witness, referred to as **Witness SA**, was in Suhret Ahmi}'s house at the time of the attack. She did not give evidence at the trial, but her statements were admitted as Court Exhibits.[520] In two statements in April 1993 (made in Zenica) she did not identify the perpetrators. In a third statement (in May 1993) she said that she did not recognise any of the soldiers. However, in December 1993, in a statement made to an Investigating Judge of the High Court in Zenica she said that she recognised Zoran, Mirjan, Ivica and Vlatko Kupre{ki} in full combat gear in her house. She repeated this in a statement to the Office of the Prosecutor in October 1994. In the view of the Trial Chamber, little or no weight can be placed upon the statements purporting to identify the accused. It was not until her fourth statement that the witness made any identifications. She did not give evidence and was, therefore, not subject to cross-examination about those discrepancies.

(iii) Other Evidence Relating to Their Presence in Ahmi}i on 16 April 1993

405. **Witness C**, a 13 year-old boy, fled barefoot from his house when it was attacked by soldiers and his brother was killed. He was rescued by Croatian soldiers and taken to the house of Jozo Alilovi} (a Croatian friend and neighbour). The house is to the east of the village between the Catholic cemetery and the Bungalow. According to Witness C, at 11 a.m. or 12 noon Zoran and Mirjan Kupre{ki} called at the house with others. They were dressed in camouflage uniforms with green straps on their shoulders and weapons (they did not have paint on their faces). They stayed for about an hour.[521]

[520] Exhibits C1-6.
[521] T. 942-948, T. 971-974 and T. 980.

5000

406. Both Zoran and Mirjan Kupre{ki} are listed in the HVO Mobilisation Report,[522] as being mobilised between 16 and 28 April 1993, although there is no indication of the precise date.

407. **Witness JJ** gave evidence that she had a number of meetings in Vitez with Zoran Kupre{ki} and that during the course of one of the meetings, Zoran Kupre{ki} said that the Jokers had been firing at fleeing civilians in Ahmi}i on 16 April, that one of them had raised his gun and threatened Zoran Kupre{ki} that unless he also shot at the civilians he himself would be shot. As a result, Zoran Kupre{ki} testified that in order to save himself he had shot into the air.[523]

(b) Defence Evidence

408. The accused deny that they participated in the crimes alleged, were in the places alleged or took any active part in the conflict at all.

409. On 15 April 1993 they were at work. **Zoran Kupre{ki}** testified that he was at work until 2 p.m., and then went into Vitez for a coffee with Senad Topoljak and Dragan Grebenar. On his way home things were normal. Just before dusk his uncle, Ivica, brought his wife from Split. Zoran Kupre{ki} and his wife went to Ivica's house that evening after 8 p.m., and stayed for half an hour. Ivica spoke about the barricades which he had come across and the incident in Zenica involving Toti} (an HVO officer who was killed). Zoran Kupre{ki} then went home and to bed about midnight.[524] When cross-examined about the evidence of Witness V, Zoran Kupre{ki} said he saw nothing of what Witness V claimed to have seen outside Zoran Kupre{ki}'s house; nor did anyone else mention it. None of the Kupre{ki}s left the village that night.[525]

410. **Mirjan Kupre{ki}** said that he left work in the Sutre shop in Vitez at 5 p.m., and went to a coffee shop before returning home where he found that his son was ill with a

[522] Exhibit P335.
[523] T. 12307-12310, T. 12314-12315, in particular T. 12333-12336 and T. 12376-12378.
[524] T. 11264-71.

temperature. He, too, then went to Ivica's house, returning home at 11 p.m.[526] His evidence about his whereabouts in Vitez was supported by the evidence of a number of witnesses.[527]

411. Witnesses also gave evidence concerning the gathering at Ivica Kupre{ki}'s house, where friends and relatives of Mrs. Ankica Kupre{ki} had called to welcome her home.[528] The guests included Zoran and Mirjan Kupre{ki} and their wives, Vlatko Kupre{ki}'s wife and Mirko Saki}.[529] According to **Gordana Cui}** and **Witness DC/1,2** they talked of "normal things".[530] According to **Ivica Kupre{ki},** they talked about the journey from Split and the Toti} case.[531] The guests left at about midnight.[532] Gordana Cui} said that she and Zoran Kupre{ki} had left earlier and gone to his house where her mother was: she stayed late, watching a music video-tape and talking of lots of things, not of war or of conflict.[533] She said that if Zoran Kupre{ki} had known that the conflict would break out the next day, he would have told her.[534]

412. Zoran Kupre{ki}'s account of the events of 16 April was as follows:

(a) He was awoken by a ring at the doorbell while it was still dark. He opened the front door to find Dragan Vidovi} who told him that there was a possibility of an attack by Mujahedin and that they should flee with their families.

(b) Zoran Kupre{ki} told his wife to get the children ready; he then went to rouse his brother and parents (he had put on a pair of jeans and a military top). He then returned to his house. He collected his family and with his parents and brother (with his mother

---

[525] **Zoran Kupre{ki}**, T. 11470 and T. 11472.
[526] T. 11599-603.
[527] **Ivan Grabovac**, T. 8640-8642; **Veljko Cato**, T. 8811-8812; **Marko Martinović**, T. 8831-8832; **Zdravko Vrebac**, T. 7766-7768.
[528] T. 7861.
[529] **Mirko Sakić**, T. 7609-7611.
[530] T. 8154; **Witness DC/1,2**, T. 8526.
[531] T. 7966-7967; **Ankica Kupre{ki}**, T. 7862.
[532] Evidence of **Ankica Kupre{ki}**, T. 7863; **Ivica Kupre{ki}**, T.7967.
[533] T. 8155-8156 and T. 8198.
[534] T. 8156-8157.

5002

in law in a wheelbarrow) went off towards Šanti}i and the shelter at the Vrebac house. He had Ivica's hunting carbine. There was no shooting at the time.[535] Some locals (Croats) were at Niko Saki}'s house, including Milutin Vidovi} who said that Zoran Kupre{ki}'s children would be safe at his house. Zoran Kupre{ki} took his family to Milutin Vidovi}'s house.[536]

(c) When he and his family and parents were going to Milutin Vidovi}'s house, he saw five or six well-armed soldiers in black and camouflage uniforms around Anto Pudja's house moving towards Niko Saki}'s house. They had painted faces and rifles and mortars, triangular insignia and some wore white belts. He concluded they were Croats who were coming to repel a possible attack; it was still dark and there was no shooting at the time.[537]

(d) Zoran Kupre{ki} and his brother (having put their families in shelters) returned to Niko Saki}'s' house. On the way they met the Didaks. Zoran Kupre{ki} then took the Didaks to Milutin Vidovi}'s house. He then returned towards Niko Saki}'s house. As he did so shooting started. It was now daybreak, between 5 and 6 a.m., and cloudy with drizzle. The shooting came from the direction of the Kupre{ki} houses and from the road by the cemetery.[538]

(e) Zoran Kupre{ki} ran back to Niko Sakić's house. Niko said that the others were in the Depression so Zoran Kupre{ki} went there where he saw Dragan Vidovi}, Mirko Saki}, his brother Mirjan, Dragan Samir and Drago Grgi}. After about 15-20 minutes smoke could be seen rising which appeared to come from his brother's house and then more smoke which seemed to come from Zoran Kupre{ki}'s house. (They later discovered that it was not coming from their houses). A short time later a shell fell nearby. The shooting was at its most intense for the first hour or two and then subsided. Mirko Saki} and Mirjan and Zoran Kupre{ki} went to see what had

[535] **Zoran Kupre{ki}**, T. 11278-11280.
[536] **Zoran Kupre{ki}**, T. 11281-11282.
[537] **Zoran Kupre{ki}**, T. 11283-11287.
[538] **Zoran Kupre{ki}**, T. 11287-11290.

happened to their families. On the way, Anto Vidovi} told them that Fahran Ahmi}, their friend from the folklore group, had been killed. At 9 or 10 a.m., they reached the shelters.[539]

(f) When they went back towards the Depression, Zoran Kupre{ki} said that he heard screams and shooting in the area behind the Kupre{ki} houses or somewhere around the Sutre warehouse. The brothers met Nikola Omazi} near Mirko Saki}'s house. Nikola Omazi} said that Mirjan Šanti} had been killed. The brothers went into the Depression. The shooting had subsided. Mirjan Šanti}'s body was brought down on a ladder and the brothers helped to take the body to a shed at Niko Saki}'s house. Mirjan Šanti} was wearing a camouflage uniform with a white belt, the insignia of the Military Police and a light blue ribbon. This all happened sometime before 11 a.m.[540]

(g) They then returned to the Depression. As they were coming back they could see smoke rising from Muslim parts of the village: "you could gain the impression that the Muslims had been driven out of there".[541] There was shooting and the sound of UNPROFOR tanks. Later Ivica Raji} told the brothers that it was not their houses but those of Muslim neighbours which were burning. Ivica said that he had seen 10 soldiers at the Kupre{ki} brother's house who identified themselves as Jokers. In the afternoon the brothers went to Zume again. Sporadic fire continued until nightfall. There was then intense fire and a loud explosion: the minaret was destroyed. This was about 7.30 or 8 p.m. They spent the night in their uncle's stables.[542]

(h) Zoran and Mirjan Kupre{ki} never went to Jozo Alilovi}'s house. They remained in the Depression all day in order to protect the shelter. Zoran Kupre{ki} carried Ivica's rifle the whole time. They did not know who was attacking whom or who would win.[543]

---

[539] **Zoran Kupre{ki}**, T. 11295-11299.
[540] **Zoran Kupre{ki}**, T. 11306-11307.
[541] T. 11303.
[542] **Zoran Kupre{ki}**, T. 11304 and T. 11307-11310.
[543] **Zoran Kupre{ki}**, T. 11311-11314.

5004

(i) When cross-examined by the Prosecution, Zoran Kupre{ki} denied that he had anything to do with the crimes on 16 April or that anybody with him had taken part in them.[544] He did not have time to call on Muslim neighbours. He did not pass Witness KL's or any other Muslim house. He did not take the car. The car was a small Fiat which was in the garage of Branko Livanci}.[545] They stayed in the Depression because they were 50-100 metres from the shelter in which their women and children were, so they could defend it.[546]

(j) When asked about the evidence of Witness KL and Witness H, Zoran Kupre{ki} said that Witness H could not have seen him or his brother because they were not there,[547] nor were they at Witness KL's house. He had normal relations with Witness KL and would greet him each day. He knew Nazir Ahmić. He never went to Witness KL's house as an adult, although he had been there as a child.[548] When examined by the Trial Chamber, Zoran Kupre{ki} said that he did not know Witness H: she was a child at the time and it was not customary to say hello to children when passing them.[549]

(k) When cross-examined about the statement of Witness JJ, Zoran Kupre{ki} said that she was wrong when she said that he had been threatened by Jokers and pretended to shoot at civilians.

413. Mirjan Kupre{ki}'s account of the events of 16 April was as follows:

(a) He was awoken before 5 a.m. by his brother Zoran, who told him that an attack from Barin Gaj was expected.[550] He roused his family. His mother-in-law suffered back-pain and his son Marko was ill. As a result, Mirjan Kupre{ki} informed nobody else of the news. The family set off for Zume, Mirjan Kupre{ki} taking his mother-in-

[544] T. 11468-11469.
[545] **Zoran Kupre{ki}**, T. 11473-11479.
[546] **Zoran Kupre{ki}**, T. 11487-11488.
[547] T. 11506.
[548] **Zoran Kupre{ki}**, T. 11511-11513.
[549] **Zoran Kupre{ki}**, T. 11554-11555.
[550] T. 11673-11679.

5005

law in a wheelbarrow. They met Zoran and their parents and all went together through the Depression.[551] On the road near Anto Pudja's house they passed some soldiers, commandos with white belts and holsters, some with painted faces and with several cases of ammunition. Mirjan Kupre{ki} concluded that they were Military Police: they had some type of insignia.[552]

(b) Mirjan Kupre{ki} left his family at the Vrebac shelter and returned to Niko Saki}'s house. When the shooting started, he was with others in front of the shelter at the back of the house and they ran into the Depression, at first to take shelter and later to observe what was going on:[553] Zoran Kupre{ki} was not with them, but joined them later. Mirjan Kupre{ki} had his rifle; Dragan Vidovi} and Zoran Kupre{ki} also had rifles. Zoran Kupre{ki} wore a camouflage jacket. Mirjan Kupre{ki} wore blue jeans and a long brown jacket and a green sweater. It was cold and there was drizzle or mist.[554] There were six men in the Depression in all.[555]

(c) The shooting lasted 2-3 hours and it was very intense. They tried to get out along the path but a shell fell nearby. When they tried again bullets were being fired through the forest. There was smoke coming from their houses and a high pillar of smoke rising from the road towards the mosque. There were detonations and small arms fire.[556] During the first lull Milutin Vidovi} came to the Depression to see whether they had any information. Mirjan Kupre{ki} then went to see his family with others. On the way, Anto Vidovi} told them that Fahrudin (Fahran) Ahmi} had been killed. (Mirjan Kupre{ki}, Fahrudin and Zdravko Vrebac had been inseparable friends).[557]

(d) On the way back from the shelter, Zoran said that he had been told that other persons had been killed. They heard that there were other casualties by the road near Fahran's house. Mirjan Kupre{ki} went with Mirko to the Saki} house briefly and

[551] **Mirjan Kupre{ki}**, T. 11604-11608.
[552] **Mirjan Kupre{ki}**, T. 11608-11610.
[553] T. 11610-11616.
[554] **Mirjan Kupre{ki}**, T. 11617-11619.
[555] **Mirjan Kupre{ki}**, T. 11735.
[556] **Mirjan Kupre{ki}**, T. 11619-11621.

then returned to the Depression. Nikola Omazi} told them that Mirjan Šanti} had been killed. Ivica Kupre{ki} and Nikola Omazi} put Mirjan Šanti}'s body on a ladder and carried the body to Nikola Saki}'s garage: Mirjan Šanti} wore a camouflage uniform, with an HVO Military Police insignia on his shoulder and a light blue ribbon.[558]

(e) UNPROFOR armoured personnel carriers (APCs) went towards Gornji Ahmi}i and the gunfire stopped. After the APCs left, gunfire started again immediately. About 4-5 p.m., there was another lull and then firing resumed again and stopped only after nightfall. Towards the evening the most intensive fire was from around the mosque. That night some slept in the stable and others in the gulley.[559]

(f) Over the course of 16 April, they heard that houses were on fire, including all those around the Kupre{ki} houses. During their visits to their families in Zume they saw houses burning and realised that Muslims had perished.[560]

(g) When cross-examined by the Prosecution, Mirjan Kupre{ki} said that the Vrebac shelter was closest: it was 10-15 minutes away. He did not use the car. Asked why they remained in the Depression the witness said that they were hiding in the Depression; they were close to the shelters where their families were and could keep an eye on the path.[561] Mirjan Kupre{ki} said that he did not doubt that what Witness H said had happened did happen but that it had nothing to do with him; he was not there, nor was his brother with him in that house. He had not been in Witness KL's house.[562]

---

[557] **Mirjan Kupre{ki}**, T. 11621-11625.
[558] **Mirjan Kupre{ki}**, T. 11625-11628.
[559] **Mirjan Kupre{ki}**, T. 11628-11631.
[560] T. 11632-11633.
[561] T. 11678-11683, T. 11691-11692 and T. 11706.
[562] **Mirjan Kupre{ki}**, T. 11711-14, 11717.

5007

414. The accused called witnesses to support their accounts of their journey to the shelter and arrival there.[563] They also called witnesses to support their account of spending the day in the Depression.[564] In this connection **Dragan Vidovi}** said that the men stayed in the Depression until it was dark when they went to Ivo Kupre{ki}'s stable.[565] When daylight came they went back to the Depression to keep an eye on the path; he agreed (in response to a question put by the Prosecution) that they were guarding the line of approach in case of a Muslim attack.[566] In re-examination Dragan Vidovi} said that the men in the Depression thought that they could offer some protection to the nearby shelters where the families were.[567] When examined by the Court, he said that there were patches of snow in the Depression: they did sit down but stood for most of the time when they were there.[568]

415. Zoran and Mirjan Kupre{ki} denied that they had been in the house of Jozo Alilovi} on 16 April. Other evidence was given concerning this. **Goran Papi}** denied that he was in Jozo's house with Zoran and Mirjan Kupre{ki} in the late morning, as the prosecution witness Witness C, had alleged.[569] Likewise, **Jozo Alilovi}** himself denied that Zoran and Mirjan Kupre{ki} had ever come to his house that day.[570]

416. **Anto Raji}**, brother-in-law of Mirjan and Zoran Kupre{ki}, said that he had seen the broadcast of the interview on Sarajevo TV on 18 April 1993 with Witness KL from Zenica Hospital and that the end of the interview is missing from the recording produced by the Prosecution.[571] The interviewer asked Witness KL twice if he recognised the killers. He said that he did not because their faces were painted.[572] This evidence was

---

[563] **Dragan Vidovi}**, T. 8425; **Witness DC/1,2**, T. 8527-8528; **Ivica Kupre{ki}**, T. 8058, T. 8074; **Gordana Cui}**, T. 8159; **Niko Saki}**, T. 8247; **Mirko Saki}**, T. 7613; **Jozo Vebrac**, T. 9495; **Ankica Kupre{ki}**, T. 7868-7869; **Ljuba Vidovi}**, T. 8091.
[564] Evidence of **Milutin Vidovi}**, T. 7520, T. 7565-7566 and T. 7587; **Dragan Vidovi}**, T. 8434; **Mirko Saki}**, T. 7618, T. 7627-7628; **Ivica Kupre{ki}**, T. 7983; **Niko Saki}**, T. 8254.
[565] T. 8502.
[566] T. 8498-8504.
[567] T. 8510.
[568] T. 8515.
[569] T. 7119.
[570] T. 8361 and T. 8383.
[571] Exhibit P157. **Anto Rajić**, T. 8706; **Mirko Safradin**, T. 8760.
[572] T. 8700-8702 and T. 8704.

supported by **Mirko Safradin**, a fellow member of the same anti-aircraft Defence Unit who said that he had witnessed the broadcast with Anto Raji}.[573]

417. Evidence of what happened to the accused after 16 April was given by **Zoran Kupre{ki}**. On 17 April, at 8 or 9 p.m., people fled from the shelters to Rovna. Zoran Kupre{ki} saw no bodies that day.[574] On 18 April there was still shooting in Gornji Ahmi}i and Gornji Pirići. At about 9 a.m., the accused and his brother went to their houses. Nothing was wrong with Zoran Kupre{ki}'s house apart from two broken windows.[575] Around 4–5 p.m., some military policemen appeared near the stable with some civilians: these men said that the accused had to go to the line at Gornji Pirići. Zoran Kupre{ki}, Mirjan Kupre{ki}, Dragan Vidovi}, Mirko Saki}, Ivica Kupre{ki} and Dragan Samija all then left together.[576] They passed Enver Sehi}'s house and saw the body of Enver and a burnt child's body in the house. There was a body on the balcony of another house and a further two bodies in between two houses. From the elevated ground they could see the entire village: "it was terrible ... everything was burned down".[577] Witness KL's house had burned down. At the line they were ordered to dig a trench. There was sporadic fire coming from Barin Gaj. They remained in the location for 2–3 days. They were then moved 500–600 metres to the right above Upper Ahmi}i.[578]

418. **Mirjan Kupre{ki}** said that on the evening of 17 April, he heard that his family had gone to Rovna: the next day he went to Rovna and saw his family at daybreak. He then went to his house to get his accordion. The house was in chaos: everything was pulled from drawers, doors were broken, window panes in the nursery were missing, bullet marks were on the walls, a fire was beginning to burn but died down, some things were missing and many empty cartridge cases were in front of the house.[579] In cross-examination it emerged that there are no documents concerning this damage; Mirjan

---

[573] T. 8756.
[574] T. 11320-11321.
[575] **Zoran Kupre{ki}**, T. 11322-11324.
[576] **Zoran Kupre{ki}**, T. 11325-11327.
[577] T. 11328.
[578] **Zoran Kupre{ki}**, T. 11328-11331.
[579] T. 11632-11637.

5009

Kupre{ki} had not obtained any.[580] It is the evidence of Mirjan Kupre{ki} that on 18 April 1993 the Military Police told them that they had to go to the defence lines in Pirići where they were ordered to dig trenches. Mirjan Kupre{ki} was then transferred to Upper Ahmi}i where he remained until demobilised at the end of the war in April 1994.[581] (The Trial Chamber notes that Exhibit P353, page 30 shows an entry for Mirjan Kupre{ki} as being mobilised from 8 April 1992 to 22 January 1996. Mirjan Kupre{ki} said he did not sign this entry and does not know who did: this list was compiled for the allocation of shares).[582]

419. **Zoran Kupre{ki}** testified that he remained on the frontline for three or four months and was then asked to become the Commander of that sector of the line. He refused but agreed to become Deputy Commander. He carried out administrative duties in the command post in Zume. He wrote daily reports for the battalion. In January or February 1994 he was transferred to the battalion command where he did administrative work.[583] Zoran Kupre{ki} said he became a soldier on 18 April 1993 when taken away by the Military Police. He returned to work in May 1994.[584] He went to live in Vitez. He did not return to Ahmi}i because he had been affected by events there. A terrible crime had been committed there, by Croat people. He, Zoran Kupre{ki} did not participate in it.[585] When cross-examined by the Prosecution about the Vitez Brigade List,[586] Zoran Kupre{ki} said that the signature on page 30 is not that of his brother, whereas the signature on page 75 is his. He signed it in 1996 in the municipal office. The dates of service were being stretched so that the value of shares each individual received would be as large as possible. Zoran Kupre{ki} did not know who put the date of 8 April 1992 in the entry but guessed it indicates participation in the village guards

[580] **Mirjan Kupre{ki}**, T. 11707.
[581] **Mirjan Kupre{ki}**, T. 11638-11642: Demobilisation Certificate dated 1.6.94; Exhibit D112/2 shows 31.5.94 as the date which is not correct.
[582] T. 11643-11644.
[583] Aerial photo Exhibit D23/1; **Zoran Kupre{ki}**, T. 11332-11334.
[584] Demobilisation certificate Exhibit D24/1.
[585] T. 11336-11339.
[586] Exhibit P353.

5010

(although the guards had not started then). The entry "P" for "reserve" may reflect the fact that he was a reservist in 1992.[587]

420. The Defence called **Liljana Sapina**, a friend and colleague of Witness JJ and Zoran Kupre{ki}, to contradict the evidence given by Witness JJ. Liljana Sapina said that in the summer of 1997 Zoran Kupre{ki} asked her to try and locate Witness JJ to see if the latter would be willing to make a statement in his favour. Ms. Sapina did so and the parties met in her flat. Zoran Kupre{ki} asked Witness JJ to make a statement about his helping her during the war: she said she would, but was afraid to testify because of her children and her family. Subsequently, it was apparent that Witness JJ was reluctant to make a statement: she said that her phone was bugged and from what she said Liljana Sapina concluded that she was under pressure from the Muslim side to make a statement against Zoran Kupre{ki}.[588]

5. Findings of the Trial Chamber

421. The Trial Chamber bears in mind the undisputed evidence as to the character of these accused, their activities in the folklore society and their good relations with their Muslim neighbours and colleagues prior to the conflict. Nonetheless, the Trial Chamber is satisfied that both accused were active members of the HVO. In the case of Mirjan Kupreški}, this finding is based on the HVO Register and is also to be inferred from his activities on 16 April 1993 (dealt with below).

422. In the case of Zoran Kupreški}, the Trial Chamber finds that he was a local HVO Commander and that his activities were not limited to assigning village guard duties (as he alleged). The Trial Chamber accepts the evidence of Witness JJ on this topic and also finds that Zoran Kupreški} took part in the oath-taking ceremony and was present on duty on the front line as she alleged in her evidence. The Trial Chamber accepts the evidence of Witness B and Abdulah Ahmi} in relation to the negotiations for the return of

[587] **Zoran Kupre{ki}**, T. 11405-11407.
[588] T. 12555-12557, T. 12559-12562. T. 12564 and T. 12576-12577.

5011

the Muslims after the conflict of 20 October and finds that Zoran Kupreški}'s role in these negotiations was more active than he himself admitted in evidence.[589] Finally, the Trial Chamber notes that Zoran Kupreški}, as a reserve officer and in charge of a maintenance unit at work, was used to the exercise of authority.

423. In relation to the events of 15 April 1993, the Trial Chamber accepts that the accused may have been at work that day and may have gone to a gathering at Ivica Kupreški}'s house that evening. However, the Trial Chamber does not accept their evidence, and that of their witnesses, that they did not know of the planned attack on the village the next morning. Preparations were already under way for the attack: in the light of what happened the next day, the Trial Chamber is satisfied that these accused must have known that an attack was planned and were ready to play a part in it. In this connection the Trial Chamber accepts the evidence of Witness V that he saw a group of soldiers, armed and in camouflage uniform, in front of Zoran Kupreški}'s house in the early evening of 15 April 1993.

424. With regard to the allegations of participation in the conflict of 16 April 1993, upon which the prosecution case is based, the Trial Chamber deals, first, with the alleged participation of the accused in murder and arson at the house of Witness KL. This allegation depends on the evidence of Witness KL. The Trial Chamber has already analysed that witness's evidence and found it wanting in credibility. The Trial Chamber found that the witness may have been mistaken in his identification of the accused as perpetrators of these crimes. Thus, there is no reliable evidence that the accused participated in the crimes at the house of Witness KL.

425. The Trial Chamber deals next with the allegation that the accused participated in the murders and arson at the house of Suhret Ahmić. This allegation depends principally upon the evidence of Witness H. The Trial Chamber has already analysed her evidence.

---

[589] It should be noted that the only evidence about the activities of the accused during the conflict on 20 Oct. 1992 was given by defence witnesses. Evidence about that day plays no specific part in the Prosecution case against these two accused. The Trial Chamber makes no findings except to comment that the evidence that the accused spent the day in the Depression appears unlikely to be true.

5012

The Trial Chamber takes into consideration the criticism of her credibility arising from: (a) the discrepancies between her statement and her evidence; and (b) her denial that the signature on the statement is hers. However, these criticisms are outweighed by the impression made by the witness upon the Trial Chamber while she was giving evidence. Her evidence concerning the identification of the accused was unshaken. The Trial Chamber is in no doubt that she was a truthful and accurate witness of events on 16 April. Her evidence might have been confirmed by the statements of Witness SA; however, the Trial Chamber places no reliance on this evidence.

426. Accordingly, the Trial Chamber finds that Zoran and Mirjan Kupreški}, armed, in uniform and with polish on their faces, were in the house of Suhret Ahmić immediately after he and Meho Hrstanović were shot and immediately before the house was set on fire. The Trial Chamber concludes from this evidence that the two accused were participants in the attack on the house as part of the group of soldiers who carried it out.

427. Turning to the evidence of Witness C that the accused were in the house of Jozo Alilović at about midday and that they were armed and in uniform, the Trial Chamber, having heard the evidence of Jozo Alilović, is not satisfied as to the accuracy of Witness C's identification of the accused, given the stressful conditions under which it was made and the appalling ordeal to which the young Witness C had been subjected.

428. Finally, the Trial Chamber accepts the evidence of Witness JJ that Zoran Kupreški} admitted to her that the Jokers had been firing on fleeing civilians and that under threats, he himself had fired into the air. Although Zoran Kupreški} denied making this admission and an attempt was made to undermine Witness JJ's credibility by calling Liljana Sapina, the Trial Chamber is satisfied that she told the truth. She came to give evidence despite pressure being exerted to prevent her coming and went to great lengths in her evidence to acknowledge the considerable part which Zoran Kupreški} had played in assisting her and her family during the conflict. There was no reason for her to have lied about Zoran Kupreški} in her evidence and every reason for thinking that she told the truth. This is not to say that Zoran Kupreški}, himself, told the truth in his admission to Witness JJ. It was no more than a partial admission by someone who was

5013

troubled by the horror of what had transpired that day. However, it is an admission of some participation on the part of Zoran Kupreški} and, as such, serves to undermine his contention that he did not participate in the conflict.

429. It will be apparent from the foregoing that the Trial Chamber rejects the evidence of the accused and their witnesses to the effect that the accused took no part in the crimes alleged and were elsewhere when they took place. While it is true that they may have taken their families to the shelter, the evidence about their doing so and their whereabouts during the morning are rejected as untrue. In particular, the evidence that they spent almost the entire day standing around with others in the Depression is inherently not credible given the circumstances of the conflict taking place that day in Ahmi}i.

430. In summary, the Trial Chamber concludes that both accused participated in the attack on Ahmi}i on 16 April 1993 as soldiers in the HVO. It is reasonable to conclude that their part involved their providing local knowledge and their houses as bases for the attacking troops. In addition, they participated in the attack on at least one house. Of the two accused, Zoran Kupreški}, as the local HVO Commander, must be taken to have played a more leading role.

C. Vlatko Kupre{kić

1. Introduction

431. The Prosecution case against this accused is that he was involved in the preparations for the attack on Ahmi}i. His house was used as a gathering point for the attackers and he participated in the attack on the 16 April 1993, in particular, in the shooting of members of the Pezer family. The Defence case is that he did not participate at all in the attack or shooting. On 16 April he was concerned only with the protection of his family.

5014

2. Background

432. Vlatko Kupre{ki} is 41 years old, having been born on 1 January 1958. He is married with two children. He is the cousin of Zoran and Mirjan Kupre{ki} and co-owner of the Sutre shop on the road to Upper Ahmi}i in Grabovo. He lives on the road near the shop, and near the houses of Zoran and Mirjan Kupre{ki}.

3. Events Prior to April 1993

(a) Prosecution Evidence

433. The Prosecution evidence concerning these events was as follows:

(a) One day in October 1992 **Witness T** saw Vlatko Kupre{ki} and his wife and a third person unloading weapons from a Yugo car on the road in front of Vlatko Kupre{ki}'s house.[590]

(b) Vlatko Kupre{ki} was seen by **Witness B** at the Hotel Vitez (the headquarters of the HVO) three to five times between October 1992 and April 1993.

(c) Reports of the Travnik police administration of December 1992 and February 1993 describe Vlatko Kupre{ki} as "Operations Officer for the Prevention of Crimes of Particular State Interest": his rank is shown as Inspector 1st Class.[591]

(d) When a neighbour made a plea for peace after the first conflict in Ahmi}i in October of 1992, Vlatko Kupre{ki} said that they (the Croats) had waited 45 years for their own State and now they had it.[592]

(b) Defence Evidence

434. **Vlatko Kupre{ki}**, in his own defence, said:

---

[590] T. 2946.
[591] Exhibits P377 and P378.
[592] **Witness Q**, T. 2751.

5015

(a) He has a congenital heart condition (for which he was operated on in 1966) and must not undergo stress. He was relieved of military service as one hundred per cent disabled.[593] He produced his military identification card and certificates showing him to be unfit for military service[594] and called evidence to this effect.[595]

(b) He was against ethnically-based parties, including the HDZ. He was not, in any way, politically active and was never a member of the HVO. He was on very good terms with his Muslim neighbours (including the Pezer family). He was never an HVO soldier. He produced a statement from the local HDZ to this effect[596] and called witnesses to say that he was on good terms with Muslims and did not engage in political activity, wear a uniform or carry a gun.[597] The Defence also produced the statements of 14 character witnesses (all Muslims or Serbs) who spoke of the absence of nationalist or ethnic prejudice on the part of Vlatko Kupre{ki}.[598]

(c) Vlatko Kupre{ki} said that he was not a police operations officer but was carrying out an inventory for the police, and the police chief had to assign him to a vacant post in order to be able to pay him. He was assigned to the Office of the Crime Prevention Service and assigned a desk where he would work with the commission in making inventories of basic supplies.[599]

---

[593] **Vlatko Kupre{ki}**, T. 11747-11751 and T. 11757.
[594] Exhibits D13-17/3.
[595] **Ivica Kupre{ki}**, T. 8037; **Fikreta Vidović**, T. 9556; **Ljubica Kupre{ki}**, T. 9372-9373; **Rudo Vidović**, T. 6663-6664.
[596] Exhibit D18/3.
[597] **Vlatko Kupre{ki}**, T. 11752-11758 and T. 11801; **Rudo Vidovi}**, T. 6663-6664; **Ivica Kupre{ki}**, T. 8003; Ljuba Vidovi}, T. 8108-8109; **Niko Saki}**, T. 8273-8274; **Witness DF**, T. 9213-9214.
[598] Exhibit D61/3.
[599] T. 11862-11865

5016

4. His Role on 15 April 1993

(a) Prosecution Evidence

435. According to **Witness KL**, Vlatko Kupre{ki} was among HVO soldiers, carrying rifles, on the main road between 11 a.m. and 12 noon on 15 April 1993.[600]

436. **Witness B** saw him at the Hotel Vitez on 15 April at around 2 or 3 p.m., with two or three men in uniform, standing in front of the entrance to the hotel. He was in civilian clothes.[601]

437. On 15 April between 5 and 6 p.m., a neighbour saw 20-30 soldiers on Vlatko Kupre{ki}'s balcony; Vlatko Kupre{ki} himself was sitting outside the shop.[602] Another witness saw a truck arrive with soldiers at dusk. Five or six soldiers got out in the vicinity of the house.[603] Another witness also saw several soldiers in front of Vlatko Kupre{ki} 's house at dusk.[604] Witness V's diary records that on 15 April 1993 before dark he learned that the Croats were concentrating around the Kupre{ki} houses.[605]

(b) Defence Evidence

438. The Defence case was that on 15 April Vlatko Kupre{ki} was not in Vitez or Ahmi}i until the evening: he was accompanying his cousin, Ivica Kupre{ki}, on a trip to Split to collect the latter's wife from the airport on her return from Germany.

439. According to the evidence of **Ivica** and **Vlatko Kupre{ki},** they left Ahmi}i on 14 April and were stopped at numerous roadblocks on the way.[606] Permits for the journey were produced.[607] They arrived at Split at about 12 noon. While in Split they

---

[600] T. 1896-1897.
[601] T. 778-781, T. 860-861 and T. 916-917.
[602] **Witness L**, T. 2349.
[603] **Witness M**, T. 2439.
[604] **Witness O**, T. 2623.
[605] Exhibit D8/2 p. 19; T. 3224.
[606] T. 7955-60.
[607] Exhibits D24-26/3.

went to the market and bought jeans (for re-sale) in cash and filled the boot of the car with them: they then held a business meeting at a company called Kotex about buying salt, but concluded no contracts. At about 9 p.m., they met Mrs. Ankica Kupre{ki} at the airport. They spent the night at Baska Voda, one hour from Split with Radoslav Simovi}. The next day (15 April) they set off for Ahmi}i. They got home at about 6.30 p.m. and unloaded the jeans at Vlatko Kupre{ki}'s house.[608] Further supporting evidence about the journey was given by **Witness DE**,[609] **Radoslav Simovi}**[610] and **Mrs. Ljubica Kupre{ki}**.[611]

440. **Vlatko Kupre{ki}** gave evidence about events that evening. He said that he unloaded the goods from the boot of the car and spent the evening preparing the goods for a buyer from Travnik to whom the goods were to be delivered on 16 April. There were no soldiers at his house or in front of it, or at the shop that evening. Everything was normal. He had nothing to do with the army: he did not prepare weapons or ammunition at his house as a staging post.[612]

441. Vlatko Kupre{ki} denied that he was outside the Hotel Vitez earlier that day, and denied going into the HVO Headquarters.[613] He was not, on 15 April, with a group of soldiers in front of his shop nor with soldiers on the balcony of his house.[614] There were lights on in his house (as alleged by Witnesses M and O) during the night: there were lights on the balconies and parking space for safety reasons.[615]

---

[608] **Vlatko Kupre{ki}**, T. 11764-11766; **Ivica Kupre{ki}**, T. 7955-7960 and T. 8040-8041; **Mrs. Ankica Kupre{ki}** (her passport was produced, Exhibit D12/1), T. 7851 and T. 7855.
[609] T. 9157-9158 and T. 9160.
[610] T. 9357-9359.
[611] T. 9375-9376.
[612] T. 11797-11798.
[613] T. 11810.
[614] T. 11802 and T. 11817.
[615] T. 11819.

5018

5. His Role on 16 April 1993

(a) Prosecution Evidence

442. Two documents point to Vlatko Kupre{ki}'s having been mobilised on 16 April 1993:

(a) His name appears on the HVO Mobilisation Report,[616] dated 30 April 1993, as being mobilised on a date between 16 and 28 April 1993. (His name does not appear on the reserve list. Additionally, he is listed neither for special duties nor as a medical corps driver);

(b) An HVO Certificate of 4 June 1996 was recovered from his briefcase on his arrest confirming that Vlatko Kupre{ki} was a member of the 92nd Viteska Home Guard Regiment between 16 April 1993 and January 1996. He is described as performing duties as "Assistant Commander for Health Matters".[617]

443. Gunfire came from the vicinity of Vlatko Kupre{ki}'s house during the early part of the day. According to **Esad Rizvanovi}** (a refugee in Ahmi}i, who was staying in a house close to the lower mosque) the first shots were in the direction of the mosque and the lower part of the village, coming from the Kupre{ki} houses including that of Vlatko Kupre{ki}.[618]

444. **Witness E** was another refugee whose family were staying in a house near the lower mosque. Shortly after 6.20 a.m., he was fleeing with his mother and sister along a path towards Upper Ahmi}i. They were forced to stop because of gunfire, some of which, according to Witness E, came from the direction of the houses, one being the house of Vlatko Kupre{ki}.[619]

---

[616] Exhibit P335.
[617] Exhibit P329.
[618] T. 470-478, in particular T. 475.
[619] T. 1277-1279.

445. Evidence was given that Vlatko Kupre{ki} was in the vicinity of Suhret Ahmi}'s house shortly after Suhret was murdered. When **Witness H** ran with her family from the house, they were forced to turn back because they came to a clearing where they were in danger of being shot. When they returned to their house, the witness saw Vlatko Kupre{ki} (wearing a blue overcoat with something under it) in front of the garage of her house. This was at about 5.45 a.m.[620] Her evidence was supported by the evidence of **Witness KL** who said that upon looking out of the window of his house after the murder of his family, he saw Vlatko Kupre{ki} leave the yard of Suhret's house, cross his (Witness KL's) garden and go towards Vlatko Kupre{ki}'s own house.[621]

446. **Witness KL** also testified that while he was hiding in a stack of hay in his barn later in the day, he saw five young men killed: the shots appeared to come from Vlatko Kupre{ki}'s house. Three Croat soldiers came out of Vlatko Kupre{ki}'s house, patted the bodies and returned towards the same house.[622]

447. There was evidence of the following activity during the day of the attack from Vlatko Kupre{ki}'s house:

(a) **Witness N** came under fire from in front of the store.[623]

(b) **Witness V** heard shooting coming from the direction of Vlatko Kupre{ki}'s house.[624] **Witness W** was in the vicinity of the house, hiding during the morning with his grievously wounded wife, when they were accosted by a group of soldiers who came from bushes to the right of Vlatko Kupre{ki}'s house.[625] **Witness BB** saw her neighbour Nadira fatally wounded by a shot which came from the house of Vlatko or Franjo Kupre{ki}.[626]

---

[620] T. 1656-1658.
[621] T. 1906-1907 and T. 1927.
[622] T. 1936 and T. 1939.
[623] T. 2544.
[624] T. 3060.
[625] T. 3156.
[626] T. 3830-3831.

5020

(c) **Witness X** was also hiding there: one of her daughters (aged 19) was killed and another wounded. She testified that about midday Vlatko Kupre{ki}'s yard was full of soldiers. She heard voices calling for brandy and lunch: somebody said that everybody had been killed down there and that they had done a good job.[627]

448. A defence witness, **Witness DE**, was cross-examined about a statement made to a representative of the BiH army on 25 June 1993,[628] where he stated that "it was said that the destruction of the Ahmi}i mosque was ordered by Nenad Šanti} with the support of Vlatko Kupre{ki}". The witness said in evidence that that is what he heard, what people were saying, but nobody proved it.[629] In re-examination, the witness said people from Ahmi}i were detained at Dubravica school and he took food to them. He asked them who destroyed the mosque and one replied masked soldiers. He then asked what Vlatko did: one said Vlatko took shelter; another said that he had not seen Vlatko but that all Croats are the same. After the war Vlatko denied destroying the mosque saying "my friend you know I would never do anything like that",[630] and he said that he was ready to do his part in the reconstruction.[631]

449. Finally, evidence was given of Vlatko Kupre{ki}'s alleged participation in an attack on the Pezer family which culminated in the killing of Fata Pezer and the wounding of **Dženana Pezer**. Fata Pezer was the wife of Ismail Pezer and mother of Dženana. They lived in a house on the opposite side of a small hill (which then existed, but which has now been flattened) from the Kupre{ki} houses. On the morning of the attack, they were joined by Witness S and his wife and by a refugee, Witness CF and his family, who had been living nearby. At about 8 or 8.30 a.m., the whole group (consisting of about 15 people including four small children) set off for the house of Nermin Kermo which was not far away in the direction of Upper Ahmi}i. Five witnesses from the group gave evidence: they were referred to as **Witnesses P, Q, R, S and T**. The journey

[627] T. 3247 and T. 3261-3264.
[628] Exhibit P356.
[629] T. 9184-9185 and T. 9197.
[630] T. 9242-9243.
[631] T. 9244.

5021

involved going down a gully and climbing a hill opposite Vlatko Kupre{ki}'s house.[632] The route was described by Witness Q. In cross-examination **Witness Q** was shown a video-recording made in April 1998 in which Witness CF is shown describing a different route.[633] Witness Q commented that the route described by Witness CF was marshy and was not passable at the time.[634] This evidence was corroborated by that of Witness S, who was also shown the video-recording and who stated that the route described by Witness CF was not the one taken. As the party climbed the hill, they heard shouting and swearing and came under fire from a group of soldiers standing in front of Vlatko Kupre{ki}'s house. As a result of the shooting Fata was killed and D'enana was wounded. The five witnesses all gave evidence concerning these incidents. The witnesses said that the soldiers were in front of Vlatko Kupre{ki}'s house. Two witnesses, **Q and S**, said that there was a civilian with the soldiers. Witness Q identified the civilian as Vlatko Kupre{ki}. Vlatko Kupre{ki} was 50-60 metres away and the witness had him in his view for several moments; he had known Vlatko Kupre{ki} all his life and said that he was 100 per cent sure it was him.[635] This evidence as to distance was confirmed by the evidence of **Howard Tucker**, an Investigator with the Office of the Prosecutor, who measured the distance with range-finding binoculars and found it to be 53 metres.[636]

450. The Prosecution called **Witness II** in rebuttal on this topic. He said that he was crossing the meadow when he heard cries for help coming from the top of the hill where he found Fata, D'enana and Ismail Pezer. Fata and Dženana were lying on the ground. Fata showed no signs of life. The witness went to another part of the hill to observe. He said that there was shooting from the house of Vlatko Kupre{ki}. He saw five to six soldiers with painted faces and helmets running near Vlatko Kupre{ki}'s house: their rifles were pointed in the direction of the Pezer family and himself. He then picked up Dženana, put her over his shoulder and carried her, using the hill as shelter, towards

---

[632] Exhibits P203, 205.
[633] Exhibit D4/3.
[634] T. 2809-2811.
[635] T. 2763, T. 2771-2773 and T. 2832.
[636] T. 12066 and T. 12072; Exhibit P385.

5022

Kermo's house. Two minutes elapsed between his hearing cries for help and his reaching Fata Pezer. When he reached her there were gunshots, coming primarily from Vlatko Kupre{ki}'s house. However, he noticed no civilians among the soldiers. It is his opinion that the Pezers were hit from Vlatko Kupre{ki}'s house.[637]

(b) Defence Evidence

451. The Defence case is that Vlatko Kupre{ki} was not involved in the conflict and did not participate in any of the killing or wounding of civilians or the looting and burning of property. The Defence case is also that between 5.30 and 6 a.m., Vlatko Kupre{ki} was taking his family to Jozo Vrebac's shelter in Šantići where he remained with them until 10 a.m., when he set off to try and contact his father in the family home, ending up in Niko Saki}'s house where he remained until after midday.

452. **Vlatko Kupre{ki}**'s account in evidence of the events that day was as follows:

(a) At 5 a.m., the telephone rang; he answered and an unknown person said "Vlatko, what are you waiting for? Go to the shelter". He did not take this seriously, but Ivica Kupre{ki} then rang and told him to go to the shelter: everyone had left. His wife told him someone had already called at 3 a.m. that morning. He left quickly with his family (wife, two children and mother): his father refused to go to the shelter. They went to Ivica Kupre{ki}'s house, found nobody there and went to Niko Saki}'s house where they met Saki}. They then went on towards Zume: when they were near the sportsground they heard heavy fire and detonations. They went to Jozo Vrebac's shelter, arriving at about 6 a.m.[638]

(b) He stayed in the shelter until 10 a.m., when he left to go and see his father. He told his wife that he was going to help the wounded. When he got to Niko Saki}'s house the latter told him to come in. By this time there was continuous shooting and Niko Saki} said that he had seen HVO soldiers going towards Vlatko Kupre{ki}'s

[637] T. 11979-11984 and T. 11990.
[638] **Vlatko Kupre{ki}**, T. 11770-11773.

house. Vlatko Kupre{ki} remained in Saki}'s kitchen until the shooting died down at about 12.30 p.m., when he left for his own house.[639]

(c) As he approached his own house he saw a soldier, outside the house at the entrance, who challenged him. Vlatko Kupre{ki} said that he had come to get his father. The soldier took him into the house. There were approximately 7 or 8 soldiers in a room in the house. His father was sitting in a chair. The front door had been broken down, the house had been ransacked, merchandise thrown around and the flower pots spilled. The house had been looted. Vlatko Kupre{ki} was upset and angry but a soldier pointed to the house of Suhreta Ahmi} (which was on fire) and said: "Is that what you want? .... Scram, come and get your father later". Vlatko Kupre{ki} ran out and returned to Niko Saki}'s house. On the way he met Drago Grgi}, another soldier in camouflage uniform, and Anto Vidovi}. He then fled to the basement of Nikola Samija's house where he remained until the shooting subsided again at 4 p.m., when he returned to Jozo Vrebac's shelter. The soldiers he had seen had painted faces, most had camouflage uniforms, two had black uniforms and some had helmets: all had ribbons on the left shoulder and were well-armed. They were all unknown to him.[640] In his evidence he commented that the soldiers had entered his house violently, perhaps because it was a good vantage point for viewing Ahmi}i. It was probably a very useful point for them strategically.[641]

(d) He stayed in Jozo Vrebac's shelter until 6 p.m., when he went to collect his father, returning to the shelter at 7 p.m. There were then no soldiers inside or around the house. His father told him that soldiers had burst into the house and shot from the house and from around it. (Vlatko Kupre{ki} himself, in the morning, had seen shell casings). The father said he had helped Cazim Ahmi} to assist his wife by providing a

[639] T. 11773-11775.
[640] **Vlatko Kupre{ki}**, T. 11777-11782.
[641] **Vlatko Kupre{ki}**, T. 11798-11799.

5024

blanket and axe from which Cazim could make a stretcher. His father told him nothing about the Pezer's predicament.[642]

(e) Vlatko Kupre{ki} denied killing anyone or taking property or setting property on fire. He did not participate in the killing or wounding of the Pezer family: he did not come home until about 1 p.m., on 16 April.[643] He was not in Witness H's yard at 6 a.m.[644] He was not in Witness KL's yard: he did not have a blue coat. He was not with soldiers shooting in front of his house or involved in the killing of Fata Pezer as alleged by Witness Q: he was in the shelter.[645]

(f) When cross-examined, Vlatko Kupre{ki} said he was wearing civilian clothes; a chocolate-coloured winter jacket and corduroy trousers.[646] Prior to 16 April 1993 he did not have a rifle but had a pistol for self-defence and that no more than 10 bullets were ever fired from it.[647] On 16 April at approximately 1 p.m., when he met Dragan Grgi}, the latter gave him a small rifle (a hunting carbine) to give to Ivica Kupre{ki}: the weapon went off and Vlatko Kupre{ki} gave it back to Dragan Grgi}.[648]

453. The evidence of the accused as to his clothing, the circumstances of their being woken and their journey to the shelter was supported by the evidence of his wife, **Mrs. Ljubica Kupre{ki}**[649] and cousin **Ivica Kupre{ki}**.[650]

454. The evidence of the accused that he was present in the shelter from about 6 a.m. until 10 a.m. was supported by that of his wife **Ljubica,**[651] **Ivo Vidovi},**[652] **Ljuba Vidovi}**[653] and **Gordana Cui}**.[654]

---

[642] **Vlatko Kupre{ki}**, T. 11783-11785.
[643] T. 11801-11803.
[644] **Vlatko Kupre{ki}**, T. 11813-11814.
[645] TT. 11814-16 and T. 11820.
[646] **Vlatko Kupre{ki}**, T. 11922.
[647] **Vlatko Kupre{ki}**, T. 11909-11910.
[648] T. 11912.
[649] T. 9378-9383 and T. 9440-45.
[650] T. 7971; see also **Niko Sakić**, T. 8275-8276.
[651] T. 9469-9470.
[652] T. 6984-6988.

455. **Niko Saki}** gave evidence in support of the accused's account of events at his house. This witness was cross-examined about a statement which he made in January 1998 in which he said Vlatko Kupre{ki} appeared at his house at about 10 a.m., to help in the evacuation of the wounded, remained for three hours and then left. The witness said that he thought that Vlatko Kupre{ki} could provide medical assistance because, in the witness's personal opinion he was unfit.[655]

456. Further evidence was given concerning conditions in the house of the accused on 16 April:

(a) **Witness DE** said that between 6.30 and 9 a.m., he tried to phone Vlatko Kupre{ki} but could not get through or there was no answer: at 9 a.m., somebody picked up the phone and, when the witness asked for Vlatko Kupre{ki}, brusquely said that Vlatko Kupre{ki} was not there and put the phone down.[656]

(b) According to **Ljubica Kupre{ki}**, Franjo (Vlatko's father) had said that three camouflaged soldiers had come to the house, asking for money and stealing a synthesizer.[657]

(c) **Witness DF** said that he was waiting at his home for Vlatko Kupre{ki} to bring the jeans (as promised) but by 8 a.m., he had not done so and the witness phoned him. Vlatko Kupre{ki}'s father (Franjo) answered and said that Vlatko Kupre{ki} had escaped with his wife, mother and children to the shelter: there was a war going on. Shooting could be heard on the phone. Franjo Kupre{ki} died after the war but before he died he told the witness "that on 16 April masked members of the special police

---

[653] T. 8106.
[654] T. 8174-8175 and T. 8208-8212.
[655] T. 8299-8300.
[656] T. 9162.
[657] T. 9384-9385.

5026

had entered the village and nobody could recognise them because they wore paint on their faces".[658]

457. The Defence called a great deal of evidence to contradict the Prosecution evidence concerning the murder of Fata Pezer. Summarising that evidence, it is convenient, first, to deal with the evidence of **Professor Wagenaar**, Professor of Experimental Psychology, University of Leiden, who gave his expert opinion on the identification of Vlatko Kupre{ki} by Witness Q. The Professor said that the important aspect of the recognition by Witness Q was the distance over which the observation was carried out. He said that, based on his studies, at the distance of 40 metres the accuracy rate is 50 per cent, i.e., it is as likely that a person would make a mistake as that they would be correct. Therefore, the likelihood of a witness making a mistake at 60 metres is higher than 50 per cent.[659] On the other hand, matters such as the length of the observation, the fact that the person identified was in a group, and the fact that Witness Q could not provide details of clothing are not relevant since this is a case of recognition.[660]

458. The Defence also called evidence to show that Fata Pezer was not shot on the slope opposite Vlatko Kupre{ki}'s house (as alleged by the Prosecution) but on the other side of the hill at a place from which the house could not be seen. They called four factual witnesses on this topic:

(a) **Witness CF** and **Witness CE** (a husband and wife respectively) were Muslim refugees from Prijedor living in the school in Ahmi}i. According to their evidence, on the morning of 16 April they heard shooting and went to the Pezer house and then accompanied the family on the journey to Nermin Kermo's house. They said that they were in the wood when the shooting started and the people were hit.[661] A video recording was played,[662] showing Witness CF demonstrating the alleged route taken from the Pezer house across the meadow and giving a commentary which may be

[658] T. 9210-9213 and T. 9215.
[659] T. 9848-9849, T. 9853, T. 9861-9862 and T. 9873.
[660] T. 9854-9857.
[661] **Witness CE**, T. 9613-9616; **Witness CF**, T. 9655-9657.

summarised as follows. They were fired upon from behind as they were in the wood. Witness CF was wounded in the neck and shoulder. Fata fell dead to his left and remained on the spot; the little girl (Dženana) was picked up and the rest went on.[663] Both witnesses were cross-examined. Witness CF was cross-examined about a statement he had made to defence counsel on 18 March 1998, the day that they were filming, in which he said that they started walking from the Pezer house across a meadow under a hill on the right side towards the forest (i.e. an account which supports the Prosecution case).[664] The witness said in evidence that in fact the slope was to the left of the hill.[665] He was also cross-examined about a statement made to an Office of the Prosecutor Investigator of 9 June 1998,[666] in which he said that he was shot from behind when running away from the main road and the Sutre store.[667] Witness CE was cross-examined about a statement she made to an Office of the Prosecutor Investigator in June 1998 in which she said that they hid for a while in a vegetable storage shelter. [668] She did not remember saying in the statement that the voice came from the Sutre shop or that somebody from the direction of the Sutre shop, or next to it, started shooting at them. She denied saying this.[669]

(b) In the light of these very serious discrepancies between their statements and their evidence, the Trial Chamber places no reliance on the evidence of these witnesses. In any event, the Trial Chamber prefers the evidence of the prosecution witnesses as to the route taken, in particular the evidence of Witness Q who knew the area well, as opposed to the two defence witnesses who had only been there for a few months.

(c) **Witness CG** lived near the lower mosque and said that on 16 April when the shooting began, he and his family left their house and went to an old house with a

---

[662] Exhibit D4/3.
[663] T. 9623-9627 and T. 9665-9669.
[664] Exhibit P365.
[665] T. 9688-9690 and T. 9693.
[666] Exhibit P364.
[667] T. 9707-9710.
[668] Exhibit P363.

5028

cellar 50 metres from their house. At about 8 a.m., the witness heard a scream and saw a line of people 150 metres away. He heard shouting and screaming. He saw people in the middle of the wood on a path on the side of the hill facing the witness. Gunfire was coming from all round and fragmentation bullets were hitting the trees. The shooting was coming from Hrasno. The weapons being used were not ordinary rifles, but weapons of a higher calibre. The witness left the house at about 1 p.m. and took the path to Nermin Kermo's house. Just below the wood he came across Fata's body next to the path: it was in the same place as he had seen the group of people.[670]

(d) **Stipan Vidovi}** said that 10-12 days after the conflict, he found the body of Fata Pezer in the woods about 100-150 meters behind her house. It is not possible from that place to see Vlatko Kupre{ki}'s house or yard because it is in a wood and there is a hill in between. The body had originally been found by two other men but they did not recognise Fata and told the witness. He could not tell if the body had been displaced before he discovered it. He ensured that the Red Cross were informed and they removed the body.[671]

459. The Defence called a Land Surveyor, **Mr. Kesi}**, to show that the place where Stipan Vidovi} found the body of Fata Pezer is in the same area as the place where Witness F said that he saw Fata Pezer's body on 17 April. Vlatko Kupre{ki}'s house cannot be seen from either of these places as it lies on the other side of the hill.[672]

460. With regard to the evidence regarding the finding of the body of Fata Pezer, the Trial Chamber notes that the position where the body was found cannot establish where the shooting occurred because of the possibility of the body having been moved after the shooting.

---

[669] T. 9640-9645.
[670] T. 9805-9807, T. 9810, T. 9814, and T. 9818. A further witness was called during rejoinder evidence, **Witness CH**, who said that she also had gone to the Kermo house that morning and had seen Fata Pezer's body on the edge of the forest at the foot of the hill (T. 12499, T. 12502-12506, T. 12517-12518).
[671] T. 9579-9583 and T. 9599.
[672] T. 9728-9739.

5029

461. The Defence next called two witnesses from Zagreb to give evidence concerning the injuries to Dženana Pezer and Witness CF and the way in which those injuries were inflicted, namely **Professor Skavi}**, Professor of Forensic Medicine and **Mr. Catipovi}**, a Ballistics Expert at the Ministry of the Interior.[673] Their evidence may be summarised as follows:

(a) the injuries to Dženana Pezer were wounds to the right leg above and below the knee and included a fracture of the shin and the intrusion of alien metal bodies The injury to Dženana Pezer's shin was due to a bullet or shrapnel; the explosion was on the right side and the projectile came from the right.[674] Witness CF sustained injuries to the right side of his neck and back; in fact this was a single injury, starting with a groove to the right side of the neck, the projectile then entering the right shoulder and exiting above the right shoulder blade. This wound was caused by a small firearm or fragmentation bullet. The groove formed by the projectile in the neck suggests that it is more likely to have been caused by shrapnel since a firearm would cause a narrower groove. The injury was inflicted from upward and then backward and downward.[675]

(b) the injuries to Witness CF were caused by a bullet (or fragment) fired from a firearm of heavy calibre: an MK-84 machine gun or heavier rather than to an automatic rifle. The bullets must have been fragmentation bullets which hit the treetops and then hit Witness CF in the neck, because the channel is too irregular. The injury D'enana Pezer's leg could not have been caused by a small bullet but by a projectile from an MK-84 machine gun or anti-aircraft gun hitting the trees.[676]

6. Findings of the Trial Chamber

462. The Trial Chamber takes account of the undisputed evidence that, prior to the conflict this accused was on good terms with Muslims and displayed no nationalist or

---

[673] Joint Report, Exhibit D54/3.
[674] T. 9764-9768.
[675] T. 9764-9767.
[676] T. 9779-9780, T. 9787-9789 and T. 9795.

ethnic prejudice. The Trial Chamber also takes account of the evidence (again undisputed) that he suffers from a congenital heart condition and, as a result, was excused from military service. However, this condition neither prevented him from leading an active life (as his evidence concerning his business shows), nor meant that he could not play a part in the events with which this trial is concerned.

463. In this connection, the Trial Chamber finds that in 1992-1993 Vlatko Kupreški} was an Operations Officer in the police with the rank of Inspector, as the Report of the Travnik Police Administration shows. The Trial Chamber rejects the evidence of the accused to the effect that he was concerned merely to make inventories of supplies for the police, and finds that he was an active operations officer. This occupation explains why he was seen unloading weapons from a car in front of his house in October 1992 and April 1993 and was again seen there on the afternoon of 15 April 1993. This is all evidence which the Trial Chamber accepts.

464. In addition to his police duties, the accused was engaged in business. It is his case that he did not return to Ahmi}i on 15 April until the evening when he got back from the trip to Split. On the other hand, the Prosecution evidence is that he was seen in Ahmi}i during the morning of 15 April at the Hotel Vitez (as noted) during the afternoon, and in the early evening in the vicinity of soldiers who were at his house. The Trial Chamber accepts the Prosecution evidence on this topic. While it has not been disputed by the Prosecution that the accused made the journey to Split, there is no evidence, apart from that given by the accused and his witnesses, as to the time of his return. The Trial Chamber is prepared to accept that Witness KL may have been mistaken in his identification of the accused in the morning, but is not prepared to accept that Witness B and Witness L are mistaken in their identification of the accused later in the day. Witness B, himself a security officer in the Territorial Defence and Witness L, a neighbour, both knew the accused and there is no reason to think either that they were mistaken or that they were lying during their evidence. The explanation for the discrepancy in the evidence is that the accused returned earlier in the day than he or his witnesses admitted.

465. The Trial Chamber also accepts the evidence given by the Prosecution witnesses in relation to the troop activities in and around the accused's house on the evening of 15 April. This evidence is confirmed by the entry in Witness V's diary recording that he learned that evening that the Croats were concentrating around the Kupreški} houses.

466. The Trial Chamber concludes from the above evidence that Vlatko Kupreški} was involved in the preparations for the attack on Ahmi}i in his role as police operations officer and as a resident of the village. The Trial Chamber also concludes that the accused allowed his house to be used for the purposes of the attack and as a place for the troops to gather the night before.

467. With regard to events on 16 April, it was not disputed that shots may have been fired from Vlatko Kupreški}'s house (although the circumstances in which they were fired are in dispute). The Trial Chamber finds that the first shots came from the Kupreški} houses, including that of the accused, as alleged by Esad Rizvanović, and that firing continued from that house or its vicinity during the day as alleged by Witness E, Witness V, Witness W, Witness KL and Witness BB and the witnesses to the firing upon the Pezer family (dealt with below).

468. In this connection the Trial Chamber rejects the evidence of the accused that the firing from his house had no connection with him and came about because soldiers broke into his house and used it. The Trial Chamber concludes that part of the accused's contribution to the attack was to authorise the use of his house for this purpose.

469. With regard to the evidence relating to the direct participation of the accused in the conflict of 16 April, the significant part is that relating to the shooting of the Pezer family, involving, as it did, the killing of Fata Pezer and the wounding of her daughter, D'enana. The Trial Chamber accepts that those responsible for these crimes were a group of soldiers standing in front of Vlatko Kupreški}'s house. Whatever the exact cause of D'enana's injuries was, the Trial Chamber is in no doubt that there was a group of soldiers firing, as alleged. However, the Trial Chamber is not satisfied that Vlatko Kupreški} was among them. Only one witness,Witness Q, identified the accused. This

witness did so at a distance of over 50 metres: a distance at which, as Professor Wagenaar pointed out, a witness is as likely to be mistaken as not. In the absence of confirmation of the correctness of this identification, the Trial Chamber is not able to be sure that it is correct. Accordingly, the allegation that Vlatko Kupreški} was present when these crimes were committed is not made out.

470. The other evidence relating to the presence of the accused during the armed conflict was that given by Witness H, who contends that the accused was in the vicinity of Suhret Ahmi}'s house at about 5.45 a.m. and shortly after the latter was murdered. This evidence was disputed by the accused. The evidence of Witness H has already been discussed in connection with the cases of the co-accused Zoran and Mirjan Kupreški}. She knew Vlatko Kupreški} and had no doubt of her identification of him. Her evidence was supported by the evidence of Witness KL. The Trial Chamber finds that this identification was correct and that Vlatko Kupreški} was in the vicinity shortly after the attack on Suhret Ahmi}'s house. There is no further evidence as to what the accused was doing there,[677] but the Trial Chamber concludes that he was present and ready to lend assistance in whatever way he could to the attacking forces, for instance by providing local knowledge. In this connection the Trial Chamber notes that he is recorded in two documents as being mobilised as a member of an HVO regiment on 16 April.

471. It follows that the evidence of the accused and his witnesses as to his non-participation in the conflict is rejected as untruthful. His role in the conflict was to assist in the preparation for it and to be present and ready to give assistance during it.

[677] The suggestion in the evidence of **Witness DE** that Vlatko Kupreški} may have had anything to do with the destruction of the mosque is unsubstantiated and is discounted by the Trial Chamber.

5033

D. Drago Josipović and Vladimir Šantić

1. Introduction

472. The cases involving these two accused may conveniently be considered together because both are charged together with offences in count 1 and counts 16-17 (the attack on the Pušćul family and their house).

2. Background

(a) Drago Josipović

473. Drago Josipović is aged 44, having been born on 14 February 1955. Prior to the conflict he worked in a factory. The following evidence was given regarding his conduct and associations:

(a) **Witness G**, who lived in Ahmi}i with his family was 13 years old in 1993. In the early 1990's he was a friend of Drago Josipović's son, Goran. Witness G said in evidence that a rifle was kept in the porch of the Josipovi} house and Drago Josipovi} used to wear a uniform, a pistol and a belt.[678]

(b) Drago Josipovi}'s wife, Slavica, came from what **Witness Z** described as an "Ustaša family" (her brother was Nenad Šanti}). Drago Josipovi} was seen with a rifle, usually in civilian clothes, but, on occasion, in uniform.[679] **Witness GG** in the period before the attack on 16 April saw Drago Josipovi} in a camouflage uniform with HVO patches.[680] She also saw Slavica in uniform on television with Dario Kordi} when HVO soldiers were taking a solemn oath.[681] **Witness CB** said that the

[678] T. 1446-1447, T. 1559-1561.
[679] **Witness Z**, T. 3598-3600; **Witness FF**, T. 4312.
[680] T. 4341-4342.
[681] T. 4343.

accused was a member of the HVO but was not on active duty: he was a member of the village guard taking part in patrols.[682]

(c) **Witness EE** knew Drago Josipovi} well as a neighbour: she had known him since childhood.[683] She also knew Vladimir Šanti} since she used to meet him during the course of her work for the Vitez Municipality and often used to see him in the street going towards the Hotel Vitez.[684] Passing her house before the conflict, Drago Josipovi} had said to Fahrudin Ahmi} (who was killed on 16 April) "pity for those two houses here". Fahrudin then told Witness EE what Drago Josipovi} had said.[685]

(d) The accused's name appears on the HVO Mobilisation Report[686] as having been mobilised between 16 and 28 April 1993.

474. Witnesses called by the Defence painted a different picture. Drago Josipovi} was portrayed as a quiet, hardworking craftsman, not politically active and on good terms with his neighbours.[687] He was a member of the village guard[688] and had a rifle which had belonged to Fahrudin Ahmi}, but which had been surrendered to Nenad Šanti} who had given it to Drago Josipovi}. The latter was not comfortable with this.[689]

(b) Vladimir Šanti}

475. The accused is by profession a policeman. He is aged 41, having been born on 1 April 1958. The Prosecution case is that by the time of the conflict he was a Commander in the Military Police and had an office in the Hotel Vitez.[690] In January

---

[682] T. 8938-8940.
[683] T. 4068.
[684] T. 4092.
[685] T. 4093-4094.
[686] Exhibit P343.
[687] Evidence of **Vlado Alilovi}**, T. 5504; **Rudo Vidović**, T. 6677; **Milica Vukadinović**, T. 10458-10460, T. 10466; **Dragan Stojak**, T. 6320-6321; **Marinko Katava**, T. 10582; declarations as to the character of the accused, Exhibits D29/5 and D30/5.
[688] **Ivo Vidovi}**, T. 6993.
[689] **Witness CB**, T. 8893-8895, T. 8898; **Jozo Livancić**, T. 10035-10036.
[690] **Witness B**, T. 736-737, T. 741-742 and T. 845-846.

1993 he had been promoted from Criminal Inspector to Commander of the 1st Company of the 4th Battalion, which was under the command of Pasko Ljubici}.[691]

476. Evidence concerning his position was given by Prosecution witnesses:

(a) **Witness B**, a Muslim Territorial Defence Security Officer in Vitez took up complaints which he had received about the activities of the Military Police with Vladimir Šanti}, either on the telephone, or in person in Vladimir Šanti}'s office. On one occasion Anto Furundžija came into the office in uniform, his face masked by cream and carrying a gun. Anto Furund`ija said to Vladimir Šanti}: "It's all right, we're back". Vladimir Šanti} asked "How did it go? Is everything all right?" In the witness's opinion, Vladimir Šanti} was the superior of the former.[692]

(b) Brigadier **Asim Dzambasovi}** of the BiH army, a professional soldier and former JNA officer, described six documents[693] signed by Vladimir Šanti} as documents all signed by a company commander and one[694] as a company commander's report to the Commander of the Military Police.[695]

477. Vladimir Šanti} was also Commander of the Jokers. This was according to the evidence of **Witness AA**, who was a Muslim member of the HVO Military Police and a member of the Jokers. Witness AA had known Vladimir Santi} since childhood, their fathers having been friends, and Vladimir Šanti} was his superior when he joined the HVO Military Police.[696] According to Witness AA, Vladimir Šanti} told him of the establishment of a "special purpose or anti-terrorist" unit to be set up at the Bungalow in Nadioci. The witness's platoon reported there.[697] Vladimir Šanti} gave them orders, e.g. telling them to decide on a name for the unit, to take anything they needed for the Bungalow from Busovača and to visit the lines at Rovna. Vladimir Santi} approved the

---

[691] **Witness AA**, T. 3707-3709.
[692] T. 745-746.
[693] Exhibits P390-1/2 (AD/1-6).
[694] Exhibit P390/2 (AD/1).
[695] T. 12178-12180 and T. 12182-12184.
[696] T. 3699.
[697] Exhibit P119.

5036

election of Anto Furundžija as "Immediate Commander". In the witness's view the Jokers could do nothing without orders from Vladimir Šanti}.[698] In March 1993 Vladimir Šanti} signed three orders imposing various punishments on Witness AA.[699]

478. On the other hand, defence witnesses gave evidence of his good character. According to one witness, distantly related to him, Vladimir Šanti} was employed in the civilian police before the war and was an exemplary individual.[700] According to another witness (**Zeljko Kocaj**) he never drew attention to himself as a nationalist.[701] Declarations were admitted from his wife, sister, a colleague and a Muslim family friend, which speak of his professional approach to his work, sociability and friendliness, including a willingness to help to those in need, of whatever religion.[702]

3. Their Alleged Participation in the Killing of Musafer Pu{}ul and Burning of the Pu{}ul House

(a) Prosecution Evidence

479. The Prosecution relied on the evidence of one witness, **Witness EE**, in the case against the accused in relation to these allegations. Witness EE's evidence was as follows: at dawn on 16 April there was a loud detonation and shooting. Voices could be heard calling out her husband, Musafer's, name: "Open the door, this is the police". There was then a burst of gunfire and Musafer opened the door. Soldiers in full uniform were on the verandah outside the door: the witness was at the door and recognised Drago Josipovi}, Vladimir Šanti}, Zjeliko Livanci}, Marinko Katava and Karlo ^erkez. Šanti} and Livanci} then took Musafer away and the witness never saw him again. Šanti} and Livanci} were wearing camouflage uniforms with an HVO patch and they were wearing helmets (the only ones to do so).[703] Drago Josipovi} told Witness EE and her children to

---

[698] T. 3719-3729.
[699] Exhibits P250-252; T. 3732-3733 and T. 3740.
[700] Evidence of **Rudo Kurevija**, T. 5932.
[701] T. 10862.
[702] Exhibits D16-20/6.
[703] T. 4077-4083.

5037

go into the corner of the veranda and threatened to cut their throats. When the witness and the children went into the corner, a single soldier, Stipo Alilovi}, remained. Then the group of soldiers re-appeared, including Drago Josipovi}. Livanci} ordered the witness and children to get out. She and the children went outside near some sheds where her mother was. While there, the witness saw Vlado Šanti} passing by: she hailed him, but he moved away.[704] The witness, her children and mother spent the day in a shed. There was shooting throughout the day, and soldiers set fire to her house. Towards evening Drago Josipovi} (in full military gear), Anto Papi} and Jozo Livanci} came to the shed. They told her to come out and she, her mother and the children did so. Drago Josipovi} said that the shed would be set on fire. (She asked for the cows to be let out and he let the animals out). She was told to go to Anto Papi}'s house with her family, which is where they went.[705] While they were in front of the shed Drago Josipovi} told her that her husband Musafer had been killed.[706]

480. In cross-examination Witness EE said that she wore glasses outside and when driving a car, but not in the house or at work. She was not wearing her glasses on 16 April.[707] Her husband (Musafer) was killed beside the shed: she could hear shooting while Drago Josipovi} was ordering her to go into the corner. Her late mother was standing there and watching Vladimir Šanti} and Zeljo Livanci} as they were leading him behind the shed.[708] Drago Josipovi} wore a camouflage cap but she recognised him: ". . . it was Drago. I saw the moustache and everything and I saw him there. I recognised him by everything because we saw each other every day. We were neighbours".[709] In re-examination she testified that Drago Josipovi} was "in full military gear, camouflage

[704] T. 4085-4091.
[705] T. 4109-4113.
[706] T. 4116.
[707] T. 4152-4153.
[708] T. 4216-4217.
[709] T. 4221.

5038

uniform, camouflage cap, HVO insignia and weapons".[710] She had no doubt that Drago Josipovi} and Vladimir Šanti} were in her yard on the morning of 16 April 1993.[711]

481. The following is a summary of statements made by Witness EE:

(a) On 5 May 1993 at Zenica the witness made a tape-recorded statement for an Officer of the United Nations Centre for Human Rights (Witness HH). According to the latter's note of the recording[712] the witness said that on 16 April she heard shouting at the door, telling her husband to open the door. When Musafer opened the door she saw HVO soldiers, whom she knew. Zeljko Ivanci} took her husband and fired three bursts of gunfire into him; thereupon she saw Stipo Alilovi}, Drago Josipovi} and Vladimir Šanti}. Stipo Alilovi} told her to shut up and threatened to kill the witness and her children.

(b) On 14 May 1993 in a statement to Zenica Security Services she said that Stipo Alilovi} ordered Zjelko Livanci} to take her husband and he took him behind a shed and shortly after she heard a burst of gunfire.[713]

(c) On 20 December 1993, in a statement to the Zenica court she said that Zjelko Livanci} took her husband behind the shed and fired three bursts of gunfire into him.[714]

(d) On 1 February 1995, in a statement made to investigators of the Office of the Prosecutor, she said that Zjelko Livanci}, Vladimir Šanti}, Drago Josipovi} and Marinko Katava took Musafer behind the shed: she heard many bursts of gunfire from the shed where they took her husband.[715] She said in evidence that she had not said that the four men took her husband off.

---

[710] T. 4258.
[711] T. 4259.
[712] Exhibit P292.
[713] Exhibit D10/1; T. 1300.
[714] Exhibit D3/6; T. 1305.
[715] Exhibit D4/6.

5039

482. The Defence called evidence to cast doubt on the credibility of Witness EE. The purpose was to show that Marinko Katava, Stipo Alilovi} and Zeljko Livanci} were not in Ahmi}i on 16 April 1993 and, accordingly, that the witness was mistaken in her identification of them as parties to the killing of her husband.

(a) The Defence called evidence to show that Stipo Alilovi} was in the Netherlands on 16 April 1993, i.e. the evidence of **Mrs. Dragica Krizanac**, the widow of Stipo Alilovi},[716] supported by the evidence of **Ms. Johanna Hume**, a Dutch friend of the Alilovi}'s whose daughter went to the same school as the Alilovi}'s daughter.[717] Documents were exhibited to the same effect.[718]

(b) Evidence was called that Marinko Katava was in his apartment in a building on Marshall Tito Street, Vitez on the morning of 16 April; i.e., the evidence of **Witness CD**, who lived in the same apartment,[719] and **Marinko Katava** himself.[720]

(c) Evidence was called as to the presence of Zeljo Livanci} in Kuber on the morning of 16 April. According to this evidence Livanci} was Commander of a unit of guards who went to Kuber on 13 April and which were still there on 16 April and which remained there all day.[721] Livanci} was killed on 17 April.

483. The Prosecution sought (and were granted) leave to withdraw the indictment against Katava on the grounds that there was an insufficient evidentiary basis to justify proceeding with the prosecution. However, the decision to withdraw the indictment was one for the Prosecution and it does not follow that Witness EE is mistaken in her identification of the accused. Similarly, even if she was mistaken about her identification of Katava (and Alilovi} and Livanci}), it does not necessarily mean that she was mistaken in her identification of Drago Josipović and Vladimir Šantić. Although she did

---

[716] T. 9304, 9320, 9343.
[717] T. 10627-10632, T. 10635-36 and T. 10641-10643.
[718] Exhibit D2/6.
[719] T. 9249-50 and T. 9253-55.
[720] T. 10536-38, T. 10541-10542, T. 10574 and T. 10623.
[721] **Ivo Pranjkovi}**, T. 10212, T. 10217; **Andjelko Vidovi}**, T. 10670-10674.

5040

not see the accused for long (a matter of seconds),[722] she recognised them as people known to her before the attack (Drago Josipovi} as a neighbour for more than 30 years and Vladimir Šanti} professionally).

4. Their Alleged Participation in Other Incidents on 16 April 1993

(a) Drago Josipovi}

(i) Prosecution Evidence

484. Drago Josipovi} was identified as a participant in other attacks on the homes of his neighbours in which the male inhabitants of the houses were executed and the houses set on fire. This was part of what appears to have been a concerted attack on Muslim homes in the area.

485. First, it is alleged that Drago Josipovi} participated in the attack on the house of Nazif and Senija Ahmi}, during which Nazif and his 14 year old son, Amir, were killed. **Witness DD** gave evidence of this attack. She saw Drago Josipovi} among soldiers near Asim's house, shooting at Nazif's house: the soldiers came to the latter house. A soldier took Amir behind the house and a shot was heard. Drago Josipovi} then came from behind the house, taking off his mask or cap to wipe sweat from his forehead. Drago Josipovi} pointed a rifle and told a soldier with whom she had been struggling to leave the witness alone.[723] It seemed to the witness that Drago Josipovi} was in command.[724] She had known Drago Josipovi} as a neighbour for 21 years prior to the attack.

486. Secondly, it is alleged that Drago Josipović participated in an attack in which Fahrudin ('Fahran') Ahmi} was killed. Fahrudin's mother, **Witness CA**, gave evidence regarding this attack. (She was a Court witness, called by the Trial Chamber). She lived in Zume near Fahrudin and Drago Josipovi}: only a fence separated her house from that

[722] T. 4081.
[723] T. 3899-3900; T. 3922-3926; T. 3933-3935; T. 3956 and T. 3962-3973.
[724] T. 3982.

5041

of Drago Josipovi}. She said she had good relations with Drago Josipovi} 's mother who was like a sister to her. Drago Josipovi} grew up with her children in her courtyard; her son, Fahrudin and Drago were like "blood brothers".[725] Her evidence was as follows:

(a) On the morning of the 16 April at about 5.20 a.m., after some detonations, Witness CA saw four soldiers in camouflage uniforms and with rifles coming from Drago Josipovi}'s yard to her house. They asked for her son, Fahrudin, and shortly afterwards threw a bomb into the upper part of her house. They then broke in and put her husband up against a pillar to be shot. She successfully pleaded for his life. The soldiers then told her to leave (which she did) and they set fire to the house. Witness CA then went to Fahrudin's house where his children told her that he had been killed.[726] She subsequently saw his body.

(b) Later she saw Drago Josipovi} nearby with a man called Anto Papi}; they had camouflage uniforms and weapons. She asked Drago Josipovi} where he was when Fahrudin was killed. He was crying and said he would have done something if he could, but he could not do anything. When asked who had ordered the killing, he said "somebody higher up, some higher force".[727] At Drago Josipovi}'s suggestion the witness and her family were taken to Anto Papi}'s house. While they were in the house Witness CA asked Drago Josipovi} to collect two other families from their houses which he did. Drago Josipovi} told the witness that Musafer Puš}ul had been killed and that Jozo Livanci} had told him.[728]

(c) The next day, on 17 April 1998, Drago Josipovi} and Anto Papi} told the witness and her husband to go to Ramiz's yard. When she met Drago Josipovi} later, she asked him to accompany her. He refused, saying that he could not save them since there was shooting and they would all be killed. He told her to follow her people.[729]

---

[725] T. 4571 and T. 4575-4577.
[726] T. 4557-4562 and T. 4581-4583.
[727] T. 4562-4563, T. 4577 and T. 4591-4592.
[728] T. 4563 and T. 4622.
[729] T. 4565 and T. 4596-4598.

5042

They went to Ramiz's yard and her husband was subsequently taken away and executed.

487. It may be noted that there was evidence of a similar attack on another house nearby on 16 April (although Drago Josipovi} was not identified as a participant). This evidence, given by **Witness FF**, was to the effect that shots were fired at the house, her husband Razim was taken from the house and while she and her children were locked in a barn her husband was executed.[730]

488. The remaining evidence concerning Drago Josipovi}'s conduct on 16 April concerns events at or near the Ogrjev Plant:

(a) **Witness Z** said that he saw Drago Josipovi} on the main road near the Ogrjev Plant at about 4.30 p.m., leading a group of soldiers, wearing a camouflage uniform and multi-coloured cap and with an automatic rifle, but no paint on his face.[731]

(b) According to Witness Z, Aladin Karahodja, night watchman at the Ogrjev Plant, told Witness Z that on 16 April 1993 Drago Josipovi} took his gun from him and threatened him.[732]

(c) According to **Witness BB**, Aladin told her that Drago Josipovi} had locked him in his hut and told him that he would see everything and be the last to be killed.[733] (Aladin is now dead). However, the Trial Chamber notes that this allegation was not contained in Witness BB's statement made in 1995.

(b) Vladimir Šantić

(i) Prosecution Evidence

[730] T. 4314-4317.
[731] T. 3617-3618.
[732] T. 3616.
[733] T. 3824 and T. 3834.

489. There is no other direct evidence of Vladimir Šanti}'s involvement in attacks on 16 April 1993. However there is evidence of the accused's involvement with the Jokers from which the Prosecution invited the Trial Chamber to conclude that he participated in such attacks, at least in his capacity as Commander of the Jokers. This evidence was as follows:

(a) According to **Witness B**, on 16 or 17 April 1993 a young HVO soldier, Zoran Šanti}, was arrested in Stari Vitez and was questioned. Witness B overheard part of the questioning. **Zoran Šanti}** said that he had spent the last few months at the Bungalow as a messenger and that it was full of troops and Special Purpose Units: he had often seen Vladimir Šanti} there. On the evening of 15 April 1993 "there was intensified activity with arming, equipment and fresh forces coming in". Zoran Šanti} was at the Bungalow and Vladimir Šanti} came in a car with a crate of alcohol. There had been a meeting at which he overheard Vladimir Šanti} say that the order was that not a single male from 12-70 years must remain alive; everyone else was to be captured.[734] (The Trial Chamber bears in mind that this evidence is double hearsay).

(b) A video tape of a TV report (alleged to have been made by Bosnian Croat TV from Busovača) relating to events on the evening of 16 April showed a scene at 2248 hours which **Witness AA** identified as showing the Jokers in the Bungalow with Pasko Ljubici} and Vladimir Šanti}.[735] The Defence did not dispute that Vladimir Šanti} is shown on the tape but disputed the circumstances in which it was filmed and said that the time shown therein was not accurate.

(c) According to **Sulejman Kavazovi}**, on 24 April 1993 he was taken to the Bungalow where he saw Vladimir Šanti}, wearing a black uniform normally worn by the Jokers, together with 50 or 60 people from various units. Vladimir Šanti} ordered some men to take the witness to Kratine.[736]

---

[734] T. 787-791.
[735] T. 3749; Exhibit P253.
[736] T. 4394-4396 and T. 4402.

5044

(d) **Zaim Kabler**, a Muslim prisoner and an acquaintance of Vladimir Šanti}'s, said that he saw Vladimir Šanti} at the Bungalow on 26 April 1993 in a camouflage shirt and patches.[737]

5. Defence Evidence concerning Events on 16 April 1993

(a) Drago Josipović

490. The case for this accused is that he was not involved in the murders as alleged by the Prosecution. He alleges that he was not at the location alleged at the material time but that he instead spent the day moving around the houses nearby, in particular, those of Anto Bralo and Anto Papić. He took no part in military activity but rather, was helping others find shelter (including Muslims).

491. In support of this case Drago Josipović called evidence from five of his neighbours and another witness was called by the Trial Chamber. First, **Anto Papić** said that at 5.15 a.m., he saw Drago Josipović going past his (the witness's) house. The witness was in his yard and invited Drago Josipović in for a cup of coffee. Drago Josipović said he was going to his father-in-law's in Rovna where he had some business. After ten minutes shots were fired. Drago Josipović said he did not know what it was. The witness suggested that they go to see who was firing. They went out and met Witness CB (the wife of Fahran) and her children. She asked the witness for shelter. He agreed. There were a number of Muslims at his house. Drago Josipović brought Mirsad Osmancevi} and Casim Rami} and family to the witness's house where they were protected.[738] Later he also brought back Witness EE.[739]

492. This evidence was supported by the evidence of **Mr. and Mrs Kova}**, **Mr. Anto Bralo** and **Mrs. Finka Bralo**, who described the accused moving around with Anto Papi} in the vicinity of Anto Papi}'s house between 5.30 and 5.45 a.m. that morning and

[737] T. 4026-4030.
[738] T. 9927-9933.
[739] T. 9952-9953.

taking Muslims to that house.[740] These witnesses, together with **Witness CB**, testified that Drago Josipović remained in this vicinity all day and helped various Muslims to find shelter in the house.[741]

493. It may be noted that Mr. Kova} and Mr. Bralo said that Drago Josipović was carrying a rifle.[742] Also, there was evidence that the accused was wearing an army vest which he lent to Mirsad Osmancevi} (a member of the BiH Army).[743] The vest had an insignia which was similar to that on the Croat flag, a small chessboard.[744]

494. A suggestion appeared to be made that a man called Slavko Rajkovi} (a Croat soldier wearing a Jokers patch), who was himself killed on 16 April 1993, and who was seen together with other soldiers wearing black uniforms with painted faces in front of Ramiz Ahmi}'s house, may have been responsible for the killings. Evidence of this was given by **Josip Vidovi}** and **Josip Covi}**.[745]

495. **Witness CB** was the wife of Fahran Ahmi} and gave evidence which tended to contradict that of her mother-in-law, Witness CA. Witness CB said that she and her family were awoken by loud explosions. They went downstairs. A grenade was thrown into an adjacent room. A shot was fired into the door and a man came in.[746] She said that he was tall and blonde, wearing a camouflage uniform with the insignia of the Military Police on his arm.[747] The man told the family to get out. Her husband, Fahran, went out – the man shot him in a burst of gunfire. The rest of the family remained in the house. Her mother-in-law, Fatima, came to the house. A Croat soldier in camouflage uniform told them to leave.[748] They left the house and went across the fields. There was gunfire

---

[740] **Franjo Kova}**, T. 10092-10199, T. 10102; **Katica Kova}**, T. 10157-10162, T. 10167 and T. 10190-10192; **Anto Bralo** and **Finka Bralo**, T. 10389-10392; **Finka Bralo**, T. 10340-10342, T. 10348 and T. 10357.
[741] **Witness CB**, T. 8868-8948.
[742] T. 10102 and T.10429.
[743] T. 8873-8875 and T. 8876-8877; **Anto Papi}**, T. 9937-9940; **Katica Kova}**, T. 10166-10167.
[744] **Anto Papić**, T. 10007-10008.
[745] **Josip Vidovi}**, T. 10282-10285 and T. 10293-10297; **Josip Cović**, T. 10305-10315.
[746] T. 8856-8857.
[747] T. 8945.
[748] T. 8857-8858.

all around.[749] They met Drago Josipovi} and Anto Papi}. This was before 6 a.m.[750] The witness said that Fahran had been killed and they expressed their condolences. Drago Josipović said that if he had been there he would have been killed. Anto Papi} and Drago Josipović told them to go to Anto Papi}'s house: his family would share their fate. The witness agreed with her statement to the Office of the Prosecutor that in her opinion Drago Josipović could not have been near her house when her husband was killed. The distance between the witness's house and Anto Papi}'s house was 10 minutes walk.[751]

496. **Dragan Cali}**, who was foreman of the warehouse in the Ogrjev plant, was called to give evidence about events at the plant. He said in evidence that Aladin Karahodja was one of the guards (he was between 27-30 years old and healthy). He was on duty from 4 p.m. on 15 April 1993 to 8 a.m. on 16 April 1993. According to the rules, he could not leave until the foreman arrived. The witness did not go to work on 16 April. Aladin could have climbed out over the fence or gone through the small gate which was not locked. If the guard hut was locked a person inside could get out through the door or window. On 18 April the witness returned to work and everything was in order: the door was unlocked and a pistol was in the drawer with two rounds which had been issued to Aladin.[752]

(b) Vladimir Šanti}

497. The Defence case is one of alibi, i.e. that at the time that Witness EE alleged that he was one of the party who attacked her house and killed her husband, Vladimir Šanti} was in fact in the HVO Headquarters in the Hotel Vitez. He called two witnesses in support of his alibi.

498. The first witness was **Davor Bileti}**, a member of the 4th Batallion of the HVO Military Police, employed in security in the Hotel Vitez. He said that at midnight of

[749] T. 8880.
[750] T. 8861-8862, T. 8878, T. 8863-8864 and T. 8947.
[751] T. 8863-8865.
[752] T. 10249-10251 and T. 10256-10257.

15 April, he was on duty at the reception desk at the Hotel. At 5.15 a.m. on 16 April Vladimir Šanti} arrived as usual: there was a clock on the desk and the witness was aware of the time as he had to wake up those who were going on guard duty. Vladimir Šanti} came to the hotel on foot: he was dressed in a camouflage uniform and was carrying a pistol.[753] The witness exchanged greetings with Vladimir Šanti} who then went into the Military Police office behind the reception. At 5.30 a.m., there was a loud detonation, followed by smaller detonations which shattered some of the glass. There was also fire from rifles. Shells and bullets were falling around the hotel. The witness took up position outside the entrance: he heard Vladimir Šanti}'s voice.[754] The witness remained at his post at the entrance until 11 a.m., when he went to get a sandwich and saw Vladimir Šanti} going into the mess. At about 6 p.m., the witness went to get his dinner and again saw Vladimir Šanti} in the mess.[755] After 8 p.m., the witness and six others from hotel security were sent to the Bungalow by vehicle. He saw Vladimir Šanti} in front of the Bungalow. The group stayed for 20 minutes at the Bungalow and were then taken to the frontline at Kratine.[756]

499. The second witness, **Ivica Franji}**, was at the time Manager of the Hotel Vitez. According to his evidence, he was living in Kruscice, about 1 km. from the hotel.[757] On 16 April, having been woken by detonations, he left for the hotel, arriving there between 6.15 - 6.30 a.m. He saw Vladimir Šanti} in the lobby of the hotel and asked him what was going on, only to receive a dismissive reply, to the effect that "well, don't you see?" The witness left the hotel shortly afterwards because none of his staff were there. Šanti} stayed in the lobby, issuing instructions.[758] This witness was cross-examined about an interview with an Office of the Prosecutor Investigator in March 1999 (in the presence of both Prosecution and Defence Counsel) in which (contrary to his evidence) he said that

[753] T. 10732-10738 and T. 10759.
[754] T. 10739-10743.
[755] T. 10745-10749.
[756] T. 10749, T. 10752 and T. 10759-10780.
[757] T. 10788-10789.
[758] T. 10794, T. 10798 and T. 10801-10806.

he left the hotel by the exit to the coffee shop: the witness said in evidence that he went through the coffee shop to the main entrance.[759]

6. Findings of the Trial Chamber

500. Dealing, first, with Vladimir Šanti}, the Trial Chamber finds that in April 1993 he held the following positions. It was not disputed that he was commander of the 1st Company of the 4th Battalion of the Military Police: the evidence of Witness B and the documents signed by the accused in this capacity make this clear.

501. The Trial Chamber also finds that Vladimir Šanti} was Commander of the Jokers. In this connection the Trial Chamber accepts the evidence of Witness AA who, as a member of the Jokers, gave evidence that the accused was their Commander.

502. The Trial Chamber finds that Drago Josipovi} was a member of the HVO prior to 16 April 1993; he was a member of the village guard and was seen in the village in uniform and with a rifle. The Trial Chamber accepts the Prosecution evidence on this point and notes that much is undisputed. However, the background, views and conduct of the accused's wife are irrelevant.

503. Turning to the alleged direct participation of both accused in the conflict on 16 April 1993, the prosecution relies on the evidence of Witness EE, who identified them both as participants in the attack on her house when her husband was murdered. Her evidence, together with the evidence called to cast doubt on it, have been analysed above. The thrust of the criticism is that she mis-identified three other participants. It is accepted by the Trial Chamber that the witness was mistaken in her identification of Katava and Alilovi}, since there is compelling evidence that neither was in Ahmi}i that morning. (It is not accepted that she was mistaken about Livanci} since the only evidence concerning his whereabouts that morning came from two of his colleagues). However, it does not follow from the fact that the witness was mistaken in the identification of two of the

[759] T. 10828-10830.

participants that she was mistaken in the identification of the accused. The witness struck the Trial Chamber as a trustworthy and careful witness who identified the two accused in a statement made within three weeks of these offences and has not, in any way, retracted it. The Trial Chamber accepts her evidence and finds that Vladimir Šanti} and Drago Josipovi} participated in the attack on the Pušćul house: they were part of the group of soldiers who attacked and burned the house and murdered Musafer Pušćul.

504. The Trial Chamber also finds that Drago Josipovi} participated in the attack on the house of Nazif Ahmi} in which Nazif and his 14 year old son were killed. The Prosecution case, in relation to these crimes, rests upon the evidence of Witness DD. The Trial Chamber is satisfied that she accurately identified the accused. The witness had known the accused as a neighbour for a great many years and had a ample opportunity to identify him during the incident. The Trial Chamber is also satisfied that the witness accurately described the role played by the accused in the attack and that he was, in fact, in a commanding position with regard to the troops involved.

505. On the other hand, having heard the evidence of Witness CB, the Trial Chamber is not satisfied that Drago Josipovi} participated in the attack on the house of Fahran Ahmi}. At most, his comments to Witness CA amount to his saying that he knew of the incident and had not been able to do anything to prevent it.

506. The evidence concerning Drago Josipovi} and the nightwatchman of the Ogrjev Plant is hearsay and inconclusive. However, the Trial Chamber accepts the evidence of Witness Z regarding the presence of the accused leading soldiers near the plant on the afternoon of 16 April.

507. In relation to Vladimir Šanti}, the Trial Chamber is unable to accept the evidence of the conversation overheard by Witness B. As noted, this evidence is double hearsay and lacks any features which could confirm its reliability. On the other hand, the Trial Chamber notes the scene displayed on the video tape, referred to in the same paragraph, showing the accused at the Bungalow with the Jokers in the Bungalow on the evening of the conflict.

508. In finding that Vladimir Šanti} was present during the conflict, the Trial Chamber rejects his alibi. In relation to one of the two witnesses whom the accused called to support his alibi, **Davor Biletić**, an indication of this witness's lack of credibility was that although he was a member of the Military Police in Vitez, he denied knowing anything about the Jokers.[760] He also denied knowing Vladimir Šanti}'s rank.[761] In relation to the second witness, **Ivica Franji}**, the Trial Chamber, having noted the discrepancy between his evidence and the interview he gave, does not accept his evidence.

509. The Trial Chamber, likewise, rejects the defence put forward by Drago Josipovi} and his witnesses. The picture which they paint of the accused spending the day moving around the locality to very little apparent purpose is simply not credible. The truth is that he was armed and active, playing his full part in the attacks on his neighbours, sometimes having command over a group of soldiers.

[760] T. 10761 and T. 10783.
[761] T. 10766 and T. 10784.

5051

V. THE APPLICABLE LAW

A. Preliminary Issues

1. General

510. Two particular arguments which have either been put forward by the Defence in their submissions or which are implicit in the testimony of witnesses called by the Defence need to be rebutted in the strongest possible terms.

511. The first is the suggestion that the attacks committed against the Muslim population of the Lašva Valley were somehow justifiable because, in the Defence's allegation, similar attacks were allegedly being perpetrated by the Muslims against the Croat population.[762] The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character. It thus follows that the *tu quoque* defence has no place in contemporary international humanitarian law. The defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants.

512. A second strand of argument resorted to by the Defence has been to challenge the civilian character of the Muslim population of Ahmići by alleging that the village of Ahmići was not an undefended village.[763] The Defence contends that the non-combatant status of the Muslim population of Ahmići should be determined in fact and not by

[762] See, *inter alia,* the Defence's Submission of Witnesses (sic) Summaries pursuant to the Request of the Trial Chamber on 15 Oct. 1998, Nov. 10 1998 (filed 13 Nov. 1998), Doc. No. D2943-D2928: "the commander of the Army of Bosnia and Herzegovina (sic) in Ahmići [...] confessed crying before the major (sic) group of Croats that Nijaz Sivro was the one who was in charge and set targets [for...] the Army of Bosnia and [H]erzegovina with the final aim of persecution of Croats from Ahmići [...]" and T. 5999-6033.
[763] See for instance Defence's submission of the Answer whether on 16 April 1993 a massacre was carried out in Ahmići [...], Nov. 10, 1998, filed 13 Nov. 1998, Doc. No. D2958-D2947: "Ahmići was not [an] undefended village in which all Moslems were (sic) the civilian population [.... M]any people were killed ... because it is (*sic*) a sad consequence of the war and armed conflict".

5052

formalities[764] and that it cannot encompass persons who had previously taken part in any fashion in hostilities, had previously taken up arms or who spontaneously took up arms to resist an attacker.[765] According to these submissions, the civilian deaths in Ahmići resulted from skirmishes between warring factions and hence, were militarily-justified actions.[766]

513. Whether or not this is correct – and this is a matter that will be addressed later – it is nevertheless beyond dispute that at a minimum, large numbers of civilian casualties would have been interspersed among the combatants. The point which needs to be emphasised is the sacrosanct character of the duty to protect civilians, which entails, amongst other things, the absolute character of the prohibition of reprisals against civilian populations. Even if it can be proved that the Muslim population of Ahmići was not entirely civilian but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of full-scale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality.

514. The Trial Chamber will also address an issue of general relevance and of a methodological nature, namely, the importance it should attach to case law in its findings on international humanitarian law and international criminal law.

---

[764] See for example the Defence's assertion that members of the BiH Army seldom wore uniforms or distinctive insignia and hence, the mere fact that none of the victims appeared to be wearing uniforms cannot be dispositive of this issue. (See Petition of the Counsels of the Accused Zoran and Mirjan Kupreškić, filed 12 Nov. 1998, Doc. No. D2904-D2891, at para. 7: "... in (sic) the incriminated time most of the members (sic) of the BiH had no uniforms, that they were (sic) in civilian clothes, with no special marks on them, and they were dressed that way when they left for the front line with Serbs, so, according to that, the fact that no dead persons in uniforms have been seen, does not mean that they were not army members". See also Defence's Closing Brief of 5 Nov. 1999, Doc. No. D5970-D5879, at p. 18: "In Ahmići [on April 16 1993 ...t]he resistance was significant and organised" and the closing argument of defence counsel Radović, T. 12733-12734.

[765] See for instance the Defence's Closing Brief of 5 Nov. 1999, at p. 84: "[P]rivate individuals [...] who had previously taken part in any fashion in the internal hostilities, who previously had taken arms, or who spontaneously take up arms to resist an attacker [...] directly take part in hostilities and, therefore, are [not] covered by this definition of "non-combatant" [or] protected by ICTY Art. 3".

[766] See for instance Defence's submission of the Answer whether on 16 April 1993 a massacre was carried out in Ahmići, *ibid.*

5053

2. The *Tu Quoque* Principle is Fallacious and Inapplicable: The Absolute Character of Obligations Imposed by Fundamental Rules of International Humanitarian Law

515. Defence counsel have indirectly or implicitly relied upon the *tu quoque* principle, i.e. the argument whereby the fact that the adversary has also committed similar crimes offers a valid defence to the individuals accused.[767] This is an argument resting on the allegedly reciprocal nature of obligations created by the humanitarian law of armed conflict. This argument may amount to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent. Or it may amount to saying that such breaches, having been perpetrated by the adversary, legitimise similar breaches by a belligerent in response to, or in retaliation for, such violations by the enemy. Clearly, this second approach to a large extent coincides with the doctrine of reprisals, and is accordingly assessed below. Here the Trial Chamber will confine itself to briefly discussing the first meaning of the principle at issue.

516. It should first of all be pointed out that although *tu quoque* was raised as a defence in war crimes trials following the Second World War, it was universally rejected. The US Military Tribunal in the *High Command* trial, for instance, categorically stated that under general principles of law, an accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused.[768] Indeed, there is in fact no support either in State practice or in the opinions of publicists for the validity of such a defence.

---

[767] See for instance the cross-examination of Witness Y, where defence counsel Ms. Glumać gave a list of Croatian villages from which Croats were allegedly expelled and their houses burnt, supporting the inference that the Croats justified the massacres in Ahmići in terms of revenge (T. 3344-46). See also paras. 23, 125 and 338, *ibid.*

[768] *US v. von Leeb et al* (the *High Command* trial) (1948), Law Reports of the Trials of War Criminals (hereafter *LWT)*, vol. 12, p. 1, at p. 64 (US Military Tribunal, Nuremberg). See also '*Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*,' UN Doc. S/1994/674 (27 May 1994), p. 18, para. 63.

5054

517. Secondly, the *tu quoque* argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. This concept is already encapsulated in Common Article 1 of the 1949 Geneva Conventions, which provides that "The High Contracting Parties undertake to respect [...] the present Convention *in all circumstances*" (emphasis added). Furthermore, attention must be drawn to a common provision (respectively Articles 51, 52, 131 and 148) which provides that "No High Contracting party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article [i.e. grave breaches]". Admittedly, this provision only refers to State responsibility for grave breaches committed by State agents or *de facto* State agents, or at any rate for grave breaches generating State responsibility (e.g. for an omission by the State to prevent or punish such breaches). Nevertheless, the general notion underpinning those provisions is that liability for grave breaches is absolute and may in no case be set aside by resort to any legal means such as derogating treaties or agreements. *A fortiori* such liability and, more generally individual criminal responsibility for serious violations of international humanitarian law may not be thwarted by recourse to arguments such as reciprocity.

518. The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called 'humanisation' of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century. After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy.[769] The

[769] This is translated in para. 121 of the 1958 British Manual of Military Law into a clear rejection of a broad principle of reciprocity: A belligerent is thus not justified in declaring himself freed altogether from the obligation to observe the laws of war or any of them on account of their suspected or ascertained violation by his adversary. (UK War Office, *Manual of Military Law,* Part III, *The Laws and Usages of*

underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals *qua* human beings. Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the "categorical imperative" formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it.

519. As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State *vis-à-vis* another State. Rather -- as was stated by the International Court of Justice in the *Barcelona Traction* case (which specifically referred to obligations concerning fundamental human rights) -- they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a "legal interest" in their observance and consequently a legal entitlement to demand respect for such obligations.[770]

520. Furthermore, most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character.[771] One illustration of the consequences which follow from this classification is

---

War on Land (H. Lauterpacht (ed.), London, HMSO, 1958), para. 121, n. 1(a)). This Manual does, however, leave open the possibility of reprisals against an earlier violation by the enemy (see paras. 642-9 of the Manual).

[770] *Barcelona Traction, Light and Power Co. Ltd. (Belgium v. Spain),* ICJ Reports, 1970, p. 3 at p. 32. See also W. Riphagen, "*Second Report on the Content, Forms and Degrees of International Responsibility*", *Yearbook of the International Law Commission,* 1981, UN Doc. A/CN.4/344. Vol. 2, part. 1, p. 79 at p. 86.

[771] Art. 53, Vienna Convention on the Law of Treaties, 23 May 1969. A peremptory norm or *jus cogens* principle is a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules: *Prosecutor v. Furundžija,* (IT-95-17/1-T), Judgement, Trial Chamber, 10 December 1998, (hereafter *Furundžija,* Judgement, 10 Dec. 1998), at para. 153. With regard to the impermissibility of reservations to human rights conventions with respect to peremptory norms, see also

that if the norms in question are contained in treaties, contrary to the general rule set out in Article 60 of the Vienna Convention on the Law of Treaties, a material breach of that treaty obligation by one of the parties would not entitle the other to invoke that breach in order to terminate or suspend the operation of the treaty. Article 60(5) provides that such reciprocity or in other words the principle *inadimplenti non est adimplendum* does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions prohibiting any form of reprisals against persons protected by such treaties.

3. The Prohibition of Attacks on Civilian Populations

521. The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law. In 1938, the Assembly of the League of Nations, echoing an important statement made, with reference to Spain, in the House of Commons by the British Prime Minister Neville Chamberlain,[772] adopted a Resolution concerning the protection of civilian populations against bombing from the air, in which it stated that "the intentional bombing of [the] civilian population is illegal".[773] Indeed, it is now a universally recognised principle, recently restated by the International Court of Justice, that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.[774]

522. The protection of civilians and civilian objects provided by modern international law may cease entirely or be reduced or suspended in three exceptional circumstances: (i) when civilians abuse their rights; (ii) when, although the object of a military attack is comprised of military objectives, belligerents cannot avoid causing so-called collateral

---

General Comment 24 of the UN Human Rights Committee on "Issues relating to reservations made upon ratification or accession to the Covenant [on Civil and Political Rights] or the Optional Protocol thereto, or in relation to declarations made under article 41 of the Covenant (fifty-second Session, 1994), 4 Nov. 1994.

[772] House of Commons *Debates,* 21 June 1938, vol. 337, col. 937.

[773] The Resolution was adopted on 30 Sept. 1938; see League of Nations, *Official Journal,* Special Supplement no. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15-17.

[774] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports 1996, p. 257 (para. 78).

damage to civilians; and (iii) at least according to some authorities, when civilians may legitimately be the object of reprisals.

523. In the case of clear abuse of their rights by civilians, international rules operate to lift that protection which would otherwise be owed to them. Thus, for instance, under Article 19 of the Fourth Geneva Convention, the special protection against attacks granted to civilian hospitals shall cease, subject to certain conditions, if the hospital "[is used] to commit, outside [its] humanitarian duties, acts harmful to the enemy", for example if an artillery post is set up on top of the hospital. Similarly, if a group of civilians takes up arms in an occupied territory and engages in fighting against the enemy belligerent, they may be legitimately attacked by the enemy belligerent whether or not they meet the requirements laid down in Article 4(A)(2) of the Third Geneva Convention of 1949.

524. In the case of attacks on military objectives causing damage to civilians, international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness. This principle, already referred to by the United Kingdom in 1938 with regard to the Spanish Civil War,[775] has always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack. In addition, attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians. These principles have to some extent been spelled out in Articles 57 and 58 of the First Additional Protocol of 1977. Such provisions, it would seem, are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which

[775] In his statement in the House of Commons on the Spanish civil war, the British Prime Minister stated that one of the rules applicable in any armed conflict was the rule whereby "[r]easonable care must be

have not ratified the Protocol. Admittedly, even these two provisions leave a wide margin of discretion to belligerents by using language that might be regarded as leaving the last word to the attacking party. Nevertheless this is an area where the "elementary considerations of humanity" rightly emphasised by the International Court of Justice in the *Corfu Channel*,[776] *Nicaragua*[777] and *Legality of the Threat or Use of Nuclear Weapons*[778] cases should be fully used when interpreting and applying loose international rules, on the basis that they are illustrative of a general principle of international law.

525. More specifically, recourse might be had to the celebrated Martens Clause which,[779] in the authoritative view of the International Court of Justice, has by now become part of customary international law.[780] True, this Clause may not be taken to mean that the "principles of humanity" and the "dictates of public conscience" have been elevated to the rank of independent sources of international law, for this conclusion is belied by international practice. However, this Clause enjoins, as a minimum, reference to those principles and dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must

---

taken in attacking [...] military objectives so that by carelessness a civilian population in the neighbourhood is not bombed". (House of Commons, *Debates*, 21 June 1938, vol. 337, cols. 937-938).

[776] ICJ Reports, 1949, p. 22.

[777] ICJ Reports, 1986, p. 112, para. 215.

[778] ICJ Reports, 1996, p. 257, para. 79.

[779] The Martens Clause was first set forth in the preambular provisions of the 1899 Hague Convention concerning the Laws or customs of War on Land which reads as follows:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity, and the requirements of the public conscience.

The French text of this Article reads as follows:

> En attendant qu'un code plus complet des lois de la guerre puisse être édicté, les Hautes Parties Contractantes jugent opportun de constater que, dans les cas non compris dans les dispositions réglementaires adoptées par Elles, les populations et les belligérants restent sous la sauvegarde et sous l'empire des principes du droit des gens, tels qu'ils résultent des usages établis entre nations civilisées, des lois de l'humanité et des exigences de la conscience publique.

A modern version of this clause is to be found in Art. 1(2) of Additional Protocol I of 1977, which refers, instead, to "the principles of humanity and [...] the dictates of public conscience" ("principes de l'humanité et des exigences de la conscience publique").

[780] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion), ICJ Reports 1996, at p. 259, para. 84.

be defined with reference to those principles and dictates. In the case under discussion, this would entail that the prescriptions of Articles 57 and 58 (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.

526. As an example of the way in which the Martens clause may be utilised, regard might be had to considerations such as the cumulative effect of attacks on military objectives causing incidental damage to civilians. In other words, it may happen that single attacks on military objectives causing incidental damage to civilians, although they may raise doubts as to their lawfulness, nevertheless do not appear on their face to fall foul *per se* of the loose prescriptions of Articles 57 and 58 (or of the corresponding customary rules). However, in case of repeated attacks, all or most of them falling within the grey area between indisputable legality and unlawfulness, it might be warranted to conclude that the cumulative effect of such acts entails that they may not be in keeping with international law. Indeed, this pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians, contrary to the demands of humanity.

527. As for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of the adversary. With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977, whereas reprisals against civilian objects are outlawed by Article 52(1) of the same instrument. The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol (which include such countries as the U.S., France, India, Indonesia, Israel, Japan, Pakistan and Turkey), nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive*

necessitatis may play a much greater role than *usus,* as a result of the aforementioned Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.

528. The question of reprisals against civilians is a case in point. It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers.

529. In addition, the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanisation of armed conflict is amongst other things confirmed by the works of the United Nations International Law Commission on State Responsibility. Article 50(d) of the Draft Articles on State Responsibility, adopted on

first reading in 1996, prohibits as countermeasures any "conduct derogating from basic human rights".[781]

530. It should be added that while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner. A means of inducing compliance with international law is at present more widely available and, more importantly, is beginning to prove fairly efficacious: the prosecution and punishment of war crimes and crimes against humanity by national or international courts. This means serves the purpose of bringing to justice those who are responsible for any such crime, as well as, albeit to a limited extent, the purpose of deterring at least the most blatant violations of international humanitarian law.

531. Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion. With regard to the formation of a customary rule, two points must be made to demonstrate that *opinio iuris* or *opinio necessitatis* can be said to exist.

532. First, even before the adoption of the First Additional Protocol of 1977, a number of States had declared or laid down in their military manuals that reprisals in modern warfare are only allowed to the extent that they consist of the use, against enemy armed forces, of otherwise prohibited weapons – thus *a contrario* admitting that reprisals against civilians are not allowed. In this respect one can mention the United States military manual for the Army (*The Law of Land Warfare*), of 1956,[782] as well as the

---

[781] See Draft Articles on State Responsibility, in *Report of the International Law Commission on the Work of its forty-eighth Session*, 6 May-26 July 1996, UNGAOR, 51st Session, Supp. No. 10, (A/51/10) para. 237, p. 145.

[782] See Department of the Army Field Manual, FM 27-19, July 1956, pp. 177-178, para 497. After stating that reprisals against "protected persons" are prohibited pursuant to the Geneva Conventions of 1949, the Manual goes on to state that "[h]owever, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces undertaking the reprisals" (para. 497(c)). In sub-para (a) of the same paragraph it is stated that "[t]he employment by a belligerent of a weapon the use of which is normally precluded by the law of war would constitute a lawful reprisal for intentional mistreatment of prisoners of war held by the enemy".

Dutch "Soldiers Handbook" (*Handboek voor de Soldaat*) of 1974.[783] True, other military manuals of the same period took a different position, admitting reprisals against civilians not in the hands of the enemy belligerent.[784] In addition, senior officials of the United States Government seem to have taken a less clear stand in 1978, by expressing doubts about the workability of the prohibition of reprisals against civilians.[785] The fact remains, however, that elements of a widespread *opinio necessitatis* are discernible in international dealings. This is confirmed, first of all, by the adoption, by a vast majority, of a Resolution of the U.N. General Assembly in 1970 which stated that "civilian populations, or individual members thereof, should not be the object of reprisals".[786] A further confirmation may be found in the fact that a high number of States have ratified the First Protocol, thereby showing that they take the view that reprisals against civilians must always be prohibited.[787] It is also notable that this view was substantially upheld by the

---

[783] See *Handboek voor de Soldaat* ("Soldiers Handbook"), VS 2-1350, 1974, Chapter VII ("The Laws of warfare"), Art. 34 ("The civilian population, who takes no active part in the hostilities, must be spared. [...] Reprisals against civilians are prohibited [...]". Art. 35: "[...] Collective punishments [of civilians], the taking of hostages, and reprisals [against civilians] are prohibited" (unofficial translation). These provisions have been restated in the edition of March 1995 of the Dutch Manual, at Art. 6 (pp. 7-43).

[784] See for example the British Manual (*The Law of War on Land*, The War Office, 1958, p. 184, para 644 and note 2). The Austrian Manual (*Truppenführung*), Bundesministerium für Landesverteidigung, Wien 1965, p. 255, para 48, lists the various categories of persons and objects against whom reprisals are prohibited by the Geneva Conventions, but specifies that these are the reprisals "expressly prohibited" (*ausdrücklich verboten*).

[785] In his report to the United States Secretary of State, the U.S. Deputy Legal Adviser and Head of the U.S. Delegation to the Geneva Diplomatic Conference of 1974-77 stated that in his view the Geneva Conference had "gone unreasonably far in its prohibition of [reprisals]" (text in 72(2) *American Journal of International Law*, 1978 at p. 406) and added: "It is unreasonable to think that massive and continuing attacks directed against a nation's civilian population could be absorbed without a response in kind. By denying the possibility of response and not offering any workable substitute, Art. 51 [of the First Additional Protocol] is unrealistic and cannot be expected to withstand the test of future conflicts. On the other hand, it will not be easy for any country to reserve, explicitly, the right of reprisal against an enemy's civilian population, and we shall have to consider carefully whether such a reservation is indispensable for us" (*ibid*). Furthermore, it has been reported that the United States JCS (Joint Chiefs of Staff), faced with the possibility that other States would not accept individual monitoring mechanisms, expressed misgivings about the acceptance of the prohibition of reprisals against civilians. (J.A. Roach, in *ICCR Review,* 1991, 67 at p. 183, note 7: "If the United States cannot rely on neutral supervision to ensure compliance with humanitarian law, then the threat of unilateral retaliation retains its importance as a deterrent sanction to ensure at least a minimum level of humane behaviour by US adversaries").

[786] U.N. General Assembly Resolution 2675 (XXV) of 9 Dec. 1970.

[787] It should, however, be noted that in 1998 the United Kingdom, in ratifying the First Additional Protocol of 1977, made a reservation concerning the obligations of Articles 51 and 55 of the Protocol on the use of reprisals against civilians (see the letter sent on 28 January 1998 by the British Ambassador C. Hulse to the

ICRC in its Memorandum of 7 May 1983 to the States parties to the 1949 Geneva Conventions on the Iran-Iraq war[788] and by Trial Chamber I of the ICTY in *Martić*.[789]

533. Secondly, the States that have participated in the numerous international or internal armed conficts which have taken place in the last fifty years have normally refrained from claiming that they had a right to visit reprisals upon enemy civilians in the combat area. It would seem that such claim has been only advanced by Iraq in the Iran-Iraq war of 1980-1988[790] as well as – but only *in abstracto* and hypothetically, by a few States, such as France in 1974[791] and the United Kingdom in 1998.[792] The aforementioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.

534. The existence of this rule was authoritatively confirmed, albeit indirectly, by the International Law Commission. In commenting on sub-paragraph d of Article 14 (now Article 50) of the Draft Articles on State Responsibility, which excludes from the regime of lawful countermeasures any conduct derogating from basic human rights, the

---

Swiss Government, and partially reproduced in in M. Sassoli and A.A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva 1999, pp. 617-618).

[788] The ICRC pointed out the following: "The Iraqi forces have indiscriminately and systematically bombarded towns and villages, causing casualties among the civilian inhabitants and considerable destruction of civilian property. Such acts are inadmissible, the more so that some were declared to be reprisals before being perpetrated. [...] Such acts are in total disregard of the very essence of international humanitarian law applicable in armed conficts, which is founded on the distinction between civilians and military forces" (memorandum from the International Committee of the Red Cross to the States Parties to the Geneva Conventions of August 12, 1949 Concerning the Conflict Between the Islamic Republic of Iran and the Republic of Iraq, Geneva, May 7, 1983, partially reproduced in M. Sassoli and A.A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, 1999 at 982).

[789] *Prosecutor v. Milan Martić,* Review of Indictment Pursuant to Rule 61, ICTY Trial Chamber, Case No. IT-95-11-R61, 8 March 1996, at paras. 10-18.

[790] See the Memorandum of the ICRC, *ibid.*

[791] See Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva 1974-77, *Official Records,* Vol. VI, 1977, at 162. France voted against the provision prohibiting reprisals, stating, *inter alia,* that it was "contrary to existing international law" (*idem*).

Commission noted that Article 3 common to the four 1949 Geneva Conventions "prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment".[793] It follows that, in the opinion of the Commission, reprisals against civilians in the combat zone are also prohibited. This view, according to the Trial Chamber, is correct. However, it must be supplemented by two propositions. First, Common Article 3 has by now become customary international law.[794] Secondly, as the International Court of Justice rightly held in *Nicaragua,* it encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts.[795] Indeed, it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone.

535. It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by; (a) the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary's crimes); (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders); (c) the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued) and; (d) 'elementary considerations of humanity' (as mentioned above).

---

[792] See the British reservation to the First additional Protocol of 1977, *ibid.*
[793] See the Commission's comments on the former Article 14 of the IInd Part of the Draft Articles in *Yearbook of the International Law Commission,* 1995, Volume II, Part Two, A/CN.4/SER.A/1995/Add.1 (Part 2) (State responsibility), para. 18, p. 72.
[794] See in this regard *Military and Paramilitary Activities in and Against Nicaragua (Merits),* Judgment of 27 June 1986, ICJ Reports 1986, p. 113, especially at para. 218.
[795] *Ibid.,* p. 114 at para. 219.

536. Finally, it must be noted, with specific regard to the case at issue, that whatever the content of the customary rules on reprisals, the treaty provisions prohibiting them were in any event applicable in the case in dispute. In 1993, both Croatia and Bosnia and Herzegovina had ratified Additional Protocol I and II, in addition to the four Geneva Conventions of 1949.[796] Hence, whether or not the armed conflict of which the attack on Ahmići formed part is regarded as internal, indisputably the parties to the conflict were bound by the relevant treaty provisions prohibiting reprisals.

4. The Importance the International Tribunal can Attach to Case Law in its Findings of Law

537. This issue, albeit of general relevance and of a methodological nature, acquires special significance in the present judgement, as it is largely based on international and national judicial decisions. The Tribunal's need to draw upon judicial decisions is only to be expected, due to the fact that both substantive and procedural criminal law is still at a rudimentary stage in international law. In particular, there exist relatively few treaty provisions on the matter. By contrast, especially after World War II, a copious amount of case law has developed on international crimes. Again, this is a fully understandable development: it was difficult for international law-makers to reconcile very diverse and often conflicting national traditions in the area of criminal law and procedure by adopting general rules capable of duly taking into account those traditions. By contrast, general principles may gradually crystallise through their incorporation and elaboration in a series of judicial decisions delivered by either international or national courts dealing with specific cases. This being so, it is only logical that international courts should rely heavily on such jurisprudence. What judicial value should be assigned to this *corpus*?

538. The value to be assigned to judicial precedents to a very large extent depends on and is closely bound up with the legal nature of the Tribunal, i.e. on whether or not the Tribunal is an international court proper. The Trial Chamber shall therefore first of all

[796] Croatia succeeded to the four Geneva Conventions of 1949 and the two Additional Protocols on 11 May 1992 and Bosnia and Herzegovina on 31 Dec. 1992.

consider, if only briefly, this matter – a matter that so far the Tribunal has not had the opportunity to delve into.

539. Indisputably, the ICTY is an international court, (i) because this was the intent of the Security Council, as expressed in the resolution establishing the Tribunal, (ii) because of the structure and functioning of this Tribunal, as well as the status, privileges and immunities it enjoys under Article 30 of the Statute, and (iii) because it is called upon to apply international law to establish whether serious violations of international humanitarian law have been committed in the territory of the former Yugoslavia. Thus, the normative *corpus* to be applied by the Tribunal *principaliter*, i.e. to decide upon the principal issues submitted to it, is international law. True, the Tribunal may be well advised to draw upon national law to fill possible *lacunae* in the Statute or in customary international law. For instance, it may have to peruse and rely on national legislation or national judicial decisions with a view to determining the emergence of a general principle of criminal law common to all major systems of the world.[797] Furthermore, the Tribunal may have to apply national law *incidenter tantum,* i.e. in the exercise of its incidental jurisdiction. For instance, in determining whether Article 2 of the Statute (on grave breaches) is applicable, the Tribunal may have to establish whether one of the acts enumerated there has been perpetrated against a person regarded as "protected" under the Fourth Geneva Convention of 1949. To this end it may have to satisfy itself that the person possessed the nationality of a State other than the enemy belligerent or Occupying Power. Clearly, this enquiry may only be carried out on the basis of the relevant national law of the person concerned. The fact remains, however, that the principal body of law the Tribunal is called upon to apply in order to adjudicate the cases brought before it is international law.

540. Being international in nature and applying international law *principaliter*, the Tribunal cannot but rely upon the well-established sources of international law and,

[797] A reference to such a method is made in the *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993),* (S/25704), 3 May 1993, at paragraph 58 (hereafter *Report of the Secretary-General*).

within this framework, upon judicial decisions. What value should be given to such decisions? The Trial Chamber holds the view that they should only be used as a "subsidiary means for the determination of rules of law" (to use the expression in Article 38(1)(d) of the Statute of the International Court of Justice, which must be regarded as declaratory of customary international law). Hence, generally speaking, and subject to the binding force of decisions of the Tribunal's Appeals Chamber upon the Trial Chambers, the International Tribunal cannot uphold the doctrine of binding precedent (*stare decisis*) adhered to in common law countries. Indeed, this doctrine among other things presupposes to a certain degree a hierarchical judicial system. Such a hierarchical system is lacking in the international community. Clearly, judicial precedent is not a distinct source of law in international criminal adjudication. The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo Tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone on a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts.

541. As noted above, judicial decisions may prove to be of invaluable importance for the determination of existing law. Here again attention should however be drawn to the

need to distinguish between various categories of decisions and consequently to the weight they may be given for the purpose of finding an international rule or principle. It cannot be gainsaid that great value ought to be attached to decisions of such international criminal courts as the international tribunals of Nuremberg or Tokyo, or to national courts operating by virtue, and on the strength, of Control Council Law no. 10, a legislative act jointly passed in 1945 by the four Occupying Powers and thus reflecting international agreement among the Great Powers on the law applicable to international crimes and the jurisdiction of the courts called upon to rule on those crimes. These courts operated under international instruments laying down provisions that were either declaratory of existing law or which had been gradually transformed into customary international law. In many instances no less value may be given to decisions on international crimes delivered by national courts operating pursuant to the 1948 Genocide Convention, or the 1949 Geneva Conventions or the 1977 Protocols or similar international treaties. In these instances the international framework on the basis of which the national court operates and the fact that in essence the court applies international substantive law, may lend great weight to rulings of such courts. Conversely, depending upon the circumstances of each case, generally speaking decisions of national courts on war crimes or crimes against humanity delivered on the basis of national legislation would carry relatively less weight.

542. In sum, international criminal courts such as the International Tribunal must always carefully appraise decisions of other courts before relying on their persuasive authority as to existing law. Moreover, they should apply a stricter level of scrutiny to national decisions than to international judgements, as the latter are at least based on the same *corpus* of law as that applied by international courts, whereas the former tend to apply national law, or primarily that law, or else interpret international rules through the prism of national legislation.

B. Crimes Against Humanity

1. Objective and Subjective Elements of the Crimes Under Article 5

543. Article 5 of the Statute of the International Tribunal deals with crimes against humanity. The essence of these crimes is a systematic policy of a certain scale and gravity directed against a civilian population. In the *Nikolić* Rule 61 decision, the Trial Chamber set forth in broad terms three distinct components of crimes against humanity under the ICTY Statute:[798]

> First, the crimes must be directed at a civilian population, specifically identified as a group by the perpetrators of those acts. Secondly, the crimes must, to a certain extent, be organised and systematic. Although they need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone. Lastly, the crimes, considered as a whole, must be of a certain scale and gravity.

544. The following elements can be identified as comprising the core elements of crimes against humanity: first, the existence of an armed conflict; second, that the acts were part of a widespread or systematic occurrence of crimes directed against a civilian population (the requirement that the occurrence of crimes be widespread or systematic being a disjunctive one[799]) and finally, that the perpetrator had knowledge of the wider context in which his act occurs.[800]

2. The Requirement of an Armed Conflict

545. By requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council, in establishing the International

---

[798] *Prosecutor v. Nikolić,* Rule 61 Decision, Trial Chamber, 20 Oct. 1995, (hereafter *Prosecutor v. Nikolić,* Rule 61 Decision), at para. 26.
[799] As the Trial Chamber stated in its Judgement: "it is now well established that the requirement that the acts be directed against a civilian "population" can be fulfilled if the acts occur on either a widespread basis or in a systematic manner" (*Tadić,* Trial Chamber Judgement, 7 May 1997, para. 646).
[800] *Ibid.,* at paras. 626 and 657.

Tribunal, may have defined the crime in Article 5 more narrowly than is necessary under customary international law.[801] It is nevertheless sufficient for the purposes of Article 5 that the act occurred in the course or duration of any armed conflict. The type and nature of such conflict – whether international or internal – is therefore immaterial.[802] An armed conflict can be said to exist whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.[803]

546. The nature of the nexus required under Article 5 of the Statute is merely that the act be linked geographically as well as temporally with the armed conflict.[804]

3. 'Directed Against a Civilian Population'

547. It would seem that a wide definition of "civilian" and "population" is intended. This is warranted first of all by the object and purpose of the general principles and rules of humanitarian law, in particular by the rules prohibiting crimes against humanity. The latter are intended to safeguard basic human values by banning atrocities directed against human dignity. One fails to see why only civilians and not also combatants should be protected by these rules (in particular by the rule prohibiting persecution), given that these rules may be held to possess a broader humanitarian scope and purpose than those prohibiting war crimes. However, faced with the explicit limitation laid down in Article 5, the Trial Chamber holds that a broad interpretation should nevertheless be placed on the word "civilians", the more so because the limitation in Article 5 constitutes a departure from customary international law.

---

[801] See *Prosecutor v. Tadić,* (IT-94-1-AR72), Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 Oct. 1995, (hereafter *Tadić,* Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995) at para. 141: 'It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed ... customary international law may not require a connection between crimes against humanity and any conflict at all'.

[802] *Ibid.,* at para. 142: "Art. 5 may be invoked as a basis for jurisdiction over crimes committed in either internal or international armed conflicts".

[803] *Ibid.,* at para. 70.

[804] In this regard, the Appeals Chamber in Tadić noted that "[...] the temporal scope of the applicable rules clearly reaches beyond the actual hostilities. Moreover, the [...] nature of the language [...] suggests a broad geographical scope as well" (*ibid.,* at para. 69).

548. The above proposition is borne out by the case law. Of particular relevance to the present case is the finding in *Barbie*[805] (admittedly based on general international law) that "inhumane acts and persecution commited in a systematic manner, in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community but also against the opponents of that policy, whatever the form of their "opposition" could be considered a crime against humanity.[806] In the *Vukovar* Rule 61 Decision of 3 April 1996, a Trial Chamber held that crimes against humanity may be committed even where the victims at one time bore arms.[807]

549. Thus the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity.

4. Can Crimes Against Humanity Comprise Isolated Acts?

550. In general terms, the very nature of the criminal acts over which the International Tribunal has jurisdiction under Article 5, in view of the fact that they must be 'directed against any civilian population,' ensures that what is to be alleged will not be one particular act but, instead, a course of conduct.[808] Nevertheless, in certain circumstances, a single act has comprised a crime against humanity when it occurred within the

---

[805] The *Barbie* case, French *Court of Cassation* (Criminal Chamber), 20 Dec. 1985, 78 ILR 125.
[806] *Ibid.*, at 137.
[807] On this point, the Trial Chamber held that "Fa]lthough according to the terms of Article 5 of the Statute of this Tribunal [...] combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance. As the Commission of Experts, established pursuant to Security Council Resolution 780, noted, "it seems obvious that Article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms. ... Information of the overall circumstances is relevant for the interpretation of the provision in a spirit consistent with its purpose". (*Prosecutor v. Mrksi} et al*, Review of Indictment Pursuant to Rule 61, 3 Apr. 1996, para. 29, citing *Report of the Commission of Experts established pursuant to Security Council Resolution 780,* Doc. S/1994/674, para. 78.)
[808] *Tadić,* Decision on Defence Motion on the Form of the Indictment, 14 Nov. 1995, at para. 11.

5072

necessary context.[809] For example, the act of denouncing a Jewish neighbour to the Nazi authorities - if committed against a background of widespread persecution – has been regarded as amounting to a crime against humanity.[810] An *isolated* act, however – i.e. an atrocity which did not occur within such a context – cannot.

5. The Policy Element

551. With regard to the "form of governmental, organisational or group policy" which is to direct the acts in question, the Trial Chamber has noted that although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a *requirement,* as such, for crimes against humanity. In any case, it appears that such a policy need not be explicitly formulated, nor need it be the policy of a *State.*[811]

552. The need for crimes against humanity to have been at least tolerated by a State, Government or entity is also stressed in national and international case-law. The crimes

---

[809] On this point, the Trial Chamber in *Tadić* has held that "[c]learly, a single act by a perpetrator taken within the context of a widespread or systematic attack against a civilian population entails individual criminal responsibility and an individual perpetrator need not commit numerous offences to be held liable. Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, that is the purpose of requiring that the acts be directed against a civilian *population* and thus "[e]ven an isolated act can constitute a crime against humanity if it is the product of a political system based on terror or persecution" (*Tadić,* Trial Chamber Judgement, 7 May 1997, para. 649, footnotes omitted).

[810] See e.g. the judgements of the Supreme Court for the British zone in: *Entscheidungen* des Obersten Gerichtshofes für die Britische Zone in Strafsachen, Vol. I, pp. 6 *et seq.*; 19 *et seq.*; 39 *et seq.*; 45 *et seq.*; 49 *et seq.*; 56 *et seq.*

[811] *Tadić,* Trial Chamber Judgement, 7 May 1997, at para. 653, where the Trial Chamber noted that "[t]he reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population." It went on to explain that although traditionally this requirement was understood to mean that there must be some form of State policy to commit these acts occurred during this period, this was no longer the case (*ibid.,* at para. 654). See also *Prosecutor v. Nikolić,* Rule 61 decision, at para. 26: "Although they [the crimes in question] need not be related to a policy established at State level, in the conventional sense of the term, they cannot be the work of isolated individuals alone."

at issue may also be State-sponsored or at any rate may be part of a governmental policy or of an entity holding *de facto* authority over a territory.[812]

553. National case-law tends, in particular, to emphasise that crimes against humanity are usually the manifestation of a criminal governmental policy. As observed by the Canadian Supreme Court in the case of *Finta*:[813]

> The central concern in the case of crimes against humanity is with such things as state-sponsored or sanctioned persecution, not the private individual who has a particular hatred against a particular group or the public generally.

554. The aforementioned judgements and others on the same matter implicitly illustrate the nature and implications of the link between an offence and a large-scale or systematic practice of abuses necessary in order for the offence to be characterised as a crime against humanity. In particular, they enable us to answer the question of whether the offence must be perpetrated by organs or agents of a State or a governmental authority or on behalf of such bodies, or whether it may be committed by individuals not acting in an official capacity, and in the latter case, whether the offence must be approved of or at least condoned or countenanced by a governmental body for it to amount to a crime against humanity.

555. While crimes against humanity are normally perpetrated by State organs, i.e. individuals acting in an official capacity such as military commanders, servicemen, etc., there may be cases where the authors of such crimes are individuals having neither official status nor acting on behalf of a governmental authority. The available case-law seems to indicate that in these cases some sort of explicit or implicit approval or endorsement by State or governmental authorities is required, or else that it is necessary for the offence to be clearly encouraged by a general governmental policy or to clearly fit

---

[812] The Court held in both *Barbie*, (French Court of Cassation (Criminal Chamber), 3 June 1988, 100 ILR 331 at 336) and the *Touvier* (France, Court of Appeal of Paris, First Chamber of Accusation, 13 April 1992); Court of Cassation (Criminal Chamber), 27 Nov. 1992, 100 ILR 338 at 351), that crimes against humanity are acts performed in a systematic manner in the name of a State practising by those means a policy of ideological hegemony.

5074

within such a policy. In addition to many decisions concerning crimes against humanity perpetrated by individuals acting an a private capacity,[814] the *Weller* case may prove to be of some relevance to this issue. This case gave rise to six different judgements by German courts after World War II[815] and involved the ill-treatment of Jewish civilians by two persons under the command of Weller, a member of the SS, who was at the time not in uniform and was acting on his own initiative. After the injured parties reported to the Jewish community, which in turn complained to the local Gestapo, the head of the Gestapo informed the wronged Jews that Weller's actions were an isolated event which would in no way be approved. Thereafter Weller was summoned by the Gestapo and strongly taken to task by the district leader of the Nazi party. On appeal to the Supreme Court for the British zone, it was held that the offence did indeed constitute a crime against humanity, on the grounds that it was sufficient for the attack on human dignity to be connected to the national-socialist system of power and hegemony.[816]

---

[813] *R v. Finta* [1994] 1 S.C.R. 701 at 733.

[814] See in this regard the German 'denunciation' cases, *ibid.*

[815] See the decision of the *Landgericht* of Mönchengladbach of 16 June 1948 (unpublished), the decision of the *Oberlandesgericht* of Düsseldorf of 21 Oct. 1948 (unpublished) and the decision of the German Supreme Court in the British occupied zone, of 21 Dec. 1948 (in *Entscheidungen, ibid.,* vol.1, pp. 203-208), the decision of the *Schwurgericht* of Mönchengladbach of 20 April 1949 (unpublished), that of the German Supreme Court in the British occupied zone, of 10 Oct. 1949 (unpublished) and the decision of the *Schwurgericht* of Mönchengladbach of 21 June 1950 (unpublished).
The aforementioned decisions are on the Tribunal's files (they have been kindly provided to the Tribunal by the *Nordrhein Westfälisches Hauptstaatsarchiv*).

[816] In this regard the Supreme Court noted that "[a]ctions which seemingly or actually originated from quite personal decisions were also often and readily put by the national-socialist leadership at the service of its criminal goals and plans. This held true even for actions which outwardly were even disapproved of [...] The link, in this sense, with the national-socialist system of power and tyranny does in the case at issue manifestly exist [as] the actions of the accused fitted into the numerous persecutory measures which were then imposed against the Jews in Germany or could at any time be imposed against them. [...] [Th]e link with the national-socialist system of power and tyranny does not exist only in the case of those actions which are ordered and approved by the holders of hegemony; that link exists also when those actions can only be explained by the atmosphere and conditions created by the authorities in power. The trial court was [thus] wrong when it attached decisive value to the fact that the accused after his action was "rebuked" and that even the Gestapo disapproved of the excess as an isolated infringement. That this action nevertheless fitted into the persecution of Jews effected by the State and the party, is shown by the fact that the accused ... was not held criminally responsible... in proportion to the gravity of his guilt...." (See *Entscheidungen, ibid.,* vol.1, pp. 206-207).

5075

6. Knowledge of the Context Within Which the Perpetrator's Actions are Taken: the *Mens Rea* Requirement

556. The determination of the elements comprising the *mens rea* of crimes against humanity has proved particularly difficult and controversial. Nevertheless, the requisite *mens rea* for crimes against humanity appears to be comprised by (1) the *intent* to commit the underlying offence, combined with (2) *knowledge* of the broader context in which that offence occurs.[817]

557. With regard to the latter requirement (knowledge), the ICTR in *Prosecutor v. Kayishema* noted as follows:[818]

> Ftğhe perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. []Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some sort of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused.

558. Two aspects of the subjective requirement of crimes against humanity are now free from dispute. Subsequent to the Appeals Chamber's decision in *Prosecutor v. Tadić,*

The Supreme Court for the British zone returned to this matter, although only fleetingly, in its decision of 10 October 1949 (unpublished), where it restated its position on the issue of crimes against humanity (see pp. 4-5 of the typescript).

[817] *Tadić,* Trial Chamber Judgement, 7 May 1997, at para. 656. See also *ibid.*, para. 659, where it was noted that "if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis ... that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population [and ...] know that his act fits in with the attack ....". Note the recent finding of the *Tadić* Appeals Chamber, which has declared erroneous the Trial Chamber's enunciation of a negative element; namely, that crimes against humanity must not be committed for the purely personal motives of the perpetrator: *Prosecutor v. Tadić,* (IT-94-1-A), Judgement, Appeals Chamber, 15 July 1999, (hereafter *Tadić,* Appeals Chamber Judgement, 15 July 1999), at para. 248-52.

[818] *Prosecutor v. Kayishema and Ruzindana,* (ICTR-95-1-T), Judgement, Trial Chamber, 21 May 1999 (hereafter *Kayishema and Ruzindana,* Judgement, 21 May 1999), paras. 133-4.

crimes against humanity need be committed with a discriminatory intent only with regard to the category of "persecutions" under Article 5(h); ie. the sole category in which discrimination comprises an integral element of the prohibited conduct. Otherwise, a discriminatory animus is not an essential ingredient of the *mens rea* of crimes against humanity.[819] Nor are the *motives* (as distinct from the *intent*) of the accused, as such, of special pertinence.[820]

7. The Constituent Offences

559. The instant case involves counts of murder under Article 5(a) (counts 2, 4, 6, 8, 12 and 16), persecutions under Article 5(h) (count 1) and inhumane acts under Article 5(i) (counts 10, 14 and 18). Murder and inhumane acts will here be considered; persecution forms part of a separate analysis.

(a) Article 5(a): Murder

560. The constituent elements of murder under Article 5(a) of the Statute are well known.[821] They comprise the death of the victim as a result of the acts or omissions of the accused, where the conduct of the accused was a substantial cause of the death of the victim.[822] It can be said that the accused is guilty of murder if he or she engaging in conduct which is unlawful, intended to kill another person or to cause this person grievous bodily harm, and has caused the death of that person.

561. The requisite *mens rea* of murder under Article 5(a) is the intent to kill or the intent to inflict serious injury in reckless disregard of human life.[823] In *Kayishema* it was noted that the standard of *mens rea* required is intentional and premeditated killing. The

---

[819] *Tadić,* Appeals Chamber Judgement, 15 July 1999, at para. 305.
[820] *Ibid.,* at para. 272.
[821] As was acknowledged by the International Law Commission: "Murder is a crime that is clearly understood and well defined in the national law of every State. This prohibited act does not require any further explanation". (*Report of the International Law Commission on the work of its 48th Session*, 6 May-26 July 1996, p. 96, Commentary to Article 18 (Crimes against Humanity), 51st Session, Supp. No. 10, UNGAOR (A/51/10), para. 7).
[822] *Prosecutor v. Akayesu,* (ICTR-96-4-T), Judgement, Trial Chamber, 2 September 1998, (hereafter *Akayesu,* Judgement, 2 Sept. 1998), at para. 589.

result is premeditated when the actor formulated his intent to kill after a cool moment of reflection. The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.[824]

(b) Article 5(i): Other Inhumane Acts

562. The expression "other inhumane acts" was drawn from Article 6(c) of the London Agreement and Article II(1)(c) of Control Council Law No. 10.

563. There is a concern that this category lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and hence, that it is contrary to the principle of the "specificity" of criminal law. It is thus imperative to establish what is included within this category. The phrase "other inhumane acts" was deliberately designed as a residual category, as it was felt to be undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition. The importance of maintaining such a category was elucidated by the ICRC when commenting on what would constitute a violation of the obligation to provide "humane treatment" contained in common Article 3 of the Geneva Conventions:[825]

> [I]t is always dangerous to try to go into too much detail – especially in this domain. However great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.

564. In interpreting the expression at issue, resort to the *ejusdem generis* rule of interpretation does not prove to be of great assistance. Under this rule, that expression

---

[823] *Idem.*
[824] *Kayishema and Ruzindana,* Judgement, 21 May 1999, at para. 139.
[825] *ICRC Commentary on the IVth Geneva Convention Relative to the Protection of Civilian Persons in time of War (*1958, repr. 1994*),* p. 39.

would cover *actions similar* to those specifically provided for. Admittedly such a rule of interpretation has been relied upon by various courts with regard to Article 6(c) of the London Agreement. Thus, for instance, in the *Tarnek* case, the District Court of Tel-Aviv held in a decision of 14 December 1951 that the definition of "other inhumane acts" laid down in the Israeli Law on Nazi and Nazi Collaborators (Punishment) of 1950, which reproduced the definition of Article 6(c), was to apply only to such other inhumane acts as resembled in their nature and their gravity those specified in the definition.[826] This interpretative rule lacks precision, and is too general to provide a safe yardstick for the work of the Tribunal.

565. The Statute of the International Criminal Court (ICC) (Article 7(k)) provides greater detail than the ICTY Statute as to the meaning of other inhumane acts: "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to mental or physical health".[827] However, this provision also fails to provide an indication, even indirectly, of the legal standards which would allow us to identify the prohibited inhumane acts.[828]

---

[826] See 18 *ILR,* 1951, p. 540. See also the *Enigster* case (Decision of 4 Jan. 1952 by the same Court), *ibid.*, at p. 541-2.

[827] With regard to a similar concept, that of 'inhuman treatment' under Art. 2(b) (grave breaches), the ICTY Trial Chamber in *Delalić et al.* noted that "inhuman treatment" was constituted by "an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity" (*Prosecutor v. Delali} et al,* (IT-96-21-T), Judgement, Trial Chamber, 16 Nov. 1998, (hereafter *Delali} et al.,* Judgement, 16 Nov. 1998), at para. 543). The Trial Chamber also suggested a negative definition, namely that inhuman treatment is treatment which causes severe mental or physical suffering but which falls short of torture, or lacks one of the elements of torture (e.g. a prohibited purpose or official sanction). (*Ibid.* at para. 542). Whether a given conduct constitutes inhuman treatment will be determined on a case-by-case basis and appears ultimately to be a question of fact (*ibid.*, at para. 544. See also *Kayishema and Ruzindana,* Judgement, 21 May 1999, at para. 151: "[T]he acts that rise to the level of inhuman acts should be determined on a case-by-case basis").

[828] The International Law Commission, commenting on Art. 18 of its Draft Code of Crimes further states that "[t]he Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which might constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity" (*Report of the International Law Commission on the Work of its Forty-Eighth Session,* 6 May-26 July 1996, UNGAOR 51st Sess. Supp. No. 10 (A/51/10) (Crimes Against the Peace and Security of Mankind), at para. 17, p. 103).

5079

566. Less broad parameters for the interpretation of "other inhumane acts" can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity. Thus, for example, serious forms of cruel or degrading treatment of persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with a discriminatory or persecutory intent no doubt amount to crimes against humanity: inhuman or degrading treatment is prohibited by the United Nations Covenant on Civil and Political Rights (Article 7), the European Convention on Human Rights, of 1950 (Article 3), the Inter-American Convention on Human Rights of 9 June 1994 (Article 5) and the 1984 Convention against Torture (Article 1).[829] Similarly, the expression at issue undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977), enforced prostitution (indisputably a serious attack on human dignity pursuant to most international instruments on human rights), as well as the

---

[829] As for the specification of what constitutes cruel, debasing, humiliating or degrading treatment, resort can of course be had to the important case-law of the relevant international bodies, chiefly to the United Nations Torture Committee and the European Commission and Court of Human Rights.
It is worth adding that resort to the standards laid down in the Universal Declaration of Human Rights has already been made in 1950 by a Belgian court. The *Conseil de guerre* of Brussels, in a judgment of 8 Feb. 1950, held that Art. 5 of the Universal Declaration, prohibiting torture and inhuman treatment can be utilised for the application of the so-called Marten's clause in the IVth Hague Convention of 1899. It noted, at p. 566, that "in searching for the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of public conscience, the Court-Martial is presently guided by the Universal Declaration of Human Rights ..." [*D*]*ans la recherche des principes du droit des gens tels qu'ils résultent des usages etablis entre nations civilisees, des lois de l'humanité et des exigences de la conscience publique, le Conseil de guerre est aujourd'hui guidé par la declaration universelle des droits de l'homme [...].* After citing Art. 5 of the Declaration, the court went on to say that "[...] suspending a human being by his hands tied behind his back from a pulley specially rigged for the purposes is *torture*; [...] blows to the face, delivered so repeatedly and violently that they caused it to swell up and, in several cases, broke some teeth, constitute *cruel treatment*" (*ibid.*). ([*L*] *a pendaison d'un être humain, par les mains liées derriere le dos, à une poulie specialement aménagée a cet effet, est une torture; [...] des coups au visage, à ce point répétés et violents qu'ils l'ont tuméfié et dans plusieurs cas, ont brisé des dents, constituent un traitement cruel* (in 30 *Revue de droit pénal et de criminologie,* 1949-50, p. 566).

enforced disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994). Plainly, all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5. Once the legal parameters for determining the content of the category of "inhumane acts" are identified, resort to the *ejusdem generis* rule for the purpose of comparing and assessing the gravity of the prohibited act may be warranted.

C. Persecution as a Crime Against Humanity

567. Persecution under Article 5(h) has never been comprehensively defined in international treaties. Furthermore, neither national nor international case law provides an authoritative single definition of what constitutes 'persecution'. Accordingly, considerable emphasis will be given in this judgement to elucidating this important category of offences.

568. It is clear that persecution may take diverse forms, and does not necessarily require a physical element.[830] Additionally, under customary international law (from which Article 5 of the Statute derogates), in the case of persecution, the victims of crimes against humanity need not necessarily be civilians; they may also include military personnel. An explicit finding to this effect was made by the French courts in the *Barbie* and *Touvier* cases.[831] Under Article 5 of the Statute, a key constituent of persecution

[830] In this regard, another Trial Chamber has held that "persecution can take numerous forms, so long as the common element of discrimination in regard to the enjoyment of a basic or fundamental right is present, and persecution does not necessarily require a physical element". (*Tadić*, Trial Chamber Judgement, 7 May 1997, at para. 707).

[831] In both cases the crimes at issue were held to constitute persecution. In the *Barbie* decision, the French Court of Cassation held that crimes against humanity in the form of persecution had been perpetrated against members of the French resistance movements (*ibid.)*. The same view was taken by the *Chambre d'accusation* of the Court of Appeal of Paris in a judgment of 9 July 1986 in the same case and confirmed by the *Chambre d'accusation* of the Court of Appeal of Paris in a Judgment of 13 April 1992 in the *Touvier* case (*ibid.*). The *Chambre d'accusation* stated that Jews and members of the Resistance *persecuted* in a systematic manner in the name of a State practising a policy of ideological supremacy, the former by reason of their membership of a racial or religious community, the latter by reason of their opposition to that policy, can equally be the victims of crimes against humanity. (*ibid.*, p. 352; emphasis added).

appears to be the carrying out of any prohibited conduct, directed against a civilian population, and motivated by a discriminatory *animus* (political, racial or religious grounds).[832] Beyond these brief observations, however, much uncertainty exists.

569. The non-legal or "common understanding" of the term persecution also varies widely. For example, in its comment on the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind of 1991, the United States remarked that the dictionary definition of the verb "to persecute" is "to annoy with persistent or urgent approaches, to pester".[833] Such a definition of persecution for the purposes of a criminal trial is clearly inapplicable before this Tribunal, due to the fact that crimes against humanity, far from being trivial crimes, are offences of extreme gravity.

570. Turning to the *text* of Article 5, the general elements of crimes against humanity, such as the requirements of a widespread or systematic nature of the attack directed against a civilian population, are applicable to Article 5(h) and have already been set out above. The text of Article 5, however, provides no further definition of persecution or how it relates to the other sub-headings of Article 5, except to state that persecution must be on political, racial, or religious grounds.[834] From the text of Article 5 as interpreted by the Appeals Chamber in *Tadić,* it is clear that this discriminatory purpose applies to persecution alone.[835]

571. With regard to a *logical construction* of Article 5, it could be assumed that the crime of persecution covers acts other than those listed in the other subheadings: each subheading appears to cover a separate crime. However, on closer examination, it appears that some of the crimes listed do by necessity overlap: for example,

---

[832] The question is thus raised as to whether a crime against humanity could also be committed on discriminatory grounds not enumerated in the list provided in Art. 5(h) (eg. discrimination on grounds of gender, political opinion or social class): see *Tadić,* Appeals Chamber Judgement, 15 July 1999, at para. 285.

[833] *13th Report on the Draft code of Crimes against the Peace and Security of Mankind,* UN Doc. A/CN.4/455, 24 March 1995 at para. 75; Comments and Observations of Governments on the Draft Code, UN Doc. A/CN.4/448, 1 March 1993, at p. 97.

[834] Although the text of Article 5 reads "political, racial, *and* religious grounds", these grounds should be read disjunctively: *Tadić,* Trial Chamber Judgement, 7 May 1997, at paras. 711-713.

[835] *Tadić,* Appeals Chamber Judgement, 15 July 1999, at para. 305.

extermination necessarily involves murder, torture may involve rape, and enslavement may include imprisonment. Hence, the wording of Article 5, logically interpreted, does not rule out a construction of persecution so as to include crimes covered under the other subheadings. However, Article 5 does not provide any guidance on this point. The *Report of the Secretary-General* is also silent on persecution and does not further elucidate the matter.

572. From the submissions of the parties, it appears that there is agreement between the parties that (a) persecution consists of the occurrence of a persecutory act or omission, and (b) a discriminatory basis is required for that act or omission on one of the listed grounds. Two questions remain in dispute: (a) must the crime of persecution be linked to another crime in the Statute, or can it stand alone? (b) what is the *actus reus* of persecution and how can it be defined? Each of these issues will be addressed in turn.

1. The Alleged Need for a Link Between Persecution and Other International Crimes.

573. The Defence alleges that the *Tadi}* definition of persecution contravenes a long-standing requirement that persecution be "in execution of or in connection with any crime within the jurisdiction of the Tribunal".[836] This wording is found in the Charter of the International Military Tribunal (IMT) which defines crimes against humanity as follows:

> [...] murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated (emphasis added).

574. This wording is repeated in the Charter of the IMT for the Far East, and was upheld in the 1950 UN Declaration of Principles of the Nuremberg Charter and Judgement (Principle VI(c)). Although Control Council Law No. 10 eliminated this

[836] Brief of the Defendants Zoran Kupre{ki} and Mirjan Kupre{ki} on Legal Trial Issues, filed on 19 Nov. 1998, at para. 58; Defence's Closing Brief, filed by counsel for Mirjan Kupre{ki}, 9 Nov. 1999, p. 91.

requirement, the ICC Statute upholds it in Article 7(1)(h). The Defence therefore asserts that there is a consensus that persecution is a "relatively narrow concept", and argues that "persecution should thus be construed as including only acts enumerated elsewhere in the Statute, or, at most, those connected with a crime specifically within the jurisdiction of the ICTY". The Prosecution Brief is silent on whether or not such a link is required.

575. It is evident that the phrase "in execution of or in connection with any crime within the jurisdiction of the Tribunal" contained in Article 6(c) refers not just to persecution but to the entire category of crimes against humanity. It should be noted that when this category of crimes was first laid down in Article 6(c), all crimes against humanity were subject to the jurisdictional requirement of a link to an armed conflict. Thus crimes against humanity could only be punished if committed in execution of or in connection with a war crime or a crime against the peace. Crimes against humanity constituted a new category of crimes and the framers of Article 6(c) limited its application to cases where there already existed jurisdiction under more "well-established" crimes such as war crimes.

576. Moreover, in its application of Article 6(c), the IMT exercised jurisdiction over individual defendants who had allegedly committed only crimes against humanity, even when there was only a tenuous link to war crimes or crimes against the peace. This is demonstrated by the Judgement rendered by the IMT in the case of defendant *von Schirach*. Von Schirach, as *Gauleiter* of Vienna, was charged with and convicted of crimes against humanity for the deportation of Jews from Austria. The IMT concluded that Von Schirach was probably not involved in the "development of Hitler's plan for territorial expansion by means of aggressive war", nor had he been charged with war crimes. However, the link to another crime under the Charter (that of aggression) was found in the fact that "Austria was occupied pursuant to a common plan of aggression. Its occupation was, therefore, a "crime within the jurisdiction of the Tribunal".[837] Another example is found in the case of *Streicher*, publisher of *Der Stürmer*, an anti-

[837] Judgement of the International Military Tribunal, Trial of Major War Criminals before the IMT, Nuremberg, (14 Nov. 1945 – Oct. 1946) (hereafter IMT Judgement), Vol. I, p. 318.

Semitic weekly newspaper. Streicher was convicted for "incitement of the German people to active persecution". There was no evidence that he had ever committed war crimes or "that he was ever within Hitler's inner circle of advisers; nor during his career was he closely connected with the formulation of the policies which led to war".[838] Nevertheless he was convicted of persecution as a crime against humanity (in connection with war crimes).[839]

577. What is most important, and indeed dispositive of the matter, is that an examination of customary international law indicates that as customary rules on crimes against humanity gradually crystallised after 1945, the link between crimes against humanity and war crimes disappeared. This is evidenced by; (a) the relevant provision of Control Council Law No. 10,[840] which omitted this qualification; (b) national legislation (such as the Canadian[841] and the French[842] laws); (c) case-law[843]; (d) such international treaties as the Convention on Genocide of 1948, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of

---

[838] *Ibid.*, p. 302.

[839] *Ibid.*, p. 304.

[840] Art. II(c) of Control Council Law No. 10 defines crimes against humanity as "[a]trocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial, or religious grounds whether or not in violation of the domestic laws of the country where perpetrated". As was held in *US v. Josef Alstötter et al.* (the *Justice case*), Trials of War Criminals (before the Nuremberg Military Tribunal, (hereafter NMT)) Vol. III at p. 974: ". . . it must be noted that Control Council Law No. 10 differs materially from the Charter. The latter defines crimes against humanity as inhumane acts, etc., committed, "in execution of, or in connection with, any crime within the jurisdiction of the tribunal", whereas in C. C. Law 10 the words last quoted are deliberately omitted from the definition".

[841] S. 7 (3.76) of the Canadian Criminal Code provides that: "[C]rimes against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognised by the community of nations".

[842] Art. 212-1, para. 1 of the French Criminal Code (enacted by the Law no. 92-1336 of 16 Dec. 1992, modified by the Law no. 93-913 of 19 July 1993, entered into force on 1 March 1994) provides that

> "La déportation, la réduction en ensclavage ou la pratique massive et systématique d'exécutions sommaires, d"enlèvements de personnes suivis de leur disparition, de la torture ou d'actes inhumains, inpirés par des motifs politiques, philosohpiques, raciaux ou religieux et organisés en execution d'un plan concerté à l'encontre d'un groupe de population civile sont punies de la réclusion criminelle à perpetuité".

[843] See e.g. *US v. Otto Ohlendorf et al.* (the *Einsatzgruppen* case), NMT Vol. IV, p. 49; *Justice* case, *ibid.* NMT Vol. III, p. 974. See, however, the *Flick* case, *ibid.* NMT Vol. VI, p. 1213.

1968, and the Convention on Apartheid of 1973; and (e) the prior jurisprudence of the International Tribunal.[844] This evolution thus evidences the gradual abandonment of the nexus between crimes against humanity and war crimes.[845]

578. The Defence relies on Article 7(1)(h) and 2(g) of the ICC Statute to argue that persecution must be charged in connection with another crime under that Statute. Article 7(1)(h) states:

> Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

579. Article 7(2)(g) provides:

> "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;

580. Article 7(2) thus provides a broad definition of persecution and, at the same time, restricts it to acts perpetrated "in connection" with any of the acts enumerated in the same provision as constituting crimes against humanity (murder, extermination, enslavement, etc.) or with crimes found in other provisions such as war crimes, genocide, or aggression. To the extent that it is required that persecution be connected with war crimes or the crime of aggression, this requirement is especially striking in the light of the fact that the ICC Statute reflects customary international law in abolishing the nexus between crimes against humanity and armed conflict. Furthermore this restriction might easily be circumvented by charging persecution in connection with "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health" under Article 7(1)(k). In short, the Trial Chamber finds that

---

[844] *Tadić*, Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, paras. 140-141.

[845] At present, customary international law bans crimes against humanity whether they are committed in time of war or peace (see on this point the *dictum* by the Appeals Chamber in *Tadi}*, Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, para. 141).

although the Statute of the ICC may be indicative of the *opinio juris* of many States, Article 7(1)(h) is not consonant with customary international law. In addition, it draws attention to an important provision of the ICC Statute dealing with this matter. The application of the provisions contained in Part II of the Statute (on jurisdiction, admissibility and applicable law), including Article 7 on crimes against humanity, is restricted by Article 10 of the same Statute which provides that "Nothing in the Statute shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute" (emphasis added). This provision clearly conveys the idea that the framers of the Statute did not intend to affect, amongst other things, *lex lata* as regards such matters as the definition of war crimes, crimes against humanity and genocide.

581. Accordingly, the Trial Chamber rejects the notion that persecution must be linked to crimes found elsewhere in the Statute of the International Tribunal. It notes that in any case no such requirement is imposed on it by the Statute of the International Tribunal.

2. The *Actus Reus* of Persecution

(a) Arguments of the Parties

582. The Prosecution argues that "persecutory act" should be defined broadly and that it should include both acts not covered by the Statute and acts enumerated elsewhere in the Statute, particularly other subheadings of Article 5, when they are committed with discriminatory intent.[846] According to the Prosecution:

> (a) [T]he crime of persecution has prominence [under customary international law], providing a basis for additional criminal liability in relation to all inhumane acts. [Were it not the case that crimes against humanity could comprise other crimes enumerated in the Statute], this would allow an accused to escape additional culpability for persecution merely by showing that the relevant act falls under another provision of the Statute or elsewhere in the indictment. Persecution is one of the most

[846]Prosecutor's Brief on the Permissibility of Charging Criminal Violations under the Same Articles of the Statute Based on Conduct Arising from a Single Incident, filed 15 Sept. 1998 (hereafter Prosecutor's Brief), paras. 31-32; see also Prosecutor's Closing Brief, para. 12.17.

5087

serious crimes against humanity and an interpretation of the Statute which does not recognise it as such is not tenable.

583. The Prosecution submits that persecution also includes acts not covered elsewhere in the Statute. Thus the persecution charge in the Indictment pertains to "an ethnic cleansing campaign" composed of the killing of Muslim civilians, destruction of their homes and property, and their organised detention and expulsion from Ahmići-Šantići and its environs.

584. According to the Defence a broad interpretation of persecution would be a violation of the principle of legality (*nullum crimen sine lege*).[847] Persecution should be narrowly construed, so as to give guidance as to what acts constitute persecution and to prevent possible abuses of discretion by the Prosecution. The Defence submits that on a statutory construction of Article 5, murder is not included in persecution.[848]

585. The Defence does not agree with the conclusion of the Trial Chamber in *Tadi}* that persecutory acts could include, "*inter alia*, those of a physical, economic, or judicial nature, that violate an individual's right to the equal enjoyment of his basic rights".[849] The Defence submits that persecution should not include acts which are legal under national laws, nor should it include acts not mentioned in the Statute "which, although not in and of themselves inhumane, are considered inhumane because of the discriminatory grounds on which they are taken".[850] Such a definition, in the submission of the Defence, would be too broad and strains the principle of legality. They contend that the *Tadi}* definition, which basically follows that of the International Law Commission (ILC) Draft Code, should be rejected in favour of the definition found in the ICC Statute, which "embodies the existing consensus within the international

[847] Brief of the Defendants Zoran Kupre{ki} and Mirjan Kupre{ki} on Legal Trial Issues, filed on 19 Nov. 1998, paras. 55-56.
[848] Petition of the Counsels of the Accused Zoran and Mirjan Kupre{ki}, 12 Nov. 1998; Defence's Closing Brief, filed by counsel for Dragan Papi}, 5 Nov. 1999.
[849] *Tadić*, Trial Chamber Judgement, 7 May 1997, at para. 710.
[850] *Ibid.*, at para. 715.

community", and which has taken a much narrower approach to the definition of persecutory acts in its Article 7(2)(g).[851]

(b) Discussion

586. The Trial Chamber will now discuss previous instances in which a definition of persecution has been suggested: firstly, in the *corpus* of refugee law and secondly, in the deliberations of the International Law Commission. The purpose of this discussion is to determine whether the definition propounded there may be held to reflect customary international law.

587. It has been argued that further elaboration of what is meant by the notion of persecution is provided by international refugee law. In its comments on the Draft Code presented in 1991, the government of the Netherlands stated: "It would be desirable to interpret the term 'persecution' in the same way as the term embodied in the Convention on refugees is interpreted".[852] The concept of persecution is central to the determination of who may claim refugee status under the Convention Relating to the Status of Refugees of 1951, as supplemented by the 1967 Protocol.[853]

588. However, the corpus of refugee law does not, as such, offer a definition of persecution.[854] Nor does human rights law provide such a definition. The European

---

[851] Brief of Defendants Zoran Kupre{ki} and Mirjan Kupre{ki} on Legal Trial Issues, 19 Nov. 1998, paras. 55-63.

[852] Comments and Observations of Governments on the International Law Commission Draft Code, UN Doc. A/CN.4/448, 1 March 1993, p. 93.

[853] Art. 1A(2) of the Refugee Convention defines a refugee as someone who: "[. . .] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who [. . .] is unwilling to return to it". Art. 33 of the same Convention states: "No Contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion".

[854] *The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status*, (hereafter *UNHCR Handbook)* states at para. 51: "There is no universally accepted definition of "persecution", and various attempts to formulate such a definition have met with little success. From Art. 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights - for the same reasons - would also constitute persecution".

Commission and the Court have on several occasions held that exposing a person to a risk of persecution in his or her country of origin may constitute a violation of Article 3 of the European Convention on Human Rights.[855] However, their decisions give no further guidance as to the definition of persecution.[856] In an attempt to define who may be eligible for refugee status, some national courts have delivered decisions on what acts may constitute persecution.[857] Other cases show that national courts in applying refugee law have given persecution a broad definition, and have held that it includes denial of access to employment or education[858] or more generally have drawn the conclusion that "there is an open ended category of forms of conduct capable of amounting to persecution, to be evaluated in the light of the Convention from case to case".[859]

589. The Trial Chamber finds, however, that these cases cannot provide a basis for individual criminal responsibility. It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law the central determination to be made is whether the person claiming refugee status or likely to be expelled or deported has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The emphasis is more on

---

[855] Art. 3 of the European Convention on Human Rights provides that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment".

[856] *Ahmed v. Austria* (1997) 24 ECHR 278; *Altun v. Federal Republic of Germany* D & R 36 (1984) p. 209; *A v. Switzerland* D & R 46 (1986), p. 257 (271).

[857] For example, Judge McHugh of the Australian High Court in *Chan v. Minister for Immigration and Ethnic Affairs* held that "[a]s long as the person is threatened with harm and that harm can be seen as part of a course of systematic conduct directed for a Convention reason against that person as an individual or as a member of a class, he or she is "being persecuted" for the purpose of the Convention [. . .] Moreover, to constitute "persecution" the harm threatened need not be that of loss of life or liberty [. . .] Other forms of harm short of interference of life or liberty may constitute 'persecution' for the purposes of the Convention and Protocol. Measures 'in disregard' of human dignity may, in appropriate cases, constitute persecution [. . .] ((1989) 169 CLR 379). The Judgement went on to hold that "[p]ersecution on account of race, religion and political opinion has historically taken many forms of social, political, and economic discrimination. Hence, the denial of access to employment, to the professions and to education or the imposition of restrictions on the freedoms traditionally guaranteed in a democratic society such as freedom of speech, assembly, worship or movement may constitute persecution if imposed for a Convention reason" (*idem*).

[858] *Prahastono v. Minister for Immigration and Multicultural Affairs* 1997 Austr. Fed. Ct. Lexis 514, the Federal Court of Australia, per Hill J.

5090

the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may occur. In addition, the intent of the persecutor is not relevant.[860] The result is that the net of "persecution" is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility. The definition stemming from international refugee law or human rights law cannot therefore be followed here.

590. Little guidance in the interpretation of "persecution" is provided by the ILC Draft Code of Crimes Against the Peace and Security of Mankind. The International Law Commission, which originally based its definition of crimes against humanity on the Nuremberg Charter, has included persecution since its earliest draft.[861]. The ILC proposed a definition of persecution in its commentary on the Draft Code dated 1996 which stated as follows:[862]

---

[859] *R v. Secretary of State for the Home Department ex parte Sasitharan* Queens Bench Division (Crown Office List) Co/ 1655/98, 23 June 1998, per Sedley J.

[860] *Immigration and Naturalization Service, Petitioner v. Jairo Jonathan Elias-Zacarias*, Supreme Court of the United States, 1992 U.S. Lexis 550. The *UNHCR Handbook* states in paragraphs 52 and 53: "Due to variations in the psychological make-up of individuals and in the circumstances of each case, interpretations of what amounts to persecution are bound to vary. In addition, an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on 'cumulative grounds'".

[861] The Nuremberg Principles stated that Art. 6(c) of the Charter "distinguished two categories of punishable acts, to wit: first, murder, extermination, enslavement, deportation and other inhuman acts committed against any civilian population, before or during the war, and second, persecution on political, racial or religious grounds" (Nuremberg Principles, *Report of the International Law Commission to the General Assembly*, 2nd Session (5 June –29 July 1950) UN Doc. A/1316, para. 120).

[862] *Report of the International Law Commission on the Work of its forty-eighth session*, 6 May-26 July 1996, at 98. It is not clear whether the International Law Commission interprets persecution to include other subheadings of the Article on crimes against humanity. In its Commentary on its 1991 Draft (UN Doc. A/46/10), the International Law Commission states the following: "Persecution on social, political, racial, religious, or cultural grounds, already a crime under the 1954 draft Code, relates to human rights violations other than those covered in the previous paragraphs, committed in a systematic manner or on a mass scale by government officials or by groups that exercise *de facto* power over a particular territory and seek to subject individuals or groups of individuals to a kind of life in which enjoyment of some of their basic rights is repeatedly or constantly denied. Persecution may take many forms, for example, a prohibition on practising certain kinds of religious worship; prolonged and systematic detention of individuals who represent a political, religious or cultural group; a prohibition on the use of a national

5091

> The inhumane act of persecution may take many forms with its common characteristic being the denial of the human rights and fundamental freedoms to which every individual is entitled without distinction as recognised in the Charter of the United Nations (Articles 1 and 55) and the ICCPR (Art. 2). The present provision would apply to acts of persecution which lacked the specific intent required for the crime of genocide.

591. As neither refugee law nor the ILC draft is dispositive of the issue, in resolving matters in dispute on the scope of persecution, the Trial Chamber must of necessity turn to customary international law. Indeed, any time the Statute does not regulate a specific matter, and the *Report of the Secretary-General* does not prove to be of any assistance in the interpretation of the Statute, it falls to the International Tribunal to draw upon (i) rules of customary international law or (ii) general principles of international criminal law; or, lacking such principles, (iii) general principles of criminal law common to the major legal systems of the world; or, lacking such principles, (iv) general principles of law consonant with the basic requirements of international justice. It must be assumed that the draftspersons intended the Statute to be based on international law, with the consequence that any possible *lacunae* must be filled by having recourse to that body of law.

592. In its discussion, the Trial Chamber will focus upon two distinct issues: (a) can the acts covered by the other subheadings of Article 5 fall within the notion of persecution? and (b) can persecution cover acts not envisaged in one of the other subheadings of Article 5?

(c) Can the Acts Covered by the Other Subheadings of Article 5 Fall Within the Notion of Persecution?

593. As noted above, the Prosecution argues that whereas the meaning of "persecutory act" should be given a broad definition, including a wide variety of acts not enumerated in the Statute, it should also include those enumerated in the Statute and particularly other

---

language, even in private; systematic destruction of monuments or buildings representative of a particular social, religious, cultural or other group. Such acts could come within the scope of this Article when

5092

subheadings of Article 5 when they are committed with discriminatory intent.[863] By contrast, the Defence argues that it would be a violation of the principle of legality (*nullum crimen sine lege*) for this Tribunal to apply Article 5(h) to any conduct of the accused.[864] On this view, persecution should be narrowly construed, so as to give guidance as to what acts constitute persecution and to prevent possible abuses of discretion by the Prosecution.[865]

594. With regard to the question of whether persecution can include acts laid out in the other subheadings of Article 5, and particularly the crimes of murder and deportation, the Trial Chamber notes that there are numerous examples of convictions for the crime of persecution arising from the Second World War. The IMT in its findings on persecution included several of the crimes that now would fall under other subheadings of Article 5. These acts included mass murder of the Jews by the *Einsatzgruppen* and the *SD,* and the extermination, beatings, torture and killings which were widespread in the concentration camps. Similarly, the judgements delivered pursuant to Control Council Law No. 10 included crimes such as murder, extermination, enslavement, deportation, imprisonment and torture in their findings on the persecution of Jews and other groups during the Nazi era. Thus the Military Tribunals sitting at Nuremberg found that persecution could include those crimes that now would be covered by the other subheadings of Article 5 of the Statute.

595. The International Military Tribunal in its Judgement referred to persecution, stating that: "the persecution of the Jews at the hands of the Nazi Government has been proved in the greatest detail before the Tribunal. It is a record of consistent and

---

committed in a systematic manner or on a mass scale".

[863] Prosecutor's Brief, paras. 31-32.

[864] Brief of the Defendants Zoran Kupre{ki} and Mirjan Kupre{ki} on Legal Trial Issues, filed on 19 Nov. 1998

[865] The Closing briefs of two of the accused, Vladimir [anti} and Dragan Papi}, both filed 5 Nov. 1999, indicate acceptance of a broader definition of persecution. The Defence Final Brief for the accused Vladimir [anti} states: "The Defence admits that such inhuman acts can occur in very many forms which have one mutual characteristic and that is denial of fundamental rights and freedoms which an individual is

systematic inhumanity on the greatest scale".[866] The IMT commenced with a description of the early policy of the Nazi government towards the Jewish people: discriminatory laws were passed which limited offices and professions permitted to Jews; restrictions were placed on their family life and rights of citizenship; Jews were completely excluded from German life; pogroms were organized which included the burning and demolishing of synagogues; Jewish businesses were looted; prominent Jewish businessmen were arrested; a collective fine of 1 billion marks was imposed on Jews; Jewish assets were seized; the movement of Jews was restricted; ghettos were created; and Jews were compelled to wear a yellow star.[867] According to the IMT, "[t]hese atrocities were all part and parcel of the policy inaugurated in 1941 [. . .] But the methods employed never conformed to a single pattern".[868]

596. At Nuremberg, organisations[869] as well as individual defendants[870] were convicted of persecution for acts such as deportation, slave labour, and extermination of the Jewish people pursuant to the "Final Solution". Moreover, several individual defendants were convicted of persecution in the form of discriminatory economic acts.[871] An example is the defendant Frick who had "drafted, signed, and administered many laws designed to eliminate Jews from German life and [the] economy", and thus "paved the way for the Final Solution [. . .]".[872]

597. It is clear from its description of persecution that the IMT accorded this crime a position of great prominence and understood it to include a wide spectrum of acts

---

entitled to without distinction" (p. 8). The Defence's Closing Brief for the accused Dragan Papi} states: "The concept of persecution covers a wide sphere . . ."

[866] IMT Judgement, p. 247.

[867] *Ibid.*, p. 248-249.

[868] *Ibid.*, p. 251.

[869] For example, for the role played by the SD and the Gestapo in the persecution of the Jews, see *ibid.*, pp. 265-267; for the role of the SS see *ibid.*, pp. 271-273.

[870] For example see IMT Judgement on defendants Frank (*ibid.*, pp. 297-298); von Schirach (*ibid.*, p. 319); Seyss-Inquart (*ibid.*, pp. 328-29), Borman *(ibid.*, pp. 339-340).

[871] See IMT Judgement on Göring, *ibid.*, p. 282, Frank, *ibid.*, pp. 297-298 and Funk, *ibid.*, p. 305.

[872] *Ibid.*, p. 300.

perpetrated against the Jewish people, ranging from discriminatory acts targeting their general political, social and economic rights, to attacks on their person.

598. This broad interpretation of persecution was upheld in subsequent cases. None of the courts endeavoured to define persecution but the term was generally used to describe the treatment suffered by the Jews and other groups specifically targeted by the Nazis. Persecution was a central allegation in several of the cases brought before Military Tribunals under Control Council Law No. 10. The Tribunals held that in persecuting Jews and other groups, the accused had infringed a wide variety of rights.[873] For example, in *US v. Ernst von Weizsäcker* (the *Ministries Case)*, the United States Military Tribunal stated:

> Hitler made the Jewish persecution one of the primary subjects of his policy to gain and retain power [...]. The persecution of the Jews went on steadily from step to step and finally to death in foul form.[874]

599. The Tribunal described the progression of infringement of rights, which started with the deprivation of rights of citizenship; rights to work and education; economic and property rights; and then led to arrest and confinement in concentration camps; beatings,

---

[873] The *German High Command* Trial, NMT, Vol II at pp. 647-648. The US Military Tribunal, in a summary of the evidence against the accused von Roques, stated that "many of the documents heretofore show ill-treatment and persecution of the civilians within the accused von Roques' area of command. Other documents show the establishment of ghettos for the Jews; requirements that they wear the Star of David; prohibition of Jewish rites; confiscation of Jewish ritual articles; requirements that Jews surrender all foreign exchange securities, precious metals, and precious stones; terror killings of suspect partisan and partisan sympathisers; so-called mopping-up exercises and turning over of Jews and Communists to the SD [. . .]".

[874] *Ministries* Case, NMT, Vol. XIV at p. 471: "The Jews of Germany were first deprived of the rights of citizenship. They were then deprived of the right to teach, to practice professions, to obtain education, to engage in business enterprises; they were forbidden to marry except among themselves and those of their own religion; they were subject to arrest and confinement in concentration camps, to beatings, mutilation and torture; their property was confiscated; they were herded into ghettos; they were forced to emigrate and to buy leave to do so; they were deported to the East, where they worked to exhaustion and death; they became slave labourers; and finally over six million were murdered". See also the United States Military Court in the Trial of *Ulrich Greifelt et al. (RuSHA case)* NMT Vol. V. Ulrich Greifelt and his co-accused from the RuSHA (Reichs Security Head Office) were convicted *inter alia* of participation in a program of genocide aimed at the destruction of foreign nations and ethnic groups, "in part by murderous extermination, and in part by elimination and suppression of national characteristics" (p. 88). The Notes on the Case (*Law Reports of Trials of War Criminals*, UN War Crimes Commission, (hereafter UNWCC), 1948 Vol XIII) state at p. 1-2 "The trial dealt with the main body of racial persecutions which distinguished so conspicuously the Nazi regime inside the Third Reich".

mutilation and torture; deportations; slave labour and "finally over six million were murdered".[875] The US Military Tribunal did not purport to find a common definitive element in the wide variety of acts it illustrated.[876]

600. It is clear that the courts understood persecution to include severe attacks on the person such as murder, extermination and torture; acts which potentially constitute crimes against humanity under the other subheadings of Article 5. This conclusion is supported by the findings of national courts in cases arising out of the Second World War. For example, *Gauleiter Artur Greiser* was charged with and convicted by the Supreme National Tribunal of Poland of participating in crimes against the Polish and Jewish people, including acts of persecution and extermination, by, *inter alia,* "murdering them on the spot, concentrating them in ghettos . . . whence they were being gradually deported and murdered, mainly in the gas-chambers of the extermination camp at Chelmno [. . .], submitting the Jewish population from the very beginning of the occupation to every possible kind of vexation and torment, from verbal and physical effronteries to the infliction of the most grievous bodily harm, in a way calculated to inflict the maximum of physical suffering and human degradation".[877]

601. In the case of *Willy Zühlke,* a former German prison warden was convicted by the Netherlands Special Court in Amsterdam of co-operating in the German policy of humiliation and persecution of Jews by holding them in illegal detention, beating and kicking them, and mistreating and humiliating them in other ways. It was noted by the Netherlands Special Court that "Jewish prisoners were ill-treated by him in a far more brutal manner than the other prisoners".[878]

602. *Adolf Eichmann* was convicted, *inter alia*, of causing the murder, extermination, enslavement, starvation, and deportation of civilian Jewish people by the Israeli Supreme

---

[875] *Ministries* case, *ibid.*
[876] *Ibid.*, at p. 470.
[877] *Ibid.*, Trial of *Gauleiter Artur Greiser*, Supreme National Tribunal of Poland, 21 June – 7 July 1946. Law Reports of Major War Criminals, UNWCC, Vol. XIII at p. 105.

Court. The Court found that "in carrying out the above-mentioned activities [Eichmann] persecuted Jews on national, racial, religious and political grounds".[879] Furthermore, in 1985 the French *Cour de Cassation* convicted *Klaus Barbie* of "persecution against innocent Jews, [. . .] carried out for racial and religious motives with a view to their extermination, in furtherance of the "Final Solution".[880] In 1986 the Zagreb District Court passed judgement in the case of *Andrija Artukovi},* a prominent member of the "Ustaša" movement in the self-proclaimed "Independent State of Croatia" during the Second World War. In this capacity he had ordered mass killings and deportations to a concentration camp. The Court held that his intent stemmed from his "Ustaša orientation, by which persecutions, concentration camps and mass killings of Serbs, Jews, Gypsies, as well as Croats who did not accept the ideology, were a part of the implementation of a program of creating a "pure" Croatia".[881] The Court sentenced Artukovi} to death, describing him as one of the "ruthless murderers, who under the cover of 'protecting purity of race and faith' and with the aim of realising their Nazi-Fascist ideology, [...] killed, slaughtered, tortured, crippled, exposed to great suffering, and persecuted thousands and thousands of people, among whom women and children".[882]

603. More recently, in the case of *Prosecutor v. Tadi}* before this Tribunal, Tadi} was convicted under Article 5(h) for his role in "the attack on Kozarac and the surrounding areas, as well as the seizure, collection, segregation and forced transfer of civilians to camps, calling-out of civilians, beatings and killings".[883] It is noted that these acts potentially fall under other sub-headings of Article 5, although no objection based upon this fact was put forward by the Trial Chamber.

---

[878] Judgement of *Bijzonder Gerechtshof Amsterdam*, 3 Aug. 1948 (referred to in Judgement of *Bijzondere Raad van Cassatie*, 6 Dec. 1948, *Nederlandse Jurisprudentie*, 1949 No. 85): English translation found in UNWCC, Vol. XIV, p. 139.
[879] *Attorney General of Israël v. Adolf Eichmann*, ILR 5, pp. 277-78 (1968).
[880] *Barbie, ibid.*, at 139.
[881] *Artuković*, Zagreb District Court Doc. No. K-1/84-61, 14 May 1986, Translation (on file with the ICTY), at p. 23.

604. These findings emphasise the conclusion of international tribunals and national courts that the crime of persecution both during and since the Second World War did not consist only of those acts not covered by the other types of crimes against humanity. On the contrary, these Tribunals and courts specifically included crimes such as murder, extermination and deportation in their findings on persecution.

605. The Trial Chamber finds that the case-law referred to above reflects, and is indicative of, the notion of persecution as laid down in customary international criminal law. The Trial Chamber therefore concludes that acts enumerated in other sub-clauses of Article 5 can thus constitute persecution. Persecution has been used to describe some of the most serious crimes perpetrated during Nazi rule. A narrow interpretation of persecution, excluding other sub-headings of Article 5, is therefore not an accurate reflection of the notion of persecution which has emerged from customary international law.

606. It should be added that if persecution was given a narrow interpretation, so as not to include the crimes found in the remaining sub-headings of Article 5, a *lacuna* would exist in the Statute of the Tribunal. There would be no means of conceptualising those crimes against humanity which are committed on discriminatory grounds, but which, for example, fall short of genocide, which requires a specific intent "to destroy, in whole or in part, a national, ethnical, racial, or religious group". An example of such a crime against humanity would be the so-called "ethnic cleansing", a notion which, although it is not a term of art, is particularly germane to the work of this Tribunal.

607. Although the *actus reus* of persecution may be identical to other crimes against humanity, what distinguishes the crime of persecution is that it is committed on discriminatory grounds. The Trial Chamber therefore accepts the submission of the Prosecution that "[p]ersecution, which can be used to charge the conduct of ethnic

---

[882] *Ibid.*, at p. 26.
[883] *Tadić*, Trial Chamber Judgement, 7 May 1997, at para. 717.

cleansing on discriminatory grounds is a serious crime in and of itself and describes conduct worthy of censure above and apart from non-discriminatory killings envisioned by Article 5".[884]

(d) Can Persecution Cover Acts not Envisaged in one of the Other Subheadings of Article 5?

608. The Prosecution argues that persecution can also involve acts other than those listed under Article 5. It is their submission that the meaning of "persecutory act" should be given a broad definition and includes a wide variety of acts not enumerated elsewhere in the Statute.[885] By contrast, the Defence submits that the two basic elements of persecution are (a) the occurrence of a persecutory act or omission, and (b) a discriminatory basis for that act or omission on one of the listed grounds. As mentioned above, the Defence argues that persecution should be narrowly construed.

609. The Trial Chamber is thus called upon to examine what acts not covered by Article 5 of the Statute of the International Tribunal may be included in the notion of persecution. Plainly, the Trial Chamber must set out a clear-cut notion of persecution, in order to decide whether the crimes charged in this case fall within its ambit. In addition, this notion must be consistent with general principles of criminal law such as the principles of legality and specificity. First, the Trial Chamber will examine what types of acts, aside from the other categories of crimes against humanity have been deemed to constitute persecution. Secondly, it will examine whether there are elements underlying these acts which assist in defining persecution.

610. The Judgement of the IMT included in the notion of persecution a variety of acts which, at present, may not fall under the Statute of the International Tribunal, such as the passing of discriminatory laws, the exclusion of members of an ethnic or religious group from aspects of social, political, and economic life, the imposition of a collective fine on them, the restriction of their movement and their seclusion in ghettos, and the

[884] Prosecutor's Brief, at para. 15.

5099

requirement that they mark themselves out by wearing a yellow star.[886] Moreover, and as mentioned above, several individual defendants were convicted of persecution in the form of discriminatory economic acts.[887]

611. It is also clear that other courts have used the term persecution to describe acts other than those enumerated in Article 5. A prominent example is the trial of *Josef Altstötter et al. (*the *Justice* Trial*).*[888] Altstötter and the other accused were former German Judges, Prosecutors or officials of the Reich Ministry of Justice. They were charged with a common design, conspiracy, plan and enterprise which "embraced the use of the judicial process as a powerful weapon for the persecution and extermination of all opponents of the Nazi regime regardless of nationality and for the persecution and extermination of races".[889]

612. The U.S. Military Tribunal in the *Justice* case held that the national pattern or plan for racial persecution was one of actual extermination of Jewish and Polish people, but that "lesser forms of racial persecution were universally practiced by governmental authority and constituted an integral part in the general policy of the Reich".[890] These lesser forms of persecution included the passing of a decree by which Jews were excluded from the legal profession; the prohibition of intermarriage between Jews and persons of German blood and the severe punishment of sexual intercourse between these groups; and decrees expelling Jews from public services, educational institutions, and from many business enterprises. Furthermore, upon the death of a Jew his property was confiscated, and under an amendment to the German Citizenship Law, the Security Police and the *SD* could also confiscate property of Jews who were alive. Jews were subject to more severe punishments than Germans; the rights of defendants in court were severely circumscribed; courts were empowered to impose death sentences on Poles and Jews

---

[885] *Ibid.*, para. 22.
[886] IMT *Judgement*, pp. 248-249.
[887] *Frank, ibid.*, pp. 297-298; Funk, *ibid.*, p. 305; Frick, p. 300.
[888] NMT Vol. III.
[889] Indictment, *Justice* trial, NMT Vol. III, p. 18.
[890] *Ibid.*, pp. 1063-64.

5100

even if not prescribed by law; and the police were given *carte blanche* in the punishment of Jews without resort to the judicial process.[891] In summary, what was considered to be persecution in the *Justice* case was the use of a legal system to implement a discriminatory policy.

613. The jurisprudence of the national courts provides further examples such as the trial of *Hans Albin Rauter*, before the Netherlands Special Court in The Hague. Rauter, a Nazi SS *Obergruppenführer* and a General of the *Waffen-SS* and the Police, was convicted and sentenced to death for his intentional participation in the framework of the German policy of persecution of the Jews, which manifested itself in multifarious measures.[892] Also, *Artukovi}* was found guilty of acts such as the passing and implementation of discriminatory decrees ranging from Decrees on racial identity and the protection of Aryan blood or the honour of the Croatian people to the Decree on deporting unsuitable and dangerous individuals to internment and labour camps.[893]

614. The Trial Chamber is thus bolstered in its conclusion that persecution can consist of the deprivation of a wide variety of rights. A persecutory act need not be prohibited explicitly either in Article 5 or elsewhere in the Statute. Similarly, whether or not such acts are legal under national laws is irrelevant. It is well-known that the Nazis passed many discriminatory laws through the available constitutional and legislative channels which were subsequently enforced by their judiciary. This does not detract from the fact

---

[891] *Ibid.*

[892] For instance, "[h]e issued orders under which Jews were subjected to discriminatory treatment and gradually segregated from the rest of the population, which facilitated their being detected and apprehended at a later date for slave labour and eventual extermination. Jews were ordered to wear a Star of David in public, and were forbidden to take part in public gatherings, to make use of public places for amusement, recreation or information, to visit public parks, cafes and restaurants, to use dining and sleeping cars, to visit theatres, cabarets, variety shows, cinemas, sports clubs, including swimming baths, to remain in or make use of public libraries, reading rooms, and museums. A special curfew was introduced for all Jews between the hours of 8 p.m., and 6 a.m. Later orders banned them from railway yards and the use of any public or private means of transport. These measures were followed by the erection of concentration camps in various places. They culminated in systematic round-ups of Jews, who were sent to the concentration camps in order to be deported to Germany or Poland, where they were to be used for slave labour or exterminated". (Trial of *Hans Albin Rauter*, Bijzondere Gerechtshof te 's-Gravenhage, 4 May 1948, (referred to in the Judgement of the Bijzondere Raad van Cassatie, 12 Jan. 1949, *Nederlandse Jurisprudentie*, 1949, No. 89); English Translation in UNWCC, Vol. XIV 1949, p. 93).

[893] *Artuković, ibid.*, p. 16.

5101

that these laws were contrary to international legal standards. The Trial Chamber therefore rejects the Defence submission that persecution should not include acts which are legal under national laws.

615. In short, the Trial Chamber is able to conclude the following on the *actus reus* of persecution from the case-law above:

(a) A narrow definition of persecution is not supported in customary international law. Persecution has been described by courts as a wide and particularly serious genus of crimes committed against the Jewish people and other groups by the Nazi regime.

(b) In their interpretation of persecution courts have included acts such as murder, extermination, torture, and other serious acts on the person such as those presently enumerated in Article 5.

(c) Persecution can also involve a variety of other discriminatory acts, involving attacks on political, social, and economic rights. The scope of these acts will be defined more precisely by the Trial Chamber below.

(d) Persecution is commonly used to describe a series of acts rather than a single act. Acts of persecution will usually form part of a policy or at least of a patterned practice, and must be regarded in their context. In reality, persecutory acts are often committed pursuant to a discriminatory policy or a widespread discriminatory practice, as was found by the Zagreb District Court in *Artukovi}*.[894]

(e) As a corollary to (d), discriminatory acts charged as persecution must not be considered in isolation. Some of the acts mentioned above may not, in and of

[894] *Ibid.*, p. 24: "The defendant has committed a war crime by his actions against humanity and international law. He implemented racist law, which amounted to an imitation of the law of the Third Reich against non-Aryans, Jews, and Gypsies. He also savagely and ruthlessly treated Serbs in Croatia, hundreds of thousands of whom perished in internment, concentration and labour camps, and other places. He did not choose means to eliminate and kill Serb, Croats who had not accepted the Ustaša ideology and system, Jews, communists, Gypsies, anti-fascists, and members of other ethnic groups. The apparatus through which all was done . . . was a horrific machine of violence and generally a mechanic organisation

themselves, be so serious as to constitute a crime against humanity. For example, restrictions placed on a particular group to curtail their rights to participate in particular aspects of social life (such as visits to public parks, theatres or libraries) constitute discrimination, which is in itself a reprehensible act; however, they may not in and of themselves amount to persecution. These acts must not be considered in isolation but examined in their context and weighed for their cumulative effect.[895]

3. The Definition of Persecution

616. In the Judgement of *Prosecutor v. Tadi}*, Trial Chamber II held that persecution is a form of discrimination on grounds of race, religion or political opinion that is intended to be, and results in, an infringement of an individual's fundamental rights. It is not necessary to have a separate act of an inhumane nature to constitute persecution, but rather, the discrimination itself makes the act inhumane. The Trial Chamber held that the crime of persecution encompasses a wide variety of acts, including, *inter alia*, those of a physical, economic, or judicial nature that violate an individual's basic or fundamental

---

which planned, prepared, executed and systematically implemented such crimes, as the crimes against humanity, which are most characterised by the mass destruction of human beings".

[895] The Tribunal in the *Justice* trial NMT Vol. III, p.1063) found that: "The record contains innumerable acts of persecution of individual Poles and Jews, but to consider these cases as isolated and unrelated instances of perversion of justice would be to overlook the very essence of the offence charged in the indictment. The defendants are not now charged with conspiracy as a separate and substantive offence, but it is alleged that they participated in carrying out a governmental plan and program for the persecution and extermination of Jews and Poles, a plan which transcended territorial boundaries as well as the bounds of human decency [...]".

The Notes on the case, UNWCC, 1948, Vol. VI state at pp. 82-3 that "it is probably true to say that the Tribunal regarded as constituting crimes against humanity not merely a series of changes made in the legal system of Germany but a series of such alterations as involved or were pursuant to persecutions on political, racial or religious grounds, or (perhaps) such as led to the commission of "atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts against any civilian population". In similar terms, the Zagreb District Court in the case of *Artukovi}* found that "[t]he obligation of wearing a sign to signify Jewish origin [...] was not only inhuman behaviour [with regard] to the whole people, but also a revealing foreboding of death". It is not each individual act, but rather their cumulative effect that matters. (*Ibid.*, UNWCC, p. 15).

rights. The discrimination must be on one of the listed grounds to constitute persecution.[896]

617. As mentioned above, this is a broad definition which could include acts prohibited under other subheadings of Article 5, acts prohibited under other Articles of the Statute, and acts not covered by the Statute. The same approach has been taken in Article 7(2)(g) of the ICC Statute, which states that "[p]ersecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity" (emphasis added).

618. However, this Trial Chamber holds the view that in order for persecution to amount to a crime against humanity it is not enough to define a core assortment of acts and to leave peripheral acts in a state of uncertainty. There must be clearly defined limits on the types of acts which qualify as persecution. Although the realm of human rights is dynamic and expansive, not every denial of a human right may constitute a crime against humanity.

619. Accordingly, it can be said that at a minimum, acts of persecution must be of an equal gravity or severity to the other acts enumerated under Article 5. This legal criterion has already been resorted to, for instance, in the *Flick* case.[897]

---

[896] *Tadić,* Trial Chamber Judgement, 7 May 1997, at paras. 697, 710.

[897] In this case, the U S Military Tribunal sitting at Nuremberg held that "[n]ot even under a proper construction of the section of Control Council Law No. 10 relating to crimes against humanity, do the facts [compulsory taking of Jewish industrial property] warrant conviction. The "atrocities and offences" listed therein, "murder, extermination," etc., are all offences against the person. Property is not mentioned. Under the doctrine of *ejusdem generis* the catch-all words "other persecutions" must be deemed to include only such as affect the life and liberty of the oppressed peoples. Compulsory taking of industrial property, however reprehensible, is not in that category". (*Flick et. al.*, in NMT Vol. VI, p. 1215). This statement was taken up and used by the U.S. Military Tribunal in *US v. Krauch et al., (Farben* case) (NMT Vol. VIII pp. 1129-1130). See also Notes on the Case, UNWCC, Vol. IX, which states at p. 50, that the judgement in the *Flick* case declared that "A distinction could be made between industrial property and the dwellings, household furnishings and food supplies of a persecuted people" and thus left open the question whether such offences against personal property as would amount to an assault upon the health and life of a human being (such as the burning of his house or depriving him of his food supply or his paid employment) would not constitute a crime against humanity".

S104

620. It ought to be emphasised, however, that if the analysis based on this criterion relates only to the level of seriousness of the act, it does not provide guidance on what types of acts can constitute persecution. The *ejusdem generis* criterion can be used as a supplementary tool, to establish whether certain acts which generally speaking fall under the proscriptions of Article 5(h), reach the level of gravity required by this provision. The only conclusion to be drawn from its application is that only gross or blatant denials of fundamental human rights can constitute crimes against humanity.

621. The Trial Chamber, drawing upon its earlier discussion of "other inhumane acts", holds that in order to identify those rights whose infringement may constitute persecution, more defined parameters for the definition of human dignity can be found in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948, the two United Nations Covenants on Human Rights of 1966 and other international instruments on human rights or on humanitarian law. Drawing upon the various provisions of these texts it proves possible to identify a set of fundamental rights appertaining to any human being, the gross infringement of which may amount, depending on the surrounding circumstances, to a crime against humanity. Persecution consists of a severe attack on those rights, and aims to exclude a person from society on discriminatory grounds. The Trial Chamber therefore defines persecution as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5.

622. In determining whether particular acts constitute persecution, the Trial Chamber wishes to reiterate that acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect. Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may

be termed "inhumane". This delimitation also suffices to satisfy the principle of legality, as inhumane acts are clearly proscribed by the Statute.[898]

623. The Trial Chamber does not see fit to identify which rights constitute fundamental rights for the purposes of persecution. The interests of justice would not be served by so doing, as the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights (*expressio unius est exclusio alterius*). This is not the approach taken to crimes against humanity in customary international law, where the category of "other inhumane acts" also allows courts flexibility to determine the cases before them, depending on the forms which attacks on humanity may take, forms which are ever-changing and carried out with particular ingenuity. Each case must therefore be examined on its merits.

624. In its earlier conclusions the Trial Chamber noted that persecution was often used to describe a series of acts. However, the Trial Chamber does not exclude the possibility that a single act may constitute persecution. In such a case, there must be clear evidence of the discriminatory intent. For example, in the former Yugoslavia an individual may have participated in the single murder of a Muslim person. If his intent clearly was to kill him because he was a Muslim, and this occurred as part of a wide or systematic persecutory attack against a civilian population, this single murder may constitute persecution. But the discriminatory intent of the perpetrator must be proved for this crime to qualify as persecution.

625. Although acts of persecution are often part of a discriminatory policy, the Trial Chamber finds that it is not necessary to demonstrate that an accused has taken part in the formulation of a discriminatory policy or practice by a governmental authority. An

---

[898] In this regard the Trial Chamber notes that the US Military Tribunal in the *Einsatzgruppen* case (NMT Vol IV) stated at p. 49: "Can it be said that international conventions and the law of nations gave no warning to these accused that their attacks against ethnic, national, religious, and political groups infringed the rights of mankind? We do not refer to localised outbursts of hatred nor petty discriminations which unfortunately occur in the most civilised of states. When persecutions reach the scale of nationwide campaigns designed to make life intolerable for, or to exterminate large groups of people, law dare not remain silent (. . .) The Control Council simply reasserts existing law when naming persecutions as an international offence."

'5106

example is that of the defendant *Streicher*: "In his speeches and articles [...] he infected the German mind with the virus of anti-Semitism, and incited the German People to active persecution".[899] He did so not in any official capacity but as the publisher of an anti-Semitic journal, *Der Stürmer*. The Tribunal concluded that his "incitement to murder and extermination at the time when Jews in the East were being killed under the most horrible conditions clearly constitutes persecution" and sentenced him to death.[900]

626. The Trial Chamber observes that in the light of its broad definition of persecution, the Prosecution cannot merely rely on a general charge of "persecution" in bringing its case. This would be inconsistent with the concept of legality. To observe the principle of legality, the Prosecution must charge particular acts (and this seems to have been done in this case). These acts should be charged in sufficient detail for the accused to be able to fully prepare their defence.

627. In sum, a charge of persecution must contain the following elements:

(a) those elements required for all crimes against humanity under the Statute;

(b) a gross or blatant denial of a fundamental right reaching the same level of gravity as the other acts prohibited under Article 5;

(c) discriminatory grounds.

---

[899] IMT Judgement, p. 302.

[900] *Ibid.*, pp. 302-4. This is also demonstrated in cases brought before German courts acting under Control Council Law no. 10. The *Oberster Gerichtshof für die Britische Zone in Köln,* 9 Nov, 1948, StS 78/48 held that denunciation "is [...] intimately linked to the National Socialists' regime of violence and arbitrariness because, from the very outset, it clearly fitted into the organised campaign of persecution against all Jews and everything Jewish in Germany which all humanity not under the sway of National Socialism perceived as an assault and, although directed against this one victim only, became part and parcel of all the mass crimes committed during the persecution of Jews (translation on file with the ICTY)".
More generally, the Düsseldorf *Oberlandesgericht* stated in a Judgement of 20 May 1948 (Criminal Chamber 3/48) that National Socialism has built up a power mechanism in the party and State which could be set in motion against anyone from anywhere. Not only the holder of the power himself who used his own personal position of power against someone weaker can be a perpetrator of a crime against humanity but also anyone who on his own initiative also participated in any way or even only encouraged the commission of such acts. (Judgement of Düsseldorf Regional Appellate Court, 20 May 1948, translation on file with ICTY, p. 4).

4. The Application of the Definition set out above to the Instant Case

628. The Trial Chamber will now examine the specific allegations in this case, which are the "deliberate and systematic killing of Bosnian Muslim civilians", the "organised detention and expulsion of the Bosnian Muslims from Ahmići-Šantići and its environs", and the "comprehensive destruction of Bosnian homes and property". Can these acts constitute persecution?

629. In light of the conclusions above, the Trial Chamber finds that the "deliberate and systematic killing of Bosnian Muslim civilians" as well as their "organised detention and expulsion from Ahmići" can constitute persecution. This is because these acts qualify as murder, imprisonment, and deportation, which are explicitly mentioned in the Statute under Article 5.

630. The Trial Chamber next turns its attention to the alleged comprehensive destruction of Bosnian Muslim homes and property. The question here is whether certain property or economic rights can be considered so fundamental that their denial is capable of constituting persecution. The Trial Chamber notes that in the Judgement of the IMT, several defendants were convicted of economic discrimination. For example, Göring "persecuted the Jews . . . and not only in Germany where he raised the billion mark fine . . . this interest was primarily economic - how to get their property and how to force them out of economic life in Europe".[901] Defendants Funk and Seyss-Inquart were also charged with acts of economic discrimination.[902]

631. The Trial Chamber finds that attacks on property can constitute persecution. To some extent this may depend on the type of property involved: in the passage from *Flick* cited above the Tribunal held that the compulsory taking of industrial property could not be said to affect the life and liberty of oppressed peoples and therefore did not constitute persecution. There may be certain types of property whose destruction may not have a severe enough impact on the victim as to constitute a crime against humanity, even if

[901] IMT Judgement, p. 282.

5108

such a destruction is perpetrated on discriminatory grounds: an example is the burning of someone's car (unless the car constitutes an indispensable and vital asset to the owner). However, the case at hand concerns the comprehensive destruction of homes and property. Such an attack on property in fact constitutes a destruction of the livelihood of a certain population.[903] This may have the same inhumane consequences as a forced transfer or deportation. Moreover, the burning of a residential property may often be committed with a recklessness towards the lives of its inhabitants. The Trial Chamber therefore concludes that this act may constitute a gross or blatant denial of fundamental human rights, and, if committed on discriminatory grounds, it may constitute persecution.

5. The *Mens Rea* of Persecution

632. The Trial Chamber will now discuss the *mens rea* requirement of persecution as reflected in international case-law.

633. Both parties agree that the mental element of persecution consists of discriminatory intent on the grounds provided in the Statute. Nevertheless, the Trial Chamber will elaborate further on the discriminatory intent required.

634. When examining some of the examples of persecution mentioned above, one can discern a common element: those acts were all aimed at singling out and attacking certain individuals on discriminatory grounds, by depriving them of the political, social, or economic rights enjoyed by members of the wider society. The deprivation of these rights can be said to have as its aim the removal of those persons from the society in which they live alongside the perpetrators, or eventually even from humanity itself.

---

[902] *Ibid.*, pp. 305, 328-329.
[903] See evidence of witness Dr. Bringa summarized above, para. 336.

5109

635. The grounds on which the perpetrator of persecution may discriminate are listed in Article 5(h) of the Statute as political, racial or religious grounds.[904]

636. As set forth above, the *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide. In this context the Trial Chamber wishes to stress that persecution as a crime against humanity is an offence belonging to the same *genus* as genocide. Both persecution and genocide are crimes perpetrated against persons that belong to a particular group and who are targeted because of such belonging. In both categories what matters is the intent to discriminate: to attack persons on account of their ethnic, racial, or religious characteristics (as well as, in the case of persecution, on account of their political affiliation). While in the case of persecution the discriminatory intent can take multifarious inhumane forms and manifest itself in a plurality of actions including murder, in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of *mens rea,* genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide.

D. The Question of Cumulation of Offences (*Concursus Delictorum*)

1. The Issue in Dispute

(a) Prosecutor's Submissions

(i) General

637. It is the Prosecutor's contention that a person may be charged with, and convicted of, various crimes even when that person has only engaged in one criminal action against

[904] The *RuSHA* trial (*ibid.*) dealt with persecution of Jewish and Polish people, *Greiser* was charged with the persecution of Polish as well as Jewish people, *Rauter* was charged with persecution of relatives of

5110

the same victim or victims. In other words, according to the Prosecutor the same act or transaction against one or more victims may simultaneously infringe several criminal rules and can consequently be classified as a multiple crime. For instance, one act (say, murder) may be both a war crime and a crime against humanity.

638. To support this view the Prosecutor relies on previous decisions of the ICTY and the ICTR authorising cumulative charging.[905] In particular, reliance is placed on the *Akayesu* Judgement of the ICTR and the *Tadić* Judgement of the ICTY Trial Chamber. The Prosecutor also refers to an interlocutory decision rendered in this case on the subject of cumulation of offences. The Prosecutor places principal reliance on the test enunciated by a Trial Chamber of the ICTR in its *Akayesu* judgement of 2 September 1998. According to this test, "when more than one offence contained in the Articles of the Statute applies to a single set of facts, each offence may be separately charged: (1) where the offences have different elements; *or* (2) where the provisions creating the offences protect different interests; *or* (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did".[906]

639. The Prosecutor endorses this test over that set out by this Trial Chamber in this case in its *Decision on Defence Challenges to the Form of the Indictment* of 15 May 1998, according to which:[907]

> The Prosecutor may be justified in bringing cumulative charges when the Articles of the Statute referred to are designed to protect different values *and* when each Article requires proof of a legal element not required by the others.

The Prosecutor submits that this test, inasmuch as it requires the conjunction of these two conditions, and does not allow for the third condition postulated in the *Akayesu*

---

members of the Netherlands police forces who refused to carry out German orders or who had joined the resistance movement.

[905] Prosecutor's Brief.

[906] *Akayesu,* Judgement, 2 Sept. 1998, p. 194, para. 468 (emphasis added).

[907] *Prosecutor v. Kupreškić et al.,* Decision on Defence Challenges to the form of the Indictment, 15 May 1998, at p. 3 (emphasis added).

5111 -

Judgement, mentioned above, is "overly restrictive".[908] Nevertheless, the Prosecutor submits that even this restrictive test is met in this case.[909]

640. The third approach referred to by the Prosecutor may be referred to as the *Tadić* approach. In an oft-quoted *dictum* from the *Tadić Decision on Defence Motion on Form of the Indictment*, the Trial Chamber stated:[910]

> In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend on whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading.

641. In the *Tadić* Sentencing Judgement,[911] concurrent sentences were imposed for offences which had been cumulatively charged in the indictment in relation to one set of facts. The same approach was taken in the *Delalić et al.*[912] and *Furundžija*[913] final Judgements, as well as in a number of interlocutory decisions on preliminary motions objecting to the form of the indictment,[914] on the basis of the *Tadić* dictum quoted above. The Prosecutor therefore also relies on the *Tadić* approach to justify cumulative charging.

642. Applying the tests enunciated above to the present case, the Prosecutor argues that it is justified in cumulatively charging (i) murder as a crime against humanity (Article 5(a) of the Statute) and persecution as a crime against humanity (Article 5(h) of the Statute), and (ii) murder as a crime against humanity (Article 5(a) of the Statute) and

---

[908] Prosecutor's Brief, para. 7.
[909] This conclusion is implicit in para. 40 of the Prosecutor's Brief.
[910] *Tadi}*, Decision, 14 Nov. 1995, at p. 6, para. 17.
[911] *Prosecutor v. Tadi}*, (IT-94-1-T), Sentencing Judgement, Trial Chamber, 14 July 1997 (hereafter *Tadi}*, Sentencing Judgement, 14 July 1997).
[912] *Delali} et al.*, Judgement, 16 Nov. 1998, para. 1286.
[913] *Furundžija*, Judgement, 10 Dec. 1998, paras. 292-296.
[914] *Delali} et al.*, Decision on motion by the accused Zejnil Delali} based on defects in the form of the indictment, 4 Oct. 1996, para. 24; Decision on Motion by the Accused Esad Land`o based on defects in the form of the Indictment, 15 Nov. 1996, para. 7, and Decision on Motion by accused Hazim Deli} based on defects in the form of the Indictment, 15 Nov. 1996, para. 22 (upheld by a bench of the Appeals Chamber in Decision on Application for Leave to Appeal by Hazim Deli} (Defects in the form of the Indictment), 6 Dec. 1996 paras. 35-36).

murder as a war crime (Article 3 of the Statute, incorporating the prohibition on murder laid down in Common Article 3 of the 1949 Geneva Conventions), as these crimes have different elements and protect different societal values. It can also be assumed that the Prosecutor would use the same reasoning to justify the cumulative charging of (iii) inhumane acts as a crime against humanity (Article 5 of the Statute) and cruel treatment as a war crime (Article 3 of the Statute).

(ii) Murder as a Crime Against Humanity (Article 5(a) of the Statute) and Persecution as a Crime Against Humanity (Article 5(h) of the Statute)

643. The Prosecution argues that murder and persecution, as crimes against humanity, are not co-extensive but rather have different elements, and may thus be cumulatively charged applying the test set forth in the *Akayesu* case.[915] There may be acts of persecution apart from murder, and there may be murders which do not constitute acts of persecution. To support this latter contention, the Prosecution maintains that murder as a crime against humanity may be committed without a discriminatory intent, whereas persecution requires just such a discriminatory element. Thus the Prosecution disagrees with the holding in the *Tadić* Trial Chamber Judgement that *all* crimes against humanity must be committed with a discriminatory intent. This finding was itself overruled by the Appeals Chamber in the same case.[916] Accordingly the Prosecution argues that these two crimes can be cumulatively charged, under the first limb of the *Akayesu* test, *viz.* that they both have different elements.

644. Second, the Prosecution argues that different values are protected by these different provisions, and hence that the second, disjunctive limb of the *Akayesu* test is also satisfied.[917]

---

[915] Prosecutor's Brief, paras 13-34.
[916] *Tadić*, Appeals Chamber Judgement, 15 July 1999, at para. 305.
[917] Prosecutor's Brief, para. 15: "The prohibition of persecution and that of murder as crimes against humanity protect different societal interests since murder concerns the taking of individual life and although persecution may also involve the taking of individual life it must be that of members of a targeted group on the grounds of their political, racial and religious membership of the group".

5113

645. Third, with regard to the third, disjunctive limb – the "description" test – referred to in the *Akayesu* case, the Prosecution argues that "charging such unlawful conduct under these separate provisions serves to fully describe the magnitude of the offence ...",[918] and for this reason too there can be cumulative charging.

646. Since the *Kupreškić* test involves the same first two limbs as those in *Akayesu*, but construed as *conjunctive* rather than *disjunctive* requirements – and since the *Tadić* test does not lay down a test but merely permits cumulative charging – the Prosecution concludes that "[t]he guidelines for multiple charging established by the decisions in *Tadić* and *Akayesu* and *Kupreškić*, among others, thus are fully satisfied by the charging decision in this case".[919]

(iii) Murder as a Crime Against Humanity (Article 5(a) of the Statute) and Murder as a War Crime (Article 3 of the Statute, Incorporating the Prohibition on Murder Contained in Common Article 3)

647. The Prosecution addresses this same issue of cumulative charging in the context of murder as a crime against humanity (Article 5(a) of the Statute) and murder as a war crime (Article 3 of the Statute, incorporating Common Article 3's prohibition on murder). The Prosecution argues that murder as a crime against humanity has different elements from murder as a war crime:[920]

> The elements for the crime of murder as a crime against humanity and as a violation of the laws or customs of war are not identical. The *chapeaux* of the two crimes are very different. Crimes against humanity must 'be directed against any civilian population as part of a widespread or systematic practice or policy'. This prerequisite is not one required to establish a violation of the laws or customs of war.

648. Second, the Prosecution argues that crimes against humanity and war crimes protect different societal interests. The Prosecution cites the ICTR Trial Chamber in

---

[918] *Ibid.*, para. 4.
[919] *Ibid.*, para. 15.
[920] *Ibid.*, para. 35.

5114

Akayesu to support both of these views.[921] Accordingly, the Prosecution argues that it is permissible to charge murder as a crime against humanity and murder as a war crime in relation to the same set of facts.[922] The Prosecution also alludes to the negative test applied in *Akayesu*, according to which it is not justifiable to convict an accused of two offences in relation to the same set of facts where "one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault".

649. On this issue, the Prosecution states that "[g]iven that neither the ICTY nor the ICTR has established jurisprudence indicating that crimes can be charged as lesser included offences of other crimes, the Prosecutor thus charges lesser included offences separately".[923] It is not clear whether, by the phrase "lesser included offences", the Prosecutor is referring to, for example, murder (crimes against humanity) / murder (war crimes) or, instead, murder (war crimes) / inflicting serious bodily injury (war crimes). This issue will be dealt with below, when the concept of "lesser included offences" is explored.

(iv) Inhumane acts as a Crime Against Humanity (Article 5(i) of the Statute) and Cruel Treatment as a War Crime (Article 3 of the Statute)

650. Although the matter of cumulatively charging inhumane acts as a crime against humanity (Article 5(i) of the Statute) and cruel treatment as a war crime (Article 3 of the Statute) is not specifically addressed in the Prosecution brief, it may be assumed that the arguments in (ii) apply, *mutatis mutandis* to this scenario. Thus, to the extent that inhumane acts and cruel treatment have different elements and/or protect different interests, they may be cumulatively charged applying the *Akayesu* test (if either of these two conditions is met) and the *Kupreškić* test (if both of these conditions are met).[924]

---

[921] *Ibid.*, para. 38.
[922] *Ibid.*, Conclusion, para. 40.
[923] *Ibid.*, para. 12.
[924] This issue arises for consideration since the amended indictment in this case cumulatively charges inhumane acts and cruel treatment in Counts 10 and 11, Counts 14 and 15 and Counts 18 and 19.

5115

(b) Submissions of the Defence

651. The Defence disagrees with the submissions of the Prosecution. Pursuant to a request of the Trial Chamber that the Parties submit briefs on this issue,[925] Counsel for four of the accused have submitted briefs, which shall be considered in turn.

652. Counsel for Zoran Kupreškić and Mirjan Kupreškić submitted a joint Brief ("*Kupreškić Brief*").[926] In the *Kupreškić Brief*, the Defence endorses the test articulated by this Trial Chamber in this case in its Decision of 15 May 1998 imposing a two-fold conjunctive requirement for cumulation of offences. Conversely, the Defence disapproves of the test propounded in *Akayesu*, both because it renders the two requirements articulated by this Trial Chamber in this case *disjunctive* rather than *conjunctive* requirements by use of the word "or" rather than "and", and because it adds a third, *disjunctive* requirement ("where it is necessary to record a conviction for both offences in order fully to describe what the accused did"), which, the Defence argues, is contrary to the *non bis in idem* rule and the civil law principle of "imperfect concurrence". The Defence requests the Court to reject the *Tadić* test for the same reasons. According to the Defence, the Trial Chamber, in order to decide this issue, should apply the laws, doctrine and jurisprudence on "imperfect concurrence" of the former Yugoslavia, at least to the extent that resort to international law and general principles of criminal law does not furnish a complete answer.[927]

653. The Defence further argues that the *Tadić* jurisdiction decision precludes double charging of murder under Articles 3 and 5. In this regard, it quotes the Appeals Chamber when it stated that "Article 3 may be taken to cover all violations of international humanitarian law other than the 'grave breaches' of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the

[925] Oral Ruling of 15 Oct. 1998.
[926] Brief of Defendants Zoran Kupreškić and Mirjan Kupreškić on Legal Trial Issues, 19 Nov. 1999.
[927] Kupre{kic Brief, para. 74. The Defence cites Bassiouni as arguing that, since the Tribunal's Statute does not include a "general part", aside from Art. 7 of the Statute, the Tribunal should apply the law of the former Yugoslavia in order to act in accordance with the principle of legality.

5116

extent that Articles 3, 4 and 5 overlap)".[928] Thus Article 3 is a residual clause which applies only if the principal norm cannot apply. Therefore if murder is charged under Article 5(a) or (h), it cannot be charged under Article 3. [929]

654. Moreover, the Defence agrees with the *Tadić* Trial Chamber's holding that "acts that are found to be crimes against humanity under other heads of Article 5 will not be included in the consideration of persecution as a separate offence under Article 5(h)",[930] based on the conclusion – with which the Prosecution and the *Tadić* Appeals Chamber disagrees - that discriminatory intent is required for all crimes against humanity.

655. The Defence asserts that even if no discriminatory intent was required for Article 5(a) (murder), cumulative charging under Article 5(a) and (h) is nonetheless impermissible as murder with intent to discriminate is an *aggravated form of murder.*[931] This distinction between the basic form of an offence and an aggravated form is a paradigm of a "lesser included offence in common law [...] systems or 'imperfect concurrence' [...] by reason of specialty [...] in civil law systems".[932] According to the principle of speciality, where one crime, e.g. murder, is composed of some but not all elements of the other crime, e.g. discriminatory murder, and the former crime does not have any elements which are not included in the latter crime, then the latter crime is the only one to apply when all the elements are present.

656. The Defence submits that the Prosecution conceded that Articles 3 and 5(a) murder constitute lesser included offences to murder under Article 5(h), but asserted that neither the ICTY nor the ICTR has established jurisprudence indicating that crimes can be charged as lesser included offences of other crimes. The Defence asserts that the *Akayesu* Judgement established such jurisprudence.

---

[928] *Tadić,* Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, para. 87.
[929] Kupre{ki} Brief, para. 76.
[930] *Tadi}*, Trial Chamber Judgement, 7 May 1997, para. 702.
[931] Kupre{ki} Brief, para. 80.
[932] *Idem.*

5117

657. The Defence applies the same reasoning to deny the permissibility of cumulative charging under Article 3 and Article 5(a).

658. Counsel for Zoran and Mirjan Kupre{ki} also filed a Petition,[933] which similarly argues that "ideal concurrence" is impermissible in this case, evoking the principle of specialty.

659. Defence Counsel for Dragan Papić submitted a brief on this issue,[934] dated 10 November 1998 and filed on 13 November 1998, in which Counsel joins in the brief filed by Counsel for Zoran Kupreškić and Mirjan Kupreškić on behalf of all Defence Counsel, and adds various additional points.

660. Defence Counsel for Vladimir Šantić submitted a brief[935] in which the Defence uses the civil law concepts of real concurrence, ideal concurrence and apparent concurrence to argue that cumulative charging is not permissible under the present indictment.

661. "Real concurrence" occurs when the perpetrator commits several crimes, albeit in a single transaction, either by violating the same criminal provision against more than one person or by violating a number of distinct criminal provisions through disparate acts. The Defence does not give an example of real concurrence. Since this is a well-known concept in civil law countries and examples proliferate in the case-law, the Trial Chamber will mention, as an instance of the former sub-class, the commission of more than one murder by killing several people in a spray of gunfire; an example of the latter would be reckless driving and failure to assist a person injured as a result of the reckless driving, where there are disparate acts of driving recklessly and of not stopping after knowingly colliding with someone. The Defence states that cumulative charging is permissible only under real concurrence.

---

[933] Petition of the counsel of the Accused Zoran and Mirjan Kupre{ki}, 12 Nov. 1998.
[934] Pre-Defence Brief, 13 Nov. 1998.
[935] Defence's response on Prosecutor's brief on the permissibility of charging criminal violations under the Same Articles of the Statute based on conduct arising from a single incident, 13 Nov. 1998, para. 26.

5118

662. Neither "apparent concurrence" (*unechte Konkurrenz, concours apparent d'infractions*) nor "ideal concurrence" (*Idealkonkurrenz, concours idéal d'infractions*) are defined by the Defence. However, the notions are well-known in civil law countries, although there is no unanimity about their exact definition. It is usually held that "apparent concurrence" occurs when the perpetrator performs an act that may appear to simultaneously breach several criminal provisions, whilst in reality it only violates one.
662. In many legal systems "ideal concurrence" occurs when a person through one act breaches more than one criminal provision. For an instance drawn from German law: if a father uses violence to have sexual intercourse with his minor daughter, he has at one and the same time committed unlawful coercion, incest, sexual abuse of a person under his legal protection and, possibly, bodily harm. In French law, the production of a forged document may amount to both "*usage de faux*", namely making use of a forged document with intent to defraud, and attempted deceit ("*tentative d'escroquerie*").

663. In contrast to "real concurrence", the Defence states that cumulative charging is *not* permissible in the case of ideal concurrence or apparent concurrence. In its discussion, ideal concurrence and apparent concurrence are not distinguished; rather they are conflated. The Defence mentions three principles designed to deal with and solve problems of apparent/ideal concurrence: specialty, subsidiarity, consumption, and a possible fourth principle, alternativity.[936]

664. Under "specialty", one crime, e.g. murder, may be qualified by the addition of further elements, e.g. the intent to destroy a racial group in whole or in part, as a specialised crime, i.e. genocide. In this case, if the additional element is present, then the special crime, i.e. genocide, should be charged and not both the special crime and the general crime, i.e. murder, and the accused can only be convicted of one crime.

665. It is widely held that the "subsidiarity" principle applies when one crime is a preparatory form of a second crime, so that if the second crime is completed, only that second crime should be charged. For example, a person might detain another person in

[936] *Ibid.*, paras. 11-14.

order to kill him; murder should then be charged, not illegal detention and murder. In many legal systems "consumption" applies where one crime is "consumed" by another, a notion which parallels the common law idea of "lesser included offences", e.g. robbery consumes theft, rape consumes sexual assault, etc. The fourth notion, "alternativity", refers to the situation where one or more legal descriptions might apply to an act; then the "predominant" description should be chosen, e.g., in *Akayesu*, the crime of genocide rather than complicity in genocide.

666. In its brief the Defence also discusses the common law notion of double jeopardy which often leads to the same result as the civil law concepts just explained.[937]

667. The Defence concludes that:

(a) Bringing cumulative charges in the case of apparent concurrence is not permissible. It is possible [only] in the case of genuine concurrence. However, bringing alternative charges could be permissible, and the Prosecutor has already resorted to this solution several times.

(b) The crime of murder and the crime of persecution as crimes against humanity, especially in the Kupreškić case are typical cases of apparent concurrence, and in this case bringing cumulative charges, delivering a decision on two crimes and delivering two sentences is not possible. By the application of the criteria of subsidiarity and alternativity the accused (if found guilty at all) can be convicted for only one of these crimes.

(c) In the same way as (b), a violation of the laws or the customs of war should be assessed in relation to murder charged as a crime against humanity.

(d) Persecution and murder as crimes against humanity and murder as a violation of the laws or customs of war protect certain different, but also certain identical interests and values and entirely meet the criteria according to which they can be characterised

[937] *Ibid.*, paras. 18-22.

as apparent concurrence. This requires the exclusion of bringing cumulative charges, of delivering cumulative decisions and of delivering cumulative sanctions from the point of view of substantive criminal law. At the same time, from the point of view of criminal procedure, it requires application of the double jeopardy rule as well as of the rule *non bis in idem*.[938]

2. Discussion

(a) General

668. The Trial Chamber considers that this issue has a broad import and great relevance, all the more so because it has not been dealt with in depth by an international criminal court.[939] The Trial Chamber shall therefore consider it in its general dimension, so as to set out what it considers to be the correct legal standards on the basis of which the question must be decided *in casu*.

669. In delving into this new area of international criminal law, the Trial Chamber will rely on general principles of international criminal law and, if no such principle is found, on the principles common to the various legal systems of the world, in particular those shared by most civil law and common law criminal systems. In this search for and examination of the relevant legal standards, and the consequent enunciation of the principles applicable at the international level, the Trial Chamber might be deemed to set out a sort of *ius praetorium*. However, its powers in finding the law are of course far more limited than those belonging to the Roman *praetor*: under the International Tribunal's Statute, the Trial Chamber must apply *lex lata* i.e. existing law, although it has broad powers in determining such law.[940]

---

[938] *Ibid.*, para. 26.

[939] None of the *Tadi}, Prosecutor v. Kambanda, ((*ICTR 97-23-S*),* Judgement and Sentence, 4 Sept. 1998), *Delali} et al.* or *Furund`ija,* final Judgements treated of the issue in depth. The *Akayesu* Judgement contains a brief discussion on the subject of "Cumulative Charges" (Judgement, 2 Sept. 1998, paras 461-470); so does the Judgement in *Kayishema and Ruzindana*, 25 May 1999 at paras. 625-650.

[940] See the *Report of the Secretary-General*, at para. 34: "... the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise". See also Decision on

670. It is appropriate to emphasise at the outset that the question of cumulation of charges is material in two distinct but closely intertwined respects. First of all, it is relevant from the viewpoint of *substantive* international criminal law. On this score the questions that arise are: (i) whether and on what conditions the same act or transaction may infringe two or more rules of international criminal law and (ii) in case of a double conviction for a single action, how this should be reflected in sentencing. Secondly, the question of cumulation is relevant from the viewpoint of *procedural* international criminal law. In this respect the question presents itself as follows: (i) when and on what conditions can the Prosecutor opt for cumulative charges for the same act or transaction? (ii) when should she instead put forward alternative charges? (iii) with what powers is a Trial Chamber vested when faced with a charge that has been wrongly formulated by the Prosecutor? In the opinion of the Trial Chamber the correct solution to both problems can only be found by first resolving the issue from the viewpoint of substantive law.

671. The Trial Chamber shall therefore examine the general legal criteria by which it is possible to distinguish cases where the same act or transaction infringes two or more provisions of the Statute from those cases where although the same seemingly holds true, in reality only one provision is breached. The Trial Chamber shall then establish which criteria should be applied to determine sentence when a single act is an offence under two or more Articles of the Statute.

672. In the light of the conclusions reached as a result of this analysis, the Trial Chamber shall dwell on the procedural aspects of this issue.

(b) Issues of Substantive Criminal Law

(i) Principles on Multiple Offences in International Criminal Law

---

Application for Leave to Appeal by Hazim Delić (Defects in the form of the Indictment), *Delalić et al.*, 6 Dec. 1996, Bench of the Appeals Chamber: "the Tribunal's Statute does not create new offences but rather serves to give the Tribunal jurisdiction over offences which are already part of customary law" (para. 26); see also the final Judgement in *Delalić et al.*, Judgement, 16 Nov. 1998: "The Statute does not create

673. Under traditional international criminal law it was exceedingly difficult to apply general principles concerning multiple offences so as to identify cases where the same act or transaction breached various rules of international criminal law and cases where instead only one rule was violated.

674. Under Article 6 of the London Agreement of 8 August 1945 some acts could qualify both as war crimes and crimes against humanity: e.g., mass murder or deportation of foreign civilians in occupied countries. True, that provision made it clear that some actions could only be characterised as crimes against humanity: for example, persecution on religious or political grounds of enemy civilians or persecution, on those same grounds, of civilians having the same nationality as the persecutor. By the same token, other actions could only qualify as war crimes: for example, wanton destruction of enemy property not justified by military necessity, pillage, use of prohibited weapons or execution of hostages. Nevertheless, as stated above, there was an area where the two categories overlapped. In addition, those instruments which provided for the various penalties consequent upon the various crimes did not distinguish between war crimes and crimes against humanity: they envisaged the same penalties (death sentence, imprisonment etc.) for both categories in the same terms. This holds true, for example, for Control Council Law No.10.[941]

675. It is therefore not surprising that the International Military Tribunal at Nuremberg (IMT) convicted many defendants both of war crimes and crimes against humanity for

---

substantive law, but provides a forum and framework for the enforcement of existing international humanitarian law" (para. 417, and discussion at paras. 414-417).

[941] Art. II paragraph 3 of which provides that:
"Any person found guilty of any of the crimes above mentioned may upon conviction be punished as shall be determined by the tribunal to be just. Such punishment may consist of one or more of the following:
a) Death.
b) Imprisonment for life or for a term of years, with or without hard labour.
c) Fine, and imprisonment with or without hard labour, in lieu thereof.
d) Forfeiture of property.
e) Restitution of property wrongfully acquired.
f) Deprivation of some or all civil rights".

the same act.[942] Similarly, the various military courts sitting at Nuremberg after World War II found many defendants guilty of both categories of crimes and sentenced them for both.

676. This pattern can be explained by three factors. First, at that time the class of "crimes against humanity" had just emerged and there were concerns about whether by convicting defendants of such crimes the courts would be applying *ex post facto* law. Secondly, and as a consequence, the relevant criminal provisions at the time did not draw a clear-cut distinction between the two classes of crimes. Thirdly, the general concepts of international criminal law were still in a state of flux.

677. The Trial Chamber holds the view that a satisfactory legal solution to the questions at issue can now be reached. The legal notion of "crimes against humanity" is now firmly embedded in positive international law, its legal contours are neatly drawn and it no longer gives rise to doubts as to its legitimacy; in particular, its application does not raise the issue of retroactive criminal law. General principles of international criminal law, whenever they may be distilled by dint of construction, generalisation or logical inference, may also be relied upon. In addition, it is now clear that to fill possible gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world. Where necessary, the Trial Chamber shall use such principles to fill any *lacunae* in the Statute of the International Tribunal and in customary law. However, it will always be necessary to bear in mind the dangers of wholesale incorporation of principles of national law into the unique system of international criminal law as applied by the International Tribunal.

678. It is possible to set out the following notions and principles.

---

[942] However, two defendants (Streicher and von Schirach) were only found guilty of crimes against humanity (IMT Judgement, pp. 304, 320), while another two defendants, Raeder and Doenitz, the two highest commanders of the naval forces, were convicted only of war crimes (IMT Judgement, pp. 317, 315) (Raeder was also convicted of crimes against peace and conspiracy to commit crimes against peace).

(a) Generally speaking, two different legal situations may arise. First of all, it is possible for various elements of a general criminal transaction to infringe different provisions. For instance, the Inter-American Court of Human Rights has repeatedly held that the "forced disappearance of human beings is a multiple and continuous violation of many rights under the [American] Convention [on Human Rights] that the States Parties are obligated to respect and guarantee".[943] The Court rightly noted that the kidnapping of a person is contrary to Article 7 of the Convention, prolonged isolation and deprivation of communication is contrary to Article 5, while secret execution without trial followed by the concealment of the body is contrary to Article 4.[944] In another case dealing with the illegal detention and subsequent killing of two persons by Colombian armed forces, the Court held that the respondent State had breached Article 7, laying down the right to personal liberty, and Article 4, providing for the right to life.[945]

(b) Similarly, when applying Article 3 of the European Convention on Human Rights referred to below, the European Commission and Court have not ruled out the possibility of a differentiated characterisation of various actions. Thus in the *Greek* case the European Commission held that some actions of the respondent State constituted torture, while other actions amounted to inhuman treatment.[946]

(c) Clearly, in these instances there exist distinct offences; that is, an accumulation of separate acts, each violative of a different provision. In civil law systems this situation is referred to as *concours réel d'infractions*, *Realkonkurrenz*, *concorso reale di reati*,

---

[943] *See* the Court's judgement in the *Velásquez Rodrìguez* Case (I/A Court H. R., Judgment of July 29 1988, Series C No. 4, para. 155).

[944] *See ibid.*, paras. 155-157 and 186 *et seq.*, as well as the *Godìnez Cruz* Case (I/A Court H. R., Judgment of Jan. 20, 1989, Series C No. 5, paras. 163-166) and *Fairen Garbi and Solis Corrales* Case (I/A Court H. R., Judgment of 15 May, 1989, Series C No. 6, paras. 147-150).

[945] *See Caballero Delgado and Santana* Case (I/A Court H. R., Judgment of Dec. 8, 1995, Series C No. 22, para. 72).

[946] See European Commission of Human Rights, Final Decision of the Commission as to the Admissibility of the Application, 16 July 1970, Denmark, Norway and Sweden v. Greece (the *Greek* case), Application No. 4448/70, annexed to the Report of the Commission (adopted 4 Oct. 1976) in the same case, at pp. 19-20.

5125

etc. These offences may be grouped together into one general transaction on the condition that it is clear that the transaction consists of a cluster of offences.

679. The situation is different with regard to the case of one and the same act or transaction simultaneously breaching two or more provisions. The European Court has repeatedly held that "one and the same fact may fall foul of more than one provision of the Convention and Protocols".[947] It is appropriate, however, to distinguish between two categories of such acts or transactions.

(a) First, there may be an act or transaction that breaches one provision in some respects and another provision in other respects. Consider for example the shelling of a religious group of enemy civilians by means of prohibited weapons (e.g. chemical weapons) in an international armed conflict, with the intent to destroy in whole or in part the group to which those civilians belong. This single act contains an element particular to Article 4 of the Statute (on genocide) to the extent that it intends to destroy a religious group, while the element particular to Article 3 (on war crimes) lies in the use of unlawful weapons.

(b) Second, there may be acts or transactions that are fully covered by both provisions. Consider for example the systematic rape, by combatants, of enemy civilians in an occupied territory. This conduct is envisaged by, and runs contrary to, for example, both Article 3 (on war crimes) and Article 5(g) (on crimes against humanity). This also applies to the case of lesser included offences, e.g. torture and cruel treatment (cruel treatment being the lesser included offence), both envisaged as offences under Article 3 common to the Geneva Conventions, taken in conjunction with Article 3 of the Statute.

680. Certain criteria for deciding whether there has been a violation of one or more provisions consistently emerge from national legislation and the case-law of national

[947] See Eur. Court H.R., case of *Erkner and Hofauer,* decision of 23 April 1987, Series A, no. 117, para. 76; Eur. Court H.R., *Poiss,* judgement of 23 April 1987, Series A, no. 117, para. 66; Eur. Court H.R, *Venditelli v. Italy*, judgement of 18 July 1994, Series A, no. 293-A, para. 34.

5126

courts and international human rights bodies. In other words, it is possible to deduce from a survey of national law and jurisprudence some principles of criminal law common to the major legal systems of the world. These principles have to some extent been restated by a number of international courts. One test has been enunciated and spelled out by certain national courts, such as those in the United States. The Supreme Court of Massachusetts in *Morey* v *The Commonwealth* (1871) for instance held that:[948]

> A single act may be an offence against two statutes: and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.

681. This has been followed in subsequent United States jurisprudence, notably the case of *Blockburger* v *United States of America* (1932) which approved the above criteria, since known as the "*Blockburger* test":[949]

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of an additional fact which the other does not.

682. The test then lies in determining whether each offence contains an element not required by the other. If so, where the criminal act in question fulfils the extra requirements of each offence, the same act will constitute an offence under each provision.

683. If the *Blockburger* test is not met, then it follows that one of the offences falls entirely within the ambit of the other offence (since it does not possess any element which the other lacks). Then the relationship between the two provisions can be described as that between concentric circles, in that one has a broader scope and completely encompasses the other. In these cases the choice between the two provisions is dictated by the maxim *in toto iure generi per speciem derogatur* (or *lex specialis*

---

[948] *Morey v. The Commonwealth*, (1871) 108 Mass. 433 and 434. See Prosecutor's Brief, pp. 23-24.
[949] *Blockburger v US* (1932) 284 U.S. 299, 304, 52 S.Ct. 180, and see the cases referred to in the Prosecutor's Brief, pp. 23-24.

5127

derogat generali), whereby the more specific or less sweeping provision should be chosen. This maxim reflects a principle laid down both in general international law and in many national criminal systems (see e.g. Article 55 paragraph 2 of the Dutch Criminal Code[950] and Article 15 of the Italian Criminal Code).[951]

684. The rationale behind the principle of speciality is that if an action is legally regulated both by a general provision and by a specific one, the latter prevails as most appropriate, being more specifically directed towards that action. Particularly in case of discrepancy between the two provisions, it would be logical to assume that the law-making body intended to give pride of place to the provision governing the action more directly and in greater detail.

685. When each of the two provisions requires proof of a fact which the other one does not require, civil law courts tend to speak of "reciprocal speciality" and find that both provisions apply. In sum, the reciprocal speciality doctrine leads to the same result as the *Blockburger* test.

686. In other cases, although the provisions cannot be said to be in a *lex specialis - lex generalis* relationship, it would nonetheless appear unsound to apply both provisions. This was illustrated by Judge Nieto-Navia, then President of the Inter-American Court of Human Rights, in his dissenting opinion in the *Caballero Delgado and Santana* case:[952]

> In criminal law if a person is killed by a dagger it is obvious that he was also the victim of wounding. However, the crime that was committed is murder, and no judge will interpret the norms in such a way that the dead person was the victim of "murder and wounding".

---

[950] "Where an act is punishable under one general penal provision and a special penal provision applies, only the special penal provision shall be applicable".
[951] "When a matter is governed by more than one penal law or more than one provision of the same penal law, the specific law or provision of law shall prevail over the general law or provision of law, except as otherwise prescribed".
[952] Inter-American Court of Human Rights, *Caballero Delgado and Santana* case, Judgment of 8 Dec. 1955, p. 99.

687. This notion corresponds to the common law doctrine of the "lesser included offence".[953]

688. In civil law jurisdictions, a double conviction is ruled out in such cases by the so-called principle of consumption.[954] Its *ratio* is that when all the legal requirements for a lesser offence are met in the commission of a more serious one, a conviction on the more serious count fully encompasses the criminality of the conduct.

689. In international law, albeit not in a criminal context, a similar principle may be found in the case-law of the European Commission and Court of Human Rights concerning the application of Article 3 of the European Convention on Human Rights. Article 3 of the Convention prohibits various actions, which may be grouped together into the following three classes: (i) torture, (ii) inhuman treatment or punishment, and (iii) degrading treatment or punishment.

690. Interestingly, the European Commission and Court have never applied the three provisions cumulatively. In substance, it may be inferred from their decisions that torture is any inhuman and degrading treatment which is deliberately inflicted for one of a number of specified purposes, e.g. to obtain information, and which causes extreme suffering; inhuman treatment or punishment is any action causing severe suffering and lacking in any justification; degrading treatment or punishment is any action which grossly humiliates an individual before himself or others, or drives him to act against his conscience or will. It follows that torture always constitutes inhuman and degrading treatment as well. By contrast, inhuman treatment or punishment may not amount to torture or to degrading treatment or punishment. Similarly, degrading treatment or

---

[953] See Archbold, *Criminal Pleading, Evidence and Practice* (1997), paras. 4-453 – 4-464 at 4-453): "At common law conviction of a lesser offence than that charged was permissible provided that the definition of the greater offence necessarily included the definition of the lesser offence [...]".

[954] See e.g. its application by the Austrian Supreme Court: Decision of the Oberster Gerichtshof of 3.4.1962, reported in the *Evidenzblatt* of the *Österreichische Juristenzeitung ("EvBl")* 1962/427, p. 527, Decision of the Oberster Gerichtshof of 7.10.1969, reported in *Ev.Bl.* 1970/143, Decision of the Oberster Gerichtshof of 16.2.1977, reported in the *Ev.Bl.* 1977/165, p. 360 and LSK 1983/162, in *EvBl* 1984/57, p. 220. See also the judgement delivered by the German Bundesgerichtshof on (26 June 1957) in *Entscheidungen des Bundesgerichtshofs in Strafsachen*, vol. 10, p. 313 ff.

punishment may result from an action which does not constitute torture or inhuman treatment or punishment.

691. The *Aksoy* case illustrates how Article 3 has been applied by the two international bodies. In this case, the European Court, after finding that the facts complained of amounted to torture, held that "[i]n view of the gravity of this conclusion, it [was] not necessary for the Court to examine the applicant's complaints of other forms of ill-treatment".[955]

692. In sum, the European Commission and Court have held that the more serious breach (torture) prevails over the other two less serious ones (inhuman treatment or degrading treatment). The two bodies have refrained from a multiple characterisation of the same action falling foul of Article 3: whenever an action proved to be contrary to both the proscription of inhuman treatment (or of degrading treatment) and to that of torture, the Commission and Court opted for the more serious breach. Presumably, the rationale behind this approach is twofold: (1) the European Commission and Court have applied a principle analogous to that of consumption; and (2) they have considered that the various norms of Article 3 all pursue the same goal and safeguard the same basic values.

[955] Eur. Court HR, *Aksoy v. Turkey* judgment of 18 Dec. 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2279. The Bundesgerichtshof held in a decision of 30 April 1999 on the appeal of *Jorgić, (*BGH, Urt. V. 30 April 1999 – 3 STR 251/98, OCG, Düsseldorf*)* that the offence of genocide did not in the first place protect the life and health of the individual, but the integrity and living conditions of the racial, ethnic, religious or national group subjected to such attacks (NStZ 1999, p. 396 and 401). Thus the Federal Court concluded that the offence of genocide may be committed over a longer period of time and the individual acts of murder etc. occurring therein are not of and by themselves counts of genocide, but rather of murder, committed in *Tateinheit* with genocide (*ibid.*, at p. 397). The Court of First Instance had convicted *Jorgić* of 11 counts of genocide. The conviction was therefore modified by the Federal Court to only one count, but the sentence remained unchanged and the appeal was finally dismissed (*ibid.*, at p. 399).

693. The latter rationale leads us to a further test, which consists in ascertaining whether the various provisions at stake protect different values. Again, traces of this can be found in both the common law and civil law systems.[956]

694. Under this test, if an act or transaction is simultaneously in breach of two criminal provisions protecting different values, it may be held that that act or transaction infringes *both* criminal provisions. Take the example of resort to prohibited weapons with genocidal intent. This would be contrary to both Article 3 and Article 4 of the Statute. Article 3 intends to impose upon belligerents the obligation to behave in a fair manner in the choice of arms and targets, thereby (i) sparing the enemy combatants unnecessary suffering and (ii) protecting the population from the use of inhumane weapons. By contrast, Article 4 primarily intends to protect groups from extermination. A breach of both provisions with a single act would then entail a double conviction.

695. However, the Trial Chamber's review of national case law indicates that the test is hardly ever used other than in conjunction with, and in support of, the other tests mentioned above (*Blockburger* and reciprocal speciality, as well as the principles of speciality and consumption).[957] This test is therefore unlikely to alter the conclusions reached through the application of these principles.

---

[956] This test, advanced by the Prosecution in its *Brief*, is one applied in the dissenting judgement of Ritchie, J in the Canadian case of *Kienapple v The Queen* [1975] 1 S C R. 729, at 731, in which Kienapple appealed against his conviction both for rape and for unlawful carnal knowledge of a female under fourteen years of age. This judgement, contained the following passage:

> "The purpose and effect of s.146(1) is in my view to protect female children under the age of fourteen years from sexual advances leading to intercourse by male persons over that age ... and I cannot subscribe to a result which relieves an assailant from the consequences of violating a child on the ground that his act also constitutes the crime of rape" (*ibid.*, at p. 734).

See also the decision of the French Cour de Cassation of 3 March 1960 in the *Goulam and Ben Haddadi* case (Crim., 3 mars 1960, *Bull. crim., no. 138*):

> "Attendu que si la loi punit de la peine de mort la destruction par l'effet d'un explosif d'un édifice habité ou servant à l'habitation, parce que ce fait met en péril des vies humaines, ce crime n'en est pas moins essentiellement établi en vue d'assurer la protection des propriétés".

[957] See the dissenting judgement of Ritchie, J in the Canadian case of *Kienapple v The Queen* [1975] 1 S C R 729 at p. 731.

See also the decision of the French Cour de Cassation of 3 March 1960 in the *Goulam and Ben Haddadi ibid.*, and the following Austrian Supreme Court cases: LSK 1983/162, in *EvBl* 1984/57, p. 221 (different values protected in conjunction with reciprocal specialty) and Decision of the *Oberster*

5131

(ii) Relationship Between the Various Offences Charged in the Indictment

696. Having set out the general principles of criminal law governing multiple offences in international law, the Trial Chamber will now apply these principles to the relations between the various substantive provisions of the Statute relied upon by the parties in the instant case.

697. Unlike provisions of national criminal codes or, in common-law countries, rules of criminal law crystallised in the relevant case-law or found in statutory enactments, each Article of the Statute does not confine itself to indicating a single category of well-defined acts such as murder, voluntary or involuntary manslaughter, theft, etc. Instead the Articles embrace broad clusters of offences sharing certain *general* legal ingredients. It follows that, for instance, a crime against humanity may consist of such diverse acts as the systematic extermination of civilians with poison gas or the widespread persecution of a group on racial grounds. Similarly, a war crime may for instance consist in the summary execution of a prisoner of war or the carpet bombing of a town.

698. In addition, under the Statute of the International Tribunal, some provisions have such a broad scope that they may overlap. True, some acts may only be characterised as war crimes (Article 3), e.g., the use of prohibited weapons against enemy combatants, attacking undefended towns, etc. Other acts or transactions may only be defined as crimes against humanity (Article 5): e.g., persecution of civilians, whatever their nationality, on racial, religious or political grounds. However, other acts, depending upon certain circumstances, may either be characterised as war crimes or both as war crimes and crimes against humanity. For instance, murder, torture or rape of enemy civilians normally constitute war crimes; however, if these acts are part of a widespread

---

Gerichtshof of 3 April 1962, in *EvBl* 1962/427, p. 527 (different values protected in conjunction with no consumption of the lesser offence).
The only cases in which a multiple conviction was entered for a single action by virtue of the "different protected values test", although under the speciality test a single conviction would have been appropriate, the Trial Chamber is aware of, were decided by the Italian *Corte di Cassazione* (Decision of 6 Oct. 1964, reported *in summary* in *Giustizia penale,* 1965, II, p. 205 and decision of 21 Jan. 1982, reported in

or systematic practice, they may also be defined as crimes against humanity. Plainly, Articles 3 and 5 have a different scope, which, however, may sometimes coincide or overlap.

699. In order to apply the principles on cumulation of offences set out above specific offences rather than diverse sets of crimes must be considered. The Trial Chamber will therefore analyse the relationship between the single offences with which the accused are charged, such as murder as a war crime, murder as a crime against humanity, etc.

a. Relationship Between "Murder" under Article 3 (War Crimes) and "Murder" under Article 5(a) (Crimes Against Humanity)

700. Following the principles set out above, the relevant question here is whether murder as a war crime requires proof of facts which murder as a crime against humanity does not require, and *vice versa* (the *Blockburger* test). Another relevant question is whether the prohibition of murder as a war crime protects different values from those safeguarded by the prohibition of murder as a crime against humanity.

701. With regard to the former question, while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated. As a result, the *Blockburger* test is not fulfilled, or in other words the two offences are not in a relationship of reciprocal speciality. The prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime.[958]

Cassazione penale, 1983, p. 621). However, as the *Corte di Cassazione* admitted in the decision of 21 Jan. 1982, its own jurisprudence on the issue is far from homogeneous (*ibid.*, p. 623).

[958] This result is borne out by the Appeals Chamber in its Decision on Jurisdiction:

"Article 3 thus confers on the International Tribunal jurisdiction over [any] serious offence against international humanitarian law not covered by Article 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Art. 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the

702. In addressing the latter question, it can generally be said that the substantive provisions of the Statute pursue the same general objective (deterring serious breaches of humanitarian law and, if these breaches are committed, punishing those responsible for them). In addition, they protect the same general values in that they are designed to ensure respect for human dignity. Admittedly, within this common general framework, Articles 3 and 5 may pursue some specific aims and protect certain specific values. Thus, for instance, the prohibition of war crimes aims at ensuring a minimum of humanitarian concern between belligerents as well as maintaining a distinction between combatants' behaviour toward enemy combatants and persons not participating in hostilities. The prohibition of crimes against humanity, on the other hand, is more focused on discouraging attacks on the civilian population and the persecution of identifiable groups of civilians.

703. However, as under Article 5 of the Statute crimes against humanity fall within the Tribunal's jurisdiction only when committed in armed conflict, the difference between the values protected by Article 3 and Article 5 would seem to be inconsequential.

704. As explained above, the validity of the criterion based on the difference in values protected is disputable if it is not also supported by reciprocal speciality between the two offences. It follows that, given also the marginal difference in values protected, the Trial Chamber may convict the Accused of violating the prohibition of murder as a crime against humanity only if it finds that the requirements of murder under both Article 3 and under Article 5 are proved.

b. Relationship Between "Persecution" under Article 5(h) (Crimes Against Humanity) and "Murder" under Article 5(a) (Crimes Against Humanity)

705. On the grounds set out above, the Trial Chamber agrees with the Prosecutor that "persecution" may comprise not only murder carried out with a discriminatory intent but

---

International Tribunal (emphasis added)". See *Tadić,* Appeals Chamber Decision on Jurisdiction, 2 Oct. 1995, para. 91.

also crimes other than murder. Count 1 of the indictment, which charges persecution, refers not only to killing, but also to "the comprehensive destruction of Bosnian Muslim homes and property" (para. 21(b)) and "the organised detention and expulsion of the Bosnian Muslims from Ahmići-Šantići and its environs" (para. 21(c)); in short, what in non-legal terms is commonly referred to as "ethnic cleansing". There are clearly additional elements here beyond murder.

706. As for the relations between murder as a crime against humanity and persecution as a crime against humanity, it should be noted that persecution requires a discriminatory element which murder, albeit as a crime against humanity, does not. The Trial Chamber is of the view therefore that there is reciprocal speciality between these crimes; indeed, both may have unique elements. An accused may be guilty of persecution for destroying the homes of persons belonging to another ethnic group and expelling the occupants, without however being found guilty of any acts of killing. The destruction of homes and the expulsion of persons, if carried out with a discriminatory intent, may in and of themselves be sufficient to constitute persecution. Equally, an accused may commit a non-discriminatory murder as part of a widespread attack on a civilian population which, because it is non-discriminatory, fails to satisfy the definition of persecution. These, then, are two separate offences, which may be equally charged.

707. If an accused is found guilty of persecution, *inter alia* because of the commission of murders, it seems that he should be found guilty of persecution only, and not of murder *and* persecution, because in that case the *Blockburger* test is not met: murder is in that case already encompassed within persecution as a form of aggravated murder, and it does not possess any elements which the persecutory murders do not. Hence, in that case, murder may be seen as either falling under *lex generalis* or as a lesser included offence, and a conviction should not ensue when there is already a conviction under *lex specialis* or for the more serious offence, i.e. persecutory murder.

708. Things however are different when a person is charged both with murder as a crime against humanity and with persecution (including murder) as a crime against humanity. In this case the same acts of murder may be material to both crimes. This is

so if it is proved that (i) murder as a form of persecution meets both the requirement of discriminatory intent and that of the widespread or systematic practice of persecution, and (ii) murder as a crime against humanity fulfils the requirement for the wilful taking of life of innocent civilians and that of a widespread or systematic practice of murder of civilians. If these requirements are met, we are clearly faced with a case of reciprocal speciality or in other words the requirements of the *Blockburger* test are fulfilled. Consequently, murder will constitute an offence under both provisions of the Statute (Article 5(h) and (a)).

709. Let us now consider whether the prohibition of persecution as a crime against humanity protects different values from those safeguarded by the prohibition of murder as a crime against humanity. It is clear that the criminalisation of murder and persecution may serve different values. The prohibition of murder aims at protecting innocent civilians from being obliterated on a large scale. More generally, it intends to safeguard human life in times of armed conflicts. On the other hand, the ban on persecution intends to safeguard civilians from severe forms of discrimination. This ban is designed to reaffirm and impose respect for the principle of equality between groups and human beings.

710. This test then bears out and corroborates the result achieved by using the other test. Under the conditions described above, the test based on protection of values leads to the conclusion that the same act or transaction (murder) may infringe two different provisions of Article 5 of the Statute.

c. Relationship Between "Inhumane Acts" under Article 5(i) (Crimes Against Humanity) and "Cruel Treatment" under Article 3 (War Crimes)

711. These two crimes are clearly presented as alternatives in the Indictment and should be considered as such. Except for the element of widespread or systematic practice required for crimes against humanity, each of them does not require proof of elements not required by the other. In other words, it is clear that every time an inhumane act under Article 5(i) is committed, *ipso facto* cruel treatment under Article 3 is

inflicted. The reverse is however not true: cruel treatment under Article 3 may not be covered by Article 5(i) if the element of widespread or systematic practice is missing. Thus if the evidence proves the commission of the facts in question, a conviction should only be recorded for one of these two offences: inhumane acts, if the background conditions for crimes against humanity are satisfied, and if they are not, cruel treatment as a war crime. Given this, it is not strictly necessary to consider the "different values test", since the *Blockburger* test is ultimately dispositive of the issue.

d. Relationship Between the Charges for Inhumane Acts (or Cruel Treatment) and the Charges for Murder

712. A brief word here should be said about the relationship between charges for inhumane acts/cruel treatment and murder. In Counts 2-9, for example, the accused are charged with the murder of the Ahmić family, and in Counts 10-11 for inhumane acts/cruel treatment of Witness KL by murdering his family before his eyes. These are clearly separate offences. Not only are the elements different, but the victims are even different. Witness KL's family are the victims of the murder counts, while Witness KL himself is the victim of the inhumane acts/cruel treatment counts.

(iii) The Sentence to be Imposed in the Event of More Than One Conviction for A Single Action

713. The question remains as to how a double conviction for a single action shall be reflected in sentencing. Both parties seem to agree that a defendant should not suffer two distinct penalties, to be served consecutively, for the same act or transaction. However, the Trial Chamber is under a duty to apply the provisions of the Statute and customary international law. Article 24(1) of the Statute provides that:

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

714. Pursuant to Article 48 of the former SFRY Criminal Code, which is still applied in the successor States of the SFRY, if the accused has committed several criminal

offences by one action, the court shall first assess the punishment for each criminal offence and then proceed with the determination of the principal punishment. In the case of imprisonment, the court shall impose one punishment consisting of an aggravation of the most severe punishment assessed, but the aggravated punishment may not be as high as the total of all incurred punishments.[959]

715. The 1997 Criminal Code of the Republic of Croatia contains similar rules on sentencing in the case of multiple offences committed by one action.[960] Outside the former Yugoslavia, the Italian Criminal Code includes a similar rule.[961]

716. As was held by the Trial Chamber in the *Tadić* case, "[t]he practice of courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person".[962] In numerous legal systems, the penalty imposed in case of multiple conviction for offences committed by one action is limited to the punishment provided for the most serious offence. An instance of this approach is represented by Article 52(2) of the German Penal Code.[963]

---

[959] The text of Art. 48 reads as follows:
(1) If, by one or more acts, the perpetrator has committed more than one criminal offence for which he is being tried simultaneously, the court shall first determine the sentences for each offence and then impose a single sentence for all the offences.
(2). The single sentence shall be imposed according to the following rules:
i) if the death penalty was determined for one of the concurrent criminal offences, only that sentence shall be imposed;
ii) if a sentence of twenty years imprisonment was determined for one of the concurrent criminal offences, only that sentence shall be imposed;
iii) if sentences of imprisonment are determined for concurrent criminal offences, the single sentence shall be greater than each individual sentence determined, but it shall not be greater than the sum of the sentences determined, nor shall it be greater than a term of imprisonment of fifteen years;
iv) if sentences of up to three years imprisonment were determined for all concurrent criminal offences, the single sentence may not exceed eight years of imprisonment.

[960] See Art. 60 of the Croatian Penal Code of 1997.

[961] Art. 81 of the *Codice Penale* reads:
"(1) Anyone who, by a single act or omission, violates different provisions of law or commits more than one violation of the same provision of law, shall be punished with the punishment which would be imposed for the most serious violation, increased *up to no more than three times that sentence.* [...]

[962] *Tadi}*, Sentencing Judgement, 14 July 1997, at para. 9.

[963] Art. 52 reads:

717. Faced with this discrepancy in municipal legal systems, the Trial Chamber considers that a fair solution can be derived both from the object and purpose of the provisions of the Statute as well as the general concepts underlying the Statute, and from "the general principles of justice applied by jurists and practised by military courts" referred to by the International Military Tribunal at Nuremberg.[964]

718. The following proposition commends itself as sound. If under the principles set out above a Trial Chamber finds that by a single act or omission the accused has perpetrated two offences under two distinct provisions of the Statute, and that the offences contain elements uniquely required by each provision, the Trial Chamber shall find the accused guilty on two separate counts. In that case the sentences consequent upon the convictions for the same act shall be served concurrently, but the Trial Chamber may aggravate the sentence for the more serious offence if it considers that the less serious offence committed by the same conduct significantly adds to the heinous nature of the prevailing offence, for instance because the less serious offence is characterised by distinct, highly reprehensible elements of its own (e.g. the use of poisonous weapons in conjunction with the more serious crime of genocide).

719. On the other hand, if a Trial Chamber finds under the principles set out above that by a single act or omission the accused has not perpetrated two offences under two distinct provisions of the Statute but only one offence, then the Trial Chamber will have to decide on the appropriate conviction for that offence only. For example, if the more specialised offence, e.g. genocide in the form of murder, is made out on the evidence beyond a reasonable doubt, then a conviction should be recorded for that offence and not for the offence of murder as a war crime. In that case only one conviction will be recorded and only one sentence will be imposed.

---

(1) If the same act violates several criminal statutes or violates the same statute more than once, only one punishment may be imposed.
(2) If several criminal statutes have been violated, the punishment shall be determined by the statute which provides the most severe kind of punishment. It may not be any less severe than the other applicable statutes permit.

[964] See Trial of the Major War Criminals Before the International Military Tribunal, 1947, Vol. I, p. 221.

5139

(c) Issues of Procedural Criminal Law

(i) The Power of the Prosecutor to Opt for Cumulative or Alternative Charges

720. In the light of the foregoing discussion, the Trial Chamber shall answer the query raised above regarding when the Prosecutor may present cumulative charges for the same act or transaction.

721. The approach currently adopted by the Prosecution creates an onerous situation for the Defence, on the grounds that the same facts are often cumulatively classified under different headings, very often -- as in the case at issue -- under two different heads (war crimes, and crimes against humanity), and in other cases before the Tribunal under three (or even possibly four) different heads. Admittedly, the Defence is made cognisant of the various classifications of the facts propounded by the Prosecution and is thus enabled to make its case. The fact remains, however, that the charges are made cumulatively and therefore placed on the same footing, even though the facts which allegedly infringe various provisions of the Statute may, legally speaking, violate only one provision.

722. Neither the Statute nor the Rules establish how the charges must be brought by the Prosecutor. Generally speaking, if under the principles set out above, the facts allegedly committed by the accused are in breach of only one provision of the Statute, the Prosecutor should present only one charge. If, in the Prosecutor's view, the alleged facts simultaneously infringe more than one provision of the Statute, the Prosecutor should present cumulative charges under each relevant provision.

723. In practice, however, the Prosecutor may legitimately fear that, if she fails to prove the required legal and factual elements necessary to substantiate a charge, the count may be dismissed even if in the course of the trial it has turned out that other elements were present supporting a different and perhaps even a lesser charge. As we shall see, at least for the time being it is questionable that the *iura novit curia* principle (whereby it is for a court of law to determine what relevant legal provisions are applicable and how

facts should be legally classified) fully applies in international criminal proceedings. If this is so, the eventuality just described might indeed result in a dismissal of the charge.

724. The Trial Chamber holds that the issue must be settled in the light of two basic but seemingly conflicting requirements. There is first the requirement that the rights of the accused be fully safeguarded. The other requirement is that the Prosecutor be granted all the powers consistent with the Statute to enable her to fulfil her mission efficiently and in the interests of justice.

725. The former requirement demands among other things that the accused be "informed promptly and in detail [...] of the nature and cause of the charge against him" (Article 21 (4) (a) of the Statute). It follows that the accused is entitled to know the specifics of the charges against him, namely the facts of which he is accused and the legal classification of these facts. In particular, as far as this legal element is concerned, he must be put in a position to know the legal ingredients of the offence charged.

726. It follows from the latter requirement (that relating to the functions of the Prosecutor), that legal technicalities concerning classification of international offences should not be allowed to thwart the mission of the Prosecutor, which is to prosecute persons responsible for serious violations of international humanitarian law. The efficient fulfilment of the Prosecution's mission favours a system that is not hidebound by formal requirements of pleading in the indictment.

727. These requirements may be harmonised in the following manner.

The Prosecution:

(a) may make cumulative charges whenever it contends that the facts charged violate simultaneously two or more provisions of the Statute in accordance with the criteria discussed above;

(b) should charge in the alternative rather than cumulatively whenever an offence appears to be in breach of more than one provision, depending on the elements of the

crime the Prosecution is able to prove. For instance, the Prosecution may characterise the same act as a crime against humanity and, in the alternative, as a war crime. Indeed, in case of doubt it is appropriate from a prosecutorial viewpoint to suggest that a certain act falls under a stricter and more serious provision of the Statute, adding however that if proof to this effect is not convincing, the act falls under a less serious provision. It may also prove appropriate to charge the indictee with a crime envisaged in a provision that is – at least in some respects - special *vis-à-vis* another (e.g. Article 4 of the Statute) and, in the alternative, with a violation of a broader provision (e.g. Article 2 or 3 of the Statute), so that if the evidence turns out to be insufficient with regard to the special provision (the *lex specialis*), it may still be found compelling with respect to a violation of the broader provision (the *lex generalis*). However the Prosecution should make clear that these are alternative formulations by use of the word "or" between the crimes against humanity and war crimes charges, for example, and refrain in these circumstances from using the word "and", to make clear the disjunctive and alternative nature of the charges being brought.

(c) should refrain as much as possible from making charges based on the same facts but under excessive multiple heads, whenever it would not seem warranted to contend, in line with the principles set out above in the section on the applicable law, that the same facts are simultaneously in breach of various provisions of the Statute.

(ii) The Obligations of the Prosecutor When She Decides to Change the Legal Classification of Facts in the Course of Trial and the Power of a Trial Chamber When it Disagrees with the Prosecutor's Legal Classification of the Facts.

728. Neither the Statute nor the Rules establish how Trial Chambers should act in the case of an erroneous legal classification of facts by the Prosecutor. In particular, no guidance is offered on how a Trial Chamber should proceed when certain legal ingredients of a charge have not been proved but the evidence shows that, if the facts were differently characterised, an international crime under the jurisdiction of the Tribunal would nevertheless have been perpetrated. Absent such guidance, and in view

of the lack of any general principles of international criminal law on this matter, it may prove useful to establish how most national criminal systems regulate this matter. This examination serves the purpose of establishing whether principles of criminal law common to the major legal systems of the world exist on this matter.[965]

729. In two of the major common law jurisdictions - England and Wales, and the United States of America – there is a system of "lesser included offences" and "alternative verdicts" which establishes which offences need to be separately charged in the indictment and which offences are automatically considered as lesser alternatives (e.g. murder and manslaughter, robbery and theft).[966]

730. In England, the position is now largely governed by Statute. Section 6(3) of the Criminal Law Act 1967 reads:

---

[965] See *Furundžija,* Judgement, 10 Dec. 1998, paras. 177-178.

[966] See also, in this regard, the Criminal Procedure Code of the Republic of Zambia of 1 April 1934. Art. 181 of the Zambian Procedural Code, which deals with lesser included offences, provides as follows:

> (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it;
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it.

A specific example of this is contained in Section 186(1) of the Zambian Code, which states that if a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of, say, indecent assault, he may be convicted of that offence even though he was not charged with it. Additionally, Art. 213(1) provides that "[w]here, at any stage of a trial before the accused is required to make his defence, it appears to the court that the charge is defective either in substance or in form, the court may ... make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case". Where an alteration of a charge is made, Art. 213(3) obliges the court to allow for an adjournment if it is of the opinion that the accused may have been thereby "misled".

For similar provisions, see also Section 169 of the Nigerian Criminal Procedure Act 1958 and Section 219 of the Criminal Procedure Code of 1963, whereby a court can convict an accused for an offence not charged if the evidence adduced supports a conviction on that charge and Sections 256-269 of the South African Criminal Procedure Act 51 of 1977. In particular, Section 270 of this Act reads as follows:

> If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.

In practice, the effect of Section 270 is that a court can convict an accused only of lesser included offences, the essential elements of which must be included in the offence charged. (See *S v. Mbatha* 1982 (2) SA 145 (N); *S v. Mei* 1982 (1) SA 299 (O); *S v. Mavundla* 1980 (4) SA 187 (T); and *S v. Nkosi* 1990 (1) SACR 653 (T)).

> 6. – (3) Where, on a person's trial on indictment for any offence except treason or murder, the jury finds him not guilty of the offence specifically charged in the indictment, but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence.

731. As for murder, manslaughter is always available as an alternative verdict, and need not be charged in the indictment; likewise, under the common law (as opposed to statutory law) theft is always available as an alternative verdict to robbery, and so on for all lesser included offences. Treason – always treated as a unique crime – seems to be the only offence for which there is no possible alternative verdict.

732. It is worth noting that the Criminal Law Act 1967 would apply not only to "lesser included offences" but also to offences where the elements are different. For example, a person charged with rape could also be convicted of robbery if it is alleged in the indictment that he had also forcibly taken money from the rape victim. However, in these circumstances it would be preferable to amend the indictment to add the new count rather than for the Judge to give an oral direction as to the jury's powers under section 6(3) of the above act.[967] "Lesser included offences" are not the only alternative verdicts. Theft and handling of stolen goods are alternative verdicts, as it is not permissible for an accused to be convicted of both offences with respect to the same goods, but neither is a "lesser included" version of the other.[968] Likewise, indecent assault is an alternative to a charge of unlawful sexual intercourse with a girl under 16 – i.e. the prosecution does not need to charge indecent assault in the indictment – although neither offence is necessarily more serious than the other. In the United States of America, alternative verdicts for lesser included offences not charged in the indictment are possible under Rule 31(c) of

[967] *R. v. Mandair* [1994] 2 WLR 700, (H.L.).
[968] Archbold, *Criminal Pleading, Evidence and Practice* (1997), para. 21-12 .

the Federal Rules of Criminal Procedure.[969] There is an "elements test" for what constitutes a "lesser included offence".[970]

733. Broader powers are conferred on courts in most civil law countries, including the States of the former Yugoslavia.[971] Generally speaking, in these countries the principle *iura novit curia* (the court is expected and required to establish the law, while the facts must be proved by the parties) prevails. It follows that courts enjoy greater latitude in the determination of the applicable law than courts of common law countries. However, on close scrutiny it appears that in some civil law systems the powers of courts in the matter under discussion are more limited than in other systems. In short, in some countries the court may only reclassify, in the course of the trial, the facts of the case after duly warning the accused and enabling him to prepare his defence. Germany and Spain belong to this category. In other countries, such as France and Italy, courts may instead give a different legal characterisation of the facts from that propounded by the Prosecution, without necessarily advising the accused. This is permissible even in cases where the

---

[969] Rule 31(1) of the US Federal Rules of Criminal Procedure provides: "The defendant may be found guilty of an offense (sic) necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense".

[970] *Schmuck v. United States,* 489 U.S. 705 (1989).

[971] Art. 272 of the 1985 SFRY Law on Criminal Procedure, dealing with pre-trial proceedings, provides that when making a ruling under Art. 269(3) and Arts. 270 and 271, the Chamber is not bound by the legal characterisation of the offence specified by the Prosecutor in the indictment. Arts. 269(3), 270 and 271 refer, respectively, to a finding that a criminal offence falls instead within the jurisdiction of another court (Art. 269(3)); a finding that the facts alleged does not comprise a criminal offence, that circumstances exist to preclude criminal culpability or that insufficient evidence exists to support the charge (Art. 270) and special cases, such as private prosecutions (Art. 271). Additionally, Art. 337(1) of the SFRY law permits a prosecutor to amend the indictment in the course of a hearing if the evidence presented "indicates that the factual situation outlined in the indictment has changed". In such circumstances, the court may adjourn the main hearing to allow the Defence to prepare (Art. 337(2)). Furthermore, in issuing its judgment, the court "shall not be bound by the legal characterisation of the act proposed by the prosecutor" (Art. 346(2)). This, in practice, has been interpreted to mean that the court may decide that the offence proved is either a more or a less serious offence than that charged if the factual circumstances outlined in the indictment so dictate. (See the commentary by Petrić (ed.), *The Law on Criminal Procedure as Explained by the Case Law* (Belgrade, 1983) at p. 198, concerning the equivalent and substantively identical provision in the earlier SFRY Code of 1976).
Art. 346(2) of the 1997 Law on Criminal Procedure of the Republic of Croatia is identical to its counterpart in the SFRY Law on Criminal Procedure. In addition, and with regard to Croatian pre-trial proceedings, Arts. 274(3), 275, 276, 277 and 341(1) and (2) of the Croatian Law on Criminal Procedure mirror Arts. 269(3), 270, 271, 272 and 337(1) and (2) of the SFRY Law on Criminal Procedure, considered above.

court eventually classifies the facts as a more serious offence than that charged by the Prosecution.

734. A brief survey of these legal systems may prove useful. In German law, changes in the legal characterisation of facts during the pre-trial or trial stage are dealt with under sections 206, 207 and 265 of the Code of Criminal Procedure.[972] If the court deciding on the confirmation of the indictment is of the opinion that a different legal characterisation is warranted, the order confirming the indictment will contain a notice to that effect. The court is not bound by this notice if at the trial stage the judges change their minds. If the characterisation changes yet again during the trial, the accused must be given a warning by the court, except for where lesser included offences are concerned. The accused may then request an adjournment to prepare his defence. In the case of a mere change in the legal assessment of the otherwise unchanged facts, this adjournment is discretionary. The accused only has a right to an adjournment if the evidence *at trial* suggests *new circumstances* that would make the application of a more severe offence or sanction possible.[973]

735. In Spanish law, Article 653 of the Code of Criminal Procedure allows the Prosecution to charge in the alternative and especially reserves the parties' right to re-evaluate the offences after the evidence has been heard.[974] The law permits the presiding judge, where necessary, to ask the Prosecution and the Defence after the evidence has been presented whether they wish to amend their evaluations,[975] and if the Prosecution intends to charge a more serious offence than originally charged, Article 793 No. 7 *LECrim* gives the court a discretion to grant an adjournment to the Defence.[976] The court

[972] *Strafprozessordnung, (StPO).*
[973] For a similar provision, see also Art. 262 of the Austrian Code of Criminal Procedure *(StPO).*
[974] Arts. 653 and 732 *Ley de Enjuiciamiento Criminal. (*Hereinafter *LECrim).*
[975] *Ibid.,* Art. 793.
[976] A similar procedure applies in the recently established jury trial (*tribunal del jurado*) under Arts. 29 No. 3, 42 and 48 of the *Ley Orgánica 5/1995, de 22 de mayo, del Tribunal del Jurado.* Art. 733 *LECrim* empowers the court in extraordinary circumstances to give the parties a warning that the charges may qualify for different legal classification and to ask them to present their views on the matter. However, this is a rather exceptional procedure given the adversarial nature of the Spanish trial. It would appear, though, that under constitutional law the court is always required to give a warning under Art. 733 *LECrim* before

must hand down its sentence regarding all the legal aspects of the facts proven and may thus in the ordinary trial proceedings find the accused guilty of any offence that he has been warned of under Article 733 *LECrim,* even though the Prosecution may not have amended its charges.[977]

736. A different approach is taken in France and Italy. In France, the case-law has established the principle whereby, as long as the facts alleged by the Prosecution remain the same, courts are empowered to legally characterise those same facts in a manner different from that suggested by the prosecution, and without giving any prior notice to the accused.[978] This would seem to entail, amongst other things, that the court is authorised to find that the crime of which the accused is guilty is more serious than that charged by the Prosecutor – again, on the condition that the facts charged remain the same.

737. In Italy, Article 521(1) of the Code of Criminal Procedure provides that "in its judgement the court may give a legal definition to the facts different from that set forth in the charge, as long as the crime is within the competence of that court". The following two paragraphs of the same provision envisage instead the possibility that the facts are changed in the course of trial. If the court establishes that the facts are different from those set out in the indictment, or if the Prosecutor sets forth a new charge, the court must return the file to the Prosecutor and enable the accused to prepare his defence. The case

---

sentencing the accused on a more serious charge if the Prosecution does not address the issue, or risk having its verdict quashed on appeal in terms of Art. 851 No. 4 *LECrim*

[977] This follows from a comparison of Art. 742 *LECrim,* which applies to ordinary and jury trials, and Art. 794 No. 3 *LECrim,* which deals with the expedited procedure (*procedimiento abreviado*) applicable to certain classes of relatively minor offences. In these kinds of proceedings the court may not find the defendant guilty of any offence other than the one charged if the new offence protects a different interest or the verdict would lead to a substantial change in the acts tried (*mutación sustancial del hecho enjuiciado*). Art. 742 *LECrim* does not contain that restriction.

[978] According to the French Court of Cassation "il appartient aux juridictions correctionnelles de modifier la qualification des faits et de substituer une qualification nouvelle à celle sous laquelle ils leur étaient déférés", on condition, however, that facts are not changed (the new characterisation is admissible "à la condition qu'il ne soit rien changé ni ajouté aux faits de la prévention et que ceux-ci restent tels qu'ils ont été retenus dans l'acte de saisine".) (See Cass. Crim., 22 April 1986, in *Bulletin Criminel*, no. 136; see also Cass. Crim., 21 June 1989, in *Bulletin Criminel*, no. 267).

law has clearly inferred from these provisions that, whenever the facts remain the same, courts are not bound by the legal classification of those facts propounded by the prosecutor. Courts may even find that the crime perpetrated by the accused is more serious than the crime charged in the indictment.[979]

738. It is apparent from the above survey that no general principle of criminal law common to all major legal systems of the world may be found. It therefore falls to the Trial Chamber to endeavour to look for a general principle of law consonant with the fundamental features and the basic requirements of international criminal justice.

739. In this regard, two basic requirements – already referred to above – acquire paramount importance on account of the present status of international criminal law. One is the requirement that the rights of the accused be fully safeguarded. The other requirement is that the Prosecutor and, more generally, the International Tribunal be in a position to exercise all the powers expressly or implicitly deriving from the Statute, or inherent in their functions, that are necessary for them to fulfil their mission efficiently and in the interests of justice.

740. Turning to the former requirement, it must be emphasised again that at present, international criminal rules are still in a rudimentary state. They need to be elaborated and rendered more specific either by international law-making bodies or by international case law so as to gradually give rise to general rules. In this state of flux the rights of the accused would not be satisfactorily safeguarded were one to adopt an approach akin to that of some civil law countries. Were the Trial Chamber allowed to convict persons of a specific crime as well as any other crime based on the same facts, of whose commission the Trial Chamber might be satisfied at trial, the accused would not be able to prepare his defence with regard to a well-defined charge. The task of the defence would become exceedingly onerous, given the aforementioned uncertainties which still exist in international criminal law. Hence, even though the *iura novit curia* principle is normally

[979] See Court of Cassation, Section I, 8 July 1985, *Sconocchia* case, in *Giustizia penale*, 1986, pp. 562-564; Court of Cassation, Section VI, 16 April 1991, *Parente* case, in *Giurisprudenza italiana*,1992, II, p.297.

5148

applied in international judicial proceedings,[980] under present circumstances it would be inappropriate for this principle to be followed in proceedings before international criminal courts, where the rights of an individual accused are at stake. It would also violate Article 21(4)(a) of the Statute, which provides that an accused shall be informed "promptly and in detail" of the "nature and cause of the charge against him".

741. On the other hand, the other requirement relating to the efficient discharge of the Tribunal's functions in the interest of justice warrants the conclusion that any possible errors of the Prosecution should not stultify criminal proceedings whenever a case nevertheless appears to have been made by the Prosecution and its possible flaws in the formulation of the charge are not such as to impair or curtail the rights of the Defence.

742. A careful balancing of the two aforementioned requirements leads to the following conclusions:

(a) It may happen that, in the course of the trial, the Prosecutor finds that she has not proved beyond reasonable doubt the commission of the crime charged, but that a different offence, not charged in the indictment, has been proved which has different objective or subjective elements. For instance the Prosecutor may come to the conclusion that there is evidence of torture as a crime against humanity rather than rape as a crime against humanity; or of plunder of private property as a war crime instead of the attack of undefended dwellings or buildings as a war crime. She may consider that there is evidence of the extermination of civilians as a crime against

---

[980] *See* e.g Permanent Court of International Justice, *Lotus* case, Judgement No. 9, 7 Sept. 1927, Series A no. 10, p. 31; *Brazilian Loans* case, 12 July 1929, Series A, no. 14, p. 124; *Military and Paramilitary Activities in and against Nicaragua*, 27 June 1986, ICJ Reports 1986, pp. 24-25, para. 29.
See also European Court of Human Rights, *Neumeister* case, 27 June 1968, Recueil, Series A, no. 8, para. 16; *Handyside* case, 7 Dec. 1976, Series A no. 24, para 41; Inter-American Court of Human Rights, *Velasquez Rodriguez* case, 29 July 1988, Series C, No. 4, p. 151, para. 163.
It would seem that the best definition of the principle is that given by the ICJ. in *Fisheries* (Jurisdiction):
"The Court [...], as an international judicial organ, is deemed to take judicial notice of international law and is therefore required [...] to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute. It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case, the burden of establishing or proving rules of international law cannot be imposed upon any of the parties, for the law lies within the judicial knowledge of the Court". (ICJ Reports 1974, p. 181, para. 18).

humanity rather than of killing members of an ethnic group as genocide; or of unlawful deportation or transfer of civilians as a grave breach of the Geneva Conventions instead of genocide taking the form of deliberately inflicting on an ethnic or religious group conditions of life calculated to bring about its physical destruction in whole or part. To such cases others can be assimilated. Consider for instance the case where the Prosecutor realises that the charge of committing crimes against humanity in the form of deportation or imprisonment cannot be proved, while the charge of aiding and abetting in the execution of this crime can be substantiated by sufficient evidence. In this case the modality of participation in the commission of the crime is different from (albeit perhaps less serious than) actual perpetration. In these cases the Prosecutor must request the Trial Chamber to be granted leave to amend the indictment so as to afford the Defence the opportunity to contest the charge.

(b) During the course of the trial, the Prosecutor may conclude that a more serious offence than that charged in the Indictment has been or may be proved. For instance, she considers that while the accused had been charged with a war crime consisting of killing civilians, in the course of trial evidence has been presented showing that he may be found guilty of genocide in the form of killing members of an ethnic or religious group with the intent to destroy that group, in whole or in part. Or she may consider that while the crime charged was a war crime consisting of causing inhuman treatment to civilians, evidence has been presented showing that the accused engaged in torture as a crime against humanity. Clearly, once again the Prosecutor must request leave to amend the Indictment, so as to avoid any jeopardy to the rights of the accused. Again, the accused must be put in a position to contest the charges and to this end he must be informed promptly and in detail of the "nature and cause of the charge against him" (Article 21(4)(a) of the Statute). The same concept applies to the Trial Chamber, should it consider that a more serious offence has been proved in court.

(c) The Prosecutor may conclude during the trial that a lesser included offence, not charged in the Indictment, may be or has been proved in court. For instance, she

considers that the murder of civilians charged as a crime against humanity has not been made out for lack of proof of a widespread or systematic practice, while evidence is sufficient for proving that a war crime was committed, consisting of the murder of civilians. Or else she concludes that the charge of genocide consisting of the killing of members of an ethnic group cannot be proved for lack of the requisite intent to destroy in whole or in part, the group; by contrast, evidence may be produced proving that the killing of civilians may be charged as a war crime. Clearly, these are cases where the *lex specialis* invoked by the Prosecutor is found not to be applicable, whereas the *lex generalis* is still applicable.

743. If in these and similar cases the Prosecutor is or believes she is able to prove all the elements of a crime except for that which make up an additional element elevating the crime to a more serious category, she need not request leave to amend the Indictment. For the accused has been given the opportunity to contest all the elements of the crime charged. If one of the elements is lacking, this does not entail that the crime has not been committed, provided all the elements of a lesser included offence are proven. However, it would seem advisable that prompt notice be given by the Prosecutor to the Defence and the Trial Chamber that she proposes to submit that the lesser but not the greater offence has been committed, so that the acused may know the particulars of the case against him or her.

744. Let us apply the same criteria for the power, if any, of Trial Chambers to depart from the classification of the offence suggested by the Prosecutor.

745. If it is the Trial Chamber that concludes that the more serious offence has not been proved, it is sufficient for it to make this finding in its judgement, without ordering the Prosecutor to amend the Indictment. To give a practical example, an accused may be charged in an indictment with one count of murder as a crime against humanity. During the trial, it is conclusively proved that the accused committed the murder in circumstances that would characterise it as a war crime, but it is *not* proved that the crime was committed in the context of a widespread or systematic attack on a civilian population. In those circumstances the Trial Chamber could convict the accused of

murder as a war crime, despite the fact that that crime has not been charged in the indictment.

746. Similarly, the Trial Chamber may conclude that the facts proven by the Prosecutor do not show that the accused is guilty of having perpetrated a war crime; they show instead that he aided and abetted the commission of the crime. In this case, the Trial Chamber may classify the offence in a manner different from that suggested by the Prosecutor, without previously notifying the Defence of the change in the *nomen iuris*. For the same reason the Trial Chamber may find that the accused, charged with perpetrating a murder as a crime against humanity, is instead guilty of participating in a common design to commit murder as a crime against humanity.

747. If instead the Trial Chamber finds in the course of trial that the evidence conclusively shows that the accused has committed a more serious crime than the one charged, it may call upon the Prosecutor to consider amending the indictment. Alternatively, it may decide to convict the accused of the lesser offence charged. The same course of action should be taken by the Trial Chamber in the event the Prosecutor should decide not to accede to the Trial Chamber's request that the indictment be amended.

748. Similarly, if the Trial Chamber finds in the course of trial that only a different offence can be held to have been proved, it should ask the Prosecutor to amend the indictment. If the Prosecutor does not comply with this request, the Trial Chamber shall have no choice but to dismiss the charge.

5152

VI. LEGAL FINDINGS

A. General

749. In the course of this trial, the Trial Chamber has had to assess the involvement, if any, of the six accused and their potential culpability within a tragic episode of the armed conflict that raged in Bosnia and Herzegovina between 1992 and 1994. On 16 April 1993, in a matter of few hours, some 116 inhabitants, including women and children, of Ahmi}i, a small village in central Bosnia, were killed and about 24 were wounded; 169 houses and two mosques were destroyed. The victims were Muslim civilians. The Trial Chamber is satisfied, on the evidence before it in this case, that this was not a combat operation. Rather, it was a well-planned and well-organised killing of civilian members of an ethnic group, the Muslims, by the military of another ethnic group, the Croats. The primary purpose of the massacre was to expel the Muslims from the village, by killing many of them, by burning their houses and their livestock, and by illegally detaining and deporting the survivors to another area. The ultimate goal of these acts was to spread terror among the population so as to deter the members of that particular ethnic group from ever returning to their homes.

750. This tragedy carried out in a small village reflects in a microcosm the much wider tensions, conflicts and hatreds which have, since 1991, plagued the former Yugoslavia and caused so much suffering and bloodshed. In a matter of a few months, persons belonging to different ethnic groups, who used to enjoy good neighbourly relations, and who previously lived side by side in a peaceful manner and who once respected one another's different religious habits, customs and traditions, were transformed into enemies. Nationalist propaganda gradually fuelled a change in the perception and self-identification of members of the various ethnic groups. Gradually the "others", i.e. the members of other ethnic groups, originally perceived merely as "diverse", came instead to be perceived as "alien" and then as "enemy"; as potential threats to the identity and prosperity of one's group. What was earlier friendly neighbourly coexistence turned into persecution of those "others".

751. Persecution is one of the most vicious of all crimes against humanity. It nourishes its roots in the negation of the principle of the equality of human beings. Persecution is grounded in discrimination. It is based upon the notion that people who share ethnic, racial, or religious bonds different to those of a dominant group are to be treated as inferior to the latter. In the crime of persecution, this discriminatory intent is aggressively achieved by grossly and systematically trampling upon the fundamental human rights of the victim group. Persecution is only one step away from genocide – the most abhorrent crime against humanity - for in genocide the persecutory intent is pushed to its uttermost limits through the pursuit of the physical annihilation of the group or of members of the group. In the crime of genocide the criminal intent is to destroy the group or its members; in the crime of persecution the criminal intent is instead to forcibly discriminate against a group or members thereof by grossly and systematically violating their fundamental human rights. In the present case, according to the Prosecution - and this is a point on which the Trial Chamber agrees - the killing of Muslim civilians was primarily aimed at expelling the group from the village, not at destroying the Muslim group as such. This is therefore a case of persecution, not of genocide.

752. The fact that in this area of Bosnia and Herzegovina, the armed conflict frequently took the form of persecution is vividly depicted in the words of one Muslim woman mentioned by one of the witnesses in this trial. "I do not fear the shells and bombs that may fall on my house," she said. "They do not ask for my name. I fear the foot soldiers who break into my house and kill and wound in a very personal way and commit atrocities in front of the children". The main target of these attacks was the very identity – the very humanity – of the victim.

753. The "personal violence" most feared by this Muslim woman is that which is carried out against other human beings solely upon the basis of their ethnic, religious or political affiliation. It is persecutory violence.

754. The massacre carried out in the village of Ahmi}i on 16 April 1993 comprises an individual yet appalling episode of that widespread pattern of persecutory violence. The tragedy which unfolded that day carried all the hallmarks of an ancient tragedy. For one

thing, it possessed unity of time, space and action. The killing, wounding and burning took place in the same area, within a few hours and was carried out by a relatively small groups of members of the Bosnian Croatian military forces: the HVO and the special units of the Croatian Military Police, the so-called Jokers. Over the course of the several months taken up by these trial proceedings, we have seen before us, through the narration of the victims and the survivors, the unfolding of a great tragedy. And just as in the ancient tragedies where the misdeeds are never shown but are only recounted by the actors, numerous witnesses have told the Trial Chamber of the human tragedies which befell so many of the ordinary inhabitants of that small village.

755. Indisputably, what happened on 16 April 1993 in Ahmi}i has gone down in history as comprising one of the most vicious illustrations of man's inhumanity to man. Today, the name of that small village must be added to the long list of previously unknown hamlets and towns that recall abhorrent misdeeds and make us all shudder with horror and shame: Dachau, Oradour sur Glâne, Katijn, Marzabotto, Soweto, My Lai, Sabra and Shatila, and so many others.

756. To be sure, the primary task of this Trial Chamber was not to construct a historical record of modern human horrors in Bosnia and Herzegovina. The principal duty of the Trial Chamber was simply to decide whether the six defendants standing trial were guilty of partaking in this persecutory violence or whether they were instead extraneous to it and hence, not guilty.

757. At the end of the trial, we have come to the conclusion that, with the possible exception of one of the accused, this Trial Chamber has not tried the major culprits, those most responsible for the massacre of 16 April 1993, those who ordered and planned, and those who carried out the very worst of the atrocities against innocent civilians.

758. We thus had to confine ourselves to the six persons accused by the Prosecutor before our Trial Chamber, to determine whether and to what extent they participated in the crimes perpetrated in Ahmi}i. Our task has not been easy. More than six years after

those events – events that occurred far away from The Hague – we have had to shoulder the heavy burden of establishing incredible facts by means of credible evidence.

759. We have now accomplished our arduous task and our findings, on the evidence before us, are as follows.

B. Existence of an Armed Conflict

760. The attack on Ahmi}i was undertaken as part of the beginning of the Croat-Muslim war and is thus sufficiently closely related to an armed conflict. The attack was not a single or unauthorised event brought about by rogue factions of the HVO or the Military Police. It was part of an overall campaign in the La{va River Valley, intended to bring about "ethnic cleansing" through a systematic and widespread attack as a pre-condition of unrestricted Croat dominance over the area, promoted or at least condoned by the HVO and Military Police, and more generally, by the leadership of Croatia.

The reason for this forced expulsion was the achievement of territorial homogeneity by the Croats. The Muslims were identified as the group that was to be expelled.

C. The Persecutory Nature of the Croatian Attack on Ahmi}i on 16 April 1993 - Ahmi}i as an undefended village

761. The entirety of the evidence brought before the Trial Chamber shows that the attack by the Croats was a planned and highly organised operation. The use of different classes of heavy weaponry such as rocket launchers and anti-aircraft guns proves that it was not only an operation by a special purpose unit like the Jokers, who did not dispose of such an arsenal, but that the HVO as a professional army was itself actively involved in the attack. The Trial Chamber is satisfied that there were no significant military units or installations of the BiH present in the area of the village at the time of the attack, but that the HVO and Military Police actually exploited the absence of the BiH for a surprise attack on the village.

762. The Trial Chamber also finds beyond reasonable doubt that the attack was not a military combat operation such as a pre-emptive defensive strike against a threat of Muslim armed aggression. On the contrary, the aim of the attack was the forced expulsion of the Muslim population from the area, as from the entire La{va River Valley. The attack was carried out in an indescribably cruel manner, sparing not even the lives of women and small children. The many bodies of civilians found in the village after the attack, especially those of very young children, the wholesale destruction of Muslim - and only of Muslim – houses and even the destruction of the livestock of the Muslim families, do not match the picture the Defence tried to paint, which was that of a military battle between two armies. In such a case it would have been highly improbable that it was almost exclusively Muslim persons who were killed and Muslim houses destroyed. In a pitched battle between two armies the so-called collateral damage on both sides would have been divided more evenly. Nor does the concept of a military combat engagement accord with the fact that the houses of Muslim civilians were broken into and the male members of military age pulled out and executed. Above all the intentional killing of children, at least one of which was only three months old, cannot be reconciled with the view that this was an action demanded and guided by strategic or tactical necessities. In sum, the damage and harm inflicted by the Croats on the Muslim civilian population was not collateral; it was the primary purpose of the attack.

763. The herding together of the Muslims, who had survived the killing and shooting, during and after the attack, and their ensuing detention at places such as the Dubravica school, underlines the Croatian objective of making sure that no Muslim was left free to live in the village. The systematic burning of the Muslim houses is proof of a "scorched-earth" policy on the part of the Croatians, done in order to further the aim that, as one witness put it, "no Muslim foot shall tread this soil".

764. The Defence's claim that Ahmi}i was not an undefended village must thus be rejected as completely unfounded.

D. Irrelevance of Similar Conduct by Muslims against Croats in Other Villages

765. As pointed out above in the section on the applicable law, in international law there is no justification for attacks on civilians carried out either by virtue of the *tu quoque* principle (i.e. the argument whereby the fact that the adversary is committing similar crimes offers a valid defence to a belligerent's crimes) or on the strength of the principle of reprisals. Hence the accused cannot rely on the fact that allegedly there were also atrocities committed by Muslims against Croatian civilians.

E. The Accused

1. Dragan Papi}

766. Dragan Papi} was charged under count 1 with persecution as a crime against humanity under Article 5(h) of the Statute.

767. The accused Dragan Papi} was mobilised in the HVO during some of the time relevant to this indictment although his precise role is not clear. He wore a uniform and carried a rifle in the village. In relation to the armed conflict on 20 October 1992, the Prosecution relies on one crucial witness, Mehmed Ahmi}, who identified the accused as shooting from his house early in the morning and firing an anti-aircraft machine gun in the afternoon. This witness's evidence is not accepted by the Trial Chamber. That the accused participated in the armed conflict that day has not been proved

768. In relation to the armed conflict on 16 April 1993, the Trial Chamber does not find that it can rely on the evidence of Witness G. Witness G was an honest witness who had been through a dreadful ordeal on 16 April. However, he was under the most stressful conditions imaginable and there must be some doubt about the accuracy of his identification of Dragan Papi}. None of the remaining Prosecution evidence is sufficient to establish that Dragan Papi} was an active participant in the conflict.

769. Therefore, the Trial Chamber finds that there is reasonable doubt as to whether Dragan Papi} participated in the conflict that day, and accordingly finds the accused **not guilty** under **count 1**.

2. Zoran Kupre{ki}

(a) Count 1

770. The accused, together with his brother Mirjan Kupre{ki}, was charged with persecution as a crime against humanity pursuant to Article 5(h) of the Statute under count 1 of the indictment.

771. The Trial Chamber has defined the *actus reus* of persecution under Article 5(h) of the Statute as the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary or treaty law, reaching the same level of gravity as the other acts prohibited in Article 5 of the Statute. As a crime against humanity the common prerequisites of a link with an armed conflict, a widespread or systematic attack on a civilian population in furtherance of a systematic policy, and the grave nature of the offences also apply. The requisite *mens rea* is the intent to discriminate, to attack persons on account of their racial or religious characteristics or political affiliation as well as knowledge of the widespread or systematic nature of the attack on civilians.

772. The mode of participation in the wider sense under Article 7(1) of the Statute and as charged in the indictment is either direct commission by the accused, i.e. as the sole perpetrator or as a co-perpetrator, or as an aider and abettor. The definition for both categories was recently given by the Appeals Chamber in its Judgement in *Tadi}* of 15 July 1999.[981] Co-perpetration requires a plurality of persons, the existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute and participation of the accused in the common design.

[981] *Tadić*, Appeal Chamber Judgement, 15 July 1999 at para. 227-228.

As far as *mens rea* is concerned, what is required is the intent to perpetrate a certain crime as the shared intent on the part of all co-perpetrators. An aider and abettor as opposed to a principal perpetrator carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain crime; this support must have a substantial effect upon the perpetration of the crime. The requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal.

773. The Trial Chamber is satisfied that the accused was an active member of the HVO. Zoran Kupreški} was a local HVO Commander and his activities were not limited to assigning village guard duties. Zoran Kupreški} took part in the oath-taking ceremony and was present on duty on the front line as stated by Witness JJ in her testimony. The Trial Chamber accepts the evidence of Witness B and Abdulah Ahmi} in relation to the negotiations for the return of the Muslims after the conflict of 20 October and finds that Zoran Kupreški}'s role in these negotiations was more active than he himself admitted. Finally, the Trial Chamber notes that Zoran Kupreški}, as a reserve officer and in charge of a maintenance unit at work, was used to the exercise of authority. The accused did know of the planned attack on the village the next morning, for which preparations were already under way, and was ready to play a part in it.

774. With regard to the alleged participation of the accused in murder and arson at the house of Witness KL on 16 April 1993, the Trial Chamber has already analysed that witness's evidence and found it wanting in credibility. Thus, there is no reliable evidence that the accused, together with his brother Mirjan, participated in the crimes at the house of Witness KL. The Trial Chamber, having heard the evidence of Jozo Alilovi}, is not satisfied as to the accuracy of Witness C's identification of the accused, given the stressful conditions under which it was made and the appalling ordeal to which the young Witness C had been subjected.

775. As to the murders and arson at the house of Suhret Ahmi}, the Trial Chamber has already analysed the evidence of Witness H, and is in no doubt that she was a truthful and

accurate witness of events on 16 April. The Trial Chamber places no reliance on the statements of Witness SA.

776. Zoran Kupre{ki}, together with his brother Mirjan Kupreški}, was in the house of Suhret Ahmi} immediately after he and Meho Hrstanovi} were shot and immediately before the house was set on fire, as part of the group of soldiers who carried out the attack.

777. The Trial Chamber accepts that Zoran Kupreški} admitted to Witness JJ that the Jokers had been firing on fleeing civilians and that under threat, he himself had fired into the air.

778. The Trial Chamber rejects the evidence of the accused and his witnesses to the effect that he took no part in the crimes alleged and was elsewhere when they took place.

779. In summary, the Trial Chamber concludes that Zoran Kupre{ki}, together with his brother Mirjan, participated in the attack on Ahmi}i on 16 April 1993 as a soldier in the HVO. Zoran Kupre{ki}, together with his brother Mirjan Kupre{ki}, was present as an attacker on that day and actively involved in the events. It can be safely inferred that he also provided local knowledge to the HVO and Military Police not familiar with the situation of the village, and entered the house and expelled the family of Suhret Ahmi}. Zoran Kupreški}, as the local HVO Commander, played the more leading role.

780. On the basis of his participation in the events from October 1992 until 16 April 1993, as outlined above, the Trial Chamber finds that the accused attacked his Muslim neighbours solely due to their ethnicity and with the aim of cleansing the village of any Muslim inhabitants.

781. The accused, together with his brother Mirjan, in a gross and blatant manner denied his Muslim fellow citizens their fundamental rights to life, freedom of movement and free enjoyment of their family life and property, all against the background of numerous killings, woundings etc. committed by the HVO and the Military Police. His actions and their consequences are of such a heinous nature that there can be no dispute

that they match in gravity the other offences commonly included under Article 5 of the Statute. The civilian character of the victims cannot seriously be called into question.

782. The accused acted as a co-perpetrator, together with his brother Mirjan Kupre{ki}, within the meaning of Article 7(1) of the Statute, because he adhered to a common plan for the execution of the cleansing campaign in the village, which by necessity was a highly coordinated effort and required full prior knowledge of the intended activities and subordination to a common plan of action.

783. There can be no doubt on the basis of the circumstances proven that the accused was aware of the wider background to the attack mentioned above, especially with respect to the connection with the beginning of a large-scale armed conflict against the BiH, and that the main if not sole motivation for his participation was the forced expulsion of Muslims from the La{va River Valley region, thus displaying a clear discriminatory intent. From this it follows that the accused was aware that he would not engage in a battle between military units, but would be attacking helpless and unprepared civilians.

784. Accordingly the Trial Chamber finds Zoran Kupre{ki} **guilty** of persecution as a crime against humanity under Article 5(h) of the Statute under **count 1** of the indictment.

(b) Counts 2 - 11

785. The accused, together with his brother Mirjan Kupre{ki}, was charged with murder, inhumane acts as crimes against humanity under Article 5(a), (i) and cruel treatment under Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions under counts 2 – 11 of the indictment.

786. As to these counts, pertaining to the attack on the family of Witness KL, the Trial Chamber finds on the basis of the evidence before it, as set out above, that it is not satisfied beyond reasonable doubt that the accused was present at the scene of the crime and thus cannot draw any inference as to his possible participation in these events.

787. The Trial Chamber thus finds the accused Zoran Kupre{ki} **not guilty** with regard to **counts 2 – 11**.

3. Mirjan Kupre{ki}

(a) Count 1

788. The accused, together with his brother Zoran Kupre{ki}, was charged with persecution as a crime against humanity pursuant to Article 5(h) of the Statute under count 1 of the indictment.

789. Mirjan Kupreški} was an active member of the HVO. This finding is based on the HVO Register and is to be inferred from his activities on 16 April 1993 described above under the heading of his brother Zoran.

790. With regard to his involvement in the activities from October 1992 until 16 April 1993, the Trial Chamber refers to the facts set out above with regard to his brother, Zoran Kupre{ki}. They were all committed together with the accused Mirjan Kupre{ki} and thus apply *mutatis mutandis* to him. The same is true for the requisite *mens rea* of the accused.

791. Accordingly the Trial Chamber finds Mirjan Kupre{ki} **guilty** of persecution as a crime against humanity under Article 5(h) of the Statute under **count 1** of the indictment.

(b) Counts 2 - 11

792. The accused, together with his brother Zoran, was charged with murder, inhumane acts as crimes against humanity under Article 5(a), (i) and cruel treatment under Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions under counts 2 – 11 of the indictment.

793. As to these counts, pertaining to the attack on the family of Witness KL, the Trial Chamber finds on the basis of the evidence before it, as set out above, that it is not

satisfied beyond reasonable doubt that the accused was present at the scene of the crime and thus cannot draw any inference as to his possible participation in the events.

794. The Trial Chamber finds the accused Mirjan Kupre{ki} **not guilty** with regard to **counts 2 – 11**.

4. Vlatko Kupre{ki}

(a) Count 1

795. Under count 1 the accused was charged with persecution as a crime against humanity pursuant to Article 5(h) of the Statute.

796. Prior to the conflict this accused was on good terms with Muslims and displayed no nationalist or ethnic prejudice. In 1992-1993, Vlatko Kupreški} was a member of the police, namely an "Operations Officer for the Prevention of Crimes of Particular State Interest", with the rank of Inspector 1st Class. The accused was not merely concerned to make inventories of supplies for the police, as he instead claims. He was unloading weapons from a car in front of his house in October 1992 and April 1993 and was again seen there on the afternoon of 15 April 1993.

797. With regard to the evidence of the accused that he did not return to Ahmi}i on 15 April until the evening when he got back from the trip to Split, the Trial Chamber accepts the prosecution evidence that he was seen in Ahmi}i during the morning of 15 April, at the Hotel Vitez and during the afternoon and in the early evening in the vicinity of soldiers who were at his house.

798. The Trial Chamber also accepts the testimony given by the prosecution witnesses in relation to the troop activity in and around the accused's house on the evening of 15 April, which is also confirmed by the entry in Witness V's diary recording that he learned that evening that the Croats were concentrating around the Kupreški} houses.

799. Vlatko Kupreški} was involved in the preparations for the attack on Ahmi}i in his role as police operations officer and as a resident of the village. He allowed his house to

be used for the purposes of the attack and as a place for the troops to gather the night before.

800. With regard to the shooting of the Pezer family, those responsible for these crimes were a group of soldiers standing in front of Vlatko Kupreški}'s house. However, the Trial Chamber is not satisfied that Vlatko Kupreški} was among them. Only one witness identified the accused, Witness Q, at a distance of over 50 metres: a distance at which a witness is as likely to be mistaken as not. In the absence of confirmation of the correctness of this identification the Trial Chamber is not able to be sure that it is correct. That Vlatko Kupreški} was present when these crimes were committed is thus not proven.

801. The other evidence relating to the presence of the accused during the armed conflict was that given by Witness H, of the accused being in the vicinity of Suhret Ahmi}'s house at about 5.45 a.m., and shortly after the latter was murdered. The Trial Chamber finds that this identification was correct and that Vlatko Kupreški} was in the vicinity shortly after the attack on Suhret Ahmi}'s house. There is no further evidence as to what the accused was doing there, but he was present, ready to lend assistance in whatever way he could to the attacking forces, for instance by providing local knowledge.

802. The evidence of the accused and his witnesses as to his non-participation in the conflict is not credible.

803. Vlatko Kupre{ki} helped prepare and supported the attack carried out by the other accused, the HVO and Military Police, by unloading weapons in his store and by agreeing to the use of his house as a strategic point and staging area for the attacking troops. His role is thus not quite as prominent as that of the other accused, which is why the Trial Chamber finds that he merely supported the actions of the others, conduct which must be subsumed under aiding and abetting and not under co-perpetration. The accused had the requisite *mens rea*, as he was aware that his actions would substantially and effectively assist the attackers in their activities, that he would help them in carrying out

their mission of cleansing Ahmi}i of its Muslim inhabitants. He also knew that the attack would not be a battle between soldiers, but that the Muslim civilians of his own village would be targeted.

804. Accordingly the Trial Chamber finds the accused **guilty** under **count 1** of aiding and abetting persecution as a crime against humanity pursuant to Article 5 (h) of the Statute.

(b) Counts 12 – 15

805. Under counts 12 – 15, the accused was charged with murder and inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute, and with murder and cruel treatment as a violation of the laws or customs of war pursuant to Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions.

806. With respect to these counts, the Trial Chamber finds that it cannot be satisfied beyond reasonable doubt that the accused was present at the scene of the crime, and cannot draw any inference as to his involvement in the events.

807. The Trial Chamber therefore finds the accused **not guilty** with regard to **counts 12 to 15**.

5. Drago Josipovi}

(a) Count 1

808. The accused, together with Vladimir [anti}, was charged under count 1 with persecution as a crime against humanity pursuant to Article 5(h) of the Statute.

809. Drago Josipovi} was a member of the HVO prior to 16 April 1993; he was a member of the village guard and was seen in the village in uniform and with a rifle.

810. As to the direct participation of the accused in the conflict on 16 April 1993, the Trial Chamber accepts the evidence of Witness EE, who identified him, together with the

accused Vladimir [anti}, as a participant in the attack on her house when her husband was murdered. The Trial Chamber finds that Drago Josipovi} participated in the attack on the Pu{ćul house: he was part of the group of soldiers who attacked and burned the house and murdered Musafer Pu{ćul.

811. Drago Josipovi} also participated in the attack on the house of Nazif Ahmi} in which Nazif and his 14 year old son were killed. This was not charged as a separate count in the indictment, nor did the Prosecutor request after the commencement of the trial to be granted leave to amend the indictment so as to afford the Defence the opportunity to contest the charge. Consequently, in light of the principle set out above in the part on the applicable law, these facts cannot be taken into account by the Trial Chamber as forming the basis for a separate and specific charge. They constitute, however, relevant evidence for the charge of persecution. The Trial Chamber is satisfied that Witness DD accurately identified the accused, and that the witness accurately described the role played by the accused in the attack and that he was, in fact, in a position of command with regard to the troops involved.

812. Having heard the evidence of Witness CB, the Trial Chamber is, however, not satisfied that Drago Josipovi} participated in the attack on the house of Fahran Ahmi}. The Trial Chamber accepts the evidence of Witness Z concerning the presence of the accused leading soldiers near the Ogrjev plant on the afternoon of 16 April.

813. The Trial Chamber rejects the evidence put forward by Drago Josipovi} of him spending the day moving around the locality to very little apparent purpose. The truth is that he was armed and active, playing his full part in the attacks on his neighbours, sometimes having command over a group of soldiers.

814. The Trial Chamber concludes therefore that Drago Josipovi} participated in the murder of Musafer Pu{ćul, participated in the attack on the house of Nazif Ahmi} and was actively involved in the burning of private property. On this basis, the Trial Chamber finds that the accused, together with Vladimir [anti}, was present at the scene of the crime as part of a group that went to the house with the common intent to kill and/or

expel its inhabitants and to set it on fire. He did this solely because the victims were Muslims, for the same reasons set out above with respect to Mirjan and Zoran Kupre{ki}. The accused was aware that he would be attacking unarmed and helpless civilians, and that this attack was part of the beginning of a large-scale campaign of "ethnic cleansing" of Muslims from the La{va River Valley.

815. These actions fulfil the requirements of persecution as a crime against humanity pursuant to Article 5(h) of the Statute.

816. The Trial Chamber therefore finds the accused **guilty** of persecution as a crime against humanity pursuant to Article 5(h) of the Statute under **count 1**.

(b) Counts 16 - 19

817. The accused was charged under counts 16 to 19 with murder and other inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute, as well as murder and cruel treatment as violations of the laws or customs of war pursuant to Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions.

818. Murder under Article 5(a) of the Statute comprises the death of the victim as a result of the acts or omissions of the accused. Moreover, the conduct of the accused must be a substantial cause of the death of the victim. The offence requires the intent to kill or the intent to inflict serious injury in reckless disregard of human life. Inhumane acts under Article 5(i) of the Statute are intentional acts or omissions which infringe fundamental human rights causing serious mental or physical suffering or injury of a gravity comparable to that of other crimes covered by Article 5.

819. The accused, even though he may not himself have killed Musafer Pu{ćul, by his active presence in the group, together with Vladimir [anti}, has fulfilled the *actus reus* of murder as a co-perpetrator. The same applies for the suffering caused to the family by being forced to witness the murder of Musafer Pu{ćul, being expelled from their family home and having their home destroyed. These acts clearly constitute the *actus reus* of other inhumane acts.

820. Drago Josipovi}, as may be safely inferred from his actions, had the requisite intent both for murder and inhumane acts. He knew that the inhabitants of that house were going to be killed, and if not killed then at least expelled and their house burned down. That witnessing the death of a loved one and the loss of the family home would cause serious mental suffering was equally obvious to the accused when he embarked upon his crimes. He also acted in pursuance of a common design together with the accused Vladimir [anti}. This is borne out by his actions described under count 1. The accused also had the requisite *mens rea*.

821. As stated above with regard to multiple charges in the part on the applicable law, Article 5(a) and (i), as crimes against humanity, protect different values and interests and may be charged cumulatively. This also applies to charging these acts under Article 5(h) as persecution.

822. The Trial Chamber accordingly finds the accused **guilty** of murder and other inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute under **counts 16 and 18**.

823. By contrast, the Trial Chamber finds that counts 17 and 19 were improperly charged cumulatively with the more serious offences under Article 5 of the Statute. As pointed out above in the part on the applicable law, Article 3 of the Statute, as far as murder and cruel treatment are concerned, protects the same interests as Article 5(a) and (i). However, while murder as a crime against humanity requires proof of elements that murder as a war crime does not require (the offence must be part of a systematic or widespread attack on the civilian population), this is not reciprocated. As a result, the two offences are not in a relationship of reciprocal speciality. The prohibition of murder as a crime against humanity is *lex specialis* in relation to the prohibition of murder as a war crime and must therefore prevail.

824. For reasons of law, the Trial Chamber therefore finds the accused **not guilty** with regard to **counts 17 and 19**.

6. Vladimir [anti}

825. The accused, together with Drago Josipovi}, was charged under count 1 with persecution as a crime against humanity pursuant to Article 5(h) of the Statute

826. Vladimir Šanti} in April 1993 was the commander of the 1st Company of the 4th Battalion of the Military Police. He was also Commander of the Jokers.

827. As was described with respect to the accused Drago Josipovi}, Vladimir [anti}, together with the latter, participated in the murder of Musafer Pu{ćul and the burning of his house. In addition, from his position as a company commander of the Military Police and commander of the Jokers, it can be safely inferred that he passed on the orders of his superiors to his men, and his presence on the scene of the attack also served as an added encouragement for his subordinates to abide by the orders they had received.

828. The Trial Chamber refers to the facts and the law explained above with respect to the accused Drago Josipovi}. They apply *mutatis mutandis* to the accused Vladimir [anti}.

829. The Trial Chamber accordingly finds the accused **guilty** of persecution as a crime against humanity pursuant to Article 5(h) of the Statute under **count 1**.

(a) Counts 16 – 19

830. Under counts 16 to 19, the accused, together with Drago Josipovi}, was charged with murder and other inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute, as well as murder and cruel treatment as violations of the laws or customs of war pursuant to Article 3 of the Statute in connection with Common Article 3(1)(a) of the Geneva Conventions.

831. The Trial Chamber refers to the facts and the law set out above with respect to the accused Drago Josipovi}. They apply *mutatis mutandis* to the accused Vladimir [anti}.

832. The Trial Chamber accordingly finds the accused **guilty** of murder and other inhumane acts as crimes against humanity pursuant to Article 5(a) and (i) of the Statute under **counts 16 and 18**.

833. For reasons of law, the Trial Chamber therefore finds the accused **not guilty** with regard to **counts 17 and 19**.

5171

VII. SENTENCING

A. Introduction

834. The Trial Chamber will proceed to sentence each of the accused pursuant to the findings of guilt pronounced.

835. The Prosecutor made submissions regarding sentence in her Closing Brief, filed on 5 November 1999, as well as oral submissions in the hearing of 9 November 1999. Written submissions on sentencing were made on behalf of the following accused: Zoran Kupre{ki},[982] Dragan Papi},[983] Mirjan Kupre{ki},[984] Vladimir Šanti}[985] and Drago Josipovi}.[986] No express written submissions on sentencing were made on behalf of Vlatko Kupre{ki}.[987] No oral submissions were made on behalf of any of the accused.[988]

B. Sentencing Provisions

836. The Statute and the Rules contain certain provisions relating to sentencing that are to be considered by the Trial Chamber.

837. Article 23 ("Judgement") of the Statute provides that "[t]he Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law". Article 24 of the Statute and Rule 101 of the Rules of Procedure and Evidence deal with the penalties a Trial Chamber may impose.

---

[982] Closing Argument of the Counsel of the Accused Zoran Kupre{ki}, filed on 5 Nov. 1999.
[983] Defence's Closing Brief, filed on 5 Nov. 1999.
[984] *Idem.*
[985] The Defence Final Trial Brief for the Accused Vladimir Šanti}, filed on 5 Nov. 1999, p 65.
[986] Closing Argument of the Counsel of the Accused Drago Josipovi}, filed on 5 Nov. 1999, p 60.
[987] The Defence Closing Brief for the Accused Vlatko Kupre{ki}, filed on 5 Nov. 1999.
[988] In the case of Zoran Kupre{ki}, it was submitted that no arguments in mitigation need be made since the innocence of the accused is presumed: T. 12763.

5172

838. Read together, Article 24 and Rule 101, as supplemented by Rule 85(A)(vi), allow for factors other than those expressly mentioned to be considered when determining the proper sentences to be imposed.

C. Factors to be Considered in Sentencing

1. SFRY Criminal Code Provisions

839. Pursuant to Article 24(1) of the Statute, the Trial Chamber "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia" in determining the terms of imprisonment. Rule 101(B) also requires the Trial Chamber to "take into account" such general practice.

840. It is clear from these provisions - in particular the phrase "have recourse to" and "take into account" - that the Trial Chamber is not bound to follow the sentencing practice of the courts of the former Yugoslavia. Reference should be made to the said sentencing practice as an aid in determining the sentences to be imposed by the Trial Chamber.

841. In general terms, Article 41 ("General principles in determining punishment") of the Criminal Code of the Socialist Federal Republic of Yugoslavia ("SFRY Criminal Code") sets out the various factors to be taken into account in determining sentence.[989] This Article is essentially similar to the sentencing provisions of the Statute and the Rules of the International Tribunal.

842. Articles 38, 48 and 142 of the SFRY Criminal Code should also be considered. Article 38 ("Imprisonment") of the SFRY Criminal Code reads in part:

---

[989] In particular, Art. 41(1) of the SFRY Criminal Code provides: "The court shall weigh the punishment to be imposed on the perpetrator of a criminal offence within the legal limits of the punishment for that offence, bearing in mind the purpose of punishment and taking into consideration all the circumstances which influence the severity of the punishment (mitigating and aggravating circumstances), and in particular: the degree of criminal responsibility; motives for the commission of the offence; the severity of threat or injury to the protected value; circumstances of the commission of the offence; the perpetrator's previous conduct; the perpetrator's personal circumstances and his behaviour subsequent to the commission of the offence; as well as other circumstances relating to the perpetrator".

5173

> (1) The punishment of imprisonment may not be shorter than 15 days nor longer than 15 years.
>
> (2) The court may impose a punishment of imprisonment for a term of 20 years for criminal acts eligible for the death penalty.
>
> (3) For premeditated criminal acts for which the punishment of fifteen years imprisonment may be imposed under statute, and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences, a punishment of imprisonment for a term of 20 years may be imposed when so provided by statute.
>
> [...]
>
> (6) A convicted person who has served half of his term of imprisonment, and exceptionally a convicted person who has served a third of his term, may be excused from serving the rest of his term on the condition that he does not commit a new criminal act by the end of the period encompassed by his sentence.

Capital punishment was abolished by constitutional amendment in 1977 in some of the republics of the SFRY other than Bosnia and Herzegovina. Since then, the maximum sentence has been 20 years imprisonment.[990] A 20 year prison sentence may only be imposed for the most serious types of criminal offences.[991]

843. Article 48 ("Combination of criminal acts") of the SFRY Criminal Code deals with the question of punishment of offenders found guilty of several offences.[992]

---

[990] Official Gazette of the FRY, no. 37 of 16 July 1993, p. 817, *Delali} et al.*, Judgement, 16 Nov. 1998, para. 1193; *Tadi}*, Sentencing Judgement, 14 July 1997, para. 7.
[991] *Delali} et al.*, Judgement, 16 Nov. 1998, para. 1206.
[992] Art. 48 of the SFRY Criminal Code provides: (1) If, by one or more acts, the perpetrator has committed more than one criminal offence for which he is being tried simultaneously, the court shall first determine the sentences for each offence and then impose a single sentence for all the offences.
(2). The single sentence shall be imposed according to the following rules:
i) if the death penalty was determined for one of the concurrent criminal offences, only that sentence shall be imposed;
ii) if a sentence of twenty years imprisonment was determined for one of the concurrent criminal offences, only that sentence shall be imposed;

5174

844. Chapter Sixteen of the SFRY Criminal Code is entitled "Criminal Acts Against Humanity and International Law". Article 142(1) ("War crimes against the civilian population") of the SFRY Criminal Code falls within the said Chapter, and it provides the following:

> Whosoever, in violation of rules of international law effective at the time of war, armed conflict or occupation, orders an attack on civilian populations, an inhabited area, individual civilian persons or persons *hors de combat* which results in death, serious injury or serious deterioration of health [... or], causing immense suffering or a violation of bodily integrity or health; displacement or resettlement [...]; forcible prostitution or rape; introduction of measures of intimidation and terror, [...], imposing collective punishment, [...]; confiscation of property, plunder of property belonging to the civilian population, unlawful and arbitrary destruction or large-scale appropriation of property not justified by military necessity, [...] or whosoever commits any of the foregoing acts, shall be punished by imprisonment of not less than five years or by the death penalty.

845. As has been held in the *Tadi}* Sentencing Judgement, this Article gives effect in the former Yugoslavia to the provisions of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 and its Protocols, which is incorporated into the jurisdiction of the International Tribunal by Article 2 ("Grave breaches of the Geneva Conventions of 1949") of the Statute.[993] There appear to be no provisions of the SFRY Criminal Code which give specific effect to those crimes against humanity referred to in Article 5 ("Crimes against humanity") of the Statute. However, genocide, itself a specific category of crime against humanity, is dealt with in Article 141 of the SFRY Criminal Code.[994] Article 141 also prescribes imprisonment for not less than five years or the death penalty. Further, Article 154 of the SFRY Criminal

---

iii) if sentences of imprisonment are determined for concurrent criminal offences, the single sentence shall be greater than each individual sentence determined, but it shall not be greater than the sum of the sentences determined, nor shall it be greater than a term of imprisonment of fifteen years;
iv) if sentences of up to three years imprisonment were determined for all concurrent criminal offences, the single sentence may not exceed eight years of imprisonment.

[993] *Tadi},* Sentencing Judgement, 14 July 1997, para. 8.

[994] *Idem.*

Code deals with racial and other discrimination, which, in some respects, could be said to relate to the counts on persecution as a crime against humanity. Article 154(1) reads as follows:

> Whoever on the basis of distinction of race, colour, nationality or ethnic background violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for a term exceeding six months but not exceeding five years.

846. As has already been made clear, the provisions of the SFRY Criminal Code serve as a guide. In particular, the Trial Chamber is not bound to impose a maximum sentence of 20 years imprisonment only. According to Rule 101, the Trial Chamber may impose a sentence of life imprisonment.

847. Article 33 of the SFRY Criminal Code provides for three reasons for the imposition of sentences, namely,

> (1) preventing the offender from committing criminal acts and his rehabilitation;
>
> (2) deterrent effect upon others not to commit criminal acts;
>
> (3) [...] influence on the development of the citizens' social responsibility and discipline.

2. General Sentencing Policy of the International Tribunal

848. The Trial Chamber is of the view that, in general, retribution and deterrence are the main purposes to be considered when imposing sentences in cases before the International Tribunal. As regards the former, despite the primitive ring that is sometimes associated with retribution,[995] punishment for having violated international humanitarian law is, in light of the serious nature of the crimes committed, a relevant and important consideration. As to the latter, the purpose is to deter the specific accused as well as others, which means not only the citizens of Bosnia and Herzegovina but persons

[995] *Delali} et al.*, Judgement, 16 Nov. 1998, para. 1231.

worldwide from committing crimes in similar circumstances against international humanitarian law.[996] The Trial Chamber is further of the view that another relevant sentencing purpose is to show the people of not only the former Yugoslavia, but of the world in general, that there is no impunity for these types of crimes. This should be done in order to strengthen the resolve of all involved not to allow crimes against international humanitarian law to be committed as well as to create trust in and respect for the developing system of international criminal justice.

849. The Trial Chamber also supports the purpose of rehabilitation for persons convicted in the hope that in future, if faced with similar circumstances, they will uphold the rule of law.

3. Factors Relevant to Sentencing in Respect of Each Accused

850. The Trial Chamber will next consider the various factors which influence the determination of appropriate sentences for each accused convicted, in accordance with the provisions of Article 24 of the Statute and Rule 101 of the Rules of Procedure and Evidence.

(a) Zoran Kupre{ki} and Mirjan Kupre{ki}

851. Zoran Kupre{ki} and Mirjan Kupre{ki} have been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute).

852. The sentences to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime. Zoran and Mirjan Kupre{ki} have been found guilty of persecution in the form of the expulsion of Muslim civilians, including women and children from Ahmi}i-[anti}i and its environs, the destruction of Bosnian Muslim homes and property and their active presence in the area whilst armed. In

[996] *Ibid., at* para. 1234; *Furundžija,* Judgement, 10 Dec. 1998, para. 288.

particular, they entered the house and expelled the family of Suhret Ahmi}. This is in spite of the fact that even as late as March 1993 both attended Muslim holiday celebrations. Of the two accused, Zoran Kupre{ki} played a more leading role as the local commander.

853. The fact that Zoran Kupre{ki} and Mirjan Kupre{ki} voluntarily surrendered to the International Tribunal on 6 October 1997 is a factor in mitigation of their sentence.

(b) Vlatko Kupre{ki}

854. Vlatko Kupre{ki} has been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute).

855. Vlatko Kupre{ki} has been found guilty of persecution in the form of aiding and abetting, by helping in the preparation of the attack on Ahmi}i, such as unloading weapons in his store and allowing his house to be used in the attack. He was also present near the house of Suhret Ahmi}, shortly after the attack on the latter's house. Thus he was clearly supportive of the attack.

856. It is noted that prior to the conflict this accused was on good terms with Muslims and displayed no nationalist or ethnic prejudice.

857. Unlike the other accused, Vlatko Kupre{ki} did not surrender to the International Tribunal. He was arrested on 18 December 1997. During the arrest there was an exchange of fire with the arresting forces.

(c) Drago Josipovi}

858. Drago Josipovi} has been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute); Count 16 (murder as a crime against humanity under Article 5(a) of the Statute); and Count 18 (other inhumane acts as a crime against humanity under Article 5(i) of the Statute).

859. As far as persecution is concerned, Drago Josipovi} played an active role in the killing of Bosnian Muslim civilians in Ahmi}i, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmi}i-[anti}i region. In particular, Drago Josipovi} participated in the attack on the Pušćul house, during which the house was burnt down and Musafer Pušćul was killed and the family was expelled from their home after having been forced to witness the murder of Musafer Pušćul. He also participated in the attack on the house of Nazif Ahmi} in which Nazif and his 14-year old son were killed and he was actively involved in the burning of private property. The attack was launched in the early hours of the morning, allowing the victims no opportunity whatsoever to escape.

860. In mitigation, the evidence shows that Drago Josipovi} lent an HVO army vest to Mr. Osmanovi}, a Muslim, to assist him to escape. During the attack on 16 April he stopped other soldiers from killing Witness DD. Another factor in mitigation is that he voluntarily surrendered to the International Tribunal on 6 October 1997.

(d) Vladimir [anti}

861. Vladimir [anti} has been found guilty on Count 1 (persecution as a crime against humanity under Article 5(h) of the Statute); Count 16 (murder as a crime against humanity under Article 5(a) of the Statute); and Count 18 (other inhumane acts as a crime against humanity under Article 5(i) of the Statute).

862. Concerning the conviction on the persecution count, Vladimir Šanti}'s role was most serious, since he was a commander, who assisted in the strategic planning of the whole attack. He also passed on orders from his superiors to his subordinates, which amounted to the reissuing of the orders that were illegal in the circumstances. This role renders particularly grave his participation in the offences committed. Furthermore, he played an active role in the killing of Bosnian Muslim civilians in Ahmi}i, the destruction of Bosnian Muslim homes and property and the expulsion of Bosnian Muslims from the Ahmi}i-[anti}i region. In particular, Vladimir [anti} participated in the attack on the Pu{ćul house, during which the house was burnt down, Musafer Pu{ćul was

killed and the family was expelled from their home after having been forced to witness the murder of Musafer Pu{ćul. The attack was launched in the early hours of the morning, allowing the victims no opportunity whatsoever to escape.

863. Vladimir Šanti} voluntarily surrendered to the International Tribunal on 6 October 1997 which is treated by the Trial Chamber as a mitigating circumstance.

D. The Sentence to be Imposed for a Multiple Conviction

864. Drago Josipovi} and Vladimir [anti} have been convicted on more than one count.

865. The Trial Chamber has dealt with the problems relating to multiple convictions above. Here it will suffice to say the following: Article 48 of the SFRY Criminal Code, on the one hand, provides for the imposition of a single or composite sentence where an accused has been convicted for more than one criminal act based on the commission of one deed or several deeds. It also provides that a court shall first assess the sentence for each of the criminal acts before determining the composite sentence.

866. Where an accused has been convicted on more than one count based on the commission of one or several deeds, the practice of the International Tribunal, on the other hand, has been to impose sentences on each count to be served concurrently.[997]

867. In practice, there is no real difference in effect between the imposition of concurrent sentences for multiple sentences and one composite sentence for multiple offences. In the unlikely event of there being uncertainty about the length of the concurrent or consecutive sentences to be served, the State of imprisonment could approach the International Tribunal for clarification. Similarly, if a convicted person is eligible for pardon or commutation of sentences according to the law of the State of

[997] *Delali} et al.*, Judgement, 16 Nov. 1998, para. 1286; *Tadi},* Sentencing Judgement, 14 July 1997, para. 75; *Prosecutor v. Tadi}*, (IT-94-1-T*bis*-R117), Sentencing Judgement, Trial Chamber, 11 Nov. 1999, (hereafter *Tadi},* Sentencing Judgement II, 11 Nov. 1999), p. 17; *Furundžija,* Judgement, 10 Dec. 1998, paras. 292-296 and p. 112 (Disposition).

imprisonment, the State must inform the President of the Tribunal, who will determine whether pardon or commutation is appropriate. Further, in the event of a succesful appeal on any count, there would be no problems with the sentences.

868. The Trial Chamber will thus follow the sentencing practice of the International Tribunal.

VIII. DISPOSITION

A. Sentences

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

1. Dragan Papi}

With respect to the accused, Dragan Papi}:

Count 1: NOT GUILTY of a Crime against Humanity (persecution).

2. Zoran Kupre{ki}

With respect to the accused, Zoran Kupre{ki}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Zoran Kupre{ki} to **10** years' imprisonment.

Count 2: NOT GUILTY of a Crime against Humanity (murder).
Count 3: NOT GUILTY of a Violation of the Laws or Customs of War (murder).
Count 4: NOT GUILTY of a Crime against Humanity (murder).
Count 5: NOT GUILTY of a Violation of the Laws or Customs of War (murder).
Count 6: NOT GUILTY of a Crime against Humanity (murder).
Count 7: NOT GUILTY of a Violation of the Laws or Customs of War (murder).
Count 8: NOT GUILTY of a Crime against Humanity (murder).
Count 9: NOT GUILTY of a Violation of the Laws or Customs of War (murder).
Count 10: NOT GUILTY of a Crime against Humanity (other inhumane acts).
Count 11: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

3. Mirjan Kupre{ki}

With respect to the accused, Mirjan Kupre{ki}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Mirjan Kupre{ki} to **8** years' imprisonment.

Count 2: NOT GUILTY of a Crime against Humanity (murder).
Count 3: NOT GUILTY of a Violation of the Laws or Customs of War (murder).
Count 4: NOT GUILTY of a Crime against Humanity (murder).
Count 5: NOT GUILTY of a Violation of the Laws or Customs of War (murder).
Count 6: NOT GUILTY of a Crime against Humanity (murder).
Count 7: NOT GUILTY of a Violation of the Laws or Customs of War (murder).
Count 8: NOT GUILTY of a Crime against Humanity (murder).
Count 9: NOT GUILTY of a Violation of the Laws or Customs of War (murder).
Count 10: NOT GUILTY of a Crime against Humanity (other inhumane acts).
Count 11: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

4. Vlatko Kupre{ki}

With respect to the accused, Vlatko Kupre{ki}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Vlatko Kupre{ki} to **6** years' imprisonment.

Count 12: NOT GUILTY of a Crime against Humanity (murder).
Count 13: NOT GUILTY of a Violation of the Laws or Customs of War (murder).
Count 14: NOT GUILTY of a Crime against Humanity (other inhumane acts).

Count 15: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

5. Drago Josipovi}

With respect to the accused, Drago Josipovi}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Drago Josipovi} to **10** years' imprisonment.

Count 16: GUILTY of a Crime against Humanity (murder).

For murder as a Crime against Humanity, the Trial Chamber sentences Drago Josipovi} to **15** years' imprisonment.

Count 17: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 18: GUILTY of a Crime against Humanity (other inhumane acts).

For inhumane acts as a Crime against Humanity, the Trial Chamber sentences Drago Josipovi} to **10** years' imprisonment.

Count 19: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

6. Vladimir [anti}

With respect to the accused, Vladimir [anti}:

Count 1: GUILTY of a Crime against Humanity (persecution).

For persecution as a Crime against Humanity, the Trial Chamber sentences Vladimir Šanti} to **25** years' imprisonment.

Count 16: GUILTY of a Crime against Humanity (murder).

For murder as a Crime against Humanity, the Trial Chamber sentences Vladimir Šanti} to **15** years' imprisonment.

Count 17: NOT GUILTY of a Violation of the Laws or Customs of War (murder).

Count 18: GUILTY of a Crime against Humanity (other inhumane acts).

For inhumane acts as a Crime against Humanity, the Trial Chamber sentences Vladimir Šanti} to **10** years' imprisonment.

Count 19: NOT GUILTY of a Violation of the Laws or Customs of War (cruel treatment).

B. Concurrence of Sentences

The sentences of Drago Josipovi} and Vladimir Šanti} are to be served concurrently, *inter se*.

C. Credit for Time Served

Pursuant to Rule 101(D) of the Rules, a convicted person is entitled to credit for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

1. Zoran Kupre{ki}

Zoran Kupre{ki} surrendered to the International Tribunal on 6 October 1997. Accordingly, 27 months and 8 days shall be deducted from the sentence imposed on Zoran Kupre{ki}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Zoran Kupre{ki}'s sentence, subject to the above mentioned deduction, shall begin to run from today.

2. Mirjan Kupre{ki}

Mirjan Kupre{ki} surrendered to the International Tribunal on 6 October 1997. Accordingly, 27 months and 8 days shall be deducted from the sentence imposed on Mirjan Kupre{ki}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Mirjan Kupre{ki}'s sentence, subject to the above mentioned deduction, shall begin to run from today.

3. Vlatko Kupre{ki}

Vlatko Kupre{ki} was arrested on 18 December 1997. Accordingly, 24 months and 28 days shall be deducted from the sentence imposed on Vlatko Kupre{ki}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Vlatko Kupre{ki}'s sentence, subject to the above mentioned deduction, shall begin to run from today.

4. Drago Josipovi}

Drago Josipovi} surrendered to the International Tribunal on 6 October 1997. Accordingly, 27 months and 8 days shall be deducted from the sentence imposed on Drago Josipovi}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Drago Josipovi}'s sentence, subject to the above-mentioned deduction, shall begin to run from today.

5. Vladimir [anti}

Vladimir [anti} surrendered to the International Tribunal on 6 October 1997. Accordingly, 27 months and 8 days shall be deducted from the sentence imposed on Vladimir [anti}, together with such additional time as he may serve pending the determination of any final appeal. In accordance with Rule 102 of the Rules, Vladimir

[anti}'s sentence, subject to the above-mentioned deduction, shall begin to run from today.

D. Enforcement of Sentences

Pursuant to Article 27 of the Statute and Rule 103, Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti} will serve their sentences in a State or States designated by the President of the International Tribunal.

The transfer of Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti} shall be effected as soon as possible after the time-limit for appeal has elapsed. In the event that notice of appeal is given, the transfer of the accused Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti}, if compelled by the outcome of such an appeal, shall be effected as soon as possible after the determination of the final appeal by the Appeals Chamber. Until such time as their transfer is effected, Zoran Kupre{ki}, Mirjan Kupre{ki}, Vlatko Kupre{ki}, Drago Josipovi} and Vladimir [anti} shall remain in the custody of the International Tribunal, in accordance with Rule 102.

E. Immediate Release of Dragan Papi}

Pursuant to Rule 99(A), the Trial Chambers orders the immediate release of Dragan Papi} from the United Nations Detention Unit. This order is without prejudice to any such further order as may be made by the Trial Chamber pursuant to Rule 99(B).

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

_____

Antonio Cassese

Presiding

5187

Richard May

Florence Ndepele Mwachande Mumba

Dated this fourteenth day of January 2000,
At The Hague,
The Netherlands.

[Seal of the Tribunal]

5188

ANNEX A - The Amended Indictment

THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

Case: IT-95-16-PT

IN THE TRIAL CHAMBER

Before: **Judge Antonio Cassese, Presiding**
Judge Richard May
Judge Florence Mumba

Registrar: **Mrs. de Sampayo Garrido-Nijgh**

Date Filed: **09 February 1998**

THE PROSECUTOR

v.

ZORAN KUPRE[KI]
MIRJAN KUPRE[KI]
VLATKO KUPRE[KI]
DRAGO JOSIPOVI]
DRAGAN PAPI]
VLADIMIR [ANTI]
also known as "VLADO"

AMENDED INDICTMENT

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia, pursuant to her authority under Article 18 of the Statute of the Tribunal, charges:

ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI]

with **CRIMES AGAINST HUMANITY** and **VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR**, as set forth below:

5189

Background

1. On 03 March 1992, Bosnia and Herzegovina declared its independence; it was recognised as an independent state by the European Council on 06 April 1992.

2. From at least 03 July 1992, the Croatian Community of Herzeg-Bosna ("HZ-HB") considered itself an independent political entity inside Bosnia and Herzegovina.

3. From at least October 1992 until at least the end of May 1993, the HZ-HB armed forces, known as the Croatian Defence Council ("HVO"), were engaged in an armed conflict with the armed forces of the government of Bosnia and Herzegovina.

4. From the outset of hostilities in January 1993, the HVO systematically attacked villages chiefly inhabited by Bosnian Muslims in the Lašva River Valley Region in Central Bosnia and Herzegovina. These attacks resulted in the death and wounding of numerous civilians.

5. The persecution of Bosnian Muslim civilians escalated in frequency throughout the early part of 1993, culminating in simultaneous attacks throughout the Lašva River Valley Region on 16 April 1993.

6. On 16 April 1993, at approximately 0530 hrs., HVO forces attacked the town of Vitez and the nearby villages of Donja Ve~eriska, Sivrino Selo, [anti}i, Ahmi}i, Nadioci, Stara Bila, Ga~ice, Piri}i and Preo~ica. All the villages are within a ten kilometre radius from the village of Ahmi}i.

7. During the attacks, groups of HVO soldiers went from house-to-house killing and wounding Bosnian Muslim civilians and burning houses, barns and livestock. The offensive, which lasted several days, was a highly co-ordinated military operation involving hundreds of HVO troops.

5190

8. When the HVO forces attacked the villages and towns in the Lašva River Valley on 16 April 1993, the village of Ahmi}i experienced significant killing and destruction. Located approximately five kilometres east of Vitez, Ahmi}i had a pre-attack population of approximately 466 inhabitants, with approximately 356 Bosnian Muslims and 87 Bosnian Croats. After the attack, there were no Bosnian Muslims left living in Ahmi}i.

9. ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] helped prepare the April attack on the Ahmi}i-[anti}i civilians by: participating in military training and arming themselves; evacuating Bosnian Croat civilians the night before the attack; organising HVO soldiers, weapons and ammunition in and around the village of Ahmi}i-[anti}i; preparing their homes and the homes of their relatives as staging areas and firing locations for the attack; and, by concealing from the other residents that the attack was imminent.

10. The HVO attack on Ahmi}i-[anti}i targeted houses, stables, sheds and livestock owned by Bosnian Muslim civilians. The HVO first shelled Ahmi}i-[anti}i from a distance, then groups of soldiers went from house-to-house attacking civilians and their properties using flammable tracer rounds and explosives. The HVO soldiers deliberately and systematically fired upon Bosnian Muslim civilians. The HVO soldiers also set fire to virtually every Bosnian Muslim-owned house in Ahmi}i-[anti}i.

11. Approximately 103 Bosnian Muslim civilians were killed in and around Ahmi}i-[anti}i. Of the 103 persons killed, approximately 33 were women and children. The HVO soldiers destroyed approximately 176 Bosnian Muslim houses in Ahmi}i-[anti}i, along with two mosques.

The Accused

12. ZORAN KUPRE[KI], son of Anto and brother of Mirjan, was born on 23 September 1958 in the village of Piri}i. He was a HVO soldier in the Ahmi}i area. Before the war, he operated a business in Ahmi}i with his cousin, VLATKO KUPRE[KI].

13. MIRJAN KUPRE[KI], son of Anto and brother of Zoran, was born on 21 October 1963 in the town of Vitez. He was a HVO soldier in the Ahmi}i area, together with his brother, ZORAN KUPRE[KI], and cousin, VLATKO KUPRE[KI].

14. VLATKO KUPRE[KI], son of Franjo, was born on 01 January 1958 in the village of Piri}i. Before the war, he lived and worked in Ahmi}i where he operated a business with his cousin, ZORAN KUPRE[KI]. He was a HVO soldier in the Ahmi}i area, together with his cousins, MIRJAN KUPRE[KI] and ZORAN KUPRE[KI].

15. DRAGO JOSIPOVI], son of Niko, was born on 14 February 1955 in [anti}i. Before the war, he was a chemical worker by profession. He was a HVO soldier in [anti}i.

16. DRAGAN PAPI] was born in the village of Šanti}i on 15 July 1967. He lived in Ahmi}i, Vitez and was a HVO soldier.

17. VLADIMIR ŠANTI], also known as "VLADO", was born on 01 April 1958 in Donja Ve~eriska. Before the war he lived in Vitez and was a policeman by profession. He was a HVO soldier in Vitez.

General Allegations

18. At all times relevant to this indictment, the accused were required to abide by the laws or customs governing the conduct of war.

19. Each of the accused is individually responsible for the crimes alleged against him in this indictment, pursuant to Article 7(1) of the Tribunal Statute. Individual criminal

responsibility includes committing, planning, instigating, ordering, or otherwise aiding and abetting, in the planning, preparation or execution of any crimes referred to in Articles 2, 3 and 5 of the Tribunal Statute.

Charges

COUNT 1

(Persecutions)

20. From October 1992 until April 1993, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] persecuted the Bosnian Muslim inhabitants of Ahmi}i-[anti}i and its environs on political, racial or religious grounds by planning, organising and implementing an attack which was designed to remove or "cleanse" all Bosnian Muslims from the village and surrounding areas.

21. As part of the persecution, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] participated in or aided and abetted:

(a) the deliberate and systematic killing of Bosnian Muslim civilians;

(b) the comprehensive destruction of Bosnian Muslim homes and property; and

(c) the organised detention and expulsion of the Bosnian Muslims from Ahmi}i-[anti}i and its environs.

22. By their participation in the acts described in paragraphs 9, 10, 20 and 21, ZORAN KUPRE[KI], MIRJAN KUPRE[KI], VLATKO KUPRE[KI], DRAGO JOSIPOVI], DRAGAN PAPI] and VLADIMIR [ANTI] committed the following crime:

Count 1: A **CRIME AGAINST HUMANITY**, punishable under Article 5(h) (persecutions on political, racial or religious grounds) of the Statute of the Tribunal.

COUNTS 2-9
(Ahmi} Family)
(Murder, Inhumane Acts and Cruel Treatment)

23. When the attack on Ahmi}i-[anti}i commenced in the early morning of 16 April 1993, Sakib Ahmi} was residing with his son, Naser Ahmi}, Naser's wife, Zehrudina, and their two children, Elvis (age 4) and Sejad (age 3 months).

24. Armed with an automatic weapon, ZORAN KUPRE[KI] entered the Ahmi} house and shot and killed Naser Ahmi}. ZORAN KUPRE[KI] then shot and wounded Zehrudina Ahmi}.

25. MIRJAN KUPRE[KI] then entered the Ahmić house and poured flammable liquid onto the furniture to set the house on fire. Then MIRJAN KUPRE[KI] and ZORAN KUPRE[KI], aiding and abetting each other, directed gunfire at the two children, Elvis and Sejad Ahmi}. When Sakib Ahmi} fled the burning residence, Zehrudina, who was wounded, was still alive, but ultimately perished in the fire.

26. Naser Ahmi}, Zehrudina Ahmi}, Elvis Ahmi} and Sejad Ahmi} all died and Sakib Ahmi} received burns over his head, face and hands.

27. By the foregoing acts, ZORAN KUPRE[KI] and MIRJAN KUPRE[KI], aiding and abetting each other, committed the following crimes:

Counts 2 and 3
(Murder of Naser Ahmić)

Count 2: By killing Naser Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI] committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 3: By killing Naser Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the

Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 4 and 5
(Murder of Zehrudina Ahmić)

Count 4: By killing Zehrudina Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 5: By killing Zehrudina Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 6 and 7
(Murder of Elvis Ahmić)

Count 6: By killing Elvis Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 7: By killing Elvis Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 8 and 9
(Murder of Sejad Ahmić)

Count 8: By killing Sejad Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**,

punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 9: By killing Sejad Ahmi}, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 10 and 11
(Inhumane Acts and Cruel Treatment of Sakib Ahmi})

Count 10: By killing Sakib Ahmi}'s family before his eyes and causing him severe burns by burning down his home while he was still in it, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **CRIME AGAINST HUMANITY**, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal.

Count 11: By killing Sakib Ahmi}'s family before his eyes and causing him severe burns by burning down his home while he was still in it, ZORAN KUPRE[KI], and MIRJAN KUPRE[KI], committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

COUNTS 12-15
(Pezer Family)
(Murder, Inhumane and Cruel Treatment)

28. Before the 16 April 1993 attack, HVO soldiers armed with automatic rifles congregated at the residence of VLATKO KUPRE[KI] in Ahmi}i. When the attack commenced, several HVO units used VLATKO KUPRE[KI]'s residence as a staging area. Other HVO soldiers shot at Bosnian Muslim civilians from VLATKO KUPRE[KI]'s house throughout the attack.

29. As the shooting continued, members of the Pezer family, who were Bosnian Muslims, gathered in their shelter to hide from HVO soldiers. Shortly thereafter, the Pezer family, along with other Bosnian Muslims who had taken refuge in the shelter, decided to escape through the forest.

30. As the Pezer family, with other Bosnian Muslims, ran by VLATKO KUPRE[KI]'s house toward the forest, VLATKO KUPRE[KI] and other HVO soldiers in front of VLATKO KUPRE[KI]'s house yelled at the fleeing civilians. VLATKO KUPRE[KI] and the HVO soldiers, aiding and abetting each other, shot at the group from in front of VLATKO KUPRE[KI]'s house. As the Pezer family fled toward the forest, VLATKO KUPRE[KI] and other HVO soldiers, aiding and abetting each other, wounded Dženana Pezer, the daughter of Ismail and Fata Pezer, and another woman. Dženana Pezer fell to the ground and Fata Pezer returned to assist her daughter. VLATKO KUPRE[KI] and the HVO soldiers, aiding and abetting each other, then shot Fata Pezer and killed her.

31. By the foregoing acts and omissions, VLATKO KUPRE[KI] committed the following crimes:

Counts 12 and 13
(Murder of Fata Pezer)

Count 12: By participating in or aiding and abetting the killing of Fata Pezer, VLATKO KUPRE[KI] committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 13: By participating in or aiding and abetting the killing of Fata Pezer, VLATKO KUPRE[KI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 14 and 15
(Wounding of Dženana Pezer)

Count 14: By participating in or aiding and abetting in the shooting of Dženana Pezer, VLATKO KUPRE[KI] committed a **CRIME AGAINST HUMANITY**, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal.

Count 15: By participating in or aiding and abetting in the shooting of Dženana Pezer, VLATKO KUPRE[KI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

COUNTS 16-19
(Killing of Musafer Pu{}ul and Burning of the Pu{}ul Home)

32. On 16 April 1993 numerous HVO soldiers, including DRAGO JOSIPOVI] and VLADIMIR [ANTI] attacked the home of Musafer and Suhreta Pu{}ul, while the family, which included two young daughters, was sleeping.

33. During the attack, DRAGO JOSIPOVI], VLADIMIR [ANTI] and other HVO soldiers, aiding and abetting one another, forcibly removed the family from their home and then killed Musafer Pu{}ul.

34. As part of the attack, the HVO soldiers, including DRAGO JOSIPOVI] and VLADIMIR ŠANTI], vandalised the home and then burned it to the ground.

35. By the foregoing acts, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed the following crimes:

Counts 16 and 17
(Murder of Musafer Pu{}ul)

Count 16: By killing or aiding and abetting the killing of Musafer Pu{}ul,

DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **CRIME AGAINST HUMANITY**, punishable under Article 5(a) (murder) of the Statute of the Tribunal.

Count 17: By killing or aiding and abetting the killing of Musafer Pu{}ul, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable by Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (murder) of the Geneva Conventions.

Counts 18 and 19
(Inhumane Acts and Cruel Treatment)

Count 18: By forcibly removing the Pu{}ul family from their home and holding family members nearby while they killed Musafer Pu{}ul, and burned the family home, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **CRIME AGAINST HUMANITY**, punishable by Article 5(i) (inhumane acts) of the Statute of the Tribunal.

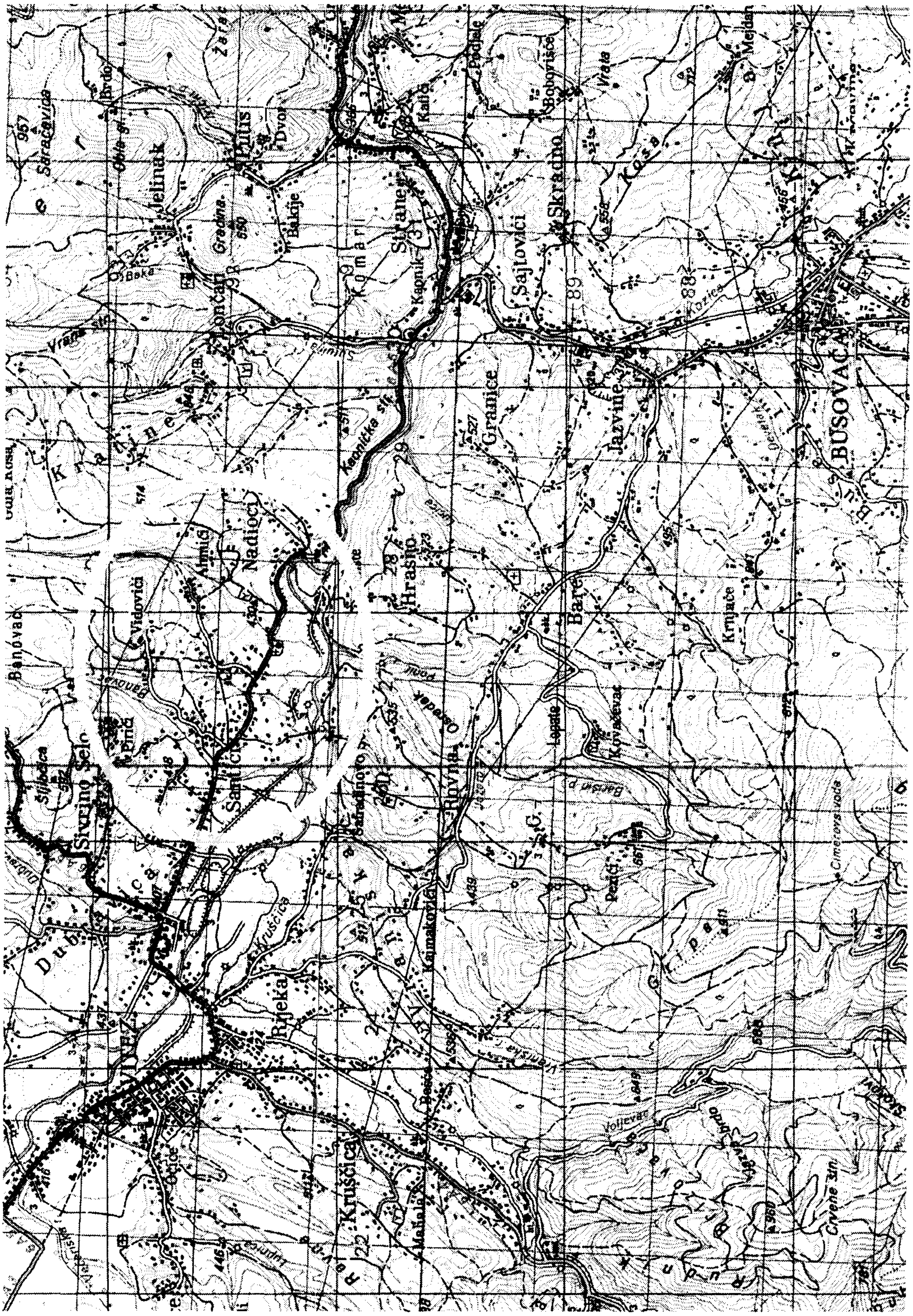
Count 19: By forcibly removing the Pu{}ul family from their home and holding family members nearby while they killed Musafer Pu{}ul, and burned the family home, DRAGO JOSIPOVI] and VLADIMIR [ANTI] committed a **VIOLATION OF THE LAWS OR CUSTOMS OF WAR**, punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.

Date:

Signed:
Graham T. Blewitt
Deputy Prosecutor

5199

Annex B


BUSOVAČA
Jazvine
Granice
Sajtovići
Skradno
Hrasno
Nadioci
Ahmići
Šantići
Vidovići
Pirići
Bare
Rovna
Kruščica
Rijeka
Jelinak
Gradina
Sivrino Selo
Krnjače

5200

Annex C

Nadioci
Bungalow
To Busovača
Rovna
Lasva River
Radak Bridge
Catholic Cemetery
Dragan Papić's House
Drago Josipović's House
Upper Ahmići (Gornji)
Lower Ahmići (Donji)
Lower Mosque
Primary School
Ogrjev
Upper Mosque
Šutra Shop
Gušavci
Kuprešković Houses
Depression
Šantići
Pecan Cafe
Zumić
Pirići
Vitez Road
Busovača
To Vitez
E
S
W
North

ANNEX 7:

Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, at p.259.

S202

INTERNATIONAL COURT OF JUSTICE

YEAR 1996

1996
8 July
General List No. 95

8 July 1996

LEGALITY OF THE THREAT OR USE OF NUCLEAR WEAPONS

Jurisdiction of the Court to give the advisory opinion requested - Article 65, paragraph 1, of the Statute - Body authorized to request an opinion - Article 96, paragraphs 1 and 2, of the Charter - Activities of the General Assembly - "Legal question" - Political aspects of the question posed - Motives said to have inspired the request and political implications that the opinion might have.

Discretion of the Court as to whether or not it will give an opinion - Article 65, paragraph 1, of the Statute - Compelling reasons - Vague and abstract question - Purposes for which the opinion is sought - Possible effects of the opinion on current negotiations - Duty of the Court not to legislate.

Formulation of the question posed - English and French texts - Clear objective - Burden of proof.

Applicable law - International Covenant on Civil and Political Rights - Arbitrary deprivation of life - Convention on the Prevention and Punishment of the Crime of Genocide - Intent against a group as such - Existing norms relating to the safeguarding and protection of the environment - Environmental considerations as an element to be taken into account in the implementation of the law applicable in armed conflict - Application of most directly relevant law: law of the Charter and law applicable in armed conflict.

Unique characteristics of nuclear weapons.

Provisions of the Charter relating to the threat or use of force - Article 2, paragraph 4 - The Charter neither expressly prohibits, nor permits, the use of any specific weapon - Article 51 - Conditions of necessity and proportionality - The notions of "threat" and "use" of force stand together - Possession of nuclear weapons, deterrence and threat.

Specific rules regulating the lawfulness or unlawfulness of the recourse to nuclear weapons as such - Absence of specific prescription authorizing the threat or use of nuclear weapons - Unlawfulness per se*: treaty law - Instruments prohibiting the use of poisoned weapons - Instruments expressly prohibiting the use of certain weapons of mass destruction - Treaties concluded in order to limit the acquisition, manufacture and possession of nuclear weapons, the deployment and testing of nuclear weapons - Treaty of Tlatelolco - Treaty of Rarotonga - Declarations made by nuclear-weapon States on the occasion of the extension of the Non-Proliferation Treaty - Absence of comprehensive and universal conventional prohibition of the use or the threat of use of nuclear weapons as such - Unlawfulness* per se*: customary law - Consistent practice of non-utilization of nuclear weapons - Policy of deterrence - General Assembly resolutions affirming the illegality of nuclear weapons - Continuing tensions between the nascent* opinio juris *and the still strong adherence to the practice of deterrence.*

Principles and rules of international humanitarian law - Prohibition of methods and means of precluding any distinction between civilian and military targets or resulting in unnecessary suffering to combatants - Martens Clause - Principle of neutrality - Applicability of these principles and rules to nuclear weapons - Conclusions.

Right of a State to survival and right to resort to self-defence - Policy of deterrence - Reservations to undertakings given by certain nuclear-weapon States not to resort to such weapons.

Current state of international law and elements of fact available to the Court - Use of nuclear weapons in an extreme circumstance of self-defence in which the very survival of a State is at stake.

Article VI of the Non-Proliferation Treaty - Obligation to negotiate in good faith and to achieve nuclear disarmament in all its aspects.

ADVISORY OPINION

Present: President BEDJAOUI; *Vice-President* SCHWEBEL; *Judges* ODA, GUILLAUME, SHAHABUDDEEN, WEERAMANTRY, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, FERRARI BRAVO, HIGGINS; *Registrar* VALENCIA-OSPINA.

On the legality of the threat or use of nuclear weapons,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The question upon which the advisory opinion of the Court has been requested is set forth in resolution 49/75 K adopted by the General Assembly of the United Nations (hereinafter called the "General Assembly") on 15 December 1994. By a letter dated 19 December 1994, received in the Registry by facsimile on 20 December 1994 and filed in the original on 6 January 1995, the Secretary-General of the United Nations officially communicated to the Registrar the decision taken by the General Assembly to submit the question to the Court for an advisory opinion. Resolution 49/75 K, the English text of which was enclosed with the letter, reads as follows:

> "*The General Assembly*,
>
> *Conscious* that the continuing existence and development of nuclear weapons pose serious risks to humanity, that the continuing existence and development of nuclear weapons pose serious risks to humanity,
>
> *Mindful* that States have an obligation under the Charter of the United Nations to refrain from the threat or use of force against the territorial integrity or political independence of any State. that States have an obligation under the Charter of the United Nations to refrain from the threat or use of force against the territorial integrity or political independence of any State.

Recalling its resolutions 1653 (XVI) of 24 November 1961, 33/71 B of 14 December 1978, 34/83 G of 11 December 1979, 35/152 D of 12 December 1980, 36/92 1 of 9 December 1981, 45/59 B of 4 December 1990 and 46/37 D of 6 December 1991, in which it declared that the use of nuclear weapons would be a violation of the Charter and a crime against humanity, its resolutions 1653 (XVI) of 24 November 1961, 33/71 B of 14 December 1978, 34/83 G of 11 December 1979, 35/152 D of 12 December 1980, 36/92 1 of 9 December 1981, 45/59 B of 4 December 1990 and 46/37 D of 6 December 1991, in which it declared that the use of nuclear weapons would be a violation of the Charter and a crime against humanity,

Welcoming the progress made on the prohibition and elimination of weapons of mass destruction, including the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction [Resolution 2826 (XXVI), Annex.] and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction [See *Official Records of the 47th Session of the General Assembly, Supplement No. 27* (A/47/27), Appendix I.], the progress made on the prohibition and elimination of weapons of mass destruction, including the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction [Resolution 2826 (XXVI), Annex.] and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction [See *Official Records of the 47th Session of the General Assembly, Supplement No. 27* (A/47/27), Appendix I.],

Convinced that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war, that the complete elimination of nuclear weapons is the only guarantee against the threat of nuclear war,

Noting the concerns expressed in the Fourth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons that insufficient progress had been made towards the complete elimination of nuclear weapons at the earliest possible time, the concerns expressed in the Fourth Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons that insufficient progress had been made towards the complete elimination of nuclear weapons at the earliest possible time,

Recalling that, convinced of the need to strengthen the rule of law in international relations, it has declared the period 1990-1999 the United Nations Decade of International Law [Resolution 44/23.], that, convinced of the need to strengthen the rule of law in international relations, it has declared the period 1990-1999 the United Nations Decade of International Law [Resolution 44/23.],

Noting that Article 96, paragraph 1, of the Charter empowers the General Assembly to request the International Court of Justice to give an advisory opinion on any legal question, that Article 96, paragraph 1, of the Charter empowers the General Assembly to request the International Court of Justice to give an advisory opinion on any legal question,

Recalling the recommendation of the Secretary-General, made in his report entitled 'An Agenda for Peace' [4A/47/277-S/24111.], that United Nations organs that are authorized to take advantage of the advisory competence of the International Court of Justice turn to the Court more frequently for such opinions, the recommendation of the Secretary-General, made in his report entitled 'An Agenda for Peace' [4A/47/277-S/24111.], that United

Nations organs that are authorized to take advantage of the advisory competence of the International Court of Justice turn to the Court more frequently for such opinions,

Welcoming resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law, including the Constitution of the World Health Organization, resolution 46/40 of 14 May 1993 of the Assembly of the World Health Organization, in which the organization requested the International Court of Justice to give an advisory opinion on whether the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligations under international law, including the Constitution of the World Health Organization,

Decides, pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'", pursuant to Article 96, paragraph 1, of the Charter of the United Nations, to request the International Court of Justice urgently to render its advisory opinion on the following question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'"

2. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations communicated to the Court a dossier of documents likely to throw light upon the question.

3. By letters dated 21 December 1994, the Registrar, pursuant to Article 66, paragraph 1, of the Statute, gave notice of the request for an advisory opinion to all States entitled to appear before the Court.

4. By an Order dated 1 February 1995 the Court decided that the States entitled to appear before it and the United Nations were likely to be able to furnish information on the question, in accordance with Article 66, paragraph 2, of the Statute. By the same Order, the Court fixed, respectively, 20 June 1995 as the time-limit within which written statements might be submitted to it on the question, and 20 September 1995 as the time-limit within which States and organizations having presented written statements might submit written comments on the other written statements in accordance with Article 66, paragraph 4, of the Statute. In the aforesaid Order, it was stated in particular that the General Assembly had requested that the advisory opinion of the Court be rendered "urgently"; reference was also made to the procedural time-limits already fixed for the request for an advisory opinion previously submitted to the Court by the World Health Organization on the question of the *Legality of the use by a State of nuclear weapons in armed conflict*.

On 8 February 1995, the Registrar addressed to the States entitled to appear before the Court and to the United Nations the special and direct communication provided for in Article 66, paragraph 2, of the Statute.

5. Written statements were filed by the following States: Bosnia and Herzegovina, Burundi, Democratic People's Republic of Korea, Ecuador, Egypt, Finland, France, Germany, India, Ireland, Islamic Republic of Iran, Italy, Japan, Lesotho, Malaysia, Marshall Islands, Mexico, Nauru, Netherlands, New Zealand, Qatar, Russian Federation, Samoa, San Marino, Solomon Islands, Sweden, United Kingdom of Great Britain and Northern Ireland, and United States of America. In addition, written comments on those written statements were submitted by the following States: Egypt, Nauru and Solomon Islands. Upon

S206

receipt of those statements and comments, the Registrar communicated the text to all States ha part in the written proceedings.

6. The Court decided to hold public sittings, opening on 30 October 1995, at which oral statements might be submitted to the Court by any State or organization which had been considered likely to be able to furnish information on the question before the Court. By letters dated 23 June 1995, the Registrar requested the States entitled to appear before the Court and the United Nations to inform him whether they intended to take part in the oral proceedings; it was indicated, in those letters, that the Court had decided to hear, during the same public sittings, oral statements relating to the request for an advisory opinion from the General Assembly as well as oral statements concerning the above-mentioned request for an advisory opinion laid before the Court by the World Health Organization, on the understanding that the United Nations would be entitled to speak only in regard to the request submitted by the General Assembly, and it was further specified therein that the participants in the oral proceedings which had not taken part in the written proceedings would receive the text of the statements and comments produced in the course of the latter.

7. By a letter dated 20 October 1995, the Republic of Nauru requested the Court's permission to withdraw the written comments submitted on its behalf in a document entitled "Response to submissions of other States". The Court granted the request and, by letters dated 30 October 1995, the Deputy-Registrar notified the States to which the document had been communicated, specifying that the document consequently did not form part of the record before the Court.

8. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and comments submitted to the Court accessible to the public, with effect from the opening of the oral proceedings.

9. In the course of public sittings held from 30 October 1995 to 15 November 1995, the Court heard oral statements in the following order by:

For the Commonwealth of Australia:

Mr. Gavan Griffith, Q.C., Solicitor-General of Australia, Counsel;

The Honourable Gareth Evans, Q.C., Senator, Minister for Foreign Affairs, Counsel;

For the Arab Republic of Egypt:

Mr. George Abi-Saab, Professor of International Law, Graduate Institute of International Studies, Geneva, Member of the Institute of International Law;

For the French Republic:

Mr. Marc Perrin de Brichambaut, Director of Legal Affairs, Ministry of Foreign Affairs;

Mr. Alain Pellet, Professor of International Law, University of Paris X and Institute of Political Studies, Paris;

For the Federal Republic of Germany:

Mr. Hartmut Hillgenberg, Director-General of Legal Affairs, Ministry of Foreign Affairs;

5207

For Indonesia:

H.E. Mr. Johannes Berchmans Soedarmanto Kardarisman, Ambassador of Indonesia to the Netherlands;

For Mexico:

H.E. Mr. Sergio González Gálvez, Ambassador, Under-Secretary of Foreign Relations;

For the Islamic Republic of Iran:

H.E. Mr. Mohammad J. Zarif, Deputy Minister, Legal and International Affairs, Ministry of Foreign Affairs;

For Italy:

Mr. Umberto Leanza, Professor of International Law at the Faculty of Law at the University of Rome "Tor Vergata", Head of the Diplomatic Legal Service at the Ministry of Foreign Affairs;

For Japan:

H.E. Mr. Takekazu Kawamura, Ambassador, Director General for Arms Control and Scientific Affairs, Ministry of Foreign Affairs;

Mr. Takashi Hiraoka, Mayor of Hiroshima;

Mr. Iccho Itoh, Mayor of Nagasaki;

For Malaysia:

H.E. Mr. Tan Sri Razali Ismail, Ambassador, Permanent Representative of Malaysia to the United Nations;

Dato' Mohtar Abdullah, Attorney-General;

For New Zealand:

The Honourable Paul East, Q.C., Attorney-General of New Zealand;

Mr. Allan Bracegirdle, Deputy Director of Legal Division of the New Zealand Ministry for Foreign Affairs and Trade;

For the Philippines:

H.E. Mr. Rodolfo S. Sanchez, Ambassador of the Philippines to the Netherlands;

Professor Merlin N. Magallona, Dean, College of Law, University of the Philippines;

For Qatar:

H.E. Mr. Najeeb ibn Mohammed Al-Nauimi, Minister of Justice;

For the Russian Federation:

Mr. A. G. Khodakov, Director, Legal Department, Ministry of Foreign Affairs;

For San Marino:

Mrs. Federica Bigi, Embassy Counsellor, Official in Charge of Political Directorate, Department of Foreign Affairs;

For Samoa:

H.E. Mr. Neroni Slade, Ambassador and Permanent Representative of Samoa to the United Nations;

Mrs. Laurence Boisson de Chazournes, Assistant Professor, Graduate Institute of International Studies, Geneva;

Mr. Roger S. Clark, Distinguished Professor of Law, Rutgers University School of Law, Camden, New Jersey;

For the Marshall Islands:

The Honourable Theodore G. Kronmiller, Legal Counsel, Embassy of the Marshall Islands to the United States of America;

Mrs. Lijon Eknilang, Council Member, Rongelap Atoll Local Government;

For the Solomon Islands:

The Honourable Victor Ngele, Minister of Police and National Security;

Mr. Jean Salmon, Professor of Law, *Université libre de Bruxelles*;

Mr. Eric David, Professor of Law, *Université libre de Bruxelles*;

Mr. Philippe Sands, Lecturer in Law, School of Oriental and African Studies, London University, and Legal Director, Foundation for International Environmental Law and Development;

Mr. James Crawford, Whewell Professor International Law, University of Cambridge;

For Costa Rica:

Mr. Carlos Vargas-Pizarro, Legal Counsel and Special Envoy of the Government of Costa Rica;

S209

For the United Kingdom of Great Britain and Northern Ireland:

The Rt. Honourable Sir Nicholas Lyell, Q.C., M.P., Her Majesty's *Attorney-General;*

For the United States of America:

Mr. Conrad K. Harper, Legal Adviser, US Department of State;

Mr. Michael J. Matheson, Principal Deputy Legal Adviser, US Department of State;

Mr. John H. McNeill, Senior Deputy General Counsel, US Department of Defense;

For Zimbabwe:

Mr. Jonathan Wutawunashe, Chargé d'affaires a.i., Embassy of the Republic of Zimbabwe in the Netherlands;

Questions were put by Members of the Court to particular participants in the oral proceedings, who replied in writing, as requested, within the prescribed time-limits; the Court having decided that the other participants could also reply to those questions on the same terms, several of them did so. Other questions put by Members of the Court were addressed, more generally, to any participant in the oral proceedings; several of them replied in writing, as requested, within the prescribed time-limits.

*
* *

10. The Court must first consider whether it has the jurisdiction to give a reply to the request of the General Assembly for an Advisory Opinion and whether, should the answer be in the affirmative, there is any reason it should decline to exercise any such jurisdiction.

The Court draws its competence in respect of advisory opinions from Article 65, paragraph 1, of its Statute. Under this Article, the Court

> "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

11. For the Court to be competent to give an advisory opinion, it is thus necessary at the outset for the body requesting the opinion to be "authorized by or in accordance with the Charter of the United Nations to make such a request". The Charter provides in Article 96, paragraph 1, that:

> "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question."

Some States which oppose the giving of an opinion by the Court argued that the General Assembly and Security Council are not entitled to ask for opinions on matters totally unrelated to their work. They suggested that, as in the case of organs and agencies acting under Article 96, paragraph 2, of the Charter, and notwithstanding the difference in wording between that provision and paragraph 1 of the same Article, the General Assembly and Security Council may ask for an advisory opinion on a legal question only within the scope of their activities.

5210

In the view of the Court, it matters little whether this interpretation of Article 96, paragraph 1, is not correct; in the present case, the General Assembly has competence in any event to seise the Court. Indeed, Article 10 of the Charter has conferred upon the General Assembly a competence relating to "any questions or any matters" within the scope of the Charter. Article 11 has specifically provided it with a competence to "consider the general principles . . . in the maintenance of international peace and security, including the principles governing disarmament and the regulation of armaments". Lastly, according to Article 13, the General Assembly "shall initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification".

12. The question put to the Court has a relevance to many aspects of the activities and concerns of the General Assembly including those relating to the threat or use of force in international relations, the disarmament process, and the progressive development of international law. The General Assembly has a long-standing interest in these matters and in their relation to nuclear weapons. This interest has been manifested in the annual First Committee debates, and the Assembly resolutions on nuclear weapons; in the holding of three special sessions on disarmament (1978, 1982 and 1988) by the General Assembly, and the annual meetings of the Disarmament Commission since 1978; and also in the commissioning of studies on the effects of the use of nuclear weapons. In this context, it does not matter that important recent and current activities relating to nuclear disarmament are being pursued in other fora.

Finally, Article 96, paragraph 1, of the Charter cannot be read as limiting the ability of the Assembly to request an opinion only in those circumstances in which it can take binding decisions. The fact that the Assembly's activities in the above-mentioned field have led it only to the making of recommendations thus has no bearing on the issue of whether it had the competence to put to the Court the question of which it is seised.

13. The Court must furthermore satisfy itself that the advisory opinion requested does indeed relate to a "legal question" within the meaning of its Statute and the United Nations Charter.

The Court has already had occasion to indicate that questions

> "framed in terms of law and rais[ing] problems of international law . . . are by their very nature susceptible of a reply based on law . . . [and] appear . . . to be questions of a legal character" (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975,* p. 18, para. 15).

The question put to the Court by the General Assembly is indeed a legal one, since the Court is asked to rule on the compatibility of the threat or use of nuclear weapons with the relevant principles and rules of international law. To do this, the Court must identify the existing principles and rules, interpret them and apply them to the threat or use of nuclear weapons, thus offering a reply to the question posed based on law.

The fact that this question also has political aspects, as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a "legal question" and to "deprive the Court of a competence expressly conferred on it by its Statute" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 172, para. 14). Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law (cf. *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, I.C.J. Reports 1947-1948*, pp. 61-62; *Competence of the General Assembly for the Admission of a State to the United Nations, Advisory*

5211

Opinion, I.C.J. Reports 1950, pp. 6-7; *Certain Expenses of the United Nations (Article 17, para. 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155).

Furthermore, as the Court said in the Opinion it gave in 1980 concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*:

> "Indeed, in situations in which political considerations are prominent it may be particularly necessary for an international organization to obtain an advisory opinion from the Court as to the legal principles applicable with respect to the matter under debate . . ." (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 87, para. 33.)

The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion.

*

14. Article 65, paragraph 1, of the Statute provides: "The Court *may* give an advisory opinion . . ." (Emphasis added.) This is more than an enabling provision. As the Court has repeatedly emphasized, the Statute leaves a discretion as to whether or not it will give an advisory opinion that has been requested of it, once it has established its competence to do so. In this context, the Court has previously noted as follows:

> "The Court's Opinion is given not to the States, but to the organ which is entitled to request it; the reply of the Court, itself an 'organ of the United Nations', represents its participation in the activities of the Organization, and, in principle, should not be refused." (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; see also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 19; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 189.)

The Court has constantly been mindful of its responsibilities as "the principal judicial organ of the United Nations" (Charter, Art. 92). When considering each request, it is mindful that it should not, in principle, refuse to give an advisory opinion. In accordance with the consistent jurisprudence of the Court, only "compelling reasons" could lead it to such a refusal *(Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 86; *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 155; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 183; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 21; and *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 191). There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory

S212

opinion in the history of the present Court; in the case concerning the *Legality of the Use by a S[illegible] Nuclear Weapons in Armed Conflict*, the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case. The Permanent Court of International Justice took the view on only one occasion that it could not reply to a question put to it, having regard to the very particular circumstances of the case, among which were that the question directly concerned an already existing dispute, one of the States parties to which was neither a party to the Statute of the Permanent Court nor a Member of the League of Nations, objected to the proceedings, and refused to take part in any way *(Status of Eastern Carelia, P.C.I.J., Series B, No. 5)*.

15. Most of the reasons adduced in these proceedings in order to persuade the Court that in the exercise of its discretionary power it should decline to render the opinion requested by General Assembly resolution 49/75K were summarized in the following statement made by one State in the written proceedings:

> "The question presented is vague and abstract, addressing complex issues which are the subject of consideration among interested States and within other bodies of the United Nations which have an express mandate to address these matters. An opinion by the Court in regard to the question presented would provide no practical assistance to the General Assembly in carrying out its functions under the Charter. Such an opinion has the potential of undermining progress already made or being made on this sensitive subject and, therefore, is contrary to the interest of the United Nations Organization." (United States of America, Written Statement, pp. 1-2; cf. pp. 3-7, II. See also United Kingdom, Written Statement, pp. 9-20, paras. 2.23-2.45; France, Written Statement, pp. 13-20, paras. 5-9; Finland, Written Statement, pp. 1-2; Netherlands, Written Statement, pp. 3-4, paras. 6-13; Germany, Written Statement, pp. 3-6, para. 2*(b)*.))

In contending that the question put to the Court is vague and abstract, some States appeared to mean by this that there exists no specific dispute on the subject-matter of the question. In order to respond to this argument, it is necessary to distinguish between requirements governing contentious procedure and those applicable to advisory opinions. The purpose of the advisory function is not to settle ‹ at least directly ‹ disputes between States, but to offer legal advice to the organs and institutions requesting the opinion (cf. *Interpretation of Peace Treaties I.C.J. Reports 1950*, p. 71). The fact that the question put to the Court does not relate to a specific dispute should consequently not lead the Court to decline to give the opinion requested.

Moreover, it is the clear position of the Court that to contend that it should not deal with a question couched in abstract terms is "a mere affirmation devoid of any justification", and that "the Court may give an advisory opinion on any legal question, abstract or otherwise" (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), Advisory Opinion, 1948, I.C.J. Reports 1947-1948*, p. 61; see also *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, p. 51; and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 27, para. 40).

Certain States have however expressed the fear that the abstract nature of the question might lead the Court to make hypothetical or speculative declarations outside the scope of its judicial function. The Court does not consider that, in giving an advisory opinion in the present case, it would necessarily have to write "scenarios", to study various types of nuclear weapons and to evaluate highly complex and controversial technological, strategic and scientific information. The Court will simply address the issues arising in all their aspects by applying the legal rules relevant to the situation.

16. Certain States have observed that the General Assembly has not explained to the Court for what precise purposes it seeks the advisory opinion. Nevertheless, it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.

Equally, once the Assembly has asked, by adopting a resolution, for an advisory opinion on a legal question, the Court, in determining whether there are any compelling reasons for it to refuse to give such an opinion, will not have regard to the origins or to the political history of the request, or to the distribution of votes in respect of the adopted resolution.

17. It has also been submitted that a reply from the Court in this case might adversely affect disarmament negotiations and would, therefore, be contrary to the interest of the United Nations. The Court is aware that, no matter what might be its conclusions in any opinion it might give, they would have relevance for the continuing debate on the matter in the General Assembly and would present an additional element in the negotiations on the matter. Beyond that, the effect of the opinion is a matter of appreciation. The Court has heard contrary positions advanced and there are no evident criteria by which it can prefer one assessment to another. That being so, the Court cannot regard this factor as a compelling reason to decline to exercise its jurisdiction.

18. Finally, it has been contended by some States that in answering the question posed, the Court would be going beyond its judicial role and would be taking upon itself a law-making capacity. It is clear that the Court cannot legislate, and, in the circumstances of the present case, it is not called upon to do so. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons. The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.

19. In view of what is stated above, the Court concludes that it has the authority to deliver an opinion on the question posed by the General Assembly, and that there exist no "compelling reasons" which would lead the Court to exercise its discretion not to do so.

An entirely different question is whether the Court, under the constraints placed upon it as a judicial organ, will be able to give a complete answer to the question asked of it. However, that is a different matter from a refusal to answer at all.

*

* *

20. The Court must next address certain matters arising in relation to the formulation of the question put to it by the General Assembly. The English text asks: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" The French text of the question reads as follows: *"Est-il permis en droit international de recourir à la menace ou à l'emploi d'armes nucléaires en toute circonstance?"* It was suggested that the Court was being asked by the General Assembly whether it was permitted to have recourse to nuclear weapons in every circumstance, and it was contended that such a question would inevitably invite a simple negative answer.

The Court finds it unnecessary to pronounce on the possible divergences between the English and French texts of the question posed. Its real objective is clear: to determine the legality or illegality of the threat or use of nuclear weapons.

21. The use of the word "permitted" in the question put by the General Assembly was criticized before the Court by certain States on the ground that this implied that the threat or the use of nuclear weapons would only be permissible if authorization could be found in a treaty provision or in customary international law. Such a starting point, those States submitted, was incompatible with the very basis of international law, which rests upon the principles of sovereignty and consent; accordingly, and contrary to what was implied by use of the word "permitted", States are free to threaten or use nuclear weapons unless it can be shown that they are bound not to do so by reference to a prohibition in either treaty law or customary international law. Support for this contention was found in dicta of the Permanent Court of International Justice in the *"Lotus"* case that "restrictions upon the independence of States cannot . . . be presumed" and that international law leaves to States "a wide measure of discretion which is only limited in certain cases by prohibitive rules" (*P.C.I.J., Series A, No. 10,* pp. 18 and 19). Reliance was also placed on the dictum of the present Court in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* that:

> "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited" (*I.C.J. Reports 1986*, p. 135, para. 269).

For other States, the invocation of these dicta in the *"Lotus"* case was inapposite; their status in contemporary international law and applicability in the very different circumstances of the present case were challenged. It was also contended that the above-mentioned dictum of the present Court was directed to the *possession* of armaments and was irrelevant to the threat or use of nuclear weapons.

Finally, it was suggested that, were the Court to answer the question put by the Assembly, the word "permitted" should be replaced by "prohibited".

22. The Court notes that the nuclear-weapon States appearing before it either accepted, or did not dispute, that their independence to act was indeed restricted by the principles and rules of international law, more particularly humanitarian law (see below, paragraph 86), as did the other States which took part in the proceedings.

Hence, the argument concerning the legal conclusions to be drawn from the use of the word "permitted", and the questions of burden of proof to which it was said to give rise, are without particular significance for the disposition of the issues before the Court.

* *

23. In seeking to answer the question put to it by the General Assembly, the Court must decide, after consideration of the great corpus of international law norms available to it, what might be the relevant applicable law.

*

24. Some of the proponents of the illegality of the use of nuclear weapons have argued that such use would violate the right to life as guaranteed in Article 6 of the International Covenant on Civil and Political Rights, as well as in certain regional instruments for the protection of human rights. Article 6,

paragraph 1, of the International Covenant provides as follows:

> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

In reply, others contended that the International Covenant on Civil and Political Rights made no mention of war or weapons, and it had never been envisaged that the legality of nuclear weapons was regulated by that instrument. It was suggested that the Covenant was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict.

25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

26. Some States also contended that the prohibition against genocide, contained in the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, is a relevant rule of customary international law which the Court must apply. The Court recalls that, in Article II of the Convention genocide is defined as

> "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> *(a)* Killing members of the group; Killing members of the group;
>
> *(b)* Causing serious bodily or mental harm to members of the group; Causing serious bodily or mental harm to members of the group;
>
> *(c)* Deliberately inflicting on the group conditions of life calculated to being about its physical destruction in whole or in part; Deliberately inflicting on the group conditions of life calculated to being about its physical destruction in whole or in part;
>
> *(d)* Imposing measures intended to prevent births within the group; Imposing measures intended to prevent births within the group;
>
> *(e)* Forcibly transferring children of the group to another group." Forcibly transferring children of the group to another group."

It was maintained before the Court that the number of deaths occasioned by the use of nuclear weapons would be enormous; that the victims could, in certain cases, include persons of a particular national, ethnic, racial or religious group; and that the intention to destroy such groups could be inferred from the fact that the user of the nuclear weapon would have omitted to take account of the well-known effects of the use of such weapons.

The Court would point out in that regard that the prohibition of genocide would be pertinent in ti. if the recourse to nuclear weapons did indeed entail the element of intent, towards a group as such, required by the provision quoted above. In the view of the Court, it would only be possible to arrive at such a conclusion after having taken due account of the circumstances specific to each case.

*

27. In both their written and oral statements, some States furthermore argued that any use of nuclear weapons would be unlawful by reference to existing norms relating to the safeguarding and protection of the environment, in view of their essential importance.

Specific references were made to various existing international treaties and instruments. These included Additional Protocol I of 1977 to the Geneva Conventions of 1949, Article 35, paragraph 3, of which prohibits the employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment"; and the Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have "widespread, long-lasting or severe effects" on the environment (Art. 1). Also cited were Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". These instruments and other provisions relating to the protection and safeguarding of the environment were said to apply at all times, in war as well as in peace, and it was contended that they would be violated by the use of nuclear weapons whose consequences would be widespread and would have transboundary effects.

28. Other States questioned the binding legal quality of these precepts of environmental law; or, in the context of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, denied that it was concerned at all with the use of nuclear weapons in hostilities; or, in the case of Additional Protocol I, denied that they were generally bound by its terms, or recalled that they had reserved their position in respect of Article 35, paragraph 3, thereof.

It was also argued by some States that the principal purpose of environmental treaties and norms was the protection of the environment in time of peace. It was said that those treaties made no mention of nuclear weapons. It was also pointed out that warfare in general, and nuclear warfare in particular, were not mentioned in their texts and that it would be destabilizing to the rule of law and to confidence in international negotiations if those treaties were now interpreted in such a way as to prohibit the use of nuclear weapons.

29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

30. However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

S2-17

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

> "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary."

31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.

32. General Assembly resolution 47/37 of 25 November 1992 on the Protection of the Environment in Times of Armed Conflict, is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law". Addressing the reality that certain instruments are not yet binding on all States, the General Assembly in this resolution "*[a]ppeals* to all States that have not yet done so to consider becoming parties to the relevant international conventions."

In its recent Order in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand *v.* France) *Case*, the Court stated that its conclusion was "without prejudice to the obligations of States to respect and protect the natural environment" (*Order of 22 September 1995, I.C.J. Reports 1995*, p. 306, para. 64). Although that statement was made in the context of nuclear testing, it naturally also applies to the actual use of nuclear weapons in armed conflict.

33. The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.

*

34. In the light of the foregoing the Court concludes that the most directly relevant applicable law governing the question of which it was seised, is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons that the Court might determine to be relevant.

* *

35. In applying this law to the present case, the Court cannot however fail to take into account certain unique characteristics of nuclear weapons.

The Court has noted the definitions of nuclear weapons contained in various treaties and accords. It also notes that nuclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.

The radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations.

36. In consequence, in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come.

*

* *

37. The Court will now address the question of the legality or illegality of recourse to nuclear weapons in the light of the provisions of the Charter relating to the threat or use of force.

38. The Charter contains several provisions relating to the threat and use of force. In Article 2, paragraph 4, the threat or use of force against the territorial integrity or political independence of another State or in any other manner inconsistent with the purposes of the United Nations is prohibited. That paragraph provides:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."

This prohibition of the use of force is to be considered in the light of other relevant provisions of the Charter. In Article 51, the Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs. A further lawful use of force is envisaged in Article 42, whereby the Security Council may take military enforcement measures in conformity with Chapter VII of the Charter.

39. These provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed. The Charter neither expressly prohibits, nor permits, the use of any specific weapon, including nuclear weapons. A weapon that is already unlawful *per se*, whether by treaty or custom, does

not become lawful by reason of its being used for a legitimate purpose under the Charter.

40. The entitlement to resort to self-defence under Article 51 is subject to certain constraints. Some of these constraints are inherent in the very concept of self defence. Other requirements are specified in Article 51.

41. The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law. As the Court stated in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America) (I.C.J. Reports 1986*, p. 94, para. 176): "there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law". This dual condition applies equally to Article 51 of the Charter, whatever the means of force employed.

42. The proportionality principle may thus not in itself exclude the use of nuclear weapons in self-defence in all circumstances. But at the same time, a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict which comprise in particular the principles and rules of humanitarian law.

43. Certain States have in their written and oral pleadings suggested that in the case of nuclear weapons, the condition of proportionality must be evaluated in the light of still further factors. They contend that the very nature of nuclear weapons, and the high probability of an escalation of nuclear exchanges, mean that there is an extremely strong risk of devastation. The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by States believing they can exercise a nuclear response in self-defence in accordance with the requirements of proportionality.

44. Beyond the conditions of necessity and proportionality, Article 51 specifically requires that measures taken by States in the exercise of the right of self-defence shall be immediately reported to the Security Council; this article further provides that these measures shall not in any way affect the authority and responsibility of the Security Council under the Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. These requirements of Article 51 apply whatever the means of force used in self defence.

45. The Court notes that the Security Council adopted on 11 April 1995, in the context of the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, resolution 984 (1995) by the terms of which, on the one hand, it

> "*[t]akes note* with appreciation of the statements made by each of the nuclear-weapon States (S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265), in which they give security assurances against the use of nuclear weapons to non-nuclear-weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons,"

and, on the other hand, it

> "*[w]elcomes* the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State

Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used".

46. Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful. Nor does it have to pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality.

47. In order to lessen or eliminate the risk of unlawful attack, States sometimes signal that they possess certain weapons to use in self-defence against any State violating their territorial integrity or political independence. Whether a signalled intention to use force if certain events occur is or is not a "threat" within Article 2, paragraph 4, of the Charter depends upon various factors. If the envisaged use of force is itself unlawful, the stated readiness to use it would be a threat prohibited under Article 2, paragraph 4. Thus it would be illegal for a State to threaten force to secure territory from another State, or to cause it to follow or not follow certain political or economic paths. The notions of "threat" and "use" of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal ‹ for whatever reason ‹ the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State ‹ whether or not it defended the policy of deterrence ‹ suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal.

48. Some States put forward the argument that possession of nuclear weapons is itself an unlawful threat to use force. Possession of nuclear weapons may indeed justify an inference of preparedness to use them. In order to be effective, the policy of deterrence, by which those States possessing or under the umbrella of nuclear weapons seek to discourage military aggression by demonstrating that it will serve no purpose, necessitates that the intention to use nuclear weapons be credible. Whether this is a "threat" contrary to Article 2, paragraph 4, depends upon whether the particular use of force envisaged would be directed against the territorial integrity or political independence of a State, or against the Purposes of the United Nations or whether, in the event that it were intended as a means of defence, it would necessarily violate the principles of necessity and proportionality. In any of these circumstances the use of force, and the threat to use it, would be unlawful under the law of the Charter.

49. Moreover, the Security Council may take enforcement measures under Chapter VII of the Charter. From the statements presented to it the Court does not consider it necessary to address questions which might, in a given case, arise from the application of Chapter VII.

50. The terms of the question put to the Court by the General Assembly in resolution 49/75K could in principle also cover a threat or use of nuclear weapons by a State within its own boundaries. However, this particular aspect has not been dealt with by any of the States which addressed the Court orally or in writing in these proceedings. The Court finds that it is not called upon to deal with an internal use of nuclear weapons.

*

* *

51. Having dealt with the Charter provisions relating to the threat or use of force, the Court will now turn to the law applicable in situations of armed conflict. It will first address the question whether there

S221

are specific rules in international law regulating the legality or illegality of recourse to nuclear w *per se*; it will then examine the question put to it in the light of the law applicable in armed conflict proper, i.e. the principles and rules of humanitarian law applicable in armed conflict, and the law of neutrality.

* *

52. The Court notes by way of introduction that international customary and treaty law does not contain any specific prescription authorizing the threat or use of nuclear weapons or any other weapon in general or in certain circumstances, in particular those of the exercise of legitimate self defence. Nor, however, is there any principle or rule of international law which would make the legality of the threat or use of nuclear weapons or of any other weapons dependent on a specific authorization. State practice shows that the illegality of the use of certain weapons as such does not result from an absence of authorization but, on the contrary, is formulated in terms of prohibition.

*

53. The Court must therefore now examine whether there is any prohibition of recourse to nuclear weapons as such; it will first ascertain whether there is a conventional prescription to this effect.

54. In this regard, the argument has been advanced that nuclear weapons should be treated in the same way as poisoned weapons. In that case, they would be prohibited under:

> *(a)* the Second Hague Declaration of 29 July 1899, which prohibits "the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases";
>
> *(b)* Article 23 *(a)* of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907, whereby "it is especially forbidden: ...to employ poison or poisoned weapons"; and
>
> *(c)* the Geneva Protocol of 17 June 1925 which prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices".

55. The Court will observe that the Regulations annexed to the Hague Convention IV do not define what is to be understood by "poison or poisoned weapons" and that different interpretations exist on the issue. Nor does the 1925 Protocol specify the meaning to be given to the term "analogous materials or devices". The terms have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear, and the parties to those instruments have not treated them as referring to nuclear weapons.

56. In view of this, it does not seem to the Court that the use of nuclear weapons can be regarded as specifically prohibited on the basis of the above-mentioned provisions of the Second Hague Declaration of 1899, the Regulations annexed to the Hague Convention IV of 1907 or the 1925 Protocol (see paragraph 54 above).

57. The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their destruction ‹ which prohibits the possession of bacteriological and toxic weapons and reinforces the prohibition of their use ‹ and the Convention of 13 January 1993 on the Prohibition of the

Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction prohibits all use of chemical weapons and requires the destruction of existing stocks. Each of these instruments has been negotiated and adopted in its own context and for its own reasons. The Court does not find any specific prohibition of recourse to nuclear weapons in treaties expressly prohibiting the use of certain weapons of mass destruction.

58. In the last two decades, a great many negotiations have been conducted regarding nuclear weapons; they have not resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons. However, a number of specific treaties have been concluded in order to limit:

(a) the acquisition, manufacture and possession of nuclear weapons (Peace Treaties of 10 February 1947; State Treaty for the Re-establishment of an Independent and Democratic Austria of 15 May 1955; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 1 July 1968 on the Non-Proliferation of Nuclear Weapons; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols; Treaty of 12 September 1990 on the Final Settlement with respect to Germany);

(b) the deployment of nuclear weapons (Antarctic Treaty of 1 December 1959; Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of 11 February 1971 on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols); and

(c) the testing of nuclear weapons (Antarctic Treaty of 1 December 1959; Treaty of 5 August 1963 Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water; Treaty of 27 January 1967 on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies; Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America, and its Additional Protocols; Treaty of Rarotonga of 6 August 1985 on the Nuclear-Weapon-Free Zone of the South Pacific, and its Protocols).

59. Recourse to nuclear weapons is directly addressed by two of these Conventions and also in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons of 1968:

(a) the Treaty of Tlatelolco of 14 February 1967 for the Prohibition of Nuclear Weapons in Latin America prohibits, in Article 1, the use of nuclear weapons by the Contracting Parties. It further includes an Additional Protocol II open to nuclear-weapon States outside the region, Article 3 of which provides:

> "The Governments represented by the undersigned Plenipotentiaries also undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America."

The Protocol was signed and ratified by the five nuclear-weapon States. Its ratification was accompanied by a variety of declarations. The United Kingdom Government, for example, stated that "in the event of any act of aggression by a Contracting Party to the Treaty in which that Party

was supported by a nuclear-weapon State", the United Kingdom Government would "be fr... reconsider the extent to which they could be regarded as committed by the provisions of Additional Protocol II". The United States made a similar statement. The French Government, for its part, stated that it "interprets the undertaking made in article 3 of the Protocol as being without prejudice to the full exercise of the right of self-defence confirmed by Article 51 of the Charter". China reaffirmed its commitment not to be the first to make use of nuclear weapons. The Soviet Union reserved "the right to review" the obligations imposed upon it by Additional Protocol II, particularly in the event of an attack by a State party either "in support of a nuclear-weapon State or jointly with that State". None of these statements drew comment or objection from the parties to the Treaty of Tlatelolco.

(b) the Treaty of Rarotonga of 6 August 1985 establishes a South Pacific Nuclear Free Zone in which the Parties undertake not to manufacture, acquire or possess any nuclear explosive device (Art. 3). Unlike the Treaty of Tlatelolco, the Treaty of Rarotonga does not expressly prohibit the use of such weapons. But such a prohibition is for the States parties the necessary consequence of the prohibitions stipulated by the Treaty. The Treaty has a number of protocols. Protocol 2, open to the five nuclear-weapon States, specifies in its Article 1 that:

> "Each Party undertakes not to use or threaten to use any nuclear explosive device against:
>
> *(a)* Parties to the Treaty; or Parties to the Treaty; or
>
> *(b)* any territory within the South Pacific Nuclear Free Zone for which a State that has become a Party to Protocol 1 is internationally responsible." any territory within the South Pacific Nuclear Free Zone for which a State that has become a Party to Protocol 1 is internationally responsible."

China and Russia are parties to that Protocol. In signing it, China and the Soviet Union each made a declaration by which they reserved the" right to reconsider" their obligations under the said Protocol; the Soviet Union also referred to certain circumstances in which it would consider itself released from those obligations. France, the United Kingdom and the United States, for their part, signed Protocol 2 on 25 March 1996, but have not yet ratified it. On that occasion, France declared, on the one hand, that no provision in that Protocol "shall impair the full exercise of the inherent right of self-defence provided for in Article 51 of the ... Charter" and, on the other hand, that "the commitment set out in Article 1 of [that] Protocol amounts to the negative security assurances given by France to non-nuclear-weapon States which are parties to the Treaty on . . . Non-Proliferation", and that "these assurances shall not apply to States which are not parties" to that Treaty. For its part, the United Kingdom made a declaration setting out the precise circumstances in which it "will not be bound by [its] undertaking under Article 1" of the Protocol.

(c) as to the Treaty on the Non-Proliferation of Nuclear Weapons, at the time of its signing in 1968 the United States, the United Kingdom and the USSR gave various security assurances to the non-nuclear-weapon States that were parties to the Treaty. In resolution 255 (1968) the Security Council took note with satisfaction of the intention expressed by those three States to

> "provide or support immediate assistance, in accordance with the Charter, to any non-nuclear-weapon State Party to the Treaty on the Non-Proliferation . . .

> that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used".

On the occasion of the extension of the Treaty in 1995, the five nuclear-weapon States gave their non-nuclear-weapon partners, by means of separate unilateral statements on 5 and 6 April 1995, positive and negative security assurances against the use of such weapons. All the five nuclear-weapon States first undertook not to use nuclear weapons against non-nuclear-weapon States that were parties to the Treaty on the Non-Proliferation of Nuclear Weapons. However, these States, apart from China, made an exception in the case of an invasion or any other attack against them, their territories, armed forces or allies, or on a State towards which they had a security commitment, carried out or sustained by a non-nuclear-weapon State party to the Non-Proliferation Treaty in association or alliance with a nuclear-weapon State. Each of the nuclear-weapon States further undertook, as a permanent Member of the Security Council, in the event of an attack with the use of nuclear weapons, or threat of such attack, against a non-nuclear-weapon State, to refer the matter to the Security Council without delay and to act within it in order that it might take immediate measures with a view to supplying, pursuant to the Charter, the necessary assistance to the victim State (the commitments assumed comprising minor variations in wording). The Security Council, in unanimously adopting resolution 984 (1995) of 11 April 1995, cited above, took note of those statements with appreciation. It also recognized

> "that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim";

and welcomed the fact that

> "the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear- weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used."

60. Those States that believe that recourse to nuclear weapons is illegal stress that the conventions that include various rules providing for the limitation or elimination of nuclear weapons in certain areas (such as the Antarctic Treaty of 1959 which prohibits the deployment of nuclear weapons in the Antarctic, or the Treaty of Tlatelolco of 1967 which creates a nuclear-weapon-free zone in Latin America), or the conventions that apply certain measures of control and limitation to the existence of nuclear weapons (such as the 1963 Partial Test-Ban Treaty or the Treaty on the Non-Proliferation of Nuclear Weapons) all set limits to the use of nuclear weapons. In their view, these treaties bear witness, in their own way, to the emergence of a rule of complete legal prohibition of all uses of nuclear weapons.

61. Those States who defend the position that recourse to nuclear weapons is legal in certain circumstances see a logical contradiction in reaching such a conclusion. According to them, those Treaties, such as the Treaty on the Non-Proliferation of Nuclear Weapons, as well as Security Council resolutions 255 (1968) and 984 (1995) which take note of the security assurances given by the nuclear-weapon States to the non-nuclear-weapon States in relation to any nuclear aggression against the latter, cannot be understood as prohibiting the use of nuclear weapons, and such a claim is contrary to the very text of those instruments. For those who support the legality in certain circumstances of recourse to nuclear weapons, there is no absolute prohibition against the use of such weapons. The very logic and construction of the Treaty on the Non-Proliferation of Nuclear Weapons, they assert, confirm this. This

5225

Treaty, whereby, they contend, the possession of nuclear weapons by the five nuclear-weapon St[illegible] been accepted, cannot be seen as a treaty banning their use by those States; to accept the fact that those States possess nuclear weapons is tantamount to recognizing that such weapons may be used in certain circumstances. Nor, they contend, could the security assurances given by the nuclear-weapon States in 1968, and more recently in connection with the Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons in 1995, have been conceived without its being supposed that there were circumstances in which nuclear weapons could be used in a lawful manner. For those who defend the legality of the use, in certain circumstances, of nuclear weapons, the acceptance of those instruments by the different non-nuclear-weapon States confirms and reinforces the evident logic upon which those instruments are based.

62. The Court notes that the treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of nuclear weapons, without specifically addressing their threat or use, certainly point to an increasing concern in the international community with these weapons; the Court concludes from this that these treaties could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves. As to the treaties of Tlatelolco and Rarotonga and their Protocols, and also the declarations made in connection with the indefinite extension of the Treaty on the Non-Proliferation of Nuclear Weapons, it emerges from these instruments that:

(a) a number of States have undertaken not to use nuclear weapons in specific zones (Latin America; the South Pacific) or against certain other States (non-nuclear-weapon States which are parties to the Treaty on the Non-Proliferation of Nuclear Weapons);

(b) nevertheless, even within this framework, the nuclear-weapon States have reserved the right to use nuclear weapons in certain circumstances; and

(c) these reservations met with no objection from the parties to the Tlatelolco or Rarotonga Treaties or from the Security Council.

63. These two treaties, the security assurances given in 1995 by the nuclear-weapon States and the fact that the Security Council took note of them with satisfaction, testify to a growing awareness of the need to liberate the community of States and the international public from the dangers resulting from the existence of nuclear weapons. The Court moreover notes the signing, even more recently, on 15 December 1995, at Bangkok, of a Treaty on the Southeast Asia Nuclear-Weapon-Free Zone, and on 11 April 1996, at Cairo, of a treaty on the creation of a nuclear-weapons-free zone in Africa. It does not, however, view these elements as amounting to a comprehensive and universal conventional prohibition on the use, or the threat of use, of those weapons as such.

*

64. The Court will now turn to an examination of customary international law to determine whether a prohibition of the threat or use of nuclear weapons as such flows from that source of law. As the Court has stated, the substance of that law must be "looked for primarily in the actual practice and *opinio juris* of States" (*Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 29, para. 27).

65. States which hold the view that the use of nuclear weapons is illegal have endeavoured to demonstrate the existence of a customary rule prohibiting this use. They refer to a consistent practice of non-utilization of nuclear weapons by States since 1945 and they would see in that practice the expression of an *opinio juris* on the part of those who possess such weapons.

66. Some other States, which assert the legality of the threat and use of nuclear weapons in certai circumstances, invoked the doctrine and practice of deterrence in support of their argument. They all that they have always, in concert with certain other States, reserved the right to use those weapons in the exercise of the right to self-defence against an armed attack threatening their vital security interests. In their view, if nuclear weapons have not been used since 1945, it is not on account of an existing or nascent custom but merely because circumstances that might justify their use have fortunately not arisen.

67. The Court does not intend to pronounce here upon the practice known as the "policy of deterrence". It notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the Members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*.

68. According to certain States, the important series of General Assembly resolutions, beginning with resolution 1653 (XVI) of 24 November 1961, that deal with nuclear weapons and that affirm, with consistent regularity, the illegality of nuclear weapons, signify the existence of a rule of international customary law which prohibits recourse to those weapons. According to other States, however, the resolutions in question have no binding character on their own account and are not declaratory of any customary rule of prohibition of nuclear weapons; some of these States have also pointed out that this series of resolutions not only did not meet with the approval of all of the nuclear-weapon States but of many other States as well.

69. States which consider that the use of nuclear weapons is illegal indicated that those resolutions did not claim to create any new rules, but were confined to a confirmation of customary law relating to the prohibition of means or methods of warfare which, by their use, overstepped the bounds of what is permissible in the conduct of hostilities. In their view, the resolutions in question did no more than apply to nuclear weapons the existing rules of international law applicable in armed conflict; they were no more than the "envelope" or *instrumentum* containing certain pre-existing customary rules of international law. For those States it is accordingly of little importance that the *instrumentum* should have occasioned negative votes, which cannot have the effect of obliterating those customary rules which have been confirmed by treaty law.

70. The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.

71. Examined in their totality, the General Assembly resolutions put before the Court declare that the use of nuclear weapons would be "a direct violation of the Charter of the United Nations"; and in certain formulations that such use "should be prohibited". The focus of these resolutions has sometimes shifted to diverse related matters; however, several of the resolutions under consideration in the present case have been adopted with substantial numbers of negative votes and abstentions; thus, although those resolutions are a clear sign of deep concern regarding the problem of nuclear weapons, they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.

72. The Court further notes that the first of the resolutions of the General Assembly expressly

5227

proclaiming the illegality of the use of nuclear weapons, resolution 1653 (XVI) of 24 November [illegible] (mentioned in subsequent resolutions), after referring to certain international declarations and binding agreements, from the Declaration of St. Petersburg of 1868 to the Geneva Protocol of 1925, proceeded to qualify the legal nature of nuclear weapons, determine their effects, and apply general rules of customary international law to nuclear weapons in particular. That application by the General Assembly of general rules of customary law to the particular case of nuclear weapons indicates that, in its view, there was no specific rule of customary law which prohibited the use of nuclear weapons; if such a rule had existed, the General Assembly could simply have referred to it and would not have needed to undertake such an exercise of legal qualification.

73. Having said this, the Court points out that the adoption each year by the General Assembly, by a large majority, of resolutions recalling the content of resolution 1653 (XVI), and requesting the member States to conclude a convention prohibiting the use of nuclear weapons in any circumstance, reveals the desire of a very large section of the international community to take, by a specific and express prohibition of the use of nuclear weapons, a significant step forward along the road to complete nuclear disarmament. The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.

* *

74. The Court not having found a conventional rule of general scope, nor a customary rule specifically proscribing the threat or use of nuclear weapons *per se*, it will now deal with the question whether recourse to nuclear weapons must be considered as illegal in the light of the principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality.

75. A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The "laws and customs of war" ‹ as they were traditionally called › were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.

76. Since the turn of the century, the appearance of new means of combat has ‹ without calling into question the longstanding principles and rules of international law › rendered necessary some specific prohibitions of the use of certain weapons, such as explosive projectiles under 400 grammes, dum-dum bullets and asphyxiating gases. Chemical and bacteriological weapons were then prohibited by the 1925 Geneva Protocol. More recently, the use of weapons producing "non-detectable fragments", of other types of "mines, booby traps and other devices", and of "incendiary weapons", was either prohibited or limited, depending on the case, by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. The provisions of the Convention on "mines, booby traps and other devices" have just been amended, on 3 May 1996, and now regulate in greater detail, for example, the

use of anti-personnel land mines.

77. All this shows that the conduct of military operations is governed by a body of legal prescriptions. This is so because "the right of belligerents to adopt means of injuring the enemy is not unlimited" as stated in Article 22 of the 1907 Hague Regulations relating to the laws and customs of war on land. The St. Petersburg Declaration had already condemned the use of weapons "which uselessly aggravate the suffering of disabled men or make their death inevitable". The aforementioned Regulations relating to the laws and customs of war on land, annexed to the Hague Convention IV of 1907, prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Art. 23).

78. The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use.

The Court would likewise refer, in relation to these principles, to the Martens Clause, which was first included in the Hague Convention II with Respect to the Laws and Customs of War on Land of 1899 and which has proved to be an effective means of addressing the rapid evolution of military technology. A modern version of that clause is to be found in Article 1, paragraph 2, of Additional Protocol I of 1977, which reads as follows:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives. If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law.

79. It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case *(I.C.J. Reports 1949*, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

80. The Nuremberg International Military Tribunal had already found in 1945 that the humanitarian rules included in the Regulations annexed to the Hague Convention IV of 1907 "were recognized by all civilized nations and were regarded as being declaratory of the laws and customs of war" (International Military Tribunal, *Trial of the Major War Criminals*, 14 November 1945 ‹ 1 October 1946, Nuremberg, 1947, Vol. 1, p. 254).

81. The Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808

(1993), with which he introduced the Statute of the International Tribunal for the Prosecution of P. Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, and which was unanimously approved by the Security Council (resolution 827 (1993)), stated:

> "In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law . . .
>
> The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945."

82. The extensive codification of humanitarian law and the extent of the accession to the resultant treaties, as well as the fact that the denunciation clauses that existed in the codification instruments have never been used, have provided the international community with a corpus of treaty rules the great majority of which had already become customary and which reflected the most universally recognized humanitarian principles. These rules indicate the normal conduct and behaviour expected of States.

83. It has been maintained in these proceedings that these principles and rules of humanitarian law are part of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties of 23 May 1969. The question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.

84. Nor is there any need for the Court elaborate on the question of the applicability of Additional Protocol I of 1977 to nuclear weapons. It need only observe that while, at the Diplomatic Conference of 1974-1977, there was no substantive debate on the nuclear issue and no specific solution concerning this question was put forward, Additional Protocol I in no way replaced the general customary rules applicable to all means and methods of combat including nuclear weapons. In particular, the Court recalls that all States are bound by those rules in Additional Protocol I which, when adopted, were merely the expression of the pre-existing customary law, such as the Martens Clause, reaffirmed in the first article of Additional Protocol I. The fact that certain types of weapons were not specifically dealt with by the 1974-1977 Conference does not permit the drawing of any legal conclusions relating to the substantive issues which the use of such weapons would raise.

85. Turning now to the applicability of the principles and rules of humanitarian law to a possible threat or use of nuclear weapons, the Court notes that doubts in this respect have sometimes been voiced on the ground that these principles and rules had evolved prior to the invention of nuclear weapons and that the Conferences of Geneva of 1949 and 1974-1977 which respectively adopted the four Geneva Conventions of 1949 and the two Additional Protocols thereto did not deal with nuclear weapons specifically. Such views, however, are only held by a small minority. In the view of the vast majority of States as well as writers there can be no doubt as to the applicability of humanitarian law to nuclear weapons.

86. The Court shares that view. Indeed, nuclear weapons were invented after most of the princi rules of humanitarian law applicable in armed conflict had already come into existence; the Confe ences of 1949 and 1974-1977 left these weapons aside, and there is a qualitative as well as quantitative difference between nuclear weapons and all conventional arms. However, it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict did not apply to nuclear weapons. Such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons, those of the past, those of the present and those of the future. In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the latter, has not been advocated in the present proceedings. On the contrary, the newness of nuclear weapons has been expressly rejected as an argument against the application to them of international humanitarian law:

> "In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons.
>
> International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons." (New Zealand, Written Statement, p. 15, paras. 63 64.)

None of the statements made before the Court in any way advocated a freedom to use nuclear weapons without regard to humanitarian constraints. Quite the reverse; it has been explicitly stated,

> "Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons" (Russian Federation, CR 95/29, p. 52);
>
> "So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the *jus in bello*" (United Kingdom, CR 95/34, p. 45); and
>
> "The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons ‹ just as it governs the use of conventional weapons" (United States of America, CR 95/34, p. 85.)

87. Finally, the Court points to the Martens Clause, whose continuing existence and applicability is not to be doubted, as an affirmation that the principles and rules of humanitarian law apply to nuclear weapons.

*

88. The Court will now turn to the principle of neutrality which was raised by several States. In the context of the advisory proceedings brought before the Court by the WHO concerning the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, the position was put as follows by one State:

> "The principle of neutrality, in its classic sense, was aimed at preventing the incursion of belligerent forces into neutral territory, or attacks on the persons or ships of neutrals. Thus: 'the territory of neutral powers is inviolable' (Article 1 of the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land,

concluded on 18 October 1907); 'belligerents are bound to respect the sovereign rights of neutral powers . . .' (Article 1 to the Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War, concluded on 18 October 1907), 'neutral states have equal interest in having their rights respected by belligerents . . .' (Preamble to Convention on Maritime Neutrality, concluded on 20 February 1928). It is clear, however, that the principle of neutrality applies with equal force to transborder incursions of armed forces and to the transborder damage caused to a neutral State by the use of a weapon in a belligerent State." (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Nauru, Written Statement (I), p. 35, IV E.)

The principle so circumscribed is presented as an established part of the customary international law.

89. The Court finds that as in the case of the principles of humanitarian law applicable in armed conflict, international law leaves no doubt that the principle of neutrality, whatever its content, which is of a fundamental character similar to that of the humanitarian principles and rules, is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict, whatever type of weapons might be used.

*

90. Although the applicability of the principles and rules of humanitarian law and of the principle of neutrality to nuclear weapons is hardly disputed, the conclusions to be drawn from this applicability are, on the other hand, controversial.

91. According to one point of view, the fact that recourse to nuclear weapons is subject to and regulated by the law of armed conflict does not necessarily mean that such recourse is as such prohibited. As one State put it to the Court:

> "Assuming that a State's use of nuclear weapons meets the requirements of self defence, it must then be considered whether it conforms to the fundamental principles of the law of armed conflict regulating the conduct of hostilities" (United Kingdom, Written Statement, p. 40, para. 3.44);
>
> "the legality of the use of nuclear weapons must therefore be assessed in the light of the applicable principles of international law regarding the use of force and the conduct of hostilities, as is the case with other methods and means of warfare" (United Kingdom, Written Statement, p. 75, para. 4.2(3)); and
>
> "The reality . . . is that nuclear weapons might be used in a wide variety of circumstances with very different results in terms of likely civilian casualties. In some cases, such as the use of a low yield nuclear weapon against warships on the High Seas or troops in sparsely populated areas, it is possible to envisage a nuclear attack which caused comparatively few civilian casualties. It is by no means the case that every use of nuclear weapons against a military objective would inevitably cause very great collateral civilian casualties." (United Kingdom, Written Statement, p. 53, para. 3.70; see also United States of America, Oral Statement, CR 95/34, pp. 89-90.)

92. Another view holds that recourse to nuclear weapons could never be compatible with the principles and rules of humanitarian law and is therefore prohibited. In the event of their use, nuclear weapons would in all circumstances be unable to draw any distinction between the civilian population and

52-32

combatants, or between civilian objects and military objectives, and their effects, largely uncontr[illegible] could not be restricted, either in time or in space, to lawful military targets. Such weapons would kill and destroy in a necessarily indiscriminate manner, on account of the blast, heat and radiation occasioned by the nuclear explosion and the effects induced; and the number of casualties which would ensue would be enormous. The use of nuclear weapons would therefore be prohibited in any circumstance, notwithstanding the absence of any explicit conventional prohibition. That view lay at the basis of the assertions by certain States before the Court that nuclear weapons are by their nature illegal under customary international law, by virtue of the fundamental principle of humanity.

93. A similar view has been expressed with respect to the effects of the principle of neutrality. Like the principles and rules of humanitarian law, that principle has therefore been considered by some to rule out the use of a weapon the effects of which simply cannot be contained within the territories of the contending States.

94. The Court would observe that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the "clean" use of smaller, low yield, tactical nuclear weapons, has indicated what, supposing such limited use were feasible, would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into the all-out use of high yield nuclear weapons. This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view.

95. Nor can the Court make a determination on the validity of the view that the recourse to nuclear weapons would be illegal in any circumstance owing to their inherent and total incompatibility with the law applicable in armed conflict. Certainly, as the Court has already indicated, the principles and rules of law applicable in armed conflict ‹ at the heart of which is the overriding consideration of humanity ‹ make the conduct of armed hostilities subject to a number of strict requirements. Thus, methods and means of warfare, which would preclude any distinction between civilian and military targets, or which would result in unnecessary suffering to combatants, are prohibited. In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements. Nevertheless, the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.

96. Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake.

Nor can it ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years. The Court also notes the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non-Proliferation of Nuclear Weapons, not to resort to such weapons.

97. Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

S2-33

*

* *

98. Given the eminently difficult issues that arise in applying the law on the use of force and above all the law applicable in armed conflict to nuclear weapons, the Court considers that it now needs to examine one further aspect of the question before it, seen in a broader context.

In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs: the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.

99. In these circumstances, the Court appreciates the full importance of the recognition by Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons of an obligation to negotiate in good faith a nuclear disarmament. This provision is worded as follows:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result ‹ nuclear disarmament in all its aspects ‹ by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.

100. This twofold obligation to pursue and to conclude negotiations formally concerns the 182 States parties to the Treaty on the Non-Proliferation of Nuclear Weapons, or, in other words, the vast majority of the international community.

Virtually the whole of this community appears moreover to have been involved when resolutions of the United Nations General Assembly concerning nuclear disarmament have repeatedly been unanimously adopted. Indeed, any realistic search for general and complete disarmament, especially nuclear disarmament, necessitates the co-operation of all States.

101. Even the very first General Assembly resolution, unanimously adopted on 24 January 1946 at the London session, set up a commission whose terms of reference included making specific proposals for, among other things, "the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction". In a large number of subsequent resolutions, the General Assembly has reaffirmed the need for nuclear disarmament. Thus, in resolution 808 A (IX) of 4 November 1954, which was likewise unanimously adopted, it concluded

> "that a further effort should be made to reach agreement on comprehensive and co-ordinated proposals to be embodied in a draft international disarmament convention providing for: . . . *(b)* The total prohibition of the use and manufacture of nuclear weapons and weapons of mass destruction of every type, together with the conversion of existing stocks of nuclear weapons for peaceful purposes."

The same conviction has been expressed outside the United Nations context in various instruments.

S2-34

102. The obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear We includes its fulfilment in accordance with the basic principle of good faith. This basic principle is set forth in Article 2, paragraph 2, of the Charter. It was reflected in the Declaration on Friendly Relations between States (resolution 2625 (XXV) of 24 October 1970) and in the Final Act of the Helsinki Conference of 1 August 1975. It is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, according to which "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith".

Nor has the Court omitted to draw attention to it, as follows:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential." (*Nuclear Tests (Australia* v. *France), Judgment of 20 December 1974, I.C.J. Reports 1974*, p. 268, para. 46.)

103. In its resolution 984 (1995) dated 11 April 1995, the Security Council took care to reaffirm "the need for all States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to comply fully with all their obligations" and urged

> "all States, as provided for in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons, to pursue negotiations in good faith on effective measures relating to nuclear disarmament and on a treaty on general and complete disarmament under strict and effective international control which remains a universal goal".

The importance of fulfilling the obligation expressed in Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons was also reaffirmed in the final document of the Review and Extension Conference of the parties to the Treaty on the Non-Proliferation of Nuclear Weapons, held from 17 April to 12 May 1995.

In the view of the Court, it remains without any doubt an objective of vital importance to the whole of the international community today.

*

* *

104. At the end of the present Opinion, the Court emphasizes that its reply to the question put to it by the General Assembly rests on the totality of the legal grounds set forth by the Court above (paragraphs 20 to 103), each of which is to be read in the light of the others. Some of these grounds are not such as to form the object of formal conclusions in the final paragraph of the Opinion; they nevertheless retain, in the view of the Court, all their importance.

*

* *

105. For these reasons,

THE COURT,

(1) By thirteen votes to one,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Guillaume, Shahabuddeen, Weeramantry, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judge* Oda.

(2) *Replies* in the following manner to the question put by the General Assembly:

A.Unanimously,

There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B.By eleven votes to three,

There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

IN FAVOUR: *President* Bedjaoui; *Vice-President* Schwebel; *Judges* Oda, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Vereshchetin, Ferrari Bravo, Higgins;

AGAINST: *Judges* Shahabuddeen, Weeramantry, Koroma.

C.Unanimously,

A threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D.Unanimously,

A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote,

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake;

5236

IN FAVOUR: *President* Bedjaoui; *Judges* Ranjeva, Herczegh, Shi, Fleischhauer, Vereschetin, Ferrari Bravo;

AGAINST: *Vice-President* Schwebel; *Judges* Oda, Guillaume, Shahabuddeen, Weeramantry, Koroma, Higgins.

F.Unanimously,

> There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this eighth day of July, one thousand nine hundred and ninety-six, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Mohammed BEDJAOUI,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President BEDJAOUI, Judges HERCZEGH, SHI, VERESHCHETIN and FERRARI BRAVO append declarations to the Advisory Opinion of the Court.

Judges GUILLAUME, RANJEVA and FLEISCHHAUER append separate opinions to the Advisory Opinion of the Court.

Vice-President SCHWEBEL, Judges ODA, SHAHABUDDEEN, WEERAMANTRY, KOROMA and HIGGINS append dissenting opinions to the Advisory Opinion of the Court.

(Initialled) M. B.

(Initialled) E. V. O.

DÉCLARATION DE M. BEDJAOUI, PRÉSIDENT

1. Les déclarations et autres opinions individuelles ou dissidentes n'ont jamais bénéficié de ma part d'une grande faveur. J'y ai donc très rarement recouru. Toutefois, l'adoption par la Cour du paragraphe E du dispositif du présent avis grâce à la voix prépondérante dont je dispose en ma qualité de Président, conformément à l'article 55 du Statut, est en soi un événement suffisamment exceptionnel pour m'inciter à me départir de ma réserve habituelle en la matière. Au demeurant, je considère le recours à cette déclaration moins comme l'exercice d'une simple faculté que comme l'accomplissement d'un véritable devoir et ce, tant en raison de la responsabilité que j'ai ainsi été amené à assumer dans l'exercice normal de mes fonctions de Président, que des enjeux du paragraphe susmentionné.

* *
*

2. Avec l'arme nucléaire, l'humanité est comme en sursis. Ce terrifiant moyen de destruction massive fait partie, depuis un demi-siècle, de la *condition humaine*. L'arme nucléaire est entrée dans tous les calculs, dans tous les scénarios, dans tous les schémas. Depuis Hiroshima, un matin du 6 août 1945, la peur est peu à peu devenue la première nature de l'homme. Le parcours terrestre de celui-ci a pris l'aspect de ce que le Coran appelle *"un long voyage nocturne"*, comme un cauchemar dont l'humanité ne parvient pas, à ce jour, à entrevoir la fin.

3. La Charte de l'Atlantique avait pourtant promis de *"délivrer l'homme de la peur"* et celle de San Francisco de *"préserver les générations futures du fléau de la guerre"*. Un long chemin reste encore à parcourir pour exorciser cette nouvelle terreur de l'homme qui l'a fait renouer avec celle de ses ancêtres qui craignaient jadis la chute sur leur tête d'un ciel d'orage chargé de foudre. Mais la situation de l'homme du XXe siècle se distingue, à bien des égards, de celle de son ancêtre: il est armé de connaissance; il s'expose de son propre fait à l'autodestruction; ses inquiétudes sont plus fondées. Pourtant doué de raison, l'homme n'a jamais été aussi déraisonnable; son destin se brouille; sa conscience s'obscurcit; sa vision se trouble et ses coordonnées éthiques tombent, comme feuilles mortes, de l'arbre de vie.

4. On reconnaîtra toutefois que l'homme a fait quelques efforts pour sortir de sa nuit noire. Ainsi, l'humanité paraît, aujourd'hui du moins, plus soulagée que dans les années 80 où elle se menaçait elle-même de la *"guerre des étoiles"*. Le vent mortel d'une guerre cosmique, totale et hautement sophistiquée, qui désintégrerait notre planète, risquait plus que jamais de souffler sur l'humanité ces années-là. Des engins en orbite dans la banlieue de la Terre pouvaient diriger leur gueule d'enfer nucléaire sur notre globe, pendant que des satellites militaires, de reconnaissance, d'observation, de surveillance ou de communication, pouvaient se multiplier. Le *système mortifère* allait se mettre en place. Le *"gouvernement universel de la mort"*, la *"thanatocratie"*, comme l'avait appelée un spécialiste de l'histoire et de la philosophie des sciences, le Français Michel Serres, se disait prêt à installer ses batteries à toutes les périphéries de la planète. Mais heureusement la détente, puis la fin de la guerre froide, mirent un terme à ces préparatifs terrifiants.

5. Néanmoins, la prolifération du feu nucléaire n'est pas pour autant maîtrisée et ce, malgré l'existence du Traité de non-prolifération. La peur et la folie peuvent encore à tout moment s'enlacer pour exécuter une danse macabre finale. L'humanité est d'autant plus vulnérable de nos jours, qu'elle est capable de produire des missiles nucléaires en grande quantité.

* *
*

6. L'homme se fait à lui-même un chantage nucléaire pervers et permanent. Il faut savoir l'en délivrer. La Cour avait le devoir de prendre sa part, si minime soit-elle, de cette oeuvre salvatrice pour l'humanité; elle l'a fait en toute conscience et en toute humilité, compte tenu des limites que lui imposent d'une part son Statut et d'autre part le droit international applicable.

7. Jamais, en effet, la Cour n'aura sans doute autant scruté les éléments les plus complexes d'un problème qu'à l'occasion de l'examen de celui des armes nucléaires. Dans l'élaboration du présent avis, la Cour a été guidée par le sens des responsabilités particulières qui sont les siennes et par sa volonté de dire le droit tel qu'il est, en ne cherchant ni à le noircir, ni à l'embellir. Elle a entendu éviter toute tentation de le créer et elle n'est assurément pas sortie de son rôle en pressant les Etats de légiférer au plus vite pour parachever l'oeuvre entreprise par eux jusqu'ici.

8. Cette très importante question des armes nucléaires s'est malheureusement révélée être un domaine où la Cour a dû constater qu'il n'existe pas de réponse immédiate et claire à la question qui lui était posée. Il faut espérer que la communauté internationale saura rendre justice à la Cour d'avoir rempli sa mission ‹ même si sa réponse peut paraître insatisfaisante › et qu'elle s'attache au plus vite à corriger les imperfections d'un droit international qui n'est en définitive que la création des Etats eux-mêmes. Ces imperfections, la Cour aura eu au moins le mérite de les signaler et d'appeler la société internationale à y remédier.

9. Comme son avis consultatif l'atteste, la Cour n'a à aucun moment perdu de vue que l'arme nucléaire constitue un moyen potentiel de destruction de l'humanité tout entière. Pas un instant, elle n'a omis de prendre en compte cet enjeu éminemment vital pour la survie de l'humanité. Le drame de conscience auquel les uns et les autres ont été confrontés se reflète à bien des égards dans le présent avis. Mais la Cour ne pouvait à l'évidence pas aller au-delà de ce que dit le droit. Elle ne pouvait pas dire ce que celui-ci ne dit pas.

10. Au terme de son avis, la Cour s'est ainsi bornée à un constat, tout en se trouvant dans l'incapacité d'aller au-delà. Certains ne manqueront pas d'interpréter le paragraphe E du dispositif comme envisageant la possibilité pour les Etats de recourir à l'arme nucléaire dans des circonstances exceptionnelles. Pour ma part, et eu égard à ce qui précède, je me sens en conscience obligé de faire une lecture différente de ce paragraphe, qui m'a permis d'apporter mon soutien à ce texte. Je m'en explique ci-après.

* *
*

11. Je ne saurais assez insister sur le fait que l'incapacité de la Cour de dépasser le constat auquel elle est parvenue ne peut en aucune manière être interprétée comme une porte entrouverte par celle-ci à la reconnaissance de la licéité de la menace ou de l'emploi d'armes nucléaires.

12. La jurisprudence de l'affaire du *Lotus*, que certains ne manqueront pas de ressusciter, mérite d'être très fortement relativisée dans le contexte particulier de la question faisant l'objet du présent avis consultatif. On exagèrerait l'importance et on déformerait la portée de cette décision de la Cour permanente si on l'isolait du contexte particulier, à la fois judiciaire et temporel, dans lequel elle est intervenue. La décision en question exprimait sans aucun doute *l'air du temps*, celui d'une société internationale encore très peu institutionnalisée et régie par un droit international de stricte coexistence,

lui-même reflet de la vigueur du principe de la souveraineté de l'Etat.

13. Il est à peine besoin de souligner que la physionomie de la société internationale contemporaine est sensiblement différente. En dépit de la percée encore limitée du *"supra- nationalisme"*, on ne saurait nier les progrès enregistrés au niveau de l'institutionnalisation, voire de l'intégration et de la *"mondialisation"*, de la société internationale. On en verra pour preuve la multiplication des organisations internationales, la substitution progressive d'un droit international de coopération au droit international classique de la coexistence, l'émergence du concept de *"communauté internationale"* et les tentatives parfois couronnées de succès de subjectivisation de cette dernière. De tout cela, on peut trouver le témoignage dans la place que le droit international accorde désormais à des concepts tels que celui d'obligations *erga omnes,* de règles de *jus cogens* ou de patrimoine commun de l'humanité. A l'approche résolument positiviste, volontariste du droit international qui prévalait encore au début du siècle - et à laquelle la Cour permanente n'a d'ailleurs pas manqué d'apporter son soutien dans l'arrêt susmentionné [«Le droit international régit les rapports entre des Etats indépendants. Les règles de droit liant les Etats procèdent donc de la volonté de ceux-ci, volonté manifestée dans des conventions ou dans des usages acceptés généralement comme consacrant des principes de droit et établis en vue de régler la co-existence de ces communautés indépendantes ou en vue de la poursuite de buts communs.» (Affaire du *« Lotus », arrêt no 9, 1927, C.P.J.I. série A no 10,* p. 18.)] - s'est substituée une conception objective du droit international, ce dernier se voulant plus volontiers le reflet d'un état de conscience juridique collective et une réponse aux nécessités sociales des Etats organisés en communauté. A l'évolution de la société internationale elle-même, il convient d'ajouter les progrès enregistrés dans le domaine technologique, qui rendent désormais possible une éradication totale et pratiquement instantanée du genre humain.

14. Par ailleurs, au delà des éléments de temps et de contexte, tout distingue la décision de la Cour permanente de l'avis de la présente Cour: la nature du problème posé, les enjeux du prononcé et la philosophie sous-jacente aux conclusions retenues. En 1927, la Cour permanente, dans le cadre de l'examen d'une question d'importance beaucoup plus modeste, était en effet arrivée à la conclusion qu'un comportement non expressément interdit par le droit international se trouve autorisé de ce seul fait.

[« La Cour doit donc, en tout état de cause, examiner s'il existe, oui ou non, une règle de droit international limitant la liberté des Etats d'étendre la juridiction pénale de leurs tribunaux à une situation réunissant les circonstances du cas d'espèce » (*ibid.*, p. 21);

et la Cour de conclure:

« Il y a donc lieu de constater qu'aucun principe de droit international, dans le sens de l'article 15 de la Convention de Lausanne du 24 juillet 1923, ne s'oppose à l'exercice des poursuites pénales dont il s'agit. En conséquence, la Turquie, en intentant, en vertu de la liberté que le droit international laisse à tout Etat souverain, les poursuites pénales en question, n'a pu, en l'absence de pareils principes, agir en contradiction des principes du droit international aux termes du compromis. » (*Ibid.*, p. 31)]

Dans le présent avis, au contraire, la Cour ne conclut ni à la licéité ni à l'illicéité de la menace ou de l'emploi de l'arme nucléaire; des incertitudes quant au droit et aux faits, elle n'infère aucune liberté en la matière. Elle ne suggère pas davantage qu'une telle licence pourrait de quelque manière que ce soit en être déduite. Alors que la Cour permanente avait actionné le seul feu vert de l'autorisation, n'ayant trouvé dans le droit international aucune raison d'actionner le feu rouge de l'interdiction, la Cour actuelle ne s'estime en mesure de n'actionner ni l'un ni l'autre de ces signaux.

15. Ainsi, la Cour, dans le présent avis, fait preuve de beaucoup plus de circonspection que sa

devancière dans l'affaire du *Lotus*, quand elle affirme aujourd'hui que ce qui n'est pas expressém prohibé par le droit international n'est pas pour autant autorisé.

16. Tout en ne se prononçant ni pour la licéité de la menace ou de l'emploi de l'arme nucléaire, ni pour leur illicéité, la Cour prend acte, dans son avis, de l'existence d'un processus très avancé de mutation du droit international en la matière, ou, en d'autres termes, d'une tendance actuelle à la substitution d'une norme de droit international à une autre, la première n'existant pas encore et la seconde n'existant déjà plus. Encore une fois, si la Cour, en tant qu'organe judiciaire, a estimé ne pas pouvoir aller au-delà d'un tel constat, les Etats ne sauraient y voir, à mon avis, une quelconque autorisation d'agir à leur guise.

17. La Cour est évidemment consciente du caractère à première vue insatisfaisant de sa réponse à l'Assemblée générale. Cependant, si la Cour peut laisser l'impression à certains qu'elle s'est arrêtée à mi-chemin de la tâche qui lui a été confiée, je suis au contraire d'avis qu'elle a rempli sa mission en allant, dans sa réponse à la question posée, jusqu'où les éléments à sa disposition lui permettaient d'aller.

18. Dans la seconde phrase du paragraphe E du dispositif de l'avis, la Cour indique qu'elle est parvenue à un point de son raisonnement qu'elle ne peut dépasser qu'en s'exposant au risque d'adopter une conclusion qui irait au delà de ce qui lui paraît légitime. C'est là la position de la Cour en tant que corps judiciaire. Nombre de juges ont adhéré à cette position mais sans doute chacun avec une approche et une interprétation qui lui sont propres. On aura sûrement observé que la répartition des voix, tant en faveur que contre le paragraphe E, n'a nullement obéi à un clivage géographique, ce qui est un signe d'indépendance des membres de la Cour, que je me plais à souligner. Ayant ainsi expliqué le sens qu'il y a lieu de reconnaître selon moi au prononcé de la Cour, je voudrais maintenant revenir brièvement sur les raisons de fond qui m'ont amené à y adhérer.

* *
*

19. Le droit international humanitaire est un corpus de règles particulièrement exigeant et ces dernières ont vocation à s'appliquer en toutes circonstances. La Cour l'a pleinement reconnu.

20. Les armes nucléaires paraissent bien ‹ du moins dans l'état actuel de la science ‹ de nature à faire des victimes indiscriminées, confondant combattants et non-combattants et causant de surcroît des souffrances inutiles aux uns comme aux autres. *L'arme nucléaire, arme aveugle, déstabilise donc par nature le droit humanitaire, droit du discernement dans l'utilisation des armes. L'arme nucléaire, mal absolu, déstabilise le droit humanitaire en tant que droit du moindre mal. Ainsi l'existence même de l'arme nucléaire constitue un grand défi à l'existence même du droit humanitaire*, sans compter les effets à long terme dommageables pour l'environnement humain dans le respect duquel *le droit à la vie* peut s'exercer. A moins que la science ne parvienne à découvrir l'arme nucléaire *"propre"* qui frapperait le combattant en épargnant le non-combattant, il est clair que l'arme nucléaire a des effets indiscriminés et constitue un défi absolu au droit humanitaire. *Guerre nucléaire et droit humanitaire paraissent par conséquent deux antithèses qui s'excluent radicalement, l'existence de l'une supposant nécessairement l'inexistence de l'autre.*

21. Il ne fait pas de doute pour moi que la plupart des principes et règles du droit humanitaire et, en tout cas, les deux principes interdisant l'un l'emploi des armes à effets indiscriminés et l'autre celui des armes causant des maux superflus, font partie du *jus cogens*. La Cour a évoqué cette question dans le présent avis; mais elle a toutefois déclaré qu'elle n'avait pas à se prononcer sur ce point dans la mesure où la question de la nature du droit humanitaire applicable aux armes nucléaires ne rentrait pas dans le cadre de la demande que lui a adressée l'Assemblée générale des Nations Unies. La Cour n 'en a pas moins

expressément considéré ces règles fondamentales comme "*des règles intransgressibles du droit international coutumier*"

[Voir le paragraphe 79 de l'avis ainsi libellé : « C'est sans doute parce qu'un grand nombre de règles du droit humanitaire applicable dans les conflits armés sont si fondamentales pour le respect de la personne humaine et pour des «considérations élémentaires d'humanité», selon l'expression utilisée par la Cour dans son arrêt du 9 avril 1949 rendu en l'affaire du *Détroit de Corfou* (*C.I.J. Recueil 1949,* p. 22), que la convention IV de La Haye et les conventions de Genève ont bénéficié d'une large adhésion des Etats. Ces règles fondamentales s'imposent d'ailleurs à tous les Etats, qu'ils aient ou non ratifié les instruments conventionnels qui les expriment, parce qu'*elles constituent des principes intransgressibles du droit international coutumier*.» (Les italiques sont de moir.)] .

22. Le droit à la survie de l'Etat est lui aussi un droit fondamental et s'apparente, à maints égards, à un droit "*naturel*". Cependant, la légitime défense ‹ fût-elle exercée dans des conditions extrêmes mettant en cause la survie même d'un Etat ‹ ne peut engendrer une situation dans laquelle un Etat s'exonérerait lui-même du respect des normes *"intransgressibles"* du droit international humanitaire. Il peut donc se produire, dans certaines circonstances, une opposition irréductible, une collision frontale de principes fondamentaux dont l'un ne saurait se réduire à l'autre. Il reste que l'emploi de l'arme nucléaire par un Etat dans des circonstances où sa survie est en jeu risque à son tour de mettre en danger la survie de l'humanité tout entière, précisément du fait de l'engrenage de la terreur et de l'escalade dans l'emploi de telles armes. On manquerait par conséquent de la plus élémentaire prudence si on plaçait sans hésitation la survie d'un Etat au dessus de toutes autres considérations, et en particulier au dessus de la survie de l'humanité elle même.

* *
*

23. Comme la Cour l'a reconnu, l'obligation de négocier de bonne foi un désarmement nucléaire concerne les quelque 182 Etats parties au Traité de non-prolifération. Il me paraît pour ma part possible d'aller au delà de cette conclusion et d'affirmer qu'il existe en réalité une double *obligation générale,* opposable *erga omnes*, de négocier de bonne foi et de parvenir au résultat recherché. Il n'est en effet pas déraisonnable de penser qu'eu égard à l'unanimité, au moins formelle, qui prévaut en ce domaine, cette double obligation de négocier de bonne foi et de parvenir au résultat prévu a désormais revêtu, après cinquante ans, *un caractère coutumier*. Pour le reste, je partage entièrement l'opinion de la Cour quant à la portée juridique de cette obligation. Je me contenterai seulement de souligner une fois encore toute l'importance du but à atteindre compte tenu en particulier des incertitudes qui subsistent encore. La Cour devait à l'évidence le dire. Eu égard au lien très étroit que cette question entretient, par le fait des choses, avec celle de la licéité ou de l'illicéité de la menace ou de l'emploi d'armes nucléaires, on ne saurait reprocher à la Cour d'avoir statué *ultra petita*. Cette dernière notion est en tout état de cause étrangère à la procédure consultative.

* *
*

24. La solution dégagée par le présent avis consultatif fait le constat sans complaisance de la réalité juridique, tout en exprimant et traduisant fidèlement l'espoir, partagé par tous, peuples et Etats, que *le but ultime de toute action dans le domaine des armes nucléaires restera toujours le désarmement nucléaire, que ce but n'est plus utopique et qu'il est du devoir de tous de le rechercher plus activement que jamais*. De l'existence de cette volonté d'engagement dépend le destin de l'homme, car comme l'écrivait Albert Einstein, *"le sort de l'humanité sera celui qu'elle méritera"*.

52.42

(Signé) Mohammed BEDJAOUI.

52-43

DÉCLARATION DE M. HERCZEGH

Selon l'article 9 du Statut de la Cour internationale de Justice, les Membres de celle-ci «assurent dans l'ensemble la représentation des grandes formes de civilisation et des principaux systèmes juridiques du monde». En conséquence, il est inévitable que des différences d'approche théorique surgissent entre eux concernant les traits caractéristiques du système du droit international et de ses branches, l'existence ou la non-existence de lacunes dans ce système et la solution des conflits éventuels entre ses règles, ainsi que d'autres questions plus ou moins fondamentales. La préparation d'un avis consultatif sur la question fort complexe posée par l'Assemblée générale au sujet de la licéité de la menace ou de l'emploi des armes nucléaires «en toute circonstance» a mis en relief les différentes conceptions du droit international qui existent au sein de la Cour. La diversité de ces conceptions a empêché celle-ci de pouvoir arriver à une solution plus complète, et partant à un résultat plus satisfaisant. La rédaction des motifs, comme celle des conclusions de l'avis consultatif, reflètent ces divergences. Il convient toutefois de noter que, la Cour, sur plusieurs points très importants, s'est exprimée de manière unanime.

A mon avis, l'état actuel du droit international aurait cependant permis, dans le cadre de l'avis consultatif, la formulation d'une réponse plus précise et moins chargée d'incertitudes et d'hésitations à la demande de l'Assemblée générale. Dans les domaines où l'on ne trouve pas d'interdiction complète et universelle de certains actes «en tant que tels», l'application des principes généraux du droit permet de régler le comportement des sujets de l'ordre juridique international, les obligeant ou les autorisant, selon le cas, à s'abstenir ou à agir d'une manière ou d'une autre. Les principes fondamentaux du droit international humanitaire, correctement mis en valeur dans les motifs de l'avis consultatif, interdisent d'une manière catégorique et sans équivoque l'emploi des armes de destruction massive et, parmi celles-ci, des armes nucléaires. Le droit international humanitaire ne connaît pas d'exception à ces principes.

Je considère que la Cour aurait dû éviter entièrement de traiter de la question des représailles en temps de conflits armés, dont un examen minutieux aurait, à mon avis, dépassé le cadre de la demande soumise par l'Assemblée générale. En l'état, la Cour a pensé utile de mentionner la question dans son avis, mais l'a fait de manière trop brève, ce qui risque de donner lieu à des interprétations hâtives et mal fondées.

Les rapports entre les points C et E, tels qu'ils apparaissent au paragraphe 105 de l'avis consultatif, ne semblent pas tout à fait clairs, et la cohérence de leur contenu respectif n'apparaît pas parfaite. La menace ou l'emploi de la force au moyen d'armes nucléaires doit, selon le point C, satisfaire «à toutes les prescriptions» de l'article 51 de la Charte des Nations Unies, qui concerne le droit naturel de légitime défense, tandis que la seconde phrase du point E indique que

> «la Cour ne peut cependant conclure de façon définitive que la menace ou l'emploi d'armes nucléaires serait licite ou illicite dans une circonstance extrême de légitime défense dans laquelle la survie même d'un Etat serait en cause».

Or, le libellé de cette dernière phrase n'est pas à mon avis aisément conciliable avec la référence faite auparavant à «toutes les prescriptions» de l'article 51 de la Charte. Les paragraphes 40 et 41 de l'avis ont précisé que le droit de recourir à la légitime défense est soumis à des restrictions et qu'il existe une «règle spécifique ... bien établie en droit international coutumier» selon laquelle «la légitime défense ne justifierait que des mesures proportionnées à l'agression armée subie, et nécessaires pour y riposter». Je pense que la Cour aurait pu faire de cette constatation l'objet de conclusions formelles au paragraphe 105 de l'avis consultatif, qui aurait ainsi gagné en précision.

S2-44

L'une des nombreuses tâches assignées à l'Assemblée générale vise ‹ selon l'article 13 de la Charte des Nations Unies ‹ «le développement progressif du droit international et sa codification». Transformer, par voie de codification, des principes généraux du droit et des règles coutumières en règles de droit conventionnel pourrait exclure certaines des faiblesses inhérentes au droit coutumier et pourrait sûrement contribuer à mettre fin aux controverses qui ont préludé à la demande d'avis adressée à la Cour par l'Assemblée générale quant à la licéité ou à l'illicéité de la menace ou de l'emploi des armes nucléaires, et cela en attendant le désarmement nucléaire complet sous un contrôle international strict et efficace.

J'ai voté en faveur du point E du paragraphe 105 de l'avis, bien que j'estime que ledit point aurait pu résumer d'une manière plus précise l'état actuel du droit international quant à la question de la menace et de l'emploi d'armes nucléaires «en toute circonstance». En effet, voter contre ce point aurait signifié prendre une position négative vis-à-vis de certaines conclusions essentielles - exprimées également dans cet avis et auxquelles le point E fait allusion - que je fais miennes entièrement.

(Signé) GEZA HERCZEGH.

DECLARATION OF JUDGE SHI

I have voted in favour of the operative paragraphs of the Advisory Opinion of the Court, because I am generally in agreement with its reasoning and conclusions.

However, I have reservations with regard to the role which the Court assigns to the policy of deterrence in determining *lex lata* on the use of nuclear weapons.

Thus, for instance, paragraph 67 of the Opinion states

> "It [the Court] notes that it is a fact that a number of States adhered to that practice during the greater part of the Cold War and continued to adhere to it. Furthermore, the Members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*."

Then in the crucial paragraph 96 it is stated

> "nor can it [the Court] ignore the practice referred to as 'policy of deterrence', to which an appreciable section of the international community adhered for many years".

In my view, "nuclear deterrence" is an instrument of policy which certain nuclear-weapon States use in their relations with other States and which is said to prevent the outbreak of a massive armed conflict or war, and to maintain peace and security among nations. Undoubtedly, this practice of certain nuclear weapon States is within the realm of international politics, not that of law. It has no legal significance from the standpoint of the formation of a customary rule prohibiting the use of nuclear weapons as such. Rather, the policy of nuclear deterrence should be an object of regulation by law, not *vice versa*. The Court, when exercising its judicial function of determining a rule of existing law governing the use of nuclear weapons, simply cannot have regard to this policy practice of certain States as, if it were to do so, it would be making the law accord with the needs of the policy of deterrence. The Court would not only be confusing policy with law, but also take a legal position with respect to the policy of nuclear deterrence, thus involving itself in international politics - which would be hardly compatible with its judicial function.

Also, leaving aside the nature of the policy of deterrence, this "appreciable section of the international community" adhering to the policy of deterrence is composed of certain nuclear weapon States and those States that accept the protection of the "nuclear umbrella". No doubt, these States are important and powerful members of the international community and play an important role on the stage of international politics. However, the Court, as the principal judicial organ of the United Nations, cannot view this "appreciable section of the international community" in terms of material power. The Court can only have regard to it from the standpoint of international law. Today the international community of States has a membership of over 185 States. The appreciable section of this community to which the Opinion refers by no means constitutes a large proportion of that membership, and the structure of the international community is built on the principle of sovereign equality. Therefore, any undue emphasis on the practice of this "appreciable section" would not only be contrary to the very principle of sovereign equality of States, but would also make it more difficult to give an accurate and proper view

S246

of the existence of a customary rule on the use of the weapon.

(Signed) SHI JIUYONG

S247

DECLARATION OF JUDGE VERESHCHETIN

The reply of the Court, in my view, adequately reflects the current legal situation and gives some indication for the further development of the international law applicable in armed conflict.

However, I find myself obliged to explain the reasons which have led me to vote in favour of paragraph 2E of the *dispositif*, which carries the implication of the indecisiveness of the Court and indirectly admits the existence of a "grey area" in the present regulation of the matter.

The proponents of the view that a court should be prohibited from declaring *non liquet* regard this prohibition as a corollary of the concept of the "completeness" of the legal system. Those among their number who do not deny the existence of gaps in substantive international law consider that it is the obligation of the Court in a concrete case to fill the gap and thus, by reference to a general legal principle or by way of judicial law-creation, to provide for the "completeness" of the legal system.

On the other hand, there is a strong doctrinal view that the alleged "prohibition" on a declaration of a *non liquet* "may not be fully sustained by any evidence yet offered" (J. Stone, *"Non Liquet* and the Function of Law in the International Community", *The British Year Book of International Law*, 1959, p. 145). In his book devoted specifically to the problems of lacunae in international law, L. Siorat comes to the conclusion that in certain cases a court is obliged to declare a *non liquet* (L. Siorat, *Le problème de lacunes en droit international*, Paris, 1958, p. 189).

In critically assessing the importance for our case of the doctrinal debate on the issue of *non liquet*, one cannot lose sight of the fact that the debate has concerned predominantly, if not exclusively, the admissibility or otherwise of *non liquet* in a contentious procedure in which the Court is called upon to pronounce a binding, definite decision settling the dispute between the Parties. Even in those cases, the possibility of declaring a *non liquet* was not excluded by certain authoritative publicists, although this view could not be convincingly supported by arbitral and judicial practice.

In the present case, however, the Court is engaged in advisory procedure. It is requested not to resolve an actual dispute between actual Parties, but to state the law as it finds it at the present stage of its development. Nothing in the question put to the Court or in the written and oral pleadings by the States before it can be interpreted as a request to fill the gaps, should any be found, in the present status of the law on the matter. On the contrary, several States specifically stated that the Court "is not being asked to be a legislator, or to fashion a régime for nuclear disarmament" (Samoa, CR 95/31, p. 34) and that "[t]he Court would be neither speculating nor legislating, but elucidating the law as it exists and is understood by it . . ." (Egypt, CR 95/23, p. 32; see also the oral statement of Malaysia, CR 95/27, p. 52.)

Even had the Court been asked to fill the gaps, it would have had to refuse to assume the burden of law-creation, which in general should not be the function of the Court. In advisory procedure, where the Court finds a lacuna in the law or finds the law to be imperfect, it ought merely to state this without trying to fill the lacuna or improve the law by way of judicial legislation. The Court cannot be blamed for indecisiveness or evasiveness where the law, upon which it is called to pronounce, is itself inconclusive. Even less warranted would be any allegation of the Court's indecisiveness or evasiveness in this particular Opinion, which gives an unequivocal, albeit non-exhaustive, answer to the question put to the Court.

S248

In its reply the Court clearly holds that the threat or use of nuclear weapons would fall within the of the prohibitions and severe restrictions imposed by the UN Charter and a number of other multilateral treaties and specific undertakings as well as by customary rules and principles of the law of armed conflict. Moreover, the Court found that the threat or use of nuclear weapons "would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law". It is plausible that by inference, implication or analogy, the Court (and this is what some States in their written and oral statements had exhorted it to do) could have deduced from the aforesaid a general rule comprehensively proscribing the threat or use of nuclear weapons, without leaving room for any "grey area", even an exceptional one.

The Court could not, however, ignore several important considerations, which debarred it from embarking upon this road. Apart from those which have been expounded in the reasoning part of the Opinion, I would like to add the following. The very States that called on the Court to display courage and perform its "historical mission", insisted that the Court should remain within its judicial function and should not act as a legislator, requested that the Court state the law as it is and not as it should be. Secondly, the Court could not but notice the fact that, in the past, all the existing prohibitions on the use of other weapons of mass destruction (biological, chemical), as well as special restrictions on nuclear weapons, had been established by way of specific international treaties or separate treaty provisions, which undoubtedly point to the course of action chosen by the international community as most appropriate for the total prohibition on the use and eventual elimination of weapons of mass destruction. And thirdly, the Court must be concerned about the authority and effectiveness of the "deduced" general rule with respect to the matter on which the States are so fundamentally divided.

Significantly, even such a strong proponent of the "completeness" of international law and the inadmissibility of *non liquet* as H. Lauterpacht observes that, in certain circumstances, the

> "apparent indecision [of the International Court of Justice], which leaves room for discretion on the part of the organ which requested the Opinion, may ‹ both *as a matter of development of the law and as a guide to action* ‹ be preferable to a deceptive clarity which fails to give an indication of the inherent complexities of the issue. In so far as the decisions of the Court are an expression of existing international law ‹ whether customary or conventional ‹ they cannot but reflect the occasional obscurity or inconclusiveness of a defective legal system." (H. Lauterpacht, *The Development of International Law by the International Court,* reprinted ed., Cambridge, 1982, p. 152; emphasis added.)

In my view, the case in hand presents a good example of an instance where the absolute clarity of the Opinion would be "deceptive" and where on the other hand, its partial "apparent indecision" may prove useful "as a guide to action".

If I may be allowed the comparison, the construction of the solid edifice for the total prohibition on the use of nuclear weapons is not yet complete. This, however, is not because of the lack of building materials, but rather because of the unwillingness and objections of a sizeable number of the builders of this edifice. If this future edifice is to withstand the test of time and the vagaries of the international climate, it is the States themselves ‹ rather than the Court with its limited building resources ‹ that must shoulder the burden of bringing the construction process to completion. At the same time, the Court has clearly shown that the edifice of the total prohibition on the threat or use of nuclear weapons is being constructed and a great deal has already been achieved.

The Court has also shown that the most appropriate means for putting an end to the existence of any "grey areas" in the legal status of nuclear weapons would be "nuclear disarmament in all its aspects

5249

under strict and effective international control". Accordingly, the Court has found that there exists an obligation of States to pursue in good faith and bring to a conclusion negotiations leading to this supreme goal.

(Signed) Vladlen S.VERESHCHETIN.

DÉCLARATION DE M. FERRARI BRAVO

J'ai voté en faveur de l'avis consultatif sur la licéité des armes nucléaires parce que je pense qu'il est du devoir de la Cour internationale de Justice de n'épargner aucun effort pour répondre au mieux aux questions que lui posent les organes principaux des Nations Unies habilités à la saisir, surtout lorsqu'une telle réponse peut augmenter les possibilités de sortir d'une impasse qui, dans le cas actuel, perdure depuis plus de cinquante ans en faisant peser une ombre triste et menaçante sur l'humanité tout entière.

Dans sa fonction d'organe judiciaire principal des Nations Unies (article 92 de la Charte), la Cour a été, entre autres, créée juste pour cela et elle ne doit pas se demander si sa réponse, au mieux de ce qu'elle peut faire, pourra contribuer à l'évolution de la situation. Elle n'a pas non plus à se justifier si sa réponse n'est pas exhaustive. Je souscris par conséquent pleinement aux motifs qui étayent la décision prise par la Cour de faire droit à la demande de l'Assemblée générale.

A ce propos, il est toutefois nécessaire de dire que la question se présente sous un angle tout à fait différent lorsque la saisine provient d'une institution spécialisée des Nations Unies, dont la compétence pour s'adresser à la Cour est, pour des raisons de principe, bien délimitée. J'ai, partant, voté aussi en faveur de l'avis par lequel la Cour décide de ne pas répondre à la demande de l'Organisation mondiale de la Santé et je trouve qu'il y a de la logique dans ce comportement. La Cour, en effet, est l'organe judiciaire principal des Nations Unies, mais elle ne l'est pas d'autres organisations internationales dont le droit de la saisir demande à être soigneusement limité si l'on veut conserver un partage correct de compétences - et donc, d'efficacité - entre organismes internationaux, en évitant que des fonctions politiques, que la logique du système a confiées *seulement* aux Nations Unies, soient usurpées par d'autres organisations qui, pour ne rien dire d'autre, n'ont ni la compétence, ni la structure pour ce faire.

*

* *

Ceci dit, je reste toutefois fort insatisfait quant à certains passages cruciaux de la décision car elle me semble, pour dire la vérité, peu courageuse et parfois de lecture difficile.

Notamment, je regrette que la Cour ait arbitrairement réparti en deux catégories la longue ligne des résolutions de l'Assemblée générale qui commence par la résolution 1 (I) du 24 janvier 1946 et qui, au moins jusqu'à la résolution 808 (IX), se présente sous la forme d'une série de résolutions adoptées à l'unanimité. Je pense que ces résolutions sont fondamentales; tel est le cas surtout de la première, dont le libellé avait déjà été arrêté à Moscou avant la création des Nations Unies (pour l'histoire de la résolution ainsi que pour les démarches entreprises à Moscou en vue de confier aux Nations Unies le contrôle de l'énergie atomique dont, à ce moment là, seuls les Etats-Unis possédaient les clés voir *The United Nations in World Affairs, 1945-1947*, New York and London, 1947, p. 391 et suiv.), et qui pourrait, à la rigueur, être assimilée aux stipulations de la Charte. Elle démontre en effet, et à mon avis clairement, l'existence d'un *véritable engagement* solennel d'éliminer toute arme atomique dont la présence dans les arsenaux militaires était jugée illicite. La résolution disait ceci :

> «5. ... En particulier, la Commission *[établie par la résolution]* présente des propositions déterminées en vue :
>
> .....

c) d'éliminer, des armements nationaux, les armes atomiques et toutes autres armes importantes permettant des destructions massives.» (Les italiques sont de moi.)

Ces idées ont été répétées à plusieurs reprises dans d'autres résolutions de l'Assemblée générale immédiatement après la création des Nations Unies (voir par exemple la résolution 41 (I) ou la résolution 191 (III)).

Je sais très bien que la guerre froide intervenue peu après (et dont il ne m'appartient pas de désigner les responsables, tout en soulignant qu'ils ne se trouvent pas dans un seul camp) a empêché le *développement* de cette notion d'illicéité (abandonnée par la suite par les Etats-Unis qui en avaient été les promoteurs), en suscitant l'apparition de toute une série d'argumentations tournant autour du concept de dissuasion nucléaire qui n'a (et c'est important, comme on le verra ci-après) *aucune valeur juridique*.

Mais à mon avis, il reste que l'illicéité existait déjà et que toute production d'armes nucléaires devait, par conséquent, *se justifier* au vu de cette tache noire d'illicéité que l'on ne pouvait pas effacer. On doit par conséquent déplorer qu'une telle conclusion ne ressorte pas clairement du raisonnement de la Cour qui, au contraire, est souvent d'une lecture compliquée, sinueuse, et finalement peu efficace.

Cela mis à part, il reste à dire qu'un certain nombre de conclusions auxquelles la Cour est arrivée ne sont pas reflétées dans les résultats dont il est fait état au dispositif. Ce sont des lacunes graves, mais elles s'expliquent par la difficulté de former sur certaines composantes du présent avis consultatif, des majorités cohérentes.

Il est toutefois important de reconnaître qu'il reste le paragraphe 104 de l'avis, introductif au dispositif, dont l'importance est vraiment cruciale. Il suggère en effet au lecteur attentif d'évaluer dans son ensemble le raisonnement fait par la Cour, de tenir compte de ces parties du raisonnement qui ne sont pas reflétées dans des passages du dispositif et, qui plus est, de se rendre compte des inévitables lacunes du raisonnement. Que les lecteurs, et pas seulement les universitaires, en profitent en gardant à l'esprit qu'un avis consultatif, malgré les similitudes procédurales, n'est pas un arrêt. Et celui-ci surtout.

*

* *

Certes, il n'existe pas une règle précise et spécifique qui interdise l'arme atomique et qui tire toutes les conséquences de cette interdiction. La théorie de la dissuasion, à laquelle l'avis ne réserve qu'une rapide mention (surtout au paragraphe 96), aurait mérité quelques considérations supplémentaires. J'ai déjà dit qu'à mon avis l'idée de dissuasion nucléaire n'a aucune valeur juridique et j'ajoute que la théorie de la dissuasion, tout en créant une pratique des Etats nucléaires et de leurs alliés, n'est pas en mesure de créer une pratique juridique sur laquelle fonder le début de création d'une coutume internationale. On pourrait arriver à dire que l'on est en présence d'un *anti-droit*, si on pense aux effets qu'elle a eus sur la Charte des Nations Unies.

Je ne vais pas jusque-là, mais je ne peux m'empêcher de constater que c'est grâce à la doctrine de la dissuasion que la portée révolutionnaire de l'article 2, paragraphe 4, de la Charte s'est réduite, alors que parallèlement la portée de l'article 51, qui en était le contrepoint selon une logique traditionnelle, s'est étendue avec la formation autour de cette norme de toute une série de constructions conventionnelles, comme le montrent les deux systèmes régissant respectivement l'Alliance atlantique d'une part et, pendant sa durée d'existence, le pacte de Varsovie. Ce sont des systèmes qui sans doute sont régis par

S252

des règles juridiques mais qui procèdent d'une idée qui relève *essentiellement* d'un constat politique donc non juridique, qui consiste à prendre acte du fait que le Conseil de sécurité ne peut pas fonctionner face à un conflit majeur, comme le serait le cas échéant celui qui fait l'objet du présent avis.

Voici comment la rivière qui sépare l'article 2, paragraphe 4, de l'article 51 s'est élargie grâce aussi à l'énorme caillou de la dissuasion qu'on a jeté dedans. Et cela a entraîné la nécessité pour enjamber la rivière de jeter un pont et pour ce faire, d'utiliser les matériaux dont nous disposons maintenant, à savoir l'article VI du traité sur la non-prolifération nucléaire.

J'ai de forts doutes sur le point de savoir si ces développements sont réellement partagés par la Cour, car la manière très ramassée que la Cour a choisie pour traiter de la dissuasion ne permet pas de bien comprendre si tel est réellement l'avis de la Cour. Mais elle ne permet pas non plus de l'exclure. En tout cas les opinions individuelles ou dissidentes jointes à l'avis (je ne vois pas une grande différence entre les unes et les autres) contribueront à éclairer ce point (ainsi que d'autres, bien entendu).

De toute façon, telle est à mes yeux la raison fondamentale pour laquelle l'avis de la Cour est obligé de contenir, dans sa partie finale, des développements fondés sur une clause d'un traité qui, n'étant pas universel, ne devrait pas en bonne logique y figurer. Mais ces développements sont tout à fait justifiés par la situation dans laquelle nous nous trouvons, où le TNP se présente comme le seul moyen pour arriver rapidement à une solution qui puisse prévenir des conséquences catastrophiques.

*

* *

En conclusion, je pense qu'une règle précise et spécifique qui interdise l'arme atomique et qui tire toutes les conséquences de cette interdiction n'existe pas encore.

Il est évident que dans la situation politique des années qui vont de 1945 à 1985 une telle règle n'aurait pas pu se former. Mais, dirais-je, l'ensemble de la production normative des dernières cinquante années, surtout en matière du droit humanitaire de la guerre, est quand même inconciliable avec le développement technologique de la construction d'armes nucléaires. Peut-on, par exemple, s'imaginer qu'au moment où le droit humanitaire, partie essentielle et toujours plus importante du droit de la guerre et (depuis peu) aussi de la paix, engendre toute une série de principes pour la protection de la population civile ou pour la sauvegarde de l'environnement, ce même droit international continue d'abriter en son sein la licéité par exemple de l'usage de la bombe à neutrons qui laisse intact l'environnement mais ... seulement avec la «petite» conséquence de l'anéantissement de la population ! Si tel est le cas, peu importe de trouver une norme spécifique sur la bombe à neutrons car elle devient *automatiquement* illicite par contraste avec la majorité des règles du droit international.

Ce phénomène n'est pas nouveau, car à toute époque de son développement, dès le début de l'ère moderne, le droit international qui est essentiellement un droit coutumier, *donc de formation spontanée*, a connu des situations où la force de certaines règles empêchait les règles contraires de s'établir ou de se maintenir.

Tout ceci a été malheureusement obscurci dans l'avis de la Cour par la crainte d'analyser courageusement l'évolution dans le temps des résolutions de l'Assemblée générale qui seulement à partir d'une certaine époque (aux alentours des années soixante) ont provoqué l'apparition de clivages nets entre Etats nucléaires (et leurs alliés) et Etats menacés par la bombe.

S253

Je répète. Le fait qu'une règle interdisant l'arme nucléaire ait commencé à se former au début de [illegible] des Nations Unies n'empêche pas que le développement de cette formation et, par conséquent, le développement de sa force propulsive, aient été arrêtés au moment où les deux principales puissances, toutes les deux dotées de l'arme nucléaire, sont entrées dans la guerre froide et ont développé tout un instrumentaire, même conventionnel, centré autour de l'idée de la dissuasion. Mais ceci a seulement empêché *la mise en oeuvre* de l'interdiction (qu'on est forcé d'obtenir par voie de négociation) alors que l'interdiction en tant que telle, l'interdiction «toute nue», si je peux m'exprimer ainsi, est demeurée en l'état et produit toujours ses effets, au moins au niveau du fardeau de la preuve, en rendant plus difficile aux puissances nucléaires de se justifier dans le cadre de maintes applications de la théorie de la dissuasion qui, je le répète, *n'est pas* une théorie juridique.

En d'autres termes, on doit, par un instrument juridique (l'accord) parer au danger d'une entité, l'arme nucléaire, qui, en soi, n'a rien de juridique sans qu'il soit possible, dans un cas d'espèce, de vérifier si les solutions esquissées tiennent ou ne tiennent pas. Une telle vérification demanderait l'explosion de la bombe. Mais, alors, la vérification aurait-elle encore un sens ?

Cet élément de déséquilibre normatif entre les raisons des Etats nucléaires et celles des Etats non nucléaires devait et pouvait être soigneusement enregistré par la Cour et non pas de la façon parfois contradictoire sous laquelle il est perçu dans l'avis consultatif.

(Signé) L. FERRARI BRAVO.

S254

OPINION INDIVIDUELLE DE M. GUILLAUME

1. L'avis consultatif donné par la Cour dans la présente affaire a fait l'objet de sérieuses réserves de la part de nombre de mes collègues et sera probablement accueilli par un concert de critiques. Je partage certaines de ces réserves, mais ne me joindrai pas à ce concert.

Certes l'avis souffre de nombreuses imperfections. Il traite de manière trop rapide de questions complexes qui auraient dû faire l'objet de développements plus complets et plus équilibrés, en ce qui concerne par exemple le droit de l'environnement, le droit des représailles, le droit humanitaire ou celui de la neutralité. Dans ces divers domaines, la Cour, en recherchant quelle était la coutume en vigueur, n'a, quoiqu'elle en dise, guère tenu compte de la pratique et de l'*opinio juris* des Etats et s'est trop souvent laissée guider par des considérations qui relèvent plus du droit naturel que du droit positif, de la *lex ferenda* que de la *lex lata.* Elle a en outre accordé une portée excessive aux résolutions de l'Assemblée générale des Nations Unies. Cette confusion, aggravée par le paragraphe 104 de l'avis, n'a pas été sans conséquence sur les formulations retenues dans le dispositif. Bien plus, ce dernier, tout en statuant *ultra petita* en ce qui concerne le désarmement nucléaire, ne répond sur certains points que de manière implicite à la question posée. Il serait aisé en pareilles circonstances d'accabler la Cour. Je ne le ferai pas, car cette situation peu satisfaisante trouve son origine profonde moins dans les errements du juge que dans le droit applicable.

2. La Cour aurait pu songer dans ces conditions à ne pas donner suite à la demande d'avis dont elle était saisie. Cette solution aurait trouvé quelque justification dans les circonstances mêmes de la saisine. En effet, l'avis sollicité par l'Assemblée générale des Nations Unies (comme d'ailleurs celui demandé par l'Assemblée mondiale de la Santé) a trouvé son origine dans l'action menée par une Association dénommée "*International Association of lawyers against nuclear arms*" (IALANA) qui, de concert avec divers autres groupements, a lancé en 1992 un projet intitulé "*World Court Project*" afin de faire proclamer par la Cour l'illicéité de la menace ou de l'emploi des armes nucléaires. Ces associations ont fait preuve d'une intense activité en vue de faire voter les résolutions saisissant la Cour et de provoquer l'intervention devant cette dernière d'Etats hostiles aux armes nucléaires. Bien plus, la Cour et les juges ont reçu des milliers de lettres inspirées par ces groupements et faisant appel tant à leur conscience qu'à la conscience publique.

Je suis certain que les pressions ainsi exercées ont été sans influence sur les délibérations de la Cour, mais je me suis interrogé sur la question de savoir si, dans ces conditions, on pouvait encore regarder les demandes d'avis comme émanant des Assemblées qui les avaient adoptées, ou si, appliquant la théorie de l'apparence, la Cour ne devait pas les écarter comme irrecevables. J'ose cependant espérer que les gouvernements et les institutions intergouvernementales conservent encore une autonomie de décision suffisante par rapport aux puissants groupes de pression qui les investissent aujourd'hui avec le concours des moyens de communication de masse. Je constate en outre qu'aucun des Etats qui s'est présenté devant la Cour n'a soulevé une telle exception. Dans ces conditions, je n'ai pas cru devoir la retenir d'office.

3. Au fond, je partage l'opinion de la Cour telle qu'exprimée au paragraphe 2 B du dispositif, selon laquelle il n'existe ni en droit coutumier, ni en droit conventionnel, d'interdiction complète et universelle de recours aux armes nucléaires en tant que telles. Par contre, je comprends mal qu'au paragraphe 2 A du même dispositif, la Cour ait cru nécessaire de préciser que "ni le droit international coutumier, ni le

S25'5

droit international conventionnel n'autorisent spécifiquement la menace ou l'emploi d'armes nucl
Cette constatation n'est pas en soi inexacte, mais elle ne présente aucun intérêt pour l'Assemblée générale des Nations Unies puisqu'il résulte de l'avis même de la Cour que "l'illicéité de l'emploi de certaines armes en tant que telles ne résulte pas d'une absence d'autorisation, mais se trouve au contraire formulée en termes de prohibition" (par. 52).

4. En revanche, je souscris entièrement au paragra

S256

OPINION INDIVIDUELLE DE M. RANJEVA

J'ai voté pour l'ensemble du dispositif, en particulier le premier alinéa du paragraphe E, dans la mesure où le présent avis confirme le principe de l'illicéité de l'emploi ou de la menace d'emploi des armes nucléaires, bien que j'estime que le second alinéa du même paragraphe E soulève des problèmes d'interprétation susceptibles de porter atteinte à la clarté de la règle de droit.

*

* *

L'illicéité de l'emploi ou de la menace d'emploi des armes nucléaires aura été, pour la première fois, affirmée dans la jurisprudence internationale inaugurée par le présent avis consultatif, sollicité par l'Assemblée générale de l'Organisation des Nations Unies. Une rédaction différente du premier alinéa du paragraphe E de la seconde partie du dispositif aurait entretenu le doute sur le bien-fondé de ce principe de droit positif, car une comparaison superficielle entre les deux paragraphes déclaratifs A et B aurait pu induire en erreur. Considérer comme équipollentes les constatations énoncées dans ces paragraphes aurait exclu, par hypothèse, une réponse soit affirmative soit négative à la question formulée dans la résolution introductive d'instance. La véritable réponse de la Cour est exprimée au paragraphe E et plus précisément au premier alinéa, tandis que le paragraphe 104 des motifs donne la clef de lecture des motifs et du dispositif dans le sens que ce paragraphe E ne peut être détaché des paragraphes A, C, D, F. A mon avis, l'adverbe «généralement» signifie : dans la majorité des hypothèses et de la doctrine; il a pour fonction grammaticale de déterminer avec insistance l'affirmation énoncée dans la proposition principale. En utilisant un adverbe de détermination, l'avis écarte toute autre interprétation qui aurait résulté de l'utilisation d'un adverbe dubitatif tel que «apparemment», «peut-être», «sans doute». Enfin, le mode conditionnel du verbe «être» employé pour énoncer l'affirmation exprime deux idées : d'une part une probabilité, c'est-à-dire un caractère dont la qualification peut être affirmée avec plus de facilité qu'une autre; et d'autre part une supposition pour l'avenir dont on ne souhaite nullement la survenance. Ces motifs, concluant à l'illicéité de l'emploi ou de la menace d'utilisation des armes nucléaires ne fait, à mon avis, que confirmer l'état du droit positif.

L'absence de référence directe et spécifique aux armes nucléaires ne peut être utilisée pour justifier une licéité, fût-elle indirecte, de l'emploi ou de la menace d'emploi des armes nucléaires. Le libellé du premier alinéa du paragraphe E du dispositif exclut toute restriction au principe général de l'illicéité. A supposer qu'on veuille attribuer une valeur dubitative à l'adverbe «généralement», une conclusion dans le sens d'une inflexion de la portée de l'illicéité ne saurait résister à l'analyse juridique. Lorsqu'on prend l'adverbe «généralement» comme un adverbe de quantité, la signification naturelle du terme exclut toute velléité d'inférer une idée de licéité, qui est contraire au principe fondamental énoncé. Le recours à l'adverbe «généralement» ne s'explique que par l'appel indirect que lance la Cour pour que les conséquences des analyses développées aux numéros 70, 71, 72 des motifs soient dégagées par les destinataires de l'avis. En d'autres termes, le droit actuel que l'avis a relevé, mérite d'être consolidé. L'absence de mention spécifique aux armes nucléaires relève en effet plus de considérations d'opportunité diplomatique, technique ou politique que juridique. Aussi apparaît-il utile d'analyser, en termes de droit, la pratique internationale pour confirmer cette interprétation.

Trois données méritent de retenir l'attention. En premier lieu, aucune réédition des précédents de Hiroshima et de Nagasaki n'est intervenue depuis 1945 même si le spectre de la menace nucléaire a été

S257

agité; en revanche, les effets du nucléaire, en général et des armes nucléaires, en particulier, son qu'ils remettent en cause les fondements mêmes du droit humanitaire et des conflits armés. En deuxième lieu, aucune déclaration favorable à la licéité de principe de l'arme nucléaire n'a été enregistrée; faut-il insister sur le fait que c'est à titre de justification d'une exception à un principe accepté comme étant de droit, en l'occurrence l'illicéité de l'emploi ou de la menace d'emploi des armes nucléaires, que les Etats dotés d'armes nucléaires tentent d'exposer les raisons de leur attitude. En troisième et dernier lieu, l'attitude constante de l'Assemblée générale réservée voire hostile à l'arme nucléaire et le développement continu de la conscience du nucléaire ont abouti à l'élaboration d'un maillage juridique de plus en plus serré du régime des armes nucléaires dont la maîtrise relève de moins en moins du pouvoir discrétionnaire de son détenteur pour arriver à des situations juridiques d'interdiction.

Deux observations se dégagent de ce rappel des données de fait. En premier lieu, le principe de l'illicéité de l'emploi ou de la menace d'utilisation des armes nucléaires a pris forme de manière progressive en droit positif. Le recensement, en fait exhaustif, des instruments juridiques et actes pertinents révèle l'effet de catalyse qu'a exercé le principe visant à consacrer l'illicéité des armes nucléaires. L'étude du droit positif ne peut se limiter, dès lors, à constater purement et simplement l'état contemporain du droit; ainsi que l'a souligné la Cour permanente internationale de Justice dans l'affaire des *Décrets de nationalité promulgués en Tunisie et au Maroc*, la question de la conformité au regard du droit international dépend de l'évolution des idées et des rapports internationaux. Le réalisme juridique amène à accepter que la conscience juridique des questions nucléaires dépend de l'évolution des idées et des connaissances tandis qu'une donnée reste permanente : l'objectif final à savoir le désarmement nucléaire. Le même effet de catalyse peut être observé dans l'évolution du droit de la Charte des Nations Unies. Les cas du droit de la décolonisation ainsi que de celui du paragraphe 4 de l'article 2 montrent qu'à l'origine, considérer les principes y afférents comme relevant du domaine des prolégomènes juridiques relevait de l'hérésie juridique, or peut-on encore soutenir ces mêmes thèses aujourd'hui ? Ne peut-on aussi s'interroger sur l'avènement d'un ordre écologique et environnemental qui tendrait à se superposer à l'ordre nucléaire et qui est en voie d'élaboration dans l'ordre du droit positif ? En matière d'emploi ou de menace d'emploi des armes nucléaires, aucun doute n'est plus permis quant à son illicéité. Mais pour certains Etats, la difficulté résulte de l'absence de consolidation conventionnelle de ce principe, question soulevée par la seconde observation.

En second lieu, le silence sur le cas spécifique des armes nucléaires en matière de régime juridique de l'utilisation des armes exclut-il vraisemblablement l'illicéité coutumière de l'emploi ou de la menace d'emploi des armes nucléaires ? Sans aucun doute, dans une matière aussi importante pour la paix et l'avenir de l'humanité, la solution conventionnelle reste la meilleure des méthodes en vue de réaliser un désarmement général en particulier nucléaire. Mais le consensualisme caractéristique du droit international ne saurait se limiter ni à une technique d'ingénierie contractuelle ou conventionnelle, ni à une formalisation par vote majoritaire des normes de droit international. Le droit des armes nucléaires représente une des branches du droit international qu'on ne saurait envisager sans un minimum d'exigences éthiques qui expriment des valeurs auxquelles participent les membres de la communauté dans leur ensemble. La survie de l'humanité et de la civilisation est une de ces valeurs. Il ne s'agit pas de substituer l'ordre moral à l'ordre juridique de droit positif au nom d'un ordre supérieur ou révélé quelconque. Les exigences morales ne sont pas des sources directes et positives de prescriptions ou d'obligations, mais elles représentent un cadre à l'aune duquel sont scrutées et interpellées les techniques et les règles d'ingénierie conventionnelle et consensuelle. Dans les grandes causes de l'humanité, les exigences du droit positif et de l'éthique font un et les armes nucléaires de par leurs effets destructeurs en sont. Dans ces conditions, l'illicéité relève-t-elle de l'*opinio juris* ? A cette question, la Cour donne une réponse que d'aucuns considéreraient dubitative alors qu'une réponse affirmative, à mon avis, ne fait pas de doute et prévaut.

Traditionnellement, en matière de recherche de l'*opinio juris*, lorsqu'il s'agit d'examiner les relations

S258

entre le fait et le droit, le fait précède le droit : de l'analyse des faits se détermine l'application de [illegible] de droit. Mais peut-il en être de même da

S259

COUR INTERNATIONALE DE JUSTICE INTERNATIONAL COURT OF

SEPARATE OPINION OF JUDGE FLEISCHHAUER

I have voted in favour of all of the Court's Conclusions as contained in paragraph 105 of the Advisory Opinion, although these conclusions do not give a complete and clear-cut answer to the question asked of the Court by the General Assembly. In their incompleteness and vagueness the Court's Conclusions - and in particular their critical Point 2.E - rather reflect the terrible dilemma that confronts persons and institutions alike which have to deal with the question of the legality or otherwise of the threat or use of nuclear weapons in international law. At present, international law is still grappling with, and has not yet overcome, the dichotomy that exists between the international law applicable in armed conflict and, in particular, the rules and principles of humanitarian law, on the one side, with which principles and rules the use of nuclear weapons ‹ as the Court says in paragraph 95 of its Opinion - seems scarcely reconcilable; and, on the other side, the inherent right of self-defence which every State possesses as a matter of sovereign equality. That basic right would be severely curtailed if for a State, victim of an attack with nuclear, chemical or bacteriological weapons or otherwise constituting a deadly menace for its very survival, nuclear weapons were totally ruled out as an ultimate legal option in collective or individual self-defence.

1. In explaining my views more in detail, I would like to begin by stating that, in my view, the Court is right in its reasoning that the humanitarian rules and principles apply to nuclear weapons (para. 86) and in its conclusion that

> "A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict particularly those of the principles and rules of international humanitarian law..." (Point 2.D of the Conclusions.)

This is so, because of the intrinsically humanitarian character of those rules and principles and in spite of the fact that they essentially evolved much before nuclear weapons were invented. This finding is also not altered by the fact that the Geneva Conferences, which were held after the appearance on the international scene of nuclear weapons and which adopted the four Geneva Conventions of 12 August 1949 on the Protection of War Victims as well as the Protocol I of 8 June 1977 to those Conventions, did not address nuclear weapons specifically. The same is true for other principles of the law applicable in armed conflict, such as the principle of neutrality which likewise evolved much before the advent of nuclear weapons.

2. The rules and principles of humanitarian law applicable in armed conflict are expression of the - as the Court puts it (para. 95) - "overriding consideration of humanity" which is at the basis of international law and which international law is expected to uphold and defend. The humanitarian rules and principles remind States that whatever the weaponry used, notwithstanding the regrettable inevitability of civilian losses in times of war, civilians might never be the object of an attack. So far as combatants are concerned, weapons may not be used that cause unnecessary suffering. Similarly, the respect for the neutrality of States not participating in an armed conflict is a key element of orderly relations between States. The nuclear weapon is, in many ways, the negation of the humanitarian considerations underlying the law applicable in armed conflict and of the principle of neutrality. The nuclear weapon cannot distinguish between civilian and military targets. It causes immeasurable suffering. The radiation released by it is unable to respect the territorial integrity of a neutral State.

I therefore agree with the Court's finding in the first paragraph of Point 2.E of the Conclusions, to the

S260

effect that

> "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law".

3. As the Court rightly sees it, the answer to the question asked of it by the General Assembly does not lie alone in a finding that the threat or use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law. Through the use of the word "generally" in the first paragraph of Point 2.E of the Conclusions and through the addition of the second paragraph to that Point, the Court points to qualifications that apply or may apply to its findings regarding irreconcilability between the use of nuclear weapons and humanitarian law. The word "generally" limits the finding as such; and according to the second paragraph,

> "in view of the current state of international law, and the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".

To end the matter with the simple statement that recourse to nuclear weapons would be contrary to international law applicable in armed conflict, and in particular the principles and rules of humanitarian law, would have meant that the law applicable in armed conflict, and in particular the humanitarian law, was given precedence over the inherent right of individual or collective self-defence which every State possesses as a matter of sovereign equality and which is expressly preserved in Article 51 of the Charter. That would be so because if a State is the victim of an all out attack by another State, which threatens the very existence of the victimized State, recourse to the threat or use of nuclear weapons in individual (if the victimized State is a nuclear-weapon State) or collective (if the victim is a non-nuclear-weapon State allied to a nuclear-weapon State) self-defence could be for the victimized State the last and only alternative to giving itself up and surrender. That situation would in particular exist if the attack is made by nuclear, bacteriological or chemical weapons. It is true that the right of self-defence as protected by Article 51 of the Charter is not weapon-specific (para. 39 of the Considerations of the Opinion). Nevertheless, the denial of the recourse to the threat or use of nuclear weapons as a legal option in any circumstance could amount to a denial of self-defence itself if such recourse was the last available means by way of which the victimized State could exercise its right under Article 51 of the Charter.

A finding that amounted to such a denial therefore would not, in my view, have been a correct statement of the law; there is no rule in international law according to which one of the conflicting principles would prevail over the other. The fact that the attacking State itself would act in contravention of international law, would not alter the situation. Nor would recourse to the Security Council, as mandated by Article 51, guarantee by itself an immediate and effective relief.

4. It is true that the qualifying elements in Point 2.E of the Conclusions have been couched by the Court in hesitating, vague and halting terms. The first paragraph of Point 2.E does not explain what is to be understood by "*generally* ... contrary to the rules of international law applicable in armed conflict" (emphasis added), and the wording of the second paragraph of Point 2.E avoids to take a position when it says that,

> "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would

S261

> be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".

Nor is the reasoning of the Court in the considerations of its Opinion leading up to the qualifications of the main finding in Point 2.E very clear. As far as the term "generally" in the first paragraph of Point 2.E of the Conclusions is concerned, the Court's explanations in paragraph 95 of its Opinion are limited to the statement

> "that it [i.e. the Court] does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance".

The considerations leading to the second paragraph of Point 2.E are contained in paragraph 96. They refer to Article 51 of the Charter, the State practice referred to as "policy of deterrence" and the reservations which certain nuclear-weapon States have appended to the undertakings they have given, notably under the Protocols to the Treaties of Tlatelolco and Rarotonga, and also under the declarations made by them in connection with the extension of the Treaty on the Non Proliferation of Nuclear Weapons (para. 59 of the Opinion). The hesitating terms in which the Court has couched the qualifying elements in Point 2.E of the Conclusions witness, in my view, the legal and moral difficulties of the territory into which the Court has been led by the question asked of it by the General Assembly.

5. Nevertheless, the Court, by acknowledging in the considerations of its Opinion as well as in Point 2.E of the Conclusions the possibility of qualifying elements, made it possible for me to vote in favour of that particularly important point of its Conclusions. The Court could however ‹ and in my view should ‹ have gone further. My view on this is the following:

The Principles and rules of the humanitarian law and the other principles of law applicable in armed conflict, such as the principle of neutrality on the one side and the inherent right of self defence on the other, which are through the very existence of the nuclear weapon in sharp opposition to each other, are all principles and rules of law. None of these principles and rules is above the law, they are of equal rank in law and they can be altered by law. They are justiciable. Yet international law has so far not developed ‹ neither in conventional nor in customary law ‹ a norm on how these principles can be reconciled in the face of the nuclear weapon. As I stated above (para. 3 of this Separate Opinion), there is no rule giving prevalence of one over the other of these principles and rules. International politics have not yet produced a system of collective security of such perfection that it could take care of the dilemma, swiftly and efficiently.

In view of their equal ranking this means that, if the need arises, the smallest common denominator between the conflicting principles and rules has to be found. This means in turn that, although recourse to nuclear weapons is scarcely reconcilable with humanitarian law applicable in armed conflict as well as the principle of neutrality, recourse to such weapons could remain a justified legal option in an extreme situation of individual or collective self-defence in which the threat or use of nuclear weapons is the last resort against an attack with nuclear, chemical or bacteriological weapons or otherwise threatening the very existence of the victimized State.

The same result is reached if, in the absence of a conventional or a customary rule for the conciliation of the conflicting legal principles and rules, it is accepted that the third category of law which the Court has to apply by virtue of Article 38 of its Statute, i.e. the general principles of law recognized in all legal systems, contains a principle to the effect that no legal system is entitled to demand the self-abandonment, the suicide, of one of its subjects. Much can be said, in my view, in favour of the

applicability of such a principle in all modern legal systems and consequently also in internatio

Whichever of the two lines of reasoning is followed, the result that the smallest common denominator, as I see it, is the guiding factor in the solution of the conflict created by the nuclear weapon between the law applicable in armed conflict and the right of self-defence, is confirmed by the important role played by the policy of deterrence during all the years of the Cold War in State practice of nuclear-weapon States as well as in the practice of non-nuclear-weapon States, supporting or tolerating that policy. Even after the end of the Cold War the policy of deterrence has not altogether been abandoned, if only in order to maintain the balance of power among nuclear-weapon States and in order to deter non-nuclear-weapon States from acquiring and threatening or using nuclear weapons. Nuclear-weapon States have found it necessary to continue beyond the end of the Cold War the reservations they have made to the undertakings they have given, notably to the Treaties of Tlatelolco and Rarotonga (para. 59 of the Opinion), and to add similar reservations under the declarations given by them in connection with the unlimited extension of the Non-Proliferation Treaty. These reservations are tolerated by the non-nuclear parties concerned as well as, in the case of the unlimited extension of the Non-Proliferation Treaty, by the Security Council. Of course, as the Court itself has stated (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3 at p. 44), not every act habitually performed or every attitude taken over a prolonged period of time by a plurality of States is a practice relevant for the determination of the state of the law. In the words of the Court:

> "There are many international acts, e.g., in the field of ceremonial and protocol, which are performed almost invariably, but which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty." (*Ibid.*)

But the practice embodied in the policy of deterrence is based specifically on the right of individual or collective self-defence and so are the reservations to the guarantees of security. The States which support or which tolerate that policy and those reservations are aware of this. So was the Security Council when it adopted resolution 984 (1995). Therefore, the practice which finds expression in the policy of deterrence, in the reservations to the security guarantees and in their toleration, must be regarded as State practice in the legal sense.

6. For a recourse to nuclear weapons to be lawful, however, not only would the situation have to be an extreme one, but the conditions on which the lawfulness of the exercise of self defence generally depends would also always have to be met. These conditions comprise, as the Opinion states *expressis verbis* (para. 41) that there must be proportionality. The need to comply with the proportionality principle must not *a priori* rule out recourse to nuclear weapons; as the Opinion states (para. 42): "The proportionality principle may thus not in itself exclude the use of nuclear weapons in all circumstances." The margin that exists for considering that a particular threat or use of nuclear weapons could be lawful is therefore extremely narrow.

The present state of international law does not permit a more precise drawing of the border line between unlawfulness and lawfulness of recourse to nuclear weapons.

7. In the long run the answer to the conflict which the invention of the nuclear weapon entailed between highest values and most basic needs of the community of States, can only lie in effective reduction and control of nuclear armaments and an improved system of collective security. This is why I have supported Point 2.F of the Conclusions of the Opinion on the existence of a general obligation of States to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control ‹ although this pronouncement goes, strictly speaking, beyond the question asked of the Court.

5263

(Signed) Carl-August FLEISCHHAUER.

DISSENTING OPINION OF VICE-PRESIDENT SCHWEBEL

More than any case in the history of the Court, this proceeding presents a titanic tension between State practice and legal principle. It is accordingly the more important not to confuse the international law we have with the international law we need. In the main, the Court's Opinion meets that test. I am in essential though not entire agreement with much of it, and shall, in this opinion, set out my differences. Since however I profoundly disagree with the Court's principal and ultimate holding, I regret to be obliged to dissent.

The essence of the problem is this. Fifty years of the practice of States does not debar, and to that extent supports, the legality of the threat or use of nuclear weapons in certain circumstances. At the same time, principles of international humanitarian law which antedate that practice govern the use of all weapons including nuclear weapons, and it is extraordinarily difficult to reconcile the use - at any rate, some uses - of nuclear weapons with the application of those principles.

One way of surmounting the antinomy between practice and principle would be to put aside practice. That is what those who maintain that the threat or use of nuclear weapons is unlawful in all circumstances do. Another way is to put aside principle, to maintain that the principles of international humanitarian law do not govern nuclear weapons. That has not been done by States, including the nuclear-weapon States, in these proceedings nor should it be done. These principles - essentially proportionality in the degree of force applied, discrimination in the application of force as between combatants and civilians, and avoidance of unnecessary suffering of combatants - evolved in the pre-nuclear age. They do not easily fit the use of weaponry having the characteristics of nuclear weapons. At the same time, it is the fact that the nuclear Powers and their allies have successfully resisted applying further progressive development of humanitarian law to nuclear weapons; the record of the conferences that concluded the Geneva Conventions of 1949 and its Additional Protocols of 1977 establishes that. Nevertheless to hold that inventions in weaponry that post-date the formation of such fundamental principles are not governed by those principles would vitiate international humanitarian law. Nor is it believable that in fashioning these principles the international community meant to exclude their application to post-invented weaponry. The Martens Clause implies the contrary.

Before considering the extent to which the chasm between practice and principle may be bridged - and is bridged by the Court's Opinion - observations on their content are in order.

State Practice

State practice demonstrates that nuclear weapons have been manufactured and deployed by States for some 50 years; that in that deployment inheres a threat of possible use; and that the international community, by treaty and through action of the United Nations Security Council, has, far from proscribing the threat or use of nuclear weapons in all circumstances, recognized in effect or in terms that in certain circumstances nuclear weapons may be used or their use threatened.

Not only have the nuclear Powers avowedly and for decades, with vast effort and expense, manufactured, maintained and deployed nuclear weapons. They have affirmed that they are legally entitled to use nuclear weapons in certain circumstances and to threaten their use. They have threatened their use by the hard facts and inexorable implications of the possession and deployment of nuclear weapons; by a posture of readiness to launch nuclear weapons 365 days a year, 24 hours of every day;

S265

by the military plans, strategic and tactical, developed and sometimes publicly revealed by ther[illegible] a very few international crises, by threatening the use of nuclear weapons. In the very doctrine and practice of deterrence, the threat of the possible use of nuclear weapons inheres.

This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a pariah Government crying out in the wilderness of otherwise adverse international opinion. This is the practice of five of the world's major Powers, of the permanent Members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas. That is to say, it is the practice of States - and a practice supported by a large and weighty number of other States - that together represent the bulk of the world's military and economic and financial and technological power and a very large proportion of its population. This practice has been recognized, accommodated and in some measure accepted by the international community. That measure of acceptance is ambiguous but not meaningless. It is obvious that the alliance structures that have been predicated upon the deployment of nuclear weapons accept the legality of their use in certain circumstances. But what may be less obvious is the effect of the Non-Proliferation Treaty and the structure of negative and positive security assurances extended by the nuclear Powers and accepted by the Security Council in pursuance of that Treaty, as well as of reservations by nuclear Powers adhering to regional treaties that govern the possession, deployment and use of nuclear weapons.

The Nuclear Non-Proliferation Treaty

The Treaty on the Non-Proliferation of Nuclear Weapons, concluded in 1968 and indefinitely extended by 175 States Parties in 1995, is of paramount importance. By the terms of Article I, "Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons . . . or control over such weapons" nor to assist "any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons . . .". By the terms of Article II, each non-nuclear weapon State undertakes not to receive nuclear weapons and not to manufacture them. Article III provides that each non-nuclear-weapon State shall accept safeguards to be negotiated with the International Atomic Energy Agency with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons. Article IV preserves the right of all Parties to develop peaceful uses of nuclear energy, and Article V provides that potential benefits from peaceful applications of nuclear explosions will be made available to non-nuclear weapon States Party. Article VI provides:

> "Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control."

Article VII provides:

> "Nothing in this Treaty affects the right of any group of States to conclude regional treaties in order to assure the total absence of nuclear weapons in their respective territories."

Article VIII is an amendment clause. Article IX provides that the Treaty shall be open to all States and that, for the purposes of the Treaty, "a nuclear-weapon State is one which has manufactured and exploded a nuclear weapon or other nuclear explosive device prior to 1 January 1967". Article X is an extraordinary withdrawal clause which also contains provision on the basis of which a conference of the Parties may be called to extend the Treaty.

S 266

The NPT is thus concerned with the possession rather than the use of nuclear weapons. It establis[illegible] fundamental distinction between States possessing, and States not possessing, nuclear weapons, and a balance of responsibilities between them. It recognizes the possibility of the presence of nuclear weapons in territories in which their total absence has not been prescribed. Nothing in the Treaty authorizes, or prohibits, the use or threat of use of nuclear weapons. However, the Treaty recognizes the legitimacy of the possession of nuclear weapons by the five nuclear Powers, at any rate until the achievement of nuclear disarmament. In 1968, and in 1995, that possession was notoriously characterized by the development, refinement, maintenance and deployment of many thousands of nuclear weapons. If nuclear weapons were not maintained, they might be more dangerous than not; if they were not deployed, the utility of possession would be profoundly affected. Once a Power possesses, maintains and deploys nuclear weapons and the means of their delivery, it places itself in a posture of deterrence.

What does the practice of such possession of nuclear weapons thus import? Nuclear Powers do not possess nuclear arms to no possible purpose. They develop and maintain them at vast expense; they deploy them in their delivery vehicles; and they made and make known their willingness to use them in certain circumstances. They pursue a policy of deterrence, on which the world was on notice when the NPT was concluded and is on notice today. The policy of deterrence differs from that of the threat to use nuclear weapons by its generality. But if a threat of possible use did not inhere in deterrence, deterrence would not deter. If possession by the five nuclear Powers is lawful until the achievement of nuclear disarmament; if possession is the better part of deterrence; if deterrence is the better part of threat, then it follows that the practice of States - including their treaty practice - does not absolutely debar the threat or use of nuclear weapons.

Thus the regime of the Non-Proliferation Treaty constitutes more than acquiescence by the non-nuclear States in the reality of possession of nuclear weapons by the five nuclear Powers. As the representative of the United Kingdom put it in the oral hearings, "The entire structure of the Non Proliferation Treaty . . . presupposes that the parties did not regard the use of nuclear weapons as being proscribed in all circumstances." To be sure, the acquiescence of most non-nuclear weapon States in the fact of possession of nuclear weapons by the five nuclear Powers - and the ineluctable implications of that fact - have been accompanied by vehement protest and reservation of rights, as successive resolutions of the General Assembly show. It would be too much to say that acquiescence in this case gives rise to *opinio juris* establishing the legality of the threat or use of nuclear weapons. What it - and the State practice described - does do is to abort the birth or survival of *opinio juris* to the contrary. Moreover, there is more than the practice so far described and the implications of the Nuclear Non-Proliferation Treaty to weigh.

Negative and Positive Security Assurances Endorsed by the Security Council

In connection with the conclusion of the Treaty in 1968 and its indefinite extension in 1995, three nuclear Powers in 1968 and five in 1995 extended negative and positive security assurances to the non-nuclear States Parties to the NPT. In resolution 984 (1995), co-sponsored by the five nuclear Powers, and adopted by the Security Council on 11 April 1995 by unanimous vote,

> "The Security Council,
> . . .
>
> Recognizing the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive security assurances,

5267

. . .

Taking into consideration the legitimate concern of non-nuclear weapon States that, in conjunction with their adherence to the Treaty on the Non-Proliferation of Nuclear Weapons, further appropriate measures be undertaken to safeguard their security,

. . .

Considering further that, in accordance with the relevant provisions of the Charter of the United Nations, any aggression with the use of nuclear weapons would endanger international peace and security,

1. Takes note with appreciation of the statements made by each of the nuclear-weapon States . . ., in which they give security assurances against the use of nuclear weapons to non-nuclear weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons;

2. Recognizes the legitimate interest of non-nuclear-weapon States Parties to the Treaty on the Non-Proliferation of Nuclear Weapons to receive assurances that the Security Council, and above all its nuclear-weapon State permanent members, will act immediately in accordance with the relevant provisions of the Charter of the United Nations, in the event that such States are the victim of an act of, or object of a threat of, aggression in which nuclear weapons are used;

3. Recognizes further that, in case of aggression with nuclear weapons or the threat of such aggression against a non-nuclear-weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons, any State may bring the matter immediately to the attention of the Security Council to enable the Council to take urgent action to provide assistance, in accordance with the Charter, to the State victim of an act of, or object of a threat of, such aggression; and recognizes also that the nuclear-weapon State permanent members of the Security Council will bring the matter immediately to the attention of the Council and seek Council action to provide, in accordance with the Charter, the necessary assistance to the State victim;

. . .

7. Welcomes the intention expressed by certain States that they will provide or support immediate assistance, in accordance with the Charter, to any non-nuclear weapon State Party to the Treaty on the Non-Proliferation of Nuclear Weapons that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used;

. . .

9. Reaffirms the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security;

. . ."

S268.

It is plain - especially by the inclusion of operative paragraph 9 in its context - that the Security Council, in so taking note "with appreciation" in operative paragraph 1 of the negative security assurances of the nuclear Powers, and in so welcoming in operative paragraph 7 "the intention expressed" by the positive security assurances of the nuclear Powers, accepted the possibility of the threat or use of nuclear weapons, particularly to assist a non-nuclear-weapon State that, in the words of paragraph 7 - "is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used".

This is the plainer in view of the terms of the unilateral security assurances made by four of the nuclear-weapon States which are, with the exception of those of China, largely concordant. They expressly contemplate the use of nuclear weapons in specified circumstances. They implicitly do not debar the use of nuclear weapons against another nuclear Power (or State not party to the NPT), and explicitly do not debar their use against a nuclear-non-weapon State Party that acts in violation of its obligations under the NPT.

For example, the United States reaffirms that it will not use nuclear weapons against non nuclear weapon States Parties to the NPT

> "except in the case of an invasion or other attack on the United States . . . its armed forces, its allies, or on a State towards which it has a security commitment, carried out or sustained by such a non-nuclear-weapon State in association or alliance with a nuclear-weapon State".

The exception clearly contemplates the use of nuclear weapons in the specified exceptional circumstances. The United States assurances add: "parties to the Treaty on the Non-Proliferation of Nuclear Weapons must be in compliance" with "their obligations under the Treaty" in order to be "eligible for any benefits of adherence to the Treaty". The United States further "affirms its intention to provide or support immediate assistance" to any non-nuclear-weapon State "that is a victim of an act of, or an object of a threat of, aggression in which nuclear weapons are used". It reaffirms the inherent right of individual or collective self-defence under Article 51 of the Charter "if an armed attack, including a nuclear attack, occurs against a Member of the United Nations . . .". Such affirmations by it - and their unanimous acceptance by the Security Council - demonstrate that nuclear Powers have asserted the legality and that the Security Council has accepted the possibility of the threat or use of nuclear weapons in certain circumstances.

Other Nuclear Treaties

As the Court's Opinion recounts, a number of treaties in addition to the NPT limit the acquisition, manufacture, and possession of nuclear weapons; prohibit their deployment or use in specified areas; and regulate their testing. The negotiation and conclusion of these treaties only makes sense in the light of the fact that the international community has not comprehensively outlawed the possession, threat or use of nuclear weapons in all circumstances, whether by treaty or through customary international law. Why conclude these treaties if their essence is already international law, indeed, as some argue, *jus cogens?*

The fact that there is no comprehensive treaty proscribing the threat or use of nuclear weapons in all circumstances is obvious. Yet it is argued that the totality of this disparate treaty making activity demonstrates an emergent *opinio juris* in favour of the comprehensive outlawry of the threat or use of nuclear weapons; that, even if nuclear weapons were not outlawed decades ago, they are today, or are on the verge of so becoming, by the cumulation of such treaties as well as resolutions of the United Nations

S269

General Assembly.

The looseness of that argument is no less obvious. Can it really be supposed that, in recent months, nuclear Powers have adhered to a protocol to the Treaty of Raratonga establishing a nuclear free zone in the South Pacific because they believe that the threat or use of nuclear weapons already is outlawed in all circumstances and places, there as elsewhere? Can it really be believed that as recently as 15 December 1995, at Bangkok, States signed a Treaty on the South-East Asia Nuclear Weapon-Free Zone, and on 11 April 1996 the States of Africa took the considerable trouble to conclude at Cairo a treaty for the creation of a nuclear-weapons-free zone in Africa, on the understanding that by dint of emergent *opinio juris* customary international law already requires that all zones of the world be nuclear-free?

On the contrary, the various treaties relating to nuclear weapons confirm what the practice described above imports: the threat or use of nuclear weapons is not - certainly, not yet - prohibited in all circumstances, whether by treaty or customary international law. This is the clearer in the light of the terms of the Treaty of Tlatelolco for the Prohibition of Nuclear Weapons in Latin America of 14 February 1967 and the declarations that accompanied adherence to an Additional Protocol under the Treaty of the five nuclear-weapon States. All of the five nuclear-weapon States in so adhering undertook not to use or threaten to use nuclear weapons against the Contracting Parties to the Treaty. But they subjected their undertakings to the possibility of the use of nuclear weapons in certain circumstances, as recounted above in paragraph 59 of the Court's Opinion. None of the Contracting Parties to the Tlatelolco Treaty objected to the declarations of the five nuclear-weapon States, which is to say that the Contracting Parties to the Treaty recognized the legality of the use of nuclear weapons in certain circumstances.

Resolutions of the General Assembly

In its opinion, the Court concludes that the succession of resolutions of the General Assembly on nuclear weapons "still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons". In my view, they do not begin to do so. The seminal resolution, resolution 1653 (XVI) of 24 November 1961, declares that the use of nuclear weapons is "a direct violation of the Charter of the United Nations" and "is contrary to the rules of international law and to the laws of humanity", and that any State using nuclear weapons is to be considered "as committing a crime against mankind and civilization". It somewhat inconsistently concludes by requesting consultations to ascertain views on the possibility of convening a conference for signing a convention on the prohibition of the use of nuclear weapons for war purposes. Resolution 1653 (XVI) was adopted by a vote of 55 to 20, with 26 abstentions. Four of the five nuclear Powers voted against it. Succeeding resolutions providing, as in resolution 36/92 I, that "the use or threat of use of nuclear weapons should . . . be prohibited . . .", have been adopted by varying majorities, in the teeth of strong, sustained and qualitatively important opposition. Any increase in the majority for such resolutions is unimpressive, deriving in some measure from an increase in the membership of the Organization. The continuing opposition, consisting as it does of States that bring together much of the world's military and economic power and a significant percentage of its population, more than suffices to deprive the resolutions in question of legal authority.

The General Assembly has no authority to enact international law. None of the General Assembly's resolutions on nuclear weapons are declaratory of existing international law. The General Assembly can adopt resolutions declaratory of international law only if those resolutions truly reflect what international law is. If a resolution purports to be declaratory of international law, if it is adopted unanimously (or virtually so, qualitatively as well as quantitatively) or by consensus, and if it corresponds to State practice, it may be declaratory of international law. The resolutions of which resolution 1653 is the exemplar conspicuously fail to meet these criteria. While purporting to be

declaratory of international law (yet calling for consultations about the possibility of concluding prohibition of what is so declared), they not only do not reflect State practice, they are in conflict with it, as shown above. Forty-six States voted against or abstained upon the resolution, including the majority of the nuclear Powers. It is wholly unconvincing to argue that a majority of the Members of the General Assembly can "declare" international law in opposition to such a body of State practice and over the opposition of such a body of States. Nor are these resolutions authentic interpretations of principles or provisions of the United Nations Charter. The Charter contains not a word about particular weapons, about nuclear weapons, about *jus in bello*. To declare the use of nuclear weapons a violation of the Charter is an innovative interpretation of it, which cannot be treated as an authentic interpretation of Charter principles or provisions giving rise to obligations binding on States under international law. Finally, the repetition of resolutions of the General Assembly in this vein, far from giving rise, in the words of the Court, to "the nascent *opinio juris*", rather demonstrates what the law is not. When faced with continuing and significant opposition, the repetition of General Assembly resolutions is a mark of ineffectuality in law formation as it is in practical effect.

Principles of International Humanitarian Law

While it is not difficult to conclude that the principles of international humanitarian law - above all, proportionality in the application of force, and discrimination between military and civilian targets - govern the use of nuclear weapons, it does not follow that the application of those principles to the threat or use of nuclear weapons "in any circumstance" is easy. Cases at the extremes are relatively clear; cases closer to the centre of the spectrum of possible uses are less so.

At one extreme is the use of strategic nuclear weapons in quantities against enemy cities and industries. This so-called "countervalue" use (as contrasted with "counterforce" uses directly only against enemy nuclear forces and installations) could cause an enormous number of deaths and injuries, running in some cases into the millions; and, in addition to those immediately affected by the heat and blast of those weapons, vast numbers could be affected, many fatally, by spreading radiation. Large-scale "exchanges" of such nuclear weaponry could destroy not only cities but countries, and render continents, perhaps the whole of the earth, uninhabitable, if not at once then through longer-range effects of nuclear fallout. It cannot be accepted that the use of nuclear weapons on a scale which would - or could - result in the deaths of many millions in indiscriminate inferno and by far-reaching fallout, have profoundly pernicious effects in space and time, and render uninhabitable much or all of the earth, could be lawful.

At the other extreme is the use of tactical nuclear weapons against discrete military or naval targets so situated that substantial civilian casualties would not ensue. For example, the use of a nuclear depth-charge to destroy a nuclear submarine that is about to fire nuclear missiles, or has fired one or more of a number of its nuclear missiles, might well be lawful. By the circumstance of its use, the nuclear depth-charge would not give rise to immediate civilian casualties. It would easily meet the test of proportionality; the damage that the submarine's missiles could inflict on the population and territory of the target State would infinitely outweigh that entailed in the destruction of the submarine and its crew. The submarine's destruction by a nuclear weapon would produce radiation in the sea, but far less than the radiation that firing of its missiles would produce on and over land. Nor is it as certain that the use of a conventional depth-charge would discharge the mission successfully; the far greater force of a nuclear weapon could ensure destruction of the submarine whereas a conventional depth-charge might not.

An intermediate case would be the use of nuclear weapons to destroy an enemy army situated in a desert. In certain circumstances, such a use of nuclear weapons might meet the tests of discrimination and proportionality; in others not. The argument that the use of nuclear weapons is inevitably disproportionate raises troubling questions, which the British Attorney General addressed in the Court's

S271

oral proceedings in these terms:

> "If one is to speak of 'disproportionality', the question arises: disproportionate to what? The answer must be 'to the threat posed to the victim State'. It is by reference to that threat that proportionality must be measured. So one has to look at all the circumstances, in particular the scale, kind and location of the threat. To assume that any defensive use of nuclear weapons must be disproportionate, no matter how serious the threat to the safety and the very survival of the State resorting to such use, is wholly unfounded. Moreover, it suggests an overbearing assumption by the critics of nuclear weapons that they can determine in advance that no threat, including a nuclear, chemical or biological threat, is ever worth the use of any nuclear weapon. It cannot be right to say that if an aggressor hits hard enough, his victim loses the right to take the only measure by which he can defend himself and reverse the aggression. That would not be the rule of law. It would be an aggressor's charter."

For its part, the body of the Court's Opinion is cautious in treating problems of the application of the principles of international humanitarian law to concrete cases. It evidences a measure of uncertainty in a case in which the tension between State practice and legal principle is unparalleled. It concludes, in Paragraph 2E of the *dispositif,* that,

> "It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of international humanitarian law."

That conclusion, while imprecise, is not unreasonable. The use of nuclear weapons is, for the reasons examined above, exceptionally difficult to reconcile with the rules of international law applicable in armed conflict, particularly the principles and rules of international humanitarian law. But that is by no means to say that the use of nuclear weapons, in any and all circumstances, would necessarily and invariably conflict with those rules of international law. On the contrary, as the *dispositif* in effect acknowledges, while they might "generally" do so, in specific cases they might not. It all depends upon the facts of the case.

Extreme Circumstances of Self-Defence and State Survival

The just-quoted first paragraph of Paragraph 2E of the holdings is followed by the Court's ultimate, paramount - and sharply controverted - conclusion in the case, narrowly adopted by the President's casting vote:

> "However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake."

This is an astounding conclusion to be reached by the International Court of Justice. Despite the fact that its Statute "forms an integral part" of the United Nations Charter, and despite the comprehensive and categorical terms of Article 2, paragraph 4, and Article 51 of that Charter, the Court concludes on the supreme issue of the threat or use of force of our age that it has no opinion. In "an extreme circumstance of self-defence, in which the very survival of a State would be at stake", the Court finds that international law and hence the Court have nothing to say. After many months of agonizing appraisal of the law, the Court discovers that there is none. When it comes to the supreme interests of State, the

5272

Court discards the legal progress of the Twentieth Century, puts aside the provisions of the Charter of the United Nations of which it is "the principal judicial organ", and proclaims, in terms redolent of *Realpolitik*, its ambivalence about the most important provisions of modern international law. If this was to be its ultimate holding, the Court would have done better to have drawn on its undoubted discretion not to render an Opinion at all.

Neither predominant legal theory (as most definitively developed by Lauterpacht in *The Function of Law in the International Community*, 1933) nor the precedent of this Court admit a holding of *non liquet*, still less a holding - or inability to hold - of such a fundamental character. Lauterpacht wrote most pertinently (and, as it has turned out, presciently):

> "There is not the slightest relation between the content of the right to self-defence and the claim that it is above the law and not amenable to evaluation by law. Such a claim is self-contradictory, inasmuch as it purports to be based on legal right, and as, at the same time, it dissociates itself from regulation and evaluation by the law. Like any other dispute involving important issues, so also the question of the right of recourse to war in self-defence is in itself capable of judicial decision . . ." (At p. 180.)

Indeed, the drafters of the Statute of the Permanent Court of International Justice crafted the provisions of Article 38 of its Statute - provisions which Article 38 of the Statute of this Court maintains - in order, in the words of the President of the Advisory Committee of Jurists, to avoid "especially the blind alley of *non liquet*". To do so, they adopted the Root-Phillimore proposal to empower the Court to apply not only international conventions and international custom but "the general principles of law recognized by civilized nations". (Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee*, June 16th-July 24th, 1920, The Hague, 1920, pp. 332, 344. See also pp. 296 ("A rule must be established to meet this eventuality, to avoid the possibility of the Court declaring itself incompetent (*non liquet*) though lack of applicable rules"); 307-320, and 336 (the reference to general principles "was necessary to meet the possibility of a *non-liquet*").

Moreover, far from justifying the Court's inconclusiveness, contemporary events rather demonstrate the legality of the threat or use of nuclear weapons in extraordinary circumstances.

Desert Storm

The most recent and effective threat of the use of nuclear weapons took place on the eve of "Desert Storm". The circumstances merit exposition, for they constitute a striking illustration of a circumstance in which the perceived threat of the use of nuclear weapons was not only eminently lawful but intensely desirable.

Iraq, condemned by the Security Council for its invasion and annexation of Kuwait and for its attendant grave breaches of international humanitarian law, had demonstrated that it was prepared to use weapons of mass destruction. It had recently and repeatedly used gas in large quantities against the military formations of Iran, with substantial and perhaps decisive effect. It had even used gas against its own Kurdish citizens. There was no ground for believing that legal or humanitarian scruple would prevent it from using weapons of mass destruction - notably chemical, perhaps bacteriological or nuclear weapons - against the coalition forces arrayed against it. Moreover, it was engaged in extraordinary efforts to construct nuclear weapons in violation of its obligations as a Party to the Non-Proliferation Treaty.

General Norman Schwarzkopf stated on 10 January 1996 over national public television in the United

5273

States on "*Frontline*":

> "My nightmare scenario was that our forces would attack into Iraq and find themselves in such a great concentration that they became targeted by chemical weapons or some sort of rudimentary nuclear device that would cause mass casualties.
>
> That's exactly what the Iraqis did in the Iran-Iraq war. They would take the attacking masses of the Iranians, let them run up against their barrier system, and when there were thousands of people massed against the barrier system, they would drop chemical weapons on them and kill thousands of people." (*Frontline*, Show #1408, "The Gulf War," *Transcript of Journal Graphics, Inc., Part II*, p. 5.)

To exorcise that nightmare, the United States took action as described by then Secretary of State James A. Baker in the following terms, in which he recounts his climactic meeting of 9 January 1990 in Geneva with the then Foreign Minister of Iraq, Tariq Aziz:

> "I then made a point 'on the dark side of the issue' that Colin Powell had specifically asked me to deliver in the plainest possible terms. 'If the conflict involves your use of chemical or biological weapons against our forces,' I warned, 'the American people will demand vengeance. We have the means to exact it. With regard to this part of my presentation, that is not a threat, it is a promise. If there is any use of weapons like that, our objective won't just be the liberation of Kuwait, but the elimination of the current Iraqi regime, and anyone responsible for using those weapons would be held accountable.'
>
> "The President had decided, at Camp David in December, that the best deterrent of the use of weapons of mass destruction by Iraq would be a threat to go after the Ba'ath regime itself. He had also decided that U.S. forces would not retaliate with chemical or nuclear response if the Iraqis attacked with chemical munitions. There was obviously no reason to inform the Iraqis of this. In hope of persuading them to consider more soberly the folly of war, I purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation. (We do not really know whether this was the reason there appears to have been no confirmed use by Iraq of chemical weapons during the war. My own view is that the calculated ambiguity how we might respond has to be part of the reason.)" (*The Politics of Diplomacy - Revolution, War and Peace, 1989-1992* by James A. Baker III, 1995, p. 359.)

In "*Frontline*", Mr. Baker adds:

> "The president's letter to Saddam Hussein, which Tariq Aziz read in Geneva, made it very clear that if Iraq used weapons of mass destruction, chemical weapons, against United States forces that the American people would - would demand vengeance and that we had the means to achieve it." (*Loc. cit., Part I*, p. 13.)

Mr. Aziz is then portrayed on the screen immediately thereafter as saying:

> "I read it very carefully and then when I ended reading it, I told him, 'Look, Mr. Secretary, this is not the kind of correspondence between two heads of state. This is a letter of threat and I cannot receive from you a letter of threat to my president,' and I returned it to him." (*Ibid.*)

At another point in the programme, the following statements were made:

5274

"NARRATOR: The Marines waited for a chemical attack. It never came.

TARIQ AZIZ: We didn't think that it was wise to use them. That's all what I can say. That was not - was not wise to use such kind of weapons in such kind of a war with - with such an enemy." (*Loc. cit.*, Part II, p. 7.)

In *The Washington Post* of 26 August 1995, an article datelined United Nations, 25 August was published as follows:

"Iraq has released to the United Nations new evidence that it was prepared to use deadly toxins and bacteria against U.S. and allied forces during the 1991 Persian Gulf War that liberated Kuwait from its Iraqi occupiers, U.N. Ambassador Rolf Ekeus said today.

"Ekeus, the chief U.N. investigator of Iraq's weapons programs, said Iraqi officials admitted to him in Baghdad last week that in December 1990 they loaded three types of biological agents into roughly 200 missile warheads and aircraft bombs that were then distributed to air bases and a missile site.

"The Iraqis began this process the day after the U.N. Security Council voted to authorize using 'all necessary means' to liberate Kuwait, Ekeus said. He said the action was akin to playing 'Russian roulette' with extraordinarily dangerous weapons on the eve of war.

"U.S. and U.N. officials said the Iraqi weapons contained enough biological agents to have killed hundreds of thousands of people and spread horrible diseases in cities or military bases in Israel, Saudi Arabia or wherever Iraq aimed the medium range missiles or squeaked a bomb-laden aircraft through enemy air defenses.

"Ekeus said Iraqi officials claimed they decided not to use the weapons after receiving a strong but ambiguously worded warning from the Bush administration on Jan. 9, 1991, that any use of unconventional warfare would provoke a devastating response.

"Iraq's leadership assumed this meant Washington would retaliate with nuclear weapons, Ekeus said he was told. U.N. officials said they believe the statement by Iraqi Deputy Prime Minister Tariq Aziz is the first authoritative account for why Iraq did not employ the biological or chemical arms at its disposal.

. . .

"Iraqi officials said the documents were hidden by Hussein Kamel Hassan Majeed, the director of Iraq's weapons of mass destruction program who fled to Jordan on Aug. 7 and whose defection prompted Iraq to summon Ekeus to hear the new disclosures . . .

"Iraq admitted to filling a total of 150 aircraft bombs with botulinum toxin and bacteria capable of causing anthrax disease, each of which is among the most deadly substances known and can kill in extremely small quantities, Ekeus said. It also claimed to have put the two agents into 25 warheads to be carried by a medium range rocket.

"According to what Aziz told Ekeus on Aug. 4, then-Secretary of State James A. Baker III

5275
5275

delivered the U.S. threat of grievous retaliation that caused Iraq to hold back during a tens four-hour meeting in Geneva about five weeks before the beginning of the U.S.-led Desert Storm military campaign. Baker hinted at a U.S. response that would set Iraq back years by reducing its industry to rubble.

"Ekeus said that Aziz told him Iraq 'translated' the warning into a threat that Washington would respond with nuclear arms. In fact, then-Joint Chiefs of Staff Chairman Colin L. Powell and other U.S. military leaders had decided early on that nuclear weapons were not needed and no such retaliatory plans existed." (*The Washington Post*, 26 August 1995, p. A1. See also the report in *The New York Times*, 26 August 1995, p. 3. For a contrasting contention by Iraq that "authority to launch biological and chemical war-heads was pre-delegated in the event that Baghdad was hit by nuclear weapons during the Gulf war", see the 8th Report to the Security Council by the Executive Chairman of the Special Commission (Ambassador Ekeus), U.N. document S/1995/864 of 11 October 1996, p. 11. That Report continues: "This pre-delegation does not exclude the alternative use of such capability and therefore does not constitute proof of only intentions concerning second use." (Ibid.)

Finally, there is the following answer by Ambassador Ekeus to a question in the course of testimony in hearings on global proliferation of weapons of mass destruction of 20 March 1996:

". . . I have had conversation with the Deputy Prime Minister of Iraq, Tariq Aziz, in which he made references to his meeting with Secretary of State James Baker in Geneva just before the outbreak of war. He, Tariq Aziz, says that Baker told him to the effect that if such [chemical or biological] weapons were applied there would be a very strong reaction from the United States.

"Tariq Aziz did not imply that Baker mentioned what type of reaction. But he told me that the Iraqi side took it for granted that it meant the use of maybe nuclear weapons against Baghdad, or something like that. And that threat was decisive for them not to use the weapons.

"But this is the story he, Aziz, tells. I think one should be very careful about buying it. I don't say that he must be wrong, but I believe there are strong reasons that this may be an explanation he offers of why Iraq lost the war in Kuwait. This is the story which they gladly tell everyone who talks to them. So I think one should be cautious at least about buying that story. I think still it is an open question." (Testimony of Ambassador Rolf Ekeus before the Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs of the United States Senate, *Hearings on the Global Proliferation of Weapons of Mass Destruction, in press*.)

Thus there is on record remarkable evidence indicating that an aggressor was or may have been deterred from using outlawed weapons of mass destruction against forces and countries arrayed against its aggression at the call of the United Nations by what the aggressor perceived to be a threat to use nuclear weapons against it should it first use weapons of mass destruction against the forces of the coalition. Can it seriously be maintained that Mr. Baker's calculated - and apparently successful - threat was unlawful? Surely the principles of the United Nations Charter were sustained rather than transgressed by the threat. "Desert Storm" and the resolutions of the Security Council that preceded and followed it may represent the greatest achievement of the principles of collective security since the founding of the League of Nations. The defeat of this supreme effort of the United Nations to overcome an act of aggression by the use of weapons of mass destruction against coalition forces and countries would have

been catastrophic, not only for coalition forces and populations, but for those principles and for the United Nations. But the United Nations did triumph, and to that triumph what Iraq perceived as a threat to use nuclear weapons against it may have made a critical contribution. Nor is this a case of the end justifying the means. It rather demonstrates that, in some circumstances, the threat of the use of nuclear weapons - as long as they remain weapons unproscribed by international law - may be both lawful and rational.

Furthermore, had Iraq employed chemical or biological weapons - prohibited weapons of mass destruction - against coalition forces, that would have been a wrong in international law giving rise to the right of belligerent reprisal. Even if, *arguendo,* the use of nuclear weapons were to be treated as also prohibited, their proportionate use by way of belligerent reprisal in order to deter further use of chemical or biological weapons would have been lawful. At any rate, this would be so if the terms of a prohibition of the use of nuclear weapons did not debar use in reprisal or obligate States "never under any circumstances" to use nuclear weapons, as they will be debarred by those terms from using chemical weapons under Article I of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction of 1993, should it come into force. In paragraph 46 of its Opinion, the Court states that, on the question of belligerent reprisals, "any" right of such recourse would, "like self-defence, be governed *inter alia* by the principle of proportionality." The citation of that latter principle among others is correct, but any doubt that the Court's reference may raise about the existence of a right of belligerent reprisal is not. Such a doubt would be unsupported not only by the customary law of war and by military manuals of States issued in pursuance of it, which have long affirmed the principle and practice of belligerent reprisal, but by the terms of the Geneva Conventions and its Additional Protocols, which prohibit reprisals not generally but in specific cases (against prisoners-of-war, the wounded, civilians, certain objects and installations, etc.) The far-reaching additional restrictions on reprisals of Protocol I, which bind only its Parties, not only do not altogether prohibit belligerent reprisals; those restrictions as well as other innovations of Protocol I were understood at the time of their preparation and adoption not to govern nuclear weapons.

There is another lesson in this example, namely, that as long as what are sometimes styled as "rogue States" menace the world (whether they are or are not Parties to the NPT), it would be imprudent to set policy on the basis that the threat or use of nuclear weapons is unlawful "in any circumstance". Indeed, it may not only be rogue States but criminals or fanatics whose threats or acts of terrorism conceivably may require a nuclear deterrent or response.

Article VI of the NPT

Finally, I have my doubts about the Court's last operative conclusion in Paragraph 2F: "There exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control." If this obligation is that only of "Each of the Parties to the Treaty" as Article VI of the Non-Proliferation Treaty states, this is another anodyne asseveration of the obvious, like those contained in operative Paragraphs 2A, 2B, 2C and 2D. If it applies to States not party to the NPT, it would be a dubious holding. It would not be a conclusion that was advanced in any quarter in these proceedings; it would have been subjected to no demonstration of authority, to no test of advocacy; and it would not be a conclusion that could easily be reconciled with the fundamentals of international law. In any event, since Paragraph 2F is not responsive to the question put to the Court by the General Assembly, it is to be treated as *dictum.*

(Signed) Stephen M. SCHWEBEL.

5277

DISSENTING OPINION OF JUDGE ODA

TABLE OF CONTENTS

Paragraphs

PART I. INTRODUCTORY REMARKS -- MY OPPOSITION TO THE COURT'S DECISION TO RENDER AN OPINION IN RESPONSE TO THE REQUEST UNDER GENERAL ASSEMBLY RESOLUTION 49/75K IN THIS CASE 1

(1) The Inadequacy of the Question put by the General Assembly in the Resolution as the Request for Advisory Opinion 2-5

(2) The Lack of a Meaningful Consensus of the Member States of the United Nations on the Request Drafted without any Adequate Statement of Reasoning 6-14

Table I

PART II. ONE ASPECT OF NUCLEAR DISARMAMENT -- THE UNSUCCESSFUL EFFORTS OVER A LONG PERIOD TO BRING ABOUT A CONVENTION "PROHIBITING THE USE OR THREAT OF USE OF NUCLEAR WEAPONS UNDER ANY CIRCUMSTANCES" AS AN IMMEDIATE BACKGROUND TO THE REQUEST TO THE COURT 15-25

(1) Declaration for the Non-use or the Prohibition of Nuclear Weapons 15-19

Table II

(2) The 1982-1995 Resolutions on the Convention on the Prohibition of the Use of Nuclear Weapons 20-25

Table III

PART III. ANOTHER ASPECT OF NUCLEAR DISARMAMENT -- NUCLEAR DISARMAMENT IN THE PERIOD OF THE COLD WAR AND THE ROAD TO THE CONCLUSION OF THE NON-PROLIFERATION TREATY 26-42

(1) The Nuclear Arms Race and the Control of Nuclear Weapons in the period of the Cold War; the Emergence of the Non-Proliferation Treaty 26-33

(2) Perpetuation of the NPT régime 34-41

Table IV

(3) Significance of the NPT régime in the period of the still valid doctrine of nuclear deterrence 42

Table V

PART IV. CONCLUDING REMARKS

(1) Re-Examination of the General Assembly's Request for the Court's 43-46

5279

Advisory Opinion

(2) Role of the Advisory Function and the Discretion of the Court to Decline to Render an Advisory Opinion 47-51

(3) Conclusions 52-54

PART V. SUPPLEMENTARY OBSERVATIONS ON MY POSITION AS REGARDS PARAGRAPH 2 OF THE OPERATIVE PART OF THE PRESENT ADVISORY OPINION 55

I. INTRODUCTORY REMARKS

MY OPPOSITION TO THE COURT'S DECISION TO RENDER AN OPINION IN RESPONSE TO THE REQUEST UNDER GENERAL ASSEMBLY RESOLUTION 49/75K IN THIS CASE

1. As the only Judge who voted against paragraph (1) of the operative part of the Court's Opinion, I would like to state my firm conviction that the Court, for reasons of judicial propriety and economy, should have exercised its discretionary power to refrain from rendering an opinion in response to the request for advisory opinion submitted by the United Nations General Assembly under its resolution 49/75K of 15 December 1994. I am sorry to have to say that the conclusions the Court has now reached do not appear to me to constitute substantive or substantial answers to the questions that the General Assembly wanted to raise by means of its resolution and occasion doubts about the credibility of the Court.

(1) The Inadequacy of the Question put by the General Assembly in the Resolution as the Request for Advisory Opinion

2. (*The request laid down in resolution 49/75K*) The question put to the Court by the General Assembly, under resolution 49/75K within the framework of the agenda item: "General and complete disarmament", reads strangely. It is worded as follows:

> "Is the threat or use of nuclear weapons in any circumstance permitted under international law?"
> (the French text reads: "Est-il permis en droit international de recourir à la menace ou à l'emploi d'armes nucléaires en toute circonstance?")

The Court's Opinion points out the difference between the English and the French texts of the Request and states that "[t]he Court finds it unnecessary to pronounce on the possible divergences" (Court's Opinion, para. 20). We should, however, note that the resolution which originated in draft resolution A/C.1/49/L.36 (original: English), prepared and introduced by Indonesia (on behalf of the States Members of the United Nations that are members of the Movement of Non-Aligned Countries), was originally drafted in English and that, in the First Committee at the 49th Session (1994) which took up this draft resolution, the content of this original English text was not questioned by any delegate. Moreover, it would seem that the francophone delegates raised no question about the text of the French

5280

translation, as far as the verbatim records indicate. I shall therefore proceed with my analysis bas the English text.

3. (*The request was presented to the Court, not so much in order to ascertain its opinion as to seek the endorsement of an alleged legal axiom*) When putting this question to the Court, the General Assembly - or those States which took the initiative in drafting the Request - clearly *never* expected that it would give an answer in the *affirmative* stating that: "*Yes*, the threat or use of nuclear weapons *is* permitted under international law in any circumstance [or, in all circumstances]". If this is true, it follows that, in fact, the General Assembly *only* expected the Court to state that: "*No*, the threat or use of nuclear weapons is *not* permitted under international law *in any circumstance*". The General Assembly, by asking the question that it did, wished to obtain nothing more than the Court's *endorsement* of the latter conclusion.

Since the Court was simply asked in this instance to give an opinion endorsing what is, in the view of the General Assembly, a legal axiom to the effect that "the threat or use of nuclear weapons is not permitted under international law in any circumstance", I wonder if the Request really does fall within the category of a request for advisory opinion within the meaning of Article 96(1) of the Charter of the United Nations. In the history of the advisory function of the Court, a simple endorsement or approval of what either the General Assembly or the Security Council believed

S 2-8 1

DISSENTING OPINION OF JUDGE SHAHABUDDEEN

The Charter was signed on 26 June 1945. A less troubled world was its promise. But the clash of arms could still be heard. A new weapon was yet to come. It must first be tested. The date was 12 July 1945; the place Alamogordo. The countdown began. The moment came: *"The radiance of a thousand suns."* That was the line which came to the mind of the leader of the scientific team. He remembered also the end of the ancient verse: *"I am become death, The Shattered of Worlds".*

By later standards, it was a small explosion. Bigger bombs have since been made. Five declared nuclear-weapon States possess them. The prospect of mankind being destroyed through a nuclear war exists. The books of some early peoples taught that the use of a super weapon which might lead to excessively destructive results was not allowed. What does contemporary international law have to say on the point?

That, in substance, is the General Assembly's question. The question raises the difficult issue as to whether, in the special circumstances of the use of nuclear weapons, it is possible to reconcile the imperative need of a State to defend itself with the no less imperative need to ensure that, in doing so, it does not imperil the survival of the human species. If a reconciliation is not possible, which side should give way? Is the problem thus posed one of law? If so, what lines of legal inquiry suggest themselves?

*

Overruling preliminary arguments, the Court, with near unanimity, decided to comply with the General Assembly's request for an advisory opinion on the question whether "the threat or use of nuclear weapons [is] in any circumstance permitted under international law". By a bare majority, it then proceeded to reply to the General Assembly's question by taking the position, on its own showing, that it cannot answer the substance of the question. I fear that the contradiction between promise and performance cannot, really, be concealed. With respect, I am of the view that the Court should and could have answered the General Assembly's question - one way or another.

*

From the point of view of the basic legal principles involved, the reply of the Court, such as it is, is set out in the first part of subparagraph E of paragraph (2) of the operative paragraph of its Advisory Opinion. Subject to a reservation about the use of the word "generally", I agree with the Court "that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law".

My difficulty is with the second part of subparagraph E of paragraph (2) of the operative paragraph of the Court's Advisory Opinion. If the use of nuclear weapons is lawful, the nature of the weapon, combined with the requirements of necessity and proportionality which condition the exercise of the inherent right of self-defence, would suggest that such weapons could only be lawfully used "in an extreme circumstance of self-defence, in which the very survival of a State would be at stake"; and this, I think, notwithstanding variations in formulation and flexible references to "vital security interests", is the general theme underlying the position taken by the nuclear weapon States. That in turn must be the main issue presented for consideration by the Court. But this is exactly the issue that the Court says it cannot decide, with the result that the General Assembly has not received an answer to the substance of its question.

I have the misfortune to be unable to subscribe to the conclusion so reached by the Court, and the more so for the reason that, when that conclusion is assessed by reference to the received view of the "*Lotus*" case, the inference could be that the Court is saying that there is a possibility that the use of nuclear weapons could be lawful in certain circumstances and that it is up to States to decide whether that possibility exists in particular circumstances, a result which would give me difficulty. In my respectful view, "the current state of international law, and ... the elements of fact at its disposal" permitted the Court to answer one way or another.

As the two parts of subparagraph E cannot be separated for the purpose of voting, I have been regretfully constrained to withhold support from this subparagraph. Further, as the point of disagreement goes to the heart of the case, I have elected to use the style "Dissenting Opinion", even though voting for most of the remaining items of the operative paragraph.

A second holding which I am unable to support is subparagraph B of paragraph (2) of the operative paragraph. The specificity conveyed by the words "as such" enables me to recognize that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such". But the words "as such" do not outweigh a general suggestion that there is no prohibition at all of the use of nuclear weapons. The circumstance that there is no "comprehensive and universal prohibition of the threat or use of nuclear weapons as such" in customary or conventional international law does not conclude the question whether the threat or use of such weapons is lawful; more general principles have to be consulted. Further, for reasons to be given later, the test of prohibition does not suffice to determine whether there is a right to do an act with the magnitude of global implications which would be involved in such use. Finally, the holding in this subparagraph is a step in the reasoning; it does not properly form part of the Court's reply to the General Assembly's question.

*

As remarked above, I have voted for the remaining items of the operative paragraph of the Court's Advisory Opinion. However, a word of explanation is appropriate. The Court's voting practice does not always allow for a precise statement of a judge's position on the elements of a dispositif to be indicated through his vote; how he votes would depend on his perception of the general direction taken by such an element and of any risk of his basic position being misunderstood. A declaration, separate opinion or dissenting opinion provides needed opportunity for explanation of subsidiary difficulties. This I now give below in respect of those parts of the operative paragraph for which I have voted.

As to subparagraph A of paragraph (2) of the operative paragraph, I take the view, to some extent implicit in this subparagraph, that, at any rate in a case of this kind, the action of a State is unlawful unless it is authorized under international law; the mere absence of prohibition is not enough. In the case of nuclear weapons, there is no authorization, whether specific or otherwise. However, subparagraph A is also a step in the reasoning; it is not properly part of the Court's reply to the General Assembly's question.

As to subparagraph C of paragraph (2) of the operative paragraph, there is an implication here that a "threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter" may nevertheless be capable of complying with some or all of the requirements of Article 51 and would in that event be lawful. I should have thought that something which was "contrary" to the former was *ipso facto* illegal and not capable of being redeemed by meeting any of the requirements of the latter. Thus, an act of aggression, being contrary to Article 2, paragraph 4, is wholly outside of the framework of Article 51, even if carried out with antiquated rifles and in strict conformity with humanitarian law. Further, it is difficult to see how the Court can allow itself to be suggesting here

that there are circumstances in which the threat or use of nuclear weapons is lawful in view of the fact that in subparagraph E of paragraph (2) of the operative paragraph it has not been able to come to a definitive conclusion on the main issue as to whether the threat or use of such weapons is lawful or unlawful in the circumstances stated there.

As to subparagraph D of paragraph (2) of the operative paragraph, the statement that a "threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict..." suggests the possibility of cases of compatibility and consequently of legality. As mentioned above, it is difficult to see how the Court can take this position in view of its inability to decide the real issue of legality. The word "should" is also out of place in a finding as to what is the true position in law.

As to subparagraph F of paragraph (2) of the operative paragraph, I have voted for this as a general proposition having regard to the character of nuclear weapons. The particular question as to the legal implications of Article VI of the Treaty on the Non-Proliferation of Nuclear Weapons (" NPT") is not before the Court; it does not form part of the General Assembly's question. It could well be the subject of a separate question as to the effect of that Article of the NPT, were the General Assembly minded to present one.

Going beyond the operative paragraph, I have hesitations on certain aspects of the *consideranda* but do not regard it as convenient to list them all. I should however mention paragraph 104 of the Advisory Opinion. To the extent that this reproduces the standing jurisprudence of the Court, I do not see the point of the paragraph. If it ventures beyond, I do not agree. The operative paragraph of the Court's Advisory Opinion has to be left to be interpreted in accordance with the settled jurisprudence on the point.

*

Returning to subparagraph E of paragraph (2) of the operative paragraph of the Court's Advisory Opinion, I propose to set out below my reasons for agreeing with this holding in so far as I agree with it and for disagreeing with it in so far as I disagree. The limited objective will be to show that, contrary to the Court's major conclusion, "the current state of international law, and ... the elements of fact at its disposal" were sufficient to enable it to "conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". With this end in view, I propose, after noticing some introductory and miscellaneous matters in Part I, to deal, in Part II, with the question whether States have a right to use nuclear weapons having regard to the general principles which determine when States are to be considered as having a power, and, in Part III, with the position under international humanitarian law. In Part IV, I consider whether a prohibitory rule, if it existed at the commencement of the nuclear age, was modified or rescinded by the emergence of a subsequent rule of customary international law. I pass on in Part V to consider denuclearization treaties and the NPT. The conclusion is reached in Part VI.

PART I. INTRODUCTORY AND MISCELLANEOUS MATTERS

1. *The main issue*

The commencement of the nuclear age represents a legal benchmark for the case in hand. One argument was that, at that point of time, the use of nuclear weapons was not prohibited under international law, but that a prohibitory rule later emerged, the necessary *opinio juris* developing under the twin influences of the general prohibition of the use of force laid down in Article 2, paragraph 4, of the Charter and of

5284

growing appreciation of and sensitivity to the power of nuclear weapons. In view of the position taken by the proponents of the legality of the use of nuclear weapons ("proponents of legality") over the past five decades, it will be difficult to establish that the necessary *opinio juris* later crystallised, if none existed earlier. That argument was not followed by most of the proponents of the illegality of the use of nuclear weapons ("proponents of illegality").

The position generally taken by the proponents of illegality was that a prohibitory rule existed at the commencement of the nuclear age, and that subsequent developments merely evidenced the continuing existence of that rule. For their part, the proponents of legality took the position that such a prohibitory rule never existed, and that what subsequent developments did was to evidence the continuing non-existence of any such rule and a corresponding right to use nuclear weapons. There was no issue as to whether, supposing that a prohibitory rule existed at the commencement of the nuclear age, it might have been reversed or modified by the development of a later rule in the opposite direction [For the possibility of a rule of customary international law being modified by later inconsistent State practice, see *Military and Paramilitary Activities in and against Nicaragua, Merits, I.C.J. Reports 1986,* p. 109, para. 207.] ; supposing that that had been argued, the position taken by the proponents of illegality would bar the development of the *opinio juris* necessary for the subsequent emergence of any such permissive rule, and more particularly so if the earlier prohibitory rule had the quality of *ius cogens.* This would have been the case if any humanitarian principles on which the earlier prohibitory rule was based themselves had the quality of *ius cogens,* a possibility left open by paragraph 83 of the Court's Advisory Opinion.

State practice is important. But it has to be considered within the framework of the issues raised. Within the framework of the issues raised in this case, State practice subsequent to the commencement of the nuclear age does not have the decisive importance suggested by the focus directed to it during the proceedings: it is not necessary to consider it in any detail beyond and above what is reasonably clear, namely, that the opposition shown by the proponents of legality would have prevented the development of a prohibitory rule if none previously existed, and that the opposition shown by the proponents of illegality would have prevented the development of a rescinding rule if a prohibitory rule previously existed. In either case, the legal situation as it existed at the commencement of the nuclear age would continue in force. The question is, what was that legal situation?

The real issue, then, is whether at the commencement of the nuclear age there was in existence a rule of international law which prohibited a State from creating effects of the kind which could later be produced by the use of nuclear weapons. If no such rule then existed, none has since come into being, and the case of the proponents of legality succeeds; if such a rule then existed, it has not since been rescinded, and the case of the proponents of illegality succeeds.

2. *The Charter assumes that mankind and its civilisation will continue*

International law includes the principles of the law of armed conflict. These principles, with roots reaching into the past of different civilizations, were constructed on the unspoken premise that weapons, however destructive, would be limited in impact, both in space and in time. That assumption held good throughout the ages. New and deadlier weapons continued to appear, but none had the power to wage war on future generations or to threaten the survival of the human species. Until now.

Is a legal problem presented? I think there is; and this for the reason that, whatever may be the legal position of the individual in international law, if mankind in the broad is annihilated, States disappear and, with them, the basis on which rights and obligations exist within the international community. How might the problem be approached?
Courts, whether international or national, have not had to deal with the legal implications of actions

which could annihilate mankind. Yet in neither system should there be difficulty in finding an answer; both systems must look to the juridical foundations on which they rest. What do these suggest?

In his critical study of history, Ibn Khaldûn referred to "the explanation that laws have their reason in the purposes they are to serve". Continuing, he noted that "the jurists mention that ... injustice invites the destruction of civilization with the necessary consequence that the species will be destroyed", and that the laws "are based upon the effort to preserve civilization" [Ibn Kaldûn, *The Muqaddimah, An Introduction to History*, trans. Franz Rosenthal, edited and abridged by N.J. Dawood, 1981, p. 40.]. Thus, the preservation of the human species and of civilization constitutes the ultimate purpose of a legal system. In my opinion, that purpose also belongs to international law, as this is understood today.

This conclusion is not at variance with the Charter of the United Nations and the Statute of the Court, by which the Court is bound. The first preambular paragraph of the Charter recorded that "the Peoples of the United Nations" were "[d]etermined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind...". A world free of conflict was not guaranteed; but, read in the light of that and other statements in the Charter, Article 9 of the Statute shows that the Court was intended to serve a civilized society. A civilized society is not one that knowingly destroys itself, or knowingly allows itself to be destroyed. A world without people is a world without States. The Charter did not stipulate that mankind would continue, but it at least assumed that it would; and the assumption was not the less fundamental for being implicit.

3. *The use of nuclear weapons is unacceptable to the international community*

It is necessary to consider the character of nuclear weapons. It was said on the part of the proponents of legality that there are "tactical", "battlefield", "theatre" or "clean" nuclear weapons which are no more destructive than certain conventional weapons. Supposing that this is so, then *ex hypothesi* the use of nuclear weapons of this kind would be as lawful as the use of conventional weapons. It was in issue, however, whether the material before the Court justified that hypothesis, the argument of the proponents of illegality being that the use of any nuclear weapon, even if directed against a lone nuclear submarine at sea or against an isolated military target in the desert, results in the emission of radiation and nuclear fall-out and carries the risk of triggering a chain of events which could lead to the annihilation of the human species. The eleventh preambular paragraph of the 1968 NPT, which was extended "indefinitely" in 1995, records that the States parties desired "the liquidation of all their existing stockpiles, and the elimination from national arsenals of nuclear weapons...". Presumably the elimination so foreshadowed comprehended all "nuclear weapons" and, therefore, "tactical", "battlefield", "theatre" or "clean" nuclear weapons also. The parties to the NPT drew no distinction. On the material before it, the Court could feel less than satisfied that the suggested exceptions exist.

The basic facts underlying the resolutions of the General Assembly as to the nature of a nuclear war, at least a full-scale one, are difficult to controvert. Since 1983 the technology has advanced, but the position even at that stage was put thus by the Secretary-General of the United Nations, Mr. Javier Pérez de Cuéllar:

> "The world's stockpile of nuclear weapons today is equivalent to 16 billion tons of TNT. As against this, the entire devastation of the Second World War was caused by the expenditure of no more than 3 million tons of munitions. In other words, we possess a destructive capacity of more than 5,000 times what caused 40 to 50 million deaths not too long ago. It should suffice to kill every man, woman and child 10 times over." [Javier Pérez de Cuéllar, Statement at the University of Pennsylvania, 24 March 1983, in *Disarmament*, Vol. VI, No. 1, p. 91.]

Thus, nuclear weapons are not just another type of explosive weapons, only occupying a higher position on the same scale: their destructive power is exponentially greater. Apart from blast and heat, the radiation effects over time are devastating. To classify these effects as being merely a byproduct is not to the point; they can be just as extensive as, if not more so than, those immediately produced by blast and heat. They cause unspeakable sickness followed by painful death, affect the genetic code, damage the unborn, and can render the earth uninhabitable. These extended effects may not have military value for the user, but this does not lessen their gravity or the fact that they result from the use of nuclear weapons. This being the case, it is not relevant for present purposes to consider whether the injury produced is a byproduct or secondary effect of such use.

Nor is it always a case of the effects being immediately inflicted but manifesting their consequences in later ailments; nuclear fall-out may exert an impact on people long after the explosion, causing fresh injury to them in the course of time, including injury to future generations. The weapon continues to strike for years after the initial blow, thus presenting the disturbing and unique portrait of war being waged by a present generation on future ones - on future ones with which its successors could well be at peace.

The first and only military use of nuclear weapons which has so far been made took place at Hiroshima on 6 August 1945 and at Nagasaki on 9 August 1945. A month later, the International Committee of the Red Cross ("ICRC") considered the implications of the use of newly developed weapons. In a circular letter to national Red Cross committees, dated 5 September 1945 and signed by Mr. Max Huber as acting President, the ICRC wrote this:

> "La guerre totalitaire a fait naître de nouvelles techniques. Faut-il en conséquence admettre que l'individu cessera d'être juridiquement protégé et ne sera plus considéré que comme un simple élément de collectivités en lutte? Ce serait là l'écroulement des principes sur lesquels repose le droit international qui tend à la protection physique et spirituelle de la personne. Même en temps de guerre un droit strictement égoïste et utilitaire et qui ne s'inspirerait que d'intérêts occasionnels, ne saurait jamais offrir une sécurité durable. Si elle refuse à la personne humaine sa valeur et sa dignité, la guerre ira irrésistiblement à des destructions sans limite, puisque l'esprit des hommes, qui s'empare des forces de l'univers, semble, par ses créations, accélérer cet élan dévastateur."

Do the rules stand set aside? Or do they still apply to protect the individual? If they do not, the seizure by man of the forces of the universe propels war irresistibly and progressively in the direction of destruction without limit, including the extinction of the human species. In time, the nuclear-weapon States ("NWS") and most of the non-nuclear-weapon States ("NNWS") would subscribe to statements acknowledging the substance of this result.

The concerns raised by the ICRC did not go unechoed. As was pointed out by several States, four months later the General Assembly unanimously adopted a resolution by which it established a commission charged with the responsibility of making "specific proposals ...*(c)* for the elimination from national armaments of atomic weapons and of all other major weapons adaptable to mass destruction" (G.A. res. 0101, para. 5 of 24 January 1946). It is too limited a view to restrict the significance of the resolution to the mere establishment of the commission; the bases on which the commission was established are also important.

In line with this, on 20 September 1961 an agreement, known as "The McCloy-Zorin Accords", was signed by representatives of the United States of America and the Soviet Union, the two leading NWS. The Accords recommended eight principles as guidance for disarmament negotiations. The fifth principle read: "Elimination of all stockpiles of nuclear, chemical, bacteriological, and other weapons of

mass destruction, and cessation of the production of such weapons." On 20 December 1961 that agreement was unanimously welcomed by the General Assembly on the joint proposition of those two States (General Assembly resolution 1722 (XVI) of 20 December 1961).

The first preamble to the 1968 NPT refers to "the devastation that would be visited upon all mankind by a nuclear war ...". The preamble to the NPT (inclusive of that statement) was reaffirmed in the first paragraph of the preamble to Decision No. 2 adopted by the 1995 Review and Extension Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons. The overwhelming majority of States are parties to these instruments.

The Final Document adopted by consensus in 1978 by the Tenth Special Session of the General Assembly (on the subject of disarmament) opened with these words: "Alarmed by the threat to the very survival of mankind posed by the existence of nuclear weapons and the continuing arms race...". Paragraph 11 stated:

> "Mankind today is confronted with an unprecedented threat of self-extinction arising from the massive and competitive accumulation of the most destructive weapons ever produced. Existing arsenals of nuclear weapons alone are more than sufficient to destroy all life on earth..."

Paragraph 47 of the Final Document noted that "[n]uclear weapons pose the greatest danger to mankind and to the survival of civilization". All of these words, having been adopted by consensus, may be regarded as having been uttered with the united voice of the international community.

Important regional agreements also testify to the character of nuclear weapons. See the Agreement of Paris of 23 October 1954 on the entry of the Federal Republic of Germany into the North Atlantic Treaty Organization, Article 1*(a)* of Annex II to Protocol No. III on the Control of Armaments, indicating that nuclear weapons are weapons of mass destruction. The preamble to the 1967 Treaty of Tlatelolco, Additional Protocol II of which was signed and ratified by the five NWS, declared that the Parties were convinced

> "That the incalculable destructive power of nuclear weapons has made it imperative that the legal prohibition of war should be strictly observed in practice if the survival of civilization and of mankind itself is to be assured.
>
> That nuclear weapons, whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, constitute, through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable."

The first two preambular paragraphs of the 1985 South Pacific Nuclear Free Zone Treaty (the Treaty of Rarotonga), Protocol 2 of which has been signed and ratified by two of the five NWS and signed by the remaining three, likewise recorded that the Parties were

> "Gravely concerned that the continuing nuclear arms race presents the risk of nuclear war which would have devastating consequences for all people;
>
> Convinced that all countries have an obligation to make every effort to achieve the goal of eliminating nuclear weapons, the terror which they hold for humankind and the threat which they pose to life on earth."

The Court has also referred to the more recently signed treaties on nuclear-free zones relating to South-East Asia and Africa. 5288

A position similar in principle to those mentioned above was taken in agreements between two of the NWS. In the preamble to a 1971 Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, the United States of America and the Soviet Union stated that they were "[t]aking into account the devastating consequences that nuclear war would have for all mankind". The substance of that statement was repeated in later agreements between those States, namely, in the 1972 Anti-Ballistic Missile Treaty, in a 1973 Agreement on the Prevention of Nuclear War, in a 1979 Treaty on the Limitation of Strategic Offensive Arms, and in the 1987 Intermediate-Range and Shorter-Range Missiles Treaty.

It was argued by some States that the purpose of possessing nuclear weapons is, paradoxically, to ensure that they are never used, and that this is shown by the circumstance that it has been possible to keep the peace, as among the NWS, during the last fifty years through policies of nuclear deterrence. Other States doubted the existence of the suggested link of causation, attributing that result to luck or chance, pointing to occasions when such weapons were nearly used, and adverting to a number of wars and other situations of armed conflict which have in fact occurred outside of the territories of the NWS. Assuming, however, that such a link of causation can be shown, a question which remains is why should policies of nuclear deterrence have kept the peace as among the NWS. A reasonable answer is that each NWS itself recognized that it faced the risk of national destruction. The record before the Court indicates that that destruction will not stop at the frontiers of warring States, but can extend to encompass the obliteration of the human species.

Other weapons are also members of the category of weapons of mass destruction to which nuclear weapons belong. However, nuclear weapons are distinguishable in important ways from all other weapons, including other members of that category. In the words of the Court:

> "[N]uclear weapons are explosive devices whose energy results from the fusion or fission of the atom. By its very nature, that process, in nuclear weapons as they exist today, releases not only immense quantities of heat and energy, but also powerful and prolonged radiation. According to the material before the Court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics render the nuclear weapon potentially catastrophic. The destructive power of nuclear weapons cannot be contained in space or time. They have the potential to destroy all civilisation and the entire ecosystem of the planet." (Advisory Opinion, para. 35.)

And a little later:

> "[I]t is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come." (Advisory Opinion, para. 36.)

Even if it is possible that, scientifically considered, other weapons of mass destruction, such as biological and chemical weapons, can also annihilate mankind, the question is not merely whether a weapon can do so, but whether the evidence shows that the international community considers that it can. The evidence was not specifically directed to this purpose in the case of other weapons; in the case nuclear weapons, it was, however, directed to that purpose and, the Court could find, successfully so directed. Similar remarks would apply to other weapons, such as flame-throwers and napalm, which,

S289

though not capable of annihilating mankind, can undoubtedly cause shocking harm. Unlike the case of nuclear weapons, there was no material before the Court to suggest that, however appalling may be the effects produced by the use of such other weapons, the international community was on record as considering their use to be repugnant to its conscience.

It may be added that, once it is shown that the use of a weapon could annihilate mankind, its repugnance to the conscience of the international community is not materially diminished by showing that it need not have that result in every case; it is not reasonable to expect that the conscience of the international community will, both strangely and impossibly, wait on the event to see if the result of any particular use is the destruction of the human species. The operative consideration is the risk of annihilation. That result may not ensue in all cases, but the risk that it can inheres in every case. The risk may be greater in some cases, less in others; but it is always present in sufficient measure to render the use of nuclear weapons unacceptable to the international community in all cases. In my view, the answer to the question of repugnance to the conscience of the international community governs throughout.

In sum, the Court could conclude, in accordance with its findings in paragraph 35 of its Advisory Opinion, that the international community as a whole considers that nuclear weapons are not merely weapons of mass destruction, but that there is a clear and palpable risk that their use could accomplish the destruction of mankind, with the result that any such use would be repugnant to the conscience of the community. What legal consequences follow will be examined later.

4. *Neutrality*

A question was raised as to whether damage resulting to a neutral State from use of nuclear weapons in the territory of a belligerent State is a violation of the former's neutrality. I accept the affirmative answer suggested in Nauru's statement in the parallel case brought by the World Health Organization, as set out in paragraph 88 of the Court's Advisory Opinion. A number of incidents collected in the books does not persuade me to take a different view [See, for example, Roberto Ago, Addendum to the Eighth Report on State Responsibility, *Yearbook of the International Law Commission*, 1980, Vol. II, Part I, pp. 35-36, para. 50.].

The principle, as stated in Article 1 of Hague Convention No. 5 of 1907 Regarding the Rights and Duties of Neutral Powers and Persons in Case of War on Land, is that "[t]he territory of neutral powers is inviolable". The principle has not been understood to guarantee neutral States absolute immunity from the effects of armed conflict; the original purpose, it is said, was to preclude military invasion or bombardment of neutral territory, and otherwise to define complementary rights and obligations of neutrals and belligerents.

It is difficult, however, to appreciate how these considerations can operate to justify the use of nuclear weapons where the radiation effects which they emit extend to the inhabitants of neutral States and cause damage to them, their off-spring, their natural resources, and possibly put them under the necessity to leave their traditional homelands. The statement of an inhabitant of the Marshall Islands left little to be imagined. Considered in relation to the more dramatic catastrophe immediately produced and the military value to the user State, these effects may be spoken of as by-products of the main event; but, as argued above, that classification is without legal pertinence. The "by-products" are not remote economic or social consequences. Whether direct or indirect effects, they result from the use of nuclear weapons, for it is a property of such weapons that they emit radiation; their destructive effect on the enemy is largely due to their radiation effects. Such radiation has a high probability of transboundary penetration.

To say that these and other transboundary effects of the use of nuclear weapons do not violate the

neutrality of third States in the absence of belligerent incursion or transboundary bombardment is to cast too heavy a burden on the proposition that neutrality is not an absolute guarantee of immunity to third States against all possible effects of the conduct of hostilities. The Fifth Hague Convention of 1907 does not define inviolability; nor does it say that the territory of a neutral State is violated only by belligerent incursion or bombardment. Accepting nevertheless that the object of the architects of the provision was to preclude military incursion or bombardment of neutral territory, it seems to me that that purpose, which was related to the then state of warfare, does not conclude the question whether, in terms of the principle, "the territory of neutral powers" is violated where that territory and its inhabitants are physically harmed by the effects of the use elsewhere of nuclear weapons in the ways in which it is possible for such harm to occur. The causes of the consequential suffering and the suffering itself are the same as those occurring in the zone of battle.

It was said, no doubt correctly, that no case was known in which a belligerent State had been held responsible for collateral damage in neutral territory for lawful acts of war committed outside of that territory. It may be recalled, however, that the possibilities of damage by nuclear fall-out did not previously exist; because of technological limitations, damage on neutral territory, as a practical matter, could only be committed by incursion or bombardment, in which cases there would be acts of war committed on the neutral territory itself. To the extent that the *Trail Smelter* type of situation was likely to be a significant consequence of acts of war, the occurrence of concrete situations in the pre-nuclear period has not been shown to the Court. Thus, while no case may have occurred in which a belligerent State has been held responsible for collateral damage in neutral territory for lawful acts of war committed outside of that territory, that is decisive of the present case only if it can be shown that there is no responsibility even where substantial physical effects of acts of war carried out elsewhere demonstrably extend to neutral territory. That cannot be persuasively shown; principle is against it. The causative act of war would have had the consequence of physically violating the territory of the neutral State. The 1907 Hague principle that the territory of a neutral State is inviolable would lose much of its meaning if in such a case it was not considered to be breached.

5. *Belligerent reprisal*

The question was argued whether, assuming that the use of nuclear weapons was otherwise unlawful, such use might nevertheless be lawful for the exceptional purposes of belligerent reprisal (i.e., as distinguished from reprisals in situations other than those of armed conflict). It seems to me, however, that there is not any necessity to examine this aspect in an opinion devoted to showing that "the current state of international law, and ... the elements of fact at its disposal" did not prevent the Court from concluding "definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". The use of nuclear weapons in belligerent reprisal, if lawful, would be equally open to an aggressor State and to a State acting in self-defence. This being so, an inquiry into the lawfulness of the use of such weapons in belligerent reprisal would not materially promote analysis of the question whether they may be lawfully used in self-defence, this being the question presented by the Court's holding.

6. *There is no* non liquet

The commentators suggest that some decisions of the Court could be understood as implying a *non liquet*. It is possible that the second part of subparagraph E of paragraph (2) of the operative paragraph of the Court's Advisory Opinion will be similarly interpreted. If that is the correct interpretation, I respectfully differ from the position taken by the Court.

To attract the idea of a *non liquet* in this case, it would have to be shown that there is a gap in the applicability of whatever may be the correct principles regulating the question as to the circumstances in

5291

which a State may be considered as having or as not having a right to act.

If, as it is said, international law has nothing to say on the subject of the legality of the use of nuclear weapons, this necessarily means that international law does not include a rule prohibiting such use. On the received view of the "*Lotus*" decision, absent such a prohibitory rule, States have a right to use nuclear weapons.
On the other hand, if that view of "*Lotus*" is incorrect or inadequate in the light of subsequent changes in the international legal structure, then the position is that States have no right to use such weapons unless international law authorises such use. If international law has nothing to say on the subject of the use of nuclear weapons, this necessarily means that international law does not include a rule authorising such use. Absent such authorisation, States do not have a right to use nuclear weapons.

It follows that, so far as this case at any rate is concerned, the principle on which the Court acts, be it one of prohibition or one of authorization, leaves no room unoccupied by law and consequently no space available to be filled by the *non liquet* doctrine or by arguments traceable to it. The fact that these are advisory proceedings and not contentious ones makes no difference; the law to be applied is the same in both cases.

7. *The General Assembly's call for a convention*

Putting aside the question of the possible law-making effect or influence of General Assembly resolutions, did its resolutions on this matter really take the position that the use of nuclear weapons was contrary to existing law? Arguing that that was not the position taken, some States point to the fact that the resolutions also called for the conclusion of a convention on the subject.

However, as the case of the Genocide Convention shows, the General Assembly could well consider that certain conduct would be a crime under existing law and yet call for the conclusion of a convention on the subject. Its resolution 96 (I) of 11 December 1946, which called for the preparation of "a draft convention on the crime of genocide", also affirmed "that genocide is a crime under international law..." It was likewise that, in its resolution of 14 December 1978, the General Assembly declared "that

> *(a)* The use of nuclear weapons will be a violation of the Charter of the United Nations and a crime against humanity;
>
> *(b)* The use of nuclear weapons should therefore be prohibited, pending nuclear disarmament."

It was on this basis that the resolution then passed on to mention the future discussion of an international convention on the subject.

A convention may be useful in focusing the attention of national bodies on the subject, particularly in respect of any action which may have to be taken by them; it may also be helpful in clarifying and settling details required to implement the main principle, or more generally for the purpose of laying down a regime for dealing with the illegality in question. A call for a convention to prohibit a particular kind of conduct does not necessarily imply that the conduct was not already forbidden.

A further argument is that some of the later General Assembly resolutions adopted a more qualified formulation than that of earlier ones (see paragraph 71 of the Advisory Opinion). I do not assign much weight to this as indicative of a resiling from the position taken in earlier General Assembly resolutions to the effect that such use was contrary to existing international law. The later resolutions proceeded on

the basis that that position had already and sufficiently been taken; they therefore contented themselves with simply recalling the primary resolution on the subject, namely, resolution 1653 (XVI) of 1961. Thus, while the language employed in the resolutions has varied from time to time, it is to be observed that in resolution 47/53 of 9 December 1992 the General Assembly reaffirmed "that the use of nuclear weapons would be a violation of the Charter of the United Nations and a crime against humanity, as declared in its resolutions 1653 (XVI) of 24 November 1961," and other cited resolutions.

The General Assembly's resolutions may reasonably be interpreted as taking the position that the threat or use of nuclear weapons was forbidden under pre-existing international law. The question is whether there is a sufficiency of fact and law to enable the Court to decide whether the position so taken by the General Assembly was correct. To the giving of an answer I proceed below.

PART II. WHETHER THE COURT COULD HOLD THAT STATES HAVE A RIGHT TO USE NUCLEAR WEAPONS HAVING REGARD TO THE GENERAL PRINCIPLES WHICH DETERMINE WHEN A STATE IS TO BE CONSIDERED AS HAVING A POWER

The General Assembly's question presents the Court, as a World Court, with a dilemma: to hold that States have a right to use nuclear weapons is to affirm that they have a right to embark on a course of conduct which could result in the extinction of civilization, and indeed in the dissolution of all forms of life on the planet, both flora and fauna. On the other hand, to deny the existence of that right may seem to contradict the "*Lotus*" principle, relied on by some States, to the effect that States have a sovereign right to do whatever is not prohibited under international law, in this respect it being said that there is no principle of international law which prohibits the use of such weapons. The dilemma was the subject of close debate. In my view, it was open to the Court to consider four possible solutions. [The dilemma recalls that which confronted the learned judges of Persia when, asked by King Cambyses whether he could marry his sister, they made the prudent answer "that though they could discover no law which allowed brother to marry sister, there was undoubtedly a law which permitted the king of Persia to do what he pleased". See *Herodotus, The Histories,* trans. Aubrey de Sélincourt, Penguin Books, 1959, p. 187. So here, an affirmative answer to the General Assembly's question would mean that, while the Court could discover no law allowing a State to put the planet to death, there is undoubtably a law which permits the State to accomplish the same result through an exercise of its sovereign powers.]

*

The first possible solution proceeds on the basis of the *"Lotus"* principle that a State has a right to do whatever is not prohibited, but it argues that an act which could lead to the extinction of mankind would necessarily involve the destruction of neutral States. This being so, the act cannot be justified under the rubric of self-defence. Therefore, even if, *quod non*, it is otherwise admissible under the *ius in bello*, the Court could hold that it is not covered by the *ius ad bellum* and is prohibited under Article 2, paragraph 4, of the Charter. The question of neutrality is dealt with in Part I, section 4, above.

*

The second possible solution also proceeds on the basis of the *"Lotus"* principle. However, it argues that, due effect being given to the Charter and the Statute of the Court thereto annexed, by both of which the Court is bound, these instruments are not consistent with a State having a right to do an act which would defeat their fundamental assumption that civilization and mankind would continue: the Court could hold that, by operation of law, any such inconsistent act stands prohibited by the Charter.

*

The third possible solution also proceeds on the basis of the *"Lotus"* principle that a State has a right to do whatever is not prohibited under international law, but (as anticipated in Part I, section 2, above) it argues that, even in the absence of a prohibition, that residual right does not extend to the doing of things which, by reason of their essential nature, cannot form the subject of a right, such as actions which could destroy mankind and civilization and thus bring to an end the basis on which States exist and in turn the basis on which rights and obligations exist within the international community.

There is not any convincing ground for the view that the "*Lotus*" Court moved off on a supposition that States have an absolute sovereignty which would entitle them to do anything however horrid or repugnant to the sense of the international community, provided that the doing of it could not be shown to be prohibited under international law. The idea of internal supremacy associated with the concept of sovereignty in municipal law is not neatly applicable when that concept is transposed to the international plane. The existence of a number of sovereignties side by side places limits on the freedom of each State to act as if the others did not exist. These limits define an objective structural framework within which sovereignty must necessarily exist [The idea is evoked by the following remark of one writer: "For some authors, the existence of a *corpus juris* governing a decentralized, 'classless' society partakes of a miracle. I would rather say that it partakes of necessity. It is not in spite of, but on account of the heterogeneity of Sates in a society of juxtaposition that international law was brought into being and has developed. If international law did not exist, it would have to be invented." *[Translation by the Registry.]* Prosper Weil, "Le droit international en quête de son identité. Cours général de droit international public", *Recueil des cours de l'Académie de droit international de La Haye,* Vol. 237 (1992-VI), p. 36.]; the framework, and its defining limits, are implicit in the reference in *"Lotus"* to "co-existing independent communities" (*P.C.I.J., Series A, No. 10*, p. 18), an idea subsequently improved on by the Charter, a noticeable emphasis on cooperation having been added.

Thus, however far-reaching may be the rights conferred by sovereignty, those rights cannot extend beyond the framework within which sovereignty itself exists; in particular, they cannot violate the framework. The framework shuts out the right of a State to embark on a course of action which would dismantle the basis of the framework by putting an end to civilization and annihilating mankind. It is not that a State is prohibited from exercising a right which, but for the prohibition, it would have; a State can have no such right to begin with.

So a prior question in this case is this: even if there is no prohibition, is there anything in the sovereignty of a State which would entitle it to embark on a course of action which could effectively wipe out the existence of all States by ending civilization and annihilating mankind? An affirmative answer is not reasonable; that sovereignty could not include such a right is suggested by the fact that the acting State would be one of what the Permanent Court of International Justice, in the language of the times, referred to as "co-existing independent communities", with a consequential duty to respect the sovereignty of other States. It is difficult for the Court to uphold a proposition that, absent a prohibition, a State has a right in law to act in ways which could deprive the sovereignty of all other States of meaning.

*

The fourth possible solution is this: if the *"Lotus"* principle leaves a State free to embark on any action whatsoever provided it is not prohibited - a proposition strongly supported by some States and as strenuously opposed by others - then, for the purposes of these proceedings at any rate, that case may be distinguished. The case did not relate to any act which could bring civilization to an end and annihilate mankind. It does not preclude a holding that there is no right to do such an act unless the act is one which is authorized under international law.

5294

This fourth solution calls for fuller consideration than the others. It will be necessary to take account of three developments which bear on the extent to which modes of legal thought originating in an earlier age are applicable in today's world.

First, as set out in Article 2, paragraph 4, of the Charter, and following on earlier developments, the right of recourse to force has come under a major restriction. This is a significant movement away from the heavy emphasis on individual sovereignty which marked international society as it earlier existed. The point was stressed by the Philippines and Samoa.

Second, there have been important developments concerning the character of the international community and of inter-State relations. While the number of States has increased, international relations have thickened; the world has grown closer. In the process, there has been a discernible movement from a select society of States to a universal international community. Thus it was that in 1984 a Chamber of the Court could speak of "the co-existence and vital co operation of the members of the international community" (*Maritime Delimitation of the Gulf of Maine Area, I.C.J.Reports 1984*, p. 299, para. 111). The earlier legal outlook has not lost all relevance. It is reasonably clear, however, that the previous stress on the individual sovereignty of each State considered as *hortus conclusus* has been inclining before a new awareness of the responsibility of each State as a member of a more cohesive and comprehensive system based on cooperation and interdependence.

These new developments have in part been consecrated by the Charter, in part set in motion by it. Their effect and direction were noticed by Judge Alvarez (*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), I.C.J. Reports 1947-1948*, p. 68, separate opinion). Doubts about his plea for a new international law did not obscure the fact that he was not alone in his central theme. Other judges observed that it was

> "an undeniable fact that the tendency of all international activities in recent times has been towards the promotion of the common welfare of the international community with a corresponding restriction of the sovereign power of individual States" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951*, p. 46, joint dissenting opinion of Judges Guerrero, McNair, Read and Hsu Mo).

Though elsewhere critical of "the theory which reduces the rights of States to competences assigned and portioned by international law" [Charles De Visscher, *Theory and Reality in Public International Law*, revised edition, trans. P.E. Corbett, 1968, p. 104.], Judge De Visscher, for his part, observed that "[t]he Charter has created an international system", and added:

> "[I]n the interpretation of a great international constitutional instrument, like the United Nations Charter, the individualistic concepts which are generally adequate in the interpretation of ordinary treaties, do not suffice." (*International Status of South West Africa, I.C.J. Reports 1950*, p. 189, dissenting opinion.)

The Charter did not, of course, establish anything like world government; but it did organise international relations on the basis of an "international system"; and fundamental to that system was an assumption that the human species and its civilization would continue.

But, third, there have been developments working in the opposite direction, in the sense that it now, and for the first time, lies within the power of some States to destroy the entire system, and all mankind with it.

What lesson is to be drawn from these developments, the third being opposed to the first and the second?

The notions of sovereignty and independence which the *"Lotus"* Court had in mind did not evolve in a context which visualised the possibility that a single State could possess the capability of wiping out the practical existence both of itself and of all other States. The Court was dealing with a case of collision at sea and the criminal jurisdiction of States in relation thereto - scarcely an earth-shaking issue. Had its mind been directed to the possibility of the planet being destroyed by a minority of warring States, it is not likely that it would have left the position which it took without qualification. No more than this Court would have done when in 1986 it said that

> "in international law there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited, and this principle is valid for all States without exception" (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, p. 135, para. 269).

The situation did not relate to the use of nuclear weapons; the Court's statement was directed to the right of a State to possess a level of armaments about the use of which no issue of legality had been raised. Caution needs to be exercised in extending the meaning of a judicial dictum to a field which was not in contemplation. The fact that he was dissenting does not diminish the value of Judge Badawi Pasha's reminder of problems which could arise "when a rule is removed from the framework in which it was formed, to another of different dimensions, to which it cannot adapt itself as easily as it did to its proper setting" (*Reparation for Injuries Suffered in the Service of the United Nations I.C.J.Reports 1949*, p. 215).

It is worth remembering, too, that, in his dissenting opinion in *"Lotus"*, Judge Finlay understood the compromis to present an issue not as to whether there was "a rule forbidding" the prosecution, but as to "whether the principles of international law authorize" it. (*P.C.I.J., Series A, No. 10*, p. 52.) In the early post-Charter period, Judge Alvarez specifically challenged the principle that States have "the right ... to do everything which is not expressly forbidden by international law". In his view, "This principle, formerly correct, in the days of absolute sovereignty, is no longer so at the present day." (*Fisheries, I.C.J. Reports 1951*, p. 152, separate opinion.)

I do not consider now whether so general a challenge is maintainable. This is because it appears to me that there is a particular area in which *"Lotus"* is distinguishable. On what point does this limited distinction turn? It is this. Whichever way the issue in *"Lotus"* was determined, the Court's determination could be accommodated within the framework of an international society consisting of "co-existing independent communities". Not so as regards the issue whether there is a right to use nuclear weapons. Were the Court to uphold such a right, it would be upholding a right which could be used to destroy that framework and which could not therefore be accommodated within it. However extensive might be the powers available to a State, there is not any basis for supposing that the Permanent Court of International Justice considered that, in the absence of a prohibition, they included powers the exercise of which could extinguish civilization and annihilate mankind and thus destroy the framework of the international community; powers of this kind were not in issue. To the extent that a course of action could be followed by so apocalyptic a consequence, the case is distinguishable; it does not stand in the way of this Court holding that States do not have a right to embark on such a course of action unless, which is improbable, it can be shown that the action is authorized under international law.

It is the case that the formulations (and in particular the title) employed in various draft conventions appended to a number of General Assembly resolutions on the subject of nuclear weapons were cast in

the terminology of prohibition. However, assuming that the correct theory is that authorisation under international law has to be shown for the use of nuclear weapons, this would not prevent States from concluding a formal prohibitory treaty; the fact that the draft conventions were directed to achieving a prohibition does not invalidate the view that authorisation has to be shown.

The terminology of prohibition is also to be found in the reasoning of the Tokyo District Court in *Shimoda* v. *The State* [*The Japanese Annual of International Law*, No. 8, 1964, p.235]. I do not consider that much can be made of this. The Tokyo District Court, being satisfied that the dropping of the bombs was prohibited under international law, was not called upon to consider whether, if there was no prohibition, it was necessary or an authorisation to be shown; the received statement of the law being, in its view, sufficient for a holding of unlawfulness, a sense of judicial economy could make it unnecessary for the Court to inquire whether the same holding could be sustained on another basis.

Can the required authorisation be shown in this case? It seems not. The Court is a creature of the Charter and the Statute. If it finds, as it should, that both the Charter and the Statute posit the continued existence of civilization and of mankind, it is difficult to see how it can avoid a holding that international law does not authorise a State to embark on a course of action which could ensue in the destruction of civilization and the annihilation of mankind.

PART III. WHETHER THE COURT COULD HOLD THAT THE USE OF NUCLEAR WEAPONS IS PROHIBITED BY HUMANITARIAN LAW

I propose now to consider the question of the legality of the use of nuclear weapons from the standpoint of some of the leading principles of humanitarian law (a term now generally used) which were in force at the commencement of the nuclear age. These principles relate to the right to choose means of warfare, the unnecessary suffering principle, and the Martens Clause.

1. *The methods or means of warfare*

This customary international law principle is restated in Article 35, paragraph 1, of Protocol Additional I of 1977 to the Geneva Conventions of 1949 as follows: "In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited." The principle has come under pressure from the continuing emergence of weapons with increasing destructive power, the tendency being to accept higher levels of destructiveness with growing powers of destruction. Its value would be further eroded if, as it is sometimes argued, all it does is to leave open the possibility that a weapon may be banned under some law other than that setting out the principle itself; but that argument cannot be right since, if it is, the principle would not be laying down a norm of State conduct and could not therefore be called a principle of international law. Paragraph 77 of the Court's Advisory Opinion recognizes that the principle is one of international law; it is not meaningless. Nor is it spent; its continuing existence was attested to by General Assembly resolution 2444 (XXIII), adopted unanimously on 19 December 1968. By that resolution the General Assembly affirmed

> "resolution XXVIII of the XXth International Conference of the Red Cross held at Vienna in 1965, which laid down, *inter alia*, the following principles for observance by all governmental and other authorities responsible for action in armed conflicts:
>
> *(a)* That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;

5297

(b) That it is prohibited to launch attacks against the civilian populations as such;

(c) That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible."

As is suggested by subparagraph *(a)*, the principle limiting the right to choose means of warfare subsists. Notwithstanding an impression of non-use, it is capable of operation. In what way? The principle may be interpreted as intended to exclude the right to choose some weapons. What these might be was not specified, and understandably so. Yet, if, as it seems, the principle can apply to bar the use of some weapons, it is difficult to imagine how it could fail to bar the use of nuclear weapons; difficulties which may exist in applying the rule in less obvious cases disappear as more manifest ones appear. But, of course, imagination is not enough; a juridical course of reasoning has to be shown. How?

A useful beginning is to note that what is in issue is not the existence of the principle, but its application in a particular case. Its application does not require proof of the coming into being of an *opinio juris* prohibiting the use of the particular weapon; if that were so, one would be in the strange presence of a principle which could not be applied without proof of an *opinio juris* to support each application.

But how can the principle apply in the absence of a stated criterion? If the principle can operate to prohibit the use of some means of warfare, it necessarily implies that there is a criterion on the basis of which it can be determined whether a particular means is prohibited. What can that implied criterion be? As seems to be recognised by the Court, humanitarian considerations are admissible in the interpretation of the law of armed conflict (see paras. 86 and 92 of the Court's Advisory Opinion). Drawing on those considerations, and taking an approach based on the principle of effectiveness, it is reasonable to conclude that the criterion implied by the principle in question is set by considering whether the use of the particular weapon is acceptable to the sense of the international community; it is difficult to see how there could be a right to choose a means of warfare the use of which is repugnant to the sense of the international community.

In relation to some weapons, it may be difficult to establish, with evidential completeness, what is the sense of the international community. But the use of nuclear weapons falls, as it were, at the broad end of a range of possibilities, where difficulties of that kind evaporate. Unlike the case of conventional weapons, the use of nuclear weapons can result in the annihilation of mankind and of civilization. As it has been remarked, if all the explosive devices used throughout the world since the invention of gunpowder were to detonate at the same time, they could not result in the destruction of civilization; this could happen if recourse were made to the use of nuclear weapons, and with many to spare. The principle limiting the right to choose means of warfare assumed that, whatever might be the means of warfare lawfully used, it would continue to be possible for war to be waged on a civilized basis in future. Thus, however free a State may be in its choice of means, that freedom encounters a limiting factor when the use of a particular type of weapon could ensue in the destruction of civilization.

It may be added that, in judging of the admissibility of a particular means of warfare, it is necessary, in my opinion, to consider what the means can do in the ordinary course of warfare, even if it may not do it in all circumstances. A conclusion as to what nuclear weapons can do in the ordinary course of warfare is not speculative; it is a finding of fact. In advisory proceedings, the Court can make necessary determinations of fact (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), I.C.J. Reports 1971*, p. 27). For the reasons given, there is no difficulty in making one in this case.

5298

In making a finding as to what is the sense of the international community, it is of course essential for the Court to consider the views held by States, provided that, for the reasons given above, there is no slippage into an assumption that, so far as concerns the particular principle in question, it is necessary to establish an *opinio juris* supportive of the existence of a specific rule prohibiting the use of nuclear weapons.

The views of States are available. The first General Assembly resolution, which was unanimously adopted on 24 January 1946, bears the interpretation that the General Assembly considered that the use of nuclear weapons is unacceptable to the international community; it is referred to above. Also there are the 1968 NPT and associated arrangements, dealt with more fully below. The Court may interpret these as amounting to a statement made both by the NWS and the NNWS to the effect that the actual use of nuclear weapons would be unacceptable to the international community, and that it is for this reason that efforts should be made to contain their spread under arrangements which committed all parties to work, in good faith, towards their final elimination. If the actual use of nuclear weapons is acceptable to the international community, it is difficult to perceive any credible basis for an arrangement which would limit the right to use them to some States, and more particularly if the latter could in some circumstances exercise that right against States not enjoying that exclusive right.

In the year following the conclusion of the NPT, the Institute of International Law, at its 1969 session in Edinburgh, had occasion to note that "existing international law prohibits the use of all weapons" (nuclear weapons being understood to be included) "which, by their nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian population". Whatever may be said of other such weapons, that view, expressed with near unanimity, is helpful not only for its high professional value, but also for its independent assessment of the unacceptability to the international community of the use of nuclear weapons. That assessment accurately reflected the basis on which the NPT arrangements had been concluded in the preceding year.

Other weapons share with nuclear weapons membership of the category of weapons of mass destruction. As mentioned above, however, it is open to the Court to take the view that the juridical criterion is not simply how destructive a weapon is, but whether its destructiveness is such as to cause the weapon to be considered by the international community to be unacceptable to it. The material before the Court (some of which was examined in Part I, section 3, above) is sufficient to enable the Court to conclude that, in the case of nuclear weapons, the revulsion of the international community is an established fact. Thus, the legal consequences in the specific case of nuclear weapons need not be the same for other weapons of mass destruction not already banned by treaty.

In *Shimoda* v. *The State* the plaintiffs' claims were dismissed on grounds not now material; the case remains the only judicial decision, national or international, in the field. It was decided by the Tokyo District Court on 7 December 1963. Though not of course binding, it ranks as a judicial decision under Article 38, paragraph 1*(d)*, of the Statute of the Court; it qualifies for consideration. A judicial conclusion different from that reached by the Tokyo District Court would need to explain why the reasoning of that Court was not acceptable.

The Tokyo District Court was deliberating over the proposition (based on expert legal opinion) "that the means which give unnecessary pain in war and inhumane means are prohibited as means of injuring the enemy" (*The Japanese Annual of International Law*, Vol. 8, 1964, p. 240). The proposition reflected two grounds invoked by Japan in its Note of protest of 10 August 1945 [*The Japanese Annual of International Law,* No.8, 1964, p. 240], in which it said:

> "It is a fundamental principle of international law in time of war that a belligerent has not an unlimited right in choosing the means of injuring the enemy, and should not use such

5299

> weapons, projectiles, and other material as cause unnecessary pain; and these are each expressly stipulated in the annex of the Convention respecting the Laws and Customs of War on Land and articles 22 and 23(e) of the Regulations respecting the Laws and Customs of War on Land." [*The Japanese Annual of International Law,* No.8, 1964, p. 252]

Article 22 of those Regulations concerned the right to adopt means of injuring the enemy, while Article 23 *(e)* concerned the unnecessary suffering principle.

The Tokyo District Court's reasoning dealt with both branches of the proposition before it, on an inter-related basis. It accepted that "international law respecting war is not formed only by humane feelings, but it has as its basis both military necessity and efficiency and humane feelings, and is formed by weighing these two factors" [*The Japanese Annual of International Law,* No.8, 1964, p. 240]. Consequently, "however great the inhumane result of a weapon may be, the use of the weapon is not prohibited by international law, if it has a great military efficiency" [*The Japanese Annual of International Law,* No.8, 1964, p. 241]. Nevertheless, the Tokyo District Court thought that it could "safely see that besides poison, poison gas and bacterium the use of the means of injuring the enemy which causes at least the same or more injury is prohibited by international law" [*The Japanese Annual of International Law,* No.8, 1964, p. 241].

The Tokyo District Court confined itself to the issue whether the particular use of atomic weapons at Hiroshima and Nagasaki was lawful, noticing but not deciding "an important and very difficult question", namely, "whether or not an atomic bomb having such a character and effect is a weapon which is permitted in international law as a so-called nuclear weapon..." [*The Japanese Annual of International Law,* No.8, 1964, p. 234]. Nevertheless, it is clear that in deciding the former issue, relating to the particular use, the Court's reasoning flowed from its consideration of the latter issue, relating to the legal status of such weapons. Thus, although the Tokyo District Court did not so decide, it followed from its reasoning that nuclear weapons would not be an admissible means of warfare. It is the reasoning of the Tokyo District Court that this Court is concerned with.

The material before this Court is sufficient to enable it to make a finding of fact that the actual use of nuclear weapons is not acceptable to the sense of the international community; on the basis of such a finding of fact, it would lie within its judicial mission to hold that such weapons are not admissible "means of warfare" within the meaning of the law.

2. *Unnecessary suffering*

Then as to the customary international law prohibition of superfluous and unnecessary suffering. As restated in Article 35, paragraph 2, of the 1977 Protocol Additional I to the 1949 Geneva Conventions, the principle reads:

> "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering".

The case of a weapon, such as the "dum-dum" bullet ["[T]he projectile known under the name of 'dum-dum' was made in the arsenal of that name near Calcutta." See *The Proceedings of the Hague Peace Conferences, The Conference of 1899*, p. 277, *per* General Sir John Ardagh.], which is deliberately crafted so as to cause unnecessary suffering, does not exhaust the interpretation and application of the prohibition. That may be regarded as a particular instance of the working of a broader underlying idea that suffering is superfluous or unnecessary if it is materially in excess of the degree of suffering which is justified by the military advantage sought to be achieved. A mechanical or absolute test is excluded: a

S 300

balance has to be struck between the degree of suffering inflicted and the military advantage in view. The greater the military advantage, the greater will be the willingness to tolerate higher levels of suffering. And, of course, the balance has to be struck by States. The Court cannot usurp their judgment; but, in this case, it has a duty to find what that judgment is. In appreciating what is the judgment of States as to where the balance is to be struck, the Court may properly consider that, in striking the balance, States themselves are guided by the public conscience. The Court has correctly held that "the intrinsically humanitarian character of the legal principles in question ... permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons..." (Advisory Opinion, para. 86). It is not possible to ascertain the humanitarian character of those principles without taking account of the public conscience.

It was thus open to the Court to take the view that the public conscience could consider that no conceivable military advantage could justify the degree of suffering caused by a particular type of weapon. Poison gas was, arguably, a more efficient way of deactivating the enemy in certain circumstances than other means in use during the First World War. That did not suffice to legitimize its use; the prohibition rested on an appreciation, as set out in the first preamble to the 1925 Geneva Gas Protocol, that "the use in war of asphyxiating, poisonous or other gases has been justly condemned by the general opinion of the civilized world". In effect, the use of a weapon which caused the kind of suffering that poison gas caused was simply repugnant to the public conscience, and so unacceptable to States whatever might be the military advantage sought to be achieved. That reasoning has not given birth to a comprehensive and universal prohibitory treaty provision in this case; it is nonetheless helpful in estimating the acceptability to the public conscience of the suffering that could be inflicted by the use of nuclear weapons on both combatants and civilians, on distant peoples, and on generations yet unborn.

On the material before it, the Court could reasonably find that the public conscience considers that the use of nuclear weapons causes suffering which is unacceptable whatever might be the military advantage derivable from such use. On the basis of such a finding, the Court would be entitled, in determining what in turn is the judgment of States on the point, to proceed on the basis of a presumption that the judgment of States would not differ from that made by the public conscience.

The "unnecessary suffering" principle falls within the framework of principles designed for the protection of combatants. If the use of nuclear weapons would violate the principle in relation to them, that is sufficient to establish the illegality of such use. However, is it possible that the principle, when construed in the light of developing military technology and newer methods of waging war, has now come to be regarded as capable of providing protection for civilians also?

In the "expanding" bullet phase in which the principle made its appearance in the second half of the nineteenth century, it was no doubt visualised that "unnecessary suffering" would only be inflicted on soldiers in the battlefield; the effects of the use of weapons which could then cause such suffering would not extend to civilians. But the framework of military operations is now different: if nuclear weapons can cause unnecessary suffering to soldiers, they can obviously have the same effect on civilians within their reach. The preamble to the Treaty of Tlatelolco correctly declared that the "terrible effects [of nuclear weapons] are suffered, indiscriminately and inexorably, by military forces and civilian population alike..."

It may be said that the substance of the principle of unnecessary suffering operates for the benefit of civilians through the medium of other principles, such as that which prohibits indiscriminate attacks, but that the principle itself does not operate in relation to them. What, however, is the position where it is contended that an apparently indiscriminate attack on civilians is validated by recourse to the collateral damage argument? In a case in which the collateral damage principle (whatever its true scope) would justify injury to civilians, the contradictory result of confining the unnecessary suffering principle to

5301

combatants would be that such injury may be prohibited by that principle in respect of combatants but not in respect of civilians who are equally affected; thus, an act which causes injury to combatants and non-combatants equally may be unlawful in relation to the former but lawful in relation to the latter. If combatants and non combatants are both victims of the same act, it is difficult to see why the act should be unlawful in the former case but lawful in the latter.

In *Shimoda*, the Tokyo District Court said, "[I]t is not too much to say that the pain brought by the atomic bombs is severer than that from poison and poison-gas, and ... that the act of dropping such a cruel bomb is contrary to the fundamental principle of the laws of war that unnecessary pain must not be given" [*The Japanese Annual of International Law*, No. 8, 1964, pp. 241-242]. So, in this part of its reasoning, the Tokyo District Court relied on the "fundamental principle" of "unnecessary pain"; it did so in relation to injuries caused to civilians. Assisted by three experts who were professors of international law, as well as by a full team of advocates for the parties in a closely contested case, the Court did not seem to be aware of a view that the principle of unnecessary suffering was restricted to injuries caused to combatants. And yet that view, if correct, should have been central to a case which concerned injury to civilians.
However, even if the unnecessary suffering principle is restricted to combatants, the question remains whether the principle is breached in so far as combatants are affected by the use of nuclear weapons. For the reasons given above, the Court could hold that it is.

3. *The Martens Clause*

Some States argued that the Martens Clause depends on proof of the separate existence of a rule of customary international law prohibiting the use of a particular weapon, and that there is no such prohibitory rule in the case of nuclear weapons. The proposition is attractive.

However, an initial difficulty is this. As is recognized in paragraphs 78 and 84 of the Court's Advisory Opinion, it is accepted that the Martens Clause is a rule of customary international law. That means that it has a normative character - that it lays down some norm of State conduct. It is difficult to see what norm of State conduct it lays down if all it does is to remind States of norms of conduct which exist wholly *dehors* the Clause. The argument in question would be directed not to ascertaining the field of application of an acknowledged rule, but to denying the existence of any rule. Would an argument which produces this infirmity be right?

As set out in the 1899 Hague Convention Respecting the Laws and Customs of War on Land, the Martens Clause came at the end of a preambular passage reading as follows:

> "According to the view of the high contracting Parties, these provisions, the wording of which has been inspired by the desire to diminish the evils of war, so far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents in their mutual relations and in their relations with the inhabitants.
>
> It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice.
>
> On the other hand, the high contracting Parties clearly do not intend that unforeseen cases should, in the absence of a written undertaking, be left to the arbitrary judgment of military commanders.
>
> Until a more complete code of the laws of war has been issued, the High Contracting Parties

S302

> deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."

These statements support an impression that the Martens Clause was intended to fill gaps left by conventional international law and to do so in a practical way. How?

The Martens Clause bears the marks of its period; it is not easy of interpretation. One acknowledges the distinction between usages and law [For "usages of war" maturing into rules of customary international law, see L. Oppenheim, *International Law, A Treatise*, Vol II, 7th ed. by H. Lauterpacht, 1952, p. 226, para. 69).]. However, as the word "remain" shows, the provision implied that there were already in existence certain principles of the law of nations which operated to provide practical protection to "the inhabitants and the belligerents" in the event of protection not being available under conventional texts. In view of the implications of that word, the Clause could not be confined to principles of the law of nations waiting, uncertainly, to be born in future. The reference to the principles of the law of nations derived from the mentioned sources was descriptive of the character of existing principles of the law of nations and not merely a condition of the future emergence of such principles. It may be added that, in its 1977 formulation, the relevant phrase now reads, "derived from established custom, from the principles of humanity and from the dictates of public conscience". Since "established custom" alone would suffice to identify a rule of customary international law, a cumulative reading is not probable. It should follow that "the principles of international law" (the new wording) could also be sufficiently derived "from the principles of humanity and from the dictates of public conscience"; as mentioned above, those "principles of international law" could be regarded as including principles of international law already derived "from the principles of humanity and from the dictates of public conscience".

In effect, the Martens Clause provided authority for treating the principles of humanity and the dictates of public conscience as principles of international law, leaving the precise content of the standard implied by these principles of international law to be ascertained in the light of changing conditions, inclusive of changes in the means and methods of warfare and the outlook and tolerance levels of the international community. The principles would remain constant, but their practical effect would vary from time to time: they could justify a method of warfare in one age and prohibit it in another. In this respect, M. Jean Pictet was right in emphasising, according to Mr. Sean Mc Bride,

> "that the Declarations in the *Hague Conventions* ... by virtue of the de Martens Clause, imported into humanitarian law principles that went much further than the written convention; it thus gave them a dynamic dimension that was not limited by time". [Sean McBride, "The Legality of Weapons for Societal Destruction", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 1984, p. 402.]

Nor should this be strange. Dealing with the subject of "Considerations of Humanity" as a source of law, Sir Gerald Fitzmaurice remarked that

> "all the implications of this view - i.e. in exactly what circumstances and to what extent considerations of humanity give rise in *themselves* to obligations of a legal character - remain to be worked out". [Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. 1, 1986, p. 17, note 4, emphasis as in the original; and see *ibid.*, p. 4].

5303

The reservation does not neutralise the main proposition that "considerations of humanity give rise in *themselves* to obligations of a legal character". The substance of the proposition seems present in the judgment given in 1948 in *Krupp's* case, in which the United States Military Tribunal sitting at Nuremberg said:

> "The Preamble [of Hague Convention No. IV of 1907] is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare." [*Annual Digest and Reports of Public International Law Cases*, 1948, p. 622.]

A similar view of the role of considerations of humanity appears in the *Corfu Channel* case. There Judge Alvarez stated that the "characteristics of an *international delinquency* are that it is an act contrary to the sentiments of humanity" (*I.C.J. Reports 1949*, p. 45, separate opinion); and the Court itself said that Albania's "obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognised principles, namely: elementary considerations of humanity, even more exacting in peace than in war; ..." (*I.C.J. Reports 1949*, p. 22). Thus, Albania's obligations were "based ... on ... elementary considerations of humanity ...", with the necessary implication that those considerations can themselves exert legal force. In 1986 the Court considered that "the conduct of the United States may be judged according to the fundamental general principles of humanitarian law"; and it expressed the view that certain rules stated in common Article 3 of the 1949 Geneva Conventions were "rules which, in the Court's opinion, reflect what the Court in 1949 called □elementary considerations of humanity' (*Corfu Channel, Merits, I.C.J. Reports 1949*, p. 22)" (*Military and Paramilitary Activities in and against Nicaragua, Merits, I.C.J. Reports 1986*, pp. 113-114, para. 218). Consistent with the foregoing is the earlier observation by the Naulilaa Tribunal that the right of reprisals "est *limitée* par les expériences de l'humanité..." [*Reports of International Arbitral Awards*, Vol. 2, p. 1026].

I am not persuaded that the purpose of the Martens Clause was confined to supplying a humanitarian standard by which to interpret separately existing rules of conventional or customary international law on the subject of the conduct of hostilities; the Clause was not needed for that purpose, for considerations of humanity, which underlie humanitarian law, would in any event have supplied that service (see para. 86 of the Court's Advisory Opinion). It is also difficult to accept that all that the Martens Clause did was to remind States of their obligations under separately existing rules of customary international law. No doubt, the focus of the Clause in the particular form in which it was reproduced in the 1949 Geneva Conventions was on reminding States parties that denunciation of these humanitarian treaties would not relieve them of the obligations visualised by the Clause; but the Clause in its more usual form was not intended to be a mere reminder [For differences between the 1949 Martens Clause and its classical formulation, see Georges Abi-Saab, "The Specificities of Humanitarian Law", in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, 1984, p. 275]. The basic function of the Clause was to put beyond challenge the existence of principles of international law which residually served, with current effect, to govern military conduct by reference to "the principles of humanity and ... the dictates of public conscience". It was in this sense that "civilians and combatants (would) remain under the protection and authority of the principles of international law derived ... from the principles of humanity and from the dictates of public conscience". The word "remain" would be inappropriate in relation to "the principles of humanity and ... the dictates of public conscience" unless these were conceived of as presently capable of exerting normative force to control military conduct.

Thus, the Martens Clause provided its own self-sufficient and conclusive authority for the proposition

that there were already in existence principles of international law under which considerations of humanity could themselves exert legal force to govern military conduct in cases in which no relevant rule was provided by conventional law. Accordingly, it was not necessary to locate elsewhere the independent existence of such principles of international law; the source of the principles lay in the Clause itself.

This was probably how the matter was understood at the Hague Peace Conference of 1899. After Mr. Martens's famous declaration was adopted, the "senior delegate from Belgium, Mr. Beernaert, who had previously objected to the adoption of Articles 9 and 10 (1 and 2 of the new draft), immediately announced that he could because of this declaration vote for them" [*The Proceedings of the Hague Peace Conferences, The Conference of 1899,* 1920, pp. 54 and 419.]. The senior Belgian delegate, as were other delegates, was not satisfied with the protection guaranteed by the particular provisions of the draft. [See the *Krupp* case, *supra,* p. 622]. Eventually, he found himself able to vote for the provisions. Why? Not because the required additional protection was available under independently existing customary international law; such protection would be available in any case. The reason he was able to vote for the provisions was because he took the view, not dissented from by other delegates, that the Martens Clause would itself be capable of exerting normative force to provide the required additional protection by appropriately controlling military behaviour.

"One is entitled to test the soundness of a principle by the consequences which would flow from its application" (*Barcelona Traction, Light and Power Co. Ltd., I.C.J. Reports 1970*, p. 220, para. 106, Judge Jessup, separate opinion). Hence, it is useful to consider the implications of the view that the Martens Clause is not by itself relevant to the issue of legality of the use of nuclear weapons. It is clear that the use of nuclear weapons could result, even in the case of neutral countries, in destruction of the living, in sickness and forced migration of survivors, and in injury to future generations to the point of causing serious illness, deformities and death, with the possible extinction of all life. If nothing in conventional or customary international law forbids that, on the view taken by the proponents of legality of the meaning of the *"Lotus"* case, States would be legally entitled to bring about such cataclysmic consequences. It is at least conceivable that the public conscience may think otherwise. But the "dictates of public conscience" could not translate themselves into a normative prohibition unless this was possible through the Martens Clause.

It is not, I think, a question of the Court essaying to transform public opinion into law: that would lead to "government by judges", which, as Judge Gros rightly observed, "no State would easily accept" (*Delimitation of the Maritime Boundary in the Gulf of Maine Area, I.C.J. Reports 1984,* p. 385, para. 41, dissenting opinion) [But see *I.C.J. Pleadings, Northern Cameroons*, p. 352, M. Weil, "to exorcise demons, it is sometimes a good idea to call them by name", i.e. "the spectre of government by judges". *[Translation by the Registry.]*]. Existing international law, in the form of the Martens Clause, has already established the necessary legal norm. The Court does not have to find whether there is an *opinio juris*. Its task is that of evaluating a standard embodied in an existing principle by way of making a finding as to what it is that the "principles of humanity and... the dictates of public conscience" require of military conduct in a given situation. In the last analysis, the answer will depend on what are the views of States themselves; but, so far as the Martens Clause is concerned, the views of States are relevant only for their value in indicating the state of the public conscience, not for the purpose of determining whether an *opinio juris* exists as to the legality of the use of a particular weapon.

The task of determining the effect of a standard may be difficult, but it is not impossible of performance; nor is it one which a court of justice may flinch from undertaking where necessary. The law is familiar with instances in which a court has to do exactly that, namely, to apply a rule of law which embodies a standard through which the rule exerts its force in particular circumstances [See *I.C.J. Pleadings, South West Africa*, Vol. VIII, p. 258, argument of Mr. Gross; *Fisheries Jurisdiction, I.C.J. Reports 1974*, pp.

S305

56-57, footnote 1, separate opinion of Judge Dillard; and Julius Stone, *Legal System and Lawyers' Reasonings*, 1964, pp. 59, 68, 263-264, 299, 305-306, 320 and 346.]. Some appreciation of a factual nature may be required. The standard being one which is set by the public conscience, a number of pertinent matters in the public domain may be judicially noticed. This is apart from the fact that the Court is not bound by the technical rules of evidence found in municipal systems; it employs a flexible procedure. That, of course, does not mean that it may go on a roving expedition; it must confine its attention to sources which speak with authority. Among these there is the General Assembly. Reference has already been made to its very first resolution of 24 January 1946. That resolution, unanimously adopted, may fairly be construed by the Court as expressive of the conscience of the international community as to the unacceptability of the use of nuclear weapons. So too with the Final Document adopted by consensus in 1978 by the Tenth Special Session of the General Assembly on the subject of disarmament. A number of related General Assembly resolutions preceded and followed that Final Document. In one, adopted in 1983, the General Assembly stated that it "[r]esolutely, unconditionally and for all time condemns nuclear war as being contrary to human conscience and reason..." (G.A. res. 38/75 of 15 December 1983). Though not unanimously adopted, the resolution was validly passed by the General Assembly, acting within its proper province in the field of disarmament. Whatever may be the position as regards the possible law-making effects or influence of General Assembly resolutions, the Court would be correct in giving weight to the Assembly's finding on the point of fact as to the state of "human conscience and reason" on the subject of the acceptability of the use of nuclear weapons, and more particularly in view of the fact that that finding accords with the general tendency of other material before the Court.

The Court may look to another source of evidence of the state of the public conscience on the question of the acceptability of the use of nuclear weapons. It may interpret the NPT to mean that the public conscience, as demonstrated in the positions taken by all parties to that treaty, considers that the use of nuclear weapons would involve grave risks, and that these risks would make such use unacceptable in all circumstances. The better view, I think, is that the Court cannot correctly interpret the treaty to mean that it was agreed by all parties that those risks may be both effectively and responsibly managed by five States but not by others. Nor could it be the case that the public conscience, as manifested in the positions taken by the parties to that treaty, *now* says that, after final elimination has been achieved, nuclear weapons could not be used, while *now* also saying that they could be acceptably used until final elimination has been achieved. On a matter touching the survival of mankind, the public conscience could not at one and the same time be content to apply one standard of acceptability as of now and another as of a later time. That would involve a contradiction in its views as to the fundamental unacceptability of the weapon as a means of warfare which could destroy civilization. No basis appears for ascribing such a contradiction to the public conscience; there is not much merit in prohibiting civilization from being destroyed in the future, while at the same time accepting that it may, with impeccable legality, be destroyed now.

If the above is correct, the Martens Clause helps to meet the objection, raised by the proponents of legality, that the General Assembly's question would require the Court to speculate on a number of matters. The Court could not say in advance what would be the exact effect of any particular use of nuclear weapons. Examples of possible situations relate to proportionality, the duty to discriminate between combatants and civilians, escalation of conflict, neutrality, genocide and the environment. The Court could however find, and find as a fact, that the use of nuclear weapons involves real risks in each of these areas. It could then look to the public conscience for its view as to whether, in the light of those risks, the use of such weapons is acceptable in any circumstances; the view of the public conscience could in turn be found to be that, in the light of those risks, such use is unacceptable in all circumstances. The public conscience thus has a mediating role through which it enjoys a latitude of evaluation not available to the Court.

In the result, on the basis of what the Court finds to be the state of the public conscience, it will be able to say whether the Martens Clause operates to prohibit the use of nuclear weapons in all circumstances. On the available material, it would be open to the Court to hold that the Clause operates to impose such a prohibition.

PART IV. WHETHER A PRIOR PROHIBITORY RULE, IF IT EXISTED, WAS MODIFIED OR RESCINDED BY THE EMERGENCE OF A SUBSEQUENT RULE

1. *The position as at the commencement of the nuclear age*

Underlying the Court's holding in the second part of subparagraph E of paragraph (2) of the operative paragraph of its Advisory Opinion that it "cannot conclude definitively" on the issue there referred to, is a contention by some States that the Court was being invited by the General Assembly's question to speculate on possible "scenarios". If that means that the Court could not decide on the basis of conjectures, I would uphold the contention. But I would not feel able to go the further step of accepting (if this other proposition was also intended) that there are no circumstances in which the Court may properly have recourse to the use of hypotheses. It would not, I think, be correct to say, as it is sometimes said, that the interpretation and application of the law always abjures hypotheses. Within reasonable limits, a hypothesis, as in other fields of intellectual endeavour, may be essential to test the limits of a theory or to bring out the true meaning of a rule. When, in a famous statement, it was said *"hypotheses non fingo"*, that only excluded propositions going beyond actual data ["For whatever is not deduc'd from the phaenomena, is to be called an hypothesis." See Sir Isaac Newton, *The Mathematical Principles of Natural Philosophy*, Book III, Vol. II, trans. Andrew Motte, 1968, p. 392; and Derek Gjertsen, *The Newton Handbook,* 1986, p. 266.]. The actual data may themselves suggest possibilities which need to be explored if the correct inference is to be drawn from the data.

The position as it stood immediately before the commencement of the nuclear age was that, since nuclear weapons did not exist, *ex hypotshesi* there was, and could have been, no rule in conventional or customary international law which prohibited the use of nuclear weapons "as such". But it cannot be a serious contention that the effects produced by the use of nuclear weapons, when they were later invented, were beyond the reach of the pre-existing law of armed conflict (see paragraphs 85-86 of the Advisory Opinion and *Shimoda, supra*, pp. 235-236); the "novelty of a weapon does not by itself convey with it a legitimate claim to a change in the existing rules of war" [L. Oppenheim, *International Law, A Treatise,* Vol. II, 7th ed. by H. Lauterpacht, p. 469, para. 181a].

Thus, if, immediately before the commencement of the nuclear age, the question was asked whether effects of the kind that would be later produced by the use of nuclear weapons would constitute a breach of the law of armed conflict, the Court could well hold that the answer would inevitably have been in the affirmative. If the effects so produced would have been forbidden by that law, it follows that nuclear weapons, when they later materialised, could not be used without violating that law - not, that is to say, unless that law was modified by the subsequent evolution of a law operating in the opposite direction, a point considered below.

12. *The position subsequent to the commencement of the nuclear age*

A "froward retention of custom is as turbulent a thing as an innovation", says Bacon ["Of Innovations", in J. Spedding, R.L. Ellis and D.D. Heath (eds.), *The Works of Francis Bacon*, 1890, Vol. VI, p. 43.]. So, on the assumption that a prohibitory rule existed at the commencement of the nuclear age, it would remain to consider whether that rule was later modified or reversed by the emergence of a new rule operating in the opposite direction: would the "froward retention" of the previous prohibition of the use

of nuclear weapons have been judged a "turbulent" thing?

It is necessary to have regard to the structure of the debate. The argument of some States is that there is not and never was a rule prohibitory of the use of nuclear weapons. In determining the issue so raised, a useful benchmark is the commencement of the nuclear age. The position as at that time has to be determined by reference to the law as it then stood. Subsequent developments do not form part of any process creative of any rule on the subject as at that time. If a correct finding is that, on the law as it existed at the commencement of the nuclear age, a prohibitory rule then existed, evidence of subsequent State practice cannot serve to contradict that finding by showing that, contrary to that finding, no prohibitory rule then existed. What subsequent State practice can do is to create an *opinio juris* supportive of the emergence of a new rule modifying or reversing the old rule. But it has not been suggested that, if a prohibitory rule existed at the commencement of the nuclear age, it was modified or reversed by the emergence of a later rule operating in the opposite direction. This being the case, it follows that if a prohibitory rule existed at the commencement of the nuclear age, that rule continues in force.

The same conclusion is reached even if it were in fact argued that any prior prohibitory rule was reversed by the emergence of a later rule operating in the opposite direction. The substantial and long standing opposition within the ranks of the NNWS to the proposition that there is a right in law to use nuclear weapons would have sufficed to prevent the evolution of the *opinio juris* required to support the birth of any such new rule, and more particularly so if the earlier rule had the status of *ius cogens*. This would have been the case if the humanitarian principles on which the earlier rule was based had that status, a possibility left open by paragraph 83 of the Advisory Opinion.

One last point. Argument was made that the NWS were "States whose interests are specially affected" within the meaning of the principle relating to the creation of customary international law, as enunciated by the Court in 1969 (*North Sea Continental Shelf Cases, I.C.J. Reports 1969,* p. 43, para. 74), and that, indeed, "in the present case, a practice involving the threat or use of nuclear weapons could proceed only from States recognized as possessing the status of nuclear weapon States" (C.R. 95/24, p. 3, translation). The argument is interesting, but not persuasive. Where what is in issue is the lawfulness of the use of a weapon which could annihilate mankind and so destroy all States, the test of which States are specially affected turns not on the ownership of the weapon, but on the consequences of its use. From this point of view, all States are equally affected, for, like the people who inhabit them, they all have an equal right to exist.

For these reasons, granted the prior existence of a prohibitory rule, it was open to the Court to hold that the position taken by a considerable number of the NNWS, if not the majority, would have operated to bar the development of the *opinio juris* necessary to support the creation of a new rule rescinding the old. The old prohibitory rule would therefore have continued up to the present time.

PART V. THE DENUCLEARIZATION TREATIES AND THE NPT

Some States rely on regional denuclearization treaties and on the NPT and associated arrangements as State practice evidencing the non-existence of a prohibitory rule. Those arrangements, they argue, are only explicable on the assumption that the use of nuclear weapons was regarded by the negotiating States as lawful. They emphasize that for fifty years the NWS have been openly possessing and deploying nuclear weapons under one form or another of a policy of nuclear deterrence; that it is well known that several NNWS have been sheltering under the nuclear umbrella of a NWS; that the NWS and other States sheltering under a nuclear umbrella constitute a substantial and important part of the international community; that elements of the negative and positive security assurances given by the

S308

NWS necessarily imply recognition by the NNWS that nuclear weapons may be lawfully used; that Security Council resolution 984 (1995) expressed the Council's appreciation of the statements through which the NWS gave those assurances; and that no NNWS protested against those assurances or with the appreciation thus expressed. How should these matters be evaluated?

The position as at the beginning of the nuclear age was either that there was no rule prohibiting States from producing effects of the kind which could later be produced by nuclear weapons, or that there was such a prohibitory rule. If there was no such prohibitory rule, it is not necessary to consider in detail whether subsequent State practice introduced one, for the known position of the NWS and those of the NNWS sheltering under a nuclear umbrella, representing a substantial and important part of the international community, would have prevented the crystallisation of the *opinio juris* required to create such a rule: the non-existence of a prohibitory rule would continue to this day, and the case of the proponents of legality succeeds.

On the opposite view that there was a prior prohibitory rule, there is equally no need to consider subsequent State practice in any detail. As has been argued, if, on the basis of the law as it stood at the commencement of the nuclear age, it is found that there then existed a prohibitory rule, that finding as to what was the then state of the law cannot be contradicted by later developments. Later developments may only be considered for the purpose of determining whether they represented a State practice which brought into being a new rule modifying or rescinding the prior prohibitory rule. But then the known position of the majority of the NNWS, also representing a substantial and important part of the international community, would have barred the development of the *opinio juris* required for the creation of a modifying or rescinding rule: the prior prohibitory rule would thus continue to this day, and the case of the proponents of illegality succeeds.

On either view, it is accordingly not necessary to consider later developments in any detail. As there has been much debate over regional denuclearization treaties and the NPT, I shall nevertheless say something about these. In my opinion, the Court could hold that they do not show that the proponents of illegality accepted the legality of the use of nuclear weapons.

* *

First, as to the regional denuclearization treaties. It will be convenient to deal with one only, namely, the Treaty of Tlatelolco of 1967. The preamble to this treaty stated that "the proliferation of nuclear weapons" seemed "inevitable unless States, in the exercise of their sovereign rights, impose restrictions on themselves in order to prevent it". The treaty being concerned with both possession and use, there is force in the argument that that statement recognized that there was a sovereign right in law to use such weapons. That inference does not however necessarily follow when regard is had to the fact that the preamble also said that the use of such a weapon could result in "an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable". The better interpretation of the treaty is that it was, objectively, directed to the establishment of a regime to ensure that Latin America would be nuclear-free, given that nuclear weapons in fact existed and might in fact be used; the treaty did not rest on an assumption that there existed a right in law to use weapons which could "render the whole earth uninhabitable." Reservations or declarations made by the NWS on signing or ratifying Protocol II to the treaty did rest on an assumption that there was a right of use; but it is risky to infer that, by remaining silent, States parties to the treaty acquiesced in that assumption in the light of the fact that, both before and after the conclusion of the treaty, many of them were on record as affirming through the General Assembly and otherwise that the use of such weapons would be a crime.

* *

5309

Next as to the NPT. This calls for fuller discussion; the arguments were more intense. Some States, or one or another of them, argued that a right to use nuclear weapons formed part of the inherent right of self-defence; that the inherent right of self-defence was inalienable; that it had a fundamental and overriding character; that it was the most fundamental right of all; but that it could be restricted by express treaty provisions. It followed that some States could retain their right to use nuclear weapons, while others could competently agree to forego it. The argument adds that acceptance of a right to possess such weapons under the NPT implies acknowledgment of a right of use.

*

These arguments are weighty; they demand careful consideration. A difficulty lies, however, in the characterization of a right to use nuclear weapons as being a part of the right of self-defence. If the characterization is correct, it is not easy to appreciate how the proponents of illegality, which were parties to the NPT, would have intended voluntarily to forego an important part of their inherent right of self-defence whilst agreeing that the right would be retained in full by the NWS. The third preambular paragraph of the NPT showed that the treaty was concluded in "conformity with resolutions of the United Nations General Assembly calling for the conclusion of an agreement on the prevention of wider dissemination of nuclear weapons". Those resolutions would include General Assembly resolution 2028 (XX) of 19 November 1965, paragraph 2 *(b)* of which laid it down that a non-proliferation treaty "should embody an acceptable balance of mutual responsibilities and obligations of the nuclear and non-nuclear Powers". It is hard to see how that prescription could find an acceptable reflection in an asymmetrical enjoyment of so fundamental a right as the inherent right of self-defence.

There would be difficulty also in following how it is that what is inalienable for some States is alienable for others. It is an attribute of sovereignty that a State may by agreement restrain the exercise of its competence; yet how far it may do so without losing its status as a State is another question [See argument of M. Yasseen in *I.C.J. Pleadings, Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* pp. 298-299.]. Since the right of self-defence is "inherent" in a State, it is not possible to conceive of statehood which lacks that characteristic. See the illustration in General Assembly resolution 49/10 of 3 November 1994,

> "[r]eaffirming... that as the Republic of Bosnia and Herzegovina is a sovereign, independent State and a Member of the United Nations, it is entitled to all rights provided for in the Charter of the United Nations, including the right to self-defence under Article 51 thereof".

Arrangements for the exercise of the right of self-defence are a different matter. But, so far as the right itself is concerned, if the right includes a right to use nuclear weapons, the latter is not a small part of the former. It was no doubt for this reason that, in the parallel case brought by the World Health Organization, it was argued that to "deny the victim of aggression the right to use the only weapons which might save it would be to make a mockery of the inherent right of self-defence" [Statement of the Government of the United Kingdom (para. 24), in the case concerning *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Request for Advisory Opinion).]. The argument is understandable, granted the premise that the right to use nuclear weapons is part of the inherent right of self-defence. The question is whether the premise is correct. For, if it is correct, then, by the same token, there is difficulty in seeing how the NNWS which were parties to the NPT could have wished to part with so crucially important a part of their inherent right of self-defence.

It is possible to see the NNWS agreeing that, because of the dangers represented by nuclear weapons, they would not acquire such weapons, on the basis that the NWS, which already had such weapons, would take steps to eliminate them. It is less easy to see how the NNWS would, on the ground of such dangers, agree to deprive themselves of the opportunity of using such weapons in exercise of their

5310

inherent right of self-defence whilst nevertheless agreeing that such weapons, notwithstanding the same dangers, could be legally used by the NWS in exercise of their own inherent right of self-defence and used in some circumstances against the NNWS. The Court could not uphold so unbalanced a view of the scheme of the NPT without endorsing the controversial thesis that its real thrust was not so much to prevent the spread of a dangerous weapon, as to ensure that enjoyment of its use was limited to a minority of States. The difference in perceived objectives is material to the correctness of the interpretation to be placed on the treaty.

A further area of nuclear weapon discrepancy could arise as between non-NPT States and the NNWS which are parties to the NPT. On the argument for legality, the former would have a right in law to use nuclear weapons in self-defence, whereas the latter would have foregone the exercise of that right even in relation to the former. For, since a NNWS, which is a party to the NPT, cannot possess nuclear weapons without breaching the treaty, it follows that it cannot threaten or use nuclear weapons even in relation to non-parties to the treaty, although the latter, not being bound by the treaty, may have gone on to develop, acquire and possess such weapons. In the result, a NNWS which is a party to the NPT would be prevented by the treaty from exercising the full measure of its inherent right of self-defence under Article 51 of the Charter, notwithstanding that the non-party to the treaty would be entitled to use such weapons in exercise of its own inherent right of self-defence under that Article.

*

These difficulties suggest that it is necessary to distinguish between the inherent right of self-defence and the means by which the right is exercisable. A State using force in self-defence is acting legally under the *ius ad bellum*. But, whether a State is acting legally or illegally under the *ius ad bellum*, if it is in fact using force it must always do so in the manner prescribed by the *ius in bello*. It is the *ius in bello* which lays down whether or not a particular means of warfare is permissible. Thus, where the use of a particular weapon is proscribed by the *ius in bello*, the denial of the use of that weapon is not a denial of the right of self-defence of the attacked State: the inherent right of self-defence spoken of in Article 51 of the Charter simply does not comprehend the use of the weapon in question. The legal answer to the possible plight of the victim State is given by the principle, as enunciated by the United States Military Tribunal at Nuremburg on 19 February 1948, that "the rules of international law must be followed even if it results in the loss of a battle or even a war. Expediency or necessity cannot warrant their violation..." [The *List* case, *Trials of War Criminals before the Nurenberg Military Tribunals under Control Council Law No. 10*, Vol. XI, 1950, p. 1272; and see, *ibid.*, pp. 1236 and 1254. See also the remarks of the United States Military Tribunal at Nuremberg in *Krupp*'s case, *Annual Digest and Reports of Public International Law Cases*, 1948, p. 628.].

A reasonable view is that the proponents of illegality which were parties to the NPT did not consider that they were contracting away an important part of their inherent right of self-defence, but that they acted on the view that a State's inherent right of self-defence did not include a right to use nuclear weapons. If they considered that a right to use nuclear weapons was an integral part of so fundamental a right as the inherent right of self-defence, it is difficult to see why they should have intended to agree that such weapons could be used only by some, and not by all. On the other hand, if they acted on the basis that a right to use such weapons was not part of the inherent right of self-defence, this governs, or at any rate qualifies and explains, the NPT arrangements, inclusive of the 1995 extension, the positive and negative assurances, and the Security Council statements set out in its resolution 984 (1995). As was pointed out by Solomon Islands, all of these arrangements formed part of a declared process for eliminating nuclear weapons; it is not persuasive to interpret them as implying acceptance by the NNWS of the legality of the use of such weapons. Answering an argument that, through the NPT, the "nuclear-weapon States were being given a legal basis for the maintenance of their nuclear arsenals", New Zealand submitted, correctly in my view, that

S311

> "the very *raison d'être* of the Treaty... is based on a recognition that nuclear weapons are different. The judgment made was that, in view of the uniquely destructive potential of such weapons, and human nature being what it is, the only option for humanity was to rid itself of these weapons entirely. The threat that the weapons represent hangs over the security of the whole international community. They also constitute a threat, and a challenge, to the international legal order." (CR 95/28, p. 36.)

In the light of the foregoing, the Court could read the NPT this way. As stated in the preamble, all parties, both the NWS and the NNWS, recognized "the devastation that would be visited upon all mankind by a nuclear war ...". The spread of nuclear weapons should therefore be halted, and States which, by their own declarations, already possessed them should eliminate them. As this would take time, the NWS would of necessity continue in possession until final elimination. This was recognition of a fact which could not suddenly be wished away, and tolerance of that fact transitionally; it was not acquiescence in a right of use. Such an acknowledgment would have been at variance with the repeated affirmation by many NNWS, through General Assembly resolutions and otherwise, and made both before and after the conclusion of the NPT, that the use of such weapons would be contrary to the Charter, to the rules of international law and the laws of humanity, and a crime against mankind and civilization.

*

It remains to consider whether this conclusion is impaired by the security assurances given by the NWS to the NNWS. In contrast with the reservations made by four of the five NWS in their negative assurances of a right to use nuclear weapons against the NNWS in certain circumstances, the positive assurances did not include a commitment to use nuclear weapons in defence of a NNWS attacked with nuclear weapons and therefore did not imply a claim to a right to use nuclear weapons. A claim to a right to use nuclear weapons is however clearly implied in the negative assurances; that need not be discussed. The question is whether the claim to such a right has been accepted by the international community.

It will be convenient to take, first, the reaction of the Security Council. Paragraph 1 of its resolution 984 (1995), adopted unanimously, recorded that the Council

> "[t]akes note with appreciation of the statements made by each of the nuclear-weapon States (S/1995/261, S/1995/262, S/1995/263, S/1995/264, S/1995/265), in which they give security assurances against the use of nuclear weapons to non-nuclear weapon States that are Parties to the Treaty on the Non-Proliferation of Nuclear Weapons".

It is argued that the "appreciation" with which the Security Council noted the statements made by each of the NWS implied an acknowledgment by it of a right in law to use nuclear weapons, and more particularly in the light of a reaffirmation in paragraph 9 of the resolution of the inherent right of self-defence under Article 51 of the Charter. The argument, which is a forceful one, makes it necessary to consider what it was that the Council's "appreciation" referred to.

Viewed in context and in particular in the light of the preamble to the resolution, the focus of paragraph 1 of the resolution was directed to the objective fact that negative security assurances had been given in the cited statements; the paragraph referred to the statements of the NWS as statements "in which they give security assurances against the use of nuclear weapons to non nuclear-weapon States...". The resolution did not refer to the statements as statements in which the NWS "reserved a right to use nuclear weapons against the NNWS in certain circumstances", as it could have done had the Council

S312

intended to indicate that its expression of appreciation extended thus far. The Council could not say so in respect of all five of the NWS because one of them, namely, China, did not reserve such a right (see paragraph 59 *(c)* of the Court's Advisory Opinion). On the contrary, in paragraph 2 of its statement, China said, "China undertakes not to use or threaten to use nuclear weapons against non-nuclear-weapon States or nuclear weapon-free zones at any time or under any circumstances"; this was the opposite of the reservation of such a right. It may be argued that the statement nonetheless implied the existence of a right to use nuclear weapons. The question, however, is how was the Security Council's expression of "appreciation" to be understood. The Court could not reasonably say that the Council's "appreciation" was to be understood as extending to the reservations made by four of the five NWS of a right to use nuclear weapons against the NNWS without also saying that it extended to China's undertaking, to the opposite effect, not to use nuclear weapons against the NNWS "at any time or under any circumstances".

In the result, the proponents of illegality, reading the text of the resolution, would not have thought that the "appreciation" expressed by the Security Council extended to those aspects of the statements in which four of the five NWS reserved a right to use nuclear weapons against the NNWS in certain circumstances, which included a situation in which there was no prior use of nuclear weapons against the NWS reserving and exercising such a right. On its part, the Court could not understand the "appreciation" expressed by the Security Council as intended to affirm the existence of such a right without also understanding it to be affirming that, in the view of the Security Council, there were two groups of States legally differentiated in the important sense that one group was entitled in law to use nuclear weapons against the other in certain circumstances, without the latter being correspondingly entitled in law to use such weapons against the former in any circumstances. The Court would need to pause before imputing such a view to the Security Council. In circumstances in which it was known that the existence of a right to use nuclear weapons was in contest, the "appreciation" expressed by the Security Council in its resolution can reasonably be understood as directed to the fact that the NWS had given "security assurances against the use of nuclear weapons to non-nuclear-weapon States...", as stated in the resolution itself, without being intended to give recognition to the existence of a legal right of use by indirectly passing on the debated issue as to whether there was such a right.

An argument of some strength is based on the fact that, in paragraph 9 of its resolution, the Security Council reaffirmed "the inherent right, recognized under Article 51 of the Charter, of individual and collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security". Although this statement did not refer to a right to use nuclear weapons, the argument is that, in the context in which it was made, it implied that, in the view of the Security Council, the inherent right of self-defence included a right to use nuclear weapons. It would not appear, however, that the correctness of any such implication of paragraph 9 of the resolution was accepted by those of the NNWS who spoke before the Security Council. What Malaysia said was that that "paragraph sidesteps the question of the legality of the use of nuclear weapons because it justifies the use or threat of nuclear weapons in cases of □self-defence'" (S/PV. 3514, 11 April 1995, p. 15). Thus, however much paragraph 9 may be understood as seeking to justify the threat or use of nuclear weapons in cases of self-defence, in the view of Malaysia the paragraph did not succeed in doing so but only side-stepped the question. Egypt associated itself with Indonesia as "speaking ... on behalf of the non-aligned States"; the statement made by Indonesia does not suggest an intention to abandon the known position of that group of States on the subject of legality. India specifically recalled that at "the forty-ninth session of the General Assembly, the international community decided to seek an advisory opinion from the International Court of Justice on whether the threat or use of nuclear weapons is permissible under international law in any circumstances". (*Ibid.*, p. 6). India added: "One would hope that by offering a draft resolution of this kind, the nuclear-weapon States are not telling the non-members of the NPT that they, the nuclear-weapon States, are free to use nuclear weapons against them, because this would have implications which are too frightening to contemplate". (*Ibid.*) Hence, even if the resolution of the Security Council

5313

contained any implication that the Council considered the use of nuclear weapons to be lawful, the argument that the proponents of illegality accepted the correctness of that implication is not well founded.

Next, the matter may be looked at from the more general standpoint of the conduct of the proponents of illegality in relation to the security assurances. Did that conduct manifest acquiescence in the claim by the NWS to the existence of a right in law to use of nuclear weapons? In particular, was such an acquiescence demonstrated by the fact that the NNWS thought it necessary to obtain such assurances?

A reasonable appreciation of the position seems to be the following. The continuing, if temporary, possession of nuclear weapons by the NWS obviously presented risks to the NNWS. The sensible thing would be to obtain assurances against any threat or use. Malaysia and Zimbabwe submitted that, in like manner, non-aggression pacts "were the common currency of international relations well after the illegality of aggression had entered the body of customary law" (Joint answers by Malaysia and Zimbabwe to questions asked by Vice-President Schwebel on 3 November 1995, response to the second question). Realities may need to be dealt with in a practical way; but not every arrangement designed to deal with them accepts their legality. Especially is this so in international relations. When regard is also had to the power of the weapons concerned, the Court could find that there is not any contradiction between the position taken by the NNWS in the General Assembly that the use of nuclear weapons is a crime, and the assurances which they accepted from States which nevertheless possessed such weapons that these would not be used against them. It is useful to remember Judge Alvarez's observation that "[r]eason, pushed to extremes, may easily result in absurdity" (*Anglo-Iranian Oil Company, I.C.J. Reports 1952*, p. 126, dissenting opinion). The practice of putting aside a legal problem in order to make progress towards a desirable goal is a familiar one in international relations. My understanding of the position taken by some of the NWS is that it was on this basis that they participated in certain negotiations in the field of humanitarian law.

*

It is also important to have in mind that bare proof of acts or omissions allegedly constituting State practice does not remove the need to interpret such acts or omissions. The fact that States may feel that realities leave them no choice but to do what they do does not suffice to exclude what they do from being classified as part of State practice, provided, however, that what they do is done in the belief that they were acting out of a sense of legal obligation. "The need for such a belief, i.e., the existence of a subjective element, is implied in the very notion of the *opinio juris sive necessitatis*." (*North Sea Continental Shelf* Cases, *I.C.J. Reports 1969*, p. 44.) Speaking of actions which could evidence an *opinio necessitatis juris*, Lauterpacht excepts conduct which "was not accompanied by any such intention" [Sir Hersch Lauterpacht, *The Development of International Law by the International Court*, 1958, p. 380]. So intention is material. Whether it exists is to be determined not on a microscopic inspection of disjointed features of a large and shifting picture, but by looking at the picture as a whole. When the whole of the picture is regarded in the circumstances of this case, the Court could find that the matters relied on to evidence an acknowledgment by the proponents of illegality that there is a right in law to use nuclear weapons fall short of demonstrating an intention to make that acknowledgement.

*

I should add that I am not persuaded that Security Council resolution 255 (1968) of 19 June 1968, to which reference is made in paragraphs 59 and 61 of the Court's Advisory Opinion, takes the matter any further. The question remains whether the resolution was dealing with the objective fact that nuclear weapons existed and could in fact be used, or whether it was affirming, directly or indirectly, the existence of a legal right of use.

5314

* *

To sum up, putting at the highest all of the matters relied on by the proponents of legality, the Court could find that those matters do not suffice to cancel out the continuing assertion of the proponents of illegality that the threat or use of nuclear weapons is illegal. It would follow that the basic difficulties noticed above would remain. If, as I consider, a correct finding is that, on the law as it stood at the commencement of the nuclear age, a prohibitory rule then existed, that finding, as to what was the then law, cannot be contradicted by subsequent inconsistent State practice; the most that subsequent inconsistent State practice could do would be to generate a new rule rescinding or modifying the old rule. But the position taken by most of the NNWS would make it impossible to establish that the necessary *opinio juris* emerged to support the creation of a new rule having the effect of reversing the old, and more particularly if the latter had the status of *ius cogens*. The prior prohibitory rule would thus continue to the present time.

PART VI. CONCLUSION

A holding that there is a right in law to use nuclear weapons would bear a difficult relationship to the Court's finding that the "destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet" (Advisory Opinion, para. 35). The affirmation of the existence of a right the exercise of which could yield such grim results would come as near as might be to a literal application of the maxim *fiat justitia ruat coelum*. Judge Carneiro's view was "that no judge nowadays can blindly follow the obsolete rule *fiat justitia, pereat mundus"* (*The Minquiers and Ecrehos* case, *I.C.J. Reports 1953*, p. 109, separate opinion). It would, at any rate, seem curious that a World Court should consider itself compelled by the law to reach the conclusion that a State has the legal right, even in limited circumstances, to put the planet to death. May it be that the maxim more properly attracted by its high mission is *fiat justitia ne pereat mundus*?

The danger of the maxim last referred to is that it could seduce the Court into acting as a legislator. In the course of the proceedings, the Court was rightly reminded that it cannot do that. To use the words of the United States Military Tribunal in the *List* case, "... it is not our province to write international law as we would have it; we must apply it as we find it" [*List* case, *supra*, footnote 33, p. 1249]. And thus, as Judge Lauterpacht remarked, "Reluctance to encroach upon the province of the legislature is a proper manifestation of judicial caution". However, as he added, "If exaggerated, it may amount to unwillingness to fulfil a task which is within the orbit of the functions of the Court as defined by its Statute" (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, p. 57, separate opinion). The danger of legislating arises not only where a court essays to make law where there is none, but also where it fails to apply such law as exists; the failure may well be regarded as amounting to judicial legislation directed to repealing the existing law.

International law does indeed concern relations between sovereign States. However, as it has been remarked, sovereignty does not mean that those relations are between billiard balls which collide but do not cooperate. There is at work a process of cohesion-building. It is not, and possibly never will be, sufficiently advanced to attract the full force of Cicero's observation that "the solidity of a State is very largely bound up with its judicial decisions" [*Cicero, Selected Works*, trans. Michael Grant, 1960, p. 36.]. Nevertheless, the broad import of the statement is not altogether amiss: the role of the Court need not be overestimated; neither should its responsibility be misunderstood. There is disciplined room for recalling the obligations of international lawyers. As it was put by Jenks, "We are not dealing with the routine of the established certainties of life but must frequently come to grips with the great unsettled issues on which the future of the world depends" [C.W. Jenks, *The Common Law of Mankind*, 1958, p.

5315

416.]. The case at bar is the supreme illustration of this truth.

*

To recall what was said at the beginning of this opinion, the great unsettled issue on which the future of the world depends is how to reconcile the imperative need of a State to defend itself with the no less imperative need to ensure that, in doing so, it does not imperil the survival of the human species. Humanitarian law, it is said, must be read as being subject to an exception which allows a State to use nuclear weapons in self-defence when its survival is at stake, that is to say, even if such use would otherwise breach that law, and this for the reason that no system of law obliges those subject to it to commit suicide. That is the argument which underlies the second part of subparagraph E of paragraph (2) of the operative paragraph of the Court's Advisory Opinion.

The implication of that part of the Court's holding is that, in the view of the Court, it is possible that the use of nuclear weapons could be lawful "in an extreme circumstance of self defence, in which the very survival of a State would be at stake", and hence even if humanitarian law would otherwise be violated. What the Court so sought to leave on the basis of a possibility takes on a firmer aspect in the light of the *"Lotus"* case, as generally understood. In saying that it cannot definitively decide, the Court is saying that it cannot definitively say whether or not a prohibitory rule exists. If the Court is in a position in which it cannot definitively say whether or not a prohibitory rule exists, the argument can be made that, on the basis of that case, the presumption is in favour of the right of States to act unrestrained by any such rule. Accordingly, the meaning of the Court's position would be that States have a right in law to use nuclear weapons. If this was not the intended result, the Court's holding was not well conceived.

Thus, however gross or excessive the suffering, the presence of the stated circumstances could create an exception to the application of humanitarian law, as indeed is visualised by the word "generally" in the first part of that subparagraph of the Court's holding. A law may, of course, provide for exceptions to its application. At the moment, however, there is nothing to suggest that humanitarian law provides for an exception to accommodate the circumstances visualized by the Court. It seems to me that to take the position that humanitarian law can be set aside in the stated circumstances would sit oddly with the repeated and correct submissions on the part of both sides to the argument that the Court should apply the law and not make new law.

One further point. Despite variations in formulation and references to the concept of "vital security interests", an "extreme circumstance of self-defence, in which the very survival of a State would be at stake", as defined by the Court, is the main circumstance in which the proponents of legality advance a claim to a right to use nuclear weapons. This is so for the reason that, assuming that the use of nuclear weapons is lawful, the nature of the weapons, combined with the limitations imposed by the requirements of necessity and proportionality which condition the exercise of the right of self-defence, will serve to confine their lawful use to that "extreme circumstance". It follows that to hold that humanitarian law does not apply to the use of nuclear weapons in the main circumstance in which a claim to a right of use is advanced is to uphold the substance of the thesis that humanitarian law does not apply at all to the use of nuclear weapons. That view has long been discarded; as the Court itself recalls, the NWS themselves do not advocate it. I am not persuaded that that disfavoured thesis can be brought back through an exception based on self defence.

*
* *

And thus I return to the real meaning of the General Assembly's question. The essence of the question is

whether the exercise of the right of self-defence can be taken to the point of endangering the survival of mankind. To this the Court responds that "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake". That is the material holding on which this opinion hinges. In so far as that holding suggests that there is a deficiency in the law, I do not think there is; in so far as it suggests that the facts are not sufficient to attract an application of the law, I am not able to agree. In my opinion, there was a sufficient legal and factual basis on which the Court could have proceeded to answer the General Assembly's question - one way or another. And hence my respectful dissent from its conclusion that it cannot.

(Signed) Mohamed SHAHABUDDEEN.

5317

DISSENTING OPINION OF JUDGE WEERAMANTRY

INDEX

Preliminary Observations on the Opinion of the Court

I. INTRODUCTION

1.Fundamental importance of issue before the Court
2.Submissions to the Court
3.Some Preliminary Observations on the United Nations Charter
4.The law relevant to nuclear weapons
5.Introductory observations on Humanitarian Law
6.Linkage between humanitarian law and the realities of war
7.The limit situation created by nuclear weapons
8.Possession and Use
9.Differing Attitudes of States supporting Legality
10.Importance of a clarification of the law

II NATURE AND EFFECTS OF NUCLEAR WEAPONS

1. The Nature of the Nuclear Weapon
2. Euphemisms concealing the realities of nuclear war
3. The Effects of Nuclear Weapons

(a) Damage to the environment and the eco-system
(b) Damage to future generations
(c) Damage to civilian populations
(d) The Nuclear Winter
(e) Loss of Life
(f) Medical effects of radiation
(g) Heat and Blast
(h) Congenital deformities
(i) Transnational damage
(j) Potential to destroy all civilization
(k) The electro-magnetic pulse
(l) Damage to nuclear reactors
(m) Damage to food productivity
(n) Multiple nuclear explosions resulting from self-defence
(o) "The shadow of the mushroom cloud"

4. The Uniqueness of the Nuclear Weapon
5. The differences in scientific knowledge between the present time and 1945
6. Do Hiroshima and Nagasaki show that nuclear war is survivable?
7. A Perspective from the Past

5318

III HUMANITARIAN LAW

1. Elementary Considerations of Humanity
2. Multicultural background to the Humanitarian Laws of War
3. Outline of humanitarian law
4. Acceptance by States of the Martens clause
5. "The dictates of public conscience"
6 Impact of the United Nations Charter and human rights on "considerations of humanity" and "dictates of public conscience"
7. The argument that "collateral damage" is unintended
8. Illegality exists independently of specific prohibitions
9. The *Lotus* decision
10. Specific rules of the humanitarian laws of war (*Jus in Bello*)

    (a) the prohibition against causing unnecessary suffering
    (b) the principle of discrimination
    (c) respect for non-belligerent states
    (d) the prohibition against genocide
    (e) the prohibition against environmental damage
    (f) human rights law

11. Juristic Opinion
12. The 1925 Geneva Gas Protocol
13. Article 23(a) of the Hague Regulations

IV SELF DEFENCE

1. Unnecessary suffering
2. Proportionality / Error
3. Discrimination
4. Non-belligerent states
5. Genocide
6. Environmental damage
7. Human rights

V SOME GENERAL CONSIDERATIONS

1. Two philosophical perspectives
2. The Aims of War
3. The Concept of a "Threat of Force" under the United Nations Charter
4. Equality in the Texture of the Laws of War
5. The logical contradiction of a dual regime in the laws of war
6. Nuclear Decision-making

VI THE ATTITUDE OF THE INTERNATIONAL COMMUNITY TOWARDS NUCLEAR WEAPONS

1. Universality of the ultimate goal of complete elimination

5319

2. Overwhelming majorities in support of total abolition
3. World public opinion
4. Current Prohibitions
5. Partial Bans
6. Who are the States most specially concerned?
7. Have States, by participating in regional treaties, recognized the use or threat of use of nuclear weapons as legal?

VII SOME SPECIAL ASPECTS

1. The Non-Proliferation Treaty
2. Deterrence
3. Reprisals
4. Internal Wars
5. The doctrine of necessity
6. Limited Nuclear Weapons

VIII SOME ARGUMENTS AGAINST THE GRANT OF AN ADVISORY OPINION

1. The Advisory Opinion would be devoid of practical effects
2. Nuclear Weapons have preserved world peace

IX CONCLUSION

1. The task before the Court
2. The alternatives before humanity

APPENDIX (demonstrating danger to neutral States)

Preliminary Observations on the Opinion of the Court

(a) Reasons for dissent

My considered opinion is that the use or threat of use of nuclear weapons is illegal *in any circumstances whatsoever*. It violates the fundamental principles of international law, and represents the very negation of the humanitarian concerns which underlie the structure of humanitarian law. It offends conventional law and, in particular, the Geneva Gas Protocol of 1925, and Article 23*(a)* of the Hague Regulations of 1907. It contradicts the fundamental principle of the dignity and worth of the human person on which all law depends. It endangers the human environment in a manner which threatens the entirety of life on the planet.

I regret that the Court has not held directly and categorically that the use or threat of use of the weapon is unlawful *in all circumstances without exception*. The Court should have so stated in a vigorous and forthright manner which would have settled this legal question now and forever.

5320

Instead, the Court has moved in the direction of illegality with some far-reaching pronouncements that strongly point in that direction, while making other pronouncements that are both less than clear and clearly wrong.

I have therefore been obliged to title this a Dissenting Opinion, although there are some parts of the Court's Opinion with which I agree, and which may still afford a substantial basis for a conclusion of illegality. Those aspects of the Court's Opinion are discussed below. They do take the law far on the road towards total prohibition. In this sense, the Court's Opinion contains positive pronouncements of significant value.

There are two of the six operative sections of the second part of the Opinion with which I profoundly disagree. I believe those two paragraphs state the law wrongly and incompletely, and I have felt compelled to vote against them.

However, I have voted in favour of paragraph 1 of the *dispositif*, and in favour of four out of the six items in paragraph 2.

(b) The positive aspects of the Court's Opinion

This Opinion represents the first decision of this Court, and indeed of any international tribunal, that clearly formulates limitations on nuclear weapons in terms of the United Nations Charter. It is the first such decision which expressly addresses the contradiction between nuclear weapons and the laws of armed conflict and international humanitarian law. It is the first such decision which expresses the view that the use of nuclear weapons is hemmed in and limited by a variety of treaty obligations.

In the environmental field, it is the first Opinion which expressly embodies, in the context of nuclear weapons, a principle of "prohibition of methods of warfare which not only are intended, but may also be expected to cause" widespread, long-term and severe environmental damage, and "the prohibition of attacks against the natural environment by way of reprisals" (para. 31).

In the field of nuclear disarmament, it also reminds all nations of their obligation to bring these negotiations to their conclusion in all their aspects, thereby ending the coninuance of this threat to the integrity of international law.

Once these propositions are established, one needs only to examine the effects of the use of nuclear weapons to conclude that there is no possibility whatsoever of a use or threat of use that does not offend these principles. This Opinion examines at some length the numerous unique qualities of the nuclear weapon which stand in flagrant contradiction of the basic values underlying the United Nations Charter, international law, and international humanitarian law. In the light of that information, it becomes demonstrably impossible for the weapon to comply with the basic postulates laid down by the Court, thus rendering them illegal in terms of the unanimous finding of the Court.

In particular, I would mention the requirement, in Article 2(4) of the Charter, of compliance with the Purposes of the United Nations. Those Purposes involve respect for human rights, and the dignity and worth of the human person. They also involve friendly relations among nations, and good neighbourliness (see Art. 1 (Purposes and Principles) read with the Preamble). The linkage of legality with compliance with these principles has now been judicially established. Weapons of warfare which can kill a million or a billion human beings (according to the estimates placed before the Court) show scant regard for the dignity and worth of the human person, or for the principle of good neighbourliness. They stand condemned upon the principles laid down by the Court.

5321

Even though I do not agree with the entirety of the Court's Opinion, strong indicators of illegality necessarily flow from the unanimous parts of that Opinion. Further details of the total incompatibility of the weapons with the principles laid down by the Court appear in the body of this Opinion.

It may be that further clarification will be possible in the future.

I proceed now to make some comments on the individual paragraphs of Part 2 of the *dispositif*. I shall deal first with the two paragraphs with which I disagree.

(c) Particular comments on the final paragraph

(i) Paragraph 2(B) - (11 votes to 3)

Regarding paragraph 2(B), I am of the view that there are comprehensive and universal limitations imposed by treaty upon the use of nuclear weapons. Environmental treaties and, in particular, the Geneva Gas Protocol and Article 23*(a)* of the Hague Regulations, are among these. These are dealt with in my Opinion. I do not think it is correct to say that there are no conventional prohibitions upon the use of the weapon.

(ii) Paragraph 2(E) - (7 votes to 7. Casting vote in favour by the President)

I am in fundamental disagreement with both sentences contained within this paragraph.

I strongly oppose the presence of the word "*generally*" in the first sentence. The word is too uncertain in content for use in an Advisory Opinion, and I cannot assent to a proposition which, even by remotest implication, leaves open any possibility that the use of nuclear weapons would not be contrary to law in any circumstances whatsoever. I regret the presence of this word in a sentence which otherwise states the law correctly. It would also appear that the word "generally" introduces an element of internal contradiction into the Court's Opinion, for in paragraphs 2(C) and 2(D) of the Court's Opinion, the Court concludes that nuclear weapons must be consistent with the United Nations Charter, the principles of international law, and the principles of humanitarian law, and, such consistency being impossible, the weapon becomes illegal.

The word "generally" admits of many meanings, ranging through various gradations, from "as a general rule; commonly", to "universally; with respect to all or nearly all"1. Even with the latter meaning, the word opens a window of permissibility, however narrow, which does not truly reflect the law. There should be no niche in the legal principle, within which a nation may seek refuge, constituting itself the sole judge in its own cause on so important a matter.

The main purpose of this Opinion is to show that, not *generally* but *always*, the threat or use of nuclear weapons would be contrary to the rules of international law and, in particular, to the principles and rules of humanitarian law. Paragraph 2(E) should have been in those terms, and the Opinion need have stated no more.

The second paragraph of 2(E) states that the current state of international law is such that the Court cannot conclude definitely whether the threat or use of the weapon would or would not be lawful in extreme circumstances of self defence. It seems self-evident to me that once nuclear weapons are resorted to, the laws of war (the *ius in bello*) take over, and that there are many principles of the laws of war, as recounted in this Opinion, which totally forbid the use of such a weapon. The existing law is sufficiently clear on this matter to have enabled the Court to make a definite pronouncement without

S322

leaving this vital question, as though sufficient principles are not already in existence to determine it. All the more should this uncertainty have been eliminated in view of the Court's very definite findings as set out earlier.

(iii) Paragraph 2(A) - (Unanimous)

Speaking for myself, I would have viewed this unquestionable proposition as a preliminary recital, rather than as part of the *dispositif.*

(iv) Paragraph 2(C) - (Unanimous)

The positive features of this paragraph have already been noted. The Court, in this paragraph, has unanimously endorsed Charter-based pre-conditions to the legality of nuclear weapons, which are diametrically opposed to the results of the use of the weapon. I thus read paragraph 1(C) of the *dispositif* as rendering the use of the nuclear weapon illegal without regard the circumstances in which the weapon is used - whether in aggression or in self defence, whether internationally or internally, whether by individual decision or in concert with other nations. A unanimous endorsement of this principle by all the judges of this Court takes the principle of illegality of use of nuclear weapons a long way forward from the stage when there was no prior judicial consideration of legality of nuclear weapons by any international tribunal.

Those contending that the use of nuclear weapons was within the law argued strongly that what is not expressly prohibited to a state is permitted. On this basis, the use of the nuclear weapon was said to be a matter on which the state's freedom was not limited. I see the limitations laid down in paragraph 1(C) as laying that argument to rest.

(v) Paragraph 2(D) - (Unanimous)

This paragraph, also unanimously endorsed by the Court, lays down the further limitation of compatibility with the requirements of international law applicable in armed conflict, and particularly with the rules of international humanitarian law and specific treaty obligations.

There is a large array of prohibitions laid down here.

My Opinion will show what these rules and principles are, and how it is impossible, in the light of the nature and effects of nuclear weapons, for these to be satisfied.

If the weapon is demonstrably contrary to these principles, it is unlawful in accordance with this paragraph of the Court's Opinion.

(vi) Paragraph 2(F) - (Unanimous)

This paragraph is strictly outside the terms of reference of the question. Yet, in the overall context of the nuclear weapons problem, it is a useful reminder of state obligations, and I have accordingly voted in favour of it.

The ensuing Opinion sets out my views on the question before the Court. Since the question posed to the Court relates only to use and threat of use, this Opinion does not deal with the legality of other important aspects of nuclear weapons, such as possession, vertical or horizontal proliferation, assembling or testing.

5323

I should also add that I have some reservations in regard to some of the reasoning in the body of the Court's Opinion. Those reservations will appear in the course of this Opinion. In particular, while agreeing with the Court in the reasoning by which it rejects the various objections raised to admissibility and jurisdiction, I would register my disagreement with the statement in paragraph 14 of the Opinion (lines 23-25) that the refusal to give the World Health Organization the Advisory Opinion requested by it was justified by the Court's lack of jurisdiction in that case. My disagreement with that proposition is the subject of my Dissenting Opinion in that case.

I am of the view that in dealing with the question of reprisals (para. 46), the Court should have affirmatively pronounced on the question of the unlawfulness of belligerent reprisals. I do not agree also with its treatment of the question of intent towards a group as such in relation to genocide, and with its treatment of nuclear deterrence. These aspects are considered in this Opinion.

(vii) Paragraph 1 - (13 votes to 1)

One other matter needs to be mentioned before I commence the substantive part of this Dissenting Opinion. I have voted in favour of the first finding of the Court, recorded in item 1 of the *dispositif*, which follows from the Court's rejection of the various objections to admissibility and jurisdiction which were taken by the States arguing in favour of the legality of nuclear weapons. I strongly support the views expressed by the Court in the course of its reasoning on these matters, but I have some further thoughts upon these objections, which I have set out in my Dissenting Opinion in relation to the WHO Request, where also similar objections were taken. There is no need to repeat those observations in this Opinion, in view of the Court's conclusions. However, what I have stated on these matters in that Dissenting Opinion should be read as supplementary to this Opinion as well.

* * *

I INTRODUCTION

1. Fundamental importance of issue before the Court

I now begin the substantive part of this Opinion.

This case has from its commencement been the subject of a wave of global interest unparalleled in the annals of this Court. Thirty-five states have filed written statements before the Court and twenty-four have made oral submissions. A multitude of organizations, including several NGO's, have also sent communications to the Court and submitted materials to it; and nearly two million signatures have been actually received by the Court from various organizations and individuals from around 25 countries. In addition, there have been other shipments of signatures so voluminous that the Court could not physically receive them and they have been lodged in various other depositories. If these are also taken into account, the total number of signatures has been estimated by the Court's Archivist at over three million2. The overall number of signatures, all of which could not be deposited in the Court, is well in excess of this figure. The largest number of signatures has been received from Japan, the only nation that has suffered a nuclear attack3. Though these organizations and individuals have not made formal submissions to the Court, they evidence a groundswell of global public opinion which is not without legal relevance, as indicated later in this Opinion.

The notion that nuclear weapons are inherently illegal, and that a knowledge of such illegality is of great practical value in obtaining a nuclear-free world, is not new. Albert Schweitzer referred to it, in a letter to Pablo Casals, as early as 1958 in terms of:

> "the most elementary and most obvious argument: namely, that international law prohibits weapons with an unlimitable effect, which cause unlimited damage to people outside the battle zone. This is the case with atomic and nuclear weapons. ... The argument that these weapons are contrary to international law contains everything that we can reproach them with. It has the advantage of being a *legal argument*. ... No government can deny that these weapons violate international law ... and international law cannot be swept aside!"4

Though lay opinion has thus long expressed itself on the need for attention to the legal aspects, the matter has not thus far been the subject of any authoritative judicial pronouncement by an international tribunal. It was considered by the courts in Japan in the *Shimoda* case5 but, until the two current requests for Advisory Opinions from this Court, there has been no international judicial consideration of the question. The responsibility placed upon the Court is thus of an extraordinarily onerous nature, and its pronouncements must carry extraordinary significance.

This matter has been strenuously argued before the Court from opposing points of view. The Court has had the advantage of being addressed by a number of the most distinguished practitioners in the field of international law. In their submissions before the Court, they have referred to the historic nature of this Request by the General Assembly and the Request of the World Health Organization, which has been heard along with it. In the words of one of them, these Requests:

> "will constitute milestones in the history of the Court, if not in history *per se*. It is probable that these requests concern the most important legal issue which has ever been submitted to the Court." (Salmon, Solomon Islands, CR 95/32, p. 38.).

> In the words of another,

> "It is not every day that the opportunity of pleading for the survival of humanity in such an august forum is offered" (David, Solomon Islands, CR 95/32, p. 49).

It is thus the grave possible issues which confronts the Court in this Advisory Opinion. It requires the Court to scrutinize every available source of international law, quarrying deep, if necessary, into its very bedrock. Seams of untold strength and richness lie therein, waiting to be quarried. Do these sources contain principles mightier than might alone, wherewith to govern the mightiest weapon of destruction yet devised?

It needs no emphasis that the function of the Court is to state the law as it now is, and not as it is envisaged in the future. Is the use or threat of use of nuclear weapons illegal under presently existing principles of law, rather than under aspirational expectations of what the law should be? The Court's concern in answering this Request for an Opinion is with *lex lata* not with *lex ferenda*.

At the most basic level, three alternative possibilities could offer themselves to the Court as it reaches its decision amidst the clash of opposing arguments. If indeed the principles of international law decree that the use of the nuclear weapon is legal, it must so pronounce. The anti-nuclear forces in the world are immensely influential, but that circumstance does not swerve the Court from its duty of pronouncing the use of the weapons legal if that indeed be the law. A second alternative conclusion is that the law gives no definite indication one way or the other. If so, that neutral fact needs to be declared, and a new stimulus may then emerge for the development of the law. Thirdly, if legal rules or principles dictate that the nuclear weapon is illegal, the Court will so pronounce, undeterred again by the immense forces ranged on the side of the legality of the weapon. As stated at the very commencement, this last represents my considered view. The forces ranged against the view of illegality are truly colossal.

5325

However, collisions with the colossal have not deterred the law on its upward course towards the concept of the rule of law. It has not flinched from the task of imposing constraints upon physical power when legal principle so demands. It has been by a determined stand against forces that seemed colossal or irresistible that the rule of law has been won. Once the Court determines what the law is, and ploughs its furrow in that direction, it cannot pause to look over its shoulder at the immense global forces ranged on either side of the debate.

2. Submissions to the Court

Apart from submissions relating to the competence of the General Assembly to request this Opinion, a large number of submissions on the substantive law have been made on both sides by the numerous states who have appeared before the Court or tendered written submissions.

Though there is necessarily an element of overlap among some of these submissions, they constitute in their totality a vast mass of material, probing the laws of war to their conceptual foundations. Extensive factual material has also been placed before the Court in regard to the many ways in which the nuclear weapon stands alone, even among weapons of mass destruction, for its unique potential of damaging humanity and its environment for generations to come.

On the other hand, those opposing the submission of illegality have argued that, despite a large number of treaties dealing with nuclear weapons, no single clause in any treaty declares nuclear weapons to be illegal in specific terms. They submit that, on the contrary, the various treaties on nuclear weapons entered into by the international community, including the NPT in particular, carry a clear implication of the current legality of nuclear weapons in so far as concerns the nuclear powers. Their position is that the principle of the illegality of the use or threat of use of nuclear weapons still lies in the future, although considerable progress has been made along the road leading to that result. It is *lex ferenda* in their submission, and not yet of the status of *lex lata*. Much to be desired, but not yet achieved, it is a principle waiting to be born.

This Opinion cannot possibly do justice to all of the formal submissions made to the Court, but will attempt to deal with some of the more important among them.

3. Some Preliminary Observations on the United Nations Charter

It was only a few weeks before the world was plunged into the age of the atom that the United Nations Charter was signed. The subscribing nations adopted this document at San Francisco on 26 June 1945. The bomb was dropped on Hiroshima on 6 August 1945. Only forty days intervened between the two events, each so pregnant with meaning for the human future. The United Nations Charter opened a new vista of hope. The bomb opened new vistas of destruction.

Accustomed as it was to the destructiveness of traditional war, the world was shaken and awe-struck at the power of the nuclear bomb - a small bomb by modern standards. The horrors of war, such as were known to those who drafted the Charter, were thus only the comparatively milder horrors of World War II, as they had been experienced thus far. Yet these horrors, seared into the conscience of humanity by the most devastating conflict thus far in human history, were sufficient to galvanize the world community into action, for, in the words of the United Nations Charter, they had "brought untold sorrow to mankind". The potential to bring untold sorrow to mankind was within weeks to be multiplied several-fold by the bomb. Did that document, drafted in total unawareness of this escalation in the weaponry of war, have anything to say of relevance to the nuclear age which lay round the corner?

There are six keynote concepts in the opening words of the Charter which have intense relevance to the matter before the Court.

The Charter's very first words are "We, the peoples of the United Nations" - thereby showing that all that ensues is the will of the peoples of the world. Their collective will and desire is the very source of the United Nations Charter and that truth should never be permitted to recede from view. In the matter before the Court, the *peoples of the world* have a vital interest, and global public opinion has an important influence on the development of the principles of public international law. As will be observed later in this Opinion, the law applicable depends heavily upon "the principles of humanity" and "the dictates of public conscience", in relation to the means and methods of warfare that are permissible.

The Charter's next words refer to the determination of those peoples to save succeeding generations from the scourge of war. The only war they knew was war with non-nuclear weapons. That resolve would presumably have been steeled even further had the destructiveness and the intergenerational effects of nuclear war been known.

The Charter immediately follows those two key concepts with a third - the dignity and worth of the human person. This is recognized as the cardinal unit of value in the global society of the future. A means was about to reveal itself of snuffing it out by the million with the use of a single nuclear weapon.

The fourth observation in the Charter, succeeding hard on the heels of the first three, is the equal rights of nations large and small. This is an ideal which is heavily eroded by the concept of nuclear power.

The next observation refers to the maintenance of obligations arising from treaties and *other sources of international law* (emphasis added). The argument against the legality of nuclear weapons rests principally not upon treaties, but upon such "other sources of international law" (mainly humanitarian law), whose principles are universally accepted.

The sixth relevant observation in the preamble to the Charter is its object of promoting social progress and better standards of life in larger freedom. Far from moving towards this Charter ideal, the weapon we are considering is one which has the potential to send humanity back to the stone age if it survives at all.

It is indeed as though, with remarkable prescience, the founding fathers had picked out the principal areas of relevance to human progress and welfare which could be shattered by the appearance only six weeks away of a weapon which for ever would alter the contours of war - a weapon which was to be described by one of its creators, in the words of ancient oriental wisdom, as a "shatterer of worlds"6.

The Court is now faced with the duty of rendering an Opinion in regard to the legality of this weapon. The six cardinal considerations set out at the very commencement of the Charter need to be kept in constant view, for each of them offers guidelines not to be lightly ignored.

4.The law relevant to nuclear weapons

As Oscar Schachter observes, the law relevant to nuclear weapons is "much more comprehensive than one might infer from the discussions of nuclear strategists and political scientists"7, and the range of applicable law could be considered in the following five categories:

1. The international law applicable generally to armed conflicts - the *jus in bello*, sometimes referred

to as the "humanitarian law of war".

2. The *ius ad bellum* - the law governing the right of states to go to war. This law is expressed in the United Nations Charter and related customary law.

3. The *lex specialis* - the international legal obligations that relate specifically to nuclear arms and weapons of mass destruction.

4. The whole corpus of international law that governs state obligations and rights generally, which may affect nuclear weapons policy in particular circumstances.

5. National law, constitutional and statutory, that may apply to decisions on nuclear weapons by national authorities.

All of these will be touched upon in the ensuing Opinion, but the main focus of attention will be on the first category mentioned above.

This examination will also show that each one of the sources of international law, as set out in Article 38 (1) of the Court's Statute, supports the conclusion that the use of nuclear weapons in any circumstances is illegal.

5. Introductory observations on Humanitarian Law

It is in the department of humanitarian law that the most specific and relevant rules relating to this problem can be found.

Humanitarian law and custom have a very ancient lineage. They reach back thousands of years. They were worked out in many civilizations - Chinese, Indian, Greek, Roman, Japanese, Islamic, modern European, among others. Through the ages many religious and philosophical ideas have been poured into the mould in which modern humanitarian law has been formed. They represented the effort of the human conscience to mitigate in some measure the brutalities and dreadful sufferings of war. In the language of a notable declaration in this regard (the St. Petersburg Declaration of 1868), international humanitarian law is designed to "conciliate the necessities of war with the laws of humanity". In recent times, with the increasing slaughter and devastation made possible by modern weaponry, the dictates of conscience have prompted ever more comprehensive formulations.

It is today a substantial body of law, consisting of general principles flexible enough to accommodate unprecedented developments in weaponry, and firm enough to command the allegiance of all members of the community of nations. This body of general principles exists in addition to over 600 special provisions in the Geneva Conventions and their Additional Protocols, apart from numerous other conventions on special matters such as chemical and bacteriological weapons. It is thus an important body of law in its own right, and this case in a sense puts it to the test.

Humanitarian law is ever in continuous development. It has a vitality of its own. As observed by the 1945 Nuremberg Tribunal, which dealt with undefined "crimes against humanity" and other crimes, "[the law of war] is not static, but by continual adaptation follows the needs of a changing world"8. Humanitarian law grows as the sufferings of war keep escalating. With the nuclear weapon, those sufferings reach a limit situation, beyond which all else is academic. Humanitarian law, as a living discipline, must respond sensitively, appropriately and meaningfully.

5328

By their very nature, problems in humanitarian law are not abstract, intellectual inquiries which can be pursued in ivory-tower detachment from the sad realities which are their stuff and substance. Not being mere exercises in logic and black-letter law, they cannot be logically or intellectually disentangled from their terrible context. Distasteful though it be to contemplate the brutalities surrounding these legal questions, the legal questions can only be squarely addressed when those brutalities are brought into vivid focus.

The brutalities tend often to be hidden behind a veil of generalities and platitudes - such as that all war is brutal or that nuclear weapons are the most devastating weapons of mass destruction yet devised. It is necessary to examine more closely what this means in all its stark reality. A close and unvarnished picture is required of the actual human sufferings involved, and of the multifarious threats to the human condition posed by these weapons. Then only can humanitarian law respond appropriately. Indeed, it is by turning the spotlight on the agonies of the battlefield that modern humanitarian law began. This Opinion will therefore examine the factual effects of nuclear weapons in that degree of minimum detail which is necessary to attract to these considerations the matching principles of humanitarian law.

6. Linkage between humanitarian law and the realities of war

The 19th century tended to view war emotionally, as a glorious enterprise, and practically, as a natural extension of diplomacy. Legitimized by some philosophers, respected by nearly all statesmen, and glorified by many a poet and artist, its brutalities tended to be concealed behind screens of legitimacy, respectability and honour.

Henri Dunant's *Memory of Solferino*, written after a visit to the battlefield of Solferino in 1859, dragged the brutalities of war into public view in a manner which shook contemporary civilization out of its complacency and triggered off the development of modern humanitarian law. That spirit of realism needs to be constantly rekindled if the law is not to stray too far from its subject matter, and thus become sterile.

Dunant's historic account touched the conscience of his age to the extent that a legal response seemed imperative. Here is his description of the raw realities of war as practiced in his time:

> "Here is a hand-to-hand struggle in all its horror and frightfulness: Austrians and Allies trampling each other under foot, killing one another on piles of bleeding corpses, felling their enemies with their rifle butts, crushing skulls, ripping bellies open with sabre and bayonet. No quarter is given. It is a sheer butchery ...
>
> A little further on, it is the same picture, only made the more ghastly by the approach of a squadron of cavalry, which gallops by, crushing dead and dying beneath its horses' hoofs. One poor man has his jaw carried away; another his head shattered; a third, who could have been saved, has his chest beaten in.
>
> Here comes the artillery, following the cavalry and going at full gallop. The guns crash over the dead and wounded, strewn pell-mell on the ground. Brains spurt under the wheels, limbs are broken and torn, bodies mutilated past recognition - the soil is literally puddled with blood, and the plain littered with human remains."

His description of the aftermath is no less powerful:

> "The stillness of the night was broken by groans, by stifled sighs of anguish and suffering.

5329

> Heart-rending voices kept calling for help. Who could ever describe the agonies of that fearful night?
>
> When the sun came up on the twenty-fifth, it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield: corpses were strewn over roads, ditches, ravines, thickets and fields: the approaches of Solferino were literally thick with dead."

Such were the realities of war, to which humanitarian law was the response of the legal conscience of the time. The nuclear weapon has increased the savagery a thousandfold since Dunant wrote his famous words. The conscience of our time has accordingly responded in appropriate measure, as amply demonstrated by the global protests, the General Assembly resolutions, and the universal desire to eliminate nuclear weapons altogether. It does not sit back in a spirit of scholarly detachment, drawing its conclusions from refined exercises in legal logic.

Just as it is through close contact with the raw facts of artillery and cavalry warfare that modern humanitarian law emerged, it is through a consideration of the raw facts of nuclear war that an appropriate legal response can emerge.

While we have moved from the cruelties of cavalry and artillery to the exponentially greater cruelties of the atom, we now enjoy a dual advantage, not present in Dunant's time - the established discipline of humanitarian law and ample documentation of the human suffering involved. Realities infinitely more awful than those which confronted Dunant's age of simpler warfare cannot fail to touch the legal conscience of our age.

Here is an eyewitness description from the first use of the weapon in the nuclear age - one of hundreds of such scenes which no doubt occurred simultaneously, and many of which have been recorded in contemporary documentation. The victims were not combatants, as was the case at Solferino:

> "It was a horrible sight. Hundreds of injured people who were trying to escape to the hills passed our house. The sight of them was almost unbearable. Their faces and hands were burnt and swollen; and great sheets of skin had peeled away from their tissues to hang down like rags on a scarecrow. They moved like a line of ants. All through the night they went past our house, but this morning they had stopped. I found them lying on both sides of the road, so thick that it was impossible to pass without stepping on them.
>
> "And they had no faces! Their eyes, noses and mouths had been burned away, and it looked like their ears had been melted off. It was hard to tell front from back. One soldier, whose features had been destroyed and was left with his white teeth sticking out, asked me for some water but I didn't have any. [I clasped my hands and prayed for him. He didn't say anything more.] His plea for water must have been his last words."9

Multiply this a thousand-fold or even a million-fold and we have a picture of just one of the many possible effects of nuclear war.

Massive documentation details the sufferings caused by nuclear weapons - from the immediate charring and mutilation for miles from the site of the explosion, to the lingering after-effects - the cancers and the leukaemias which imperil human health, the genetic mutations which threaten human integrity, the environmental devastation which endangers the human habitat, the disruption of all organization, which undermines human society.

The Hiroshima and Nagasaki experience were two isolated incidents three days apart. They tell us very little of the effects of multiple explosions that would almost inevitably follow in quick succession in the event of a nuclear war today (see section II.6 below). Moreover, fifty years of development have intervened, with bombs being available now which carry seventy or even seven hundred times the explosive power of the Hiroshima and Nagasaki bombs. The devastation of Hiroshima and Nagasaki could be magnified several-fold by just one bomb today, leave alone a succession of bombs.

7. The limit situation created by nuclear weapons

Apart from human suffering, nuclear weapons, as observed earlier, take us into a limit situation. They have the potential to destroy all civilization - all that thousands of years of effort in all cultures have produced. It is true "the dreary story of sickened survivors lapsing into stone-age brutality is not an assignment that any sensitive person undertakes willingly"10, but it is necessary to "contemplate the likely outcome of mankind's present course clearsightedly" (*ibid.*). Since nuclear weapons can destroy all life on the planet, they imperil all that humanity has ever stood for, and humanity itself.

An analogy may here be drawn between the law relating to the environment and the law relating to war.

At one time it was thought that the atmosphere, the seas and the land surface of the planet were vast enough to absorb any degree of pollution and yet rehabilitate themselves. The law was consequently very lax in its attitude towards pollution. However, with the realization that a limit situation would soon be reached, beyond which the environment could absorb no further pollution without danger of collapse, the law found itself compelled to reorientate its attitude towards the environment.

With the law of war, it is no different. Until the advent of nuclear war, it was thought that however massive the scale of a war, humanity could survive and reorder its affairs. With the nuclear weapon, a limit situation was reached, in that the grim prospect opened out that humanity may well fail to survive the next nuclear war, or that all civilization may be destroyed. That limit situation has compelled the law of war to reorientate its attitudes and face this new reality.

8. Possession and Use

Although it is the use of nuclear weapons, and not possession, that is the subject of this reference, many arguments have been addressed to the Court which deal with possession and which therefore are not pertinent to the issues before the Court.

For example, the Court was referred, in support of the position that nuclear weapons are a matter within the sovereign authority of each state, to the following passage in *Military and Paramilitary Activities in and against Nicaragua*:

> "in international law, there are no rules, other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the *level of armaments* of a sovereign State can be limited" (France, CR 95/23, p. 79; *I.C.J. Reports 1986*, p. 135; emphasis added).

This passage clearly relates to possession, not use.

Much was made also of the Nuclear Non-Proliferation Treaty, as permitting nuclear weapons to the nuclear weapons states. Here again such permission, if any, as may be inferred from that treaty relates to *possession* and not *use*, for nowhere does the NPT contemplate or deal with the use or threat of use of

nuclear weapons. On questions of use or threat of use, the NPT is irrelevant.

9. Differing Attitudes of States supporting Legality

There are some significant differences between the positions adopted by States supporting the legality of the use of nuclear weapons. Indeed, in relation to some very basic matters, there are divergent approaches among the nuclear States themselves.

Thus the French position is that

> "This criterion of proportionality does not itself rule out in principle the utilization, whether in response or as a matter of first use, of any particular weapon whatsoever, including a nuclear weapon, *provided that such use is intended to withstand an attack and appears to be the most appropriate means of doing so.*" (French Written Statement, tr. p. 15, emphasis added.)

According to this view, the factors referred to could, in a given case, even outweigh the principle of proportionality. It suggests that the governing criterion determining the permissibility of the weapon is whether it is the most appropriate means of withstanding the attack. The United States position is that:

> "Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the nature of the enemy threat, the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians." (United States Written Statement, p. 23.)

The United States position thus carefully takes into account such circumstances as the character, size and effects of the device and the magnitude of risk to civil

DISSENTING OPINION OF JUDGE KOROMA

It is a matter of profound regret to me that I have been compelled to append this Dissenting Opinion to the Advisory Opinion rendered by the Court, as I fundamentally disagree with its finding - secured by the President's casting vote - that:

> "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively *whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake*".

This finding, in my considered opinion, is not only unsustainable on the basis of existing international law, but, as I shall demonstrate later, is totally at variance with the weight and abundance of material presented to the Court. The finding is all the more regrettable in view of the fact that the Court had itself reached a conclusion that:

> "the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law".

A finding with which I concur, save for the word "generally". It is my considered opinion based on the existing law and the available evidence that the use of nuclear weapons in any circumstance would be unlawful under international law. That use would at the very least result in the violation of the principles and rules of international humanitarian law, and would therefore be contrary to that law.

I am also unable to agree with various aspects of the reasoning which motivates the Advisory Opinion. Some of it, in my view, is not only untenable in law, but may even have the effect of potentially destabilizing the existing international legal order.

According to the material before the Court, it is estimated that more than 40,000 nuclear warheads exist in the world today with a total destructive capacity around a million times greater than that of the bomb which devastated Hiroshima. A single nuclear bomb detonated over a large city is said to be capable of killing more than 1 million people. These weapons, if used massively, could result in the annihilation of the human race and the extinction of human civilization. Nuclear weapons are thus not just another kind of weapon, they are considered the absolute weapon and are far more pervasive in terms of their destructive effects than any conventional weapon. A request for an advisory opinion asking for a determination about the lawfulness or otherwise of the use of such weapons is a matter which, in my considered opinion, this Court as a court of law and the guardian of legality in the United Nations system should be capable of making.

While it is admitted that the views of States are divided on the question of nuclear weapons, as well as about their possible consequences, views are also divided as to whether the Court should have been asked to render an opinion on the matter at all. However, the Court, having found that the General Assembly was competent to ask the question and in the absence of any "compelling reason" relating to propriety or to any issue that would compromise its judicial character, should have performed its judicial function in accordance with Article 38 of its Statute and determined the question, "in accordance with international law", by simultaneously applying international conventions, international custom as

S330

established rules recognized by States or as evidence of general practice accepted as law or the general principles of law recognized by all States, the judicial decisions of the Court and resolutions of international organizations, at a minimum as evidence of the law.

In my view, the prevention of war, by the use of nuclear weapons, is a matter for international law and, if the Court is requested to determine such an issue, it falls within its competence to do so. Its decision can contribute to the prevention of war by ensuring respect for the law. The Court in the *Corfu Channel* case described as its function "the need to ensure respect for international law of which it is the organ" (*I.C.J. Reports 1949*, p. 35). The late Judge Nagendra Singh, a former Member and President of this Court, commenting on that statement, observed that it was made by the Court without reference to the United Nations Charter or to its own Statute. He observed that "the Court has thus to be conscious of this fact, as something inherent to its existence in relation to the law which it administers" ("The Role and Record of the International Court of Justice", p. 173). Today a system of war prevention exists in international law, and comprises the prohibition of the use of force, the collective security provisions of the United Nations Charter for the maintenance of international peace, the obligation to resort to peaceful means for the settlement of international disputes and the regulations on weapons prohibition, arms limitation and disarmament. The Court's Advisory Opinion in this case could have strengthened this regime by serving as a shield of humanity.

In my view, it is wholly incoherent in the light of the material before the Court to say that it cannot rule definitively on the matter now before it in view of the current state of the law and because of the elements of facts at its disposal, for neither the law nor the facts are so imprecise or inadequate as to prevent the Court from reaching a definitive conclusion on the matter. On the other hand, the Court's findings could be construed as suggesting either that there is a gap, a lacuna, in the existing law or that the Court is unable to reach a definitive conclusion on the matter because the law is imprecise or its content insufficient or that it simply does not exist. It does not appear to me any new principles are needed for a determination of the matter to be made. All that was requested of the Court was to apply the existing law. A finding of *non liquet* is wholly unfounded in the present case. The Court has always taken the view that the burden of establishing the law is on the Court and not on the Parties. The Court has stated that:

> "there is no incompatibility with its judicial function in making a pronouncement on the rights and duties of the Parties under existing international law which would clearly be capable of having a forward reach ... The possibility of the law changing is ever present: but that cannot relieve the Court from its obligation to render a judgment on the basis of the law as it exists at the time of its decision ..." (*Fisheries Jurisdiction Case, I.C.J. Reports 1974*, p. 20.)

The *corpus juris* on the matter is not only considerable, but is sufficiently clear and precise for the Court to have been able to make a definitive finding. If the Court had applied the whole spectrum of the law, including international conventions, rules of customary international law, general principles of international law, judicial decisions, as well as resolutions of international organizations, there would have been no room for a purported finding of *non liquet*.

Furthermore, all States - both the nuclear-weapon and non-nuclear-weapon States - are agreed that the rules of international law applicable in armed conflict, particularly international humanitarian law, apply to the use of nuclear weapons. This law, which has been formulated and codified to restrict the use of various weapons and methods of warfare, is intended to limit the terrible effects of war. Central to it is the principle of humanity which above all aims to mitigate the effects of war on civilians and combatants alike. It is this law which also establishes a regime on the basis of which the methods and means of warfare are to be judged. Accordingly, it would seem apposite and justifiable for the effects of

a conflict involving nuclear weapons - regarded as the ultimate weapon of mass destruction - to be judged against the standards of such a regime.

Despite its findings, the Court has itself recognized that the law of armed conflict, and in particular the principles and rules of humanitarian law - would apply to a conflict involving the use of nuclear weapons. It follows that the Court's finding that it cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake, is a contradiction and can at best be described as the identification of two principles, namely, the obligation to comply with the principles and rules of international law applicable in armed conflict and the right of a State to self-defence including when it considers its very survival to be at stake. It these principles are not mutually exclusive and are recognized in international law. However, it has been argued that when the Court is faced with two competing principles or rights, it should jurisprudentially assign a priority to one of them and cause it to prevail. In the opinion of Sir Hersch Lauterpacht, even though the margin of preference for giving a priority to one principle over another may be small, yet, however tenuous, that margin must be decisive. He admits that judicial action along this line may in some respects be indistinguishable from judicial legislation. However, he argues, the Court "may have to effect a compromise - which is not a diplomatic but a legitimate judicial compromise - between competing principles of law", and concludes that:

> "there is no decisive reason why the Court should avoid at all cost some such outcome. It is in accordance with the true function of the Court that the dispute submitted to it should be determined by its own decision and not by the contingent operation of an attitude of accommodation on the part of the disputants. There is an embarrassing anticlimax, which is not legally irrelevant, in a situation in which the Court, after prolonged written and oral pleadings, is impelled to leave the settlement of the actual issue to ... the parties." (*The Development of International Law by the International Court*, p. 146.)

The suggestion that it should be left to individual States to determine whether or not it may be lawful to have recourse to nuclear weapons, is not only an option fraught with serious danger, both for the States that may be directly involved in conflict, and for those nations not involved, but may also suggest that such an option is not legally reprehensible. Accordingly, the Court, instead of leaving it to each State to decide whether or not it would be lawful or unlawful to use nuclear weapons in an extreme circumstance of "State survival", should have determined whether or not it is permissible to use nuclear weapons even in a case involving the survival of the state. The question put to the Court is whether it is lawful to use nuclear weapons and is not about the survival of the state, which is what the Court's reply turned on. If the Court had correctly interpreted the question this would not only have had the effect of declaring the law regarding the use of nuclear weapons but could well have deterred the use of such weapons. Regrettably, the Court refrained not only from performing its judicial function, but, by its "non-finding", appears to have made serious inroads into the present legal restraints relating to the use of nuclear weapons, while throwing the regime of self-defence into doubt by creating a new category called the "survival of the State", seen as constituting an exception to Articles 2, paragraph 4, and 51of the United Nations Charter and to the principles and rules of humanitarian law. In effect, this kind of restraint would seem to be tantamount to judicial legislation at a time when the Court has itself - rightly in my view - recognized that it "cannot legislate", and, that

> "in the circumstances of the present case, *it is not* called upon *to do so*. Rather its task is to engage in its normal judicial function of ascertaining the existence or otherwise of legal principles and rules applicable to the threat or use of nuclear weapons." (Advisory Opinion, para. 18.)

However, just after reaffirming this self-denying ordinance, the Court went on to do just that by

proclaiming that it cannot conclude definitively whether or not the threat or use of nuclear weapons would be "lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake", given the current state of international law and the elements of fact at its disposal. This finding, with respect, is not only untenable in law but legally superfluous. The right of self-defence is inherent and fundamental to all States. It exists within and not outside or above the law. To suggest that it exists outside or above the law is to render it probable that force may be used unilaterally by a State when it by itself considers its survival to be at stake. The right of self-defence is not a licence to use force; it is regulated by law and was never intended to threaten the security of other states.

Thus the Court's finding does not only appear tantamount to judicial legislation which undermines the regime of the non-use of force as enshrined in Article 2, paragraph 4, of the Charter, and that of self-defence as embodied in Article 51, but the doctrine of the survival of the State represents a throwback to the law before the adoption of the United Nations Charter and is even redolent of a period long before that. Grotius, writing in the seventeenth century, stated that: "[t]he right of self-defence ... has its origin directly, and chiefly, in the fact that nature commits to each his own protection" (Grotius, *De Jure Belli Ac Pacis*, bk. II, ch. I, pt. III, at 172 (Carnegie Endowment trans. 1925) (1646)). Thus, the Court's finding would appear to be tantamount to according to each State the exclusive right to decide for itself to use nuclear weapons when its survival is at stake as that State perceives it - a decision subjected neither to the law nor to third party adjudication. When Lauterpacht had to consider a similar situation following the conclusion of the Briand-Kellog Pact of 1928, according to which the participating States declared that a State claiming the right of self-defence "alone is competent to decide whether circumstances require recourse to war in self-defence", he found such a claim to be "self-contradictory in as much as it purports to be based on legal right and at the same time, it dissociates itself from regulations and evaluation of the law". While he acknowledged the right of self-defence as "absolute" in the sense that no law could disregard it, Lauterpacht however maintained that the right is "relative" in as much as it is presumably regulated by law. "It is regulated to the extent that it is the business of the Courts to determine whether, how far, and for how long, there was a necessity to have recourse to it". ("The Function of Law in the International Community", pp. 179-180).

As already stated, the Court's present finding represents a challenge to some of the fundamental precepts of existing international law including the proscription of the use of force in international relations and the exercise of the right of self-defence. That the Court cannot decide definitively whether the use of nuclear weapons would be lawful or unlawful when the survival of the State is at stake is a confirmation of the assertion that the survival of that State is not only not a matter for the law but that a State, in order to ensure its survival, can wipe out the rest of humanity by having recourse to nuclear weapons. In its historical garb "of the fundamental right of self-preservation", such a right was used in the past as a pretext for the violation of the sovereignty of other States. Such acts are now considered unlawful under contemporary international law. The International Military Tribunal at Nuremburg in 1946 rejected the argument that the State involved had acted in self-defence and that every State must be the judge of whether, in a given case, it is entitled to decide whether to exercise the right of self-defence. The Tribunal held that "whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation or adjudication if international law is ever to be enforced" (*Judgment of the International Military Tribunal at Nuremburg*, 1946, Trial of German Major War Criminals before the International Military Tribunal, (1947), Vol. I, p. 208).

Similarly, this Court, in the *Nicaragua* case, rejected the assertion that the right of self-defence is not subject to international law. While noting that Article 51 of the United Nations Charter recognizes a "natural" or "inherent" right of self-defence, it stated that "it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed by the Charter" (*I.C.J. Reports 1986*, p. 94). By its present findings, the Court would appear to be departing from its own jurisprudence by

saying that it cannot determine conclusively whether or not it would be lawful for a State to use nuclear weapons.

Be that as it may, it is not as if the Court was compelled to reach such a conclusion, for the law is clear. The use of force is firmly and peremptorily prohibited by Article 2, paragraph 4, of the United Nations Charter. The regime of self-defence or the doctrine of "self-survival", as the Court would prefer to have it, is likewise regulated and subjected to that law. The right of self-defence by a State is clearly stipulated in Article 51 of the Charter, as follows:

> "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Thus, the Article permits the exercise of that right subject to the conditions stipulated therein. Firstly, in order to exercise the right, a State must have been the victim of an armed attack and, while exercising such a right, it must observe the principle of proportionality. Secondly, the measure or measures taken in exercise of such a right must be reported to the Security Council and are to be discontinued as soon as the Security Council itself has taken measures necessary for the maintenance of international peace. Article 51 therefore envisages the ability of a State *lawfully* to defend itself against armed attack. The Court emphasized this when it stated that the right of self-defence under Article 51 is conditioned by necessity and proportionality and that these conditions would apply whatever the means of force employed. Moreover, self-defence must also meet the requirements of the law applicable in armed conflict, particularly the principles and rules of international humanitarian law.

The question therefore is not whether a State is entitled to exercise its right of self-defence in an extreme circumstance in which the very survival of that State would be at stake, but rather whether the use of nuclear weapons would be lawful or unlawful under any circumstance including an extreme circumstance in which its very survival was at stake - or, in other words, whether it is possible to conceive of consequences of the use of such weapons which do not entail an infringement of international law applicable in armed conflict, particularly international humanitarian law. As stated above, in terms of the law, the right of self-defence is restricted to the repulse of an armed attack and does not permit of retaliatory or punitive action. Nor is it an exception to the *jus in bello* (conduct of hostilities). Since, in the light of the law and the facts, it is inconceivable that the use of nuclear weapons would not entail an infringement of, at the very least, the law applicable in armed conflict, particularly humanitarian law, it follows that the use of such weapons would be unlawful. Nuclear weapons do not constitute an exception to humanitarian law.

Given these considerations, it is not legally sustainable to find, as the Court has done, that, in view of the present state of the law, it cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-survival, for as it stated in the *Nicaragua* case:

> "the conduct of States should, in general, be consistent with ... rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of that rule" (*I.C.J. Report 1986*, p. 98).

5337

Judge Mosler, a former member of this Court has in another context, stated

> "that law cannot recognise any act either of one member or of several members in concert, as being legally valid if it is directed against the very foundation of law". (H. Mosler, The International Society as a Legal Community, (1980), p. 18).

The Court's finding is also untenable, for, and as already mentioned, the *corpus juris* on which it should have reached its conclusion does indeed exist, and in an ample and substantial form. The Court had itself taken cognizance of this when it noted that the "laws and customs of war" applicable to the matter before it had been codified in The Hague Conventions of 1899 and 1907, based upon the 1868 Declaration of St. Petersburg as well as the results of the Brussels Conference of 1874. The Court also recognized that "The Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, do regulate the rights and duties of belligerent States in the conduct of their hostilities and limit the choice of methods and means of injuring the enemy in wartime. It found that the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities, is equally applicable to the issue before it. It noted that these two branches of law today constitute international humanitarian law which was codified in the 1977 Additional Protocols to the Geneva Conventions of 1949.

It observed that, since the turn of the century, certain weapons, such as explosive projectiles under 400 g, dum-dum bullets and asphyxiating gases, have been specifically prohibited, and that chemical and bacteriological weapons were also prohibited by the 1925 Geneva Gas Protocol. More recently, the Court found, the use of weapons producing "non-detectable fragments", of other types of mines, booby traps and other devices, and of incendiary weapons, was either prohibited or limited depending on the case by the Convention of 10 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. Such prohibition, it stated, was in line with the rule that "the right of belligerents to adopt means of injuring the enemy is not unlimited" as stated in Article 22 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land. The Court further noted that the St. Petersburg Declaration had already condemned the use of weapons "which uselessly aggravate the suffering of disabled men or make their death inevitable" and that the aforementioned Regulations annexed to the Hague Convention IV of 1907, prohibit the use of "arms, projectiles, or material calculated to cause unnecessary suffering" (Article 23).

The Court also identified the cardinal principles constituting the fabric of international humanitarian law, the first of which is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants. According to those principles, States are obliged not to make civilians the object of attack and must consequently not use weapons that are incapable of distinguishing between civilian and military targets. Secondly, it is prohibited to cause unnecessary suffering to combatants and, accordingly, it is prohibited to use weapons causing them needless harm or that uselessly aggravate their suffering. In this regard, the Court noted that States do not have unlimited freedom of choice in the weapons they can use.

The Court also considered applicable to the matter the Martens Clause, first enunciated in the Hague Convention of 1899 with respect to the laws and customs of war on land, a modern version of which has been codified in Article 1, paragraph 2, of Additional Protocol I of 1977, and reads as follows:

> "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of

public conscience."

The Court noted that the principles embodied in the Clause are principles and rules of humanitarian law and, together with the principle of neutrality, apply to nuclear weapons.

It was in the light of the foregoing that the Court recognized that humanitarian law does prohibit the use of certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary and superfluous harm caused to combatants. The Court accordingly held that the principles and rules of international humanitarian law are obligatory and binding on all States as they also constitute intransgressible principles of customary international law.

With regard to the applicability of Additional Protocol I of 1977 to nuclear weapons, the Court recalled that even if not all States are parties to the Protocol, they are nevertheless bound by those rules in the Protocol which, when adopted, constituted an expression of the pre-existing customary law, such as, in particular, the Martens Clause, which is enshrined in Article I of the Protocol.

The Court observed that the fact that certain types of weapons were not specifically mentioned in the Convention does not permit the drawing of any legal conclusions relating to the substantive issues raised by the use of such weapons. It took the view that there can be no doubt that the principles and rules of humanitarian law, which are enshrined in the Geneva Conventions of 1949 and the Additional Protocols of 1977, are applicable to nuclear weapons. Even when it observed that the Conferences of 1949 and 1977 did not specifically address the question of nuclear weapons, the Court stated that it cannot be concluded from this that the established principles and rules of humanitarian law applicable in armed conflict do not apply to nuclear weapons, as such a conclusion would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeate the entire law of armed conflict and apply to all forms of warfare and to all kinds of weapons.

The Court agreed with the submission that:

> "In general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons.
>
> International humanitarian law has evolved to meet contemporary circumstances, and is not limited in its application to weaponry of an earlier time. The fundamental principles of this law endure: to mitigate and circumscribe the cruelty of war for humanitarian reasons." (New Zealand, Written Statement, p. 15.)

The Court also observed that none of the States advocating the legality of the use of nuclear weapons under certain circumstances, including the "clean" use of smaller, low-yield, tactical nuclear weapons, had indicated that the principles of humanitarian law do not apply to nuclear weapons, noting that, for instance, the Russian Federation had recognized that "restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons"; that for the United States, "the United States has long shared the view that the law of armed conflict governs the use of nuclear weapons - just as it governs the use of conventional weapons"; while for the United Kingdom, "so far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the principles of the *jus in bello*".

With regard to the elements of fact advanced in its findings, the Court noted the definitions of nuclear weapons contained in various treaties and instruments, including those according to which nuclear explosions are "capable of causing massive destruction, generalized damage or massive

poisoning" (Paris Accords of 1954), or the preamble of the Tlatelolco Treaty of 1967 which described nuclear weapons "whose terrible effects are suffered, indiscriminately and inexorably, by military forces and civilian population alike, [and which] constitute through the persistence of the radioactivity they release, an attack on the integrity of the human species and ultimately may even render the whole earth uninhabitable". It also took note of the fact that nuclear weapons release not only immense quantities of heat and energy, but also powerful and prolonged radiation; that the first two causes of damage are vastly more powerful than such causes of damage in other weapons of mass destruction, and that the phenomenon of radiation is said to be peculiar to nuclear weapons. These characteristics, the Court concluded, render nuclear weapons potentially catastrophic; their destructive power cannot be contained in either space or time, and they have the potential to destroy all civilization and the entire ecosystem of the planet.

With regard to the elements of fact, the Court noted that the radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a wide area and that such weapons would be a serious danger to future generations. It further noted that ionizing radiation has the potential to damage the future environment, food and marine ecosystems, and to cause genetic defects and illness in future generations.

Also in this regard, the Government of Japan told the Court that the yields of the atomic bombs detonated in Hiroshima on 6 August 1945 and in Nagasaki on 9 August 1945 were the equivalent of 15 kilotons and 22 kilotons of TNT respectively. The bomb blast produced a big fireball, followed by extremely high temperatures of some several million degrees centigrade, and extremely high pressures of several hundred thousand atmospheres. It also emitted a great deal of radiation. According to the delegation, the fireball, which lasted for about 10 seconds, raised the ground temperature at the hypocentre to somewhere between 3,000šC and 4,000šC, and the heat caused the scorching of wood buildings over a radius of approximately 3 kilometres from the hypocentre. The number of houses damaged by the atomic bombs was 70,147 in Hiroshima and 18,409 in Nagasaki. People who were within 1,000 m of the hypocentre were exposed to the initial radiation of more than 3.93 Grays. It is estimated that 50 per cent of people who were exposed to more than 3 Grays die of marrow disorder within two months. Induced radiation was emitted from the ground and buildings charged with radioactivity. In addition, soot and dust contaminated by induced radiation was dispersed into the air and whirled up into the stratosphere by the force of the explosion, and this caused radioactive fallout back to the ground over several months.

According to the delegation, the exact number of fatalities was not known, since documents were scarce. It was estimated, however, that the number of people who had died by the end of 1945 amounted to approximately 140,000 in Hiroshima and 74,000 in Nagasaki. The population of the cities at that time was estimated at 350,000 in Hiroshima and 240,000 in Nagasaki. The number of people who died of thermal radiation immediately after the bomb blast, on the same day or within a few days, was not clear. However, 90 to 100 per cent of the people who were exposed to thermal radiation without any shield within 1 k of the hypocentre, died within a week. The early mortality rates for the people who were within 1.5 k to 2 k of the hypocentre were 14 per cent for people with a shield and 83 per cent for the people without a shield. In addition to direct injury from the bomb blast, death was caused by several interrelated factors such as being crushed or buried under buildings, injuries caused by splinters of glass, radiation damage, food shortages or a shortage of doctors and medicines.

Over 320,000 people who survived but were affected by radiation still suffer from various malignant tumours caused by radiation, including leukaemia, thyroid cancer, breast cancer, lung cancer, gastric cancer, cataracts and a variety of other after-effects. More than half a century after the disaster, they are still said to be undergoing medical examinations and treatment.

5340

According to the Mayor of Hiroshima who made a statement before the Court, the atomic bomb which was detonated in Hiroshima produced an enormous destructive power and reduced innocent civilian populations to ashes. Women, the elderly and the newborn were said to have been bathed in deadly radiation. The Court was told that the dropping of the bomb unleashed a mushroom cloud and human skin was burned raw while other victims died in desperate agony. The Mayor further told the Court that when the bomb exploded, enormous pillars of flame leaped up towards the sky and a majority of the buildings crumbled, causing a large number of casualties, many of them fatal.

Later in his statement he described the unique characteristic of the atomic bombing as one whose enormous destruction was instantaneous and universal. Old, young, male, female, soldiers, civilians were all killed *indiscriminately*. The entire city of Hiroshima, he said, had been exposed to thermal rays, shock-wave blast and radiation. The bomb purportedly generated heat that reached several million degrees centigrade. The fireball was about 280 metres in diameter, the thermal rays emanating from it were thought to have instantly charred any human being who was outdoors near the hypocentre. The witness further disclosed that according to documented cases, clothing had burst into flames at a distance of 2 kilometres from the hypocentre of the bomb; many fires were ignited simultaneously throughout the city; the entire city was carbonized and reduced to ashes. Yet another phenomenon was a shock-wave which inflicted even greater damage when it ricocheted off the ground and buildings. The blast wind which resulted had, he said, lifted and carried people through the air. All wooden buildings within a radius of 2 kilometres collapsed, while many well beyond that distance were damaged.

The blast and thermal rays combined to burn to ashes or cause the collapse of approximately 70 per cent of the 76,327 dwellings in Hiroshima at the time. The rest were partially destroyed, half-bombed or damaged. The entire city was said to have been instantly devastated by the dropping of the bomb.

On the day the bomb was dropped, the witness further disclosed that there were approximately 350,000 people in Hiroshima, but it was later estimated that some 140,000 had died by the end of December 1945. Hospitals were said to be in ruins with medical staff dead or injured and with no medicines or equipment, and an incredible number of victims died, unable to receive sufficient treatment. Survivors developed fever, diarrhoea, haemorrhaging, and extreme fatigue, many died abruptly. Such was said to be the pattern of the acute symptoms of the atomic bomb disease. Other consequences were a widespread destruction of cells, loss of blood-producing tissue, and organ damage. The immune systems of survivors were weakened and such symptoms as hair loss were conspicuous. Other experiences recorded were an increase in leukaemia, cataracts, thyroid cancer, breast cancer, lung cancer and other cancers. As a result of the bombing, children exposed to radiation suffered mental and physical retardation. Nothing could be done for these children medically and even unborn babies, the Mayor stated, had been affected. He concluded by saying that exposure to high levels of radiation continues in Hiroshima to this day.

The Mayor of Nagasaki, in his testimony, described effects on his city that were similar to those experienced by Hiroshima as a result of the atomic bombing which had taken place during the war. According to the witness,

> "The explosion of the atomic bomb generated an enormous fireball, 200 metres in radius, almost as though a small sun had appeared in the sky. The next instant, a ferocious blast and wave of heat assailed the ground with a thunderous roar. The surface temperature of the fireball was about 7,000šC, and the heat rays that reached the ground were over 3,000šC. The explosion instantly killed or injured people within a two-kilometre radius of the hypocentre, leaving innumerable corpses charred like clumps of charcoal and scattered in the ruins near the hypocentre. In some cases not even a trace of the person's remains could be found. The blast wind of over 300 metres per second slapped down trees and demolished

most buildings. Even iron reinforced concrete structures were so badly damaged that they seemed to have been smashed by a giant hammer. The fierce flash of heat meanwhile melted glass and left metal objects contorted like strands of taffy, and the subsequent fires burned the ruins of the city to ashes. Nagasaki became a city of death where not even the sounds of insects could be heard. After a while, countless men, women and children began to gather for a drink of water at the banks of nearby Urakami River, their hair and clothing scorched and their burnt skin hanging off in sheets like rags. Begging for help, they died one after another in the water or in heaps on the banks. Then radiation began to take its toll, killing people like a scourge of death expanding in concentric circles from the hypocentre. Four months after the atomic bombing, 74,000 were dead and 75,000 had suffered injuries, that is, two-third of the city population had fallen victim to this calamity that came upon Nagasaki like a preview of the Apocalypse." (CR 95/27.)

The witness went on to state that even people who were lucky enough to survive continued to this day to suffer from the late effects unique to nuclear weapons. Nuclear weapons, he concluded, bring in their wake the indiscriminate devastation of civilian populations.

Testimony was also given by the delegation of the Marshall Islands which was the site of 67 nuclear weapons tests from 30 June to 18 August 1958, during the period of the United Nations Pacific Islands territories trusteeship. The total yield of those weapons was said to be equivalent to more than 7,000 bombs of the size of that which destroyed Hiroshima. Those nuclear weapon tests were said to have caused extensive radiation, induced illnesses, deaths and birth defects. Further on in the testimony, it was disclosed that human suffering and damage to the environment occurred at great distances, both in time and in geography, from the sites of detonations even when an effort was made to avoid or mitigate harm. The delegation went on to inform the Court that the unique characteristics of nuclear weapons are that they cause unnecessary suffering and include not only widespread, extensive, radioactive contamination with cumulative adverse effects, but also locally intense radiation with severe, immediate and long-term adverse effects, far-reaching blasts, heat, and light resulting in acute injuries and chronic ailments. Permanent, as well as temporary, blindness from intense light and reduced immunity from radiation exposures were said to be common and unavoidable consequences of the use of nuclear weapons, but which were uncommon or absent from the use of other destructive devices.

The delegation further disclosed that birth defects and extraordinarily prolonged and painful illnesses caused by the radioactive fallout inevitably and profoundly affected the civilian population long after the nuclear weapons tests had been carried out. Such suffering had affected generations born long after the testing of such weapons. It went on to say that, apart from the immediate damage at and near ground zero (where the detonation took place), the area experienced contamination of animals and plants and the poisoning of soil and water. As a consequence, some of the islands were still abandoned and in those that had recently been resettled, the presence of caesium in plants from the radioactive fallout rendered them inedible. Women on some of the other atolls in the islands who had been assured that their atolls were not affected by radiation, were said to have given birth to "monster babies". A young girl on one of these atolls was said to have no knees, three toes on each foot and a missing arm; her mother had not been born by 1954 when the tests started but had been raised on a contaminated atoll.

In the light of the foregoing the Court, as well as taking cognizance of the unique characteristics of nuclear weapons when used, reached the following conclusions; that nuclear weapons have a destructive capacity unmatched by any conventional weapon; that a single nuclear weapon has the capacity to kill thousands if not millions of human beings; that such weapons cause unnecessary suffering and superfluous injury to combatants and non-combatants alike; and that they are unable to distinguish between civilians and combatants. When recourse is had to such weapons, it can cause damage to generations unborn and produce widespread and long-term effects on the environment, particularly in

respect of resources necessary for human survival. In this connection, it should be noted that the radioactive effects of such weapons are not only similar to the effects produced by the use of poison gas which would be in violation of the 1925 Geneva Gas Protocol, but are considered even more harmful.

The above findings by the Court should have led it inexorably to conclude that any use of nuclear weapons is unlawful under international law, in particular the law applicable in armed conflict including humanitarian law. However, instead of this, the Court found that:

> "in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".

This finding that would appear to suggest that nuclear weapons when used in circumstances of a threat to "State survival" - a concept invented by the Court - would constitute an exception to the corpus of humanitarian law which applies in all armed conflicts and makes no exception for nuclear weapons. In my considered opinion, the unlawfulness of the use of nuclear weapons is not predicated on the circumstances in which the use takes place, but rather on the unique and established characteristics of those weapons which under any circumstance would violate international law by their use. It is therefore most inappropriate for the Court's finding to have turned on the question of State survival when what is in issue is the lawfulness of nuclear weapons. Such a misconception of the question deprives the Court's finding of any legal basis.

On the other hand, if the Court had properly perceived the question and intended to give an appropriate reply, it would have found that an overwhelming justification exists on the basis of the law and the facts, which would have enabled it to reach a finding that the use of nuclear weapons in any circumstance would be unlawful. The Court's failure to reach this inevitable conclusion has compelled me to enter a vigorous dissent to its main finding.

I am likewise constrained to mention various other, more general, misgivings with regard to the Advisory Opinion on the whole. While the purpose of the Court's advisory jurisdiction is to provide an authoritative legal opinion and to enlighten the requesting body on certain legal aspects of an issue with which it has to deal when discharging its functions, the device has also been used to secure authoritative interpretations of the provisions of the Charter or the constitutive instruments of specialized agencies, or to provide guidance to various organs of the United Nations in relation to their functions. Furthermore, although the Advisory Opinions of the Court are not legally binding and impose no legal obligations either upon the requesting body or upon States, such Opinions are nonetheless not devoid of effect as they remain the law "recognized by the United Nations" (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, p. 23, Sep. Op. Judge Lauterpacht at p. 46). Accordingly, this Court has, on various occasions, used its advisory jurisdiction as a medium of participation in the work of the United Nations, helping the Organization to achieve its objectives. Advisory opinions have enabled the Court to contribute meaningfully to the development and crystallization of the law. For example, in the *Namibia* Advisory Opinion, the Court referred to the development "of international law in regard to the non-self-governing territories, as enshrined in the Charter of the United Nations" (*I.C.J. Reports 1971*, p. 31), which made the principle of self-determination applicable to such territories.

In its Advisory Opinion on the Western *Sahara*, the Court, citing the *Namibia* Opinion in relation to the principle of self-determination, stated that when questions are asked with reference to that principle, the Court

> "must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law.
>
> ...
>
> In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore." (*I.C.J. Reports 1975*, p. 32).

The Court's Opinion in the case accordingly referred to Article 1 of the United Nations Charter and to the Declaration on the Granting of Independence to Colonial Countries and Peoples which, it said, "confirm and emphasize that the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned" (*I.C.J. Reports 1975*, p. 32). Moreover, the Court insisted that "the validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory" (*ibid.*, p. 33). It can therefore be observed that through the medium of its Advisory Opinions, the Court has rendered normative decisions which have enabled the United Nations to achieve its objectives, in some cases even leading to the peaceful settlement of disputes, and has either contributed to the crystallisation and development of the law or, with its imprimatur, affirmed the emergence of the law..

It is therefore to be regretted that, on this occasion, the Court would seem not only to have retreated from this practice of making its contribution to the development of the law on a matter of such vital importance to the General Assembly and to the international community as a whole but may, albeit unintentionally, have cast doubt on established or emerging rules of international law. Indeed, much of the approach of the Court in this Opinion is indicative of this attitude. When not looking for specific treaties or customary law rules supposed to regulate or prohibit the use of nuclear weapons, the Court has tended to declare either that it is not called upon to make a finding on the matter or that it is not necessary for it to take a position. For instance, regarding the matter of whether the principles and rules of humanitarian law are part of *jus cogens* as defined in Article 53 of the Vienna Convention on the Law of Treaties of 1969, the Court stated that there is no need for it to pronounce on the matter even though there is almost universal adherence to the fact that the Geneva Conventions of 1949 are declaratory of customary international law, and there is community interest and consensus in the observance of and respect for their provisions. A pronouncement of the Court emphasizing their humanitarian underpinnings and the fact that they are deeply rooted in the traditions and values of member States of the international community and deserve universal respect and protection, and not to be derogated from by States would assist in strengthening their legal observance especially in an era which has so often witnessed the most serious and egregious violation of humanitarian principles and rules and whose very raison d'être is irreconcilable with the use of nuclear weapons. This has been part of the judicial function of the Court - the establishment of international legal standards for the community of States and, in particular, for those that appear before it or are parties to its Statute. In the establishment of such legal standards, the Court, in the *Reservations* case, referred to the principles underlying the Convention on the Prohibition of Genocide as principles which are recognized by civilized nations "as binding on States, even without any conventional obligation" (*I.C.J. Reports 1951*, p. 23). It also recognized the co-operation required by the Convention "in order to liberate mankind from such an odious scourge ..." (*ibid.*). The Court noted that the Convention was adopted for a purely humanitarian and civilizing purpose, "to safeguard the very existence of certain human groups and, ... to confirm and endorse the most elementary principles of humanity" (*ibid.*). In the *Corfu Channel* case, the Court referred to "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war" (*I.C.J. Reports 1949*, p. 22). Such pronouncements

5344

would undoubtedly have helped to foster a proper sense of restraint within the international community. In the *Barcelona Traction* case, the Court in discussing the obligations of States towards the international community stated that such obligations are *ergo omnes* and

> "derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law..." (*I.C.J. Reports 1970*, p. 32).

In the case under consideration, the Court would appear to have been all too reluctant to take any position of principle on a question involving what the late Judge Nagendra Singh described as the most important aspect of international law facing humanity today (Nagendra Singh, *Nuclear Weapons and International Law*, p. 17) . Instead, the Court resolved the issue about the *jus cogens* character of some of the principles and rules of humanitarian law by saying that the request transmitted to it "does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons". With respect they do. A pronouncement by the Court about the character of such rules while not guaranteeing their observance at all times, would nonetheless as they are related to human values already protected by positive legal principles which, taken together, reveal certain criteria of public policy. (See I. Brownlie, Principles of Public International Law (1990), p. 29.) H. Lauterpacht has also stated that among other reasons, that many of the provisions of the Geneva Conventions following as they do from "compelling considerations of humanity, are declaratory of universally binding international custom". (E. Lauterpacht, *International Law, being the Collected Papers of Hersch Lauterpacht*, p. 115 (E. Lauterpacht ed., 1970)). The International Law Commission pointed out in its commentary on Article 50 (now 53) of the Vienna Convention of the Law of Treaties, that "it is not the form of a general rule of international law, but the particular nature of the subject-matter with which it deals that may ... give it a character of *ius cogens*". Already in 1980, the Commission observed that "some of the rules of humanitarian law are, in the opinion of the Commission, rules which impose obligations of *jus cogens*".

The Court also adopted the judicial policy of "non-pronouncement" on the question of belligerent reprisals - an issue most pertinent to the question before it - "save to observe that should the possibility to make such reprisals exist, it would, like self-defence, be governed *inter alia* by the principle of proportionality" (paras. 41-42). It is to say the least strange that the Court should refrain from pronouncing on the lawfulness or otherwise of belligerent reprisals, particularly if it would involve the use of nuclear weapons. Under contemporary international law, belligerent reprisals, if carried out with nuclear weapons, would grossly violate humanitarian law in any circumstance and international law in general. More specifically the Geneva Conventions prohibit such reprisals against a range of protected persons and objects as reaffirmed in Additional Protocol I of 1977. According to the Protocol, all belligerent parties are prohibited from carrying out belligerent reprisals. If nuclear weapons were used and given the characteristics of those weapons, their inability to discriminate between civilians and combatants and between civilian and military objectives, together with the likelihood of violations of the prohibition of unnecessary suffering and superfluous injuries to belligerents, such reprisals would at a minimum be contrary to established humanitarian law and would therefore be unlawful. The Court's "judicial restraint" on an issue of such crucial importance to the question before it contributes neither to the clarification of the law, let alone to its observance.

The Court's reluctance to take a legal position on some of the important issues which pertain to the question before it could also be discerned from what may be described as a "judicial odyssey" in search of a specific conventional or customary rule specifically authorizing or prohibiting the use of nuclear weapons, which only led to the discovery that no such specific rule exists. Indeed, if such a specific rule

did exist, it is more than unlikely that the question would have been brought before the Court in its present form, if at all. On the other hand, the absence of a specific convention prohibiting the use of nuclear weapons should not have suggested to the Court that the use of such weapons might be lawful, as it is generally recognized by States that customary international law embodies principles which are applicable to the use of such weapons. Hence the futile quest for specific legal prohibition can only be attributable to an extreme form of positivism, which is out of keeping with the international jurisprudence - including that of this Court. The futility of such an enterprise was recognized by the British-American Claims Arbitral Tribunal in the *Eastern Extension, Australia and China Telegraph Company* case, where it was held that even if there were no specific rule of international law applicable to a case, it could not be said that there was no rule of international law to which resort might be had.

> "International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find - exactly as in the mathematical sciences - the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country, resulting in the definition and settlement of legal relations as well between States as between private individuals." (*United Nations Arbitral Reports*, Vol. VI, p. 114.)

Such then has been the jurisprudential approach to issues before the Court. The Court has applied legal principles and rules to resolve the conflict of opposing rights and interests where no specific provision of the law exists, and has relied on the corollaries of general principles in order to find a solution to the problem. The Court's approach has not been restricted to a search for a specific treaty or rule of customary law specifically regulating or applying to a matter before it and, in the absence of such a specific rule or treaty, it has not declared that it cannot definitively conclude or that it is unable to reach a decision or make a determination on that matter. The Court has in the past - rightly in my view - not imposed such restrictions upon itself when discharging its judicial function to decide disputes in accordance with international law, but has referred to the principles of international law, to equity and to its own jurisprudence in order to define and settle the legal issues referred to it.

On the other hand, the search for specific rules led the Court to overlook or not fully to apply the principles of the United Nations Charter when considering the question before it. One such principle that does not appear to have been given its due weight in the Judgment of the Court is Article 2, paragraph 1, of the Charter of the United Nations, which provides that "The Organization is based on the principle of sovereign equality of all of its Members". The principle of sovereign equality of States is of general application. It presupposes respect for the sovereignty and territorial integrity of all States. International law recognizes the sovereignty of each State over its territory as well as the physical integrity of the civilian population. By virtue of this principle, a State is prohibited from inflicting injury or harm on another State. The principle is bound to be violated if nuclear weapons are used in a given conflict, because of their established and well-known characteristics. The use of such weapons would not only result in the violation of the territorial integrity of non-belligerent States by radioactive contamination, but would involve the death of thousands, if not millions, of the inhabitants of territories not parties to the conflict. This would be in violation of the principle as enshrined in the Charter, an aspect of the matter that would appear not to have been taken fully into consideration by the Court when making its findings.

I am likewise constrained to express my apprehension over some of the other findings in the Advisory Opinion with regard to respect for human rights and genocide, the protection of the natural environment and the policy of deterrence. With regard to genocide, it is stated that genocide would be considered to have been committed if a recourse to nuclear weapons resulted from an intent to destroy, in whole or in

5346

part, a national, ethnical, racial or religious group, as such. This reflects the text of the Genocide Convention. However, one must be mindful of the special characteristics of the Convention, its object and purpose, to which the Court itself referred in the *Reservations* case as being to condemn and punish

> "a crime under international law involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity and which is contrary to moral law and the spirit and aims of the United Nations";

while further pointing out

> "that the principles underlying the Convention are recognized by civilized nations as binding on States, even without any conventional obligation".

It further emphasized the co-operation required in order "to liberate mankind from such an odious scourge" and, given the humanitarian and civilizing purpose of the Convention, it referred to it as intended "to safeguard the very existence of certain human groups", and "to confirm and endorse the most elementary principles of morality". The Court cannot therefore view with equanimity the killing of thousands, if not millions, of innocent civilians which the use of nuclear weapons would make inevitable, and conclude that genocide has not been committed because the State using such weapons has not manifested any intent to kill so many thousands or millions of people. Indeed, under the Convention, the quantum of the people killed is comprehended as well. It does not appear to me that judicial detachment requires the Court from expressing itself on the abhorrent shocking consequences that a whole population could be wiped out by the use of nuclear weapons during an armed conflict, and the fact that this could tantamount to genocide, if the consequences of the act could have been foreseen. Such expression of concern may even have a preventive effect on the weapons being used at all.

As to whether recourse to nuclear weapons would violate human rights, in particular the right to human life, the Court found that it was never envisaged that the lawfulness or otherwise of such weapons would be regulated by the International Covenant on Civil and Political Rights. While this is accepted as a legal position, it does seem to me that too narrow a view has been taken of the matter. It should be recalled that both human rights law and international humanitarian law have as their *raison d'être* the protection of the individual as well as the worth and dignity of the human person, both during peacetime or in an armed conflict. It is for this reason, to my mind, that the United Nations Charter, which was adopted immediately after the end of the Second World War in the course of which serious and grave violations of human rights had occurred, undertook to protect the rights of individual human beings whatever their race, colour or creed, emphasizing that such rights were to be protected and respected even during an armed conflict. It should not be forgotten that the Second World War had witnessed the use of the atomic weapon in Hiroshima and Nagasaki, resulting in the deaths of thousands of human beings. The Second World War therefore came to be regarded as the period epitomizing gross violations of human rights. The possibility that the human rights of citizens, in particular their right to life, would be violated during a nuclear conflagration, is a matter which falls within the purview of the Charter and other relevant international legal instruments. Any activity which involves a terrible violation of the principles of the Charter deserves to be considered in the context of both the Charter and the other applicable rules. It is evidently in this context that the Human Rights Committee under the International Covenant on Civil and Political Rights adopted, in November 1984, a "general comment" on Article 6 of the Covenant (Right to Life), according to which the production, testing, possession, deployment and use of nuclear weapons ought to be prohibited and recognized as crimes against humanity. It is to be recalled that Article 6 of the Charter of the Nuremburg Tribunal defined crimes against humanity as "murder, extermination ..., and other inhumane acts committed against any civilian population, before or during war ...". It follows that the Nuremburg principles are likewise pertinent to the matter just considered by the Court.

With regard to the protection and safeguarding of the natural environment, the Court reached the conclusion that existing international law does not prohibit the use of nuclear weapons, but that important environmental factors are to be taken into account in the context of the implementation of the principles and rules of law applicable in armed conflict. The Court also found that relevant treaties in relation to the protection of the natural environment could not have intended to deprive a State of the exercise of its right to self-defence under international law. In my view, what is at issue is not whether a State might be denied its right to self-defence under the relevant treaties intended for the protection of the natural environment, but rather that, given the known qualities of nuclear weapons when exploded as well as their radioactive effects which not only contaminate human beings but the natural environment as well including agriculture, food, drinking water and the marine ecosystem over a wide area, it follows that the use of such weapons would not only cause severe and widespread damage to the natural environment, but would deprive human beings of drinking water and other resources needed for survival. In recognition of this, the First Additional Protocol of 1977 makes provision for the preservation of objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural produce, drinking water installations, etc. The Advisory Opinion should have considered the question posed in relation to the protection of the natural environment from this perspective, rather than giving the impression that the argument advanced was about denying a State its legitimate right of self-defence.

The Advisory Opinion considered that the fact of nuclear weapons not having been used for 50 years cannot be regarded as an expression of an *opinio juris*. The legal basis for such a recognition was not elaborated; it was more in the nature of an assertion. However, the Court was unable to find that the conviction of the overwhelming majority of States that the fact that nuclear weapons have not been used for the last 50 years has established an *opinio juris* in favour of the prohibition of such use, was such as to have a bearing on its Opinion. In this connection, the Court should have given due consideration and weight to the statements of the overwhelming majority of States together with the resolutions adopted by various international organizations on the use of nuclear weapons, as evidence of the emergence of an *opinio juris*.

In my view, it was injudicious for the Court to have appeared to give legal recognition to the doctrine of deterrence as a principle of international law. While it is legitimate for judicial notice should be taken of that policy, the Court should have realised that it has the potential of being declared illegal if implemented, as it would involve a nuclear conflict between belligerents with catastrophic consequences for the civilian population not only of the belligerent parties but those of States not involved in such a conflict, and could result in the violation of international law in general and humanitarian law in particular. It would therefore have been prudent for the Court to have refrained from taking a position on this matter, which is essentially non-legal.

Be that as it may, the Advisory Opinion cannot be considered as entirely without legal merit or significance. The positive findings it contains should be regarded as a step forward in the historic process of imposing legal restraints in armed conflicts. Some of those restraints as they relate to nuclear weapons have now found expression in the opinion of the Court. For the first time in its history, indeed in the history of any tribunal of similar standing, the Court has declared and confirmed that nuclear weapons are subject to international law; that a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter, and that fails to meet the requirements of Article 51 is unlawful. The Court has also held that any threat or use of nuclear weapons that is incompatible with the requirements of international law applicable in armed conflict, particularly those of the principles of humanitarian law as well as specific obligations under the treaties or other undertakings, dealing expressly with nuclear weapons, would be unlawful. Inferentially, it is because recourse to nuclear weapons could not meet the aforementioned requirements that the Court has found "that the threat or use of nuclear weapons would generally be contrary to the rules of international law

5348

applicable in armed conflict, and in particular the principles and the rules of humanitarian law". This finding, though qualified, should be regarded as of normative importance, when taken together with the other conclusions reached by the Court. Among other things, it is a rejection of the argument that since humanitarian law pre-dated the invention of nuclear weapons, it could not therefore be applicable to those weapons. On the contrary, the Court has found that given the intrinsic character of the established principles and rules of humanitarian law, it does apply to them.

It is in the response to these juridical findings of both historic and normative importance that I have voted in favour of paragraphs 2A, 2C, 2D and 2F of the *dispositif*, but not without reservations with respect to paragraph 2C.

However, I have voted against paragraph B according to which the Court finds that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat of nuclear weapons as such. Such a finding, in my view, is not in accordance with the law . At the very least, the use of nuclear weapons would violate the prohibition of the use of poison weapons as embodied in Article 23 *(a)* of the Hague Convention of 1899 and 1907 as well as the Geneva Gas Protocol of 1925 which prohibits the use of poison gas and/or bacteriological weapons. Because of its universal adherence, the Protocol is considered binding on the international community as a whole. Furthermore, the prohibition of the use of poison gas is now regarded as a part of customary international law binding on all States, and, the finding by the Court in Paragraph B cannot be sustained in the face of the Geneva Conventions of 1949 and the 1977 Additional Protocols thereto either. With regard to the Conventions, they are as of today binding on at least 186 states and their universal acceptance is said to be even greater than that of the United Nations Charter. Accordingly, those treaties are now recognized as a part of customary international law binding on all States. The Court in its Judgment in the *Nicaragua* case confirmed that the Conventions are a part of customary international law, when it stated that:

> "there is an obligation ... in the terms of Article I of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression" (*I.C.J. Reports 1986*, p. 114).

By reference to the humanitarian principles of international law, the Court recognized that the Conventions themselves are reflective of customary law and as such universally binding. The same reasoning applies to Additional Protocol I in particular,which constitutes a restatement and a reaffirmation of customary law rules based on the earlier Geneva and Hague Conventions. To date, 143 states have become parties to the Protocol, and the customary force of the provisions of the Protocol are not based on the formal status of the Protocol itself.

In the light of the foregoing conclusion, it cannot be maintained as the Court has done - that there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such. Such a finding is not consistent with its jurisprudence either as alluded to above.

I have however voted in favour of Paragraph F of the *dispositif* which stresses the obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control. I am of the view that the parties to the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, realising the danger posed to all States by the proliferation of nuclear weapons, entered into a binding commitment to end the nuclear arms race at an early date and to embark on nuclear disarmament. The dangers that those weapons posed for humanity in 1968 are still current

5349

today, as is evident from the decision taken in 1995 by the States parties to the Treaty, to make it permanent. The obligation to eliminate those weapons remain binding on those States so as to remove the threat such weapons pose to violate the Charter or the principles and rules of humanitarian law. There is accordingly a correlation between the obligation of nuclear disarmament assumed by those States Parties to the Non-Proliferation Treaty and the obligations assumed by States under the United Nations Charter and under the law applicable in armed conflict, in particular international humanitarian law.

Despite this and some of the other normative conclusions reached by the Court in its Advisory Opinion, it is a matter of profound regret that on the actual question put to it, that is, whether it is permitted under international law to use nuclear weapons in any circumstances, the Court flinched and failed to reach the only and inescapable finding, namely, that in view of the established facts of the use of such weapons, it is inconceivable that there is any circumstance in which their use would not violate the principles and rules of international law applicable in armed conflict and, in particular, the principles and rules of humanitarian law. By not answering the question and leaving it to States to decide the matter, the Court declined to the challenge to reaffirm the applicability of the rules of law and of humanitarian law in particular to nuclear weapons and to ensure the protection of human beings, of generations unborn and of the natural environment against the use of such weapons whose destructive power we have seen, is unable to discriminate between combatants and non-combatants, cannot spare hospitals or prisoner-of-war camps and can cause suffering out of all proportion to military necessity leaving their victims to die as a result of burns after weeks of agony, or to be afflicted for life with painful infirmities. The request by the General Assembly was for the Court, as the guarantor of legality, to affirm that because of these consequences, the use of nuclear weapons is unlawful under international law. A determination that this Court as a court of law should have been able to make.

In the absence of such a categoric and inescapable finding, I am left with no alternative but with deep regret to dissent from the Advisory Opinion.

(Signed) Abdul G. KOROMA.

DISSENTING OPINION OF JUDGE HIGGINS

1. I agree with all that the Court has to say as to why it must render this Opinion and much that it has to say on the substance of the question put to it. I have also voted in favour of paragraphs 2A, 2B, 2C, 2D and 2F of the *dispositif*. The first four of these findings are in a sense stepping stones to the heart of the matter, which is to be found in paragraph 2E. I have, with regret, been unable to vote for what the Court there determines.

2. In the first part of its Opinion the Court has rejected suggestions that it should in its discretion decline to give the Opinion on the grounds that the question is not legal, or is too vague, or would require the Court to make scenarios, or would require it to "legislate". But at paragraph 96 of its Opinion, and in paragraph 2E of its *dispositif*, the Court effectively pronounces a *non liquet* on the key issue on the grounds of uncertainty in the present state of the law, and of facts. I find this approach inconsistent.

3. I agree with most of the legal reasoning that sustains paragraphs 2A, 2B, 2C and 2D. Although paragraph C is negatively formulated, it is clear from the Court's analysis that neither the Charter provisions, nor customary international law, nor treaty law, make the threat or use of nuclear weapons unlawful *per se*.

4. In its Judgment on *Military and Paramilitary Activities* the Court confirmed the existence of a rule of proportionality in the exercise of self-defence under customary international law. It there noted that the Charter "does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it" (*I.C.J. Reports 1986*, para. 176). Importantly, in the present Opinion the Court makes clear (paras. 40-41) that notwithstanding the absence of specific mention of proportionality in Article 51, this requirement applies equally to the exercise of self-defence under the Charter.

5. In the *Military and Paramilitary Activities* case the terms used by the Court already made clear that the concept of proportionality in self-defence limits a response to what is needed to reply to an attack. This is consistent with the approach of Professor Ago (as he then was), who had made clear in the Addendum to his Eighth Report on State Responsibility that the concept of proportionality referred to was that which was proportionate to repelling the attack, and not a requirement of symmetry between the mode of the initial attack and the mode of response (A/CN.4/318/Adds.5-7, para. 121, *YBILC* (1980), Vol. II, Part One, p. 69.)

6. Paragraph 2E states in its first part that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, in particular the principles and rules of humanitarian law; and in its second part that the Court cannot conclude whether a threat or use of nuclear weapons *in extremis* in self-defence, where a State's very survival was at stake, would be lawful or unlawful.

7. I have not been able to vote for these findings for several reasons. It is an essential requirement of the judicial process that a court should show the steps by which it reaches its conclusions. I believe the Court has not done so in respect of the first part of paragraph 2E. The findings in a judicial *dispositif* should be clear. I believe paragraph 2E is unclear in its meaning (and one may suspect that this lack of clarity is perhaps regarded as a virtue). I greatly regret the *non liquet* offered in the second part of paragraph 2E. And I believe that in that second sentence the Court is declining to answer a question that

5351

was in fact never put to it.

8. After finding that the threat or use of nuclear weapons is not prohibited *per se* by reference to the Charter or treaty law, the Court moves to see if it is prohibited *per se* by reference to the law of armed conflict (and especially humanitarian law).

9. It is not sufficient, to answer the question put to it, for the Court merely briefly to state the requirements of the law of armed conflict (including humanitarian law) and then simply to move to the conclusion that the threat or use of nuclear weapons is generally unlawful by reference to these principles and norms. The Court limits itself to affirming that the principles and rules of humanitarian law apply to nuclear weapons. It finds in paragraph 95, by reference to "the unique characteristics of nuclear weapons" that their use is "scarcely reconcilable" with the requirements of humanitarian law and "would generally be contrary" to humanitarian law (*dispositif*, para. 2E). At no point in its Opinion does the Court engage in the task that is surely at the heart of the question asked: the systematic application of the relevant law to the use or threat of nuclear weapons. It reaches its conclusions without the benefit of detailed analysis. An essential step in the judicial process - that of legal reasoning - has been omitted.

10. What in my view the Court should have done is to explain, elaborate and apply the key elements of humanitarian law that it identifies. I agree with the Court that certain general principles emanating from the treaties on the law of armed conflict and on humanitarian law are binding, either as continuing treaty obligations or as prescriptions of customary international law. These principles stem from a variety of uncontested sources (by which I mean they are in no way dependent upon the provisions of Additional Protocol I to the Geneva Conventions of 1949 nor upon any views held as to the application of those provisions to nuclear weapons). Particular reference may be made to the St. Petersburg Declaration of 11 December 1868 and to the Regulations, annexed to the Hague Convention IV, 1907, Articles 22 and 23 *(e)*. The Court recalls that the Regulations annexed to Hague Convention IV were in 1946 held by the Nuremberg Military Tribunal to have become part of customary international law by 1939. (Opinion, para. 80.)

11. The legal principle by which parties to an armed conflict do not have an unlimited choice of weapons or of methods of warfare cannot of itself give the answer to the question before the Court. Its purpose is to ensure that weapons, both in the context of their use, and in the methods of warfare, must comply with the other substantive rules.

12. It is not permitted in the choice of weapons to cause unnecessary suffering to enemy combatants, nor to render their death inevitable, nor to aggravate their sufferings when disabled. Equally, the Report of the International Military Commission in St. Petersburg of 1868 made clear that harm to civilians as a means of securing victory over the enemy was not a legitimate right of war; and that even in seeking to disable the military not every method was lawful. There has been, in many of the written and oral submissions made to the Court, a conflation of these two elements. But the Court itself makes clear, in paragraph 78 of its Opinion, that the prohibitions against means of conflict that cause unnecessary suffering is directed towards the fulfilment of the second, progressive, limb - namely, that even in seeking to disable the military forces of the enemy, there is a limitation upon the means that may be employed. These provisions are not directed at the protection of civilians, - other provisions serve that purpose. It is in any event absolutely prohibited to attack civilians, whether by nuclear or other weapons. Attack upon civilians does not depend for its illegality upon a prohibition against "superfluous injury" or aggravating the sufferings of men already disabled.

13. If then the "unnecessary suffering" provision does not operate as a generalized prohibition, but is rather directed at the protection of combatants, we must ask whether it still does not follow that the appalling primary effects of a nuclear weapon - blast waves, fires, radiation or radioactive fallout - cause

extensive unnecessary suffering? These effects indeed cause horrendous suffering. But that is not necessarily "unnecessary suffering" as this term is to be understood within the context of the 1868 and 1907 law, which is directed at the limitation of means against a legitimate target, military personnel.

14. The background to Article 23 *(a)* of the Hague Regulations was the celebrated provision in Article 22 (which opens a Chapter on the means of injuring the enemy) that the means of injuring the enemy is not unlimited. A certain level of violence is necessarily permissible in the exercise of self-defence; humanitarian law attempts to contain that force (and illegal uses of force too), by providing a "balancing" set of norms. It is thus unlawful to cause suffering and devastation which is in excess of what is required to achieve these legitimate aims. Application of this proposition requires a balancing of necessity and humanity. This approach to the proper understanding of "unnecessary suffering" has been supported, *inter alia,* by the Netherlands (Request for an Advisory Opinion on the Legality of the use by a State of Nuclear Weapons, Written Statement (Art. 66, para. 2, of the Statute), para. 27; United Kingdom, *ibid.,* paras. 36 ff. and Oral Statement (CR 95/34); United States, *ibid.*, para. 25; and New Zealand, Request for an Advisory Opinion on the Legality of the Threat or use of Nuclear Weapons, Written Statement, para. 69).

15. Subsequent diplomatic practice confirms this understanding of "unnecessary suffering" as established in the 1907 Regulations. In the Lucerne Conference of Governmental Experts on the use of Certain Conventional Weapons of 1974, the Experts were agreed both what was meant by "suffering" and by "unnecessary". As to the latter:

> "This involved some sort of equation between, on the one hand, the degree of injury or suffering inflicted (the humanitarian aspect) and, on the other, the degree of necessity underlying the choice of a particular weapon (the military aspect)." (Conference Report, published by ICRC, 1975, para. 23.)

They were in accord that the concept entailed a "balancing" or "equation" rather than a prohibition against a significant degree or even a vast amount of suffering. Any disagreement rather lay in whether, on the military necessity side of the equation, all that was permitted was to put enemy personnel *hors de combat*, or whether it was permitted also to attack enemy material, lines of communication and resources (*ibid.,* para. 25).

16. It is this understanding of the principle that explains why States have been able to move to a specific prohibition of dum-dum bullets, whereas certain weapons that cause vastly greater suffering have neither been the subject of specific prohibitions, nor, in general State practice, been regarded as clearly prohibited by application of the "unnecessary suffering" principle. The status of incendiary projectiles, flame-throwers, napalm, high velocity weapons - all especially repugnant means of conducting hostilities - have thus remained contested.

17. The prohibition against unnecessary suffering and superfluous injury is a protection for the benefit of military personnel that is to be assessed by reference to the necessity of attacking the particular military target. The principle does not stipulate that a legitimate target is not to be attacked if it would cause great suffering.

18. There remains unanswered the crucial question: *what* military necessity is so great that the sort of suffering that would be inflicted on military personnel by the use of nuclear weapons would ever be justified? That question, in turn, requires knowing the dimensions of the suffering of which we speak and the circumstances which occasion it. It has been suggested that suffering could be relatively limited in the tactical theatre of war. The Court rightly regards that evidence as uncertain. If the suffering is of

the sort traditionally associated with the use of nuclear weapons - blast, radiation, shock, together with risk of escalation, risk of spread through space and time - then only the most extreme circumstances (defence against untold suffering or the obliteration of a State or peoples) could conceivably "balance" the equation between necessity and humanity.

19. To show how it reached its findings in paragraph 2E of the *dispositif*, the Court should, after analysing the provisions of humanitarian law concerning the protection of combatants, then systematically have applied the humanitarian rules and principles as they apply to the protection of civilians. The major legal issues in this context which it might have been expected the Court would address are these: does the prohibition against civilians being the object of attack preclude attack upon a military target if it is realized that collateral civilian casualties will be unavoidable? And in the light of the answer to the above question, what then is meant by the requirements that a weapon must be able to discriminate between civilian and military targets and how will this apply to nuclear weapons?

20. For some States making submissions to the Court, the large number of civilian victims was said *itself to show* that the collateral damage is excessive. But the law of armed conflict has been articulated in terms of a broad prohibition - that civilians may not be the object of armed attack - and the question of numbers or suffering (provided always that this primary obligation is met) falls to be considered as part of the "balancing" or "equation" between the necessities of war and the requirements of humanity. Articles 23 *(g)*, 25 and 27 of the Annex to the Fourth Hague Convention have relevance here. The principle of proportionality, even if finding no specific mention, is reflected in many provisions of Additional Protocol I to the Geneva Conventions of 1949. Thus even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack. One is inevitably led to the question of whether, if a target is legitimate and the use of a nuclear weapon is the only way of destroying that target, any need can ever be so necessary as to occasion massive collateral damage upon civilians.

21. It must be that, in order to meet the legal requirement that a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage, the "military advantage" must indeed be one related to the very survival of a State or the avoidance of infliction (whether by nuclear or other weapons of mass destruction) of vast and severe suffering on its own population; and that no other method of eliminating this military target be available.

22. It is said that collateral damage to civilians, even if proportionate to the importance of the military target,must never be intended. "One's intent is defined by what one chooses to do, or seeks to achieve through what one chooses to do." (Finnis, Boyle and Grisez, *Nuclear Deterrence, Morality and Idealism* (1987), at pp. 92-3.) This closely approximates to the legal doctrine of foreseeability, by which one is assumed to intend the consequences of one's actions. Does it follow that knowledge that in concrete circumstances civilians will be killed by the use of a nuclear weapon is tantamount to an intention to attack civilians? In law, analysis must always be contextual and the philosophical question here put is no different for nuclear weapons than for other weapons. The duty not to attack civilians as such applies to conventional weapons also. Collateral injury in respect of these weapons has always been accepted as not constituting "intent", provided always that the requirements of proportionality are met.

23. Very important also in the present context is the requirement of humanitarian law that weapons may not be used which are incapable of discriminating between civilian and military targets.

24. The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack. There has been considerable debate, as yet unresolved, as to whether this principle refers to weapons which, because of the way they are commonly

used, strike civilians and combatants indiscriminately (*Weapons that May Cause Unnecessary Suffering or have Indiscriminate Effects,* Report of the Work of Experts, published by the ICRC, 1973) or whether it refers to whether a weapon "having regard to [its] effects in time and space" can "be employed with sufficient or with predictable accuracy against the chosen target" (Conference of Government Experts on the Use of Certain Conventional Weapons (Lucerne, 1974), Report published by the ICRC, 1975, pp. 10-11, para. 31; see also Kalshoven "Arms, Armaments and Interpretation of Law", *Receuil des Cours*, 1985, II, at p. 236). For this concept to have a separate existence, distinct from that of collateral harm (with which it overlaps to an extent), and whichever interpretation of the term is chosen, it may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs. Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in all their effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful.

25. I do not consider it juridically meaningful to say that the use of nuclear weapons is "generally contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law". What does the term "generally" mean? Is it a numerical allusion, or is it a reference to different types of nuclear weapons, or is it a suggestion that the rules of humanitarian law cannot be met save for exceptions? If so, where is the Court's analysis of these rules, properly understood, and their application to nuclear weapons? And what are any exceptions to be read into the term "generally"? Are they to be linked to an exceptional ability to comply with humanitarian law? Or does the term "generally", especially in the light of paragraph 96, suggest that if a use of nuclear weapons in extreme circumstances of self-defence were lawful, that might *of itself* exceptionally make such a use compatible with the humanitarian law? The phraseology of paragraph 2E of the *dispositif* raises all these questions and answers none of them.

26. There is a further reason why I have been unable to vote for paragraph 2E of the *dispositif.* It states a negative consequence of humanitarian law and (unspecified) possible exceptions. The role of humanitarian law (in contrast to treaties of specific weapon prohibition) is to prescribe legal requirements of conduct rather than to give "generalized" answers about particular weapons. I do not, however, exclude the possibility that such a weapon could be unlawful by reference to the humanitarian law, if its use could never comply with its requirements - no matter what specific type within that class of weapon was being used and no matter where it might be used. We may believe that, in the present stage of weapon development, there may be very limited prospects of a State being able to comply with the requirements of humanitarian law. But that is different from finding the use of nuclear weapons "generally unlawful".

27. The meaning of the second sentence of paragraph 2E of the *dispositif,* and thus what the two sentences of paragraph 2E of the *dispositif* mean when taken together, is unclear. The second sentence is presumably not referring to self-defence in those exceptional circumstances, implied by the word "generally", that might allow a threat or use of nuclear weapons to be compatible with humanitarian law. If, as the Court has indicated in paragraph 42 (and operative paragraph 2C), the Charter law does not *per se* make a use of nuclear weapons illegal, and if a specific use complied with the provisions of Article 51 *and* was also compatible with humanitarian law, the Court can hardly be saying in the second sentence of paragraph 2E that it knows not whether such a use would be lawful or unlawful.

28. Therefore it seems the Court is addressing the "general" circumstances that it envisages - namely that a threat or use of nuclear weapons violates humanitarian law - and that it is addressing whether in *those* circumstances a use of force *in extremis* and in conformity with Article 51 of the Charter, might nonetheless be regarded as be lawful, or not. The Court answers that it does not know.

29. What the Court has done is reach a conclusion of "incompatibility in general" with humanitarian law; and then effectively pronounce a *non liquet* on whether a use of nuclear weapons in self-defence when the survival of a State is at issue might still be lawful, even were the particular use to be contrary to humanitarian law. Through this formula of non-pronouncement the Court necessarily leaves open the possibility that a use of nuclear weapons contrary to humanitarian law might nonetheless be lawful. This goes beyond anything that was claimed by the nuclear weapons States appearing before the Court, who fully accepted that any lawful threat or use of nuclear weapons would have to comply with both the *jus ad bellum* and the *jus in bello* (see para. 86).

30. That the formula chosen is a *non liquet* cannot be doubted, because the Court does not restrict itself to the inadequacy of facts and argument concerning the so-called "clean" and "precise" weapons. I share the Court's view that it has not been persuasively explained in what circumstances it might be essential to use any such weaponry. Nor indeed may it be assumed that such types of weapons (perhaps to be used against submarines, or in deserts) can suffice to represent for a nuclear weapon State all that is required for an effective policy of deterrence.

31. The formula in the second part of paragraph 2E refers also to "the current state of international law" as the basis for the Court's *non liquet*. I find it very hard to understand this reference. Paragraph F of the *dispositif*, and the final paragraphs of the Court's Opinion, indicate that the Court hopes for a negotiated and verified total disarmament, including nuclear disarmament. But it cannot be the absence of this goal which means that international law has no answer to give on the use of nuclear weapons in self-defence. International law does not simply consist of total prohibitions. Nor can it be that there is no substantive law of self-defence upon which the Court may offer advice - this, all said and done, is one of the most well developed areas of international law.

32. Can the reference to "the current state of international law" possibly refer to humanitarian law? This is one of the many elements that is unclear. This aspect appears to have been disposed of already in the first part of paragraph E. In any event, humanitarian law too is very well-developed. The fact that its principles are broadly stated and often raise further questions that require a response can be no ground for a *non liquet*. It is exactly the judicial function to take principles of general application, to elaborate their meaning and to apply them to specific situations. This is precisely the role of the International Court, whether in contentious proceedings or in its advisory function.

33. Perhaps the reference to "the current state of international law" is a reference to perceived tensions between the widespread acceptance of the possession of nuclear weapons (and thus, it may be presumed, of the legality of their use in certain circumstances) as mentioned by the Court in paragraphs 67 and 96 on the one hand, and the requirements of humanitarian law on the other. If so, I believe this to be a false dichotomy. The pursuit of deterrence, the shielding under the nuclear umbrella, the silent acceptance of reservations and declarations by the nuclear powers to treaties prohibiting the use of nuclear weapons in certain regions, the seeking of possible security assurances - all this points to a significant international practice which is surely relevant not only to the law of self-defence but also to humanitarian law. If a substantial number of States in the international community believe that the use of nuclear weapons might *in extremis* be compatible with their duties under the Charter (whether as nuclear powers or as beneficiaries of "the umbrella" or security assurances) they presumably *also* believe that they would not be violating their duties under humanitarian law.

34. Nothing in relevant statements made suggests that those States giving nuclear assurances or receiving them believed that they would be violating humanitarian law, - but decided nonetheless to act in disregard of such violation. In sum, such weight as may be given to the State practice just referred to has a relevance for our understanding of the complex provisions of humanitarian law as much as for the provisions of the Charter law of self-defence.

35. For all of these reasons, I am unable to see why the Court resorts to the answer it does in the second part of paragraph 2E of the *dispositif.*

36. It is also, I think, an important and well-established principle that the concept of *non liquet* - for that is what we have here - is no part of the Court's jurisprudence.

37. The Court has, of course, on several occasions, declined to answer a question even after it has established its jurisdiction. Reasons of propriety (Art. 65 of the Statute; and the Monetary *Gold,* and *Northern Cameroons* cases) or important defects in procedure (the *Asylum* case, the *Haya de la Torre* case) have been given. But "[in] none of these cases is the *non-liquet* due ... to deficiencies in the law" (Rosenne, *The Law and Practice of the International Court,* 2nd rev. ed., p. 100).

38. This unwelcome formulation ignores sixty-five years of proud judicial history and also the convictions of those who went before us. Former President of the International Court, Judge Elias, reminds us that there are what he terms "useful devices" to assist if there are difficulties in applying the usual sources of international law. In his view these "preclude the Court from pleading *non liquet* in any given case" (Elias, *The International Court of Justice and Some Contemporary Problems,* 1983, p. 14).

39. The learned editors of the 9th Edition of *Oppenheim's International Law* remind us:

> "there is [not] always a clear and specific legal rule readily applicable to every international situation, but that every international situation is capable of being determined *as a matter of law*" (Jennings and Watts, Vol. I, p. 13).

40. Nor is the situation changed by any suggestion that the problem is as much one as "antimony" or clashes between various elements in the law as much as alleged "vagueness" in the law. Even were there such an "antimony" (which, as I have indicated above, I doubt), the judge's role is precisely to decide which of two or more competing norms is applicable in the particular circumstances. The corpus of international law is frequently made up of norms that, taken in isolation, appear to pull in different directions - for example, States may not use force/States may use force in self-defence; *pacta sunt servanda*/States may terminate or suspend treaties on specified grounds. It is the role of the judge to resolve, in context, and on grounds that should be articulated, why the application of one norm rather than another is to be preferred in the particular case. As these norms indubitably exist, and the difficulties that face the Court relate to their application, there can be no question of judicial legislation.

41. One cannot be unaffected by the knowledge of the unbearable suffering and vast destruction that nuclear weapons can cause. And one can well understand that it is expected of those who care about such suffering and devastation that they should declare its cause illegal. It may well be asked of a judge whether, in engaging in legal analysis of such concepts as "unnecessary suffering", "collateral damage" and "entitlement to self-defence", one has not lost sight of the real human circumstances involved. The judicial lodestar, whether in difficult questions of interpretation of humanitarian law, or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and protect. In the present case, it is the physical survival of peoples that we must constantly have in view. We live in a decentralized world order, in which some States are known to possess nuclear weapons but choose to remain outside of the non-proliferation treaty system; while other such non-parties have declared their intention to obtain nuclear weapons; and yet other States are believed clandestinely to possess, or to be working shortly to possess nuclear weapons (some of whom indeed may be party to the NPT). It is not clear to me that either a pronouncement of illegality in all circumstances of the use of nuclear weapons or the answers formulated by the Court in paragraph 2E best serve to protect mankind against that unimaginable suffering that we all fear.

5357

(Signed) Rosalyn HIGGINS.

ANNEX 8:

Prosecutor v Akayesu, Judgement, Case No. ICTR-96-4-T, Trial Chamber I, 2 September 1998.

5359

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

United Nations
Nations Unies

CHAMBER I - CHAMBRE I

OR : ENG

Before:

Judge Laïty Kama, Presiding
Judge Lennart Aspegren
Judge Navanethem Pillay

Registry:

Mr. Agwu U. Okali

Decision of: 2 September 1998

THE PROSECUTOR
VERSUS
JEAN-PAUL AKAYESU

Case No. ICTR-96-4-T

JUDGEMENT

The Office of the Prosecutor:

Mr. Pierre-Richard Prosper

Counsel for the Accused:

Mr. Nicolas Tiangaye
Mr. Patrice Monthé

List of Contents

5360

1. INTRODUCTION

1.1. The International Tribunal

1.2. The Indictment

1.3. Jurisdiction of the Tribunal

Article 2: Genocide
Article 3: Crimes against Humanity
Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II
Article 6: Individual Criminal Responsibility

1.4. The Trial

1.4.1. Procedural Background
1.4.2. The Accused's line of defence

1.5. The Accused and his functions in Taba (paragraphs 3-4 of the Indictment)

De jure powers
De facto powers

2. HISTORICAL CONTEXT OF THE EVENTS IN RWANDA IN 1994

3. GENOCIDE IN RWANDA IN 1994?

4. EVIDENTIARY MATTERS

5. FACTUAL FINDINGS

5.1. General allegations (Paragraphs 5-11 of the Indictment)

5.2 Killings (Paragraphs 12, 13, 18, 19 & 20 of the Indictment)

5.2.1. Paragraph 12 of the Indictment
5.2.2. Paragraph 13 of the Indictment
5.2.3. Paragraph 18 of the Indictment
5.2.4. Paragraph 19 and 20 of the Indictment

5.3 Meeting

5.3.1. Paragraphs 14 and 15 of the Indictment

5.4 Beatings (Torture/Cruel Treatment) (Paragraphs 16, 17, 21, 22 & 23 of the Indictment)

5.5 Sexual Violence (Paragraphs 12A & 12B of the Indictment)

5361

6. THE LAW

6.1 Cumulative Charges

6.2. Individual criminal responsibility (Article 6 of the Statute)

6.3. Genocide (Article 2 of the Statute)

6.3.1. Genocide
6.3.2. Complicity in Genocide
6.3.3. Direct and Public Incitement to commit Genocide

6.4. Crimes against Humanity (Article 3 of the Statute)

6.5. Violations of Common Article 3 and Additional Protocol II (Article 4 of the Statute)

7. LEGAL FINDINGS

7.1. Counts 6, 8, 10 and 12 - Violations of Common Article 3 (murder and cruel treatment) and Count 15 - Violations of Common Article 3 and Additional Protocol II (outrages upon personal dignity, in particular rape...)

7.2. Count 5 - Crimes against humanity (murder)

7.3. Count 7 - Crimes against Humanity (murder)

7.4. Count 9 - Crimes against Humanity (murder)

7.5. Count 4 - Direct and Public Incitement to commit Genocide

7.6. Count 11 - Crimes against Humanity (torture)

7.7. Count 13 (rape) and Count 14 (other inhumane acts) - Crimes against Humanity

7.8. Count 1 - Genocide, Count 2 - Complicity in Genocide

7.9. Count 3 - Crimes against Humanity (extermination)

8. VERDICT

---

1. INTRODUCTION

1.1. The International Tribunal

1. This judgment is rendered by Trial Chamber I of the International Tribunal for the prosecution of persons responsible for genocide and other serious violations of international humanitarian law

5362

committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 (the "Tribunal"). The judgment follows the indictment and trial of Jean Paul Akayesu, a Rwandan citizen who was bourgmestre of Taba commune, Prefecture of Gitarama, in Rwanda, at the time the crimes alleged in the indictment were perpetrated.

2. The Tribunal was established by the United Nations Security Council by its resolution 955 of 8 November 1994.1 After having reviewed various official United Nations reports2 which indicated that acts of genocide and other systematic, widespread and flagrant violations of international humanitarian law had been committed in Rwanda, the Security Council concluded that the situation in Rwanda in 1994 constituted a threat to international peace and security within the meaning of Chapter VII of the United Nations Charter. Determined to put an end to such crimes and " convinced that...the prosecution of persons responsible for such acts and violations ... would contribute to the process of national reconciliation and to the restoration and maintenance of peace", the Security Council, acting under the said Chapter VII established the Tribunal.3 Resolution 955 charges all States with a duty to cooperate fully with the Tribunal and its organs in accordance with the Statute of the Tribunal (the "Statute"), and to take any measures necessary under their domestic law to implement the provisions of the Statute, including compliance with requests for assistance or orders issued by the Tribunal . Subsequently, by its resolution 978 of 27 February 1995, the Security Council "urge[d] the States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda".4

3. The Tribunal is governed by its Statute, annexed to the Security Council Resolution 955, and by its Rules of Procedure and Evidence (the "Rules"), adopted by the Judges on 5 July 1995 and amended subsequently.5 The two Trial Chambers and the Appeals Chamber of the Tribunal are composed of eleven Judges in all, three sitting in each Trial Chamber and five in the Appeals Chamber. They are elected by the United Nations General Assembly and represent, in accordance with Article 12(3) (c) of the Statute, the principal legal systems of the world. The Statute stipulates that the members of the Appeals Chamber of the other special internatinal criminal tribunal, namely the Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 ("the Tribunal for the former Yugoslavia"), shall also serve as members of the Appeals Chamber of the Tribunal for Rwanda.

4. Under the Statute, the Tribunal has the power to prosecute persons responsible for serious violations of international human law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994. According to Articles 2 to 4 of the Statute relating to its *ratione materiae* jurisdiction, the Tribunal has the power to prosecute persons who committed genocide as defined in Article 2 of the Statute, persons responsible for crimes against humanity as defined in Article 3 of the Statute and persons responsible for serious violations of Article 3 Common to the Geneva Conventions of 12 August 1949 on the protection of victims of war6, and of Additional Protocol II thereto of 8 June 1977, a crime defined in Article 4 of the Statute 7. Article 8 of the Statute provides that the Tribunal has concurrent jurisdiction with national courts over which it, however, has primacy.

5. The Statute stipulates that the Prosecutor, who acts as a separate organ of the Tribunal, is responsible for the investigation and prosecution of the perpetrators of such violations. Upon determination that a prima facie case exists to proceed against a suspect, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged. Thereafter, he or she shall transmit the indictment to a Trial Judge for review and, if need be,

5363

confirmation. Under the Statute, the Prosecutor of the Tribunal for the former Yugoslavia shall also serve as the Prosecutor of the Tribunal for Rwanda. However, the two Tribunals maintain separate Offices of the Prosecutor and Deputy Prosecutors. The Prosecutor of the Tribunal for Rwanda is assisted by a team of investigators, trial attorneys and senior trial attorneys, who are based in Kigali, Rwanda. These officials travel to Arusha whenever they are expected to plead a case before the Tribunal.

1.2. The Indictment

6. The Indictment against Jean-Paul Akayesu was submitted by the Prosecutor on 13 February 1996 and was confirmed on 16 February 1996. It was amended during the trial, in June 1997, with the addition of three counts (13 to 15) and three paragraphs (10A, 12A and 12B). The Amended Indictment is here set out in full:

> "The Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the Tribunal, charges:
>
> **JEAN PAUL AKAYESU**
>
> with **GENOCIDE, CRIMES AGAINST HUMANITY** and **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS**, as set forth below:
>
> Background
>
> 1. On April 6, 1994, a plane carrying President Juvénal Habyarimana of Rwanda and President Cyprien Ntaryamira of Burundi crashed at Kigali airport, killing all on board. Following the deaths of the two Presidents, widespread killings, having both political and ethnic dimensions, began in Kigali and spread to other parts of Rwanda.
>
> 2. Rwanda is divided into 11 prefectures, each of which is governed by a prefect. The prefectures are further subdivided into communes which are placed under the authority of bourgmestres. The bourgmestre of each commune is appointed by the President of the Republic, upon the recommendation of the Minister of the Interior. In Rwanda, the bourgmestre is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*.
>
> The Accused
>
> 3. **Jean Paul AKAYESU**, born in 1953 in Murehe sector, Taba commune, served as bourgmestre of that commune from April 1993 until June 1994. Prior to his appointment as bourgmestre, he was a teacher and school inspector in Taba.
>
> 4. As bourgmestre, **Jean Paul AKAYESU** was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority.

5364

General Allegations

5. Unless otherwise specified, all acts and omissions set forth in this indictment took place between 1 January 1994 and 31 December 1994, in the commune of Taba, prefecture of Gitarama, territory of Rwanda.

6. In each paragraph charging genocide, a crime recognized by Article 2 of the Statute of the Tribunal, the alleged acts or omissions were committed with intent to destroy, in whole or in part, a national, ethnic or racial group.

7. The victims in each paragraph charging genocide were members of a national, ethnic, racial or religious group.

8. In each paragraph charging crimes against humanity, crimes recognized by Article 3 of the Tribunal Statute, the alleged acts or omissions were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic or racial grounds.

9. At all times relevant to this indictment, a state of internal armed conflict existed in Rwanda.

10. The victims referred to in this indictment were, at all relevant times, persons not taking an active part in the hostilities.

10A. In this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity.

11. The accused is individually responsible for the crimes alleged in this indictment. Under Article 6(1) of the Statute of the Tribunal, individual criminal responsibility is attributable to one who plans, instigates, orders, commits or otherwise aids and abets in the planning, preparation or execution of any of the crimes referred to in Articles 2 to 4 of the Statute of the Tribunal.

Charges

12. As bourgmestre, **Jean Paul AKAYESU** was responsible for maintaining law and public order in his commune. At least 2000 Tutsis were killed in Taba between April 7 and the end of June, 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as bourgmestre, **Jean Paul AKAYESU** must have known about them. Although he had the authority and responsibility to do so, **Jean Paul AKAYESU** never attempted to prevent the killing of Tutsis in the commune in any way or called for assistance from regional or national authorities to quell the violence.

12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal

5365

premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.

12B. **Jean Paul AKAYESU** knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. **Jean Paul AKAYESU** facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, **Jean Paul AKAYESU** encouraged these activities.

13. On or about 19 April 1994, before dawn, in Gishyeshye sector, Taba commune, a group of men, one of whom was named Francois Ndimubanzi, killed a local teacher, Sylvere Karera, because he was accused of associating with the Rwandan Patriotic Front ("RPF") and plotting to kill Hutus. Even though at least one of the perpetrators was turned over to **Jean Paul AKAYESU**, he failed to take measures to have him arrested.

14. The morning of April 19, 1994, following the murder of Sylvere Karera, **Jean Paul AKAYESU** led a meeting in Gishyeshye sector at which he sanctioned the death of Sylvere Karera and urged the population to eliminate accomplices of the RPF, which was understood by those present to mean Tutsis. Over 100 people were present at the meeting. The killing of Tutsis in Taba began shortly after the meeting.

15. At the same meeting in Gishyeshye sector on April 19, 1994, **Jean Paul AKAYESU** named at least three prominent Tutsis -- Ephrem Karangwa, Juvénal Rukundakuvuga and Emmanuel Sempabwa -- who had to be killed because of their alleged relationships with the RPF. Later that day, Juvénal Rukundakuvuga was killed in Kanyinya. Within the next few days, Emmanuel Sempabwa was clubbed to death in front of the Taba bureau communal.

16. **Jean Paul AKAYESU**, on or about April 19, 1994, conducted house-to-house searches in Taba. During these searches, residents, including Victim V, were interrogated and beaten with rifles and sticks in the presence of **Jean Paul AKAYESU**. **Jean Paul AKAYESU** personally threatened to kill the husband and child of Victim U if she did not provide him with information about the activities of the Tutsis he was seeking.

17. On or about April 19, 1994, **Jean Paul AKAYESU** ordered the interrogation and beating of Victim X in an effort to learn the whereabouts of Ephrem Karangwa. During the beating, Victim X's fingers were broken as he tried to shield himself from blows with a metal stick.

18. On or about April 19, 1994, the men who, on **Jean Paul AKAYESU**'s instructions, were searching for Ephrem Karangwa destroyed Ephrem Karangwa's house and burned down his mother's house. They then went to search the house of Ephrem Karangwa's brother-in-law in Musambira commune and found Ephrem Karangwa's three brothers there. The three brothers -- Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome Gakuba -- tried to escape, but **Jean Paul AKAYESU** blew his whistle to alert local residents to the attempted escape and ordered the people to capture the brothers. After the

5366

brothers were captured, **Jean Paul AKAYESU** ordered and participated in the killings of the three brothers.

19. On or about April 19, 1994, **Jean Paul AKAYESU** took 8 detained men from the Taba bureau communal and ordered militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled from Runda commune and had been held by **Jean Paul AKAYESU**.

20. On or about April 19, 1994, **Jean Paul AKAYESU** ordered the local people and militia to kill intellectual and influential people. Five teachers from the secondary school of Taba were killed on his instructions. The victims were Theogene, Phoebe Uwineze and her fiance (whose name is unknown), Tharcisse Twizeyumuremye and Samuel. The local people and militia killed them with machetes and agricultural tools in front of the Taba bureau communal.

21. On or about April 20, 1994, **Jean Paul AKAYESU** and some communal police went to the house of Victim Y, a 68 year old woman. **Jean Paul AKAYESU** interrogated her about the whereabouts of the wife of a university teacher. During the questioning, under **Jean Paul AKAYESU**'s supervision, the communal police hit Victim Y with a gun and sticks. They bound her arms and legs and repeatedly kicked her in the chest. **Jean Paul AKAYESU** threatened to kill her if she failed to provide the information he sought.

22. Later that night, on or about April 20, 1994, **Jean Paul AKAYESU** picked up Victim W in Taba and interrogated her also about the whereabouts of the wife of the university teacher. When she stated she did not know, he forced her to lay on the road in front of his car and threatened to drive over her.

23. Thereafter, on or about April 20, 1994, **Jean Paul AKAYESU** picked up Victim Z in Taba and interrogated him. During the interrogation, men under **Jean Paul AKAYESU**'s authority forced Victims Z and Y to beat each other and used a piece of Victim Y's dress to strangle Victim Z.

Counts 1-3
(Genocide)
(Crimes against Humanity)

By his acts in relation to the events described in paragraphs 12-23, **Jean Paul AKAYESU** is criminally responsible for:

COUNT 1: **GENOCIDE**, punishable by Article 2(3)(a) of the Statute of the Tribunal;

COUNT 2: Complicity in **GENOCIDE**, punishable by Article 2(3)(e) of the Statute of the Tribunal; and

COUNT 3: **CRIMES AGAINST HUMANITY** (extermination), punishable by Article 3(b) of the Statute of the Tribunal.

Count 4
(Incitement to Commit Genocide)

5367

By his acts in relation to the events described in paragraphs 14 and 15, **Jean Paul AKAYESU** is criminally responsible for:

COUNT 4: Direct and Public Incitement to Commit **GENOCIDE**, punishable by Article 2 (3)(c) of the Statute of the Tribunal.

Counts 5-6
(Crimes Against Humanity)
(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation the murders of Juvénal Rukundakuvuga, Emmanuel Sempabwa, Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome Gakuba, as described in paragraphs 15 and 18, **Jean Paul AKAYESU** committed:

COUNT 5: **CRIMES AGAINST HUMANITY** (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

COUNT 6: **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS**, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal.

Counts 7-8
(Crimes Against Humanity)
(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation the murders of 8 detained men in front of the bureau communal as described in paragraph 19, **Jean Paul AKAYESU** committed:

COUNT 7: **CRIMES AGAINST HUMANITY** (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

COUNT 8: **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS**, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal.

Counts 9-10
Crimes Against Humanity)
(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the murders of 5 teachers in front of the bureau communal as described in paragraph 20, **Jean Paul AKAYESU** committed:

COUNT 9: **CRIMES AGAINST HUMANITY** (murder) punishable by Article 3(a) of the Statute of the Tribunal; and

COUNT 10 **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS**, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal.

Counts 11-12
(Crimes Against Humanity)
(Violations of Article 3 common to the Geneva Conventions)

S368

By his acts in relation to the beatings of U, V, W, X, Y and Z as described in paragraphs 16, 17, 21, 22 and 23, **Jean Paul AKAYESU** committed:

COUNT 11:**CRIMES AGAINST HUMANITY** (torture), punishable by Article 3(f) of the Statute of the Tribunal; and

COUNT 12: **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS**, as incorporated by Article 4(a)(cruel treatment) of the Statute of the Tribunal.

In addition and/or in the alternative to his individual responsibility under Article 6(1) of the Statute of the Tribunal, the accused, is individually responsible under Article 6(3) of the Statute of the Tribunal for the crimes alleged in Counts 13 through 15. Under Article 6(3), an individual is criminally responsible as a superior for acts of a subordinate if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Counts 13-15
(Crimes Against Humanity)
(Violations of Article 3 common to the Geneva Conventions)

By his acts in relation to the events at the bureau communal, as described in paragraphs 12 (A) and 12(B), **Jean Paul AKAYESU** committed:

COUNT 13:**CRIMES AGAINST HUMANITY** (rape), punishable by Article 3(g) of the Statute of the Tribunal; and

COUNT 14: **CRIMES AGAINST HUMANITY**, (other inhumane acts), punishable by Article 3(i) of the Statute of the Tribunal; and

COUNT 15:**VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF ARTICLE 4(2)(e) OF ADDITIONAL PROTOCOL 2**, as incorporated by Article 4(e)(outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault) of the Statute of the Tribunal.

___(Signed)_____
Louise Arbour
Prosecutor

1.3. Jurisdiction of the Tribunal

7. The subject-matter jurisdiction of the ICTR is set out in Articles 2,3 and 4 of the Statute:

Article 2: Genocide

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the

other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

a) Killing members of the group;

b) Causing serious bodily or mental harm to members of the group;

c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

a) Genocide;

b) Conspiracy to commit genocide;

c) Direct and public incitement to commit genocide;

d) Attempt to commit genocide;

e) Complicity in genocide.

Article 3: CRIMES AGAINST HUMANITY

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

a) Murder;

b) Extermination;

c) Enslavement;

d) Deportation;

e) Imprisonment;

f) Torture;

g) Rape;

5370

h) Persecutions on political, racial and religious grounds;

i) Other inhumane acts.

Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

b) Collective punishments;

c) Taking of hostages;

d) Acts of terrorism;

e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

f) Pillage;

g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

h) Threats to commit any of the foregoing acts.

8. In addition, Article 6 states the principle of individual criminal responsibility:

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or

S3471

had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

1.4. The Trial

1.4.1. Procedural Background

9. Jean-Paul Akayesu was arrested in Zambia on 10 October 1995. On 22 November 1995, the Prosecutor of the Tribunal, pursuant to Rule 40 of the Rules, requested the Zambian authorities to keep Akayesu in detention for a period of 90 days, while awaiting the completion of the investigation.

10. On 13 February 1996, the then Prosecutor, Richard Goldstone8, submitted an Indictment against Akayesu, which was subsequently amended on 17 June 1997. It contains a total of 15 counts covering genocide, crimes against humanity and violations of Article 3 Common to the 1949 Geneva Conventions and Additional Protocol II of 1977 thereto. More specifically, Akayesu was individually charged with genocide, complicity in genocide, direct and public incitement to commit genocide, extermination, murder, torture, cruel treatment, rape, other inhumane acts and outrages upon personal dignity, which he allegedly committed in Taba commune of which he was the bourgmestre at the time of the alleged acts.

11. The Indictment was confirmed and an arrest warrant, accompanied by an order for continued detention, was issued by Judge William H. Sekule on 16 February 1996. The following week, the Indictment was submitted by the Registrar to the Zambian authorities, to be served upon the Accused. Akayesu was transferred to the Detention Facilities of the Tribunal in Arusha on 26 May 1996, where he is still detained awaiting judgment.

12. The initial appearance of the Accused, pursuant to Rule 62 of the Rules, took place on 30 May 1996 in the presence of his counsel before Trial Chamber I, composed of Judge Laʿty Kama, presiding, Judge Lennart Aspegren and Judge Navanethem Pillay. The prosecution team, led by Honoré Rakotomanana9, Deputy Prosecutor of the Tribunal, was composed of Yacob Haile-Mariam, Mohamed Chande Othman and Pierre-Richard Prosper10. The Accused pleaded not guilty to all the counts against him. On the same date, the Chamber ordered the continued detention of the Accused while awaiting his trial11. Simultaneous interpretation in French and English, and where necessary Kinyarwanda, was provided at the hearings.

13. The Accused having been found indigent by the Tribunal, in accordance with the provisions of the Directive on Assignment of Defence Counsel12, the Registrar of the Tribunal assigned Johan Scheers as defence counsel for the Accused and counsel's fees were paid by the Tribunal. By a decision of 31 October 1996, the Chamber directed the Registrar of the Tribunal to withdraw the assignment of Johan Scheers as defence counsel for Akayesu, pursuant to Article 19 of the Directive on Assignment of Defence Counsel, and to immediately assign Michael Karnavas as the new defence counsel for the Accused. In the same decision, the Chamber postponed the trial until 9 January 1997, at the request of the Accused13. On 20 November 1996, the Chamber granted a request for a further change of defence counsel filed by the Accused on 11 November 1996, pursuant to Article 19 of the Directive. On 9 January 1997, the Registrar assigned Nicolas Tiangaye and Patrice Monthé, who served as defence counsel for the Accused until the end of the trial. On 16 January 1997, the Chamber rejected a third

motion for change of defence counsel filed by the Accused on 9 January 199714. The decision of 16 January 1997 also put an end to the interim measures adopted by the Chamber on 13 January 1997, temporarily authorizing the Accused to cross-examine the witnesses himself, along with his two counsel.

14. On 27 May 1996, the then counsel for the Accused, Johan Scheers, filed a preliminary motion under Rule 73 of the Rules15, requesting the Chamber to (i) rule that the criminal proceedings were inadmissible for reasons of flagrant violations of the rights of Defence; (ii) order the hearing of witnesses and that Defence investigations be conducted; (iii) exclude from the proceedings, all indirect witnesses to the acts for which the Accused is charged; and (iv) order the release of the Accused pending the trial on the merits. During the oral presentation of the motion at the hearing of 26 September 1996, however, the Defence raised issues beyond the framework of the said motion by advancing complaints regarding, on the one hand, the detention conditions of the Accused during his imprisonment in Zambia and, on the other hand, the delay by the Prosecutor in disclosing the Indictment and supporting material. In its decision of 27 September 199616, the Chamber rejected the entire motion on the grounds that the objections raised by the Defence and the manner in which they were presented, did not provide sufficient basis for the Chamber to rule on the merits under Rule 73 of the Rules. That same day, the Chamber adjourned the trial at the request of the Defence and set 31 October 199617 as the official opening date of the trial on the merits.

15. On 29 October 1996, the Chamber granted the Prosecutor's motion of 23 October 1996 for the transfer of a witness detained in Rwanda in order for him to testify before the Tribunal. A similar motion by the Defence, filed on 30 October 1997, was granted by the Chamber, it being ordered that three witnesses then detained in Rwanda be transferred to the Tribunal's Detention Facilities for a period of not more than two months so as to testify in the trial18. However, two subsequent requests by the Defence for the transfer and appearance in court of five and thirteen witnesses detained in Rwanda respectively were rejected, on the basis, *inter alia*, that the Defence was unable to demonstrate how the appearance of each witness was undoubtedly material in the discovery of the truth or that the conditions stipulated in Rule 90*bis* (b) of the Rules had been met19.

16. Besides the above-mentioned motions, several pre-trial motions were filed by the Defence, including a motion for the defendant to sit at counsel table during trial, a motion for an expedited in camera hearing regarding Prosecutorial misconduct and a motion to compel the Prosecutor to conduct a fair and just investigation. These motions were not granted.

17. The trial of the Accused on the merits opened on 9 January 1997 before Trial Chamber I, composed of Judge La‹ty Kama, presiding, Judge Lennart Aspegren and Judge Navanethem Pillay. Pursuant to Rule 84 of the Rules, Honoré Rakotomanana and Yacob Haile-Mariam made the opening statement for the Prosecutor, which was followed by the opening statement for the Defence, made by Nicolas Tiangaye and Patrice Monthé. During the initial phase of the trial which took place over 26 trial days until 24 May 1997, 22 witnesses, including five expert witnesses, testified for the Prosecutor. Subsequent to the presentation of the Prosecutor's evidence, an *in camera* status conference was held after which the Chamber, at the request of the Defence, adjourned the trial until 29 September 1997.

18. All Prosecutor and Defence eye-witnesses requiring protection benefited from measures guaranteeing the confidentiality of their testimony 20. No information which could in any way identify the witnesses was given. During the hearings, letters of the alphabet were used as pseudonyms to refer to protected witnesses and screens isolated the said witnesses from the public, but not from the Accused and his counsel. One Defence witness was heard *in camera*.

19. On 13 January 1997, as an interim measure pending a Chamber decision on a request by the Accused for the replacement of his counsel, Akayesu was authorized by the Chamber to cross-examine,

5373

along with his assigned counsel, prosecution witnesses. The pertinent decision was rendered on 16 January 199721, whereby the request for replacement of Counsel was dismissed and the interim measure terminated.

20. Most of the Rwandan witnesses spoke in Kinyarwanda and their testimonies were interpreted into the two working languages of the Tribunal (French and English). By Decision of 9 March 1998, the Chamber dismissed a Defence motion, based on Rule 91 of the Rules, to direct the Prosecutor to investigate an alleged false testimony by prosecution witness "R". The Chamber found that for the Defence to raise doubts as to the reliability of statements made by a witness, was not by itself sufficient to establish strong grounds for believing that the witness may have knowingly and wilfully given false testimony 22.

21. During the hearing of 23 January 1997, the Chamber requested the Prosecutor, in view of the exceptional nature of the offences, to submit all written witness statements already made available by her to the Defence. The Prosecutor objected to the request; hence the Chamber, by a decision rendered on 28 January 1997, pursuant to Rules 89(A), 89(C) and 98 of the Rules, ordered the Prosecutor to submit all available written witness statements to the Chamber in the case and that all such statements to which reference had been made by either the Prosecutor or the Defence shall be admitted as evidence and form part of the record. However, this was subject to the caveat that disclosure of all the written statements did not necessarily entail their admissibility as evidence23.

22. On 4 February 1997, the Prosecutor, who had not yet complied with the order of 28 January 1997, filed a motion requesting the Chamber to reconsider and rescind the said order. The Prosecutor submitted, *inter alia*, that the order of 28 January 1997 represented an unjustified change in the established order for production of evidence and thus did not satisfy the provisions of Rule 85, that Rule 98 simply allows the Chamber to order the production of specific additional evidence and not the disclosure of all the evidence, that it involves the Chamber in the process of disclosure and, in actual fact, circumvents Rule 66 (A), and that the order is prejudicial to the parties. On 6 march 1997, the Chamber declared the Prosecutor's motion groundless, and expressed surprise, in the circumstances, at receiving a motion asking it to reconsider and rescind its order, instead of a motion for clarification. The Chamber specified in its decision that the order of 28 January 1997 could only be interpreted with respect to the witness statements already communicated to the Defence24. On 16 April 1997, the Prosecutor filed a notice of intent to comply with the Chamber's order to submit witness statements.

23. As stated above, 24 May 1997 marked the end of the first part of the trial of the Accused with the testimony of the last prosecution witness. However, on 16 June 1997, the Prosecutor submitted a request to bring an expedited oral motion before the Chamber seeking an amendment of the Indictment. During the hearing held to that end on 17 June 1997, the Prosecutor sought leave to add three further Counts, namely, Count 13: rape, a Crime Against Humanity, punishable under Article 3 (g) of the Statute, Count 14: inhumane acts, a Crime Against Humanity, punishable under Article 3 (i) of the Statute, and Count 15: outrages on personal dignity, notably rape, degrading and humiliating treatment and indecent assault, a Violation of Article 3 Common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II, as incorporated in Article 4(e) of the Statute. The Chamber granted leave to the Prosecutor to amend the Indictment and postponed the date for resumption of the trial to 23 October 199725

24. The second phase of the trial started on 23 October 1997 with the initial appearance of Akayesu for the new counts in a public session before the Chamber. The Accused pleaded not guilty to each of the new counts. The Prosecutor then proceeded to present six new witnesses, including an investigator with the Office of the Prosecutor. In all, the Prosecutor put 28 witnesses on the stand over 31 trial days. The Defence, for its part, presented its evidence over the course of 12 trial days between 4 November 1997

5374

and 13 March 1998. It called 13 witnesses, including the Accused, to the stand. A total of 155 exhibits were submitted during the trial.

25. During the second phase of the trial, the Defence requested and obtained the issuance of a subpoena for Major-General Roméo Dallaire, former force Commander of UNAMIR (United Nations Assistance Mission in Rwanda), whose immunity had been partially lifted by the UN Secretary-General, to appear as a witness for the Defence 26. The Chamber also granted leave to a representative of the United Nations Secretariat to appear as an Amicus Curiae to make a statement on the lifting of the immunity Major-General Roméo Dallaire enjoys by virtue of his position as former force Commander of UNAMIR27

26. However, the Chamber did not grant the Defence motion for the issuance of a subpoena for two persons accused before the Tribunal to appear as Defence witnesses, on the grounds that their fundamental rights, as recognized by Article 20(4)(g) of the Statute, would perhaps be violated, and that there would be a risk that their appearance as witnesses in the case could cause prejudice to them28. A further Defence motion for the appearance of another accused as an expert witness was similarly dismissed29. The Chamber held therein that the impartiality of the potential expert witness, who is accused by the Tribunal for crimes related to those with which Akayesu is charged, could not be assured and consequently that he did not fulfil the requisite conditions for appearing as an expert witness. Furthermore, the Chamber found that for this particular Accused to be compelled to appear as an expert witness in the case would be prejudicial to him and could possibly violate his fundamental rights, as recognized by the provisions of Article 20(4)(g) of the Statute and Article 14(3)(g) of the International Covenant of Civil and Political Rights of 1966.

27. The Chamber dismissed a Defence motion for a site visit and the conduct of a forensic analysis of the remains of three alleged victims. The Chamber found that a new forensic analysis would not be appropriate nor, in any case, instrumental in the discovery of the truth, on the basis, *inter alia*, that a number of the purported mass graves, including, without a doubt, those supposedly in the vicinity of the Taba bureau communal' had been subject of previous exhumations. Moreover, the Chamber felt that the arguments of the Defence Counsel in support of the motion were pertinent mainly to evaluating the credibility of certain witness statements and not to showing the necessity for an exhumation and forensic analysis, as requested30

28. None of the parties presented witnesses for rebuttal purposes. The Accused testified in his own defence on 12 March 1998 and was cross-examined the next day by the Prosecutor. The latter presented her final arguments on 19 and 23 March, and the Defence presented its closing arguments on 26 March 1998. The trial on the merits was held over a period of 60 days of hearings, since 9 January 1997. The case was adjourned on 26 March 1998 for deliberation on the Judgment by the Chamber.

1.4.2. The Accused's line of defence

29. The Accused has pleaded not guilty to all counts of the Indictment, both at his initial appearance, held on 30 May 1996, and at the hearing of 23 October 1997 when he pleaded not guilty to each of the new counts which had been added to the Indictment when it was amended on 17 June 1997.

30. In essence, the Defence case - insofar as the Chamber has been able to establish it - is that the Accused did not commit, order or participate in any of the killings, beatings or acts of sexual violence alleged in the Indictment. The Defence concedes that a genocide occurred in Rwanda and that massacres of Tutsi took place in Taba Commune, but it argues that the Accused was helpless to prevent them, being outnumbered and overpowered by one Silas Kubwimana and the Interahamwe. The Defence

pointed out that, according to prosecution witness R, Akayesu had been so harassed by the Interahamwe that at one point he had had to flee Taba commune. Once the massacres had become widespread, the Accused was denuded of all authority and lacked the means to stop the killings.

31. The Defence claims that the Chamber should not require the Accused to be a hero, to have laid down his life - as, for example, did the bourgmestre of Mugina - in a futile attempt to prevent killings and beatings. The Defence alluded to the fact that General Dallaire, in charge of UNAMIR and 2,500 troops, was unable to prevent the genocide. How, then, was Akayesu, with 10 communal policemen at his disposal, to fare any better? Moreover, the Defence argue, no bourgmestre in the whole of Rwanda was able to prevent the massacres in his Commune, no matter how willing he was to do so.

32. As for acts of sexual violence, the Defence case is somewhat different from that for killings and beatings, in that, whereas for the latter the Defence does not contest that there were killings and beatings, it does deny that there were acts of sexual violence committed, at least at the Bureau Communal. During his testimony the Accused emphatically denied that any rapes had taken place at the Bureau Communal, even when he was not there. The Chamber notes the Accused's emphatic denial of facts which are not entirely within his knowledge.

33. As general remarks, the Defence alluded to the fragility of human testimony as opposed to documentary evidence, and specifically referred to the evidence of Dr. Mathias Ruzindana, who had testified about problems in relying on eye-witness accounts of Rwandans31. The Defence also raised problems associated with alleged "syndicates of informers", in which groups of Rwandans supposedly collaborated to concoct testimony against a person for revenge or other motives. This allegation is specifically dealt with below.

34. As regards the Accused, the Defence pointed out that, though the Prosecutor admitted that the Accused had opposed massacres before 18 April 1994, the Prosecutor could not demonstrate that he was a "genocidal ideologue", since one did not adopt the ideology of genocide overnight. Hence, the Defence argued, he could not be convicted of genocide.

35. In general, the Defence argued that the Accused was a "scapegoat", who found himself Accused before the Chamber only because he was a Hutu and a bourgmestre at the time of the massacres.

36. Turning to the specific allegations contained in the Indictment, the Defence case is that there was no change in Akayesu's attitude or behaviour before and after the Murambi meeting of 18 April 1998. Both before and after, he attempted to save Tutsi lives. Witness DBB testified that the Accused gave a Tutsi woman (witness DEEX) a laissez-passer, although he could not say whether the accused knew at the time that the woman was a Tutsi or not. Witness DEEX confirmed that she was given a laissez-passer by the accused. Witnesses DIX and DJX also heard that Akayesu had saved Tutsi lives.

37. The Defence also challenged the premise that the Murambi meeting of 18 April 1994 was the key event which led to a complete change in the accused's behaviour. Since, the Defence argued, it had not been shown that orders for the extermination of the Tutsi were given at the Murambi meeting by the interim government, it follows that the accused could not have returned to his Commune a changed man because of those non-existent orders. The Defence pointed out that only one prosecution witness and one Defence witness had attended the Murambi meeting, and that neither testified that an explicit message to kill the Tutsi had been given.

38. Regarding the Gishyeshye meeting of 19 April 1994, the Defence argued that the accused was forced by the Interahamwe to read a document which allegedly mentioned the names of RPF accomplices, but

that the accused tried to dissuade the population from being incited by the document, arguing that the mere appearance of names on a list did not mean that the persons named were accomplices of the RPF. The Defence also noted further "contradictions" in the accounts given by witnesses of the Gishyeshye meeting.

39. As regards the killings of the eight Runda refugees and the five teachers, the Defence pointed out that the only witness to these killings was witness K, and that the accused had, at the time of his interview by the OTP in Zambia, cited witness K as a possible Defence witness. It begged credulity that the accused would contemplate calling as a Defence witness a person whom he knew had seen him order such killings.

40. Concerning the killings of the Karangwa brothers, the Defence argued that there was such uncertainty as to how they were killed, and by what instruments, that a conviction could not stand in the absence of these material averments. It was because of these inconsistencies and uncertainties that the Defence had asked for an exhumation of the bodies, which had not been granted.

41. The charges of beatings the Defence contested on the grounds that no medical examination had been conducted on the alleged victims to verify that the injuries which they claimed were sustained as a result of the accused's actions could genuinely be so attributed.

42. The charges of offences of sexual violence, the Defence argued, were added under the pressure of public opinion and were not credibly supported by the evidence. Witness J's account, for example, of living in a tree for one week after her family were killed and her sister raped, while several months pregnant, was simply not credible but rather the product of fantasy the Defence claimed - "of interest to psychiatrists, but not justice".32

43. The Chamber has considered the Defence case extremely carefully and it will be treated here in the course of making the various factual and legal findings. There is one aspect which, however, should be dealt with here.

Putting the case to a witness

44. In the Defence closing argument, Mr. Nicholas Tiangaye, made the suggestion that some, if not all, of the Prosecution witnesses who had testified against Jean-Paul Akayesu did so because they were colluding in a "syndicate of informers" which would denounce a particular individual for political reasons or in order to take over his property. In this connection, Mr. Tiangaye quoted Rene Degni-Segui, the Special Rapporteur of the Commission on Human Rights on Rwanda, who recounted a story of a demonstrably innocent Rwandan who had been denounced by 15 witnesses as a participant in the genocide. Mr. Tiangaye concluded thus:

> "... there were cases of calumny which existed and which enabled people to denounce others regarding their participation in genocide in order to be able to take over their property."

Mr. Tiangaye then went on to say:

> "So, what do we do, Mr. President, ladies and gentlemen, when witnesses come to tell lies before the Chamber, what do we do?" 33

5377

45. To the extent that Defence counsel invites the Chamber to disbelieve the testimony of Prosecution witnesses because they may belong to a syndicate of informers or that they *may* be denouncing Akayesu in order to take over his property, and that they have therefore lied before the Chamber, it is to be noted this is a very serious allegation of false testimony or perjury, which is a criminal offence. Indeed, Defence counsel during the course of the trial made a motion for a certain prosecution witness to be investigated for false testimony; which motion was rejected in a Decision of this Trial Chamber in which it gave its reasons.34. That matter does not concern the Chamber here. What is of concern is whether the Chamber should give any weight, in its deliberations, to the possibility raised by Defence counsel that prosecution witnesses may have been lying for one of the above-mentioned motives.

46. The Chamber holds that, as a blanket allegation to undermine the credibility of prosecution witnesses, this allegation can carry no weight, for two reasons. First, an attack on credibility which is not particularised with respect to individual witnesses is no attack at all on those witnesses' credibility; it is merely a generalised and unsubstantiated suspicion. Doubt can only arise where the criteria for doubt are fulfilled. To state that all prosecution witnesses should be disbelieved because some Rwandan witnesses elsewhere have lied is similar to saying, "some money is counterfeit, therefore all money might be counterfeit". If, and this is the second point, the Defence wish to challenge prosecution witnesses as members of an informer's syndicate, or to allege that they are lying in order to be able to confiscate the accused's property, then the Defence must *lay the foundations for that challenge and put the challenge to the witness in question during cross-examination.* This is both a matter of practicality and of principle. The practical matter is this: if the Defence does put to a witness the allegation that he is lying because he wishes to take the accused's property, then this may elicit a convincing admission or rebuttal. The witness may break down and reveal, by his words or demeanour, that he has indeed been lying for that purpose; alternatively, he may offer a convincing rebuttal, for example, by pointing out that the accused has no property which the witness could wish to misappropriate. Either way, the matter might be resolved. To never put the crucial question to the witness is to deprive the Chamber of such a possible resolution. As a matter of principle, it is only fair to a witness, whom the Defence wishes to accuse of lying, to give him or her an opportunity to hear that allegation and to respond to it. This is a rule in Common law, 35 but it is also simply a matter of justice and fairness to victims and witnesses, principles recognised in all legal systems throughout the world.

47. It is to be noted that during the trial the Defence did not put, nor even suggest, to a single prosecution witness that he or she was lying because he or she had been drawn into a syndicate of informers and instructed as to how to testify against the accused, or that the witness was lying because he or she wished to take the accused's property. In these circumstances, Defence counsel's attempt in his closing arguments to tar all prosecution witnesses with the same broad brush of suspicion cannot be accepted by the Chamber. Thus the credibility of each witness must be assessed on its merits, taking into account the witness's demeanour and the consistency and credibility or otherwise of the answers given by him or her under oath.

1.5. The Accused and his functions in Taba (paragraphs 3-4 of the Indictment)

48. Paragraphs 3 and 4 of the Indictment appear under the heading, "the Accused". Taking these paragraphs in turn, paragraph 3 reads as follows:

> The Accused
>
> 3. Jean Paul AKAYESU, born in 1953 in Murehe sector, Taba commune, served as

5378

bourgmestre of that commune from April 1993 until June 1994. Prior to his appointment as bourgmestre, he was a teacher and school inspector in Taba.

49. The Chamber confirms paragraph 3, which is common cause between the Prosecution and the Defence. On the basis of the evidence presented at trial, the Chamber finds the following facts have been established with regard to the Accused generally.

50. The Accused, Akayesu was born in 1953 in Murehe sector, Taba commune in Rwanda, where he also grew up. He was an active athlete in Taba and a member of the local football team. In 1978 he married a local woman from the same commune, whom he had then known for ten years. They are still married and have five children together.

51. Before being appointed bourgmestre in 1993, the Accused served as a teacher and was later promoted to Primary School Inspector in Taba. In this capacity he was in charge of inspecting the education in the commune and acted as head of the teachers. He would occasionally fill in as a substitute teacher and was popular among pupils and students of different educational levels in the commune. Generally speaking, the Accused was a well known and popular figure in the local community.

52. Akayesu became politically active within the commune in 1991 and on 1 July of the same year, following the transition into multipartyism, he was one of the signatories to the statute and a founding member of the new political party R called,Mouvement Démocratique Républicain MDR Politically the goal of the MDR was not to be an extension of the traditional MDR Parmehutu, but rather an updated version thereof, diametrically opposed to the MRND. The MDR focused on pointing out the errors of the MRND such as delays in the provision of infrastructure, roads, schools, health facilities, lack of electricity, etc.. Eventually, Akayesu was elected local president of the MDR in Taba commune. A sizeable proportion of the population in Taba became members of the MDR, and as the party grew, a certain animosity between members of the MDR and the MRND began to appear, resulting in several acts of violence. The other parties within the Commune, the Parti Social Démocratique, PSD and the Parti Libéral, PL cooperated with the MDR but, like the MDR, both parties experienced similar difficulties in cooperating with the MRND.

53. On a personal level, Akayesu was considered a man of high morals, intelligence and integrity, possessing the qualities of a leader, who appeared to have the trust of the local community. These abilities were in all likelihood the main reasons why different groups in the commune, among others the leaders of the MDR, communal representatives and religious leaders, considered Akayesu a suitable candidate for bourgmestre in Taba for the 1993 elections. The Accused himself admits to having been reluctant to run for the post of bourgmestre, but was pressured into candidacy by the aforementioned groups, according to several witnesses, including Akayesu himself.

54. In April 1993, Akayesu was elected bourgmestre after an election contested by four candidates. He then served as bourgmestre of Taba Commune from April 1993 until June 1994. According to the Accused, the duties of a bourgmestre were diverse. In short, he was in charge of the total life of the commune in terms of the economy, infrastructure, markets, medical care and the overall social life.Traditionally the role of the bourgmestre had always been to act as the representative of the President in the commune. Therefore the arrival of multipartyism did not particularly change the considerable amount of unofficial powers conferred upon the bourgmestre by the people in the commune. The bourgmestre was the leader of the commune and commonly treated with great respect and deference by the population.

55. In Taba Commune, Akayesu played a major role in leading the people. He would give advice on

S3794

various matters concerning security, economics or on the social well-being of the citizens. His advice would generally be followed and he was considered a father-figure or parent of the commune, to whom people would also come for informal advice. After a period of economic difficulties in Taba Commune due to corruption under the previous administration, a clear difference could be detected when Akayesu took office, as people would now settle their debts trusting the new administration. According to those of his colleagues appearing as witnesses before the Chamber, Akayesu was performing his task as bourgmestre well, prior to the period which is the subject of the Indictment.

56. Paragraph 4 of the Indictment reads as follows:

> 4. As bourgmestre, Jean Paul AKAYESU was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect. He had exclusive control over the communal police, as well as any gendarmes put at the disposition of the commune. He was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority.

57. The Chamber finds it necessary to explore in some detail the powers of the bourgmestre and, in particular, to distinguish between the *de facto* and *de jure* powers of a bourgmestre. In so doing, the Chamber will also deal with the allegation in paragraph 2 of the Indictment which reads, "In Rwanda, the bourgmestre is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*".

Background

58. A commune is governed by a bourgmestre in conjunction with the communal council which is composed of representatives of the different sectors in the commune. Below the sectors are the cellules and at the lowest level are the units of ten households. The latter two are really party structures, rather than administrative subdivisions.

59. Before the advent of multi-partyism, appointment and removal of a bourgmestre was the prerogative of the State President, political loyalty being the criterion. The bourgmestre was the representative of the central government in the commune but embodied at the same time the commune as a semi-autonomous unit. In that capacity, he would, for example, arrange contracts or represent the commune in court. He also had the authority to allocate the resources of the commune, including the land. He had the sole responsibility and authority over the communal police and could call upon the national gendarmerie to restore order. In addition, he was a judicial officer. Moreover, as the trusted representative of the President, he had a series of unofficial powers and duties, to such an extent that he was the central person in the daily life of the ordinary people. Citizens needed his protection in order to function in society. The bourgmestre held considerable sway over the communal council. Although an elected body, the council was less a representative body of the interest of the population than it was simply a channel for passing orders down to the people.

60. The introduction of multipartyism in 1991 had its effect on the local and national power structures from 1992 onwards. The MRND had to sacrifice the advantages which it enjoyed when it was the Siamese twin of the administration. A number of bourgmestres were removed on the advice of a pluralistic evaluation commission. The subsequent local elections were a clear victory for the opposition. Other bourgmestres were simply ousted by militia of an opposition party. Since then, the bourgmestres were no longer necessarily the representatives of the State President or of the central authority. Instead, they became primarily the representatives of their political party at the local level. But

5380

in any case, they would still remain the most important local representatives of power at the centre.

***De jure* powers**

61. The office of bourgmestre in Rwanda is similar to the office of maire in France or bourgmestre in Belgium36. It is an executive civilian position in the territorial administrative subdivision of commune. The primary function of the bourgmestre is to execute the laws adopted by the communal legislature, i.e., the elected communal council37. He "embodies the communal authority"38

The communal administration

62. The relationship between a bourgmestre and the communal workforce is spelt out in the body of law which is called administrative law in Civil Law countries (as opposed to labour law which regulates employment in the private sector). The bourgmestre has the power to hire (appoint) and fire (remove) communal employees after advice from the communal council39. The President of the Republic decrees by law the legal status (rights and duties) of the communal personnel. Although the legal situation (administrative law) may be very different from the private sector (labour law), it is very much a relationship of employer and employee and, therefore, strictly limited to the scope of the employment.

The communal police

63. The bourgmestre, without being a part of the communal police, has ultimate authority over it and is entirely responsible for its organisation, functioning and control.40

64. The communal police is a civilian police whose members do not fall under the military penal code. Sanctions and procedures for sanctions are the subject of administrative law. A bourgmestre has only disciplinary jurisdiction (e.g. blame, suspension) over his communal police.

65. Although the law states that only the bourgmestre has authority over the police41, he is, however, not its commander. Article 108 of the Loi sur l'organisation communale states, "Le commandement de la Police communale est assuré par un brigadier placé sous l'autorité du bourgmestre". Therefore, the relationship between the bourgmestre and the communal police is comparable to the relationship between a Minister of Defence and the High Command of the armed forces.

66. In case of public disturbances, the prefect can assume direct control over the communal police.42

Gendarmerie Nationale

67. Paragraph 4 of the Indictment states that Akayesu as a bourgmestre had exclusive control over the communal police as well as any gendarmes put at the disposal of the commune.

68. The Gendarmerie Nationale is a military force whose task it is to maintain public order when it is requested to do so43.

69. It is the prefect, not the bourgmestre who can request the intervention of the Gendarmerie44. The Gendarmes put at the disposal of the commune at the request of the prefect operate under the bourgmestre's authority45. It is far from clear, however, that in such circumstances a bourgmestre would have command authority over a military force.46

Powers of a bourgmestre in times of war or national emergency

5381

70. Apart from asking the prefect to request the Gendarmerie to intervene (*supra*), there are few legal provisions on the powers of a bourgmestre in times of war or national emergency.

71. A decree of 20 October 1959 (by the Belgian authorities) on the state of emergency is apparently still on the books. It gives the bourgmestre the power, once the the state of emergency has been declared, to order the evacuation, removal and internment of persons.47

***De facto* powers**

72. A number of witnesses testified before the Chamber as to the *de facto* powers of the bourgmestre and there is indeed evidence to support the Prosecutor's assertion that the bourgmestre enjoyed significant *de facto* authority.

73. The expert witness, Alison DesForges, testified that the bourgmestre was the most important authority for the ordinary citizens of a Commune, who in some sense exercised the powers of a chief in pre-colonial times.

74. Witness E said that the bourgmestre was considered as the "parent" of all the population whose every order would be respected. Witness S went further and stated that the people would normally follow the orders of the administrative authority, i.e. the bourgmestre, even if those orders were illegal or wrongful. Witness V said that the people could not disobey the orders of the bourgmestre.

75. On the other hand, Witness DAAX, who was the prefect of the Gitarama prefecture in which the accused was bourgmestre - and hence the Accused's hierarchical superior - testified that the bourgmestre had to work within the ambit of the law and could not exceed his *de jure* powers, and that if he did so, the prefect would intervene.

76. Witness R, himself a former bourgmestre, said that the duties and responsibilities of the bourgmestre were those prescribed and decreed by law, which the bourgmestre had to respect. The witness conceded, however, that the popularity of a bourgmestre might affect the extent to which his orders and advice were obeyed within the Commune. Witness R also admitted that, at least during the transitional period, certain bourgmestres exceeded their *de jure* powers with impunity, for example imprisoning their political rivals or embezzling from communal resources.

77. In light of the above, the Chamber finds it proved beyond a reasonable doubt that, as paragraph 4 of the Indictment states, "As bourgmestre, Jean Paul AKAYESU was charged with the performance of executive functions and the maintenance of public order within his commune, subject to the authority of the prefect". The Chamber does find it proved that "[the bourgmestre] had exclusive control over the communal police, [...][and authority over] any gendarmes put at the disposal of the commune". The Chamber does find it proved that "[the bourgmestre] was responsible for the execution of laws and regulations and the administration of justice, also subject only to the prefect's authority". The Chamber does find it proved that, "In Rwanda, the bourgmestre is the most powerful figure in the commune. His *de facto* authority in the area is significantly greater than that which is conferred upon him *de jure*".

2. HISTORICAL CONTEXT OF THE EVENTS IN RWANDA IN 1994

78. It is the opinion of the Chamber that , in order to understand the events alleged in the Indictment, it is necessary to say, however briefly, something about the history of Rwanda, beginning from the pre-colonial period up to 1994.

5382

79. Rwanda is a small, very hilly country in the Great Lakes region of Central Africa. Before the events of 1994, it was the most densely populated country of the African continent (7.1 million inhabitants, 26,338 square kilometres). Ninety per cent of the population lives on agriculture. Its per capita income is among the lowest in the world, mainly because of a very high population pressure on land.

80. Prior to and during colonial rule, first, under Germany, from about 1897, and then under Belgium which, after driving out Germany in 1917, was given a mandate by the League of Nations to administer it, Rwanda was a complex and an advanced monarchy. The monarch ruled the country through his official representatives drawn from the Tutsi nobility. Thus, there emerged a highly sophisticated political culture which enabled the king to communicate with the people.

81. Rwanda then, admittedly, had some eighteen clans defined primarily along lines of kinship. The terms Hutu and Tutsi were already in use but referred to individuals rather than to groups. In those days, the distinction between the Hutu and Tutsi was based on lineage rather than ethnicity. Indeed, the demarcation line was blurred: one could move from one status to another, as one became rich or poor, or even through marriage.

82. Both German and Belgian colonial authorities, if only at the outset as far as the latter are concerned, relied on an elite essentially composed of people who referred to themselves as Tutsi, a choice which, according to Dr. Alison Desforges, was born of racial or even racist considerations. In the minds of the colonizers, the Tutsi looked more like them, because of their height and colour, and were, therefore, more intelligent and better equipped to govern.

83. In the early 1930s, Belgian authorities introduced a permanent distinction by dividing the population into three groups which they called ethnic groups, with the Hutu representing about 84% of the population, while the Tutsi (about 15%) and Twa (about 1%) accounted for the rest. In line with this division, it became mandatory for every Rwandan to carry an identity card mentioning his or her ethnicity. The Chamber notes that the reference to ethnic background on identity cards was maintained, even after Rwanda's independence and was, at last, abolished only after the tragic events the country experienced in 1994.

84. According to the testimony of Dr. Alison Desforges, while the Catholic Church which arrived in the wake of European colonizers gave the monarch, his notables and the Tutsi population privileged access to education and training, it tried to convert them. However, in the face of some resistance, the missionaries for a while undertook to convert the Hutu instead. Yet, when the Belgians included being Christian among the criteria for determining the suitability of a candidate for employment in the civil service, the Tutsi, hitherto opposed to their conversion, became more willing to be converted to Christianity. Thus, they carried along most Hutu. Quoting a witness from whom she asked for an explanation for the massive conversion of Hutu to Christianity, Dr. Desforges testified that the reasons for the conversion were to be found in the cult of obedience to the chiefs which is highly developed in the Rwandan society. According to that witness, "you could not remain standing while your superiors were on their knees praying". For these reasons, therefore, it can be understood why at the time, that is, in the late 1920s and early 1930s, the church, like the colonizers, supported the Tutsi monopoly of power.

85. From the late 1940s, at the dawn of the decolonization process, the Tutsi became aware of the benefits they could derive from the privileged status conferred on them by the Belgian colonizers and the Catholic church. They then attempted to free themselves somehow from Belgian political stewardship and to emancipate the Rwandan society from the grip of the Catholic church. The desire for independence shown by the Tutsi elite certainly caused both the Belgians and the church to shift their alliances from the Tutsi to the Hutu, a shift rendered more radical by the change in the church's

philosophy after the second world war, with the arrival of young priests from a more democratic a egalitarian trend of Christianity, who sought to develop political awareness among the Tutsi- do Hutu majority.

86. Under pressure from the United Nations Trusteeship Council and following the shift in alliances just mentioned, Belgium changed its policy by granting more opportunities to the Hutu to acquire education and to hold senior positions in government services. This turn-about particularly angered the Tutsi, especially because, on the renewal of its mandate over Rwanda by the United Nations, Belgium was requested to establish representative organs in the Trust territory, so as to groom the natives for administration and, ultimately, grant independence to the country. The Tutsi therefore began the move to end Belgian domination, while the Hutu elite, for tactical reasons, favoured the continuation of the domination, hoping to make the Hutu masses aware of their political weight in Rwanda, in a bid to arrive at independence, which was unavoidable, at least on the basis of equality with the Tutsi. Belgium particularly appreciated this attitude as it gave it reason to believe that with the Hutu, independence would not spell a severance of ties.

87. In 1956, in accordance with the directives of the United Nations Trusteeship Council, Belgium organized elections on the basis of universal suffrage in order to choose new members of local organs, such as the grassroots representative Councils. With the electorate voting on strictly ethnic lines, the Hutu of course obtained an overwhelming majority and thereby became aware of their political strength. The Tutsi, who were hoping to achieve independence while still holding the reins of power, came to the realization that universal suffrage meant the end of their supremacy; hence, confrontation with the Hutu became inevitable.

88. Around 1957, the first political parties were formed and, as could be expected, they were ethnically rather than ideologically based. There were four political parties, namely the Mouvement démocratique répubicain, Parmehutu ("MDR Parmehutu"), which clearly defined itself as the Hutu grassroots movement; the Union Nationale Rwandaise ("UNAR"), the party of Tutsi monarchists; and, between the two extremes, the two others, Aprosoma, predominantly Hutu, and the Rassemblement démocratique rwandais ("RADER"), which brought together moderates from the Tutsi and Hutu elite.

89. The dreaded political unrest broke out in November 1959, with increased bloody incidents, the first victims of which were the Hutu. In reprisal, the Hutu burnt down and looted Tutsi houses. Thus became embedded a cycle of violence which ended with the establishment on 18 October 1960, by the Belgian authorities, of an autonomous provisional Government headed by Grégoire Kayibanda, President of MDR Parmehutu, following the June 1960 communal elections that gave an overwhelming majority to Hutu parties. After the Tutsi monarch fled abroad, the Hutu opposition declared the Republic of Gitarama, on 28 January 1961, and set up a legislative assembly. On 6 February 1961, Belgium granted self-government to Rwanda. Independence was declared on 1 July 1962, with Grégoire Kayibanda at the helm of the new State, and, thus, President of the First Republic.

90. The victory of Hutu parties increased the departure of Tutsi to neighbouring countries from where Tutsi exiles made incursions into Rwanda. The word Inyenzi, meaning cockroach, came to be used to refer to these assailants. Each attack was followed by reprisals against the Tutsi within the country and in 1963, such attacks caused the death of at least ten thousand of them, further increasing the number of those who went into exile. Concurrently, at the domestic level, the Hutu regime seized this opportunity to allocate to the Hutu the lands abandoned by Tutsi in exile and to redistribute posts within the Government and the civil service, in favour of the Hutu, on the basis of a quota system linked to the proportion of each ethnic group in the population.

91. The dissensions that soon surfaced among the ruling Hutu led the regime to strengthen the primacy

S384

of the MDR Parmehutu party over all sectors of public life and institutions, thereby making it the *de facto* sole party. This consolidated the authority of President Grégoire Kayibanda as well as the influence of his entourage, most of who came from the same region as he, that is the Gitarama region in the centre of the country. The drift towards ethnic and regional power became obvious. From then onwards, a rift took root within the Hutu political Establishment, between its key figures from the Centre and those from the North and South who showed great frustration. Increasingly isolated, President Kayibanda could not control the ethnic and regional dissensions. The disagreements within the regime resulted into anarchy, which enabled General Juvénal Habyarimana, Army Chief of Staff, to seize power through a coup on 5 July 1973. General Habyarimana dissolved the First Republic and established the Second Republic. Scores of political leaders were imprisoned and, later, executed or starved to death, as was the case with the former President, Grégoire Kayibanda.

92. Following a trend then common in Africa, President Habyarimana, in 1975, instituted the one-party system with the creation of the Mouvement révolutionnaire national pour le développement (MRND), of which every Rwandan was a member *ipso facto*, including the newborn. Since the party encompassed everyone, there was no room for political pluralism. A law passed in 1978 made Rwanda officially a one-party State with the consequence that the MRND became a "State-party", as it formed one and the same entity with the Government. According to Dr. Desforges, the local administrative authority was, at the same time, the representative of the party within his administrative unit. There was therefore a single centralized organization , both for the State and the party, which stretched from the Head of State down to basic units known as cellules, with even smaller local organs , each comprising ten households, below the cellules. The cellules and local organs were, indeed, more of party organs, than administrative units. They were the agencies for the implementation of Umuganda, the mobilization programme which required people to allocate half a day's labour per week to some communal project, such as the construction of schools or road repairs.

93. According to testimonies given before the Chamber, particularly that of Dr. Desforges, Habyarimana's accession to power aroused a great deal of enthusiasm and hope, both inside and outside the country, and also among members of the Tutsi ethnic group. Indeed, the regime at the outset did guard against pursuing a clearly anti-Tutsi policy. Many Tutsi were then prepared to reach a compromise. However, as the years went by, power took its toll and Habyarimana's policies became clearly anti-Tutsi. Like his predecessor, Grégoire Kayibanda, Habyarimana strengthened the policy of discrimination against the Tutsi by applying the same quota system in universities and government services. A policy of systematic discrimination was pursued even among the Hutu themselves, in favour of Hutu from Habyarimana's native region, namely Gisenyi and Ruhengeri in the north-west, to the detriment of Hutu from other regions. This last aspect of Habyarimana's policy, considerably weakened his power: henceforth, he faced opposition not only from the Tutsi but also from the Hutu, who felt discriminated against and most of whom came from the central and southern regions. In the face of this situation, Habyarimana chose to relentlessly pursue the same policy like his predecessor who favoured his region, Gitarama. Like Kayibanda, he became increasingly isolated and the base of his regime narrowed down to a small intimate circle dubbed "Akazu", meaning the "President's household". This further radicalized the opposition whose ranks swelled more and more. On 1 October 1990, an attack was launched from Uganda by the Rwandan Patriotic Front (RPF) whose forebear, the Alliance rwandaise pour l'unité nationale ("ARUN"), was formed in 1979 by Tutsi exiles based in Uganda. The attack provided a pretext for the arrest of thousands of opposition members in Rwanda considered as supporters of the RPF.

94. Faced with the worsening internal situation that attracted a growing number of Rwandans to the multi-party system, and pressured by foreign donors demanding not only economic but also political reforms in the form of much greater participation of the people in the country's management, President Habyarimana was compelled to accept the multi-party system in principle. On 28 December 1990, the

5385

preliminary draft of a political charter to establish a multi-party system was published. On 10 June 199[illegible] the new constitution introducing the multi-party system was adopted, followed on 18 June by the promulgation of the law on political parties and the formation of the first parties, namely :

- the Mouvement démocratique républicain (MDR), considered to be the biggest party in terms of membership and claiming historical links with the *MDR*-Parmehutu of Grégoire Kayibanda; its power-base was mainly the centre of the country, around Gitarama;

- the Parti social démocrate (PSD), whose membership included a good number of intellectuals, recruited its members mostly in the South, in Butare;

- the Parti libéral(PL); and

- the Parti démocrate chrétien (PDC).

95. At the same time, Tutsi exiles, particularly those in Uganda organized themselves not only to launch incursions into Rwandan territory but also to form a political organization, the Rwandese Patriotic Front (RPF), with a military wing called the Rwandan Patriotic Army (RPA). The first objective of the exiles was to return to Rwanda. But they met with objection from the Rwandan authorities and President Habyarimana, who is alleged to have said that land in Rwanda would not be enough to feed all those who wanted to return. On these grounds, the exiles broadened their objectives to include the overthrow of Habyarimana.

96. The above-mentioned RPF attack on 1 October 1991 sent shock waves throughout Rwanda. Members of the opposition parties formed in 1991, saw this as an opportunity to have an informal alliance with the RPF so as to further destabilize an already weakened regime. The regime finally accepted to share power between the MRND and the other political parties and, around March 1992, the Government and the opposition signed an agreement to set up a transitional coalition government headed by a Prime Minister from the MDR. Out of the nineteen ministries, the MRND obtained only nine. Pressured by the opposition, the MRND accepted that negotiations with the RPF be started. The negotiations led to the first cease-fire in July 1992 and the first part of the Arusha Accords48. The July 1992 cease-fire tacitly recognized RPF control over a portion of Rwandan territory in the north-east. The protocols signed following these accords included the October 1992 protocol establishing a transitional government and a transitional assembly and the participation of the RPF in both institutions. The political scene was now widened to comprise three blocs: the Habyarimana bloc, the internal opposition and the RPF. Experience showed that President Habyarimana accepted these accords only because he was compelled to do so, but had no intention of complying with what he himself referred to as "un chiffon de papier", meaning a scrap of paper.

97. Yet, the RPF did not drop its objective of seizing power. It therefore increased its military attacks. The massive attack of 8 February 1993 seriously undermined the relations between the RPF and the Hutu opposition parties, making it easy for Habyarimana supporters to convene an assembly of all Hutu. Thus, the bond built on Hutu kinship once again began to prevail over political differences. The three blocs mentioned earlier gave way to two ethnic- based opposing camps: on the one hand, the RPF, the supposed canopy of all Tutsi and, on the other hand, the other parties said to be composed essentially of the Hutu.

98. In March 1992, a group of Hutu hard-liners founded a new radical political party, the Coalition pour la défense de la republique (CDR), or Coalition for the Defence of the Republic, which was more extremist than Habyarimana himself and opposed him on several occasions.

5386

99. To make the economic, social and political conflict look more like an ethnic conflict, the President's entourage, in particular, the army, persistently launched propaganda campaigns which often consisted in fabricating events. Dr. Alison Desforges in her testimony referred to this as "mirror politics", whereby a person accuses others of what he or she does or wants to do. In this regard, in the morning hours of 5 October 1990, the Rwandan army simulated an attack on Kigali and, immediately thereafter, the Government claimed that the city had just been infiltrated by the RPF, with the help of local Tutsi accomplices. Some eight thousand Tutsi and members of the Hutu opposition were arrested the next morning. Several dozens of them died in jail. Another example of mirror politics is the March 1992 killings in Bugesera which began a week after a propaganda agent working for the Habyarimana government distributed a tract claiming that the Tutsi of that region were preparing to kill many Hutu. The MRND militia, known as Interahamwe, participated in the Bugesera killings. It was the first time that this party's militia participated in killings of this scale. They were later joined by the militia of other parties or wings of Hutu extremist parties, including, in particular, the CDR militia known as the Impuzamugambi.

100. Mirror politics was also used in Kibulira, in the north-west, and in the Bagoguye region. In both cases, the population was goaded on to defend itself against fabricated attacks supposed to have been perpetrated by RPF infiltrators and to attack and kill their Tutsi neighbours. In passing, mention should be made of the role that Radio Rwanda and, later, the RTLM, founded in 1993 by people close to President Habyarimana, played in this anti-Tutsi propaganda. Besides the radio stations, there were other propaganda agents, the most notorious of whom was a certain Léon Mugesera, vice-president of the MRND in Gisenyi Préfecture and lecturer at the National University of Rwanda, who published two pamphlets accusing the Tutsi of planning a genocide of the Hutu49. During an MRND meeting in November 1992, the same Léon Mugesera called for the extermination of the Tutsi and the assassination of Hutu opposed to the President. He made reference to the idea that the Tutsi allegedly came from Ethiopia and, hence, that after they had been killed, they should be thrown into the Rwandan tributaries of the Nile, so that they should return to where they are supposed to have come from50. He exhorted his listeners to avoid the error of earlier massacres during which some Tutsi, particularly children, were spared.

101. On the political front, a split was noticed in almost all the opposition parties on the issue of the proposed signing of a final peace agreement. This schismatic trend began with the MDR party, the main rival of the MRND, whose radical faction, later known as MDR Power, affiliated with the CDR and the MRND.

102. On 4 August 1993, the Government of Rwanda and the RPF signed the final Arusha Accords and ended the war which started on 1 October 1990. The Accords provided, *inter alia*, for the establishment of a transitional government to include the RPF, the partial demobilization and integration of the two opposing armies (13,000 RPF and 35,000 FAR troops), the creation of a demilitarized zone between the RPF-controlled area in the north and the rest of the country, the stationing of an RPF battalion in the city of Kigali, and the deployment, in four phases, of a UN peace-keeping force, the United Nations Assistance Mission for Rwanda (UNAMIR), with a two-year mandate.

103. On 23 October 1993, the President of Burundi, Melchior Ndadaye, a Hutu, was assassinated in the course of an attempted coup by Burundi Tutsi soldiers. Dr. Alison Desforges testified that in Rwanda, Hutu extremists exploited this assassination to prove that it was impossible to agree with the Tutsi, since they would always turn against their Hutu partners to kill them. A meeting held at the Kigali stadium at the end of October 1993 was entirely devoted to the discussion of the assassination of President Ndadaye, and in a very virulent speech, Froduald Karamira, senior national vice-President of the Interahamwe, is alleged to have called for unreserved solidarity among all the Hutu, solidarity transcending the divide of political parties. He reportedly concluded his speech with a call for "Hutu-

5387

Power".

104. The assassination of President Ndadaye gave President Habyarimana and the CDR the opportunity to denounce, in a joint MRND - CDR statement issued at the end of 1993, the Arusha Accords, calling them treason. However, a few days later, pursuing his policy of prevarication towards the international community, Habyarimana signed another part of the peace accords. Indeed, the Arusha Accords no longer existed, except on paper. The President certainly did take the oath of office, but the installation of a transitional government was delayed, mainly by divisions within the political parties and the ensuing infightings.

105. The leaders of the CDR and the PSD were assassinated in February 1994. In Kigali, in the days that followed, the Interahamwe and the Impuzamugambi massacred Tutsi as well as Habyarimana's Hutu opponents. The Belgian Foreign Minister informed his representative at the UN of the worsening situation which "could result in an irreversible explosion of violence"51 . At the same time, as he stated in his testimony before the Tribunal, UNAMIR commander, Major-General Dallaire, alerted the United Nations in New York of the discovery of arms caches and requested a change in UNAMIR's engagement rules to enable him to seize the arms; but the request was turned down. Meanwhile, anti-Tutsi propaganda on the media intensified. The RTLM constantly stepped up its attacks which became increasingly targeted and violent.

106. At the end of March 1994, the transitional government was still not set up and Rwanda was on the brink of bankruptcy. International donors and neighbouring countries put pressure on the Habyarimana government to implement the Arusha Accords.
On 6 April 1994, President Habyarimana and other heads of State of the region met in Dar-es-Salaam (Tanzania) to discuss the implementation of the peace accords. The aircraft carrying President Habyarimana and the Burundian President, Ntaryamirai, who were returning from the meeting, crashed around 8:30 pm near Kigali airport. All aboard were killed.

107. The Rwandan army and the militia immediately erected roadblocks around the city of Kigali. Before dawn on April 7 1994, in various parts of the country, the Presidential Guard and the militia started killing the Tutsi as well as Hutu known to be in favour of the Arusha Accords and power-sharing between the Tutsi and the Hutu. Among the first victims, were a number of ministers of the coalition government, including its Prime Minister, Agathe Uwilingiyimana (MDR), the president of the Supreme Court and virtually the entire leadership of the parti social démocrate (PSD). The constitutional vacuum thus created cleared the way for the establishment of the self-proclaimed Hutu-power interim government, mainly under the aegis of retired Colonel Théoneste Bagosora.

108. Soldiers of the Rwandan Armed Forces (FAR) executed ten Belgian blue helmets, thereby provoking the withdrawal of the Belgian contingent which formed the core of UNAMIR. On April 21 1994, the UN Security Council decided to reduce the peace-keeping force to 450 troops.

109. In the afternoon of 7 April 1994, RPF troops left their quarters in Kigali and their zone in the north, to resume open war against the Rwandan Armed Forces. Its troops from the north moved south, crossing the demilitarized zone, and entered the city of Kigali on April 12 1994, thus forcing the interim government to flee to Gitarama.

110. On April 12 1994, after public authorities announced over Radio Rwanda that "we need to unite against the enemy , the only enemy and this is the enemy that we have always known...it's the enemy who wants to reinstate the former feudal monarchy", it became clear that the Tutsi were the primary targets. During the week of 14 to 21 April 1994, the killing campaign reached its peak. The President of

the interim government, the Prime Minister and some key ministers travelled to Butare and Gikongoro and that marked the beginning of killings in these regions which had hitherto been peaceful. Thousands of people, sometimes encouraged or directed by local administrative officials, on the promise of safety, gathered unsuspectingly in churches, schools, hospitals and local government buildings. In reality, this was a trap intended to lead to the rapid extermination of a large number of people.

111. The killing of Tutsi which henceforth spared neither women nor children, continued up to 18 July 1994, when the RPF triumphantly entered Kigali. The estimated total number of victims in the conflict varies from 500,000 to 1,000,000 or more.

3. GENOCIDE IN RWANDA IN 1994?

112. As regards the massacres which took place in Rwanda between April and July 1994, as detailed above in the chapter on the historical background to the Rwandan tragedy, the question before this Chamber is whether they constitute genocide. Indeed, it was felt in some quarters52 that the tragic events which took place in Rwanda were only part of the war between the Rwandan Armed Forces (the RAF) and the Rwandan Patriotic Front (RPF). The answer to this question would allow a better understanding of the context within which the crimes with which the accused is charged are alleged to have been committed.

113. According to paragraph 2 of Article 2 of the Statute of the Tribunal, which reflects verbatim the definition of genocide as contained in the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter, "the Convention on Genocide")53, genocide means any of the following acts referred to in said paragraph, committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, namely, *inter alia*: killing members of the group; causing serious bodily or mental harm to members of the group.

114. Even though the number of victims is yet to be known with accuracy, no one can reasonably refute the fact that widespread killings were perpetrated throughout Rwanda in 1994.

115. Indeed, this is confirmed by the many testimonies heard by this Chamber. The testimony of Dr. Zachariah who appeared before this Chamber on 16 and 17 January 1997 is enlightening in this regard. Dr. Zachariah was a physician who at the time of the events was working for a non-governmental organisation, "Médecins sans frontières." In 1994 he was based in Butare and travelled over a good part of Rwanda upto its border with Burundi. He described in great detail the heaps of bodies which he saw everywhere, on the roads, on the footpaths and in rivers and, particularly, the manner in which all these people had been killed. At the church in Butare, at the Gahidi mission, he saw many wounded persons in the hospital who, according to him, were all Tutsi and who, apparently, had sustained wounds inflicted with machetes to the face, the neck, and also to the ankle, at the Achilles' tendon, to prevent them from fleeing. The testimony given by Major-General Dallaire, former Commander of the United Nations Assistance Mission for Rwanda (UNAMIR) at the time of the events alleged in the Indictment, who was called by the defence, is of a similar vein. Major-General Dallaire spoke of troops of the Rwandan Armed Forces and of the Presidential Guard going into houses in Kigali that had been previously identified in order to kill. He also talked about the terrible murders in Kabgayi, very near Gitarama, where the interim Government was based and of the reports he received from observers throughout the country which mentioned killings in Gisenyi, Cyangugu and Kibongo.

116. The British cameraman, Simon Cox, took photographs of bodies in many churches in Remera, Biambi, Shangi, between Cyangugu and Kibuye, and in Bisesero. He mentioned identity cards strewn on the ground, all of which were marked "Tutsi". Consequently, in view of these widespread killings the

victims of which were mainly Tutsi, the Chamber is of the opinion that the first requirement for there be genocide has been met, the killing and causing serious bodily harm to members of a group.

117. The second requirement is that these killings and serious bodily harm, as is the case in this instance, be committed with the intent to destroy, in whole or in part, a particular group targeted as such.

118. In the opinion of the Chamber, there is no doubt that considering their undeniable scale, their systematic nature and their atrociousness, the massacres were aimed at exterminating the group that was targeted. Many facts show that the intention of the perpetrators of these killings was to cause the complete disappearance of the Tutsi. In this connection, Alison Desforges, an expert witness, in her testimony before this Chamber on 25 February 1997, stated as follows: "on the basis of the statements made by certain political leaders, on the basis of songs and slogans popular among the Interahamwe, I believe that these people had the intention of completely wiping out the Tutsi from Rwanda so that-as they said on certain occasions - their children , later on , would not know what a Tutsi looked like, unless they referred to history books". Moreover, this testimony given by Dr. Desforges was confirmed by two prosecution witnesses, witness KK and witness OO, who testified separately before the Tribunal that one Silas Kubwimana had said during a public meeting chaired by the accused himself that all the Tutsi had to be killed so that someday Hutu children would not know what a Tutsi looked like.

119. Furthermore, as mentioned above, Dr. Zachariah also testified that the Achilles' tendons of many wounded persons were cut to prevent them from fleeing. In the opinion of the Chamber, this demonstrates the resolve of the perpetrators of these massacres not to spare any Tutsi. Their plan called for doing whatever was possible to prevent any Tutsi from escaping and, thus, to destroy the whole group. Witness OO further told the Chamber that during the same meeting, a certain Ruvugama, who was then a Member of Parliament, had stated that he would rest only when no single Tutsi is left in Rwanda".

120. Dr. Alison Desforges testified that many Tutsi bodies were often systematically thrown into the Nyabarongo river, a tributary of the Nile. Indeed, this has been corroborated by several images shown to the Chamber throughout the trial. She explained that the underlying intention of this act was to "send the Tutsi back to their place of origin", to "make them return to Abyssinia", in keeping with the allegation that the Tutsi are foreigners in Rwanda, where they are supposed to have settled following their arrival from the Nilotic regions.54

121. Other testimonies heard, especially that of Major-General Dallaire, also show that there was an intention to wipe out the Tutsi group in its entirety, since even newborn babies were not spared. Even pregnant women, including those of Hutu origin, were killed on the grounds that the foetuses in their wombs were fathered by Tutsi men, for in a patrilineal society like Rwanda, the child belongs to the father's group of origin. In this regard, it is worthwhile noting the testimony of witness PP, heard by the Chamber on 11 April 1997, who mentioned a statement made publicly by the accused to the effect that if a Hutu woman were impregnated by a Tutsi man, the Hutu woman had to be found in order "for the pregnancy to be aborted". According to prosecution witnesses KK, PP and OO, the accused expressed this opinion on other occasions in the form of a Rwandese proverb according to which if a snake wraps itself round a calabash, there is nothing that can be done, except to break the calabash' (" Iyo inzoka yiziritse ku gisabo, nta kundi bigenda barakimena)55. In the context of the period in question, this proverb meant that if a Hutu woman married to a Tutsi man was impregnated by him, the foetus had to be destroyed so that the Tutsi child which it would become should not survive. It should be noted in this regard that in Rwandese culture, breaking the "gisabo", which is a big calabash used as a churn was considered taboo. Yet, if a snake wraps itself round a gisabo, obviously, one has no choice but to ignore this taboo in order to kill the snake.

S390

122. In light of the foregoing, it is now appropriate for the Chamber to consider the issue of specific intent that is required for genocide (*mens rea* or *dolus specialis*). In other words, it should be established that the above-mentioned acts were targeted at a particular group as such. In this respect also, many consistent and reliable testimonies , especially those of Major-General Dallaire, Dr. Zachariah, victim V, prosecution witness PP, defence witness DAAX, and particularly that of the accused himself unanimously agree on the fact that it was the Tutsi as members of an ethnic group which they formed in the context of the period56 in question, who were targeted during the massacres57.

123. Two facts, in particular, which suggest that it was indeed the Tutsi who were targeted should be highlighted: Firstly, at the roadblocks which were erected in Kigali immediately after the crash of the President's plane on 6 April 1994 and, later on, in most of the country's localities, members of the Tutsi population were sorted out. Indeed, at these roadblocks which were manned, depending on the situation, either by soldiers, troops of the Presidential Guard and/or militiamen, the systematic checking of identity cards indicating the ethnic group of their holders, allowed the separation of Hutu from Tutsi, with the latter being immediately apprehended and killed, sometimes on the spot. Secondly, the propaganda campaign conducted before and during the tragedy by the audiovisual media, for example, "Radio Television des Milles Collines"(RTLM), or the print media, like the Kangura58 newspaper. These various news media overtly called for the killing of Tutsi, who were considered as the accomplices of the RPF and accused of plotting to take over the power lost during the revolution of 1959. Some articles and cartoons carried in the *Kangura* newspaper, entered in evidence, are unambiguous in this respect. In fact, even exhibit 25A could be added to this lot. Exhibit 25A is a letter from the "GZ" staff headquarters dated 21 September 1992 and signed by Deofratas Nsabimana, Colonel, BEM, to which is annexed a document prepared by a committee of ten officers and which deals with the definition of the term enemy. According to that document, which was intended for the widest possible dissemination, the enemy fell into two categories, namely:" the primary enemy" and the "enemy supporter". The primary enemy was defined as "the extremist Tutsi within the country or abroad who are nostalgic for power and who have NEVER acknowledged and STILL DO NOT acknowledge the realities of the Social Revolution of 1959, and who wish to regain power in RWANDA by all possible means, including the use of weapons". On the other hand, the primary enemy supporter was "anyone who lent support in whatever form to the primary enemy". This document also stated that the primary enemy and their supporters came mostly from social groups comprising, in particular, "Tutsi refugees", "Tutsi within the country", "Hutu dissatisfied with the current regime", "Foreigners married to Tutsi women" and the "Nilotic-hamitic tribes in the region".

124. In the opinion of the Chamber, all this proves that it was indeed a particular group, the Tutsi ethnic group, which was targeted. Clearly, the victims were not chosen as individuals but, indeed, because they belonged to said group; and hence the victims were members of this group selected as such. According to Alison Desforges's testimony, the Tutsi were killed solely on account of having been born Tutsi.

125. Clearly therefore, the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. In any case, the Tutsi children and pregnant women would, naturally, not have been among the fighters.

126. Consequently, the Chamber concludes from all the foregoing that genocide was, indeed, committed in Rwanda in 1994 against the Tutsi as a group. Furthermore, in the opinion of the Chamber, this genocide appears to have been meticulously organized. In fact, Dr. Alison Desforges testifying before the Chamber on 24 May 1997, talked of "centrally organized and supervised massacres". Indeed, some evidence supports this view that the genocide had been planned. First, the existence of lists of Tutsi to be eliminated is corroborated by many testimonies. In this respect, Dr. Zachariah mentioned the case of patients and nurses killed in a hospital because a soldier had a list including their names. There are also

5891

the arms caches in Kigali which Major-General Dallaire mentioned and regarding whose destruction he had sought the UN's authorization in vain. Lastly, there is the training of militiamen by the Rwandan Armed Forces and of course, the psychological preparation of the population to attack the Tutsi, which preparation was masterminded by some news media, with the RTLM at the forefront.

127. Finally, in response to the question posed earlier in this chapter as to whether the tragic events that took place in Rwanda in 1994 occurred solely within the context of the conflict between the RAF and the RPF, the Chamber replies in the negative, since it holds that the genocide did indeed take place against the Tutsi group, alongside the conflict. The execution of this genocide was probably facilitated by the conflict, in the sense that the fighting against the RPF forces was used as a pretext for the propaganda inciting genocide against the Tutsi, by branding RPF fighters and Tutsi civilians together, through dissemination via the media of the idea that every Tutsi was allegedly an accomplice of the Inkotanyi. Very clearly, once the genocide got under way, the crime became one of the stakes in the conflict between the RPF and the RAF. In 1994, General Kagame, speaking on behalf of the RPF, declared that a cease fire could possibly not be implemented until the massacre of civilians by the government forces59 had stopped.

128. In conclusion, it should be stressed that although the genocide against the Tutsi occurred concomitantly with the above-mentioned conflict, it was, evidently, fundamentally different from the conflict. The accused himself stated during his initial appearance before the Chamber, when recounting a conversation he had with one RAF officer and Silas Kubwimana, a leader of the Interahamwe, that the acts perpetrated by the Interahamwe against Tutsi civilians were not considered by the RAF officer to be of a nature to help the government armed forces in the conflict with the RPF60. Note is also taken of the testimony of witness KK which is in the same vein. This witness told the Chamber that while she and the children were taken away, an RAF soldier allegedly told persons who were persecuting her that "instead of going to confront the Inkotanyi at the war front, you are killing children, although children know nothing; they have never done politics". The Chamber's opinion is that the genocide was organized and planned not only by members of the RAF, but also by the political forces who were behind the "Hutu-power", that it was executed essentially by civilians including the armed militia and even ordinary citizens, and above all, that the majority of the Tutsi victims were non-combatants, including thousands of women and children, even foetuses. The fact that the genocide took place while the RAF was in conflict with the RPF, can in no way be considered as an extenuating circumstance for it.

129. This being the case, the Chamber holds that the fact that genocide was indeed committed in Rwanda in 1994 and more particularly in Taba, cannot influence it in its decisions in the present case. Its sole task is to assess the individual criminal responsibility of the accused for the crimes with which he is charged, the burden of proof being on the Prosecutor61. In spite of the irrefutable atrocities of the crimes committed in Rwanda, the judges must examine the facts adduced in a most dispassionate manner, bearing in mind that the accused is presumed innocent Moreover, the seriousness of the charges brought against the accused makes it all the more necessary to examine scrupulously and meticulously all the inculpatory and exonerating evidence, in the context of a fair trial and in full resect of all the rights of the Accused.

4. EVIDENTIARY MATTERS

130. The Chamber will address certain general evidentiary matters of concern which arose in relation to the evidence produced by the parties during this trial. These matters include the assessment of evidence, the impact of trauma on witnesses, questions of interpretation from Kinyarwanda into French and English, and cultural factors which might affect an understanding of the evidence presented.

5392

Assessment of Evidence

131. In its assessment of the evidence, as a general principle, the Chamber has attached probative value to each testimony and each exhibit individually according to its credibility and relevance to the allegations at issue. As commonly provided for in most national criminal proceedings, the Chamber has considered the charges against the accused on the basis of the testimony and exhibits offered by the parties to support or challenge the allegations made in the Indictment. In seeking to establish the truth in its judgment, the Chamber has relied as well on indisputable facts and on other elements relevant to the case, such as constitutive documents pertaining to the establishment and jurisdiction of the Tribunal, even if these were not specifically tendered in evidence by the parties during trial. The Chamber notes that it is not restricted under the Statute of the Tribunal to apply any particular legal system and is not bound by any national rules of evidence. In accordance with Rule 89 of its Rules of Procedure and Evidence, the Chamber has applied the rules of evidence which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of law.

Unus Testis, Nullus Testis

132. The Chamber notes that during trial, only one testimony was presented in support of certain facts alleged in the Indictment; hence the question arises as to the principle found in Civil Law systems: *unus testis, nullus testis* (one witness is no witness) whereby corroboration of evidence is required if it is to be admitted.

133. Without wishing to delve into a debate on the applicability of the rule of corroboration of evidence in this judgment, the Chamber recalls that the proceedings before it are conducted in accordance solely with the Statute of the Tribunal and its Rules and, as provided for by Rule 89(A), it shall not be bound by national rules of evidence. Furthermore, where evidentiary matters are concerned, the Chamber is bound only to the application of the provisions of its Statute and Rules, in particular Rule 89 of the Rules which sets out the general principle of the admissibility of any relevant evidence which has probative value, provided that it is in accordance with the requisites of a fair trial.

134. Rule 96(i) of the Rules alone specifically deals with the issue of corroboration of testimony required by the Chamber. The provisions of this Rule, which apply only to cases of testimony by victims of sexual assault, stipulate that no corroboration shall be required. In the Tadic judgment rendered by the ICTY, the Trial Chamber ruled that this "Sub-rule accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of victims of other crimes, something which had long been denied to victims of sexual assault in common law [which] certainly does not [...] justify any inference that in cases of crimes other than sexual assault, corroboration is required. The proper inference is, in fact, directly to the contrary"62.

135. In view of the above, the Chamber can rule on the basis of a single testimony provided such testimony is, in its opinion, relevant and credible.

136. The Chamber can freely assess the probative value of all relevant evidence. The Chamber had thus determined that in accordance with Rule 89, any relevant evidence having probative value may be admitted into evidence, provided that it is being in accordance with the requisites of a fair trial. The Chamber finds that hearsay evidence is not inadmissible *per se* and has considered such evidence, with caution, in accordance with Rule 89.

Witness statements

5393

137. During the trial, the Prosecutor and the Defence relied on pre-trial statements from witnesses for the purpose of cross-examination. The Chamber ordered that any such statements to which reference was made in the proceedings be submitted in evidence for consideration63. In many instances, the Defence has alleged inconsistencies and contradictions between the pre-trial statements of witnesses and their evidence at trial. The Chamber notes that these pre-trial statements were composed following interviews with witnesses by investigators of the Office of the Prosecution. These interviews were mostly conducted in Kinyarwanda, and the Chamber did not have access to transcripts of the interviews, but only translations thereof. It was therefore unable to consider the nature and form of the questions put to the witnesses, or the accuracy of interpretation at the time. The Chamber has considered inconsistencies and contradictions between these statements and testimony at trial with caution for these reasons, and in the light of the time lapse between the statements and the presentation of evidence at trial, the difficulties of recollecting precise details several years after the occurrence of the events, the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements. Moreover, the statements were not made under solemn declaration and were not taken by judicial officers. In the circumstances, the probative value attached to the statements is, in the Chamber's view, considerably less than direct sworn testimony before the Chamber, the truth of which has been subjected to the test of cross-examination.

False testimony

138. Rule 91 of the Rules (False Testimony under Solemn Declaration) provides for, *inter alia*, the investigation and possible prosecution of a witness whom the Chamber believes may have knowingly and wilfully given false testimony. As held by the Chamber in its decision rendered thereon in relation to a Defence motion requesting the Chamber to direct the Prosecutor to investigate the alleged false testimony by a witness 64, Rule 91(B) provides:

> *Either* the Chamber establishes *proprio motu* that strong grounds exist for believing that a witness has knowingly and wilfully given false testimony, and thence directs the Prosecutor to investigate the matter with a view to the preparation and submission of an Indictment for false testimony;
>
> *Or*, at the request of a party, it invites the Prosecutor to investigate the matter with a view to the preparation and submission of an Indictment for false testimony; and in this case, the onus is on the party to convince the Chamber that there exist strong grounds for believing that a witness has knowingly and wilfully given false testimony;

139. Further, the Chamber held in the decision, that the onus is on the party pleading a case of false testimony to prove the falsehoods of the witness statements, that they were made with harmful intent, or at least that they were made by a witness who was fully aware that they were false, and their possible bearing upon the judge's decisions. The Chamber found that for the Defence to raise only doubts as to the credibility of the statements made by the witness was not sufficient to establish strong grounds for believing that the witness may have knowingly and wilfully given false testimony, and that the assessment of credibility pertains to the rendering of the final judgment.

140. The majority of the witnesses who appeared before the Chamber were eye-witnesses, whose testimonies were based on events they had seen or heard in relation to the acts alleged in the Indictment. The Chamber noted that during the trial, for a number of these witnesses, there appeared to be contradictions or inaccuracies between, on the one hand, the content of their testimonies under solemn declaration to the Chamber, and on the other, their earlier statements to the Prosecutor and the Defence. This alone is not a ground for believing that the witnesses gave false testimony. Indeed, an often levied criticism of testimony is its fallibility. Since testimony is based mainly on memory and sight, two human

5394

characteristics which often deceive the individual, this criticism is to be expected. Hence, testim[illegible] rarely exact at to the events experienced. To deduce from any resultant contradictions and inacc[illegible] that there was false testimony, would be akin to criminalising frailties in human perceptions. Moreover, inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony. Moreover, false testimony requires the necessary *mens rea* and not a mere wrongful statement.

141. Were the Chamber to have strong grounds for believing that the witness had knowingly and wilfully given false testimony, with the intent to impede the due process of Justice, then Rule 91 of the Rules would be applied accordingly.

The impact of trauma on the testimony of witnesses

142. Many of the eye-witnesses who testified before the Chamber in this case have seen atrocities committed against their family members or close friends, and/or have themselves been the victims of such atrocities. The possible traumatism of these witnesses caused by their painful experience of violence during the conflict in Rwanda is a matter of particular concern to the Chamber. The recounting of this traumatic experience is likely to evoke memories of the fear and the pain once inflicted on the witness and thereby affect his or her ability fully or adequately to recount the sequence of events in a judicial context. The Chamber has considered the testimony of those witnesses in this light.

143. The Chamber is unable to exclude the possibility that some or all of these witnesses did actually suffer from post traumatic or extreme stress disorders, and has therefore carefully perused the testimonies of these witnesses, those of the Prosecutor as well as those of the Defence, on the assumption that this might possibly have been the case. Inconsistencies or imprecisions in the testimonies, accordingly, have been assessed in the light of this assumption, personal background and the atrocities they have experienced or have been subjected to. Much as the Witness Protection Programme and the orders for protection of witnesses issued by the Chamber during this trial were designed primarily to reduce the danger for witnesses in coming to the Tribunal to testify, these measures may also have provided for some alleviation of stress. Reducing the physical danger to the witnesses in Rwanda, and ordering the non-disclosure of their identities to the media and the public, as well as accommodating them during their presence at the seat of the Tribunal in safe houses where medical and psychiatric assistance was available, are, in any event, measures conducive to easing the level of stress.

144. The Chamber has thanked each witness for his or her testimony during the trial proceedings and wishes to acknowledge in its judgment the strength and courage of survivors who have recounted their traumatic experiences, often reliving extremely painful emotions. Their testimony has been invaluable to the Chamber in its pursuit of truth regarding the events which took place in the commune of Taba in 1994.

Interpretation from Kinyarwanda into French and English

145. The majority of the witnesses in this trial testified in Kinyarwanda. The Chamber notes that the interpretation of oral testimony of witnesses from Kinyarwanda into one of the official languages of the Tribunal has been a particularly great challenge due to the fact that the syntax and everyday modes of expression in the Kinyarwanda language are complex and difficult to translate into French or English. These difficulties affected the pre-trial interviews carried out by investigators in the field, as well as the

5395

interpretation of examination and cross-examination during proceedings in Court. Most of the testimony of witnesses at trial was given in the language, Kinyarwanda, first interpreted into French, and then from French into English. This process entailed obvious risks of misunderstandings in the English version of words spoken in the source language by the witness in Kinyarwanda. For this reason, in cases where the transcripts differ in English and French, the Chamber has relied on the French transcript for accuracy. In some cases, where the words spoken are central to the factual and legal findings of the Chamber, the words have been reproduced in this judgment in the original Kinyarwanda.

146. The words Inkotanyi, Inyenzi, Icyitso/Ibyitso, Interahamwe and the expressions used in Kinyarwanda for "rape", because of their significance to the findings of the Chamber, are considered particularly, as follows: The Chamber has relied substantially on the testimony of Dr. Mathias Ruzindana, an expert witness on linguistics, for its understanding of these terms. The Chamber notes that Dr. Ruzindana stated in his testimony that in ascertaining the specific meaning of certain words and expressions in Kinyarwanda, it is necessary to place them contextually, both in time and in space.

147. The origin of the term Inkotanyi can be traced back to the 19th Century, at which time it was the name of one of the warrior groups of a Rwandese king, King Rwabugiris. There is no evidence to suggest that this warrior group was monoethnic. Dr. Ruzindana suggested that the name Inkotanyi was borne with pride by these warriors. At the start of the war between the RPF and the Government of Rwanda, the RPF army wing was called Inkotanyi. As such, it should be assumed that the basic meaning of the term Inkotanyi is the RPF army. Based on the analysis of a number of Rwandan newspapers and RTLM cassettes, as well as his personal experiences during the conflict, Dr. Ruzindana believed the term Inkotanyi had a number of extended meanings, including RPF sympathizer or supporter, and, in some instances, it even seemed to make reference to Tutsi as an ethnic group.

148. The basic everyday meaning of the term *Inyenzi* is cockroach. Other meanings of the term stem from the history of Rwanda. During the revolution' of 1959, refugees, mainly Tutsi, fled the country. Throughout the 1960's incursions on Rwandan soil were carried out by some of these refugees, who would enter and leave the country under the cover of the night, only rarely to be seen in the morning. This activity was likened to that of cockroaches, which are rarely seen during the day but often discovered at night, and accordingly these attackers were called Inyenzi. A similar comparison, between insurgent Tutsi refugees and cockroaches, was made when the RPF army carried out a number of attacks in Rwanda in 1990. It was thought that the Inyenzi of 1990 were the children of the Inyenzi of the 1960's. "The cockroach begets another cockroach and not a butterfly" was an article heading in the magazine Kangura. Another article in this publication made the reference even more explicitly, saying "The war between us and the Inyenzi-Inkotanyi has lasted for too long. It is time we told the truth. The present war is a war between Hutu and Tutsi. It has not started today, it is an old one."65

149. Unlike the term Inkotanyi, the term Inyenzi had a negative, even abusive, connotation. The radio station RTLM broadcast on 20 April 1994, "They are a gang of Tutsi extremists who called themselves Inkotanyi while they are no more than Inyenzi," and in a speech on 22 November 1992, Léon Mugesera said "Don't call them Inkotanyi, they are true Inyenzi". The term Inyenzi was widely used by extremist media, by those who had refused to accept the Arusha Peace Accords and those who wanted to exterminate the Tutsi, in whole or in part. It was often contained in RTLM broadcasts, a radio which, in the opinion of Dr. Ruzindana, was anti-Tutsi in its broadcastings.66

150. The term Icyitso, or Ibyitso in the plural, has been in usage in Kinyarwanda for quite some time. It is a common term which means accomplice. In ancient Rwandan history, a king wanting to launch an attack on neighbouring countries would send spies to the targeted country. These spies would recruit collaborators who would be known as Ibyitso. In Rwanda, the term has a negative connotation. Thus it should not be seen as being synonymous with supporter', a term which can be viewed both positively

S396

and negatively, but perhaps rather "collaborator". The term evolved, as early as 1991, to include not only collaborators, but all Tutsi. The editor of Kangura stated in 1993, "When the war started, Hutu ta openly about the Tutsi, or they referred to them, indirectly, calling them Ibyitso"67.

151. The term Interahamwe derives from two words put together to make a noun, intera and hamwe. Intera comes from the verb gutera' which can mean both to attack and to work. It was documented that in 1994, besides meaning to work or to attack, the word gutera could also mean to kill. Hamwe means together. Therefore Interahamwe could mean to attack or to work together, and, depending on the context, to kill together. The Interahamwe were the youth movement of the MRND. During the war, the term also covered anyone who had anti-Tutsi tendencies, irrespective of their political background, and who collaborated with the MRND youth.

152. The terms gusambanya, kurungora, kuryamana and gufata ku ngufu were used interchangeably by witnesses and translated by the interpreters as "rape". The Chamber has consulted its official trial interpreters to gain a precise understanding of these words and how they have been interpreted. The word gusambanya means "to bring (a person) to commit adultery or fornication". The word kurungora means "to have sexual intercourse with a woman". This term is used regardless of whether the woman is married or not, and regardless of whether she gives consent or not. The word kuryamana means "to share a bed" or "to have sexual intercourse", depending on the context. It seems similar to the colloquial usage in English and in French of the term "to sleep with". The term gufata ku ngufu means "to take (anything) by force" and also "to rape".

153. The context in which these terms are used is critical to an understanding of their meaning and their translation. The dictionary entry for kurungora 68, the most generic term for sexual intercourse, includes as an example of usage of this word, the sentence "Mukantwali yahuye n'abasore batatu baramwambura baramurongora," for which the dictionary translation into French is "Mukantwali a recontré trois jeunes gens qui l'ont dévalisée et violée" (in English "Mukantwali met three young men who robbed her of her belongings and raped her.")

154. The Chamber notes that the accused objected on one occasion to the translation of the words stated by Witness JJ ("Batangira kujya babafata ku ngufu babakoresha ibyo bashaka") as "They began to rape them." It was clarified that the witness said "they had their way with them." The Chamber notes that in this instance the term used, babafata ku ngufu, is the term which of the four terms identified in the paragraph above is the term most closely connected to the concept of force. Having reviewed in detail with the official trial interpreters the references to "rape" in the transcript, the Chamber is satisfied that the Kinyarwanda expressions have been accurately translated.

Cultural Factors Affecting the Evidence of Witnesses

155. Dr. Mathias Ruzindana noted that most Rwandans live in an oral tradition in which facts are reported as they are perceived by the witness, often irrespective of whether the facts were personally witnessed or recounted by someone else. Since not many people are literate or own a radio, much of the information disseminated by the press in 1994 was transmitted to a larger number of secondary listeners by word of mouth, which inevitably carries the hazard of distortion of the information each time it is passed on to a new listener. Similarly, with regard to events in Taba, the Chamber noted that on examination it was at times clarified that evidence which had been reported as an eyewitness account was in fact a second-hand account of what was witnessed. Dr. Ruzindana explained this as a common phenomenon within the culture, but also confirmed that the Rwandan community was like any other and that a clear distinction could be articulated by the witnesses between what they had heard and what they had seen. The Chamber made a consistent effort to ensure that this distinction was drawn throughout the trial proceedings.

5397

156. According to the testimony of Dr. Ruzindana, it is a particular feature of the Rwandan culture that people are not always direct in answering questions, especially if the question is delicate. In such cases the answers given will very often have to be "decoded" in order to be understood correctly. This interpretation will rely on the context, the particular speech community, the identity of and the relation between the orator and the listener, and the subject matter of the question. The Chamber noted this in the proceedings. For example, many witnesses when asked the ordinary meaning of the term Inyenzi were reluctant or unwilling to state that the word meant cockroach, although it became clear to the Chamber during the course of the proceedings that any Rwandan would know the ordinary meaning of the word. Similar cultural constraints were evident in their difficulty to be specific as to dates, times, distances and locations. The Chamber also noted the inexperience of witnesses with maps, film and graphic representations of localities, in the light of this understanding, the Chamber did not draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions.

5. FACTUAL FINDINGS

5.1. General allegations (Paragraphs 5-11 of the Indictment)

Events Alleged

157. Paragraphs 5 to 11 of the indictment appear under the heading, "General Allegations". These general allegations are, for the most part, mixed questions of fact and law relating to the general elements of genocide, crimes against humanity, and violations of international humanitarian law, the crimes set forth in Articles 2, 3 and 4 of the Statute of the Tribunal, under which the Accused is charged. Several witnesses testified before the Chamber with regard to historical background and the general situation in Rwanda prior to and during 1994. The Chamber has substantially relied on the testimonies of Dr. Ronie Zachariah, Ms. Lindsey Hilson, Mr. Simon Cox, Dr. Alison Desforges, who testified as an expert witness, and General Romeo Dallaire, the force commander of UNAMIR at the time of these events as well as United Nations reports of which it takes judicial notice, for its general findings on the factual allegations set forth in paragraphs 5-11 of the indictment.

158. Dr. Zachariah, the Chief Medical and Field Coordinator for Medecins sans frontieres ("MSF"), based in the Butare region, testified that he witnessed widespread massacres of civilians in Rwanda from 13 to 24 April 1994. He stated that he travelled from Butare to Gitarama on 13 April 1994 in order to provide medical supplies to a hospital in Gitarama which had received 40 to 50 injured people. From 25 kilometres outside Gitarama, Dr. Zachariah said he and his team began to see refugees on the road, who reported the killings of civilians at roadblocks. At one of these barriers, Dr. Zachariah stated that his driver was treated aggressively by a guard manning the roadblock, because the driver was Tutsi and the Tutsi were accused of helping the RPF. Dr. Zachariah testified that it soon became apparent upon arrival at Gitarama Hospital that Tutsi civilians were being targeted for attack on a massive scale. Subsequently, Dr. Zachariah witnessed attacks on civilian populations, and killings of civilians. He recounted visiting Kibeho Church on 16 April 1994, where two to four thousand Tutsi civilians were apparently killed, and Butare on 17 April 1994, where a Burundian Tutsi was apparently beaten to death at a checkpoint, and where his purchase officer reported seeing the bodies of 5-10 dead civilians at every checkpoint on the road from Kigali. These checkpoints were apparently manned by well-armed, drunken soldiers and civilians. On the road from Butare to Burundi on 19 April 1994, Dr. Zachariah sated that saw civilians being massacred in villages throughout the countryside and at roadblocks. In his words:

> "All the way through we could see on the [...] hillside, where there were communities, people [...] being pulled out by people with machetes, and we could see piles of bodies. In fact the entire landscape was becoming spotted with corpses, with bodies, all the way from

5398

there until almost Burundi's border".

(Hearing of 16 January 1997, pp 98-99)

159. At the Rwanda-Burundi border, on the same day, Dr. Zachariah testified that he saw a group of 60 to 80 civilians fleeing towards the Burundian border, from men armed with machetes. He stated that most of these civilians were hacked to death before they reached the border. Returning from the Burundian border, on 21 April 1994, Dr Zachariah stated that he had spoken to eye-witnesses who had informed him of the killings of approximately 40 Tutsi MSF personnel, in the Saga camps in Butare. He stated that his driver's entire family had been killed on the outskirts of Butare by *Interahamwe* and he had been informed of these killings by his driver who had managed to escape death. Dr. Zachariah testified that he had witnessed, on 22 April 1994, the aftermath of the massacre of the family of a moderate Hutu, Mr. Souphene, the sub-Prefect of Butare, by the Presidential Guard, and, on the same day, the killings of children in the Hotel Pascal in Butare and the executions of tens of Tutsi patients and nurses in Butare Hospital, including a Hutu nurse who was pregnant by a Tutsi man and whose child would therefore be Tutsi. Dr. Zachariah stated that he then decided to evacuate his team from Rwanda and he arrived at the Burundian border on 24 April 1994. On the way to the border and at the border, he stated that he had crossed streams and rivers in which the mutilated corpses of men, women and children floated by at an estimated rate of five bodies every minute. Dr. Zachariah stated under cross-examination that in his opinion the attacks were both "organised and systematic".

160. Lindsey Hilson, a journalist, testified that she was in Kigali from 7 February 1994 to mid-April 1994. Following the aeroplane crash of 6 April 1994 in which the Presidents of Rwanda and Burundi were killed, she said she heard from others and saw for herself the ensuing killings of Tutsi in the capital. On the third day after the aeroplane crash, she toured Kigali with aid workers and saw victims suffering from machete and gunshot wounds. In Kigali central hospital, where she described the situation as "absolutely terrible", wounded men, women and children of all ages were packed into the wards, and hospital gutters were "running red with blood". At the morgue she saw "a big pile like a mountain of bodies outside and these were bodies with slash wounds, with heads smashed in, many of them naked, men and women". She estimated that the pile outside the morgue contained about five hundred bodies, with more bodies being brought in all the time by pickup trucks. She stated that she also saw teams of convicts around Kigali collecting bodies in the backs of trucks for mass burial, as well as groups of armed men roaming the city with machetes, clubs and sticks.

161. Simon Cox, a cameraman and photographer, testified that he was on an assignment in Rwanda during the time of the events set forth in the indictment. He said he entered Rwanda from Uganda, arriving in the border town of Mulindi, in the third week of April 1994. Thence he headed south with an RPF escort and found evidence of massacres of civilian men, women and children, whom it appeared from their identity cards were mostly Tutsi, in church compounds. En route to Rusumo, in the south-east of the country, he visited hospitals where Tutsi civilians suffering from machete wounds were being treated, some of whom he interviewed. At the Tanzanian border, near Rusumo, by the Kagera river which flows towards Lake Victoria, Mr. Cox saw and filmed corpses floating by at the rate of several corpses per minute. Later, at the beginning of May, he was in Kigali and saw more bodies of dead civilians on the roads. The Chamber viewed film footage taken by Mr. Cox.

162. On a second trip, in June 1994, Mr. Cox visited the western part of Rwanda, arriving in Cyangugu from Zaire (now the Democratic Republic of Congo) and travelling north towards Kibuye. On that journey, he visited orphanages populated by Tutsi children whose parents had been massacred or disappeared. He visited a church in Shangi where a Priest described how the whole of his congregation who had been Tutsi had been hiding inside the church, because they had heard disturbances, and they were eventually all killed by large armed gangs of people, some of whom were equipped with hand

S399

grenades. The church had previously survived five repeated attacks. Mr. Cox himself examined the church and outbuildings and found graves, much blood and other evidence of killings. On the road to Kibuye, he saw further evidence of freshly dug mass graves in churchyards. Later, in the hills of Bisesero, he saw some 800 Tutsi civilians "in a desperate, desperate state", many apparently starving and with severe machete and bullet wounds, and with a great many corpses strewn all over the hills.

163. The testimony of an expert witness, Alison Desforges, which has been referred to and summarised above in the "Context of the conflict" section, also indicates that Tutsi and so-called moderate Hutu civilians were targeted for attacks on a massive scale in Rwanda at the time of the events which are the subject of this indictment.

164. In addition, the Chamber heard the testimony of General Romeo Dallaire, who was the force commander of UNAMIR in April 1994. General Dallaire described before the Chamber the massacres of civilian Tutsi which took place in Rwanda in 1994. He also testified in relation to the armed conflict which took place between the RPF and the FAR at the same time as the massacres. This conflict appeared to be a civil war between two well-organised armies. In this context, General Dallaire referred to the FAR and the RPF as "two armies", "two belligerents" or "two sides to the conflict." He noted that the mandate of the UNAMIR was to assist these two parties in implementing the Arusha Peace Accords which were signed on 4 October 1993. Subsequently, other military agreements were signed between the parties, including cease-fire agreements and agreements for arms-free zones. General Dallaire testified that the FAR was under the control of the government of Rwanda and that the RPF was under the control of Paul Kagame. The FAR and RPF occupied different sides of a clearly demarcated demilitarised zone, and according to General Dallaire, the RPF comprised 12,000-13,000 soldiers deployed in three groups: two groups for reaction in the western flank of the demilitarised zone and another group in the eastern flank with six independent battalions. The RPF headquartered in Mulundi, and had a lightweight battalion stationed in Kigali. General Dallaire testified that the RPF troops were disciplined and possessed a well-structured leadership which was answerable to authority and which respected instruction.

165. In addition to the testimony of these witnesses, the Chamber takes judicial notice of the following United Nations reports, which extensively document the massacres which took place in Rwanda in 1994: notably, the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994)*, U.N. Doc. S/1994/1405 (1994); *Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, Bacre Waly Ndiaye, on his mission to Rwanda from 8-17 April 1993*, U.N. Doc. E/CN.4/1994/7/Add.1 (1993); *Special Report of the Secretary-General on UNAMIR, containing a summary of the developing crisis in Rwanda and proposing three options for the role of the United Nations in Rwanda,* S/1994/470, 20 April 1994; *Report of the United Nations High Commissioner for Human Rights, Mr. José Ayala Lasso, on his mission to Rwanda 11-12 May 1994,* U.N. Doc. E/CN.4/S-3/3 (1994). See also, generally, the collection of United Nations documents in *The United Nations and Rwanda, 1993-1996,* The United Nations Blue Books Series, Volume X, Department of Public Information, United Nations, New York.

166. The Chamber notes that witnesses from Taba also attested to the mass killings which took place around the country.

Factual Findings

167. Paragraph 5 of the indictment alleges, "Unless otherwise specified, all acts and omissions set forth in this indictment took place between 1 January 1994 and 31 December 1994, in the commune of Taba, prefecture of Gitarama, territory of Rwanda". This allegation, which supports the legal finding that the Chamber has territorial and temporal jurisdiction over the crimes charged, is not contested, and the

5400

Chamber finds that it has been established by the evidence presented.

168. Paragraph 6 of the indictment alleges that the acts set forth in each paragraph of the indictment charging genocide, i.e. paragraphs 12-24, "were committed with intent to destroy, in whole or in part, a national, ethnic or racial group". That acts of violence committed in Rwanda during this time were committed with the intent to destroy the Tutsi population is evident not only from the testimony cited above of Dr. Zachariah, Ms. Hilson, Mr. Cox, Dr. Desforges and General Dallaire, but also from the witnesses who testified with regard to events in the commune of Taba. Witness JJ testified that she was driven away from her home, which was destroyed after a man came to the hill near where she lived and said that the bourgmestre had sent him so that no Tutsi would remain on the hill that night. At the meeting which was held on the morning of 19 April 1994, at which the Accused spoke, Witness OO testified that it was said by another speaker that all the Tutsi should be killed so that some day a child could be born who would have to ask what a Tutsi had looked like. She also quoted this speaker as saying "I will have peace when there will be no longer a Tutsi in Rwanda.". Witness V testified that Tutsi were thrown into the Nyabarongo river, which flows towards the Nile, and told to "meet their parents in Abyssinia", signifying that the Tutsi came from Abyssinia (Ethiopia) and that they "should go back to where they came from" (hearing of 24 January 1997, p.7)

169. In light of this evidence, the Chamber finds beyond a reasonable doubt that the acts of violence which took place in Rwanda during this time were committed with the intent to destroy the Tutsi population, and that the acts of violence which took place in Taba during this time were a part of this effort.

170. Paragraph 7 of the indictment alleges that the victims in each paragraph charging genocide were members of a national, ethnic, racial or religious group. The Chamber notes that the Tutsi population does not have its own language or a distinct culture from the rest of the Rwandan population. However, the Chamber finds that there are a number of objective indicators of the group as a group with a distinct identity. Every Rwandan citizen was required before 1994 to carry an identity card which included an entry for ethnic group (ubwoko in Kinyarawanda and ethnie in French), the ethnic group being Hutu, Tutsi or Twa. The Rwandan Constitution and laws in force in 1994 also identified Rwandans by reference to their ethnic group. Article 16 of the Constitution of the Rwandan Republic, of 10 June 1991, reads, "All citizens are equal before the law, without any discrimination, notably, on grounds of race, colour, origin, ethnicity, clan, sex, opinion, religion or social position". Article 57 of the Civil Code of 1988 provided that a person would be identified by "sex, ethnic group, name, residence and domicile." Article 118 of the Civil Code provided that birth certificates would include "the year, month, date and place of birth, the sex, the ethnic group, the first and last name of the infant." The Arusha Accords of 4 August 1993 in fact provided for the suppression of the mention of ethnicity on official documents (see Article 16 of the Protocol on diverse questions and final dispositions).

171. Moreover, customary rules existed in Rwanda governing the determination of ethnic group, which followed patrilineal lines of heredity. The identification of persons as belonging to the group of Hutu or Tutsi (or Twa) had thus become embedded in Rwandan culture. The Rwandan witnesses who testified before the Chamber identified themselves by ethnic group, and generally knew the ethnic group to which their friends and neighbours belonged. Moreover, the Tutsi were conceived of as an ethnic group by those who targeted them for killing.

172. As the expert witness, Alison Desforges, summarised:

> "The primary criterion for [defining] an ethnic group is the sense of belonging to that ethnic group. It is a sense which can shift over time. In other words, the group, the definition of the group to which one feels allied may change over time. But, if you fix any given moment in

S401

time, and you say, how does this population divide itself, then you will see which ethnic groups are in existence in the minds of the participants at that time. The Rwandans currently, and for the last generation at least, have defined themselves in terms of these three ethnic groups. In addition reality is an interplay between the actual conditions and peoples' subjective perception of those conditions. In Rwanda, the reality was shaped by the colonial experience which imposed a categorisation which was probably more fixed, and not completely appropriate to the scene. But, the Belgians did impose this classification in the early 1930's when they required the population to be registered according to ethnic group. The categorisation imposed at that time is what people of the current generation have grown up with. They have always thought in terms of these categories, even if they did not, in their daily lives have to take cognizance of that. This practice was continued after independence by the First Republic and the Second Republic in Rwanda to such an extent that this division into three ethnic groups became an absolute reality".

173. Paragraph 8 of the indictment alleges that the acts set forth in each paragraph of the indictment charging crimes against humanity, i.e. paragraphs 12-24, "were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic or racial grounds". As set forth in the evidence, the scale of the attack was extraordinary. Defence counsel called the events which took place in Rwanda in 1994 "the greatest human tragedy" at the end of this century. Around the country, a massive number of killings took place within a very short time frame. Tutsi were clearly the target of the attack - at roadblocks, in shelters, and in their own homes. Hutu sympathetic to or supportive of Tutsi were also massacred. That the attack was systematic is evidenced by the unusually large shipments of machetes into the country shortly before it occurred. It is also evidenced by the structured manner in which the attack took place. Teachers and intellectuals were targeted first, in Taba as well as the rest of the country. Through the media and other propaganda, Hutu were encouraged systematically to attack Tutsi. For these reasons, the Chamber finds beyond a reasonable doubt that a widespread and systematic attack began in April 1994 in Rwanda, targeting the civilian Tutsi population and that the acts referred to in paragraphs 12-24 of the indictment were acts which formed part of this widespread and systematic attack.

174. Paragraph 9 of the indictment states, "At all times relevant to this indictment, a state of internal armed conflict existed in Rwanda". The Chamber notes the testimony of General Dallaire, a witness called by the Defence, that the FAR was and the RPF were "two armies" engaged in hostilities, that the RPF had soldiers systematically deployed under a command structure headed by Paul Kagame, and that FAR and RPF forces occupied different sides of a clearly demarcated demilitarised zone. Based on the evidence presented, the Chamber finds beyond a reasonable doubt that armed conflict existed in Rwanda during the events alleged in the indictment, and that the RPF was an organised armed group, under responsible command, which exercised control over territory in Rwanda and was able to carry out sustained and concerted military operations.

175. Paragraph 10 of the indictment reads, "The victims referred to in this indictment were, at all relevant times, persons not taking an active part in the hostilities". The victims referred to in the indictment, several of whom testified before the Chamber, were farmers, teachers and refugees. The Chamber notes that the Defence did not challenge the civilian status of the victims by making any submissions or leading any evidence connecting any of the victims to the RPF or the hostilities that prevailed in 1994.Since the allegations in Paragraphs 13, 17 and those pertaining to Juvenal Rukundakuvuga and Emmanuel Sempabwa in paragraph 15 of the indictment have not been proved beyond a reasonable doubt, the Chamber finds that it is futile to determine whether these alleged victims were in fact civilians, taking no active part in the hostilities that prevailed in 1994. In light of the evidence presented by the Prosecutor, the Chamber finds beyond a reasonable doubt that all the other victims referred to in the indictment were civilians, not taking any active part in the hostilities that

5402

prevailed in 1994.

176. Paragraph 10A was added to the indictment when it was amended to include charges of sexual violence, set forth in Paragraphs 12A and 12B of the indictment. It is not an allegation of fact, rather it appears to be a definition of sexual violence proposed by the Prosecutor.

177. Paragraph 11 of the indictment sets forth the definition of individual criminal responsibility in Article 6(1) of the Statute of the Tribunal and alleges that the Accused is individually responsible for the crimes alleged in the indictment. The Chamber does not consider this to be a factual allegation but rather a matter of legal issue, which is addressed in the legal findings on each count. The Chamber notes that no general allegation has been made by the Prosecution in connection with Counts 13, 14 and 15, under which the Accused is charged with individual criminal responsibility under Article 6(3), as well as Article 6(1) of the Tribunal's Statute.

5.2 Killings (Paragraphs 12, 13, 18, 19 & 20 of the Indictment)

5.2.1. Paragraph 12 of the Indictment

178. The Chamber now considers paragraph 12 of the Indictment, which alleges the responsibility of the Accused, his knowledge of the killings which took place in Taba between 7 April and the end of June 1994, and his failure to attempt to prevent these killings or to call for assistance from regional or national authorities.

179. Paragraph 12 of the Indictment reads as follows:

> 12. As bourgmestre, Jean Paul AKAYESU was responsible for maintaining law and public order in his commune. At least 2000 Tutsi were killed in Taba between April 7 and the end of June, 1994, while he was still in power. The killings in Taba were openly committed and so widespread that, as bourgmestre, Jean Paul AKAYESU must have known about them. Although he had the authority and responsibility to do so, Jean Paul AKAYESU never attempted to prevent the killing of Tutsi in the commune in any way or called for assistance from regional or national authorities to quell the violence.

180. Many witnesses testified regarding the responsibilities of the bourgmestre. Witness DZZ, a former police officer, testified that as bourgmestre, the Accused was responsible for maintaining law and public order in the commune. Witness R, a former bourgmestre, confirmed this testimony, as did Witness V and expert witness Alison DesForges. The responsibilities of the bourgmestre are set forth in Rwandese law, which provides in Article 108 of the Law on the Organization of the Commune that the brigadier has command of the communal police, under the authority of the bourgmestre. Moreover, according to the testimony of witness NN and others, the accused's authority over the communal police continued, and he continued to issue them orders, throughout the period in question. Many witnesses testified as to their perception of the authority of the bourgmestre. Witness K and Witness NN both stated that as bourgmestre, the Accused was the leader of the commune, and Witness S, Witness V and Ephrem Karangwa, the current bourgmestre of Taba, all testified that the people of the commune respected and followed every order of the Accused, as bourgmestre. The bourgmestre was the most important person in the Commune and its "parent" according to Ephrem Karangwa. He was "paramount for the life of the whole commune" and the representative of the executive power in the commune, according to Witness R, himself a former bourgmestre The Accused himself acknowledged that he was responsible for the maintenance of law and order in the commune. Accordingly, the Chamber finds that this proposition has been established.

181. With regard to the allegation that at least 2000 Tutsi were killed in Taba from 7 April to the end of June 1994, the Chamber notes that while many witnesses testified to widespread killings in Taba, few witnesses were able to estimate numbers of people killed. Ephrem Karangwa, the present bourgmestre of Taba, testified that the population of Taba has decreased by 7,000 persons since April 1994, and he described mass graves in each sector of the commune. While some part of the population decrease may be attributed to refugees leaving the commune, it is clear from the testimony of many witnesses that a substantial number of people were killed in Taba. The number 2000 has not been contested by the Defence, and it seems to the Chamber, based on the evidence of killing and mass graves, a modest estimate of the number of people killed in Taba during this period. The testimony also uniformly establishes that virtually all of these people were Tutsi. Accordingly, the Chamber finds that it has been established beyond a reasonable doubt that at least 2000 Tutsi were killed in Taba from 7 April to the end of June 1994. It has also been established that the accused remained bourgmestre throughout this period.

182. The Indictment alleges that the killings in Taba were openly committed and so widespread that the Accused must have known about them. A number of witnesses, including Witness PP and Witness V, testified that they informed the Accused of the killings which were taking place in Taba. Others, such as Witness NN, testified that the Accused was present at the bureau communal and elsewhere when killings took place, and that he witnessed these killings. Others, including Witness KK, Witness NN, Witness G, Witness W, Witness J, Witness C, Witness JJ and Witness V, have testified that the Accused supervised and actively participated in the killings. The Accused himself acknowledged that he knew such killings were taking place. He testified that he was told that there were killings everywhere in Taba, and that it was the Tutsi who were being killed. He stated that on 19 April 1994, killings spread to most of the commune of Taba. The issue is not contested, and it has been established that the Accused knew that killings were taking place and were widespread in Taba during the period in question.

183. The final allegation of paragraph 12 is that although he had the authority and responsibility to do so, Jean Paul Akayesu never attempted to prevent the killing of Tutsi in the commune in any way or called for assistance from regional or national authorities to quell the violence. The Accused contends that he did not have the power necessary to prevent the killings from taking place. The Chamber notes that the issue to be addressed is whether he ever attempted to do so. In the light of the evidence, the Chamber considers that it is necessary to distinguish between the period before 18 April 1994, when the key meeting between members of the interim government and the bourgmestres took place in Murambi, in Gitarama, and the period after 18 April 1994. Indeed, on the Prosecution's own case, a marked change in the accused's personality and behaviour took place after 18 April 1994.

184. There is a substantial amount of evidence establishing that before 18 April 1994 the Accused did attempt to prevent violence from taking place in the commune of Taba. Many witnesses testified to the efforts of the Accused to maintain peace in the commune and that he opposed by force the Interahamwe's attempted incursions into the commune to ensure that the killings which had started in Kigali on 7 April 1994 did not spread to Taba. Witness W testified that on the order of the Accused to the population that they must resist these incursions, members of the Interahamwe were killed. Witness K testified that Taba commune was calm during the period when Akayesu wanted that there be calm. She said he would gather the population in a meeting and tell them that they had to be against the acts of violence in the commune. Witness A testified that when the Interahamwe tried to enter the commune of Taba, the bourgmestre did everything to fight against them, and called on the residents to go to the borders of the commune to chase them away. The Accused testified that he intervened when refugees from Kigali were being shot at by the Interahamwe. The police returned fire and three Interahamwe were killed. The Accused testified that he confiscated their weapons and their vehicle.

185. The Accused testified that he asked for three gendarmes at the meeting with the Prime Minister in

5404

Gitarama on 18 April 1994, to help him maintain order and security and to stop the killing of Tu[illegible] The only witnesses to attend the Murambi meeting were prosecution witness R, an MDR bourgmestre Gitarama prefecture like the accused, and Defence witness DAAX, the former prefect of Gitarama. Witness R recalled three meetings of the bourgmestres in Gitarama prefecture convened by the prefect after 6 April 1994, and in his statement to the Office of the Prosecutor he said that the accused did ask for gendarmes at one of those meetings. When testifying before the Chamber, Witness R did not remember the accused having spoken at the Murambi meeting of 18 April 1994, although in his earlier statement to the Office of the Prosecutor, he stated that the accused had spoken at that meeting. Because of these inconsistencies, Defence counsel submitted a motion requesting the Chamber to consider a prosecution for false testimony, which this Chamber rejected in a Decision of 9 March 1998. As the Chamber stated in that Decision, it did not deem the matter appropriate for an investigation into false testimony, but rather it was a matter for the evaluation of the credibility of the witness in question. In this case, the Chamber considers that, despite discrepancies between Witness R's testimony and his prior statement to the Prosecutor relating to the sequence of the meetings addressed by the accused, if taken in the light most favourable to the accused, it corroborates the accused's account that at some point after 6 April 1994, and in all likelihood at the Murambi meeting of 18 April 1994, the accused asked for gendarmes to assist with the problems of security in his commune. Given the accused's testimony on this point, and its corroboration in part by the sole prosecution witness who was present at the Murambi meeting, the accused's version of events - that he did call for assistance from the national and regional authorities - must be credited.

186. Moreover, Defence witness DAAX, the former prefect of Gitarama supports the accused's account. Witness DAAX testified that he convened three meetings of bourgmestres between 6 April 1994 and 18 April 1994 - all of which were attended by the accused - the third meeting being the one which was moved from Gitarama to Murambi at the last minute at the request of the Prime Minister so that the Prime Minister and other Ministers could address the prefect and bourgmestres. At this third meeting, the prefect testified, the accused took the floor and complained of the problems of security in his commune, in common with the Prefect and other bourgmestres. Witness DAAX's testimony agrees with that of the accused that the Prime Minister did not reply directly to the bourgmestre's expressions of concern about security in their Communes, but that he rather read parts of a prepared policy speech and threatened the complaining bourgmestres with dismissal. Witness DAAX further testified that at least one bourgmestre, the bourgmestre of Mugina, was killed shortly after the meeting as a result. Witness DAAX also testified that the accused had to flee his commune due to pressure from the Interahamwe at some point between 6 April 1994 and 18 April 1994, and in any event after the first two meetings referred to above but before the third meeting. Witness DAAX said the Accused never officially requested gendarmes from him, unlike the bourgmestre of Mugina. Witness DAAX lost contact with the Accused after 18 April 1994. The Chamber notes that the Accused does not assert that he requested assistance from the prefect of Gitarama but rather from the Prime Minister, during the course of the meeting.

187. A substantial amount of evidence has been presented indicating that the conduct of the Accused did, however, change significantly after the meeting on 18 April 1994, and many witnesses, including Witnesses E, W, PP, V and G, testified to the collaboration of the Accused with the Interahamwe in Taba after this date. Witness A testified that he was surprised to see that the Accused had become a friend of the Interahamwe. The Accused contends that he was overwhelmed. Witness DAX and Witness DBB, both witnesses for the Defence, testified that the Interahamwe threatened to kill the Accused if he did not cooperate with them. The Accused testified that he was coerced by the Interahamwe and particularly by Silas Kubwimana, the head of the Interahamwe with whom he was seen quite frequently during this time. The Chamber notes that in his pre-trial written statement, the Accused gave a very different account of Silas Kubwimana, describing his mandate in the commune as that of a "peace-maker".

5405

188. The Chamber recognises the difficulties a bourgmestre encountered in attempting to save lives of Tutsi in the period in question. Prosecution witness R, who was the bourgmestre of another commune in Gitarama prefecture, testified that there was very little he or other bourgmestres could do to prevent massacres in his commune once killings became widespread after 18 April 1994. He averred that a bourgmestre could do nothing openly to combat the killings after that date or he would risk being killed; what little he could do had to be done clandestinely. The Defence case is that this is precisely what the accused did.

189. Defence witnesses, DAAX, DAX, DCX, DBB and DCC confirm that the accused failed to prevent killings after 18 April 1994 and expressed the opinion that it was not possible for him to do anything with ten communal policemen at his disposal against more than a hundred Interahamwe.

190. The Defence contends that, despite pressure from the Interahamwe, the Accused continued to save lives after 18 April 1994. There is some evidence on this matter, referred to in the section on "the accused's line of Defence".

191. There is also evidence indicating that after 18 April 1994, there were people that came to the Accused for help, and he turned them away, and there is evidence that the Accused witnessed, participated in, supervised, and even ordered killings in Taba. Witness JJ testified that after her arrival at the bureau communal, where she came to seek refuge, she went to the Accused on behalf of a group of refugees, begging him to kill them with bullets so that they would not be hacked to death with machetes. She said he asked his police officers to chase them away and said that even if there were bullets he would not waste them on the refugees.

192. The Chamber finds that the allegations set forth in paragraph 12 cannot be fully established. The Accused did take action between 7 April and 18 April to protect the citizens of his commune. It appears that he did also request assistance from national authorities at the meeting on 18 April 1994. Accordingly, the Accused did attempt to prevent the killing of Tutsi in his Commune, and it cannot be said that he never did so.

193. Nevertheless, the Chamber finds beyond a reasonable doubt that the conduct of the Accused changed after 18 April 1994 and that after this date the Accused did not attempt to prevent the killing of Tutsi in the commune of Taba. In fact, there is evidence that he not only knew of and witnessed killings, but that he participated in and even ordered killings. The fact that on one occasion he helped one Hutu woman protect her Tutsi children does not alter the Chamber's assessment that the Accused did not generally attempt to prevent the killings at all after 18 April. The Accused contends that he was subject to coercion, but the Chamber finds this contention greatly inconsistent with a substantial amount of concordant testimony from other witnesses. It is also inconsistent with his own pre-trial written statement. Witness C testified to having heard the accused say to an Interahamwe " I do not think that what we are doing is proper. We are going to have to pay for this blood that is being shed..",a statement which indicates the Accused's knowledge of the wrongfulness of his acts and his awareness of the consequences of his deeds. For these reasons, the Chamber does not accept the testimony of the Accused regarding his conduct after 18 April, and finds beyond a reasonable doubt that he did not attempt to prevent killings of Tutsi after this date. Whether he had the power to do so is not at issue, as he never even tried and as there is evidence establishing beyond a reasonable doubt that he consciously chose the course of collaboration with violence against Tutsi rather than shielding them from it.

5.2.2. Paragraph 13 of the Indictment

Alleged facts:

5406

194. Paragraph 13 of the Indictment is worded as follows:

> "On or about 19 April 1994, before dawn, in Gishyeshye sector, Taba commune, a group of men, one of whom was named François Ndimubanzi, killed a local teacher, Sylvère Karera, because he was accused of associating with the Rwandan Patriotic Front ("RPF") and plotting to kill Hutu. Even though at least one of the perpetrators was turned over to **Jean-Paul Akayesu**, he failed to take measures to have him arrested".

195. It is alleged that, by the acts with which he is charged in this paragraph, Akayesu is guilty of the offences which form the subject of three counts:

> Count 1 of the Indictment charges him with the crime of genocide, punishable under Article 2(3)(a) of the Statute;
>
> Count 2 charges him with the crime of complicity in genocide, punishable under Article 2 (3)(e) of the Statute; and
>
> Count 3 charges him with the crime of extermination which is a Crime against Humanity, punishable under Article 3(b) of the Statute.

196. In order to prove the acts alleged against Akayesu under paragraph 13 of the Indictment, it is necessary to first establish that Sylvère Karera, a teacher, was killed in the Gishyeshye sector, Taba commune, on 19 April 1994, before dawn, by a group of men, one of whom was named François Ndimubanzi and that he was killed because he was accused of associating with the RPF and plotting to kill Hutu. The Chamber must then be satisfied that at least one of the perpetrators of this killing was indeed turned over to Jean-Paul Akayesu, and that he failed to take measures to have him arrested.

With regard to the killing of Sylvère Karera in the Gishyeshye sector, Taba commune, on or about 19 April 1994, before dawn:

197. Several Prosecution witnesses, particularly, those who appeared under the pseudonyms A, W, E and U, as well as Ephrem Karangwa, provided information on the killing of teacher Sylvère Karera in the night of 18 to 19 April 1994.

198. Witness A, a Hutu man, testified that, during the night of 18 to 19 April 1994, he heard people shouting that thieves had killed people at Remera school and calling on the population to stop them. Witness A affirmed that, on 19 April 1994, he had gone to Remera school. There he learnt from the headmaster that the prefect of studies, who turned out to be Sylvère Karera, had been killed. The witness saw the body of the teacher before it was covered with a pink sheet at the request of the headmaster.

199. Ephrem Karangwa, a Tutsi man, called by the Prosecutor as a witness who, at the material time, performed the functions of Inspecteur de police judiciaire of the Taba commune, stated before the Chamber that Sylvère Karera, a teacher at the Remera Rukoma school complex, was killed in the night of 18 to 19 April 1994 by members of the Interahamwe.

200. Witness W, a Tutsi, who resided in Taba, where he worked as a teacher, testified that on returning from night patrols in which he had participated during the night of 18 to 19 April 1994, he learnt that the prefect of studies at the public primary school, Rukoma, had just been killed.

201. Questioned on the death of Sylvère Karera, witness E stated that he had gone, in the night of 18 to

5407.

19 April 1994, to the entrance of Remera school. He did not directly see Karera's body, but had heard that the body was in the school premises. No one stopped him from entering the school, but he h... preferred to go to the place from where the noise came which had brought him out of his home.

202. Prosecution witness U also heard that a teacher, named Karera, had been killed. She stated that throughout the night, she had heard people shouting in the streets and announcing, particularly, that Karera had been killed.

203. The Defence has never disputed the killing of Sylvère Karera in the night of 18 to 19 April 1994. The accused has himself confirmed, during his appearance as witness before the Chamber, that the teacher Sylvère Karera had been killed in the night of 18 to 19 April 1994.

Concerning the allegation that Sylvère Karera was killed by a group of men, one of whom was named François Ndimubanzi, and that he was killed because he was accused of associating with the RPF and plotting to kill Hutu:

204. The Chamber notes that though the Indictment alleges that Sylvère Karera was killed by a group of men, one of whom was named François Ndimubanzi, the Prosecutor has adduced no evidence to show number and identity of the perpetrators of the killing.

205. As for the reasons alleged by the Prosecutor for the killing of Sylvère Karera, that is, associating with the RPF and plotting to kill Hutu, the Defence stated, in its concluding arguments, that they should be dismissed on the ground that Sylvère Karera was, according to the Defence, Hutu and that the Prosecutor's allegations that this teacher was killed because he was accused of plotting to kill Hutu were therefore without merit.

Concerning the allegation that at least one of the perpetrators of the killing of Sylvère Karera was turned over to Jean-Paul Akayesu and that he failed to take measures to have him arrested:

206. Though the Indictment alleges that at least one of the perpetrators of the killing of Sylvère Karera was turned over to Akayesu, the Prosecutor has adduced no evidence to support this allegation.

207. Witness E stated that, in the night of 18 to 19 April 1994, after going to the school entrance where Sylvère Karera had been killed, he went to the place from where camethe noise which had brought him out of his home. At Gishyeshye, from where came the noise, near a roadblock, he saw the body of another person who had been killed. A crowd gathered. It was said that teacher Karera was killed and that the remains near the roadblock were those of the Interahamwe who had just killed Karera. Apart from that dead Interahamwe, no other person was held responsible for killing Karera. Witness E specified that he had heard that Sylvère Karera had been killed by that Interahamwe alone.

208. The witness called by the Prosecutor under the pseudonym Z, a Tutsi man, stated that, on or about 19 April 1994, in the early hours of the day following the killing of a Tutsi teacher in Remera and that of his murderer, who was killed by persons in charge of maintaining security, he and other persons stood near the body of the teacher's murderer. Akayesu, who was armed, separated members of the Interahamwe from the population. According to witness Z, Akayesu, in referring to the body on the spot, reportedly deplored the killing of this person.

209. Prosecution witness A testified that, in the night of 18 to 19 April 1994, an Interahamwe was killed. No investigation was conducted. He was simply buried immediately.

5408

210. Prosecution witness U stated that some men told him, on 19 April 1994, that a person had been killed and that Akayesu had gone to where the body was and held a meeting there.

211. Several other witnesses indicated to the Chamber that a crowd had formed early in the morning of 19 April 1994, in Gishyeshye, around the body of a young member of the Interahamwe. That meeting is at the root of the allegations brought by the Prosecutor against Akayesu under paragraphs 14 and 15 of the Indictment. The factual findings of the Chamber on the holding of the said meeting are elaborated upon below.

212. The Prosecutor accepted this version of facts in her concluding arguments. She had then told the Chamber that, following the killing of the Tutsi teacher, Sylvère Karera, in the middle of the night of 18 to 19 April 1994, in Remera, by some members of the Interahamwe, the people of the commune had gone out into the streets to find out what was happening, wondering why a teacher had been killed. Later, according to the Prosecutor's statement, they caught one member of the Interahamwe in Gishyeshye and killed him.

213. In her concluding arguments, the Prosecutor did not mention any fact designed to show that one of the possible killers of Sylvère Karera was turned over to Jean-Paul Akayesu alive, contrary to what is alleged in paragraph 13 of the Indictment.

214. During cross-examination of the accused appearing as witness in his own trial, the Prosecutor had him confirm that Sylvère Karera was killed in the night of 18 to 19 April 1994 and that later, one member of the Interahamwe, the person who had killed Karera, was also killed. The Prosecutor added that Prosecution witnesses had indeed testified to that.

215. During his appearance before the Chamber as witness, the accused argued that during the night of 18 to 19 April 1994, he was sleeping in the *Bureau Communal*, when towards 4 a.m., a certain Augustin Sebazungu, MDR treasurer at Taba, residing in the Gishyeshye sector, came to inform him that the situation in the sector was tense, following the killing of a young man, a member of the Interahamwe. The *Bourgmestre* then immediately alerted the police and went to the scene, accompanied by two policemen. There he found a body stretched out on the ground, covered with traces of blood, as if it had been hit. The accused affirmed before the Chamber that he seized the opportunity of this gathering which formed as people came to see what was happening, to address the population. He noted that members of the region's Interahamwe had rushed and surrounded the body of their young member. Akayesu told the Chamber that he had condemned the killing of the young man because he felt that it was not in that manner that law and order would be maintained, and that he had indicated that his arrest would simply have been enough.

Factual findings

216. Prosecution witnesses appearing under the pseudonyms A, W, E and U, as well as Ephrem Karangwa, provided information which confirmed the Prosecutor's allegations as to the killing of teacher Sylvère Karera in the night of 18 to 19 April 1994. On the basis of such corroborative evidence, which was not substantially disputed by the Defence, the Chamber is satisfied that Sylvère Karera was actually killed, in Gishyeshye, in the night of 18 to 19 April 1994.

217. The Chamber notes however that the Prosecutor has not adduced conclusive evidence to support her allegations relating to the number and identity of the perpetrators of the killing of Sylvère Karera as well as the reasons for this murder.

5409

218. With regard to the allegation that at least one of the perpetrators of the killing of Sylvère Karera had been turned over to Jean-Paul Akayesu and that he failed to take any measures to have him arrested, for the reasons explained above and in the absence of pertinent evidence, the Chamber finds that the Prosecutor has not established beyond reasonable doubt that at least one of the perpetrators of the killing of Sylvère Karera was turned over alive to Akayesu, and that he failed to take any measures to have him arrested.

5.2.3. Paragraph 18 of the Indictment

219. Paragraph 18 of the Indictment reads as follows:

> 18. On or about April 19, 1994, the men who, on Jean Paul AKAYESU's instructions, were searching for Ephrem Karangwa destroyed Ephrem Karangwa's house and burned down his mother's house. They then went to search the house of Ephrem Karangwa's brother-in-law in Musambira commune and found Ephrem Karangwa's three brothers there. The three brothers -- Simon Mutijima, Thaddée Uwanyiligira and Jean Chrysostome Gakuba -- tried to escape, but Jean Paul AKAYESU blew his whistle to alert local residents to the attempted escape and ordered the people to capture the brothers. After the brothers were captured, Jean Paul AKAYESU ordered and participated in the killing of the three brothers.

Events alleged

Testimony Of Ephrem Karangwa (Witness d)

220. Ephrem Karangwa was assigned the pseudonym D and placed under the Tribunal's Witness Protection Unit, pursuant to an order of 26 September 1996, but he waived witness protection and elected to testify under his own name.

221. Karangwa testified that he resided in Taba and in April 1994 he was the Inspecteur de Police Judiciaire (IPJ) in the Ministry of Justice for the Prosecutor in Taba commune having taken office in August 1984. As IPJ he investigated criminal complaints and transmitted case files to the Prosecutor. The witness's office was situated in the bureau communal in Taba. The witness testified that the head of any commune was the bourgmestre. The Accused who was the bourgmestre of Taba during the events of April 1994. The witness had known the Accused for about twenty years. The witness did not belong to any political party and he was not allowed to do so by the Minister of Justice. He testified that there was never any tension between him and the Accused and they had a good working relationship.

222. Karangwa testified that in his role as IPJ he became aware that there were problems of a political nature between the political parties in Taba, especially the MDR and the MRND. The MDR had a greater following in Taba and this party was led by the Accused. On one occasion in 1992 there was a demonstration by the MDR which led to violence when the demonstrators tried to forcibly enter the bureau communal. The MDR wanted the bourgmestre at that time removed from office. The matter was investigated by the witness and referred to the Prosecutor for prosecution. The witness did not have any knowledge of the eventual out come of this matter, at the time of testifying. The witness said that he knew of Silas Kubwimana and that he often complained about the Accused and the MDR officials. He said that there existed a file on this complaint at the Prosecutor's office. The witness said that he had become aware of the existence of this file in his official capacity as IPJ.

223. Karangwa testified that on the morning of 7 April 1994, while preparing to go to work he heard an announcement on the radio that the President had been killed. He also heard an announcement calling on

SL-10

people to remain wherever they were and he therefore decided not to go to work.

224. Karangwa testified that he had spoken to many people about the security situation in Taba. On 14 April 1994, he saw a blue Toyota Minibus pass him. He was informed that this motor vehicle and a white "pick up" were confiscated from the Interahamwe by the people of Kamembe. He was further informed that a police officer was killed and an Interahamwe wounded in this process.

225. Karangwa testified that on the night of 18 April 1994 he was outside his house because he had heard that Tutsi in Runda commune were being killed and since he was a tutsi he was afraid. He stated that Runda and Taba were neighbouring communes. At approximately 1 am on 19 April 1994, a person came to the witness's house and informed him that he had just attended a meeting led by the Accused where plans were being made to kill the witness and to commence killings in Taba in a similar manner to killings that were happening in Runda. This person advised the witness to flee with his family. The witness and his family hid on a hill and at dawn the witness's sisters, mother and wife went on foot to his wife's sisters house in Musambira and he and his brothers stayed behind because they wanted to verify the information that had been given to him. The witness said that he wondered why someone would want to kill him and his family, since they had no problem with anyone.

226. Karangwa testified that from his hiding place on the hill, he could see his house on the opposite hill about 150 metres away. The witness stated that he saw three vehicles drive up to his house between the hours of eight and nine o'clock in the morning. The Accused came in a blue Toyota mini bus, the one that the people had taken away from the Interahamwe. The witness was uncertain as to whether the Accused was driving the blue Toyota Hiace minibus. The witness described the other two vehicles as a white Toyota and a red Toyota. The witness could not see what the Accused had in his hands, but he did see the Accused wearing a military jacket. The Accused and the other people alighted from the motor vehicles and went down to the witness's house. The witness's dogs barked and someone in this group of people fired a round from a firearm and the dogs ran away. The witness stated that he saw this group of people then destroy his house and his mother's house. The witness stated that the houses were looted and burnt. The witness identified prosecution exhibits 50 and 51 as being photographs of the remains of these houses.

227. Karangwa testified that this event confirmed the information that he had received and he then decided to join his family in Musambira. He arrived at Musambira at about 3 o'clock in the afternoon. He saw his family at the house of his brother in law, Laurent Kamondo and they immediately left for Kabgayi, whilst he awaited the arrival of his younger brothers. He stated that he could not stay in the house because he was afraid that the Accused would look for him there. Instead, he hid in an eucalyptus bush on the side of a hill approximately eighty metres from the house.

228. Karangwa testified that he saw two motor vehicles, a blue Toyota Hiace minibus and a red Toyota Hilux approach the house. These vehicles stopped approximately twenty five metres away from the house. This was the same minibus that was taken away from the Interahamwe and the Accused was using it at that time. Many people alighted from the vehicles and walked towards Laurent Kamondo's house. The witness recognised some of these people as the bourgmestre of Musambira, the Accused, a police officer named Emanuel Mushumba from the Taba commune, Mutiji Masivere, Winima Boniface and Munir Yarangaclaude who was the secretary of the MDR party in the commune of Taba (phonetic spelling). The Accused was wearing a military jacket and he had a gun in his hand.

229. Karangwa testified that he heard shouts and whistles as this group of people approached Laurent Kamondo's house. He saw people running and, thereafter, he saw his younger brothers in the court yard with these people. The witness stated that it was then that he realised that his brothers were in Musambira. The witness continued to hear shouts from these people and then he heard the Accused say

5411

that his brothers must be shot. The witness heard gun shots and concluded that his brothers were killed and that the Accused had fired the gun. When asked by the Prosecutor whether he saw the gun that used to kill his brothers, the witness replied that he saw the Accused carrying a gun when he arrived and that he heard the shots.

230. Karangwa testified that after the killing of his brothers, he fled to Kabgayi, and on arrival at the cathedral, the witness stated that he saw the Accused in a pick up' drive up to the cathedral. The Accused was in the company of two police officers from the Taba commune named Emanuel Mushumba (phonetic spelling) and Ooli Musakarani (phonetic spelling) and a group of people. The witness said that he saw the Accused and these other people alight from the vehicle and look around the courtyard of the cathedral but they did not go inside. They then got back into the motor vehicle and left. The witness was informed by Witness V that the Accused was making enquiries about his whereabouts and he was advised to hide. The witness stayed in the seminary until the end of the war.

231. Karangwa testified that he was not able to leave the seminary but that he heard from many people that the Accused was outside the seminary on many occasions. The Accused was able to come into the compound of the seminary from 30 May 1994. The witness recalled that he remembered that day clearly, because it was on that day that the Accused came to take him away, and he was saved by someone.

232. Karangwa testified that he stayed in Kabgayi from 21 April 1994 to 2 June 1994. At the beginning of 1995 the witness went to work as IPJ in the public prosecutor's office in Gitarama and on 3 January 1996 became the bourgmestre of Taba. The witness said that at that time Tutsi were killed and the only reason the Accused looked for him was because he had worked in the commune and he was Tutsi.

233. In response to a question from the bench, Karangwa stated that the fact that the Accused was present made him responsible for the death of his brothers. When asked for clarification as to whether the Accused ordered the shooting, the witness reaffirmed that the Accused ordered their shooting.

234. Under cross examination, Karangwa testified that he had a very good working relationship with the Accused. The witness stated that the Accused dealt with civil disputes and he referred all criminal matters to the witness. The witness stated that he was generally invited to meetings pertaining to security in Taba. He testified that he saw the Accused between 6 and 10 April 1994 in Kamembe. The Accused was there assessing the security situation, since there was an influx of people that were fleeing Kigali. The Accused sent commune police officers to ensure the security of these people. The Accused at this stage was opposed to any killing.

235. In clarification of an averment in his written statement made to the Office of the Prosecutor (exhibit 105), the witness testified that the Accused held meetings on 18 and 19 April 1994 with a view to planning the genocide. The witness stated that he had not attended any of these meetings but he heard of them. The witness stated that at these meetings a decision was taken that the MDR and the MRND should not fight the Interahamwe and the CDR but they should fight the tutsi. This decision according to the witness, was taken at communal level by the bourgmestre. Although the bourgmestre belonged to the MDR all the political parties at communal level were under his authority. The witness did not go to work from 7 April 1994. The witness stated that he knew that there were major security problems in the commune and expressed the view that if the bourgmestre believed that the witness was competent to resolve these problems, the bourgmestre would have provided the witness with transport to go to work.

236. The witness acknowledged the fact that the Accused fought against the Interahamwe after 6 April 1994 and went on to say that if the Accused had not done so the killing in Taba would have started much

S412

earlier. The Defence Counsel pointed out that in his written statement to the Office of the Prosecutor, the witness stated that he was about a kilometre away from his house when he saw the Accused come to his house with a group of people. The witness denied this and reaffirmed his testimony that he was 150 metres away from his house, on the opposite hill. According to the witness, he was able to identify the Accused by the way that he walked and the clothes that he was wearing. The witness could also hear what was spoken by the Accused and the group of people when they were at his house, although he was 150 metres away. The witness identified the people with the Accused as assistant bourgmestre Civil Mootijima (phonetic spelling), assistant bourgmestre Wimina Boniface (phonetic spelling), manager of a popular bank Aloyce Kubunda (phonetic spelling), businessman Daniel Gasiba (phonetic spelling) and some communal police officers.

237. Karangwa testified under cross-examination, that when the Accused arrived at Laurent Kamondo's house at Musambira he immediately searched the house and found his three brothers. The Accused then killed the witness's three brothers by shooting them. The Defence Counsel pointed out that, in his written statement, the witness had stated that the Accused killed his brother, Jean Kististan (phonetic spelling), by shooting him and when his other two brothers tried to escape they were attacked and killed with machetes by the men who were with the Accused. The Defence Counsel requested an explanation from the witness in respect of this discrepancy. The witness denied that he stated this and maintained that all three of his brothers were shot.

238. Karangwa testified under cross examination, that he left Musambira immediately after his brothers were killed and when he was asked whether he buried is brothers, his response was that he did not have the time to do so. The Defence Counsel pointed out that the witness had stated in his written statement that he had buried his brothers near the house of Laurent Kamondo and requested the witness to explain this discrepancy. The witness denied this and maintained that his brothers were buried by Laurent Kamondo.

Testimony of Witness S

239. Witness S testified that he is a Hutu farmer. In April 1994, he lived in the commune of Musambira. There was safety and security in Musumbira even after 6 April 1994 when the President's plane had crashed but this had changed on 19 April 1994. Witness S was in his house on 19 April 1994. In the morning of the same day, between 9am and 10 am, Ephrem Karangwa's wife, sisters and mother went to Witness S's home. Witness S spoke to these people on their arrival and they had informed him that killings had begun in the Taba commune and many people were leaving their homes and fleeing.

240. Witness S testified that Ephrem Karangwa arrived at his home between 11 am and 12 noon on the same day. On his arrival, his wife, mother and sisters immediately left for Kabgayi. Witness S spoke to Ephrem Karangwa who also informed him that killings had began in Taba. Witness S stepped out of his house and he stated that when he looked in the direction of Taba he could see columns of smoke. Witness S stated that Karangwa left saying that he was waiting for his brothers and on their arrival they would set off for Kabgayi to join the rest of their family.

241. Witness S testified that Ephrem Karangwa's three brothers arrived at his house between 4 and 5 o'clock in the afternoon of 19 April 1994. The three brothers went into the witness's home and asked for their mother and sisters. Witness S informed them that they had already left. He also informed them that Ephrem Karangwa was waiting for them but that he did not know where. The witness said that the three brothers were wearing civilian clothes and they did not have any weapons in their possession. The three brothers together with Witness S went into the house. Whilst in the house, the witness heard the sound of cars. The three brothers went behind the house. Witness S went into the front court yard and he saw the motor vehicle that belonged to the commune of Musumbira. The witness described this motor

5413

vehicle as a red dual cab Hilux "pickup". Witness S then saw the bourgmestre of Musumbira, Justin Nyangwe and the assistant bourgmestre, Martin Kalisa, on the path that led to his house. He also saw the Accused with the assistant bourgmestre of Taba and a few police officers. Witness S did not know all the police officers that were in the group but he recognised them as police officers by the fact that they were wearing police uniforms and they were in possession of firearms. The witness recognised two of these police officers as being from the commune of Musambira. He did not know or recognise the other people in the group. These people were wearing civilian clothes.

242. Witness S testified that he had known the Accused before the events of April 1994. When the witness visited Ephrem Karangwa at his office in the bureau communal, he often saw the Accused. According to Witness S, the Accused was wearing a long military jacket and he had a grenade in his hand. Witness S's father was also in the group of people that came to his house and the witness noticed that his father was injured in his face and he was bleeding. By this time this group of people had arrived and were standing about three metres away from the house. Witness S's father said to him if Ephrem Karangwa was in the house he should hand him over or else they will be killed by this group of people. The Accused at this time was standing next to the bourgmestre of Musambira. The bourgmestre of Musambira asked Witness S if Ephrem Karangwa was in the house. According to the witness he responded by saying that he was not in the house and invited the bourgmestre to search the house if he so wished. The assistant bourgmestre of Musumbira, Martin Kalisa, together with two police officers from Taba searched the house. Witness S was not allowed into the house whilst the search was being conducted and he stood outside. The Accused during this search ordered the police officers to surround the house, to prevent Ephrem Karangwa from running away. By this time many people from the general population of Musambira had gathered to see what was going on and they also acted on the Accused's instruction and surrounded the house.

243. Witness S testified that the people searching the house did not find Ephrem Karangwa. Instead they came out with some cans of sardines and Accused the witness and his family of being "Inyenzi". At this time Ephrem Karangwa's brothers were behind the house with the witness's sister. The witness said he did not see this but he was informed by his sister that the brothers fled. The police officers blew their whistles and said stop these "Inyenzi" from running away and a group of people pursued the three brothers.

244. Witness S testified that he heard people shouting "...stop that Inyenzi..." About ten minutes later, the mob of people returned with the three Karangwa brothers. According to Witness S, they had been beaten and although he did not see the beatings he saw the injuries sustained as a result of the beating. The brothers had certain open wounds that were bleeding and their clothes were torn. The three brothers were made to sit on the lawn about two metres from the entrance to the court yard, in the presence of the Accused. The bourgmestre of Musambira, Justin Nyangwe asked the Accused if he knew these three brothers. The Accused replied that they were from his commune. Justin Nyangwe then asked the Accused what must be done with them and the Accused responded by saying "we need to finish these people off..." and he confirmed this response by saying, they need to be shot. The police officers from Musambira made the three brothers lie on their stomachs. There was a crowd of people that had now gathered and they were asked to step back. All three brothers were shot at close range behind their heads, by two police officers from Musambira. Monzatina (phonetic spelling) shot two of the brothers and Albert shot one of the brothers.

245. Witness S testified that he and his family were told by Justin Nyangwe, the bourgmestre of Musambira, to get into the commune motor vehicle. Whilst they were being taken, Witness S heard people say that they were going to destroy his home because he and his family were "Inyenzi". The Accused and a group of people got into their motor vehicle and drove in the direction of Taba. The motor vehicle that Witness S was in started to move first and as it passed the motor vehicle of the

5414

Accused, the witness could see a person tied in the Accused's motor vehicle. Witness S and his family were taken to the bureau communal of Musambira where they were detained. He later managed to escape, but his three sisters were killed.

246. Under cross-examination, Witness S testified that he met the Accused when he went to the bureau communal in Taba to visit Ephrem Karangwa who worked as an IPJ in the commune. He often visited Ephrem Karangwa at the bureau communal. Witness S also met the assistant bourgmestre of Taba, although he did not know his name.

247. Witness S testified that before the Accused came to his house he went to his grand father's house and that was where he found Witness S's father. On arrival at Witness S's house, the Accused parked his motor vehicle on the tarred road and the bourgmestre of Musumbira parked his motor vehicle outside Witness S's house. Witness S was sitting inside his house at this time and he heard the sound of the engine of this motor vehicle the bourgmestre of Musambira travelled in, which was approximately 25 metres away from the house. The motor vehicle the Accused travelled in was approximately three to four hundred metres away on the tarred road. Witness S reiterated that he did not hear the sound of the engine of the Accused's motor vehicle but rather that of the motor vehicle the bourgmestre of Musumbira travelled in. Witness S realised that the Accused was looking for Ephrem Karangwa when the bourgmestre of Musumbira asked if Ephrem Karangwa was there and also when his father asked him to hand over Ephrem Karangwa to the Accused if he was in the house.

248. Under cross-examination Witness S confirmed that he had made a statement to the Prosecutor of Gitarama. This statement was tendered into evidence by the Defence as part of exhibit 104. Witness S stated that this statement did not pertain to the Accused but rather to the former bourgmestre of Musumbira, who was now in prison as a result of his conduct as mentioned in this statement. Witness S stated that he was asked specific questions about the bourgmestre of Musumbira. The Defence Counsel pointed out to Witness S that this statement mentioned that the Accused was with Kalisa Martin, the bourgmestre of Musambira and Justin Nyandwi. Witness S recalled that he had mentioned the Accused's involvement in respect of the killing of the Karangwa brothers to the Prosecutor of Gitarama but this was omitted from this statement.

249. Witness S testified under cross-examination that he saw the Accused with a grenade in his hand. He recognised this item in the Accused's hand as being a grenade because he saw soldiers with it before the war. Defence Counsel pointed out to Witness S that in his statement to the investigators at the Office of the Prosecutor he stated that the Accused came to his house with a gun and a grenade, whilst in his evidence in chief before the Chamber the witness testified that the Accused only had a grenade. Witness S denied making this statement to the investigators and maintained that he had only seen the Accused with a grenade.

250. Witness S testified that police officers in Musambira normally used whistles to indicate that the market was closing. Whistles were also used when there was a security problem in the region. He stated that the Karangwa brothers were chased by the people because at that time there was a search of homes for hidden people. The Police Officers blew their whistles and shouted "catch these Inyenzi, don't let them get away". The people immediately chased after the Karangwa brothers. The witness stated that the people acted in this manner because it was an order from the authorities. The people generally followed orders given by the authorities even if the order leads to any wrongful conduct. Defence Counsel pointed out that the Karangwa brothers were not armed and they did not pose any threat to the people of Musambira and despite this they were assaulted by the mob of people chasing them, even though they were not ordered to do so. This illustrated that the people committed wrongful acts even if they were not ordered to do so. Witness S did not tender an explanation in response to this issue raised by Defence Counsel.

S415

The Testimony of Witness DAX

251. Witness DAX testified on behalf of the Defence. He stated that he knew Ephrem Karangwa and they are friends. He also knew Ephrem Karangwa's family. He stated that he did not hear anybody say that Ephrem Karangwa was to be killed or that someone was attempting to kill Ephrem Karangwa. Witness DAX testified that he had heard of the destruction of Ephrem Karangwa's house and the killing of his brothers. The witness had heard that Ephrem Karangwa's brothers were making their way to Kabgayi when they were killed in Kivumu in the Nyakabunda Commune (phonetic spelling). The witness stated that the Interahamwe were responsible for the deaths of the Karangwa brothers. The witness stated that he had since met Ephrem Karangwa several times in Kigali and although they did not discuss the details of his brothers death, the witness offered his condolences to Ephrem Karangwa.

252. Witness DAX testified that on 19 April 1994, Ephrem Karangwa's house was destroyed by neighbours. He stated that in a poor country like Rwanda it is difficult for a rich person to stay with poor neighbours. It was the Abaghi family, more specifically a person called Gahibi who destroyed the Karangwa house. A person named Gasimba Daniels, who was an enemy of Ephrem Karanga also participated in destroying the Karangwa house. Gasimba Daniels had purchased and distributed the petrol to the neighbours of Ephrem Karangwa, for the purpose of destroying Ephrem Karangwa's house. This petrol was used to set Ephrem Karangwa's house on fire. A certain person known as Usuri (phonetic spelling) also participated in destroying Ephrem Karangwa's house. The witness stated that he knew all the people responsible for the destruction of Ephrem Karangwa's house and the Accused was not involved.

253. Witness DAX admitted under cross-examination that he did not see Ephrem Karangwa's house being destroyed but he had spoken to the people responsible for such destruction immediately after the house was set on fire. He observed that they were carrying doors that they had removed from Ephrem Karangwa's house and they were boasting about their actions.

The Testimony of the Accused

254. The Accused testified that on 19 April 1994 at about 4 o' clock in the afternoon, he went to Musambira. He stated that the bourgmestre of Musambira promised to give him some fabric that he had intended to use to make a uniform for the new police officer he had employed. The Accused also stated that on 20 April 1994 he went to Kabgayi. He said that his reason for going to Kabgayi was to see one Kayibanda Alfred to ask him for shelter because he thought about fleeing. The Accused said that he saw Ephrem Karangwa's sister at Kabgayi. She greeted the Accused and he did the same. The Accused said that when he saw Karangwa's sister he realised that Karangwa was in Kabgayi. The Accused said that Karangwa abandoned him during the events of 1994. He stated that he had written to Karangwa on two occasions during the events of April 1994 and Karangwa had failed to respond. The Accused also stated that during the events of 1994 he saw Karangwa at Kamonyi. On this occasion he had spoken to Karangwa and asked Karangwa why he had abandoned him. That was all the Accused said in his testimony that was relevant to the allegations in paragraph 18 of the Indictment.

Factual Findings

255. The Chamber finds that on 19 April 1994, the Accused was searching for Ephrem Karangwa. At approximately 1am, on that day, Karangwa received a report that at a meeting led by the Accused, plans were made to kill him and other Tutsi. Karangwa's evidence that the Accused was in pursuit of him and his family, is corroborated by many witnesses. Witnesses V, E and Z were present at the meeting in the morning of 19 April 1994 at Gishyeshye, addressed by the Accused, when Karangwa's name was

5416

mentioned as being on a list of people to be killed; and the Accused named the IPJ as working with the RPF and told the people to look for him. Witness V reported this meeting to Karangwa, later in Witness V saw the Accused in Kabgayi twice and on one of these times, on 20 April 1994, the Accused asked him to find Karangwa and bring Karangwa to him. Witness K, in the morning of 19 April 1994, saw the Accused get into his vehicle at the Bureau Communal and instruct others to also get in so that Ephrem Karangwa would not escape them. Witness KK also heard the Accused refer to Tutsi and Ephrem Karangwa and say, "we now have to hunt them and kill all of them". Defence witness DCC confirmed under cross-examination that the Accused had wasted no time in pursuing Ephrem Karangwa

256. Karangwa and his family left their house and went into hiding. His sisters, mother and wife went to his wife's sister's house in Musambira and he and his brothers hid on a hill opposite his house. Karangwa saw the Accused arrive at his house on the morning of 19 April 1994 in a blue Toyota Hiace mini bus, accompanied by men in two other Toyota vehicles, one red and the other white. The Accused was wearing a military jacket. A gun was fired which frightened the dogs away. The houses of Karangwa and his mother were burnt and looted. The Accused and the group of people then left. The fact that the Accused was wearing a military jacket during this time is corroborated by other witnesses. Witness S saw him in that military jacket later that day; Witness V saw him at Kabgayi on 20 April 1994 in the military uniform of the Rwandan army; defence Witness DAAX saw the Accused in a military jacket and warned him against it's use. Defence witness DFX confirmed that the Accused wore a soldier's shirt. The Accused testified that he wore a military jacket in May, given to him by a colonel of the Rwandan army.

257. Karangwa hid on a hill approximately 80 metres from the house of witness S in Musambira, to await his brothers. The Accused, together with the bourgmestre of Musambira, a police officer named Emanuel Musumba and others arrived in two motor vehicles that were blue and red in colour. Karangwa heard shouts and whistles, and thereafter saw his brothers in the courtyard with these people. He heard the Accused say that his brothers must be shot and he heard gun-shots. His three brothers whom he names in his written statement to the prosecutor as; Simon Mutijima, Thadée Uwanyiligira, and Jean Chrysostome were shot dead.

258. Karangwa fled to Kabgayi where the Accused continued to look for him. Witness V told Karangwa that the Accused was looking for him in Kabgayi and he himself saw the Accused on two occasions and evaded arrest. Karangwa remained in Kabgayi from 21 April to 21 June 1994. In cross-examination the witness denied various statements attributed to him in his written statement to the prosecutor and adhered to his testimony before the Chamber. He re-affirmed that he had not seen the shooting of his brothers but heard the Accused give the order that they be shot, and the fact that he was there made him responsible for their deaths.

259. The Defence Counsel submitted that because of the uncertainties and inconsistencies in the evidence before the Chamber on how the Karangwa brothers were killed and more specifically what weapons were used, material averments in respect of this allegation were not proved.

260. The Defence Counsel cross-examined Karangwa on the discrepancy between his evidence that his brothers were shot and his prior statement to the Office of the Prosecutor that two of his brothers died from injuries sustained from machete blows. Karangwa denied stating this to the Office of the Prosecutor and reaffirmed his testimony that all three of his brothers were shot. This explanation was not subjected to further cross-examination by Defence Counsel.

261. As noted else where, the Chamber places greater reliance on direct testimony rather than untested prior statements made under variable circumstances. The Chamber accepts Karangwa's explanation for the inconsistent prior statement and notes that his evidence that his brothers died of injuries inflicted by

5417

gun shots is consistent throughout his testimony and is corroborated by the testimony of witness S.

262. The Chamber finds that Karangwa gave a truthful account of events actually witnessed by him and that he did so without exaggeration or hostility. The Chamber is satisfied that the witness could reasonably have seen and heard the matters to which he testified. Witness S confirmed Karangwa's evidence in all material respects. Karangwa's three brothers came to Witness S's house on the afternoon of 19 April 1994. They were not armed and wore civilian clothes. They heard vehicles and the brothers hid behind the house. A red Hilux "pick-up" belonging to the commune of Musambira was outside his house. A group of people came to his house; among them was the bourgmestre and assistant bourgmestre of Musambira, the Accused, whom he knew as the bourgmestre of Taba, the assistant bourgmestre of Taba, men in police uniforms carrying firearms, two of whom he knew as police from Musambira, and civilians.

263. The Accused held a grenade in his hand. The Chamber notes that this is in contradiction to Karangwa's observation that the Accused carried a gun. While it is clear from both their testimony that the Accused held a weapon in his hand, Witness S's identification thereof is more reliable, as he was in close proximity to the Accused in the courtyard of his house.

264. Witness S's house was searched by the assistant bourgmestre of Musambira and two policemen from Taba. During the search, the Accused ordered the police to surround the house to prevent Karangwa escaping. People from Musambira also acted on this instruction.

265. The brothers of Karangwa tried to flee, and the police officers blew their whistles and said stop those "Inyenzi" from running away. A mob of people took up the call, chased after the brothers and brought them back. The brothers were bleeding from open wounds and their clothing was torn. They were made to sit on the ground about 2 metres from the entrance to the courtyard. The bourgmestre of Musambira asked the Accused if he knew the men and what should be done with them. The Accused said they came from his commune and said we need to finish these people off-they need to be shot. All three brothers were then shot dead at close range in the back of their heads by two policemen from Musambira, in the Accused's presence.

266. After the killing, the Accused and his group drove off in the direction of Taba. Witness S saw a person tied up in the Accused's vehicle. Witness S and his family were detained at the bureau communal in Musambira, from where he later escaped. In cross-examination, the witness confirmed his direct testimony and he explained that he had omitted to give an account of the Accused's's involvement , in his statement to the prosecutor of Gitarama because he was asked specific questions related to the bourgmestre of Musambira. The chamber finds this to be a reasonable explanation and accepts the direct, eye-witness testimony of Witness S on these events and rejects the hearsay evidence of defence witness DXX.

267. The Accused confirmed his presence in Musambira on the afternoon of 19 April 1994 and in Kabgayi on 20 April 1994 ,but offered explanations for his appearance that are beyond belief, in the light of overwhelming testimony to the effect that he was at that time in hot pursuit of Karangwa. The defence did not specifically address allegations, and failed to challenge the evidence of witnesses S, Karangwa and others on material issues, such as his hunt for Karangwa, orders to look for Karangwa and other tutsi to be killed, his presence at the houses of Karangwa and witness S, his carrying of a grenade and his participation in the killing of the Karangwa's brothers by ordering their deaths and being present when they were killed.

268. The Chamber has not found any evidence that the Accused blew the whistle to alert local residents

5418

to the attempted escape of the brothers but finds as proven beyond a reasonable doubt that the Accused was present at both houses, that he was searching for Karangwa, that the houses of Karangwa and his mother were destroyed in his presence by men under his control, that he went to search the house of Karangwa's brother-in-law in Musimbira and found Karangwa's brothers at this house, that he participated in the killings of the three brothers, named, Simon Mutijima, Thadee Uwanyiligira, and Jean Chrysostome Gakuba, by ordering their deaths and being present when they were killed by policemen, under the immediate authority of the Accused as bourgmestre of Taba commune and in response to his order made to the bourgmestre of Musambira.

5.2.4. Paragraph 19 and 20 of the Indictment

The Events Alleged

269. Paragraphs 19 and 20 of the Indictment read as follows:

> 19. On or about April 19, 1994, **Jean Paul Akayesu** took 8 detained men from the Taba bureau communal and ordered militia members to kill them. The militia killed them with clubs, machetes, small axes and sticks. The victims had fled from Runda commune and had been held by **Jean Paul Akayesu.**
>
> 20. On or about April 19, 1994, **Jean Paul Akayesu** ordered the local people and militia to kill intellectual and influential people. Five teachers from the secondary school of Taba were killed on his instructions. The victims were Theogene, Phoebe Uwineze and her fiancé (whose name is unknown), Tharcisse Twizeyumuremye and Samuel. The local people and militia killed them with machetes and agricultural tools in front of the Taba bureau communal.

270. For his alleged participation in the acts described in paragraphs 19 and 20, Akayesu is charged under seven counts, namely:

> Count 1, Genocide, punishable by Article 2(3)(a) of the Statute of the Tribunal;
>
> Count 2, Complicity in Genocide, punishable by Article 2(3)(e) of the Statute of the Tribunal;
>
> Count 3, Crimes against Humanity (extermination), punishable by Article 3(b) of the Statute of the Tribunal;
>
> Count 7, Crimes against Humanity (murder), punishable by Article 3(a) of the Statute of the Tribunal;
>
> Count 8, Violations of Article 3 common to the Geneva Conventions, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal;
>
> Count 9, Crimes against Humanity (murder) punishable by Article 3(a) of the Statute of the Tribunal; and
>
> Count 10, Violations of Article 3 common to the Geneva Conventions, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal.

5419

271. The Chamber noted, during the presentation of evidence in this case, that the events alleged occurred during a distinct period on or about 19 April 1994 at the bureau communal. Consequently, paragraphs will be treated together.

272. A number of specific acts can be identified in the events set out in paragraphs 19 and 20. It is alleged, as pertains to paragraph 19, firstly, that Akayesu took eight refugees from the bureau communal, secondly, that he ordered militia members to kill them, thirdly, that the refugees were consequently killed with clubs, machetes, small axes and sticks, and fourthly, that the victims had fled from Runda commune and had been held by Akayesu. As regards paragraph 20, firstly, Akayesu is accused of having ordered local people and militia to kill intellectual and influential people, and secondly, five teachers, named in the Indictment, from the secondary school of Taba were killed on his instructions by the local people and militia with machetes and agricultural tools in front of Taba bureau communal. With these specific allegations in mind, the Chamber shall proceed in determining whether the participation of the accused in the events enunciated in paragraphs 19 and 20 of the Indictment has been proved beyond reasonable doubt.

273. The first witness to appear for the Prosecutor to testify in relation to the events alleged in paragraphs 19 and 20 was Witness K, a Tutsi woman, married to a Hutu, who was an accountant/cashier at the bureau communal in Taba from 1990 until 1994. She had worked under the authority of Akayesu whilst he was bourgmestre of the commune at the time of the events alleged in the Indictment. Witness K testified as follows.

274. On 19 April 1994, between 9h00 and 10h00, she had gone to the bureau communal following a demand from Akayesu who requested her services as the accountant/cashier of the commune. On arriving that morning, she encountered the accused, whose mood appeared to have changed, outside the bureau communal. She said he spoke to her harshly, asking her why she was no longer coming to work. Witness K told him she was scared, and that she had come to the bureau communal on this occasion only because he had asked her. She said Akayesu then told her that she would know why she had come.

275. After this exchange, witness K, who was still standing next to the accused, testified that Akayesu called over a certain Etienne, and instructed him to bring the youths'. She saw Etienne drive off in the direction of Remera, and return with a number of youths' who were armed with traditional weapons, such as machetes and small axes69. Witness K said they all gathered close to Akayesu who told them "Messieurs, if you knew what the Tutsi who live with you are doing, I inform you that what I heard during the meeting is sufficient. Right now, I can no longer have pity for the Tutsi, especially the intellectuals. Even those who are with us, those we have kept here, I want to deliver them to you so that you can render a judgment unto them"70. The witness said Akayesu then proceeded to release the refugees from Runda held in the communal prison, and handed them - with the words here they are' - to the Interahamwe, whom she also called the killers'.

276. Witness K affirmed that there were eight refugees, all men, three of whom she personally knew to be Tutsi. She explained that they did not have their hands tied and that they all looked fine. She said the Interahamwe escorted the eight refugees to the fence of the bureau communal, where they were made to sit on the ground, in a line, their backs to the fence and their legs straight out in front of them. According to the witness, the refugees pleaded for mercy as the Interahamwe prepared to kill them. Witness K testified that Akayesu then said "Do it quickly", at which point they were killed rapidly by a large group of people who used whatever weapon they had on them.

277. After the eight refugees had been killed, witness K said she heard Akayesu instruct a communal policeman to open the communal prison and release the persons who had been imprisoned for Common law offences so that they could bury the dead refugees. She said the persons who had been released from

5420

the prison by Akayesu put the bloody bodies of the victims onto a wheelbarrow and took them away to be buried.

278. Witness K testified she heard Akayesu tell those present to fetch the one who remained. She said this person was a professor by the name of Samuel. Witness K said that they fetched him and she saw him being killed with a machete blow to the neck.

279. According to the witness, Akayesu then gave instructions for the release of all those who had broken the law, and told them to go into the hills with their whistles so as to sensitize the youth. Witness K understood this to mean go to your sectors, increase public awareness of the population and kill with them. Witness K testified she heard the accused tell the killers' that she would be killed after she had been interrogated about the Inkotanyi secrets. She said Akayesu put her into her office, took her keys and locked her up. The witness said she saw Akayesu get into a car, instructing others to also get in so that Ephrem Karangwa wouldn't escape them

280. Witness K said she had other keys on her person, thus enabling her to access the meeting room in the bureau communal from where she was able to see the events occurring outside. She testified she saw many people being brought to the bureau communal and killed, some of the victims only making it as far as the front of the entrance of the bureau communal before being killed. According to the witness, amongst those killed were professors from Remera school. She said the bodies of the victims, even those still alive, were put into wheelbarrows and taken for burial.

281. When questioned about the use of whistles, Witness K said she saw persons go behind the bureau communal to get a professor who lived there. She said that these persons used whistles so as to terrorize this professor, and to attract the attention of others nearby.

282. Pursuant to a question from the Chamber as to the killing of teachers, witness K stated she was unsure how many were killed, but that she knew the names of some of them, Theogene, Tharcisse, a woman called Phoebe (the gérante of Remera secondary school), and her fiancé whose name she didn't know. She explained that the woman was killed because it was alleged a radio for communicating with the Inkotanyi had been found at her house. She further stated that the true reason for the killings of the teachers and the refugees was because they were Tutsi.

283. Under cross-examination, questioned about where the teachers she saw being killed had come from, witness K stated that some of the teachers had been brought from the direction of Remera and another from behind the bureau communal. Asked if Akayesu was then still present, she stated that she had explained that Akayesu wasn't present when the actual killings of the professors took place. She reasserted being next to Akayesu when he gave the order to kill the teachers.

284. Under cross-examination, witness K further testified she had heard the refugees had been locked up in the prison of the bureau communal by Akayesu at the request of the bourgmestre of Runda, but that she hadn't heard whether this bourgmestre had asked for these refugees to be killed. She said she had found out the refugees were from Runda by speaking to at least two other individuals from Runda whom she knew. The witness testified not knowing why exactly the refugees had been locked up in the communal prison, but was adamant they had been killed because of their Tutsi ethnicity. Witness K also confirmed that she was next to Akayesu at the bureau communal when he gave the instructions to fetch the youths/Interahamwe and that she heard Akayesu order the killing of the refugees from Runda.

285. Witness KK for the Prosecutor, a Hutu woman married to a Tutsi and residing in Taba commune in 1994, also testified in relation to the events alleged in paragraphs 19 and 20. She said that shortly after

5421

April 6 1994, the houses of Tutsi including her own were pillaged, and that she sought refuge at the bureau communal with her Tutsi husband and nine children. She said many refugees came to the bureau communal, but that they were treated differently depending on their ethnicity. According to the witness, the atmosphere changed a few days later with the arrival of a number of Interahamwe from Remera. She said the Interahamwe addressed the refugees in the presence of Akayesu in front of the bureau communal. According to witness KK, the Interahamwe stated that they had uncovered a Tutsi plan to kill the Hutu, but as their God was never far, and because they had discovered the plan, they were going to put the Tutsi where the Tutsi had planned to put the Hutu.

286. According to the testimony of witness KK, Akayesu then went to his office. On his return, she asserted he was angry and brandished a document which he read to the refugees, by saying "We lived with Tutsi, there was a hatred between us. The IPJ, Karangwa Ephrem had planned to kill me so that he could replace me in my function as bourgmestre. We now have to hunt them and find all of them"71. The witness testified Akayesu continued by talking of a landmine planted by the Tutsi that had exploded at the primary school. This landmine, she heard the accused state, was the beginning of the planned killings of Hutu. She said the accused then stated that as schoolchildren of all ethnicities were in this school, when the explosion happened, it was aimed at all Rwandans.

287. Witness KK testified Akayesu said further "there are many accomplices in our commune. There is an accomplice who is to be found behind the bureau communal, who is called Tharcisse. He was a professor"72. She said Akayesu then told the policemen and Interahamwe to fetch him. The witness saw Tharcisse and his wife being made to sit in the mud. She said the wife was undressed and told to go and die elsewhere. She also heard Akayesu ask Tharcisse for information on the Inkotanyi.She said Tharcisse replied "do what you will because I know no secrets". She testified Tharcisse was killed by the Interahamwe on the road outside the bureau communal. She testified Akayesu was standing near to where the victim was sitting.

288. Witness KK said she also heard Akayesu order the Interahamwe to bring the teachers who taught in Remera, and say that the intellectuals were the source of all of the misery. She testified that she saw the Interahamwe return very angry with the teachers. She saw the teachers, the number of which she was unsure of being made to sit in the mud on the road outside the bureau communal, where Tharcisse had been killed. According to the witness, it was alleged that these teachers had communicated by radio with Inkotanyi. Witness KK said a young couple who were soon to be married was killed first. She said that all the teachers were killed on the road in front of the bureau communal with little hoes and clubs and that she had heard it being stated that to kill them with a bullet or grenade would be inflicting a less atrocious death. The witness added that no one could ask for help because Tutsi were not allowed to live in Taba commune. She said the bodies of the teachers were then taken to makeshift ditches, and covered in earth and grass. According to witness KK, some of the teachers were still breathing when buried.

289. Under cross-examination, witness KK asserted that no teachers had taken up refuge at the bureau communal, but that the massacres had started with the killing of the teachers. The Defence attempted to discredit the witness by raising doubts as to the various dates she spoke of during her testimony, however she explained that considering all that happened to her in April 1994, it was very difficult for her to remember with certainty the specific dates. She also confirmed never having seen Akayesu kill anyone himself, save that it was he who ordered the killings which took place before his eyes.

The case for the Defence

290. Witness DCC for the Defence, detained in Rwanda at the time of his appearance before the Chamber, was a driver at the Taba bureau communal from 1 July 1993 until the events in 1994. During his examination-in-chief, he stated that he had not heard of Akayesu being an anti-Tutsi in the month of

S422

April, 1994. He also testified he came every day to the bureau communal during the massacres. During cross-examination, he added he had seen a substantial number of persons being killed at the bureau communal. According to the witness, the bodies of those killed were taken next to the primary school, however he said he never personally witnessed any burials of cadavers because he was not part of the people who took the bodies away. He maintained this statement even though he testified that he walked past the school every day on his way home. The Chamber notes thereupon, that in answer to questions put to him by the Chamber, pertaining to there being mass graves in the vicinity of the bureau communal, the witness said that he rarely went to the bureau communal during 1994 and that he had never seen any mass graves.

291. Witness DCC testified that after 6 April 1994, refugees from Runda and Shyorongi started arriving at the bureau communal of Taba, where they were welcomed by the authorities and lodged in various premises. He said the refugees were all free and none were locked up in the prison. Witness DCC testified he saw Interahamwe on two occasions come to the bureau communal and kill people. On the first of these occasions, he said the Interahamwe were from Taba but that he did not personally see Akayesu. On the second of these occasions, he saw the Interahamwe from Runda with military personnel search the office of Akayesu after having forced him out of the bureau communal. He said the Interahamwe terrorised the people at the bureau communal and asked for identity cards. According to witness DCC, the Interahamwe took the Tutsi away to be killed. He also said that Akayesu did not have a good understanding with the Interahamwe who accused him at times of being an Inkotanyi as he was welcoming refugees at the bureau communal.

292. Reference was also made by the Defence to the statement given by witness DCC to the Prosecutor[73], in which he stated "What I know, Akayesu was only present at the commune office one time when four people were killed at the entrance of the office. Akayesu did not do anything about it. Akayesu knew that the killings of Tutsi took place in the commune. The killers were Interahamwe". According to the witness, Akayesu did nothing to stop the Interahamwe because he was powerless to do so.

293. During cross-examination, the witness asserted that he was 34 years old, that in 1994, he did not flee Taba or go to Uganda, and that he did not have knowledge of and never saw Akayesu searching for Karangwa. Witness DCC said he was arrested in Rwanda on 30 April 1996. The Prosecutor produced a report, "Witness to Genocide", of an interview given by witness DCC to an NGO named Africa Rights[74]. Witness DCC confirmed speaking to a Human Rights Organization in 1996. The Prosecutor summarized extracts of the said document which stated that at the time of the interview, Witness DCC was 33 years old, that he had been recruited as the driver of the commune on 1 July 1993, that he had returned to Rwanda and was arrested on 30 April 1996. The Prosecutor read out another extract: "According to Akayesu's driver, [...] Akayesu lost no time in pursuing Ephrem. On 19 April, Akayesu, assistant bourgmestre Mutijima and a communal policeman, Mushumba, went to Kamonyi to look for the IPJ of the commune, Ephrem Karangwa, saying that he was a great accomplice of the RPF. Akayesu and his team came back in the afternoon'". Witness DCC confirmed that Akayesu had not wasted any time in pursuing Karangwa, but denied having spoken of Kamonyi, of Akayesu's return or that Akayesu had called Karangwa an accomplice of the RPF.

294. Witness DZZ for the Defence, a Hutu policeman in 1994 detained in Rwanda at the time of his appearance before the Chamber, testified manning barriers in the commune of Taba and guarding the bureau communal at the time of the events alleged. He said massacres had become widespread in the commune of Taba after 18 April 1994 and that he had heard of massacres at the bureau communal. He said he went to the bureau communal on a regular basis and manned a barrier nearby, but asserted that he did not personally witness any crimes at the bureau communal. He testified that he had not heard of Akayesu participating in the massacres, and that the accused had preached peace amongst the refugees.

5423

The witness said that Akayesu saved certain Tutsi, namely witness K and Karangwa, during the massacres. In his mind, they had been saved because, had Akayesu supported the killings, Akayes would also have targeted Karangwa and witness K.

295. Akayesu testified going to the bureau communal on 19 April 1994. On his arrival within the vicinity of the bureau communal, he said he saw the refugees running everywhere. In the courtyard of the bureau communal, according to Akayesu, the Interahamwe were killing the refugees who had fled from Runda and Shyorongi. He said he parked the car and saw the cashier, witness K. Akayesu said he was perplexed at seeing her and wondered from where she had come. He testified that he called out to her, ordering her to go into her office. He said he had to stop someone with a machete from attacking her and subsequently escorted her personally into the office of the bureau communal. According to Akayesu, he went back into the courtyard and saw refugees who had been killed, and noted that others had managed to escape. However, at a later stage during his examination-in-chief, when asked whether anyone had ever been killed in the courtyard of the bureau communal, Akayesu stated that when he was at the bureau communal or when there had been Interahamwe attacks during his absence, no one had been killed in the courtyard. After these events, Akayesu said he departed with the communal police in the direction of Mbizi, consequent upon receiving information that some of the killers had gone to Mbizi.

296. During cross-examination, the Prosecutor presented tape recordings of interviews of Akayesu carried out by the Office of the Prosecutor on 10 and 11 April 1996 in Zambia75. The Prosecutor questioned the credibility of Akayesu's testimony before the Chamber regarding answers he had given about the refugees at the bureau communal on 18, 19 and 20 April 1994. During his testimony, Akayesu stated he was unable to distinguish intellectuals from the rest of the refugees on the basis that there was no criteria to make it possible to tell an intellectual apart from other persons. However, in the said interviews, the accused said he was surprised not to have seen intellectuals of the commune amongst the refugees who, in his opinion, appeared to be farmers, old women, children, and old people. The Chamber questioned Akayesu as to the differences in the answers given in court, on the one hand, and before the Office of the Prosecutor, on the other. Akayesu said he had not seen anyone who could be categorized as an intellectual/teacher, but that he was able to find out by speaking with the refugees whether or not there were any intellectuals/teachers amongst them.

297. Furthermore the accused confirmed that in the context of the events in 1994, had he told the population to fight the enemy, this would have been understood as meaning fight the Tutsi. He also asserted not having control of the population after 18 April 1994. He said witness KK was at the bureau communal on 19 April 1994. Questioned as to the killings at the bureau communal on 19 April 1994, Akayesu said he did not see anyone killed with a machete because he was in the courtyard of the bureau communal attending to witness K. Akayesu added that he never saw any bodies either outside or inside the perimeter of the bureau communal and never went behind the primary school. Further, Akayesu testified never personally seeing cadavers save for the bodies of two dead children in his sector. In answer to questions on the fate of the schoolteachers whom he said he knew, Akayesu stated only hearing of their killings near the bureau communal three days after their deaths.

298. In support of its case, the Defence recalled that at least 19 witnesses in this case had never seen Akayesu either personally kill or order killings, and that only one witness, witness K, had been called to testify in relation to the events in paragraphs 19 and 20 of the Indictment. The Defence questioned the credibility of witness K on the grounds that Akayesu, during the said interviews of 1996, had cited this particular witness as a potential defence witness. If witness K had really lived through all the events she testified on, argued the Defence, why would Akayesu have named her as a defence witness.

Factual Findings

5424

299. The testimonies of witnesses K and KK evidenced, on the one hand, events which both K and KK witnessed, and on the other hand, events that only one of the two had witnessed. The Chamber recalls that the requirement of corroboration of a witness' testimony unique to certain events, i.e. the principle of *unus testis nullus testis*, is not applicable under the Rules of the Tribunal76. The Chamber found both witness K and witness KK to be credible. Their testimonies were not marked by hostility and were confirmed under cross-examination. The Defence attempted to discredit witness KK on the basis of her inability to remember specific dates and times. However, the Chamber considers that these lapses of memory were not significant and an inability to recall dates and times with specificity - particularly in the light of the traumatic experience of this witness - is not by itself a basis for discrediting the witness77.

300. Further, the Defence contested the credibility of witness K on the premise that Akayesu had indicated to the Prosecutor in April 1996 that she was a potential defence witness. The Chamber finds this to be a mere affirmation by Akayesu of his intent to call a certain witness, and that it does not constitute a defence *per se* as to the allegations contained in paragraphs 19 and 20 of the Indictment. Further the Defence claimed the Prosecutor had called only one witness in respect of the events alleged in the said paragraphs. In light of the testimonies of two witnesses, namely K and KK, the Chamber finds the latter to be an erroneous submission by the Defence.

301. In view of the aforementioned, the Chamber finds the testimonies of witnesses K and KK both to be credible on their own, and that when dealt with together they offer sufficient correlation as to events, dates and locations for the Chamber to base its findings thereon.

302. During their respective testimonies before the Chamber, both witnesses DCC and DZZ were evasive in answering questions in relation to the events alleged in paragraphs 19 and 20 of the Indictment. However, the Chamber notes that the reluctance of these witnesses in answering certain questions was limited either to their individual participation in the acts, or to events they had personally seen. The Chamber recalls that both witnesses DCC and DZZ were at the time of their testimonies, detained in prisons in Rwanda, hence it is understandable that neither wished to present self-incriminating evidence. The Chamber has considered the probative value of their testimonies in light of the above, and finds that the evasiveness and reluctance which punctuated their oral testimony reduced their credibility.

303. Witnesses K and KK for the Prosecution, testified that they witnessed massacres at the bureau communal. Witness K specified seeing the massacres on 19 April 1994 at the bureau communal, and witness KK testified that the massacres started with the killing of teachers.

304. Both witnesses presented by the Defence, witness DCC and DZZ, also testified that killings took place at the bureau communal. Witness DCC went to the bureau communal everyday during the events. He saw people, mainly Tutsi, being massacred by the Interahamwe and taken to be buried behind the primary school. Furthermore, the Defence presented as evidence the statement given by witness DCC to the Prosecutor78. The section quoted by the Defence clearly indicates that Akayesu was at the bureau communal when four people were killed at the entrance of the office and that he knew the killing of Tutsi was taking place in the commune. Questioned as to why Akayesu did nothing to stop these acts perpetrated by the Interahamwe, witness DCC said Akayesu was powerless to do so. The Chamber notes that the testimony of witness DCC supports the prosecution's evidence that people were killed at the bureau communal, in the presence of the accused; and conflicts with Akayesu's testimony that no killings took place at the bureau communal and that the only dead bodies he saw were those of two children

305. Witness DZZ testified that he went regularly to the bureau communal but that he never personally

5425

saw any massacres or crimes he had heard of being perpetrated. He added that Akayesu never participated in the massacres and even preached peace amongst the refugees. He also affirmed t massacres in Taba had become widespread after 18 April 1994. However, the Chamber notes that for witness DZZ to stipulate on the occasions he went to the bureau communal he did not see any of the massacres, and further that he had not heard of Akayesu's participation in massacres, does not refute the specific allegations in paragraphs 19 and 20. Indeed, it is alleged killings occurred at the bureau communal in the presence and under the instructions of Akayesu. DZZ had heard there were massacres at the bureau communal but never personally witnessed any. The Chamber notes thereon that the defence presented by the testimony of witness DZZ supports the fact that there were massacres at the bureau communal but that it does not specifically address the events in the said paragraphs, as the witness was not present when the killings he had heard of took place.

306. Akayesu admitted during his examination-in-chief that he saw massacres of refugees at the bureau communal on 19 April 1994. This is corroborated by the testimonies of witnesses DZZ, DCC, K and KK in relation to there being massacres at the bureau communal. The Chamber finds it has been proved beyond reasonable doubt that, firstly, there were refugees at the bureau communal and, secondly, that massacres did occur at the bureau communal on or about 19 April 1994.

307. Akayesu confirmed under cross-examination that he was able to identify intellectuals, teachers being an example he put to the Chamber, from the rest of the refugees. Witnesses K and KK both stated that Akayesu ordered the killing of certain intellectuals and other refugees. The Defence did not specifically address these allegations. Under cross-examination, questioned as to these allegations, Akayesu said he never saw anyone killed in the courtyard with a machete because he was attending to witness K, that he never saw any bodies inside or outside the courtyard of the bureau communal and that he heard of the deaths of the teachers three days after their killings. The Chamber finds that the veracity of these answers can be doubted. Indeed, Akayesu affirmed himself during his examination-in-chief that, on 19 April 1994, he saw refugees being attacked at the bureau communal, and that he saw some killed and others escape. Further, the Chamber finds implausible the assertion that he heard of the deaths of the Remera teachers three days later. Witnesses, including himself, have placed Akayesu at the bureau communal on 19 April 1994. Akayesu testified to seeing and hearing of searches of various intellectuals in Taba throughout the day of 19 April 1994, yet he somehow did not hear of killings that took place at the bureau communal the same day. The Chamber cannot accept Akayesu's assertion with regard to the killing of teachers. Further, the Chamber notes that Akayesu did not specifically contest the allegations that he ordered the militia and local population to kill intellectuals and influential people.

Paragraph 19

308. As pertains to the allegations in paragraph 19, evidence set out above has demonstrated that refugees from Runda had been held at the bureau communal by Akayesu. Evidence has established that Akayesu told the Interahamwe he had sent for that "[...] he could no longer have pity for the Tutsi. Even those who we have kept here, I want to deliver them to you so that you can render a judgment unto them". It has been demonstrated that he then ordered the release of the refugees and handed them over to the Interahamwe with the words here they are'. Evidence has demonstrated that these refugees were made to sit next to the fence of the bureau communal and that when they begged for mercy, Akayesu said to the Interahamwe do it quickly'. It has been established that immediately after Akayesu had said this, the refugees were killed in his presence, by persons nearby who used whatever weapons they had on them. It has been established that the refugees were killed because they were Tutsi.

309. The Chamber finds that it has been proved beyond reasonable doubt that Akayesu released eight detained men of Runda commune whom he was holding in the bureau communal and handed them over to the Interahamwe. It has also been proved beyond reasonable doubt that Akayesu ordered the local

5426

militia to kill them. It has been proved beyond reasonable doubt that the eight refugees were killed by the Interahamwe in the presence of Akayesu. The Chamber also finds that it has been proved beyond reasonable doubt that traditional weapons, including machetes and small axes, were used in the killings, though it is has not been proved beyond reasonable doubt that sticks and clubs were used in the killings. It has been proved beyond reasonable doubt that the eight refugees were killed because they were Tutsi.

Paragraph 20

310. Evidence has demonstrated that after the killing of the refugees, Akayesu instructed people near him to fetch the one who remained', and that consequent to this instruction, a certain professor by the name of Samuel was brought to the bureau communal. It has been established that Samuel was then killed with a machete blow to the neck.

311. Evidence has demonstrated that on or about 19 April 1994, Akayesu addressed refugees and Interahamwe in front of the bureau communal, calling for all Tutsi within the commune to be hunted and found. It has been established that Akayesu stated that there were accomplices in the commune, one of whom lived behind the bureau communal. It has been established that Akayesu cited a professor by the name of Tharcisse as the accomplice and ordered the Interahamwe and communal policemen to fetch him. Evidence has established that persons using whistles fetched Tharcisse and his wife from behind the bureau communal. Tharcisse and his wife were made to sit in the mud on the road outside the bureau communal, whereupon his wife was undressed and told to leave. It has been established that Akayesu asked Tharcisse for information on the Inkotanyi, after which the Interahamwe killed Tharcisse in the presence of Akayesu.

312. Evidence has shown that Akayesu said to the Interahamwe that the intellectuals were the source of all the misery, and that he ordered the Interahamwe to bring the teachers from Remera. It has been demonstrated that a number of teachers from Remera school were brought to the road outside the bureau communal and killed with traditional weapons, including hoes and clubs. Evidence identified the victims to be Theogene and Phoebe Uwineze and her fiancé.

313. The Chamber finds that it has been proved beyond reasonable doubt that on or about 19 April 1994, Akayesu ordered the local people and Interahamwe to kill intellectual people'. It has been proved beyond reasonable doubt that, after the killing of the refugees, Akayesu instructed the local people and Interahamwe near him at the bureau communal to fetch the one who remains', a professor by the name of Samuel, and that consequent to this instruction, a certain professor by the name of Samuel was brought to the bureau communal. It has been proved beyond reasonable doubt that Samuel was then killed by the local people and Interahamwe with a machete blow to the neck. The Chamber finds that it has been proved beyond reasonable doubt that teachers from the commune of Taba were killed pursuant to the instructions of Akayesu. The Chamber finds it has been proved beyond reasonable doubt that amongst the teachers who were killed were Tharcisse, Theogene, Phoebe Uwineze and her fiancé. It has been proved beyond reasonable doubt that Tharcisse was killed in the presence of Akayesu. The Chamber finds it has been proved beyond reasonable doubt that the victims were all killed by local people and Interahamwe using machetes and agricultural tools on the road in front of the bureau communal. The Chamber finds that it has not been proved beyond reasonable doubt that Akayesu ordered the killing of influential people, nor that the victims were teachers from the secondary school of Taba.

314. The Chamber finds that it has been proved beyond reasonable doubt that the teachers were killed because they were Tutsi.

5427

5.3 Meeting

5.3.1. Paragraphs 14 and 15 of the Indictment

315. Paragraph 14 of the Indictment reads as follows: "The morning of April 19, 1994, following the murder of Sylvère Karera, Jean Paul Akayesu led a meeting in Gishyeshye sector at which he sanctioned the death of Sylvère Karera and urged the population to eliminate accomplices of the RPF, which was understood by those present to mean Tutsi. Over 100 people were present at the meeting. The killing of Tutsi in Taba began shortly after the meeting".

316. It is alleged that by the acts with which he is charged in this paragraph, the Accused is guilty of offences covered under four counts:

> Count 1 of the Indictment charges him with the crime of genocide, punishable under Article 2 (3)(a) of the Statute;
>
> Count 2 charges him with the crime of complicity in genocide, punishable under Article 2 (3)(e) of the Statute;
>
> Count 3 charges him with the crime of extermination which constitutes a crime against humanity, punishable under Article 3 (b) of the Statute; and
>
> Count 4 charges him with the crime of direct and public incitement to commit genocide, punishable under Article 2 (3)(c) of the Statute.

317. The Chamber deems that, in order to derive clear and articulate factual findings regarding the acts alleged in paragraph 14 of the Indictment, it is necessary to consider, separately, the facts relating to:

> firstly, the holding on the morning of 19 April 1994 of a meeting in Gishyeshye sector, alleged to have been attended by over 100 people and led by the Accused alone following the death of Mr. Karera;
>
> secondly, the fact during that meeting, the Accused is alleged to have sanctioned the death of Sylvère Karera;
>
> thirdly, the fact during that meeting, the Accused is alleged to have urged the population to eliminate the accomplices of the RPF, which was understood by those present to mean Tutsi; and
>
> Fourthly, the killing of Tutsi in Taba is alleged to have begun shortly after the said meeting.

318. With regard to the facts in paragraph 14 of the Indictment detailed as follows:

> "The morning of April 19, 1994, following the murder of Sylvère Karera, Jean Paul Akayesu led a meeting in Gishyeshye sector. (.....) Over 100 people were present at the meeting."

319. The Chamber finds a substantial disparity between the French and English versions of paragraph 14 of the Indictment. While in the French version it is said that " Jean Paul Akayesu alone led a meeting," the English version only indicates that "Jean Paul Akayesu led a meeting,' without specifying whether he

5428

led the meeting alone. The Chamber is of the opinion that the French version should be accepted in this particular case, because the Indictment was read to the Accused in French at his initial appearance because the Accused and his counsel spoke French during the hearings and, above all, because the general principles of law stipulate that, in criminal matters, the version favourable to the Accused should be selected. In the present case and in accordance with the French version of the Indictment, the Prosecution must not only establish that the Accused led the meeting, but also that he led it alone.

320. The murder of Sylvère Karera, a teacher killed on the night of 18 to 19 April 1994, and the subsequent events, alleged under paragraph 13 of the Indictment, have already been discussed *supra.*

321. Prosecution witness A testified that after he saw the remains of Sylvère Karera at the Remera school, he went to Gishyeshye on 19 April 1994, towards 6 or 7 o'clock in the morning, where he found a large gathering of 300 to 400 people at a crossroads. The witness stated that no one had convened the meeting but that it was rather a gathering of people attracted by the events. The crowd stood near to the body of a person identified as an Interahamwe from Gishyeshye, who was alleged to have killed Sylvère Karera. A small group of people, including the bourgmestre , the Accused, sector council members and four armed members of the Interahamwe, who could be identified by the MRND coat of arms on their caps, faced the crowd in such a way that enabled them to address it. The sector councillors called on the crowd to pay attention to the speech by the . Witness A pointed out that the Interahamwe stood near a blue minibus in which the Accused had arrived, and that they seemed to have been escorting the latter, which was a surprise to the crowd.

322. A Tutsi man, appearing as a Prosecution witness under the pseudonym Z, testified that on or about 19 April 1994, in the early hours of the day following the murder of a Tutsi teacher in Remera, the murderer of this teacher was killed by persons responsible for maintaining law and order. Witness Z and other people gathered around the body of the teacher's murderer. The crowd Accused the Interahamwe present of having caused the death of the teacher. The Accused, who was armed, separated the rest of the population from members of the Interahamwe and then addressed the crowd.

323. Prosecution witness V, a teacher in Taba for nearly 30 years, went to Gishyeshye sector where he attended a meeting, at the place where the body of a Hutu man lay. He confirmed that a meeting was then held on the road in Gishyeshye, in the presence of the Accused, who was carrying a gun, and who organized the said meeting. The witness estimated that it was attended by some 500 people. The people were standing in front of a house. The Accused himself stood in the middle of the road with the Interahamwe next to him, across the road from the people.

324. Ephrem Karangwa, a Tutsi man, called as witness for the Prosecution, who, at the time of the acts alleged in the Indictment, was the Inspecteur de police judiciaire (Senior law enforcement Officer, criminal investigation department) of the Taba commune, testified before the Chamber that on 19 April, the Accused held a meeting in Gishyeshye sector.

325. Men, who had gone to inquire after Sylvère Karera, told witness U that a person had been killed following the murder of Karera and that the Accused himself had gone to where the body was and held a meeting there.

326. The holding of the said meeting was confirmed by the Accused himself, who told the Chamber during his testimony as witness, that at about 4 a.m., on the night of 18 to 19 April 1994, a certain Augustin Sebazungu, treasurer of the MDR in Taba and a resident of Gishyeshye sector, came to see him at the Bureau communal, where he had been sleeping, to inform him that the situation in Gishyeshye sector was tense, following the murder of a young man who was a member of the

5429

Interahamwe. The bourgmestre immediately alerted the police and went to the scene with two policemen, in a blue minibus. In Gishyeshye, he found a body stretched out on the ground, covered traces of blood, as if it had been hit. The Accused affirmed before the Chamber that since people were coming to see what was happening, he took advantage of the fact that a crowd had gathered there to address the population. He noted that the Interahamwe of the region had flocked around the body of their young member. The Accused puts the crowd at the meeting at about 100 to 200 people, including Hutu and Tutsi, members of the Interahamwe, members of the MDR and probably other political parties. The Accused admitted before the Chamber that he asked the crowd to draw closer, and then addressed the crowd, while the two policemen accompanying him stood behind him.

327. In his closing arguments, the Defence counsel underscored that the Accused never convened the Gishyeshye meeting, but that a crowd had spontaneously gathered after a man had been killed. The Accused, as bourgmestre, reportedly found himself among the crowd thus assembled which included members of the Interahamwe.

328. With regard to the facts in paragraph 14 of the Indictment detailed as follows:

> " Jean Paul Akayesu (...) sanctioned the death of Sylvère Karera"

329. According to Prosecution witness V, the Accused stated that Sylvère Karera died because he was working with the Inkotanyi. The bourgmestre further stated that the person whose body lay at the meeting place had been wrongly killed, but that Sylvère Karera had been justly killed. Under cross-examination by the Defence, witness V reiterated that the Accused stated that Karera had been killed because he was working with the Inkotanyi.

330. Witness Z, a Tutsi man, testified that at the meeting which followed the murder of the Remera teacher, the Accused, who was armed, separated the rest of the population from the members of the Interahamwe and, speaking of the body on the ground, he reportedly deplored the murder of the person and stated that this person was dead and yet the enemy was still alive. According to witness Z, the Accused told the crowd that papers detailing Tutsi plans to exterminate the Hutu had been seized at the home of the teacher.

331. The Accused told the Chamber, during his testimony, that he had inquired of the crowd standing around the body of the young Interahamwe, why the young man had been killed. The people gathered there, answered that he had looted and that he had been justly punished. The bourgmestre then stayed on to speak to the people, trying to explain to them that killing as a habit must stop and making them aware of the consequences. He condemned the murder of the young man because he felt that such was not a way of maintaining law and order, and explained that it would have been enough to arrest the young man. The Accused told the Chamber that he had asked Augustin Sebazungu why he, as a prominent figure and an educated man, had failed to stop the population from killing the young man, to which Sebazungu reportedly replied that there was nothing he could do.

332. With regard to the facts in paragraph 14 of the Indictment detailed as follows:

> " Jean Paul Akayesu (...) urged the population to eliminate the accomplices of the RPF, which was understood by those present to mean Tutsi."

333. Prosecution witness A testified that, during the said meeting, the Accused held papers which he allegedly showed to the crowd saying that the papers had been seized at the home of an Inkotanyi accomplice. He also said the papers detailed what the Inkotanyi accomplices were to do. The Accused

5430

showed the papers to the public. He stated that things had changed and that the Inkotanyi and their accomplices wanted to seize power. According to witness A, the bourgmestre stated that everyone should do everything possible to fight against those people because they were seeking to restore the former regime. He said that he was personally going to search for some of the people. A teacher then told the Accused that he knew of an accomplice to which the Accused replied: "Go fetch this person". Witness A also stated that the Interahamwe allegedly told the Accused he was to put the people of the commune at their disposal. The bourgmestre then told the crowd to fight against the Inkotanyi and their accomplices. The witness stated that the crowd remained rather calm even though it was stunned by the unusual statement made by the Accused. Witness A was personally surprised, just as, in his words, the rest of the people present, to see that the bourgmestre had changed and that he seemed, among other things, to have become friends with the Interahamwe.

334. Prosecution witness V told the Chamber that at the Gishyeshye meeting of 19 April 1994, the Accused asked the population to collaborate with the Interahamwe in the fight against the Tutsi, the sole enemy of the Hutus. According to witness V, the Accused brandished documents which he said contained a list of names of Hutu that the Tutsi wanted to kill. He read the papers and said that the Tutsi were holding meetings to exterminate the Hutu. Witness V felt that the bourgmestre wanted to make the population understand that the Tutsi were their enemies. The Accused said the Tutsi, the real and only enemies of the Hutu, must be killed. He called on the population to work with the Interahamwe to search for the sole enemy. He also said that there were well-known Tutsi people living in the commune, who were working with the RPF. Witness V stated that apart from the Accused, only a certain François took the floor, to state that a list of receipts for contributions, allegedly made by the Tutsi to the Inkotanyi, had been seized.

335. According to Prosecution witness C, during that meeting, showed the Accused the crowd documents which included a list of the names of Hutu whom the Inkotanyi and the Tutsi inhabitants of Taba wanted to kill and a list of the names of Tutsi who had paid their contributions to the RPF. The witness noted that, while the Interahamwe seemed to be happy, the crowd was stunned by the change in the behaviour of the bourgmestre. Witness C stated that the Accused said during the meeting that the Tutsi was the sole enemy of the Hutu. He confirmed that he did hear the Accused say the Tutsi must be killed.

336. Witness Z, a Tutsi man, testified that at the meeting which followed the murder of the Remera teacher, the Accused, who was armed, called on all those present to bury their political differences and unite to fight the enemy, the enemy being the Tutsi, the accomplices of the Inkotanyi. Witness Z stated that the Accused, speaking of the body of the young Interahamwe believed to have killed Sylvère Karera, deplored the murder of the person and said that he was dead whereas the enemy was still alive. Witness Z further testified that, at the meeting, the Accused had in his possession papers which included a list of names. The Accused read the papers and stated that the Tutsi were holding meetings to exterminate the Hutu. In addition to the Accused, a member of the Interahamwe, named François, also took the floor, holding papers his hands. He showed the papers and said they had been seized at the home of the teacher killed in Remera. The documents included a list of the names of Tutsi who had paid their contributions to the Inkotanyi. The crowd was surprised to see that the Accused then seemed to be cooperating with the Interahamwe. Witness Z felt that, during the said meeting, the Accused was addressing the Hutu and telling them to kill the Tutsi.

337. A certain Ephrem Karangwa, who was the Inspecteur de police judiciaire of Taba Commune at the time of the events, testified before the Chamber that at the Gishyeshye meeting, the Accused told the population to kill the Tutsi in Taba. The bourgmestre told the people that whether they supported the MDR, MRND or the PSD, they should unite and understand that there was only one enemy, namely the Tutsi. The Accused told the people not to fear the Interahamwe. According to the witness the people

5431

who attended the said meeting affirmed to him that, during the meeting, the Accused showed a list of people to be killed, which included the name of Ephrem Karangwa. Allegations that the Accused, *inter alia*, named Ephrem Karangwa during the said meeting, are included in paragraph 13 of the Indictment and elaborated upon here *infra*.

338. Men reportedly told Prosecution witness U that, at the meeting held by the Accused near the body of Sylvère Karera's murderer, it was said that the only enemy was the Tutsi and that all Tutsi must be killed. According to witness U, the crowd then allegedly said that the "plane" had been shot by the Inkotanyi, and that the Inkotanyi were the Tutsi.

339. Several Prosecution witnesses confirmed the Prosecution allegation that, when the Accused called on the people to fight against the enemy, the people present took it to mean that the Tutsi must be killed. Witness C, a male Hutu farmer like witness N, a female Hutu farmer, told the Chamber that, at the time of the alleged events, the "Inkotanyi" and the "Inyenzi" meant the Tutsi. Witness N specified that the Accused himself, as a leader, took the Tutsi to mean the Inkotanyi and the Inyenzi. Witness V also pointed out that, at the time of the events, the words Inkotanyi and Tutsi, were interchangeable in the countryside. He specified that, while all Inkotanyi were not Tutsi, everyone understood at the time that all Tutsi were Inkotanyi. Witness V also confirmed that the words Tutsi and Inkotanyi were synonymous and stated that the Tutsi had been pursued with such shouts as " There they are, those Inkotanyi, those Tutsi." He explained that the Tutsi were assimilated to the Inkotanyi.

340. Dr. Mathias Ruzindana, Professor of Linguistics at the University of Rwanda, appearing as expert witness for the Prosecution, explained to the Chamber that, based on his own analyses of Rwandan publications and broadcasts by the RTLM and on his personal experience, he was of the opinion that, at the time of the events alleged in the Indictment, the term Inkotanyi had several extended meanings, from an RPF sympathizer to members of the Tutsi group, depending on the context.

341. According to witness DIX, a Hutu woman, appearing as a Defence witness, explained that in her opinion, the Interahamwe started to kill people because they thought that their neighbours had in their midst accomplices of enemies from outside the country.

342. A certain Joseph Matata, a Defence witness, testified before the Chamber that the contention that when the Accused called on the people to fight against the enemy, those present took it to mean that the Tutsi must be killed, had to rebutted. According to him, the latter's speech must be interpreted with two factors in mind, namely the context of RPF incursions into the Rwandan territory and the fact that people who knew the bourgmestre could not have construed his speech as a call to kill the Tutsi.

343. A Defence witness appearing under the pseudonym DZZ, denied that the Accused ever held a meeting in Taba commune at the time of the alleged acts.

344. During his testimony before the Chamber, the Accused stated that the Interahamwe began to shout when the crowd had gathered at Gishyeshye. He called on them to calm down, stating that it was necessary to work in an orderly fashion. The Interahamwe then reportedly informed the bourgmestre that soldiers, the Inkotanyi, were allegedly infiltrating the commune. The Accused maintained before the Chamber that he had replied that if they knew of a family harbouring an RPF militant, they could reveal such information to a councillor, an officer of the Cellule, a policeman or the bourgmestre , who would then take up the case and follow it up. The Accused denied that he himself told the crowd that people, the accomplices of the Inkotanyi, should be flushed out, but admitted that it was said in the crowd that certain families were harbouring RPF soldiers.

5432

345. In response to Prosecution questions regarding the lists of names mentioned by several Prosecution witnesses, the Accused stated under cross-examination, that a certain François had given him papers to rapidly read through silently for his personal edification. Those papers included the names of people and their functions. The Accused testified that the Interahamwe ordered him twice to read out the list and he refused to do so. According to him, members of the Interahamwe then said that the list, which included the names of RPF soldiers and their supporters, had been seized in the office of an "Inspecteur de police judiciaire" in Runda, a member of the RPF, who had been killed while he was shooting at the soldiers and the communal police.

346. The Accused testified before the Chamber that he refused to read the list aloud to the crowd because he had had time to recognize certain names on the list such as those of Karangwa, Charlotte, Rukundakuvuga and Mutabazi. According to the Accused, he allegedly explained to the assembled population that the list contained names which included that of Ephrem Karangwa, and that such a list constituted a real danger since anyone could someday find their name on such a list. Thus, he reportedly cautioned the people against such documents.

347. The Accused then specifically admitted before the Chamber that mentioning a name on such a list was seriously damaging to the person thus named and jeopardized their life. He also confirmed that made by a public official, such as the bourgmestre , such a statement would have so much more impact on the people, who would understand that the person was thus being denounced and that they would certainly be killed.
The position of the Defence as stated, particularly, during the closing arguments, regarding the documents read by the Accused, is that overexcited members of the Interahamwe allegedly forced the bourgmestre to read a document in their possession, which included the names of a certain number of people considered to be accomplices of the RPF. The Accused allegedly tried to dissuade the demonstrators from denouncing anyone in such a manner, by explaining that there was no proof that the people whose names appeared on the list were indeed RPF supporters.

348. With regard to the facts in paragraph 14 of the Indictment detailed as follows:

> " The killing of Tutsi in Taba began shortly after the meeting."

349. With regard to the allegation made in paragraph 14 of the Indictment, the Chamber feels that it is not sufficient to simply establish a possible coincidence between the Gishyeshye meeting and the beginning of the killing of Tutsi in Taba, but that there must be proof of a possible causal link between the statement made by the Accused during the said meeting and the beginning of the killings.

350. Witness Ephrem Karangwa, who was the "Inspecteur de police judiciaire" of Taba commune, at the time of the events testified that until 18 April 1994, the people of Taba were united and there were no killings in Taba at that time.

351. According to Prosecution witness C, the Taba population followed the instructions given by the bourgmestre at the Gishyeshye meeting and began thereafter to destroy houses and to kill. The witness recalled that the people once again complied with the instructions of the Accused as they always had.

352. Prosecution witness W, a Tutsi, clearly stated that the attacks began on 19 April 1994. The first attack he witnessed took place on 19 April 1994 at about 2:00 p.m. Just before that, his younger brother, who had gone to find out what had happened in Rukoma, told him that a list of "Collaborators" had allegedly been discovered in the home of Sylvère Karera, and that the name of witness W was allegedly on the list. The witness then immediately went into hiding and later sought refuge in Kayenzi commune.

5743

353. Prosecution witness A, a Tutsi man, testified before the Chamber that five Tutsi were killed on the day of the meeting. From that date, witness A personally observed that the people were destroying houses, taking away corrugated iron sheets, doors and anything they could carry, and killing cows which they ate. Some of the people tried to run away when the killings began. Most of the victims were Tutsi. Witness A said that in his opinion when the Accused began to have good relations with the Interahamwe, the latter did whatever they wanted with the commune. He felt that the people were thus subjected to propaganda designed to make one part of the population hate the other. The people were believed to have changed because of repeated statements and promises made to them and that, as a result, they allegedly began to kill.

354. Witness N, a 69-year old female Hutu farmer, also explained that the destruction of houses, the killing of cows and even the killings, began following said meeting. She attributed the scale of the killings to the Accused's fiery mood during said meeting and his urging to wage war against the Inkotanyi and the Tutsi. She felt that had the Accused not held the meeting in question, the killings would never have started at that very moment, even if the Interahamwe were more powerful than the bourgmestre .

355. The Accused himself confirmed to the Chamber that killings started in Taba on 19 April 1994. He said that, on that day, after addressing the crowd at Gishyeshye, he went to the Bureau communal where he noted that the Interahamwe had killed a good number of people, who had sought refuge there, including elderly people, women and children.

356. During its closing arguments, the Defence pointed out that Prosecution witness V had testified before the Chamber that many Tutsi had sought refuge at the Bureau communal on the night of 19 April 1994. It therefore expressed doubt as to the reliability of Prosecution Witness V who had also stated, during his testimony, that on the morning of the same 19 April 1994, the Accused had ordered the Tutsi to be killed.

357. A certain Joseph Matata, called as a Defence witness, explained to the Chamber that, in his opinion and according to testimonies he had allegedly collected in Taba, the militia began to neutralize the Accused as from 19 April 1994. He therefore concluded that the beginning of the massacres was not linked to the Gishyeshye meeting, but that it was an unfortunate coincidence.

358. Factual findings:

359. On the basis of consistent evidence and the facts confirmed by the Accused himself, the Chamber is satisfied beyond a reasonable doubt that the Accused was present in Gishyeshye, during the early hours of 19 April 1994, that he joined the crowd gathered around the body of a young member of the Interahamwe militia, and that he took that opportunity to address the people. The Chamber finds that the Accused did not convene the meeting, but that he joined an already formed gathering. Furthermore, on the basis of consistent evidence, the Chamber is satisfied beyond a reasonable doubt that on that occasion, the Accused, by virtue of his functions as bourgmestre and the authority he held over the population, did lead the crowd and the ensuing proceedings.

360. With regard to the Prosecution allegation that the Accused sanctioned the death of Sylvère Karera, the Chamber finds that the Accused himself admitted to having condemned the death of a young Interahamwe who had allegedly killed Karera, but failing to mention that he also condemned the death of Karera. The Chamber nevertheless points out that failure to condemn is not tantamount to approval in this case. However, on the basis of testimonies by witnesses V and Z, the Chamber finds that the Accused could very well have attributed the death of Sylvère Karera to his alleged complicity with the

5434

Inkotanyi and may have added that Karera had been justly killed. The Chamber however finds that no other evidence corroborated the testimony of witness V, whereas some ten witnesses had been questioned about facts relating to the murder of Sylvestre Karera and the ensuing meeting at which the Accused spoke. Consequently, the Chamber holds that in the absence of conclusive evidence, the Prosecution has failed to establish beyond a reasonable doubt that the Accused publicly sanctioned the death of Sylvère Karera at the Gishyeshye gathering.

361. With regard to the allegation that the Accused urged the population, during the said gathering, to eliminate the accomplices of the RPF, after considering the weight of all supporting and corroborative evidence, the Chamber is satisfied beyond a reasonable doubt that the Accused clearly called on the population to unite and eliminate the sole enemy: accomplices of the Inkotanyi. On the basis of consistent evidence heard throughout the trial and the information provided by Dr. Ruzindana, appearing as an expert witness on linguistic issues, the Chamber is satisfied beyond a reasonable doubt that the population construed the Accused's call as a call to kill the Tutsi. The Chamber is satisfied beyond a reasonable doubt that the Accused was himself fully aware of the impact of his statement on the crowd and of the fact that his call to wage war against Inkotanyi accomplices could be construed as one to kill the Tutsi in general.

362. Finally, relying on substantial evidence which was not essentially called into question by the Defence, and as it was confirmed by the Accused, the Chamber is satisfied beyond a reasonable doubt that there was a causal link between the statement of the Accused at the 19 April 1994 gathering and the ensuing widespread killings in Taba.

The events alleged

363. Paragraph 15 reads as follows:

> At the same meeting in Gishyeshye sector on April 19, 1994, Jean Paul Akayesu named at least three prominent Tutsis -- Ephrem Karangwa, Juvénal Rukundakuvuga and Emmanuel Sempabwa -- who had to be killed because of their alleged relationships with the RPF. Later that day, Juvénal Rukundakuvuga was killed in Kanyiya. Within the next few days, Emmanuel Sempabwa was clubbed to death in front of Taba *bureau communal.*
>
> It is the alleged that by his participation in relation to these acts the accused committed offences charged in six counts:
>
> > Count 1, Genocide, punishable by Article 2(3)(a) of the Statute of the Tribunal;
> >
> > Count 2, Complicity in Genocide, punishable by Article 2(3)(e) of the Statute of the Tribunal;
> >
> > Count 3, Crimes against Humanity (extermination), punishable by Article 3(b) of the Statute of the Tribunal;
> >
> > Count 4, Direct and Public Incitement to Commit Genocide, punishable by virtue of Article 2(3)(c) of the Statute of the Tribunal;
> >
> > Count 5, Crimes against Humanity (murder), punishable by Article 3(a) of the Statute of the Tribunal; and

5435

Count 6, Violations of Article 3 common to the Geneva Conventions of 1949, as incorporated by Article 4(a)(murder) of the Statute of the Tribunal.

364. Paragraph 15 of the Indictment alleges that, at a meeting held on 19 April 1994 in Gishyeshye sector, the accused called for the killing of three prominent Tutsi due to their alleged relationships with the RPF. As a supposed consequence of being named, at least two of them, namely Juvénal Rukundakuvuga and Emmanuel Sempabwa, were subsequently killed. The acts which were allegedly further perpetrated as regards to Ephrem Karangwa are the subject of paragraphs 16, 17 and 18 of the Indictment.

365. It has already been established beyond reasonable doubt, as alleged in paragraph 14 of the Indictment, that Akayesu was present at an early morning gathering in Gishyeshye sector on April 19 1994. The Chamber found that Akayesu urged those present to unite to eliminate the only enemy, the accomplice of the Inkotanyi. The Chamber also found the terms Inkotanyi and accomplice during the said meeting to refer to Tutsi and that the accused was conscious that his utterances to the crowd would be understood as calls to kill the Tutsi in general.

366. It now needs to be established whether during this gathering, Akayesu specifically named Ephrem Karangwa, Juvénal Rukundakuvuga and Emmanuel Sempabwa who had to be killed because of their alleged relationships with the RPF. If it is proved beyond a reasonable that Akayesu named the said three, the Chamber will consider evidence presented in relation to their subsequent fates as alleged in the second and third sentences of paragraph 15 of the Indictment.

The Role, if any, of the Accused

367. A number of the witnesses, namely witnesses V, C, A, Z and Akayesu, who testified in relation to the events alleged in paragraph 14 of the Indictment, also testified in relation to the specific allegations contained in paragraph 15 of the Indictment. Hence, the Chamber will limit itself to recalling the testimonies of these witnesses only as pertains to the paragraph 15 of the Indictment, i.e. the naming of three individuals and their subsequent fates, factual findings having already been made above to there having been a gathering in Gishyeshye and the pertinent general allegations.

368. Witness Z, a Tutsi man, testified that on or about 19 April 1994, in the early hours of the morning, he was present at the Gishyeshye sector gathering, which was attended by Akayesu. He said Akayesu separated the crowd from the Interahamwe and called for all those present to forget their political differences until the enemy had been eliminated, the enemy being the Tutsi, the accomplices of the Inkotanyi.

369. Witness Z said Akayesu, who was holding documents, cited Ephrem Karangwa as someone wanting to kill him and replace him as bourgmestre. He said the accused did not name anyone else in particular. According to witness Z, Akayesu said that he didn't want to give the names of the other persons because they lived nearby and someone might warn and help them escape. The witness said an Interahamwe by the name of François spoke about papers. According to the witness, the Interahamwe said the papers had been seized from the dead professor's house (see factual findings on paragraphs 13 and 14 of the Indictment) and contained details of monies paid by the Tutsi to the Inkotanyi.

370. Witness Z testified Akayesu announced on leaving that he was going so that those persons who are to be found between Taba and Kayenzi did not escape him. He said the accused left in a vehicle with the Interahamwe. Once back at his house which was on a neighboring hill, the witness said he observed the persons who had been in the vehicle with Akayesu break down the door of Rukundakuvuga's house. He

later heard that Rukundakuvuga was arrested. Under cross-examination, witness Z confirmed that Akayesu had not named Rukundakuvuga but added that Akayesu read from documents at the gatl.

371. Witness V, a Tutsi teacher in Taba in Taba commune for nearly 28 years, testified he was present at the gathering at the Gishyeshye sector. He said that, during this gathering, Akayesu asked the population to collaborate with the Interahamwe in the fight against the only enemy of the Hutu, namely the Tutsi. The witness said Akayesu brandished documents on which there was a list of names of Hutu who were to be killed by the Inkotanyi and the Tutsi, and a list of RPF collaborators. The witness affirmed Akayesu said he knew of a number of people in the commune, namely three teachers, to be RPF collaborators who lived in Kanyenzi, and a fourth person, the "inspecteur de police judiciaire" who worked at the office of the commune. Witness V said the accused told the crowd that these people had to be sought to prevent them from escaping. The witness testified the accused named Ephrem Karangwa during the meeting, and by reference to where they lived also implicitly spoke of Juvénal Rukundakuvuga and Emmanuel Sempabwa, who were both Tutsi. According to the witness, the crowd understood that Akayesu was looking for these people as they were supposedly RPF accomplices.

372. Witness V testified that of the four individuals spoken of by the accused, he saw two of the bodies at the bureau communal, and the body of Rukundakuvuga on the Kanyiya road as he fled the commune of Taba. The fourth person named at the meeting was able to escape.

373. Under cross-examination, witness V asserted that Akayesu brandished three documents during the gathering. He said there was a list of people who were financing the RPF, a list of Hutu who had to be killed by the Tutsi, and a list of Tutsi RPF collaborators. The witness testified that Akayesu only named Karangwa. Questioned as to the identification of other individuals, witness V said they weren't expressly cited, but Akayesu pointed to where they lived and said that they were teachers. According to witness V, as people immediately went to search for them it had been possible for individuals at the gathering to guess about whom Akayesu was speaking.

374. Witness E, a Hutu man from Taba testified that he was present at the Gishyeshye gathering on the morning of 19 April 1994. He said Akayesu arrived in a car and addressed the crowd. According to the witness, Akayesu, who was armed with a rifle, pointed to the Interahamwe who were alongside him and told the crowd that the Interahamwe and the MRND, the party to which belonged the Interahamwe, meant them no harm. Witness E said Akayesu told the crowd that all of the political parties were at present one and the same, and that the only enemy was the accomplice of the Inkotanyi. The witness said a certain François gave Akayesu some documents which had allegedly been found at the residence of a RPF accomplice. He said Akayesu told the crowd that all of the Inkotanyi accomplices had to be sought. Questioned as to any names being cited by Akayesu, the witness said only that of Ephrem Karangwa was mentioned.

375. Witness A, a Hutu man who worked with Akayesu from April 1993 up until 7 April 1994, testified that he attended the Gishyeshye gathering in the early hours of 19 April 1994. He said that on arriving, around 06h00 and 07h00 in the morning, he saw a crowd gathered around a body. According to the witness, amongst the people present were the bourgmestre, conseillers, the local population who had heard the noise the night before and Interahamwe. The witness said the members of the cellules and the conseillers asked the crowd to listen to the bourgmestre. Witness A declared Akayesu showed a number of documents to the people, and told the crowd that things had changed, that the Inkotanyi and their accomplices wanted to take power. Questioned as to the citing of names, the witness stated that Akayesu mentioned only Ephrem Karangwa, the "inspecteur de police judiciaire", as someone who had a plan to replace him. The witness added that Akayesu told the crowd that everyone had to do whatever they could to fight these people so as not to return to the previous regime, and that he too would personally search for these people. Witness A testified that a teacher in the crowd informed Akayesu that he knew

5437

of another accomplice, in response to which Akayesu ordered that this person be found.

376. Under cross-examination, witness A affirmed that during the gathering in Gishyeshye, Akayesu named only Ephrem Karangwa, and mentioned no other names.

377. Witness C, a Hutu farmer, testified that he attended the Gishyeshye gathering. He said Akayesu addressed the crowd. According to the witness, the accused took documents from his jacket and stated that he was going to read the contents of the documents found at the Professor's house who had been killed in Remera. He said that Akayesu called for the crowd to listen attentively and to put into practice the contents of the documents. Witness C declared that thereafter Akayesu read out the documents.

378. Akayesu testified that on the morning of 19 April 1994 in Gishyeshye sector, a number of people, including Interahamwe, had assembled around the cadaver of an Interahamwe. Akayesu explained that during his discussions on commune security with the crowd at this gathering, a certain François, who had arrived with the Interahamwe, gave him a number of documents on which there figured names and occupations of supposed RPF accomplices and told him to read them. Though François told him to read out the names on the lists, the accused asserted that he did not do so, save for citing, reluctantly so, that of Ephrem Karangwa. In so doing he said he explained to those present at the gathering "there is on this list Ephrem Karangwa, tomorrow you may find yourselves on the list; will it then be said that you too are housing elements of the RPF, a soldier of the RPF?".

379. Under cross-examination, Akayesu declared that he did not read out any names but that he did cite that of Ephrem Karangwa. He added that he had summarized the contents of the documents in his possession by saying there was a list of names on which figured Ephrem Karangwa, tomorrow others could appear on the list, would it then be said that they too are hiding RPF soldiers. Akayesu said the Rukundakuvuga was also on the list, but denied having read it out. Akayesu stated it would be dangerous to publicly designate an individual as an accomplice of the RPF

380. The Defence argued that Akayesu never convened the gathering at Gishyeshye. Instead, the accused was amongst a group of people who had gathered there after a man had been killed. The Defence submitted that Interahamwe were angry, and forced Akayesu to read a document, which contained the names of persons they believed to be accomplices of the RPF. The Defence averred that Akayesu tried to dissuade the Interahamwe from denouncing people in this manner as there was nothing to prove on the list that these people were accomplices of the RPF.

Findings of fact

381. The Chamber has already found beyond a reasonable doubt that Akayesu was present and did speak at the gathering in Gishyeshye sector on the morning of 19 April 1994. This has been developed in the factual findings pertaining to paragraph 14 of the Indictment.

382. Akayesu admitted to having been given a number of documents by the Interahamwe François, and that he did cite the name of Ephrem Karangwa during this gathering, as a forewarning to those present that they too could be deemed RPF accomplices if their names figured on the list. Akayesu also admitted it would be dangerous to cite the name of an individual as an RPF accomplice. However, he was adamant that at he did not read out the documents as such, but summarized them for the crowd. Akayesu confirmed names, save that of Ephrem Karangwa, also appeared on the list. Further, the Defence submitted in its closing arguments that Akayesu had been forced to read out the documents given to him by the Interahamwe.

5438

383. Akayesu's testimony, as regards the naming of Ephrem Karangwa, is supported by the evidence presented by witnesses Z, V, E and A in this matter. All four affirmed that only the name of Ephrer Karangwa had been cited during the Gishyeshye gathering. Witnesses V and Z added that in their opinions it was possible to infer, from Akayesu's gestures and subsequent conduct, reference to Sempabwa and Rukundakuvuga.

384. The Chamber finds that it has been proved beyond reasonable doubt that Akayesu did cite Ephrem Karangwa during the Gishyeshye meeting. It has also been established beyond a reasonable doubt he did so knowing of the consequences of naming someone as an RPF accomplice in the temporal context of the events alleged in the Indictment.

385. However, the Chamber is of the opinion that the evidence presented in this matter does not support the specific allegations that Akayesu named Juvénal Rukundakuvuga and Emmanuel Sempabwa. The evidence presented shows only an implicit, yet remote, allusion by Akayesu during the Gishyeshye gathering to these two individuals, and does not demonstrate that Akayesu expressly named them. Hence, the Chamber finds that it has not been proved beyond reasonable doubt that Akayesu named Juvénal Rukundakuvuga or Emmanuel Sempabwa during the Gishyeshye gathering on 19 April 1994, and that their fates were consequent upon the utterances of Akayesu at the Gishyeshye gathering.

5.4 Beatings (Torture/Cruel Treatment) (Paragraphs 16, 17, 21, 22 & 23 of the Indictment)

Charges Set Forth in the Indictment

> 16. Jean Paul Akayesu, on or about April 19, 1994, conducted house-to-house searches in Taba. During these searches, residents, including Victim V, were interrogated and beaten with rifles and sticks in the presence of Jean Paul Akayesu. Jean Paul Akayesu personally threatened to kill the husband and child of Victim U if she did not provide him with information about the activities of the Tutsi he was seeking.
>
> 17. On or about April 19,1994, Jean Paul Akayesu ordered the interrogation and beating of Victim X in an effort to learn the whereabouts of Ephrem Karangwa. During the beating, Victim X's fingers were broken as he tried to shield himself from blows with a metal stick.
>
> 21. On or about April 20, 1994, Jean Paul Akayesu and some communal police went to the house of Victim Y, a 68 year old woman. Jean Paul Akayesu interrogated her about the whereabouts of the wife of a university teacher. During the questioning, under Jean Paul Akayesu's supervision, the communal police hit Victim Y with a gun and sticks. They bound her arms and legs and repeatedly kicked her in the chest. Jean Paul Akayesu threatened to kill her if she failed to provide the information he sought.
>
> 22. Later that night, on or about April 20, 1994, Jean Paul Akayesu picked up Victim W in Taba and interrogated her also about the whereabouts of the wife of the university teacher. When she stated she did not know, he forced her to lay on the road in front of his car and threatened to drive over her.
>
> 23. Thereafter, on or about April 20, 1994, Jean Paul Akayesu picked up Victim Z in Taba and interrogated him. During the interrogation, men under Jean Paul Akayesu's authority forced Victims Z and Y to beat each other and used a piece of Victim Y's dress to strangle Victim Z.

5439.

Events Alleged

386. The Chamber notes that paragraph 16 of the Indictment includes allegations with respect to Victim V and Victim U. As the evidence which was given by and about Victim V (Witness A) relates to events which are described in paragraphs 21, 22 and 23 of the Indictment, the Chamber will consider this component of paragraph 16 together with the allegations set forth in paragraphs 21, 22 and 23.

387. Witness K (Victim U), a Tutsi woman married to a Hutu man, was an accountant who worked for the Accused in the office of the bureau communal in Taba, during the events of April 1994. Witness K testified that on the morning of 19 April 1994 she went to the bureau communal at the request of the Accused and that she found him there outside the office with many people, changed in mood and in temper. She said he asked her why she had not been coming to work and sh e told him that she was afraid and had come only at his request. After then witnessing the killing of Tutsi at the bureau communal, which she said was ordered by the Accused, Witness K said the killers asked the Accused why she had not been killed as well. She said he told them that they were going to kill her after questioning her about the secrets of the Inkotanyi. According to Witness K, the Accused then took her keys, locked her in her office and left, saying he was going to search for Ephrem Karangwa, the Inspector of Judicial Police.

388. The Accused returned, said Witness K, with other men whom she referred to as "killers", and they questioned her. She said they asked her to explain how she was cooperating with the Inkotanyi, which she denied. She said the Accused insisted and said that if she did not tell them how she worked with the Inkotanyi, they would kill her. After further discussion, she said the Accused again threatened her, saying she should tell them what she knew or they would kill her, and then left. At this time she estimated it was about three o'clock in the afternoon. Witness K testified that the Accused returned at around midnight with a police officer and asked her whether she had decided to tell them what she knew. When she said she knew nothing, she said he told her, "I wash my hands of your blood." She said he then told her to leave the office and go home and when she expressed concern about the late hour, he asked the driver and the police to accompany her home.

389. Under cross-examination, Witness K stated that her husband was a friend of the Accused. When asked why she was not killed, she said that Tutsi women married to Hutu men were not killed. In his testimony, the Accused confirmed that he saw Witness K at the bureau communal on 19 April 1994 and said that he had wondered why she was there. He said that he saw a man behind her with a machete and that he came between them and escorted her to the office, and told her to keep the door closed.

390. Witness Q (Victim X), a Tutsi man who lived in Musambira, testified that on the same day, 19 April 1994, while he was there visiting, the Accused came to the home of his parents, looking for Ephrem Karangwa, the Inspector of Judicial Police for the commune of Taba. Witness Q told the Chamber that the four people who came - one of whom was a policeman armed with a gun, another armed with grenades and another with a small hatchet - made him, his brother, his sister and his brother-in-law sit down in the courtyard at the entrance of the house. He said they asked where Ephrem Karangwa was, and after a discussion in French, entered the house to search, leaving the policeman with them in the courtyard, his gun charged and ready to shoot. Witness Q said he recognized the policeman, who told his brother-in-law that it was Akayesu, the bourgmestre of Taba, who had come to his house. He said that Akayesu was wearing a long military jacket. Witness Q had not previously met the Accused but was able to identify him in court. He said the Accused and two other people came out of the house with boxes, papers and photographs, which they scattered in the courtyard, saying the photographs of family members in Uganda had been sent by Inkotanyis. Witness Q said he and his relatives were then

S4460

beaten and kicked by the two men who were with the Accused, and he was hit with a small axe on his right hand. He said his brother-in-law was hit and wounded in the head. The witness displayed in c[illegible] his right hand with a bent index finger, which he said had been broken from the beating when he raised his hand to ward off the blows. Witness Q testified that the Accused was present during this beating and watched it. He said the Accused was the one apparently responsible.

391. The other house-to-house searches referred to in the relevant paragraphs of the Indictment appear to have taken place on the next day and relate to the search by the Accused for Alexia, the wife of Pierre Ntereye, a university teacher. Witness N (Victim Y), a Hutu farmer, testified that she knew where Alexia was hiding. She said the Accused, whom she had known for two years, came to her house with three Interahamwe - Mugenzi, Francois and Singuranayo - at nine o'clock in the evening, the day after the meeting in the commune (i.e. 20 April), looking for Alexia. She said the Accused stayed in his vehicle, near the entrance of her home. The others broke down the door and pointed their guns at her, ordering her to show them the Inkotanyi hiding in her house. She said she told them to search the house, and one of them went to search while the other one stayed at the door. Witness N testified that Mugenzi, who was a communal police officer, took her by the arm to the door and hit her on her head with the barrel of his rifle. She said Francois, who had gone into the house, found a young girl whom he told to open her mouth. According to Witness N, Singuranayo then forced open her mouth and struck her with the barrel of the gun.

392. Witness N said that when she told them that she did not know where Alexia was, she was lifted by her arms and legs by the three men and taken outside to the Accused. She said the Accused told her to lie down, which she did. She said Mugenzi then stepped on her neck and pushed the butt of his rifle into her neck. She said he stomped on her with a lot of force, and that the Accused then hit her with a club on her back. When she shouted, she said the Accused told her to be quiet, calling her the mother-in-law of the Inkotanyi and a "poisonous woman." Witness N testified that they then took her in the vehicle to a partially opened mine at a place called Buguli. She said the Accused ordered her to lie down in front of the vehicle, got into the driver's seat and told her that he was going to run her over. Mugenzi told her to tell them where the people she was hiding were or they would kill her. She said she told them that she did not know and that they should kill her if they wanted. Witness N said Mugenzi then bound her arms and legs with a piece of cloth, pushed her to the ground and stomped on her with his foot. She said the others also joined in and stomped on her.

393. Witness N said she was then put in the vehicle and taken to the house of Ntereye's sisters. When they arrived, she said Francois called for Ntereye's niece Tabita (Victim W) and they questioned her. According to Witness N, the Accused remained in the vehicle and called Tabita from there. He asked her where Alexia was, and she said she did not know. Witness N testified that Tabita was then taken in the vehicle back to the mine. There, she said, they made her get out and told her to get in front of the vehicle. The Accused threatened to run her over and again asked her for the whereabouts of the people in question. She said Tabita was afraid and said that they had hidden in a sorghum field but that she did not know where they were. According to her testimony, Witness N was then told by the Accused that she was a "poisonous woman" and that she had hidden these people. She said they then began to strike her with their gun[s].

394. Witness N said that she and Tabita were then taken in the vehicle to a roadblock, where they picked up Victim Z, and they were then taken to Gishyeshye Sector. Witness N testified that she was at this time "almost dead" from the beating she had suffered. When they arrived, Witness N said she was thrown on the road, next to Victim Z, and they began to beat him with a club. She said the Accused then instructed Victim Z to beat her. She said Victim Z stood up and began to beat her, and that he beat her several times on her leg with a club. During this time, she testified that the Accused was standing next to them near the vehicle. Witness N said her hands were then tied in the back with a piece of cloth, the

5441

other end of which was used to strangle Victim Z. She said they tightened the cloth, and his eyes almost came out of their sockets. Victim Z then said that he thought he knew who had hidden Alexia. Sh[e] [they] then started hitting him again, very hard, and the Accused asked [him] to hit her hard, to make her talk. Witness N said she threatened to bite [him] if [he] continued to hit her.

395. Witness N testified that she was then taken in the vehicle with Victim Z to a roadblock and there they picked up a person identified as Victim V(Witness A). She said they were taken to Victim V's house, where they were taken out of the vehicle and thrown on the ground. According to the testimony, they started beating Victim Z again with the club and they also beat Victim V and told him to bring out the person he was hiding. Victim V said he was not hiding anybody. On direct examination, Witness N said the Accused told Victim V to raise his arms so that they could shoot him. On cross-examination, Witness N testified that Mugenzi told Victim V to raise his arms so that they could shoot him. She said they did not shoot him, and that the Accused told Victim V that they would continue searching for Alexia and that if they did not find her he would have to die.

396. Witness N testified that as a result of the beatings she received, her arm is limp. She said that she can no longer walk as she did before and that she needs help to get dressed. She testified that she can no longer work on the farm. The Trial Chamber notes that Witness N walked with difficulty, aided by a walking stick.

397. Witness C (Victim Z), a Hutu farmer, testified that he knew Alexia, that she was a Tutsi teacher and the wife of Ntereye. He said that she hid in his house during April 1994 and that she had come to his house because she realized that he had not participated in the killings. Witness C testified that some Interahamwe came to his house while he was out harvesting coffee. He said one of his children came to look for him after the child had been beaten and asked where Alexia was. Witness C returned to his house and found the Interahamwe at the entrance, carrying machetes and clubs. He said some also had grenades. According to the testimony, the Interahamwe surrounded Witness C and accused him of hiding Alexia. Witness C said that Alexia was not in his house, and one of them started beating him on his back with the blunt side of a machete. He said he then told them that Alexia sometimes hid in his house and sometimes in another person's house. They continued to beat him, and Witness C testified that when he realized that he was about to be killed he said that Alexia was in another [room]. He said the Interahamwe took him to Victim Y's house, and when they arrived they continued beating him. He said they asked Victim Y where Alexia was, and she said that Alexia had gone to her husband's relatives. Witness C said that the Interahamwe then left the house, taking him with them, and after a distance released him, saying that they had from him what they needed.

398. Witness C (Victim Z) testified that one week after this incident, while participating in a night patrol, he saw the Accused, whom he had known for a long time, with three Interahamwes, Victim Y (Witness N) and Tabita, the niece of Ntereye, in a white twin cab. He said the Accused was driving and stopped at the roadblock, got out of his car and told the Interahamwe that they should bring Witness C to him. He said the Accused told him to get into the vehicle, which he did, and they drove to the forest. In the middle of the forest, Witness C said they stopped and asked him to get out and lie down in front of the vehicle. He said the Accused then stepped on his face, causing his lips to bleed, and kept his foot on Witness C's face while two of the Interahamwe - Francois and Mugenzi - began to beat him with the butt of their guns. During this time, he said he was asked repeatedly where Alexia was hiding.

399. Witness C said that during the beating, Victim Y(Witness N), who was in the vehicle, urged him to tell them where Alexia was, and when he realized that they were going to kill him, he told them that she was at his home. Concerned that they would find her there, Witness C said he then told them she was somewhere else and Victim Y told them that Victim V could advise them of her whereabouts. Witness C testified that he was then made to sit next to Victim Y and they were bound together, side by side, with a

5442

rope by the Interahamwe Mugenzi. He said the rope was put around his neck. Under cross-examination, Witness C clarified that the rope was in fact a piece of cloth that he had been wearing. When he vomit, Witness C said they were untied and the Accused then told them to get back into the vehicle. Witness C also testified on examination that he was asked by Francois to hit Victim Y and given a cudgel, with which he struck her once on the leg. He said he was told to tell Victim Y to tell them where Alexia was hiding. After this, Witness C testified that the Accused told them to get back into the vehicle and they were taken to the roadblock.

400. At the roadblock, Witness C testified that they picked up Victim V and the Accused drove them to Victim V's house. When they arrived, he said the Accused asked his Interahamwes to search the house. He said two of them went in and came back, saying that Alexia was not in the house. According to Witness C, the Accused then told Victim V twice to step aside and raise his arms in the air so that they could shoot at him. One of the Interahamwe told him a third time to raise his arms so that they could shoot him. Witness C said they did not shoot at Victim V, but they again beat him, Witness C, on the back with the blunt side of a machete. He said they were then asked to get back in the vehicle and went near the home of Victim Y, who was dropped off. They continued, he said, dropping one Interahamwe off at a roadblock and stopping at another roadblock, where the members of Ntereye's family had been arrested. Witness C testified that the Accused asked them to get in the vehicle - a woman, three children and three men. He said they then went to a commercial center near Remera Rukoma, and the people were taken to a prison there. Witness C and Victim V were left to wait in the vehicle while the Accused, Francois and Mugenzi went to drink beer at a place about fifteen feet from the vehicle. From the vehicle, Witness C testified that he heard the Accused say to the Interahamwe "I do not think that what we are doing is proper. We are going to have to pay for this blood that is being shed." After the Accused and the Interahamwe drank beer and returned to the vehicle, Witness C said they were taken near the school of Remera Rukoma, dropped off there and told to be at the office the next morning at 7:00.

401. Witness C showed the Trial Chamber the scars he said he had from this beating, on the left side of his back. He said that he did not have scars on his lips but that he did have wounds on his head and a scar on his nose. He testified that he has continuing health problems such as a bleeding nose and pains in his head, and that his body is no longer what it was before.

402. Witness A (Victim V), a Hutu man, testified that he knew Alexia and that he was the person who had found the hiding place for her. He said he saw the Accused, whom he had known for ten years and worked with, one night while he was on patrol, sometime between 7:00 and 9:00. He said the Accused was alone in a white pickup truck, and while they were talking, he saw people, including the Interahamwe Francois and a commune police officer, coming from the house of an elderly woman, who lived near him. He said they put this woman in the vehicle and took her to the forest, and shouts were heard as they beat her. Later, he said the Accused came back and took away another of his neighbours who was doing the night patrol, and he also heard this person crying out as he was being beaten. Witness A said they came back and picked him up and went to his house. He said the Accused was driving the vehicle. He said they came into his house and searched for people they said were hiding there, in particular Alexia. Witness A said they had guns, and that after they searched the house they took him and the others to the gate of the house, and the commune police officer and Francois began to beat them with the butt of a rifle and a stick, asking them where Alexia was. At this time, he said the Accused was standing next to them and watching. He said when they discovered that Alexia was not in the house, they stopped the beating and put them in the vehicle. He said they released the elderly woman and sent her back to her house, and they continued to detain him and Victim Z.

403. Witness A testified that near his house, they found nine people from families who had been stopped by night patrols. He said these people were presented to the Accused who put them in the vehicle and took them to a prison near Remera Hospital. He said the Accused and Francois went to have drinks and

5443

he was left in the vehicle with Victim Z and a young girl, guarded by the commune police officer. Afterwards, he said they went back to the bureau communal and on the way the Accused told them home but come back to the bureau communal early the next morning. At this time, he said it was approximately 2:00 in the morning. On cross-examination, Witness A said that he did not sustain serious injuries from the beatings apart from a broken rib which was treated.

404. The Accused testified that after Ntereye was killed on 10 May 1994, people were saying that they still did not know where his wife was. The Accused said he knew that she was being sought, and he said he was determined to save her. He said that Ntereye had told him that she was going from house to house. He said he found an Interahamwe called Francois and told him that he had someone to save. He said he asked Francois to help him for a price and gave him twenty thousand. He said he then went to Ntereye's sister's house and found his niece who told him that Alexia was living in the house of an elderly woman. He said he knew her to be a tough old lady and asked the niece to come with him to reassure her. He said they left - himself, a police officer and Francois. He said they called for the lady and she came, and he spoke to her. He said she told him that Alexia had been there but left and gone to Kayenzi. He said when he asked her whether she was telling the truth, she told him "I cannot lie because you are going to do good for Alexia and then I have also heard that you tried to save Ntereye." He said he left with the niece and drove to Buguli and that he spoke to her and her sisters, warning them not to let the children go outside because they would be killed. In his testimony, the Accused then moved on to other events. The Accused later testified that when he went to look for Alexia, there were two or three people at the roadblock near the home of the old lady, but that neither Victim V nor Victim Z was there, and he did not see them on this occasion. He testified that Victim Y, Victim Z and Victim V were known to him. He also said there were no mines in Buguli.

Factual Findings

405. The Chamber finds that on 19 April 1994, Victim U (Witness K) was threatened by the Accused at the bureau communal. She went to the bureau communal because she had been summoned there by the Accused. She was questioned by the Accused in the presence of men whom she had just seen killing Tutsi at the bureau communal. In response to a question from the killers, Victim U heard the Accused tell them that she would be killed after she was questioned about the secrets of the Inkotanyi. The Accused then questioned Victim U and threatened that she would be killed if she did not divulge information about her cooperation with the Inkotanyi. The Accused then locked Victim U in her office and left. When he returned in the afternoon, he resumed questioning Victim U and again threatened that she would be killed if she did not provide information about the Inkotanyi. He left again and returned at midnight with a police officer. The Accused asked her whether she would tell them what she knew and when she said she knew nothing, he said, "I wash my hands of your blood." He then asked the driver and the police to accompany her home.

406. The Chamber found Victim U to be a very credible witness whose testimony was not marked by anger or hostility and whose testimony was confirmed under cross-examination. The Chamber notes that the Accused in his testimony confirmed the presence of Victim U at the bureau communal on 19 April 1994. The Chamber does not accept his explanation of her presence there or his actions. If he intended to protect her, as he suggested, why did he take her key from her, why did he question her about the Inkotanyi, and why did he leave her there until midnight? The Accused did not address any of these questions or specifically deny that he did any of these things. He did not even deny specifically that he told the others in her presence that she would be killed after questioning or that he threatened her when he questioned her. The Chamber notes that there is no evidence to suggest that the Accused threatened the husband or child of Victim U.

407. With regard to the allegations set forth in paragraph 17 of the Indictment, the Chamber is unable to

5446

find, beyond a reasonable doubt, that the Accused ordered the interrogation and beating of Victim X (Witness U) on 19 April 1994. The evidence presented in support of the allegation relies entirely on a single witness, the credibility of whom the Defence has successfully challenged. In cross-examination, the Defence questioned Witness Q regarding the details of the incident at his father's home, as they had been described by him in his pre-trial written statement. When asked about his prior statement that the Accused had been accompanied by two policemen rather than one, Witness Q explained that one of the policeman was from Taba and the other from Musambira. He said the second policeman had remained on the main road, and he had not actually seen this policeman which is why he did not mention him in his testimony. When asked about his prior statement that the Accused was armed rather than unarmed, Witness Q said that he had said that the Accused was wearing a military jacket and that he had heard that another policeman had a gun. When asked about his prior statement that he had been beaten by a policeman with a metal bar, Witness Q said that he was beaten by a man in civilian clothes, whom he assumed was a policeman because he was carrying a grenade. He said he was beaten with a metal instrument which had a pointed end. When asked about his prior statement that the Accused arrived in a red Toyota and that he saw a man lying in the rear seat of the vehicle with his hands tied, Witness Q said that he did not see the man in the back seat but that he heard about him. He said he did not see the vehicle as it was 500 meters away, but that he had heard that it was red.

408. While the Chamber has been cautious in allowing the contents of pre-trial written statements to impeach the testimony of witnesses before it, in this case the inconsistencies between the testimony and the written statement of Victim X are many and too significant to justify a finding of credibility without corroboration of other testimony. The Chamber notes that even if it were to accept the testimony of Victim X in full, it would not be able to find, beyond a reasonable doubt, that the Accused ordered the interrogation and beating of Victim X. The witness testified that the Accused was present and watched the beatings, but there is no evidence that he gave any orders. There is only evidence that words were spoken in French. No evidence has been presented as to what was said and by whom.

409. With regard to the search for Alexia, wife of Ntereye, the Chamber finds that at on the evening of 20 April 1994, the Accused went with two Interahamwe named Francois and Singuranayo and one communal police officer named Mugenzi to the house of Victim Y (Witness N), a [68] year old woman at the time. Mugenzi took her by the arm to the door and hit her on the head with the barrel of his rifle. Victim Y was then forcibly taken to the Accused, who ordered her to lie down. In the presence of the Accused, Victim Y was beaten by the communal police officer Mugenzi who stepped on her neck, pushed the butt of his rifle into her neck, and stomped on her. Victim Y was also beaten by the Accused, who hit her with a club on her back. She was interrogated by Mugenzi and the Accused about the whereabouts of Alexia, the wife of Ntereye, a university professor. She was then taken to Buguli, where the Accused made her lie down in front of the vehicle and threatened to run her over. At the mine, in the presence of the Accused, she was also threatened and interrogated by Mugenzi, who bound her arms and legs and stomped on her with his foot. The others stomped on her as well.

410. Later that night, the Accused picked up Tabita (Victim W) and interrogated her also about the whereabouts of Alexia, the wife of Ntereye. She was then taken in the vehicle back to the mine. She was asked to get in front of the vehicle, and the Accused threatened to run her over and again interrogated her about the whereabouts of Alexia.

411. Thereafter, on the same evening, the Accused picked up Victim Z (Witness C) and took him to a forest in Gishyeshye Sector, where the Accused stepped on his face, causing his lips to bleed, and kept his foot on Victim Z's face while the Interahamwe Francois and the commune police officer Mugenzi beat him with the butt of their guns. Victim Z was tied to Victim Y with a piece of cloth by Mugenzi, which was used to choke him. Victim Z was also forced by Francois to beat Victim Y with a cudgel he was given. During this time, Victim Z was interrogated, but it is unclear who actually did the

5445

interrogation.

412. Following the interrogation of Victim Y and Victim Z, the Accused picked up Victim V at a roadblock and took him, with Victim Y and Victim Z, to his house, which was searched by Interahamwe at the direction of the Accused. The Accused then told Victim V to raise his arms in the air and threatened to shoot him. In the presence of the Accused, Victim V was then beaten under interrogation by the Interahamwe Francois and the commune police officer Mugenzi with the butt of a rifle and a stick. Victim Z was beaten on the back with the blunt side of a machete. Victim Y, Victim Z and Victim V were then taken away in the vehicle and, after Victim Y was released near her home, Victim Z and Victim V were kept in the vehicle while the Accused and the others drank beer. Victim Z and Victim V were released at approximately 2:00 in the morning.

413. As a result of the beatings, Victim Y has trouble walking. Victim Z has scars on his back and continuing health problems. Victim V sustained a broken rib from the beatings.

414. The Chamber notes that the testimony of Witness N, Witness C and Witness A closely correlate in all material respects and even with regard to minor details. There were very few inconsistencies, of an extremely minor nature. Witness N said, for example, that Victim Z (Witness C) was beaten with a club. Victim Z testified that he was beaten with the butt of a gun. It is clear that there was a club, as it was used by Victim Z to hit Victim Y (Witness N) when he was forced to do so. It is understandable that Victim Y may have therefore mistaken the instrument used on Victim Z. Victim Z initially testified that he was tied to Victim Y with a rope, whereas Victim Y testified that it was a piece of cloth. On cross-examination, however, Victim Z clarified that in fact it was a piece of cloth that was used.

415. The Chamber finds these facts have been established beyond a reasonable doubt. In making its factual findings, the Chamber has carefully considered the cross-examination by the Defence of Prosecution witnesses and the evidence presented by the Defence in the form of testimony by the Accused. With regard to cross-examination, the Chamber notes that the Prosecution witnesses substantially confirmed their direct testimony. In his testimony, the Accused confirmed that he picked up the niece of Ntereye, with the Interahamwe Francois and his police officer, and went with her to the house of Victim Y. He confirmed that he drove with Ntereye's niece to Buguli, stating only that there were no mines in Buguli. The Accused also confirmed that he was looking for Alexia, the wife of Ntereye, but he maintained that he was determined to save her. He said that he paid Francois to help him in this effort. The Accused testified that he did not see Victim Z or Victim V at the roadblock near the home of Victim Y, although they all testified that they saw him and each other. According to the testimony of the Accused, the search for Alexia took place after the death of Ntereye on 10 May 1994. All the prosecution witnesses, however, date this search to 20 April 1994. The Defence in its cross-examination did not question the evidence given by the Prosecution witnesses about the date. The Accused also testified that when he spoke to Victim Y, she said "I cannot lie because you are going to do good for Alexia and then I have also heard that you tried to save Ntereye." Having heard Victim Y's (Witness N's) testimony, the Chamber finds it highly unlikely that she would have made such a statement and notes that the statement was not put to her by the Defence on cross-examination, in which the Accused himself participated. Moreover, the Accused's account of his efforts to find and save Alexia simply tapered off in his testimony, without any explanation as to whether he continued the search or gave it up and if so, why. The Chamber also notes the testimony of Witness PP, which it has accepted as credible, that when Alexia and her nieces were brought to the bureau communal, the Accused said to the Interahamwe, "Take them to Kinihira. Don't you know where killings take place, where the others have been killed?" The actions of the Accused were incompatible with a desire to save Alexia, and the Chamber does not accept the testimony of the Accused on these events as credible.

5.5 Sexual Violence (Paragraphs 12A & 12B of the Indictment)

5744b

Charges Set Forth in the Indictment

12A. Between April 7 and the end of June, 1994, hundreds of civilians (hereinafter "displaced civilians") sought refuge at the bureau communal. The majority of these displaced civilians were Tutsi. While seeking refuge at the bureau communal, female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, and/or beaten on or near the bureau communal premises. Displaced civilians were also murdered frequently on or near the bureau communal premises. Many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. The female displaced civilians lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence and beatings and killings.
12B. Jean Paul Akayesu knew that the acts of sexual violence, beatings and murders were being committed and was at times present during their commission. Jean Paul Akayesu facilitated the commission of the sexual violence, beatings and murders by allowing the sexual violence and beatings and murders to occur on or near the bureau communal premises. By virtue of his presence during the commission of the sexual violence, beatings and murders and by failing to prevent the sexual violence, beatings and murders, Jean Paul Akayesu encouraged these activities.

Events Alleged

416. Allegations of sexual violence first came to the attention of the Chamber through the testimony of Witness J, a Tutsi woman, who stated that her six year-old daughter had been raped by three Interahamwe when they came to kill her father. On examination by the Chamber, Witness J also testified that she had heard that young girls were raped at the bureau communal. Subsequently, Witness H, a Tutsi woman, testified that she herself was raped in a sorghum field and that, just outside the compound of the bureau communal, she personally saw other Tutsi women being raped and knew of at least three such cases of rape by Interahamwe. Witness H testified initially that the Accused, as well as commune police officers, were present while this was happening and did nothing to prevent the rapes. However, on examination by the Chamber as to whether Akayesu was aware that the rapes were going on, she responded that she didn't know, but that it happened at the bureau communal and he knew that the women were there. Witness H stated that some of the rapes occurred in the bush area nearby but that some of them occurred "on site". On examination by the Chamber, she said that the Accused was present during one of the rapes, but she could not confirm that he saw what was happening. While Witness H expressed the view that the Interahamwe acted with impunity and should have been prevented by the commune police and the Accused from committing abuses, she testified that no orders were given to the Interahamwe to rape. She also testified that she herself was beaten but not raped at the bureau communal.

417. On 17 June 1997, the Indictment was amended to include allegations of sexual violence and additional charges against the Accused under Article 3(g),Article 3(i) and Article 4(2)(e) of the ICTR Statute. In introducing this amendment, the Prosecution stated that the testimony of Witness H motivated them to renew their investigation of sexual violence in connection with events which took place in Taba at the bureau communal. The Prosecution stated that evidence previously available was not sufficient to link the Accused to acts of sexual violence and acknowledged that factors to explain this lack of evidence might include the shame that accompanies acts of sexual violence as well as insensitivity in the investigation of sexual violence. The Chamber notes that the Defence in its closing statement questioned whether the Indictment was amended in response to public pressure concerning the prosecution of sexual violence. The Chamber understands that the amendment of the Indictment resulted

5447

from the spontaneous testimony of sexual violence by Witness J and Witness H during the course of this trial and the subsequent investigation of the Prosecution, rather than from public pressure. Never the Chamber takes note of the interest shown in this issue by non-governmental organizations, which it considers as indicative of public concern over the historical exclusion of rape and other forms of sexual violence from the investigation and prosecution of war crimes. The investigation and presentation of evidence relating to sexual violence is in the interest of justice.

418. Following the amendment of the Indictment, Witness JJ, a Tutsi woman, testified about the events which took place in Taba after the plane crash. She that she was driven away from her home, which was destroyed by her Hutu neighbours who attacked her and her family after a man came to the hill near where she lived and said that the bourgmestre had sent him so that no Tutsi would remain on the hill that night. Witness JJ saw her Tutsi neighbours killed and she fled, seeking refuge in a nearby forest with her baby on her back and her younger sister, who had been wounded in the attack by a blow with an axe and two machete cuts. As she was being chased everywhere she went, Witness JJ said she went to the bureau communal. There she found more than sixty refugees down the road and on the field nearby. She testified that most of the refugees were women and children.

419. Witness JJ testified that the refugees at the bureau communal had been beaten by the Interahamwe and were lying on the ground when she arrived. Witness JJ encountered four Interahamwe outside the bureau communal, armed with knives, clubs, small axes and small hoes. That afternoon, she said, approximately forty more Interahamwe came and beat the refugees, including Witness JJ. At this time she said she saw the Accused, standing in the courtyard of the communal office, with two communal police officers who were armed with guns, one of whom was called Mushumba. Witness JJ said she was beaten on the head, the ribs and the right leg, which left her disabled. That evening, she said, the Accused came with a policeman to look for refugees and ordered the Interahamwe to beat them up, calling them "wicked, wicked people" and saying they "no longer had a right to shelter." The refugees were then beaten and chased away. Witness JJ said she was beaten by the policeman Mushumna, who hit her with the butt of his gun just behind her ear.

420. Witness JJ testified that she spent the night in the rain in a field. The next day she said she returned to the bureau communal and went to the Accused, in a group of ten people representing the refugees, who asked that they be killed as the others had been because they were so tired of it all. She said the Accused told them that there were no more bullets and that he had gone to look for more in Gitarama but they had not yet been made available. He asked his police officers to chase them away and said that even if there were bullets they would not waste them on the refugees. As the refugees saw that death would be waiting for them anywhere else, Witness JJ testified they stayed at the bureau communal.

421. Witness JJ testified that often the Interahamwe came to beat the refugees during the day, and that the policemen came to beat them at night. She also testified that the Interahamwe took young girls and women from their site of refuge near the bureau communal into a forest in the area and raped them. Witness JJ testified that this happened to her - that she was stripped of her clothing and raped in front of other people. At the request of the Prosecutor and with great embarrassment, she explicitly specified that the rapist, a young man armed with an axe and a long knife, penetrated her vagina with his penis. She stated that on this occasion she was raped twice. Subsequently, she told the Chamber, on a day when it was raining, she was taken by force from near the bureau communal into the cultural center within the compound of the bureau communal, in a group of approximately fifteen girls and women. In the cultural center, according to Witness JJ, they were raped. She was raped twice by one man. Then another man came to where she was lying and he also raped her. A third man then raped her, she said, at which point she described herself as feeling near dead. Witness JJ testified that she was at a later time dragged back to the cultural center in a group of approximately ten girls and women and they were raped. She was raped again, two times. Witness JJ testified that she could not count the total number of times she was

5448

raped. She said, "each time you encountered attackers they would rape you," - in the forest, in the sorghum fields. Witness JJ related to the Chamber the experience of finding her sister before sh having been raped and cut with a machete.

422. Witness JJ testified that when they arrived at the bureau communal the women were hoping the authorities would defend them but she was surprised to the contrary. In her testimony she recalled lying in the cultural center, having been raped repeatedly by Interahamwe, and hearing the cries of young girls around her, girls as young as twelve or thirteen years old. On the way to the cultural center the first time she was raped there, Witness JJ said that she and the others were taken past the Accused and that he was looking at them. The second time she was taken to the cultural center to be raped, Witness JJ recalled seeing the Accused standing at the entrance of the cultural center and hearing him say loudly to the Interahamwe, "Never ask me again what a Tutsi woman tastes like," and "Tomorrow they will be killed" (Ntihazagire umbaza uko umututsikazi yari ameze, ngo kandi mumenye ko ejo ngo nibabica nta kintu muzambaza. Ngo ejo bazabica). According to Witness JJ, most of the girls and women were subsequently killed, either brought to the river and killed there, after having returned to their houses, or killed at the bureau communal. Witness JJ testified that she never saw the Accused rape anyone, but she, like Witness H, believed that he had the means to prevent the rapes from taking place and never even tried to do so. In describing the Accused and the statement he made regarding the taste of Tutsi women, she said he was "talking as if someone were encouraging a player" (Yavugaga nk'ubwiriza umukinnyi) and suggested that he was the one "supervising" the acts of rape. Witness JJ said she did not witness any killings at the bureau communal, although she saw dead bodies there.

423. When Witness JJ fled from the bureau communal, she left her one year-old child with a Hutu man and woman, who said they had milk for the child and subsequently killed him. Witness JJ spoke of the heavy sorrow the war had caused her. She testified to the humiliation she felt as a mother, by the public nudity and being raped in the presence of children by young men. She said that just thinking about it made the war come alive inside of her. Witness JJ told the Chamber that she had remarried but that her life had never been the same because of the beatings and rapes she suffered. She said the pain in her ribs prevents her from farming because she can no longer use a hoe, and she used to live on the food that she could grow.

424. Witness OO, a young Tutsi woman, testified that she and her family sought refuge at the bureau communal in April 1994 and encountered many other Tutsi refugees there, on the road outside the compound. While she was there, she said, some Interahamwe arrived and started killing people with machetes. She and two other girls tried to flee but were stopped by the Interahamwe who went back and told the Accused that they were taking the girls away to "sleep with" them. Witness OO told the Chamber that standing five meters away from the Accused, she heard him say in reply, "take them". She said she was then separated from the other girls and taken to a field by one Interahamwe called Antoine. When she refused to sit down, he pushed her to the ground and put his "sex" into hers, clarifying on examination that he penetrated her vagina with his penis. When she started to cry, she said he warned her that if she cried or shouted, others might come and kill her.

425. According to Witness OO, Antoine left her in the field and returned that night to take her to the house of a woman called Zimba, where she spent three nights. On the fourth night, she said Antoine returned and took her to another Interahamwe called Emanuel. She said that Antoine did the same thing he had done before to her, and that Emanuel followed him in turn. Witness OO told the Chamber she spent three days and nights at the house of Emanuel where every day she was sexually violated by both Antoine and Emanuel. Afterwards, she said she was chased away by them.

426. Witness OO returned to the bureau communal when she heard that an order had been given to stop the killing of women and children, but after hearing the Accused, Kubwimana and Ruvugama all call for

5449

the killing of Tutsi, she left and went back into hiding. Subsequently, she and her seven year-old sister were apprehended by Interahamwe and taken to a roadblock. Her sister and two other people were imprisoned overnight and killed in the morning. At the time of these events, Witness OO was fifteen years old. When asked how it was that the Accused had the authority to protect her from rape, Witness OO replied that if he had told the Interahamwe not to take her from the bureau communal, they would have listened to him because he was the bourgmestre. Witness OO was unable to identify the Accused in the courtroom. She told the Chamber that someone had pointed him out to her at the bureau communal as the bourgmestre but that she had not looked at him closely and that it had been a long time ago.

427. Witness KK, a Hutu woman married to a Tutsi man, also sought refuge at the bureau communal in Taba after her home was destroyed. She testified that the Tutsi refugees there were beaten often by the police and the Accused, whom she described as "supervising." She recalled the Accused publicly name a teacher called Tharcisse as an accomplice and send the police to find him. They brought Tharcisse and his wife and made them sit in the mud. With the Accused standing nearby they then killed Tharcisse. They took off his wife's clothing and told her to go and die somewhere else. Witness KK testified that on the same day, on the orders of the Accused, the Interahamwe brought teachers from Remera, who were also forced to sit in the mud. She said they started by clubbing a young teacher who had been brought with his fiancee, and that during this time the Accused was walking around and supervising the police, who were beating refugees. The teachers were critically wounded with small hoes and taken in a wheelbarrow to a mass grave, many still breathing, left to die a slow death.

428. Witness KK testified that her husband was beaten at the bureau communal and injured on the head. After escaping, he was captured by Interahamwe, and Witness KK received a message from him requesting to speak to her before he died. She found him behind the bureau communal with Interahamwes armed with clubs and spears, who then took him away between the two buildings of the bureau communal. She learned later that he was killed. Witness KK later went to the Accused and asked him for an attestation to help her keep her children alive. She said he replied that it was not he who had made them be born Tutsi and that "when rats are killed you don't spare rats that are still in the form of fetus." Witness KK testified that she had been pregnant and miscarried after being beaten by police and Interahamwe. Of her nine children, only two survived the events of this period.

429. Witness KK also recalled seeing women and girls selected and taken away to the cultural center at the bureau communal by Interahamwes who said they were going to "sleep with" these women and girls. Witness KK testified regarding an incident in which the Accused told the Interahamwe to undress a young girl named Chantal, whom he knew to be a gymnast, so that she could do gymnastics naked. The Accused told Chantal, who said she was Hutu, that she must be a Tutsi because he knew her father to be a Tutsi. As Chantal was forced to march around naked in front of many people, Witness KK testified that the Accused was laughing and happy with this. Afterwards, she said he told the Interahamwes to take her away and said "you should first of all make sure that you sleep with this girl." (Ngo kandi nababwiye ko muzajya mubanza mukirwanaho mukarongora abo bakobwa.) Witness KK also testified regarding the rape of Tutsi women married to Hutu men. She described, after leaving the bureau communal, encountering on the road a man and woman who had been killed. She said the woman, whom she knew to be a Tutsi married to a Hutu, was "not exactly dead" and still in agony. She described the Interahamwes forcing a piece of wood into the woman's sexual organs while she was still breathing, before she died. In most cases, Witness KK said that Tutsi women married to Hutu men "were left alone because it was said that these women deliver Hutu children." She said that there were Hutu men who married Tutsi women to save them, but that these women were sought, taken away forcibly and killed. She said that she never saw the Accused rape a woman.

430. Witness NN, a Tutsi woman and the younger sister of JJ, described being raped along with another sister by two men in the courtyard of their home, just after it was destroyed by their Hutu neighbours

5450

and her brother and father had been killed. Witness NN said one of the men told her that the girls had been spared so that they could be raped. She said her mother begged the men, who were armed w. bludgeons and machetes, to kill her daughters rather than rape them in front of her, and the man replied that the "principle was to make them suffer" and the girls were then raped. Witness NN confirmed on examination that the man who raped her penetrated her vagina with his penis, saying he did it in an "atrocious" manner, mocking and taunting them. She said her sister was raped by the other man at the same time, near her, so that they could each see what was happening to the other. Afterwards, she said she begged for death.

431. According to the testimony of Witness NN, after these men left, two other men who were neighbours came and one of them raped her, while the other took her sister a little further away and raped her sister. She recalled that the neighbour said that marriage had been refused to them, but now they were going to sleep with the girls without penalty (peine). She said the men left afterwards, warning the girls that they would kill them if they did not stay where they were. That evening, she said two other younger men, around the age of 15 or 16, came and asked them to "teach them because they didn't know how it was done". After these two men raped the girls, Witness NN said their mother asked her daughters to leave rather than continue to be tortured in front of her. The girls left and went into hiding with a relative.

432. After hiding for a week and one half, Witness NN said she heard that Akayesu had stopped the killings, and she went with her sister towards the bureau communal. On the way, having taken a different route from her sister, Witness NN said she met two men who said they would accompany her to the bureau communal and that they had been given orders by the bourgmestre. She said the two men then took her a short distance away and raped her, each of them in turn, leaving her there afterwards lying naked. Subsequently, she said four men herding cattle came upon her, and two of them raped her. These incidents took place in the countryside, not very far from the bureau communal, according to Witness NN. After the rapes, Witness NN said she could not move - she was unable to get up and unable to dress herself. She said her sister found her and brought her some ghee to put in her lower parts to relieve the muscles. When she was able to get up, Witness NN said she continued on her way to the bureau communal with her sister.

433. Witness NN estimated that she arrived at the bureau communal some time in the beginning of May, and she said she found about three hundred refugees there, mostly women and children. The morning after she arrived, she said she saw the Accused with a towel around his neck, moving to the place where two Interahamwes were driving a woman to rape her, between the bureau communal and the cultural center. She said she saw the Accused standing watching the men drag the woman and later on he entered the office. She said she saw the Interahamwe circle this woman and saw them on top of her but did not see them penetrate her. She also said there were many refugees watching while this was happening. During the rape, she said there were two commune policemen who were in front of the office of the bourgmestre, one called Mushumba and one called Nsengiyumva who was in plain clothes. She said they did nothing to prevent the rape from happening and that the Accused did nothing as well - only watched and entered his office. She said after the rape she saw that the naked woman was hungry and cold, and the woman was pregnant. She said she was told by an Interahamwe that the woman died at the bureau communal. Witness NN said she did not see anyone raped inside the cultural center but that the Interahamwe did come at night and take some girls away.

434. Two days after arriving at the bureau communal, Witness NN recounted seeing an Interahamwe called Rafiki, whom she had known previously and who had previously told her that he wanted to live with her. When he saw her at the bureau communal, she said he told her that he was going to rape her and not marry her. She said Rafiki took her to his home not far from the bureau communal and locked her up there for two days, during which time he raped her repeatedly day and night, a total of

5451

approximately six times. She said often when he came to rape her, he had been smoking herbs or drinking alcohol. When she returned to the bureau communal, Witness NN said she found her sis who told her that she also had been raped again, at the bureau communal. Witness NN testified that her sister was hungry and cold, and could not move. Her sister died and when they went to bury her, they found her body had been eaten by dogs.

435. Witness NN said she saw the Accused often at the bureau communal and that she heard him tell police to remove the refugees, citing one occasion where a policeman named Mushuba beat and chased them away after receiving such an order from the Accused. She also recalled seeing the Accused when Ntereye was taken from the prison and killed. She did not witness this killing but heard a gunshot and later saw the corpse of Nteyere, his head crushed as if by a hammer. Subsequently, Witness NN said on two consecutive days she was taken with a group of several hundred people, mostly women and children, to a hole near the bureau communal where the Interahamwe were intending to kill them with a grenade. The first day they were apparently unable to find a grenade. On the second day, they were beaten and brought back to the hole. At that time Witness NN said Rafiki, the Interahamwe who had locked her in his house, took her out of the group and said that she was his wife. According to her testimony, the Interahamwe then started stabbing the group of people, beating them with machetes and throwing them into the hole while she was standing by. Witness NN said she closed her eyes but could hear people crying and shouting. She estimated that the killing of the group took twenty minutes, and recalled feeling as if she were dead, apart from the fact that she was still breathing.

436. Witness NN said she was then taken by the younger brother of Rafiki back to his home where she stayed for one week. While she was there, she said she was locked up by Rafiki, who gave the key to other young men who came and "slept with" her, which she explained meant that they took their "sex" and put it into hers. She did not recall how many times this happened, stating that they came every day but that sometimes they did not rape her. After a week, Witness NN told the Chamber that she ran away and hid in the bush. Witness NN expressed the opinion in her testimony that the Accused had the power to oppose the killings and rapes and that by not giving refuge to anybody at the bureau communal, he authorized the rapes which took place. She testified that as a result of the rapes she has had recurring vaginal discharge and pain which require treatment in hospital.

437. Witness PP, a Tutsi woman married to a Hutu man, lived very near the bureau communal. Witness PP testified that she saw three women - Alexia, the wife of Ntereye, and her two nieces Nishimwe and Louise - raped and killed at Kinihira, a basin near the bureau communal. Witness PP said that the women were brought by the Interahamwe, at the direction of the Accused, in a vehicle of the bureau communal driven by Mutabaruka, the driver of the commune of Taba. She said she first saw the women in the vehicle at the bureau communal, where she heard the Accused say to the Interahamwe, "Take them to Kinihira. Don't you know where killings take place, where the others have been killed?" According to Witness PP, who then went to Kinihira herself, the three women were forced by the Interahamwe to undress and told to walk, run and perform exercises "so that they could display the thighs of Tutsi women." All this took place, she said, in front of approximately two hundred people. After this, she said the women were raped. She described in particular detail the rape of Alexia by Interahamwe who threw her to the ground and climbed on top of her saying "Now, let's see what the vagina of a Tutsi woman feels like." According to Witness PP, Alexia gave the Interahamwe named Pierre her Bible before he raped her and told him, "Take this Bible because it's our memory, because you do not know what you're doing." Then one person held her neck, others took her by the shoulders and others held her thighs apart as numerous Interahamwe continued to rape her - Bongo after Pierre, and Habarurena after Bongo. According to the testimony, Alexia was pregnant. When she became weak she was turned over and lying on her stomach, she went into premature delivery during the rapes. Witness PP testified that the Interahamwe then went on to rape Nishimwe, a young girl, and recalled lots of blood coming from her private parts after several men raped her. Louise was then raped by several

5452

Interahamwe while others held her down, and after the rapes, according to the testimony, all three women were placed on their stomachs and hit with sticks and killed.

438. Witness PP said that no one tried to rape her because they did not know which ethnic group she belonged to. She also said she was protected from rape by an Interahamwe named Bongo because she had given him a sandwich and tea, and he told the other Interahamwe not to harm her. Witness PP testified that some women and children were able to escape from the bureau communal in April 1994 but that they had to "sacrifice themselves" in order to survive. By sacrifice she said she meant that they submitted to rape and she said that she helped to care for one of these women who subsequently came to her house for a week. On cross-examination, Witness PP described her encounter with a woman called Vestine, whom she had rescued from the pit at Kinihira where people were being thrown and where Vestine had just given birth. Witness PP said she brought Vestine to stay in the house of Emmanuel, a man she knew, and when she went back two days later, he told her that Vestine had been taken by an Interahamwe called Habarurena to a sorghum field in a place known as Kanyinya. According to Witness PP, Habarurena kept Vestine in the sorghum field for a week and raped her repeatedly. When she next saw Vestine there was a liquid flowing from her private parts and Vestine told her, "I think it would be better to go Kinihira to be killed." The next day Witness PP said she saw Vestine being raped, together with other women, and there was nothing she could do. On the following day, from the church where she went to pray, Witness PP said she saw Vestine being killed with a machete, by an Interahamwe called Bongo, and thrown into the pit, having been brought back there by the Interahamwe Habarurena.

439. Defence Witness DBB, a former student of the Accused currently in detention in Rwanda, testified that he went to the bureau communal on the 17 April 1994. Thereafter he went into hiding during the massacres and did not go to the bureau communal at all. Witness DBB testified that he never heard of or saw violence perpetrated against women during the events which took place in 1994, and that no women in his sector were raped. Subsequently he did say that he heard people saying that women were being raped in the commune of Taba, outside of his sector, but he said he did not witness this. Witness DBB said he did not hear the name of the Accused mentioned in connection with sexual violence and that it was being attributed to the people who were participating in the massacres and looting. Witness DBB expressed the view that these incidents were being done out of sight of the Accused. On cross-examination he said he did not know anything about the Accused allowing women to be taken away and raped at the bureau communal.

440. Defence Witness DCC, the driver of Taba commune, testified that he never heard about violence perpetrated against women in Taba commune, that the Accused perpetrated violence against women in the commune or that the Accused gave orders for women to be raped. He said that during the period he was at the bureau communal, in April and throughout May, there were refugees there and he was there every day. He said nothing happened to the women refugees, and that he did not witness any of them being beaten or taken away to be raped. He said he did not know Alexia, Ntereye's wife, and denied going to look for her, finding her, and driving her in the communal vehicle to the bureau communal and then to Kinihira. He said the bureau communal vehicle had broken down before the massacres started

441. Defence Witness DZZ , a former Taba communal policeman currently in detention in Rwanda, testified that he went to the bureau communal every day and that incidents of sexual violence did not take place there. Witness DZZ also testified that he saw no crimes of any type being committed at the bureau communal. Witness DZZ was quite insistent that he heard of no cases of rape in the entire commune of Taba during this period. Defence Witness DCX in a similar statement said that when he was in Taba he heard no mention of sexual violence. He stated categorically that there was no rape. Defence Witness DAX when asked whether he had heard that the Interahamwe had committed crimes of sexual violence against women stated that nobody talked about such things where he was. He said he could not affirm that elsewhere maybe such things were heard or took place.

5453

442. Defence Witness Matata, called as an expert witness, noted only one case he had heard of in Taba an attempted rape of two girls aged fourteen and fifteen. He expressed his opinion that the bourgmestre would not have been aware of this case as it was in a region, Buguri sector, which the bourgmestre had never gone to. Witness Matata noted that there is a cultural factor which prevented people from talking about rape, but also suggested that the phenomenon of rape was introduced afterwards for purposes of blackmail. He said he had come across incidents of rape in other parts of the country but suggested that cases of rape were not frequent and not related to an ethnic group. Witness Matata expressed the opinion that rapists were more interested in satisfying their physical needs, that there were spontaneous acts of desire even in the context of killing. He noted that Tutsi women, in general, are quite beautiful and that raping them is not necessarily intended to destroy an ethnic group, but rather to have a beautiful woman.

443. Defence Witness DIX testified that her father lent his vehicle to the Accused and helped him ensure security in the commune during this period. Witness DIX testified that she was at home in Taba and heard all the news but that she did not hear anything about rape or sexual violence during the killings which took place. However, she said that she received all her information from her parents and neighbours and did not once go to the bureau communal after the killings started. She said that she herself saw the Accused just one time, in April. According to her testimony, she did not speak to him at that time, and has never spoken to him at any other time. Nevertheless, Witness DIX expressed the opinion that the Accused had committed no crime, and she was surprised that he was in prison. Defence Witness DJX, a minor and the brother of Witness DIX, also testified that he did not hear anything about rape and he did not see any cases of rape. The Chamber notes that the written statements of these two witnesses, prepared and submitted by the Defence, are identical. Witness DJX was twelve years old at the time of the events, and like Witness DIX, he testified that he did not go to the bureau communal during this period. He said he saw the Accused two times.

444. Witness DFX testified that she was never a witness to acts of rape or sexual violence in Taba and that she never even heard anyone talk about them. The Chamber notes that this witness, who is a protected witness, has a close personal relationship to the Defendant. She testified, on examination by the Chamber, that the Accused did not tell her what was happening at the bureau communal, that she did not ask him, and that her source of information was from other people. On cross-examination by the Prosecution, she testified that she herself never went to the bureau communal during this period for security reasons. On examination by the Chamber, the Witness acknowledged that in her written statement submitted by the Defence she had mentioned reports that the Interahamwe were abducting beautiful Tutsi girls and taking them home as mistresses. She conceded that such conduct could be considered sexual violence as it was not consensual.

445. Defence Witness DEEX, a Tutsi woman, testified that before killing women the Interahamwes raped them. Asked whether the Accused encouraged or authorized them in this sexual violence, she said she did not know. On cross-examination, she said that she did not personally witness sexual violence, although she heard that the girls at the house of the family where she had taken refuge were raped by the Interahamwe. Witness DEEX testified that she was given a laissez-passer by the Accused, which helped her to move around safely.

446. The Accused himself testified that he was completely surprised by the allegations of rape in Taba during the events which took place. He asserted that anyone saying that even a single woman was raped at the bureau communal was lying. While he acknowledged that some witnesses had testified that they were raped at the bureau communal, he swore, in the name of God, that the charge was made up. He said he never saw, and never heard from his policemen, that any woman was raped at the bureau communal. He said that he heard about rape accusations over Radio Rwanda and that women's associations had organized demonstrations and a march from Kigali to Taba. He suggested that perhaps this was intended to make the Chamber understand that in Taba women were raped at the bureau communal, but he

5454

insisted that women were never raped within the premises of the bureau communal or on land belonging to the bureau communal or the commune.

447. In his testimony, the Accused recalled the allegation that he had forced a young girl, Chantal, to march naked. He said he did not know her and that it never took place. He said he would not do something like that. He referred to the account of a woman raped with a wooden stick as "savagery", questioning how a woman could witness such a thing, and he referred to the statement he had been accused of making at the entrance to the cultural center as "too much". He also testified that the cultural center building is such that it would be difficult to see what was going on inside from the door and that it would be difficult for a woman lying down inside to know who is at the door. The Accused testified that there were women taking refuge all over and outside the bureau communal and that there were women in the cultural center. He denied that the Interahamwe brought women to the cultural center. He said that some of the women who took refuge at the bureau communal were killed and others escaped.

448. On examination by the Chamber, the Accused stated that he did hear about rapes in Kigali but only after he was out of the country. When asked by the Chamber for a reaction to the testimony of sexual violence, the Accused noted that rape was not mentioned in the pre-trial statements of Witness J and Witness H, although Witness H said on examination by the Chamber that she had mentioned her rape to investigators. The Accused suggested that his Indictment was amended because of pressure from the women's movement and women in Rwanda, whom he described as "worked up to agree that they have been raped." On examination by the Chamber, the Accused acknowledged that it was possible that rape might have taken place in the commune of Taba, but he insisted that no rape took place at the bureau communal. He said he first learned of the rape allegations in Taba at the Chamber and maintained that the charges were an "invented accusation.

Factual Findings

449. Having carefully reviewed the testimony of the Prosecution witnesses regarding sexual violence, the Chamber finds that there is sufficient credible evidence to establish beyond a reasonable doubt that during the events of 1994, Tutsi girls and women were subjected to sexual violence, beaten and killed on or near the bureau communal premises, as well as elsewhere in the commune of Taba. Witness H, Witness JJ, Witness OO, and Witness NN all testified that they themselves were raped, and all, with the exception of Witness OO, testified that they witnessed other girls and women being raped. Witness J, Witness KK and Witness PP also testified that they witnessed other girls and women being raped in the commune of Taba. Hundreds of Tutsi, mostly women and children, sought refuge at the bureau communal during this period and many rapes took place on or near the premises of the bureau communal - Witness JJ was taken by Interahamwe from the refuge site near the bureau communal to a nearby forest area and raped there. She testified that this happened often to other young girls and women at the refuge site. Witness JJ was also raped repeatedly on two separate occasions in the cultural center on the premises of the bureau communal, once in a group of fifteen girls and women and once in a group of ten girls and women. Witness KK saw women and girls being selected and taken by the Interahamwe to the cultural center to be raped. Witness H saw women being raped outside the compound of the bureau communal, and Witness NN saw two Interahamwes take a woman and rape her between the bureau communal and the cultural center. Witness OO was taken from the bureau communal and raped in a nearby field. Witness PP saw three women being raped at Kinihira, the killing site near the bureau communal, and Witness NN found her younger sister, dying, after she had been raped at the bureau communal. Many other instances of rape in Taba outside the bureau communal - in fields, on the road, and in or just outside houses - were described by Witness J, Witness H, Witness OO, Witness KK, Witness NN and Witness PP. Witness KK and Witness PP also described other acts of sexual violence which took place on or near the premises of the bureau communal - the forced undressing and public humiliation of girls and women. The Chamber notes that much of the sexual violence took place in front

5455

of large numbers of people, and that all of it was directed against Tutsi women.

450. With a few exceptions, most of the rapes and all of the other acts of sexual violence described by the Prosecution witnesses were committed by Interahamwe. It has not been established that the perpetrator of the rape of Witness H in a sorghum field and six of the men who raped Witness NN were Interahamwe. In the case of Witness NN, two of her rapists were neighbours, two were teenage boys and two were herdsmen, and there is no evidence that any of these people were Interahamwe. Nevertheless, with regard to all evidence of rape and sexual violence which took place on or near the premises of the bureau communal, the perpetrators were all identified as Interahamwe. Interahamwe are also identified as the perpetrators of many rapes which took place outside the bureau communal, including the rapes of Witness H, Witness OO, Witness NN, Witness J's daughter, a woman near death seen by Witness KK and a woman called Vestine, seen by Witness PP. There is no suggestion in any of the evidence that the Accused or any communal policemen perpetrated rape, and both Witness JJ and Witness KK affirmed that they never saw the Accused rape anyone.

451. In considering the role of the Accused in the sexual violence which took place and the extent of his direct knowledge of incidents of sexual violence, the Chamber has taken into account only evidence which is direct and unequivocal. Witness H testified that the Accused was present during the rape of Tutsi women outside the compound of the bureau communal, but as she could not confirm that he was aware that the rapes were taking place, the Chamber discounts this testimony in its assessment of the evidence. Witness PP recalled the Accused directing the Interahamwe to take Alexia and her two nieces to Kinihira, saying "Don't you know where killings take place, where the others have been killed?" The three women were raped before they were killed, but the statement of the Accused does not refer to sexual violence and there is no evidence that the Accused was present at Kinihira. For this reason, the Chamber also discounts this testimony in its assessment of the evidence.

452. On the basis of the evidence set forth herein, the Chamber finds beyond a reasonable doubt that the Accused had reason to know and in fact knew that sexual violence was taking place on or near the premises of the bureau communal, and that women were being taken away from the bureau communal and sexually violated. There is no evidence that the Accused took any measures to prevent acts of sexual violence or to punish the perpetrators of sexual violence. In fact there is evidence that the Accused ordered, instigated and otherwise aided and abetted sexual violence. The Accused watched two Interahamwe drag a woman to be raped between the bureau communal and the cultural center. The two commune policemen in front of his office witnessed the rape but did nothing to prevent it. On the two occasions Witness JJ was brought to the cultural center of the bureau communal to be raped, she and the group of girls and women with her were taken past the Accused, on the way. On the first occasion he was looking at them, and on the second occasion he was standing at the entrance to the cultural center. On this second occasion, he said, "Never ask me again what a Tutsi woman tastes like." Witness JJ described the Accused in making these statements as "talking as if someone were encouraging a player." More generally she stated that the Accused was the one "supervising" the acts of rape. When Witness OO and two other girls were apprehended by Interahamwe in flight from the bureau communal, the Interahamwe went to the Accused and told him that they were taking the girls away to sleep with them. The Accused said "take them." The Accused told the Interahamwe to undress Chantal and march her around. He was laughing and happy to be watching and afterwards told the Interahamwe to take her away and said "you should first of all make sure that you sleep with this girl." The Chamber considers this statement as evidence that the Accused ordered and instigated sexual violence, although insufficient evidence was presented to establish beyond a reasonable doubt that Chantal was in fact raped.

453. In making its factual findings, the Chamber has carefully considered the cross-examination by the Defence of Prosecution witnesses and the evidence presented by the Defence. With regard to cross-examination, the Chamber notes that the Defence did not question the testimony of Witness J or Witness

5456

H on rape at all, although the Chamber itself questioned both witnesses on this testimony. Witness JJ, OO, KK, NN and PP were questioned by the Defence with regard to their testimony of sexual violence, but the testimony itself was never challenged. Details such as where the rapes took place, how many rapists there were, how old they were, whether the Accused participated in the rapes, who was raped and which rapists used condoms were all elicited by the Defence, but at no point did the Defence suggest to the witnesses that the rapes had not taken place. The main line of questioning by the Defence with regard to the rapes and other sexual violence, other than to confirm the details of the testimony, related to whether the Accused had the authority to stop them. In cross-examination of the evidence presented by the Prosecution, specific incidents of sexual violence were never challenged by the Defence.

454. The Defence has raised discrepancies between the pre-trial written statements made by witnesses to the Office of the Prosecutor and their testimony before this Chamber, to challenge the credibility of these witnesses. The Chamber has considered the discrepancies which have been alleged with regard to the witnesses who testified on sexual violence and finds them to be unfounded or immaterial. For example, the Defence challenged Witness PP, quoting from her pre-trial statement that she stayed home during the genocide and recalling her testimony that she went out often as a contradiction. The Chamber pointed out to the Defence that elsewhere in her pre-trial statement, Witness PP had also said "I went out of my house often." The Chamber established that during this period, Witness PP stayed, generally speaking, in the Taba commune, but that she went out of her house often. Selectively quoting from the pre-trial statements, the Defence often suggested inconsistencies which, upon examination or with further explanation, were found not to be inconsistencies.

455. With regard to the inconsistencies which were established by the Defence, the Chamber finds them to be immaterial. For example, Witness OO said in her pre-trial statement that she went to the bureau communal four days after the plane crash which killed President Habyarimana. In her testimony, she said she went to the bureau communal one week after the plane crash. Witness PP said in her pre-trial statement that when she rescued Vestine, Vestine was thereafter taken from her by Habarurena. In her testimony, Witness PP said she left Vestine at the house of Emmanuel, from which Vestine was taken by Habarurena. Whether Tutsi women were stripped on the way to or at Kinihira is the core of another discrepancy between the pre-trial statement and testimony of Witness PP. The Chamber considers that these inconsistencies are not of material consequence and that they are not substantial enough to impeach the credibility of the witnesses. The Chamber is of the view that the inconsistencies between pre-trial statements and witness testimony can be explained by the difficulties of recollecting precise details several years after the occurrence of the events, the trauma experienced by the witnesses to these events, the difficulties of translation, and the fact that several witnesses were illiterate and stated that they had not read their written statements.

456. The Defence in its closing argument used the example of Witness J to demonstrate the dishonesty of Prosecution witnesses. He recalled that Witness J testified that she was six months pregnant, and that when her brother was killed she climbed up a tree and stayed there for an entire week in her condition, without any food. In fact, the Defence is misrepresenting Witness J's testimony. She did not say that she stayed in a tree for a whole week without food. Witness J testified that when she got hungry she came down and went to a neighbour's house for food and that subsequently her neighbour brought food to her and then she would spend the night in the tree. Under cross-examination, Witness J testified that she came down from the tree every night. What the Defence characterized as the "fantasy" of this witness, which may be "of interest to psychologists and not justice", the witness characterized as desperation, answering his challenge with the suggestion, "If somebody was chasing you, you would be able to climb a tree."

457. Of the twelve witnesses presented by the Defence, other than the Accused only two - DZZ and DCC - testified that they went regularly to the bureau communal after the killings began in Taba. These

5457

two witnesses contradicted each other on what they saw and heard. Witness DZZ, a former communal policeman currently in detention in Rwanda, testified that he heard of no cases of rape in the entire commune during this period. He testified that he was at the bureau communal every day and that no sexual violence took place there. He also testified that no crimes of any sort took place at the bureau communal - a categorical statement which, in the light of all the other witnesses who have testified that killings took place at the bureau communal, is highly implausible. The Accused himself testified that killings took place at the bureau communal. Witness DCC, who is currently in detention in Rwanda, also testified that killings took place at the bureau communal. Witness DCC was the driver of the commune during this time, and he testified that he never heard that violence was perpetrated against women in Taba. He denied bringing Alexia, the wife of Ntereye, in the communal vehicle to the bureau communal and then to Kinihira, and he testified that this vehicle had broken down before the massacres started Yet Defence Witness DAX testified that the communal vehicle was in use between April and June. Witness PP also testified that she saw the driver in this vehicle within this time frame. For these reasons the Chamber does not accept the testimony of Witness DZZ and DCC with regard to sexual violence.

458. Most of the Defence witnesses did not go to the bureau communal during the period from 7 April 1994 to the end of June 1994. Witness DCX , who testified that he did not hear any mention of sexual violence, only went to the bureau communal two times during this period, for personal reasons, and passed by the bureau several times. Witness DEEX, a Tutsi woman, who testified that she went once to the bureau communal, did hear that women were being raped by the Interahamwe before they were killed. The other Defence witnesses who testified that they had not heard any mention of sexual violence stated that they did not go to the bureau communal at any time after the killings started. Witness DBB, Witness DAX, Witness DAAX, Witness DIX, Witness DJX, Witness DFX and Witness Matata never went to the bureau communal during this period. Witness DAAX and Witness Matata, who was called as an expert, were not in the commune of Taba during this period, and Witness DBB was in hiding after 17 April 1994. The Chamber considers that these witnesses were not in a position to know what occurred at the bureau communal. By their own accounts none of them, with the exception of Witness DAAX, had any conversation with the Accused regarding what was happening there. Witness DAAX, a prefet, testified that he lost contact with the Accused after 18 April 1994, before the killings began. The testimony of these witnesses therefore does not discredit the evidence presented by the Prosecution witnesses.

459. With regard to the testimony of the Accused, the Chamber finds very little concrete evidence or argument on sexual violence other than his bare denial that it occurred. The only specific incident referred to by the Accused on direct examination was the forced undressing and parading of Chantal, which he denied. On examination by the Chamber, the Accused subsequently referred to other incidents and a statement he was said to have made outside the cultural center, suggesting that it would be difficult for a person standing at the entrance to see what was happening inside, and that it would be difficult for a person inside lying down to see who was at the entrance. The Accused did not assert that this was impossible, and these comments were made in an offhand manner rather than as a serious defence. The Accused simply stated that there was very little to say about the allegations of sexual violence, that unlike the killings this was impossible and not even for discussion.

460. Faced with first-hand personal accounts from women who experienced and witnessed sexual violence in Taba and at the bureau communal, and who swore under oath that the Accused was present and saw what was happening, the Chamber does not accept the statement made by the Accused. The Accused insists that the charges are fabricated, but the Defence has offered the Chamber no evidence to support this assertion. There is overwhelming evidence to the contrary, and the Chamber does not accept the testimony of the Accused. The findings of the Chamber are based on the evidence which has been presented in this trial. As the Accused flatly denies the occurrence of sexual violence at the bureau communal, he does not allow for the possibility that the sexual violence may have occurred but that he

was unaware of it.

5458

6. THE LAW

6.1 Cumulative Charges

461. In the amended Indictment, the accused is charged cumulatively with more than one crime in relation to the same sets of facts, in all but count 4. For example the events described in paragraphs 12 to 23 of the Indictment are the subject of three counts of the Indictment - genocide (count 1), complicity in genocide (count 2) and crimes against humanity/extermination (count 3). Likewise, counts 5 and 6 of the Indictment charge murder as a crime against humanity and murder as a violation of common article 3 of the Geneva Conventions, respectively, in relation to the same set of facts; the same is true of counts 7 and 8, and of counts 9 and 10, of the Indictment. Equally, counts 11 (crime against humanity/torture) and 12 (violation of common article 3/cruel treatment) relate to the same events. So do counts 13 (crime against humanity/rape), 14 (crimes against humanity/other inhumane acts) and 15 (violation of common article 3 and additional protocol II/rape).

462. The question which arises at this stage is whether, if the Chamber is convinced beyond a reasonable doubt that a given factual allegation set out in the Indictment has been established, it may find the accused guilty of all of the crimes charged in relation to those facts or only one. The reason for posing this question is that it might be argued that the accumulation of criminal charges offends against the principle of double jeopardy or a substantive *non bis in idem* principle in criminal law. Thus an accused who is found guilty of both genocide and crimes against humanity in relation to the same set of facts may argue that he has been twice judged for the same offence, which is generally considered impermissible in criminal law.

463. The Chamber notes that this question has been posed, and answered, by the Trial Chamber of the ICTY in the first case before that Tribunal, *The Prosecutor v. Dusko Tadic*. Trial Chamber II, confronted with this issue, stated:

> "In any event, since this is a matter that will only be relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading". (Prosecutor v. Tadic , Decision on Defence Motion on Form of the Indictment at p.10 (No. IT-94-1-T, T.Ch.II, 14 Nov, 1995)

464. In that case, when the matter reached the sentencing stage, the Trial Chamber dealt with the matter of cumulative criminal charges by imposing *concurrent* sentences for each cumulative charge. Thus, for example, in relation to one particular beating, the accused received 7 years' imprisonment for the beating as a crime against humanity, and a 6 year concurrent sentence for the same beating as a violation of the laws or customs of war.

465. The Chamber takes due note of the practice of the ICTY. This practice was also followed in the *Barbie* case, where the French *Cour de Cassation* held that a single event could be qualified both as a crime against humanity and as a war crime. 79

466. It is clear that the practice of concurrent sentencing ensures that the accused is not twice punished for the same acts. Notwithstanding this absence of prejudice to the accused, it is still necessary to justify

the prosecutorial practice of accumulating criminal charges. 5459

467. The Chamber notes that in Civil Law systems, including that of Rwanda, there exists a principle known as *concours ideal d'infractions* which permits multiple convictions for the same act under certain circumstances. Rwandan law allows multiple convictions in the following circumstances:

> Code pénal du Rwanda: Chapitre VI - Du concours d'infractions:
>
> > Article 92.- Il y a concours d'infractions lorsque plusieurs infractions ont été commises par le mˆme auteur sans qu'une condamnation soit intervenue entre ces infractions.
> >
> > Article 93.- Il y concours idéal:
> > 1) lorsque le fait unique au point de vue matériel est susceptible de plusieurs qualifications;
> > 2) lorsque l'action comprend des faits qui, constituant des infractions distinctes, sont unis entre eux comme procédant d'une intention délictueuse unique ou comme étant les uns des circonstances aggravantes des autres.
> >
> > Seront seules prononcées dans le premier cas les peines déterminées par la qualification la plus sévère, dans le second cas les peines prévues pour la répression de l'infraction la plus grave, mais dont le maximum pourra ˆtre alors élevé de moitié.

468. On the basis of national and international law and jurisprudence, the Chamber concludes that it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide.

469. Having regard to its Statute, the Chamber believes that the offences under the Statute - genocide, crimes against humanity, and violations of article 3 common to the Geneva Conventions and of Additional Protocol II - have different elements and, moreover, are intended to protect different interests. The crime of genocide exists to protect certain groups from extermination or attempted extermination. The concept of crimes against humanity exists to protect civilian populations from persecution. The idea of violations of article 3 common to the Geneva Conventions and of Additional Protocol II is to protect non-combatants from war crimes in civil war. These crimes have different purposes and are, therefore, never co-extensive. Thus it is legitimate to charge these crimes in relation to the same set of facts. It may, additionally, depending on the case, be necessary to record a conviction for more than one of these offences in order to reflect what crimes an accused committed. If, for example, a general ordered that all prisoners of war belonging to a particular ethnic group should be killed, with the intent thereby to eliminate the group, this would be both genocide and a violation of common article 3, although not necessarily a crime against humanity. Convictions for genocide and violations of common article 3 would accurately reflect the accused general's course of conduct.

470. Conversely, the Chamber does not consider that any of genocide, crimes against humanity, and

5460

violations of article 3 common to the Geneva Conventions and of Additional Protocol II are lesser included forms of each other. The ICTR Statute does not establish a hierarchy of norms, but rather all three offences are presented on an equal footing. While genocide may be considered the gravest crime, there is no justification in the Statute for finding that crimes against humanity or violations of common article 3 and additional protocol II are in all cricumstances alternative charges to genocide and thus lesser included offences. As stated, and it is a related point, these offences have different constituent elements. Again, this consideration renders multiple convictions for these offences in relation to the same set of facts permissible.

6.2. Individual criminal responsibility (Article 6 of the Statute)

471. The Accused is charged under Article 6(1) of the Statute of the Tribunal with individual criminal responsibility for the crimes alleged in the Indictment. With regard to Counts 13, 14 and 15 on sexual violence, the Accused is charged additionally, or alternatively, under Article 6(3) of the Statute. In the opinion of the Tribunal, Articles 6(1) and 6(3) address distinct principles of criminal liability and should, therefore, be considered separately. Article 6(1) sets forth the basic principles of individual criminal liability, which are undoubtedly common to most national criminal jurisdictions. Article 6(3), by contrast, constitutes something of an exception to the principles articulated in Article 6(1), as it derives from military law, namely the principle of the liability of a commander for the acts of his subordinates or "command responsibility".

472. Article 6(1) provides that:

> "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime".

Thus, in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he plans with them, instigates them, orders them or aids and abets them to commit those acts.

473. Thus, Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization. However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide80. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.

474. Article 6 (1) thus appears to be in accord with the Judgments of the Nuremberg Tribunal which held that persons other than those who committed the crime, especially those who ordered it, could incur individual criminal responsibility.

475. The International Law Commission, in Article 2 (3) of the Draft Code of Crimes Against the Peace and Security of Mankind, reaffirmed the principle of individual responsibility for the five forms of participation deemed criminal referred to in Article 6 (1) and consistently included the phrase "which in fact occurs", with the exception of aiding and abetting, which is akin to complicity and therefore implies a principal offence.

476. The elements of the offences or, more specifically, the forms of participation in the commission of

5461

one of the crimes under Articles 2 to 4 of the Statute, as stipulated in Article 6 (1) of the said Statute, their elements are inherent in the forms of participation *per se* which render the perpetrators thereof individually responsible for such crimes. The moral element is reflected in the desire of the Accused that the crime be in fact committed.

477. In this respect, the International Criminal Tribunal for the former Yugoslavia found in the Tadic case that:

> "a person may only be criminally responsible for conduct where it is determined that he knowingly participated in the commission of an offence" and that "his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident."81

478. This intent can be inferred from a certain number of facts, as concerns genocide, crimes against humanity and war crimes, for instance, from their massive and/or systematic nature or their atrocity, to be considered *infra* in the judgment, in the Tribunal's findings on the law applicable to each of the three crimes which constitute its *ratione materiae* jurisdiction.

479. Therefore, as can be seen, the forms of participation referred to in Article 6 (1), cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge. This greatly differs from Article 6 (3) analyzed here below, which does not necessarily require that the superior acted knowingly to render him criminally liable; it suffices that he had reason to know that his subordinates were about to commit or had committed a crime and failed to take the necessary or reasonable measures to prevent such acts or punish the perpetrators thereof. In a way, this is liability by omission or abstention.

480. The first form of liability set forth in Article 6 (1) is **planning** of a crime. Such planning is similar to the notion of *complicity* in Civil law, or *conspiracy* under Common law, as stipulated in Article 2 (3) of the Statute. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.

481. The second form of liability is **'incitation'** (in the french version of the Statute) to commit a crime, reflected in the English version of Article 6 (1) by the word *instigated.* In English, it seems the words incitement and instigation are synonymous82. Furthermore, the word "instigated" or "instigation" is used to refer to incitation in several other instruments83. However, in certain legal systems and, under Civil law, in particular, the two concepts are very different84. Furthermore, and even assuming that the two words were synonymous, the question would be to know whether instigation under Article 6 (1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide (Article 2 (3)(c) of the Statute) which, in this instance, translates *incitation* into English as "incitement" and no longer "instigation". Some people are of that opinion85. The Chamber also accepts this interpretation 86.

482. That said, the form of participation through instigation stipulated in Article 6 (1) of the Statute, involves prompting another to commit an offence; but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator87.

483. By **ordering** the commission of one of the crimes referred to in Articles 2 to 4 of the Statute, a person also incurs individual criminal responsibility. Ordering implies a superior- subordinate relationship between the person giving the order and the one executing it. In other words, the person in a

position of authority uses it to convince another to commit an offence. In certain legal systems, including that of Rwanda 88, ordering is a form of complicity through instructions given to the direct perpetrator of an offence. Regarding the position of authority, the Chamber considers that sometimes it can be just a question of fact.

484. Article 6 (1) declares criminally responsible a person who "(...) or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 (...)". **Aiding** and **abetting**, which may appear to be synonymous, are indeed different. Aiding means giving assistance to someone. Abetting, on the other hand, would involve facilitating the commission of an act by being sympathetic thereto. The issue here is to whether the individual criminal responsibility provided for in Article 6(1) is incurred only where there was aiding and abetting at the same time. The Chamber is of the opinion that either aiding or abetting alone is sufficient to render the perpetrator criminally liable. In both instances, it is not necessary for the person aiding or abetting another to commit the offence to be present during the commission of the crime.

485. The Chamber finds that, in many legal systems, aiding and abetting constitute acts of complicity. However, though akin to the constituent elements of complicity, they themselves constitute one of the crimes referred to in Articles 2 to 4 of the Statute, particularly, genocide. The Chamber is consequently of the opinion that when dealing with a person Accused of having aided and abetted in the planning, preparation and execution of genocide, it must be proven that such a person did have the specific intent to commit genocide, namely that, he or she acted with the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such; whereas, as stated *supra*, the same requirement is not needed for complicity in genocide89.

486. Article 6(3) of the Statute deals with the responsibility of the superior, or command responsibility. This principle, which derives from the principle of individual criminal responsibility as applied in the Nuremberg and Tokyo trials, was subsequently codified in Article 86 of the Additional Protocol I to the Geneva Conventions of 8 June 1977.

487. Article 6 (3) stipulates that:

"The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".

488. There are varying views regarding the *Mens rea* required for command responsibility. According to one view it derives from a legal rule of strict liability, that is, the superior is criminally responsible for acts committed by his subordinate, without it being necessary to prove the criminal intent of the superior. Another view holds that negligence which is so serious as to be tantamount to consent or criminal intent, is a lesser requirement. Thus, the "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949" stated, in reference to Article 86 of the Additional Protocol I, and the *mens rea* requirement for command responsibility that:

> "[...] the negligence must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place. This element in criminal law is far from being clarified, but it is essential, since it is precisely on the question of intent that the system of penal sanctions in the Conventions is based"90.

489. The Chamber holds that it is necessary to recall that criminal intent is the moral element required

for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person Accused of crimes falling within the jurisdiction of the Chamber, such as genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.

490. As to whether the form of individual criminal responsibility referred to Article 6 (3) of the Statute applies to persons in positions of both military and civilian authority, it should be noted that during the Tokyo trials, certain civilian authorities were convicted of war crimes under this principle. Hirota, former Foreign Minister of Japan, was convicted of atrocities - including mass rape - committed in the "rape of Nanking", under a count which charged that he had " recklessly disregarded their legal duty by virtue of their offices to take adequate steps to secure the observance and prevent breaches of the law and customs of war".The Tokyo Tribunal held that:

> "Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence".

It should, however, be noted that Judge Röling strongly dissented from this finding, and held that Hirota should have been acquitted. Concerning the principle of command responsibility as applied to a civilian leader, Judge Röling stated that:

> "Generally speaking, a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for omissions'. Considerations of both law and policy, of both justice and expediency, indicate that this responsibility should only be recognized in a very restricted sense".

491. The Chamber therefore finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6 (3), to civilians remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.

6.3. Genocide (Article 2 of the Statute)

6.3.1. Genocide

492. Article 2 of the Statute stipulates that the Tribunal shall have the power to prosecute persons responsible for genocide, complicity to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide.

493. In accordance with the said provisions of the Statute, the Prosecutor has charged Akayesu with the crimes legally defined as genocide (count 1), complicity in genocide (count 2) and incitement to commit genocide (count 4).

Crime of Genocide, punishable under Article 2(3)(a) of the Statute

5467

494. The definition of genocide, as given in Article 2 of the Tribunal's Statute, is taken verbatim from Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention")91. It states:

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

495. The Genocide Convention is undeniably considered part of customary international law, as can be seen in the opinion of the International Court of Justice on the provisions of the Genocide Convention, and as was recalled by the United Nations' Secretary-General in his Report on the establishment of the International Criminal Tribunal for the former Yugoslavia92.

496. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 197593. Thus, punishment of the crime of genocide did exist in Rwanda in 1994, at the time of the acts alleged in the Indictment, and the perpetrator was liable to be brought before the competent courts of Rwanda to answer for this crime.

497. Contrary to popular belief, the crime of genocide does not imply the actual extermination of group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2 (2)(e) is committed with the specific intent to destroy "in whole or in part" a national, ethnical, racial or religious group.

498. Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

499. Thus, for a crime of genocide to have been committed, it is necessary that one of the acts listed under Article 2(2) of the Statute be committed, that the particular act be committed against a specifically targeted group, it being a national, ethnical, racial or religious group. Consequently, in order to clarify the constitutive elements of the crime of genocide, the Chamber will first state its findings on the acts provided for under Article 2(2)(a) through Article 2(2)(e) of the Statute, the groups protected by the Genocide Convention, and the special intent or *dolus specialis* necessary for genocide to take place.

Killing members of the group (paragraph (a)):

500. With regard to Article 2(2)(a) of the Statute, like in the Genocide Convention, the Chamber notes that the said paragraph states *"meurtre"* in the French version while the English version states "killing". The Trial Chamber is of the opinion that the term "killing" used in the English version is too general, since it could very well include both intentional and unintentional homicides, whereas the term *"meurtre"*, used in the French version, is more precise. It is accepted that there is murder when death has been caused with the intention to do so, as provided for, incidentally, in the Penal Code of Rwanda

5465

which stipulates in its Article 311 that "Homicide committed with intent to cause death shall be treated as murder".

501. Given the presumption of innocence of the accused, and pursuant to the general principles of criminal law, the Chamber holds that the version more favourable to the accused should be upheld and finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder given in the Penal Code of Rwanda, according to which *"meurtre"* (killing) is homicide committed with the intent to cause death. The Chamber notes in this regard that the *travaux préparatoires* of the Genocide Convention 94, show that the proposal by certain delegations that premeditation be made a necessary condition for there to be genocide, was rejected, because some delegates deemed it unnecessary for premeditation to be made a requirement; in their opinion, by its constitutive physical elements, the very crime of genocide, necessarily entails premeditation.

Causing serious bodily or mental harm to members of the group (paragraph b)

502. Causing serious bodily or mental harm to members of the group does not necessarily mean that the harm is permanent and irremediable.

503. In the Adolf Eichmann case, who was convicted of crimes against the Jewish people, genocide under another legal definition, the District Court of Jerusalem stated in its judgment of 12 December 1961, that serious bodily or mental harm of members of the group can be caused

> " by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture"95.

504. For purposes of interpreting Article 2 (2)(b) of the Statute, the Chamber takes serious bodily or mental harm, without limiting itself thereto, to mean acts of torture, be they bodily or mental, inhumane or degrading treatment, persecution.

Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part (paragraph c):

505. The Chamber holds that the expression deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, should be construed as the methods of destruction by which the perpetrator does not immediately kill the members of the group, but which, ultimately, seek their physical destruction.

506. For purposes of interpreting Article 2(2)(c) of the Statute, the Chamber is of the opinion that the means of deliberate inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include, *inter alia*, subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement.

Imposing measures intended to prevent births within the group (paragraph d):

507. For purposes of interpreting Article 2(2)(d) of the Statute, the Chamber holds that the measures intended to prevent births within the group, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages. In patriarchal

societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.

508. Furthermore, the Chamber notes that measures intended to prevent births within the group may be physical, but can also be mental. For instance, rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.

Forcibly transferring children of the group to another group (paragraph e)

509. With respect to forcibly transferring children of the group to another group, the Chamber is of the opinion that, as in the case of measures intended to prevent births, the objective is not only to sanction a direct act of forcible physical transfer, but also to sanction acts of threats or trauma which would lead to the forcible transfer of children from one group to another.

510. Since the special intent to commit genocide lies in the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group, as such", it is necessary to consider a definition of the group as such. Article 2 of the Statute, just like the Genocide Convention, stipulates four types of victim groups, namely national, ethnical, racial or religious groups.

511. On reading through the *travaux préparatoires* of the Genocide Convention96, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

512. Based on the *Nottebohm* decision97 rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties.

513. An ethnic group is generally defined as a group whose members share a common language or culture.

514. The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors.

515. The religious group is one whose members share the same religion, denomination or mode of worship.

516. Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in Article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether it would be impossible to punish the physical destruction of a group as such under the Genocide Convention, if the said group, although stable and membership is by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Chamber, it is particularly important to respect the

5457

intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.

517. As stated above, the crime of genocide is characterized by its *dolus specialis*, or special intent, which lies in the fact that the acts charged, listed in Article 2 (2) of the Statute, must have been "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".

518. Special intent is a well-known criminal law concept in the Roman-continental legal systems. It is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator98.

519. As observed by the representative of Brazil during the *travaux préparatoires* of the Genocide Convention,

> "genocide [is] characterised by the factor of particular intent to destroy a group. In the absence of that factor, whatever the degree of atrocity of an act and however similar it might be to the acts described in the convention, that act could still not be called genocide."99

520. With regard to the crime of genocide, the offender is culpable only when he has committed one of the offences charged under Article 2(2) of the Statute with the clear intent to destroy, in whole or in part, a particular group. The offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.

521. In concrete terms, for any of the acts charged under Article 2 (2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual100.

522. The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior motive, which is to destroy, in whole or part, the group of which the individual is just one element.

523. On the issue of determining the offender's specific intent, the Chamber considers that intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.

5468-

524. Trial Chamber I of the International Criminal Tribunal for the former Yugoslavia also stated that the specific intent of the crime of genocide

> " may be inferred from a number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate the very foundation of the group- acts which are not in themselves covered by the list in Article 4(2) but which are committed as part of the same pattern of conduct"101.

Thus, in the matter brought before the International Criminal Tribunal for the former Yugoslavia, the Trial Chamber, in its findings, found that

> "this intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group".102

6.3.2. Complicity in Genocide

The Crime of Complicity in Genocide, punishable under Article 2(3)e) of the Statute

525. Under Article 2(3)e) of the Statute, the Chamber shall have the power to prosecute persons who have committed complicity in genocide. The Prosecutor has charged Akayesu with such a crime under count 2 of the Indictment.

526. Principle VII of the "Nuremberg Principles" 103 reads

> "complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."

Thus, participation by complicity in the most serious violations of international humanitarian law was considered a crime as early as Nuremberg.

527. The Chamber notes that complicity is viewed as a form of criminal participation by all criminal law systems, notably, under the Anglo-Saxon system (or Common Law) and the Roman-Continental system (or Civil Law). Since the accomplice to an offence may be defined as someone who associates himself in an offence committed by another 104, complicity necessarily implies the existence of a principal offence.105

528. According to one school of thought, complicity is borrowed criminality' (criminalité d'emprunt). In other words, the accomplice borrows the criminality of the principal perpetrator. By borrowed criminality, it should be understood that the physical act which constitutes the act of complicity does not have its own inherent criminality, but rather it borrows the criminality of the act committed by the principal perpetrator of the criminal enterprise. Thus, the conduct of the accomplice emerges as a crime when the crime has been consummated by the principal perpetrator. The accomplice has not committed an autonomous crime, but has merely facilitated the criminal enterprise committed by another.

529. Therefore, the issue before the Chamber is whether genocide must actually be committed in order

5469

for any person to be found guilty of complicity in genocide. The Chamber notes that, as stated above, complicity can only exist when there is a punishable, principal act, in the commission of which the accomplice has associated himself. Complicity, therefore, implies a predicate offence committed by someone other than the accomplice.

530. Consequently, the Chamber is of the opinion that in order for an accused to be found guilty of complicity in genocide, it must, first of all, be proven beyond a reasonable doubt that the crime of genocide has, indeed, been committed.

531. The issue thence is whether a person can be tried for complicity even where the perpetrator of the principal offence himself has not being tried. Under Article 89 of the Rwandan Penal Code, accomplices

> "may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification"[unofficial translation].

As far as the Chamber is aware, all criminal systems provide that an accomplice may also be tried, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, guilt could not be proven.

532. The Chamber notes that the logical inference from the foregoing is that an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which an accused is being charged cannot, therefore, be characterized both as an act of genocide and an act of complicity in genocide as pertains to this accused. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act.

533. As regards the physical elements of complicity in genocide *(Actus Reus)*, three forms of accomplice participation are recognized in most criminal Civil Law systems: complicity by instigation, complicity by aiding and abetting, and complicity by procuring means106. It should be noted that the Rwandan Penal Code includes two other forms of participation, namely, incitement to commit a crime through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at pubic gatherings, or through the public display of placards or posters, and complicity by harbouring or aiding a criminal. Indeed, according to Article 91 of the Rwandan Penal Code:

> "An accomplice shall mean:
> 1. A person or persons who by means of gifts, promises, threats, abuse of authority or power, culpable machinations or artifice, directly incite(s) to commit such action or order(s) that such action be committed.
> 2. A person or persons who procure(s) weapons, instruments or any other means which are used in committing such action with the knowledge that they would be so used.
> 3. A person or persons who knowingly aid(s) or abet(s) the perpetrator or perpetrators of such action in the acts carried out in preparing or planning such action or in effectively committing it.
> 4. A person or persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at pubic gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such an action without prejudice to the penalties applicable to those who incite others to commit offences, even where such incitement fails to produce results.

5447-10

5. A person or persons who harbour(s) or aid(s) perpetrators under the circumstances provided for under Article 257 of this Code."107 [unofficial translation]

534. The Chamber notes, first of all, that the said Article 91 of the Rwandan Penal Code draws a distinction between *"instigation"* (instigation), on the one hand, as provided for by paragraph 1 of said Article, and *"incitation"* (incitement), on the other, which is referred to in paragraph 4 of the same Article. The Chamber notes in this respect that, as pertains to the crime of genocide, the latter form of complicity, i.e. by incitement, is the offence which under the Statute is given the specific legal definition of "direct and public incitement to commit genocide," punishable under Article 2(3)c), as distinguished from "complicity in genocide." The findings of the Chamber with respect to the crime of direct and public incitement to commit genocide will be detailed below. That said, instigation, which according to Article 91 of the Rwandan Penal Code, assumes the form of incitement or instruction to commit a crime, only constitutes complicity if it is accompanied by, "gifts, promises, threats, abuse of authority or power, machinations or culpable artifice"108. In other words, under the Rwandan Penal Code, unless the instigation is accompanied by one of the aforesaid elements, the mere fact of prompting another to commit a crime is not punishable as complicity, even if such a person committed the crime as a result.

535. The ingredients of complicity under Common Law do not appear to be different from those under Civil Law. To a large extent, the forms of accomplice participation, namely "aid and abet, counsel and procure", mirror those conducts characterized under Civil Law as "l'aide et l'assistance, la fourniture des moyens".

536. Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a very common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.

537. For the purposes of interpreting Article 2(3)e) of the Statute, which does not define the concept of complicity, the Chamber is of the opinion that it is necessary to define complicity as per the Rwandan Penal Code, and to consider the first three forms of criminal participation referred to in Article 91 of the Rwandan Penal Code as being the elements of complicity in genocide, thus:

- complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
- complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof;
- complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide crime, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited to commit genocide.

538. The intent or mental element of complicity implies in general that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.

539. Moreover, as in all criminal Civil law systems, under Common law, notably English law, generally, the accomplice need not even wish that the principal offence be committed. In the case of National Coal Board v. Gamble109, Justice Devlin stated

"an indifference to the result of the crime does not of itself negate abetting. If one man

5471

> deliberately sells to another a gun to be used for murdering a third, he may be indifferent about whether the third lives or dies and interested only the cash profit to be made out of the sale, but he can still be an aider and abettor."

In 1975, the English House of Lords also upheld this definition of complicity, when it held that willingness to participate in the principal offence did not have to be established110. As a result, anyone who knowing of another's criminal purpose, voluntarily aids him or her in it, can be convicted of complicity even though he regretted the outcome of the offence.

540. As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.

541. Thus, if for example, an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, the accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide. However, if the accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group.

542. This finding by the Chamber comports with the decisions rendered by the District Court of Jerusalem on 12 December 1961 and the Supreme Court of Israel on 29 May 1962 in the case of Adolf Eichmann111. Since Eichmann raised the argument in his defence that he was a "small cog" in the Nazi machine, both the District Court and the Supreme Court dealt with accomplice liability and found that,

> "[...] even a small cog, even an insignificant operator, is under our criminal law liable to be regarded as an accomplice in the commission of an offence, in which case he will be dealt with as if he were the actual murderer or destroyer".112

543. The District Court accepted that Eichmann did not personally devise the "Final Solution" himself, but nevertheless, as the head of those engaged in carrying out the "Final Solution" - "acting in accordance with the directives of his superiors, but [with] wide discretionary powers in planning operations on his own initiative," he incurred individual criminal liability for crimes against the Jewish people, as much as his superiors. Likewise, with respect to his subordinates who actually carried out the executions, "[...] the legal and moral responsibility of he who delivers up the victim to his death is, in our opinion, no smaller, and may be greater, than the responsibility of he who kills the victim with his own hands"113. The District Court found that participation in the extermination plan with knowledge of the plan rendered the person liable "as an accomplice to the extermination of all [...] victims from 1941 to 1945, irrespective of the extent of his participation"114.

544. The findings of the Israeli courts in this case support the principle that the *mens rea*, or special intent, required for complicity in genocide is *knowledge* of the genocidal plan, coupled with the *actus reus* of participation in the execution of such plan. Crucially, then, it does not appear that the specific intent to commit the crime of genocide, as reflected in the phrase "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such," is required for complicity or accomplice liability.

545. In conclusion, the Chamber is of the opinion that an accused is liable as an accomplice to genocide

5472

if he knowingly aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

546. At this juncture, the Chamber will address another issue, namely that which, with respect to complicity in genocide covered under Article 2(3)(e) of the Statute, may arise from the forms of participation listed in Article 6 of the Statute entitled, "Individual Criminal Responsibility," and more specifically, those covered under paragraph 1 of the same Article. Indeed, under Article 6(1), "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime." Such forms of participation, which are summarized in the expression "[...] or otherwise aided or abetted [...]," are similar to the material elements of complicity, though they in and of themselves, characterize the crimes referred to in Articles 2 to 4 of the Statute, which include namely genocide.

547. Consequently, where a person is accused of aiding and abetting, planning, preparing or executing genocide, it must be proven that such a person acted with specific genocidal intent, i.e. the intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such, whereas, as stated above, there is no such requirement to establish accomplice liability in genocide.

548. Another difference between complicity in genocide and the principle of abetting in the planning, preparation or execution a genocide as per Article 6(1), is that, in theory, complicity requires a positive act, i.e. an act of commission, whereas aiding and abetting may consist in failing to act or refraining from action. Thus, in the Jefferson and Coney cases, it was held that "The accused [...] only accidentally present [...] must know that his presence is actually encouraging the principal(s)"115. Similarly, the French Court of Cassation found that,

> "A person who, by his mere presence in a group of aggressors provided moral support to the assailants, and fully supported the criminal intent of the group, is liable as an accomplice"116[unofficial translation].

The International Criminal Tribunal for the Former Yugoslavia also concluded in the Tadic judgment that :

> "if the presence can be shown or inferred, by circumstantial or other evidence, to be knowing and to have a direct and substantial effect on the commission of the illegal act, then it is sufficient on which to base a finding of participation and assign the criminal culpability that accompanies it."117

6.3.3. Direct and Public Incitement to commit Genocide

THE CRIME OF DIRECT AND PUBLIC INCITEMENT TO COMMIT GENOCIDE, PUNISHABLE UNDER ARTICLE 2(3)(c) OF THE STATUTE

549. Under count 4, the Prosecutor charges Akayesu with direct and public incitement to commit genocide, a crime punishable under Article 2(3)(c) of the Statute.

550. Perhaps the most famous conviction for incitement to commit crimes of international dimension was that of Julius Streicher by the Nuremberg Tribunal for the virulently anti-Semitic articles which he

5473

had published in his weekly newspaper *Der Stürmer*. The Nuremberg Tribunal found that: "Streicher's incitement to murder and extermination, at the time when Jews in the East were being killed under the most horrible conditions, clearly constitutes persecution on political and racial grounds in connection with War Crimes, as defined by the Charter, and constitutes a Crime against Humanity". 118

551. At the time the Convention on Genocide was adopted, the delegates agreed to expressly spell out direct and public incitement to commit genocide as a specific crime, in particular, because of its critical role in the planning of a genocide, with the delegate from the USSR stating in this regard that, "It was impossible that hundreds of thousands of people should commit so many crimes unless they had been incited to do so and unless the crimes had been premeditated and carefully organized. He asked how in those circumstances, the inciters and organizers of the crime could be allowed to escape punishment, when they were the ones really responsible for the atrocities committed".119

552. Under Common law systems, incitement tends to be viewed as a particular form of criminal participation, punishable as such. Similarly, under the legislation of some Civil law countries, including Argentina, Bolivia, Chili, Peru, Spain, Uruguay and Venezuela, provocation, which is similar to incitement, is a specific form of participation in an offence120; but in most Civil law systems, incitement is most often treated as a form of complicity.

553. The Rwandan Penal Code is one such legislation. Indeed, as stated above, in the discussion on complicity in genocide, it does provide that direct and public incitement or provocation is a form of complicity. In fact, Article 91 subparagraph 4 provides that an accomplice shall mean " A person or persons who, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings or through the public display of placards or posters, directly incite(s) the perpetrator or perpetrators to commit such an action without prejudice to the penalties applicable to those who incite others to commit offences, even where such incitement fails to produce results". 121

554. Under the Statute, direct and public incitement is expressly defined as a specific crime, punishable as such, by virtue of Article 2(3)(c). With respect to such a crime, the Chamber deems it appropriate to first define the three terms: incitement, direct and public.

555. Incitement is defined in Common law systems as encouraging or persuading another to commit an offence122. One line of authority in Common law would also view threats or other forms of pressure as a form of incitement123. As stated above, Civil law systems punish direct and public incitement assuming the form of provocation, which is defined as an act intended to directly provoke another to commit a crime or a misdemeanour through speeches, shouting or threats, or any other means of audiovisual communication124. Such a provocation, as defined under Civil law, is made up of the same elements as direct and public incitement to commit genocide covered by Article 2 of the Statute, that is to say it is both direct and public.

556. The public element of incitement to commit genocide may be better appreciated in light of two factors: the place where the incitement occurred and whether or not assistance was selective or limited. A line of authority commonly followed in Civil law systems would regard words as being public where they were spoken aloud in a place that were public by definition125. According to the International Law Commission, public incitement is characterized by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television 126. It should be noted in this respect that at the time Convention on Genocide was adopted, the delegates specifically agreed to rule out the possibility of including private incitement to commit genocide as a crime, thereby underscoring their commitment to set aside for

5474

punishment only the truly public forms of incitement127.

557. The "direct" element of incitement implies that the incitement assume a direct form and specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement128. Under Civil law systems, provocation, the equivalent of incitement, is regarded as being direct where it is aimed at causing a specific offence to be committed. The prosecution must prove a definite causation between the act characterized as incitement, or provocation in this case, and a specific offence129. However, the Chamber is of the opinion that the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as "direct" in one country, and not so in another, depending on the audience130. The Chamber further recalls that incitement may be direct, and nonetheless implicit. Thus, at the time the Convention on Genocide was being drafted, the Polish delegate observed that it was sufficient to play skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime. 131

558. The Chamber will therefore consider on a case-by-case basis whether, in light of the culture of Rwanda and the specific circumstances of the instant case, acts of incitement can be viewed as direct or not, by focusing mainly on the issue of whether the persons for whom the message was intended immediately grasped the implication thereof.

559. In light of the foregoing, it can be noted in the final analysis that whatever the legal system, direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.

560. The *mens rea* required for the crime of direct and public incitement to commit genocide lies in the intent to directly prompt or provoke another to commit genocide. It implies a desire on the part of the perpetrator to create by his actions a particular state of mind necessary to commit such a crime in the minds of the person(s) he is so engaging. That is to say that the person who is inciting to commit genocide must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

561. Therefore, the issue before the Chamber is whether the crime of direct and public incitement to commit genocide can be punished even where such incitement was unsuccessful. It appears from the *travaux préparatoires* of the Convention on Genocide that the drafters of the Convention considered stating explicitly that incitement to commit genocide could be punished, whether or not it was successful. In the end, a majority decided against such an approach. Nevertheless, the Chamber is of the opinion that it cannot thereby be inferred that the intent of the drafters was not to punish unsuccessful acts of incitement. In light of the overall *travaux*, the Chamber holds the view that the drafters of the Convention simply decided not to specifically mention that such a form of incitement could be punished.

562. There are under Common law so-called inchoate offences, which are punishable by virtue of the criminal act alone, irrespective of the result thereof, which may or may not have been achieved. The Civil law counterparts of inchoate offences are known as [*infractions formelles*] (acts constituting an offence *per se* irrespective of their results), as opposed to [*infractions matérielles*] (strict liability offences). Indeed, as is the case with inchoate offenses, in [*infractions formelles*], the method alone is punishable. Put another way, such offenses are "deemed to have been consummated regardless of the

5475

result achieved [*unofficial translation*]"132 contrary to [*infractions matérielles*]. Indeed, Rwandan lawmakers appear to characterize the acts defined under Article 91(4) of the Rwandan Penal Code as so-called [*infractions formelles*], since provision is made for their punishment even where they proved unsuccessful. It should be noted, however, that such offences are the exception, the rule being that in theory, an offence can only be punished in relation to the result envisaged by the lawmakers. In the opinion of the Chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.

6.4. Crimes against Humanity (Article 3 of the Statute)

Crimes against Humanity - Historical development

563. Crimes against humanity were recognized in the Charter and Judgment of the Nuremberg Tribunal, as well as in Law No. 10 of the Control Council for Germany. Article 6(c) of the Charter of Nuremberg Tribunal defines crimes against humanity as

> "..murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connexion with any crime within the jurisdiction of the Chamber, whether or not in violation of the domestic law of the country where perpetrated."

564. Article II of Law No. 10 of the Control Council Law defined crimes against humanity as:

> "Atrocities and Offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population or persecution on political, racial or religious grounds, whether or not in violation of the domestic laws of the country where perpetrated."133

565. Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character134. In fact, the concept of crimes against humanity had been recognised long before Nuremberg. On 28 May 1915, the Governments of France, Great Britain and Russia made a declaration regarding the massacres of the Armenian population in Turkey, denouncing them as "crimes against humanity and civilisation for which all the members of the Turkish government will be held responsible together with its agents implicated in the massacres".135 The 1919 Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties formulated by representatives from several States and presented to the Paris Peace Conference also referred to "offences against ... the laws of humanity".136

566. These World War I notions derived, in part, from the Martens clause of the Hague Convention (IV) of 1907, which referred to "the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience". In 1874, George Curtis called slavery a "crime against humanity". Other such phrases as "crimes against mankind" and "crimes against the human family" appear far earlier in human history (see 12 N.Y.L. Sch. J. Hum. Rts 545 (1995)).

567. The Chamber notes that, following the Nuremberg and Tokyo trials, the concept of crimes against

humanity underwent a gradual evolution in the *Eichmann, Barbie, Touvier and Papon* cases.

568. In the *Eichmann* case, the accused, Otto Adolf Eichmann, was charged with offences under Nazi and Nazi Collaborators (punishment) Law, 5710/1950, for his participation in the implementation of the plan know as the Final Solution of the Jewish problem'. Pursuant to Section I (b) of the said law:

> "Crime against humanity means any of the following acts: murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population , and persecution on national, racial, religious or political grounds."137

The district court in the Eichmann stated that crimes against humanity differs from genocide in that for the commission of genocide special intent is required. This special intent is not required for crimes against humanity138. Eichmann was convicted by the District court and sentenced to death. Eichmann appealed against his conviction and his appeal was dismissed by the supreme court.

569. In the *Barbie* case, the accused, Klaus Barbie, who was the head of the Gestapo in Lyons from November 1942 to August 1944, during the wartime occupation of France, was convicted in 1987 of crimes against humanity for his role in the deportation and extermination of civilians. Barbie appealed in cassation, but the appeal was dismissed. For the purposes of the present Judgment, what is of interest is the definition of crimes against humanity employed by the Court. The French Court of Cassation, in a Judgment rendered on 20 December 1985, stated:

> Crimes against humanity, within the meaning of Article 6(c) of the Charter of the International Military Tribunal annexed to the London Agreement of 8 August 1945, which were not subject to statutory limitation of the right of prosecution, even if they were crimes which could also be classified as war crimes within the meaning of Article 6(b) of the Charter, *were inhumane acts and persecution committed in a systematic manner in the name of a State practising a policy of ideological supremacy, not only against persons by reason of their membership of a racial or religious community, but also against the opponents of that policy, whatever the form of their opposition.* (Words italicized by the Court)139

570. This was affirmed in a Judgment of the Court of Cassation of 3 June 1988, in which the Court held that:

> The fact that the accused, who had been found guilty of one of the crimes enumerated in Article 6(c) of the Charter of the Nuremberg Tribunal, in perpetrating that crime took part in the execution of a common plan to bring about the deportation or extermination of the civilian population during the war, or persecutions on political, racial or religious grounds, constituted not a distinct offence or an aggravating circumstance but rather *an essential element of the crime against humanity, consisting of the fact that the acts charged were performed in a systematic manner in the name of a State practising by those means a policy of ideological supremacy.*140(Emphasis added)

571. The definition of crimes against humanity developed in *Barbie* was further developed in the *Touvier* case. In that case, the accused, Paul Touvier, had been a high-ranking officer in the Militia (*Milice*) of Lyons, which operated in "Vichy" France during the German occupation. He was convicted of crimes against humanity for his role in the shooting of seven Jews at Rillieux on 29 June 1994 as a reprisal for the assassination by members of the Resistance, on the previous day, of the Minister for Propaganda of the "Vichy" Government.

572. The Court of Appeal applied the definition of crimes against humanity used in *Barbie*, stating that:

> The specific intent necessary to establish a crime against humanity was the intention to take part in the execution of a common plan by committing, in a systematic manner, inhuman acts or persecutions in the name of a State practising a policy of ideological supremacy.141

573. Applying this definition, the Court of Appeal held that Touvier could not be guilty of crimes against humanity since he committed the acts in question in the name of the "Vichy" State, which was not a State practising a policy of ideological supremacy, although it collaborated with Nazi Germany, which clearly did practice such a policy.

574. The Court of Cassation allowed appeal from the decision of the Court of Appeal, on the grounds that the crimes committed by the accused had been committed at the instigation of a Gestapo officer, and to that extent were linked to Nazi Germany, a State practising a policy of ideological supremacy against persons by virtue of their membership of a racial or religious community. Therefore the crimes could be categorised as crimes against humanity. Touvier was eventually convicted of crimes against humanity by the *Cour d'Assises des Yvelines* on 20 April 1994.142

575. The definition of crimes against humanity used in *Barbie* was later affirmed by the ICTY in its *Vukovar* Rule 61 Decision of 3 April 1996 (IT-95-13-R61), to support its finding that crimes against humanity applied equally where the victims of the acts were members of a resistance movement as to where the victims were civilians:

> "29. ... Although according to the terms of Article 5 of the Statute of this Tribunal combatants in the traditional sense of the term cannot be victims of a crime against humanity, this does not apply to individuals who, at one particular point in time, carried out acts of resistance. As the Commission of Experts, established pursuant to Security Council resolution 780, noted, "it seems obvious that Article 5 applies first and foremost to civilians, meaning people who are not combatants. This, however, should not lead to any quick conclusions concerning people who at one particular point in time did bear arms. ... Information of the overall circumstances is relevant for the interpretation of the provision in a spirit consistent with its purpose." (Doc S/1994/674, para. 78).

576. This conclusion is supported by case law. In the Barbie case, the French Cour de Cassation said that:

> "inhumane acts and persecution which, in the name of a State practising a policy of ideological hegemony, were committed systematically or collectively not only against individuals because of their membership in a racial or religious group but also against the adversaries of that policy whatever the form of the opposition" could be considered a crime against humanity. (Cass. Crim. 20 December 1985).

577. Article 7 of the Statute of the International Criminal Court defines a crime against humanity as any of the enumerated acts committed as part of a widespread of systematic attack directed against any civilian population, with knowledge of the attack. These enumerated acts are murder; extermination; enslavement; deportation or forcible transfer of population; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as

impermissible under international law, in connection with any act referred to in this article or any other crime within the jurisdiction of the Court; enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering , or serious injury to body or mental or physical health.143

Crimes against Humanity in Article 3 of the Statute of the Tribunal

578. The Chamber considers that Article 3 of the Statute confers on the Chamber the jurisdiction to prosecute persons for various inhumane acts which constitute crimes against humanity. This category of crimes may be broadly broken down into four essential elements, namely :

(i) the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
(ii) the act must be committed as part of a wide spread or systematic attack;
(iii) the act must be committed against members of the civilian population;
(iv) the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.

The act must be committed as part of a wide spread or systematic attack.

579. The Chamber considers that it is a prerequisite that the act must be committed as part of a wide spread or systematic attack and not just a random act of violence. The act can be part of a widespread or systematic attack and need not be a part of both.144

580. The concept of widespread' may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of systematic' may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy. 145

581. The concept of attack' maybe defined as a unlawful act of the kind enumerated in Article 3(a) to (I) of the Statute, like murder, extermination, enslavement etc. An attack may also be non violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.

The act must be directed against the civilian population

582. The Chamber considers that an act must be directed against the civilian population if it is to constitute a crime against humanity. Members of the civilian population are people who are not taking any active part in the hostilities, including members of the armed forces who laid down their arms and those persons placed *hors de combat* by sickness, wounds, detention or any other cause.146 Where there are certain individuals within the civilian population who do not come within the definition of civilians , this does not deprive the population of its civilian character.147

The act must be committed on discriminatory grounds

583. The Statute stipulates that inhumane acts committed against the civilian population must be committed on national, political, ethnic, racial or religious grounds.' Discrimination on the basis of a

person's political ideology satisfies the requirement of political' grounds as envisaged in Article 3 of the Statute. For definitions on national, ethnic, racial or religious grounds see supra.

584. Inhumane acts committed against persons not falling within any one of the discriminatory categories could constitute crimes against humanity if the perpetrator's intention was to further his attacks on the group discriminated against on one of the grounds mentioned in Article 3 of the Statute. The perpetrator must have the requisite intent for the commission of crimes against humanity. 148

The enumerated acts

585. Article 3 of the Statute sets out various acts that constitute crimes against humanity, namely: murder; extermination; enslavement; deportation; imprisonment; torture; rape; persecution on political, racial and religious grounds; and; other inhumane acts. Although the category of acts that constitute crimes against humanity are set out in Article 3, this category is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are met. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.

586. The Chamber notes that the accused is indicted for murder, extermination, torture, rape and other acts that constitute inhumane acts. The Chamber in interpreting Article 3 of the Statute, shall focus its discussion on these acts only.

Murder

587. The Chamber considers that murder is a crime against humanity, pursuant to Article 3 (a) of the Statute. The International Law Commission discussed the inhumane act of murder in the context of the definition of crimes against humanity and concluded that the crime of murder is clearly understood and defined in the national law of every state and therefore there is no need to further explain this prohibited act.

588. The Chamber notes that article 3(a) of the English version of the Statute refers to "Murder", whilst the French version of the Statute refers to "Assassinat". Customary International Law dictates that it is the act of "Murder" that constitutes a crime against humanity and not "Assassinat". There are therefore sufficient reasons to assume that the French version of the Statute suffers from an error in translation.

589. The Chamber defines murder as the unlawful, intentional killing of a human being. The requisite elements of murder are :

1. the victim is dead;
2. the death resulted from an unlawful act or omission of the accused or a subordinate;
3. at the time of the killing the accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless whether death ensures or not.

590. Murder must be committed as part of a widespread or systematic attack against a civilian population. The victim must be a member of this civilian population. The victim must have been murdered because he was discriminated against on national, ethnic, racial, political or religious grounds.

Extermination

591. The Chamber considers that extermination is a crime against humanity, pursuant to Article 3 (c) of the Statute. Extermination is a crime which by its very nature is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction which is not required for murder.

592. The Chamber defines the essential elements of extermination as the following :

1. the accused or his subordinate participated in the killing of certain named or described persons;
2. the act or omission was unlawful and intentional.
3. the unlawful act or omission must be part of a widespread or systematic attack;
4. the attack must be against the civilian population;
5. the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.

Torture

593. The Chamber considers that torture is a crime against humanity pursuant to Article 3(f) of the Statute. Torture may be defined as :

..any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'149

594. The Chamber defines the essential elements of torture as :

(i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:

(a) to obtain information or a confession from the victim or a third person;
(b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
(c) for the purpose of intimidating or coercing the victim or the third person;
(d) for any reason based on discrimination of any kind.

(ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.

595. The Chamber finds that torture is a crime against humanity if the following further elements are satisfied :

(a) Torture must be perpetrated as part of a widespread or systematic attack;
(b) the attack must be against the civilian population;
(c) the attack must be launched on discriminatory grounds, namely: national, ethnic, racial, religious and political grounds.

5481

Rape

596. Considering the extent to which rape constitute crimes against humanity, pursuant to Article 3(g) of the Statute, the Chamber must define rape, as there is no commonly accepted definition of this term in international law. While rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.

597. The Chamber considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

598. The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed :

(a) as part of a wide spread or systematic attack;
(b) on a civilian population;
(c) on certained catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds.

6.5. Violations of Common Article 3 and Additional Protocol II (Article 4 of the Statute)

Article 4 of the Statute

599. Pursuant to Article 4 of the Statute, the Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

b) collective punishments;

c) taking of hostages;

d) acts of terrorism;

e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

f) pillage;

5482

g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

h) threats to commit any of the foregoing acts.

600. Prior to developing the elements for the above cited offences contained within Article 4 of the Statute, the Chamber deems it necessary to comment upon the applicability of common Article 3 and Additional Protocol II as regards the situation which existed in Rwanda in 1994 at the time of the events contained in the Indictment.

Applicability of Common Article 3 and Additional Protocol II

601. The four 1949 Geneva Conventions and the 1977 Additional Protocol I thereto generally apply to international armed conflicts only, whereas Article 3 common to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a non-international conflict, a protection which was further developed and enhanced in the 1977 Additional Protocol II. In the field of international humanitarian law, a clear distinction as to the thresholds of application has been made between situations of international armed conflicts, in which the law of armed conflicts is applicable as a whole, situations of non-international (internal) armed conflicts, where Common Article 3 and Additional Protocol II are applicable, and non-international armed conflicts where only Common Article 3 is applicable. Situations of internal disturbances are not covered by international humanitarian law.

602. The distinction pertaining to situations of conflicts of a non-international character emanates from the differing intensity of the conflicts. Such distinction is inherent to the conditions of applicability specified for Common Article 3 or Additional Protocol II respectively. Common Article 3 applies to "armed conflicts not of an international character", whereas for a conflict to fall within the ambit of Additional Protocol II, it must "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Additional Protocol II does not in itself establish a criterion for a non-international conflict, rather it merely develops and supplements the rules contained in Common Article 3 without modifying its conditions of application. 150

603. It should be stressed that the ascertainment of the intensity of a non-international conflict does not depend on the subjective judgment of the parties to the conflict. It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts. If the application of international humanitarian law depended solely on the discretionary judgment of the parties to the conflict, in most cases there would be a tendency for the conflict to be minimized by the parties thereto. Thus, on the basis of objective criteria, both Common Article 3 and Additional Protocol II will apply once it has been established there exists an internal armed conflict which fulfills their respective pre-determined criteria151.

604. The Security Council, when delimiting the subject-matter jurisdiction of the ICTR152, incorporated violations of international humanitarian law which may be committed in the context of both an international and an internal armed conflict:

" Given the nature of the conflict as non-international in character, the Council has incorporated within the subject-matter jurisdiction of the Tribunal violations of international

5483

> humanitarian law which may either be committed in both international and internal armed conflicts, such as the crime of genocide and crimes against humanity, or may be committed only in internal armed conflicts, such as violations of article 3 common to the four Geneva Conventions, as more fully elaborated in article 4 of Additional Protocol II.
> In that latter respect, the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the Statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the Statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, for the first time criminalizes common article 3 of the four Geneva Conventions."153

605. Although the Security Council elected to take a more expansive approach to the choice of the subject-matter jurisdiction of the Tribunal than that of the ICTY, by incorporating international instruments regardless of whether they were considered part of customary international law or whether they customarily entailed the individual criminal responsibilty of the perpetrator of the crime, the Chamber believes, an essential question which should be addressed at this stage is whether Article 4 of the Statute includes norms which did not, at the time the crimes alleged in the Indictment were committed, form part of existing international customary law. Moreover, the Chamber recalls the establishment of the ICTY 154, during which the UN Secretary General asserted that in application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of International Humanitarian law which are beyond any doubt part of customary law.

606. Notwithstanding the above, a possible approach would be for the Chamber not to look at the nature of the building blocks of Article 4 of the Statute nor for it to categorize the conflict as such but, rather, to look only at the relevant parts of Common Article 3 and Additional Protocol II in the context of this trial. Indeed, the Security Council has itself never explicitly determined how an armed conflict should be characterised. Yet it would appear that, in the case of the ICTY, the Security Council, by making reference to the four Geneva Conventions, considered that the conflict in the former Yugoslavia was an international armed conflict, although it did not suggest the criteria by which it reached this finding. Similarly, when the Security Council added Additional Protocol II to the subject matter jurisdiction of the ICTR, this could suggest that the Security Council deemed the conflict in Rwanda as an Additional Protocol II conflict. Thus, it would not be necessary for the Chamber to determine the precise nature of the conflict, this having already been pre-determined by the Security Council. Article 4 of the Statute would be applicable irrespective of the Additional Protocol II question', so long as the conflict were covered, at the very least, by the customary norms of Common Article 3. Findings would thus be made on the basis of whether or not it were proved beyond a reasonable doubt that there has been a serious violation in the form of one or more of the acts enumerated in Article 4 of the Statute.

607. However, the Chamber recalls the way in which the Prosecutor has brought some of the counts against the accused, namely counts 6, 8, 10, 12 and 15. For the first four of these, there is mention only of Common Article 3 as the subject matter jurisdiction of the particular alleged offences, whereas count 15 makes an additional reference to Additional Protocol II. To so add Additional Protocol II should not, in the opinion of the Chamber, be dealt with as a mere expansive enunciation of a *ratione materiae* which has been pre-determined by the Security Council. Rather, the Chamber finds it necessary and reasonable to establish the applicability of both Common Article 3 and Additional Protocol II individually. Thus, if an offence, as per count 15, is charged under both Common Article 3 and Additional Protocol II, it will not suffice to apply Common Article 3 and take for granted that Article 4 of the Statute, hence Additional Protocol II, is therefore automatically applicable.

608. It is today clear that the norms of Common Article 3 have acquired the status of customary that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3. It was also held by the ICTY Trial Chamber in the Tadic judgment 155 that Article 3 of the ICTY Statute (Customs of War), being the body of customary international humanitarian law not covered by Articles 2, 4, and 5 of the ICTY Statute, included the regime of protection established under Common Article 3 applicable to armed conflicts not of an international character. This was in line with the view of the ICTY Appeals Chamber stipulating that Common Article 3 beyond doubt formed part of customary international law, and further that there exists a corpus of general principles and norms on internal armed conflict embracing Common Article 3 but having a much greater scope156.

609. However, as aforesaid, Additional Protocol II as a whole was not deemed by the Secretary-General to have been universally recognized as part of customary international law. The Appeals Chamber concurred with this view inasmuch as "[m]any provisions of this Protocol [II] can now be regarded as declaratory of existing rules or as having crystallised in emerging rules of customary law[ ]", but not all.157

610. Whilst the Chamber is very much of the same view as pertains to Additional Protocol II as a whole, it should be recalled that the relevant Article in the context of the ICTR is Article 4(2) (Fundamental Guarantees) of Additional Protocol II 158. All of the guarantees, as enumerated in Article 4 reaffirm and supplement Common Article 3159 and, as discussed above, Common Article 3 being customary in nature, the Chamber is of the opinion that these guarantees did also at the time of the events alleged in the Indictment form part of existing international customary law.

Individual Criminal Responsibility

611. For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common Article 3 and parts of Article 4 of Additional Protocol II - which comprise the subject-matter jurisdiction of Article 4 of the Statute - form part of international customary law. Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.

612. As regards individual criminal responsibility for serious violations of Common Article 3, the ICTY has already affirmed this principle in the Tadic case. In the ICTY Appeals Chamber, the problem was posed thus:

> " Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such provisions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal's jurisdiction.160"

613. Basing itself on rulings of the Nuremberg Tribunal, on "elements of international practice which show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts", as well as on national legislation designed to implement the Geneva Conventions, the ICTY Appeals Chamber reached the conclusion:

5485

" All of these factors confirm that customary international law imposes criminal liability serious violations of common Article 3, as supplemented by other general principles and rules on protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.161"

614. This was affirmed by the ICTY Trial Chamber when it rendered in the Tadic judgment162.

615. The Chamber considers this finding of the ICTY Appeals Chamber convincing and dispositive of the issue, both with respect to serious violations of Common Article 3 and of Additional Protocol II.

616. It should be noted, moreover, that Article 4 of the ICTR Statute states that, "The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed *serious violations* of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977" (emphasis added). The Chamber understands the phrase "serious violation" to mean "a breach of a rule protecting important values [which] must involve grave consequences for the victim", in line with the above-mentioned Appeals Chamber Decision in Tadic , paragraph 94. The list of serious violations which is provided in Article 4 of the Statute is taken from Common Article 3 - which contains fundamental prohibitions as a humanitarian minimum of protection for war victims - and Article 4 of Additional Protocol II, which equally outlines "Fundamental Guarantees". The list in Article 4 of the Statute thus comprises *serious* violations of the fundamental humanitarian guarantees which, as has been stated above, are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds.

617. The Chamber, therefore, concludes the violation of these norms entails, as a matter of customary international law, individual responsibility for the perpetrator. In addition to this argument from custom, there is the fact that the Geneva Conventions of 1949 (and thus Common Article 3) were ratified by Rwanda on 5 May 1964 and Additional Protocol II on 19 November 1984, and were therefore in force on the territory of Rwanda at the time of the alleged offences. Moreover, all the offences enumerated under Article 4 of the Statute constituted crimes under Rwandan law in 1994. Rwandan nationals were therefore aware, or should have been aware, in 1994 that they were amenable to the jurisdiction of Rwandan courts in case of commission of those offences falling under Article 4 of the Statute.

The nature of the conflict

618. As aforesaid, it will not suffice to establish that as the criteria of Common Article 3 have been met, the whole of Article 4 of the Statute, hence Additional Protocol II, will be applicable. Where alleged offences are charged under both Common Article 3 and Additional Protocol II, which has a higher threshold, the Prosecutor will need to prove that the criteria of applicability of, on the one hand, Common Article 3 and, on the other, Additional Protocol II have been met. This is so because Additional Protocol II is a legal instrument the overall sole purpose of which is to afford protection to victims in conflicts not of an international character. Hence, the Chamber deems it reasonable and necessary that, prior to deciding if there have been serious violations of the provisions of Article 4 of the Statute, where a specific reference has been made to Additional Protocol II in counts against an accused, it must be shown that the conflict is such as to satisfy the requirements of Additional Protocol II.

Common Article 3

619. The norms set by Common Article 3 apply to a conflict as soon as it is an armed conflict not of an

5486

international character'. An inherent question follows such a description, namely, what constitutes armed conflict? The Appeals Chamber in the Tadic decision on Jurisdiction163 held "that an armed conflict exists whenever there is [...] protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until [...] in the case of internal conflicts, a peaceful settlement is reached". Similarly, the Chamber notes that the ICRC commentary on Common Article 3164 suggests useful criteria resulting from the various amendments discussed during the Diplomatic Conference of Geneva, 1949, *inter alia*:

> That the Party in revolt against the *de jure* Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring the respect for the Convention.
>
> That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military in possession of a part of the national territory.
>
> (a) That the *de jure* Government has recognized the insurgents as belligerents; or
>
> (b) that it has claimed for itself the rights of a belligerent; or
>
> (c) that it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
>
> (d) that the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of peace, or an act of aggression.

620. The above reference' criteria were enunciated as a means of distinguishing genuine armed conflicts from mere acts of banditry or unorganized and short-lived insurrections165. The term, armed conflict' in itself suggests the existence of hostilities between armed forces organized to a greater or lesser extent166. This consequently rules out situations of internal disturbances and tensions. For a finding to be made on the existence of an internal armed conflict in the territory of Rwanda at the time of the events alleged, it will therefore be necessary to evaluate both the intensity and organization of the parties to the conflict.

621. Evidence presented in relation to paragraphs 5-11 of the Indictment167, namely the testimony of Major-General Dallaire, has shown there to have been a civil war between two groups, being on the one side, the governmental forces, the FAR, and on the other side, the RPF. Both groups were well-organized and considered to be armies in their own right. Further, as pertains to the intensity of conflict, all observers to the events, including UNAMIR and UN Special rapporteurs, were unanimous in characterizing the confrontation between the two forces as a war, an internal armed conflict. Based on the foregoing, the Chamber finds there existed at the time of the events alleged in the Indictment an armed conflict not of an international character as covered by Common Article 3 of the 1949 Geneva Conventions.

Additional Protocol II

622. As stated above, Additional Protocol II applies to conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable

them to carry out sustained and concerted military operations and to implement this Protocol".

623. Thus, the conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that:

> (i) an armed conflict took place in the territory of a High Contracting Party, namely Rwanda, between its armed forces and dissident armed forces or other organized armed groups;
>
> (ii) the dissident armed forces or other organized armed groups were under responsible command;
>
> (iii) the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
>
> (iv) the dissident armed forces or other organized armed groups were able to implement Additional Protocol II.

624. As per Common Article 3, these criteria have to be applied objectively, irrespective of the subjective conclusions of the parties involved in the conflict. A number of precisions need to be made about the said criteria prior to the Chamber making a finding thereon.168

625. The concept of armed conflict has already been discussed in the previous section pertaining to Common Article 3. It suffices to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict. Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term, armed forces' of the High Contracting Party is to be defined broadly, so as to cover all armed forces as described within national legislations.

626. The armed forces opposing the government must be under responsible command, which entails a degree of organization within the armed group or dissident armed forces. This degree of organization should be such so as to enable the armed group or dissident forces to plan and carry out concerted military operations, and to impose discipline in the name of a *de facto* authority. Further, these armed forces must be able to dominate a sufficient part of the territory so as to maintain sustained and concerted military operations and to apply Additional Protocol II. In essence, the operations must be continuous and planned. The territory in their control is usually that which has eluded the control of the government forces.

627. In the present case, evidence has been presented to the Chamber which showed there was at the least a conflict not of a international character in Rwanda at the time of the events alleged in the Indictment169. The Chamber, also taking judicial notice of a number of UN official documents dealing with the conflict in Rwanda in 1994, finds, in addition to the requirements of Common Article 3 being met, that the material conditions listed above relevant to Additional Protocol II have been fulfilled. It has been shown that there was a conflict between, on the one hand, the RPF, under the command of General Kagame, and, on the other, the governmental forces, the FAR. The RPF increased its control over the Rwandan territory from that agreed in the Arusha Accords to over half of the country by mid-May 1994, and carried out continuous and sustained military operations until the cease fire on 18 July 1994 which brought the war to an end. The RPF troops were disciplined and possessed a structured leadership which

was answerable to authority. The RPF had also stated to the International Committee of the Red that it was bound by the rules of International Humanitarian law170. The Chamber finds the said conflict to have been an internal armed conflict within the meaning of Additional Protocol II. Further, the Chamber finds that conflict took place at the time of the events alleged in the Indictment.

Ratione personae

628. Two distinct issues arise with respect to personal jurisdiction over serious violations of Common Article 3 and Additional Protocol II - the class of victims and the class of perpetrators.

The class of victims

629. Paragraph 10 of the Indictment reads, "The victims referred to in this Indictment were, at all relevant times, persons not taking an active part in the hostilities". This is a material averment for charges involving Article 4 inasmuch as Common Article 3 is for the protection of "persons taking no active part in the hostilities" (Common Article 3(1)), and Article 4 of Additional Protocol II is for the protection of, "all persons who do not take a direct part or who have ceased to take part in hostilities". These phrases are so similar that, for the Chamber's purposes, they may be treated as synonymous. Whether the victims referred to in the Indictment are *indeed* persons not taking an active part in the hostilities is a factual question, which has been considered in the Factual Findings on the General Allegations (paragraphs 5-11 of the Indictment).

The class of perpetrators

630. The four Geneva Conventions - as well as the two Additional Protocols - as stated above, were adopted primarily to protect the victims as well as potential victims of armed conflicts. This implies thus that the legal instruments are primarily addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. The category of persons to be held accountable in this respect then, would in most cases be limited to commanders, combatants and other members of the armed forces.

631. Due to the overall protective and humanitarian purpose of these international legal instruments, however, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted. The duties and responsibilities of the Geneva Conventions and the Additional Protocols, hence, will normally apply only to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. The objective of this approach, thus, would be to apply the provisions of the Statute in a fashion which corresponds best with the underlying protective purpose of the Conventions and the Protocols.

632. However, the Indictment does not specifically aver that the accused falls in the class of persons who may be held responsible for serious violations of Common Article 3 and Additional Protocol II. It has not been alleged that the accused was officially a member of the Rwandan armed forces' (in its broadest sense). It could, hence, be objected that, as a civilian, Article 4 of the Statute, which concerns the law of armed conflict, does not apply to him.

633. It is, in fact, well-established, at least since the Tokyo trials, that civilians may be held responsible for violations of international humanitarian law. Hirota, the former Foreign Minister of Japan, was convicted at Tokyo for crimes committed during the rape of Nanking171. Other post-World War II trials

5489

unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict172.The principle of holding civilians liable for breaches of the laws of war is, moreover, favored by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities.

634. Thus it is clear from the above that the laws of war must apply equally to civilians as to combatants in the conventional sense. Further, the Chamber notes, in light of the above dicta, that the accused was not, at the time of the events in question, a mere civilian but a bourgmestre. The Chamber therefore concludes that, if so established factually, the accused could fall in the class of individuals who may be held responsible for serious violations of international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II.

Ratione loci

635. There is no clear provision on applicability *ratione loci* either in Common Article 3 or Additional Protocol II. However, in this respect Additional Protocol II seems slightly clearer, in so far as it provides that the Protocol shall be applied "to all persons affected by an armed conflict as defined in Article 1". The commentary thereon 173 specifies that this applicability is irrespective of the exact location of the affected person in the territory of the State engaged in the conflict. The question of applicability *ratione loci* in non-international armed conflicts, when only Common Article 3 is of relevance should be approached the same way, i.e. the article must be applied in the whole territory of the State engaged in the conflict. This approach was followed by the Appeals Chamber in its decision on jurisdiction in Tadic , wherein it was held that "the rules contained in [common] Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations"174.

636. Thus the mere fact that Rwanda was engaged in an armed conflict meeting the threshold requirements of Common Article 3 and Additional Protocol II means that these instruments would apply over the whole territory hence encompassing massacres which occurred away from the war front'. From this follows that it is not possible to apply rules in one part of the country (i.e. Common Article 3) and other rules in other parts of the country (i.e. Common Article 3 and Additional Protocol II). The aforesaid, however, is subject to the caveat that the crimes must not be committed by the perpetrator for purely personal motives.

Conclusion

637. The applicability of Common Article 3 and Additional Protocol II has been dealt with above and findings made thereon in the context of the temporal setting of events alleged in the Indictment. It remains for the Chamber to make its findings with regard the accused's culpability under Article 4 of the Statute. This will be dealt with in section 7 of the judgment.

7. LEGAL FINDINGS

7.1. Counts 6, 8, 10 and 12- Violations of Common Article 3 (murder and cruel treatment) and Count 15 - Violations of Common Article 3 and Additional Protocol II (outrages upon personal dignity, in particular rape...)

638. Counts 6, 8, 10, and 12 of

7. LEGAL FINDINGS

7.1. Counts 6, 8, 10 and 12 - Violations of Common Article 3 (murder and cruel treatment) and Count 15 - Violations of Common Article 3 and Additional Protocol II (outrages upon personal dignity, in particular rape...)

637. Counts 6, 8, 10, and 12 of the Indictment charge Akayesu with Violations of Common Article 3 of the 1949 Geneva Conventions, and Count 15 charges Akayesu of Violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto. All these counts are covered by Article 4 of the Statute.

638. It has already been proved beyond reasonable doubt that there was an armed conflict not of an international character between the Government of Rwanda and the RPF in 1994 at the time of the events alleged in the Indictment[175]. The Chamber found the conflict to meet the requirements of Common Article 3 as well as Additional Protocol II.

639. For Akayesu to be held criminally responsible under Article 4 of the Statute, it is incumbent on the Prosecutor to prove beyond a reasonable doubt that Akayesu acted for either the Government or the RPF in the execution of their respective conflict objectives. As stipulated earlier in this judgment, this implies that Akayesu would incur individual criminal responsibility for his acts if it were proved that by virtue of his authority, he is either responsible for the outbreak of, or is otherwise directly engaged in the conduct of hostilities. Hence, the Prosecutor will have to demonstrate to the Chamber and prove that Akayesu was either a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. Indeed, the Chamber recalls that Article 4 of the Statute also applies to civilians.

---

[175] *Supra* 'Legal Findings on Article 4 of the Statute' and 'Genocide in Rwanda in Rwanda in 1994'

640. Evidence presented during trial established that, at the time of the events alleged in the Indictment, Akayesu wore a military jacket, carried a rifle, he assisted the military on their arrival in Taba by undertaking a number of tasks, including reconnaissance and mapping of the commune, and the setting up of radio communications, and he allowed the military to use his office premises. The Prosecutor relied in part on these facts to demonstrate that there was a nexus between the actions of Akayesu and the conflict. Further the Prosecutor argued that reference by Akayesu to individuals as RPF accomplices was indicative of Akayesu connecting his actions to the conflict between the Government and the RPF.

641. It has been established in this judgment that Akayesu embodied the communal authority and that he held an executive civilian position in the territorial administrative subdivision of Commune. However, the Prosecutor did not bring sufficient evidence to show how and in what capacity Akayesu was supporting the Government effort against the RPF. The evidence as pertains to the wearing of a military jacket and the carrying of a rifle, in the opinion of the Chamber, are not significant in demonstrating that Akayesu actively supported the war effort. Furthermore, the Chamber finds that the limited assistance given to the military by the accused in his role as the head of the commune does not suffice to establish that he actively supported the war effort. Moreover, the Chamber recalls it has been proved that references to RPF accomplices in the context of the events which occurred in Taba were to be understood as meaning Tutsi.[176]

642. Considering the above, and based on all the evidence presented in this case, the Chamber finds that it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu in the commune of Taba at the time of the events alleged in the Indictment were committed in conjunction with the armed conflict. The Chamber further finds that it has not been proved beyond reasonable doubt that Akayesu was a member of the armed forces, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts.

643. The Tribunal therefore finds that Jean-Paul Akayesu did not incur individual criminal responsibility under counts 6, 8, 10, 12 & 15 of the Indictment.

---

[176] *Supra* 'Factual findings on paragraphs 14 and 15 of the Indictment'

7.2. Count 5 - Crimes against humanity (murder)

644. Count 5 of the indictment charges the Accused with a crime against humanity (murder), pursuant to Article 3(a) of the Statute, for the acts alleged in paragraphs 15 and 18 of the indictment.

645. The definition of crimes against humanity, including the various elements that comprise the enumerated offences under Article 3 of the Statute have already been discussed.

646. The Chamber finds beyond a reasonable doubt that the Accused was present and addressed a gathering in Gishyeshye sector on the morning of 19 April 1994. The Chamber however finds that it has not been proven beyond a reasonable doubt that the Accused during this address, mentioned the names of Juvénal Rukundakuvuga or Emmanuel Sempabwa as Tutsi to be killed and as a result thereof they were subsequently killed.

647. The Chamber finds beyond a reasonable doubt that during his search for Ephrem Karangwa, the Accused participated in the killing of Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome, by ordering their deaths and being present when they were killed.

648. The Chamber finds beyond a reasonable doubt that Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome were civilians, taking no active part in the hostilities that prevailed in Rwanda in 1994 and the only reason they were killed is because they were Tutsi.

649. The Chamber finds beyond a reasonable doubt that in ordering the killing of Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome, the Accused had the requisite intent to kill them as part of a widespread or systematic attack against the civilian population of Rwanda on ethnic grounds.

650. The Chamber finds beyond a reasonable doubt that in ordering the killing of Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome, the Accused is individually criminally responsible for the death of these victims, pursuant to Article 6(1) of the Statute.

651. The Chamber finds beyond a reasonable doubt that there was a widespread and systematic attack against the civilian population in Rwanda on 19 April 1994 and the conduct of the Accused formed part of this attack.

652. The Chamber finds beyond a reasonable doubt that the killing of Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome constitutes murder committed, as part of a widespread or systematic attack on the civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the Chamber finds beyond a reasonable doubt that the Accused is guilty as charged in count 5 of the indictment.

7.3. Count 7 - Crimes against Humanity (murder)

653. Count 7 of the indictment charges the Accused with a crime against humanity (murder), pursuant to Article 3(a) of the Statute, for the acts alleged in paragraph 19 of the indictment.

654. The definition of crimes against humanity, including the various elements that comprise the enumerated offences under Article 3 of the Statute have already been discussed.

655. The Chamber finds beyond a reasonable doubt that on 19 April 1994, the Accused took eight detained refugees who were civilians and who did not take any active part in the hostilities that prevailed in Rwanda in 1994 and handed them over to the local militia, known as the Interahamwe with orders that they be killed.

656. The Chamber finds beyond a reasonable doubt that the Interahamwe, acting on the orders from the Accused killed these eight refugees, at the bureau communal in the presence of the Accused.

657. The Chamber finds beyond a reasonable doubt that in ordering the killing of the eight refugees, the Accused had the requisite intent to kill them as part of a widespread or systematic attack against the civilian population of Rwanda on ethnic grounds and as such he is criminally responsible for the killing of these eight refugees.

658. The Chamber finds beyond a reasonable doubt that in ordering the killing of the eight refugees, the Accused is individually criminally responsible for the death of these victims, pursuant to Article 6(1) of the Statute.

659. The Chamber finds beyond a reasonable doubt that there was a widespread and systematic attack against the civilian population in Rwanda on 19 April 1994 and the conduct of the Accused formed part of this attack.

660. The Chamber finds beyond a reasonable doubt that the killing of these eight refugees constitutes murder committed, as part of a widespread or systematic attack on the civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the Chamber finds beyond a reasonable doubt that the Accused is guilty as charged in count 7 of the indictment.

1.

7.4. Count 9 - Crimes against Humanity (murder)

661. Count 9 of the indictment charges the Accused with a crime against humanity (murder), pursuant to Article 3(a) of the Statute, for the acts alleged in paragraph 20 of the indictment.

662. The definition of crimes against humanity, including the various elements that comprise the enumerated offences under Article 3 of the Statute have already been discussed.

663. The Chamber finds beyond a reasonable doubt that on 19 April 1994, the Accused ordered the local people and militia known as the Interahamwe to kill intellectual people.

664. The Chamber finds beyond a reasonable doubt that the Interahamwe and the local population, acting on the orders of the Accused killed five teachers namely; a professor known as Samuel; Tharcisse who was killed in the presence of the Accused; Theogene, Phoebe Uwineze and her fiancé.

665. The Chamber finds beyond a reasonable doubt that these five teachers were civilians and did not take any active part in the hostilities that prevailed in Rwanda in 1994.

666. The Chamber finds beyond a reasonable doubt that these five teachers were killed because they were Tutsi.

667. The Chamber finds beyond a reasonable doubt that in ordering the killing of these five teachers, the Accused had the requisite intent to kill them as part of a widespread or systematic attack against the civilian population of Rwanda on ethnic grounds.

668. The Chamber finds beyond a reasonable doubt that in ordering the killing of these five teachers, the Accused is individually criminally responsible for the death of these victims, pursuant to Article 6(1) of the Statute.

669. The Chamber finds beyond a reasonable doubt that there was a widespread and systematic attack against the civilian population in Rwanda on 19 April 1994 and the conduct of the Accused formed part of this attack.

670. The Chamber finds, beyond a reasonable doubt that the killing of these five people constitute murder committed, as part of a widespread or systematic attack on the civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the Chamber finds beyond a reasonable doubt that the Accused is guilty as charged in count 9 of the indictment

7.5. Count 4 - Direct and Public Incitement to commit Genocide

2. Count 4 deals with the allegations described in paragraphs 14 and 15 of the Indictment, relating, essentially, to the speeches that Akayesu reportedly made at a meeting held in Gishyeshye on 19 April 1994. The Prosecutor alleges that, through his speeches, Akayesu committed the crime of direct and public incitement to commit genocide, a crime punishable under Article 2(3)(c) of the Statute.

671. The Trial Chamber made the following factual findings on the events described in paragraphs 14 and 15 of the Indictment. The Chamber is satisfied beyond a reasonable doubt that:

(i) Akayesu, in the early hours of 19 April 1994, joined a crowd of over 100 people which had gathered around the body of a young member of the Interahamwe in Gishyeshye.

(ii) He seized that opportunity to address the people and, owing, particularly, to his functions as bourgmestre and his authority over the population, he led the gathering and the proceedings.

(iii) It has been established that Akayesu then clearly urged the population to unite in order to eliminate what he termed the sole enemy: the accomplices of the Inkotanyi.

(iv) On the basis of consistent testimonies heard throughout the proceedings and the evidence of Dr. Ruzindana, appearing as expert witness on linguistic matters, the Chamber is satisfied beyond a reasonable doubt that the population understood Akayesu's call as one to kill the Tutsi. Akayesu himself was fully aware of the impact of his speech on the crowd and of the fact that his call to fight against the accomplices of the Inkotanyi would be construed as a call to kill the Tutsi in general.

(v) During the said meeting, Akayesu received from the Interahamwe documents which included lists of names, and read from the lists to the crowd by stating, in particular, that the names were those of RPF accomplices.

(vi) Akayesu testified that the lists contained, especially, the name of Ephrem Karangwa, whom he named specifically, while being fully aware of the consequences of doing so. Indeed, he admitted before the Chamber that, at the time of the events alleged in the Indictment, to label anyone in public as an accomplice of the RPF would put such a person in danger.

(vii) The Chamber is of the opinion that there is a causal relationship between Akayesu's speeches at the gathering of 19 April 1994 and the ensuing widespread massacres of Tutsi in Taba.

672. From the foregoing, the Chamber is satisfied beyond a reasonable doubt that, by the above-mentioned speeches made in public and in a public place, Akayesu had the intent to directly create a particular state of mind in his audience necessary to lead to the destruction of the Tutsi group, as such. Accordingly, the Chamber finds that the said acts constitute the crime of direct and public incitement to commit genocide, as defined above.

673. In addition, the Chamber finds that the direct and public incitement to commit genocide as engaged in by Akayesu, was indeed successful and did lead to the destruction of a great number of Tutsi in the commune of Taba.

7.6. Count 11 - Crimes against Humanity (torture)

674. In the light of its factual findings with regard to the allegations set forth in paragraphs 16,17, 21, 22 and 23 of the Indictment, the Tribunal considers the criminal responsibility of the Accused on Count 11 for his acts in relation to the beatings of Victims U, V, W, X, Y and Z.

675. The Tribunal notes that evidence has been presented at trial regarding the beating of victims not specifically named in paragraphs 16,17,21,22 and 23 of the Indictment. Witness J, for example, testified that she was slapped and her brother was beaten by the Accused. As counts 11 and 12 are restricted to acts in relation to the beatings of Victims U, V, W, X, Y and Z, the Tribunal will restrict its legal findings to these acts.

676. The Tribunal notes that paragraph 16 of the Indictment alleges that the Accused threatened to kill the husband and child of Victim U. The factual finding of the Tribunal is that the Accused threatened to kill Victim U, not her husband and child. The Tribunal considers that the allegations set forth in the Indictment sufficiently informed the Accused, in accordance with the requirements of due process, of the charge against him. The material allegation is that he threatened Victim U. Whether the threat was against her life or the life of her immediate family is not legally significant in the Tribunal's view.

677. The Tribunal notes that Paragraph 21 of the Indictment refers to "communal police" without reference to the Interahamwe, although Paragraph 23 refers to "men under Jean Paul Akayesu's authority". In its factual findings, the Tribunal has determined that only Mugenzi was a communal police officer. The other person actively involved in the interrogation and beating of Victim Z and possibly the interrogation of Victim W was Francois, an Interahamwe. As Francois and Mugenzi were both acting in the presence of and under the immediate authority of the Accused, as bourgemester, the Tribunal finds that in relation to the Accused the acts of Francois may be treated as equivalent to the acts of Mugenzi.
1.

678. The Tribunal notes that the Accused himself participated in the beating of Victim Y by hitting her on the back with a club, and the beating of Victim Z by stepping on his face and holding his foot there while others beat him. It is alleged that he interrogated them but it is not specifically alleged in Paragraphs 21 and 23 of the Indictment that the Accused committed acts of physical violence. The Tribunal finds, however, that the allegations in the Indictment were sufficient notice to the Accused of the incidents in question, and that the exact role of the Accused in these incidents was a matter which was adjudicated at trial in accordance with the

requirements of due process. For these reasons, the Tribunal finds that the Accused may be judged criminally responsible for his direct participation in these beatings, despite the absence of a specific allegation of direct participation by the Accused in the relevant paragraphs of the Indictment.

679. The Tribunal interprets the word "torture", as set forth in Article 3(f) of its Statute, in accordance with the definition of torture set forth in the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that is "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

680. The Tribunal finds that the following acts committed by the Accused or by others in the presence of the Accused, at his instigation or with his consent or acquiescence, constitute torture:

(i) the interrogation of Victim U, under threat to her life, by the Accused at the bureau communal, on 19 April 1994;

(ii) the beating of Victim Y outside of her house by the Accused and Mugenzi on 20 April 1994;

(iii) the interrogation of Victim Y, under threat to her life, by the Accused, and the beating of Victim Y under interrogation by Mugenzi, in the presence of the Accused, at a mine at Buguli on 20 April 1994;

(iv) the interrogation of Victim W, under threat to her life, at a mine at Buguli by the Accused, on 20 April 1994;

(v) the beating of Victim Z under interrogation by the Accused, and by Mugenzi and Francois in the presence of the Accused, in Gishyeshye Sector, on 20 April 1994;

(vi) the forcing of Victim Z to beat Victim Y under interrogation, by Francois in the presence of the Accused, in Gishyeshye Sector, on 20 April 1994;

(vii) the beating of Victim Z and Victim V by Mugenzi and Francois and the interrogation of Victim V, under threat to his life, by the Accused outside the house of Victim V, on 20 April 1994;

681. Accordingly, the Tribunal finds the Accused criminally responsible on Count 11 under Article 6(1) of its Statute for commission of the following acts of torture as crimes against humanity under Article 3(a) of its Statute:

(i) his interrogation of Victim U, under threat to her life, at the bureau communal on 19 April 1994;

(ii) his beating of Victim Y, outside of her house, on 20 April 1994;

(iii) his interrogation of Victim Y, under threat to her life, at a mine at Buguli on 20 April 1994;

(iv) his interrogation of Victim W, under threat to her life, at a mine at Buguli on 20 April 1994;

(v) his beating of Victim Z in Gishyeshye Sector, on 20 April 1994;

(vi) his interrogation of Victim V, under threat to his life, outside of his house, on 20 April 1994.

682. The Tribunal finds the Accused criminally responsible on Count 11 under Article 6(1) of its Statute for implicitly ordering, as well as instigating, aiding and abetting, the following acts of torture, which were committed in his presence by men acting on his behalf, as crimes against humanity under Article 3(a) of its Statute:

(i) the beating of Victim Y outside of her house by Mugenzi on 20 April 1994;

(ii) the beating of Victim Y, under interrogation, by Mugenzi, at a mine at Buguli on 20 April 1994;

(iii) the beating of Victim Z, under interrogation, by Mugenzi and Francois, in Gishyeshye Sector on 20 April 1994;

(iv) the forcing of Victim Z to beat Victim Y, under interrogation, by Francois, in Gishyeshye Sector on 20 April 1994.

7.7. Count 13 (rape) and Count 14 (other inhumane acts) - Crimes against Humanity

683. In the light of its factual findings with regard to the allegations of sexual violence set forth in paragraphs 12A and 12B of the Indictment, the Tribunal considers the criminal responsibility of the Accused on Count 13, crimes against humanity (rape), punishable by Article 3(g) of the Statute of the Tribunal and Count 14, crimes against humanity (other inhumane acts), punishable by Article 3(i) of the Statute.

684. In considering the extent to which acts of sexual violence constitute crimes against humanity under Article 3(g) of its Statute, the Tribunal must define rape, as there is no commonly accepted definition of the term in international law. The Tribunal notes that many of the witnesses have used the term "rape" in their testimony. At times, the Prosecution and the Defence have also tried to elicit an explicit description of what happened in physical terms, to document what the witnesses mean by the term "rape". The Tribunal notes that while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. An act such as that described by Witness KK in her testimony - the Interahamwes thrusting a piece of wood into the sexual organs of a woman as she lay dying - constitutes rape in the Tribunal's view.

685. The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Tribunal also notes the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured. The United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state-sanctioned violence. The Tribunal finds this approach more useful in the context of international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

686. The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not

limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact. The incident described by Witness KK in which the Accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence. The Tribunal notes in this context that coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal. Sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the Tribunal's Statute, "outrages upon personal dignity," set forth in Article 4(e) of the Statute, and "serious bodily or mental harm," set forth in Article 2(2)(b) of the Statute.

687. The Tribunal notes that as set forth by the Prosecution, Counts 13-15 are drawn on the basis of acts as described in paragraphs 12(A) and 12(B) of the Indictment. The allegations in these paragraphs of the Indictment are limited to events which took place "on or near the bureau communal premises." Many of the beatings, rapes and murders established by the evidence presented took place away from the bureau communal premises, and therefore the Tribunal does not make any legal findings with respect to these incidents pursuant to Counts 13, 14 and 15.

688. The Tribunal also notes that on the basis of acts described in paragraphs 12(A) and 12(B), the Accused is charged only pursuant to Article 3(g) (rape) and 3(i) (other inhumane acts) of its Statute, but not Article 3(a)(murder) or Article 3(f)(torture). Similarly, on the basis of acts described in paragraphs 12(A) and 12(B), the Accused is charged only pursuant to Article 4(e)(outrages upon personal dignity) of its Statute, and not Article 4(a)(violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment). As these paragraphs are not referenced elsewhere in the Indictment in connection with these other relevant Articles of the Statute of the Tribunal, the Tribunal concludes that the Accused has not been charged with the beatings and killings which have been established as Crimes Against Humanity or Violations of Article 3 Common to the Geneva Conventions. The Tribunal notes, however, that paragraphs 12(A) and 12(B) are referenced in Counts 1-3, Genocide and it considers the beatings and killings, as well as sexual violence, in connection with those counts.

689. The Tribunal has found that the Accused had reason to know and in fact knew that acts of sexual violence were occurring on or near the premises of the bureau communal and that he took no measures to prevent these acts or punish the perpetrators of them. The Tribunal notes that it is only in consideration of Counts 13, 14 and 15 that the Accused is charged with individual criminal responsibility under Section 6(3) of its Statute. As set forth in the Indictment, under Article 6(3) "an individual is criminally responsible as a superior for the acts of a

subordinate if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or punish the perpetrators thereof." Although the evidence supports a finding that a superior/subordinate relationship existed between the Accused and the Interahamwe who were at the bureau communal, the Tribunal notes that there is no allegation in the Indictment that the Interahamwe, who are referred to as "armed local militia," were subordinates of the Accused. This relationship is a fundamental element of the criminal offence set forth in Article 6(3). The amendment of the Indictment with additional charges pursuant to Article 6(3) could arguably be interpreted as implying an allegation of the command responsibility required by Article 6(3). In fairness to the Accused, the Tribunal will not make this inference. Therefore, the Tribunal finds that it cannot consider the criminal responsibility of the Accused under Article 6(3).

1.

690. The Tribunal finds, under Article 6(1) of its Statute, that the Accused, by his own words, specifically ordered, instigated, aided and abetted the following acts of sexual violence:

(i) the multiple acts of rape of ten girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;

(ii) the rape of Witness OO by an Interahamwe named Antoine in a field near the bureau communal;

(iii) the forced undressing and public marching of Chantal naked at the bureau communal.

691. The Tribunal finds, under Article 6(1) of its Statute, that the Accused aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal, while he was present on the premises in respect of (i) and in his presence in respect of (ii) and (iii), and by facilitating the commission of these acts through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

(i) the multiple acts of rape of fifteen girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;

(ii) the rape of a woman by Interahamwe in between two buildings of the bureau communal, witnessed by Witness NN;

(iii) the forced undressing of the wife of Tharcisse after making her sit in the mud outside the bureau communal, as witnessed by Witness KK;

5505

692. The Tribunal finds, under Article 6(1) of its Statute, that the Accused, having had reason to know that sexual violence was occurring, aided and abetted the following acts of sexual violence, by allowing them to take place on or near the premises of the bureau communal and by facilitating the commission of such sexual violence through his words of encouragement in other acts of sexual violence which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place:

(i) the rape of Witness JJ by an Interahamwe who took her from outside the bureau communal and raped her in a nearby forest;
(ii) the rape of the younger sister of Witness NN by an Interahamwe at the bureau communal;
(iii) the multiple rapes of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe by Interahamwe near the bureau communal;
(iv) the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal.

693. The Tribunal has established that a widespread and systematic attack against the civilian ethnic population of Tutsis took place in Taba, and more generally in Rwanda, between April 7 and the end of June, 1994. The Tribunal finds that the rape and other inhumane acts which took place on or near the bureau communal premises of Taba were committed as part of this attack.

COUNT 13

694. The Accused is judged criminally responsible under Article 3(g) of the Statute for the following incidents of rape:

(i) the rape of Witness JJ by an Interahamwe who took her from outside the bureau communal and raped her in a nearby forest;
(ii) the multiple acts of rape of fifteen girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
(iii) the multiple acts of rape of ten girls and women, including Witness JJ, by numerous Interahamwe in the cultural center of the bureau communal;
(iv) the rape of Witness OO by an Interahamwe named Antoine in a field near the bureau communal;
(v) the rape of a woman by Interahamwe in between two buildings of the bureau communal, witnessed by Witness NN;

(vi) the rape of the younger sister of Witness NN by an Interahamwe at the bureau communal;

(vii) the multiple rapes of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe by Interahamwe near the bureau communal.

COUNT 14

695. The Accused is judged criminally responsible under Article 3(i) of the Statute for the following other inhumane acts:

(i) the forced undressing of the wife of Tharcisse outside the bureau communal, after making her sit in the mud, as witnessed by Witness KK;

(ii) the forced undressing and public marching of Chantal naked at the bureau communal;

(iii) the forced undressing of Alexia, wife of Ntereye, and her two nieces Louise and Nishimwe, and the forcing of the women to perform exercises naked in public near the bureau communal.

7.8. Count 1 - Genocide, Count 2 - Complicity in Genocide

696. Count 1 relates to all the events described in the Indictment. The Prosecutor submits that by his acts alleged in paragraphs 12 to 23 of the Indictment, Akayesu committed the crime of genocide, punishable under Article 2(3)(a) of the Statute.

697. Count 2 also relates to all the acts alleged in paragraphs 12 to 23 of the Indictment. The Prosecutor alleges that, by the said acts, the accused committed the crime of complicity in genocide, punishable under Article 2(3)(e) of the Statute.

698. In its findings on the applicable law, the Chamber indicated *supra* that, in its opinion, the crime of genocide and that of complicity in genocide were two distinct crimes, and that the same person could certainly not be both the principal perpetrator of, and accomplice to, the same offence. Given that genocide and complicity in genocide are mutually exclusive by definition, the accused cannot obviously be found guilty of both these crimes for the same act. However, since the Prosecutor has charged the accused with both genocide and complicity in genocide for each of the alleged acts, the Chamber deems it necessary, in the instant case, to rule on counts 1 and 2 simultaneously, so as to determine, as far as each proven fact is concerned, whether it constituted genocide or complicity in genocide.

699. Hence the question to be addressed is against which group the genocide was allegedly committed. Although the Prosecutor did not specifically state so in the Indictment, it is obvious, in the light of the context in which the alleged acts were committed, the testimonies presented and the Prosecutor's closing statement, that the genocide was committed against the Tutsi group. Article 2(2) of the Statute, like the Genocide Convention, provides that genocide may be committed against a national, ethnical, racial or religious group. In its findings on the law applicable to the crime of genocide *supra*, the Chamber considered whether the protected groups should be limited to only the four groups specifically mentioned or whether any group, similar to the four groups in terms of its stability and permanence, should also be included. The Chamber found that it was necessary, above all, to respect the intent of the drafters of the Genocide Convention which, according to the *travaux préparatoires*, was clearly to protect any stable and permanent group.

700. In the light of the facts brought to its attention during the trial, the Chamber is of the opinion that, in Rwanda in 1994, the Tutsi constituted a group referred to as "ethnic" in official classifications. Thus, the identity cards at the time included a reference to "*ubwoko*" in Kinyarwanda or "*ethnie*" (ethnic group) in French which,

depending on the case, referred to the designation Hutu or Tutsi, for example. The Chamber further noted that all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity. Accordingly, the Chamber finds that, in any case, at the time of the alleged events, the Tutsi did indeed constitute a stable and permanent group and were identified as such by all.

701. In the light of the foregoing, with respect to each of the acts alleged in the Indictment, the Chamber is satisfied beyond reasonable doubt, based on the factual findings it has rendered regarding each of the events described in paragraphs 12 to 23 of the Indictment, of the following:

702. The Chamber finds that, as pertains to the acts alleged in **paragraph 12**, it has been established that, throughout the period covered in the Indictment, Akayesu, in his capacity as bourgmestre, was responsible for maintaining law and public order in the commune of Taba and that he had effective authority over the communal police. Moreover, as "leader" of Taba commune, of which he was one of the most prominent figures, the inhabitants respected him and followed his orders. Akayesu himself admitted before the Chamber that he had the power to assemble the population and that they obeyed his instructions. It has also been proven that a very large number of Tutsi were killed in Taba between 7 April and the end of June 1994, while Akayesu was bourgmestre of the Commune. Knowing of such killings, he opposed them and attempted to prevent them only until 18 April 1994, date after which he not only stopped trying to maintain law and order in his commune, but was also present during the acts of violence and killings, and sometimes even gave orders himself for bodily or mental harm to be caused to certain Tutsi, and endorsed and even ordered the killing of several Tutsi.

703. In the opinion of the Chamber, the said acts indeed incur the individual criminal responsibility of Akayesu for having ordered, committed, or otherwise aided and abetted in the preparation or execution of the killing of and causing serious bodily or mental harm to members of the Tutsi group. Indeed, the Chamber holds that the fact that Akayesu, as a local authority, failed to oppose such killings and serious bodily or mental harm constituted a form of tacit encouragement, which was compounded by being present to such criminal acts.

704. With regard to the acts alleged in **paragraphs 12 (A) and 12 (B)** of the Indictment, the Prosecutor has shown beyond a reasonable doubt that between 7 April and the end of June 1994, numerous Tutsi who sought refuge at the Taba Bureau communal were frequently beaten by members of the Interahamwe on or near the premises of the Bureau communal. Some of them were killed. Numerous Tutsi women were forced to endure acts of sexual violence, mutilations and rape, often repeatedly, often publicly and often by more than one assailant. Tutsi women were systematically raped, as one female victim testified to by saying that "each time that you met assailants, they raped you". Numerous incidents of such rape and sexual violence against Tutsi women occurred

inside or near the Bureau communal. It has been proven that some communal policemen armed with guns and the accused himself were present while some of these rapes and sexual violence were being committed. Furthermore, it is proven that on several occasions, by his presence, his attitude and his utterances, Akayesu encouraged such acts, one particular witness testifying that Akayesu, addressed the Interahamwe who were committing the rapes and said that "never ask me again what a Tutsi woman tastes like"[177]. In the opinion of the Chamber, this constitutes tacit encouragement to the rapes that were being committed.

705. In the opinion of the Chamber, the above-mentioned acts with which Akayesu is charged indeed render him individually criminally responsible for having abetted in the preparation or execution of the killings of members of the Tutsi group and the infliction of serious bodily and mental harm on members of said group.

706. The Chamber found *supra*, with regard to the facts alleged in **paragraph 13** of the Indictment, that the Prosecutor failed to demonstrate beyond reasonable doubt that they are established.

707. As regards the facts alleged in **paragraphs 14 and 15** of the Indictment, it is established that in the early hours of 19 April 1994, Akayesu joined a gathering in Gishyeshye and took this opportunity to address the public; he led the meeting and conducted the proceedings. He then called on the population to unite in order to eliminate what he referred to as the sole enemy: the accomplices of the Inkotanyi; and the population understood that he was thus urging them to kill the Tutsi. Indeed, Akayesu himself knew of the impact of his statements on the crowd and of the fact that his call to fight against the accomplices of the Inkotanyi would be understood as exhortations to kill the Tutsi in general. Akayesu who had received from the Interahamwe documents containing lists of names did, in the course of the said gathering, summarize the contents of same to the crowd by pointing out in particular that the names were those of RPF accomplices. He specifically indicated to the participants that Ephrem Karangwa's name was on of the lists. Akayesu admitted before the Chamber that during the period in question, that to publicly label someone as an accomplice of the RPF would put such a person in danger. The statements thus made by Akayesu at that gathering immediately led to widespread killings of Tutsi in Taba.

---

[177] "Ntihazagire umbaza uko umututsikazi yari ameze, ngo kandi mumenye ko ejo ngo nibabica nta kintu muzambaza."

708. Concerning the acts with which Akayesu is charged in paragraphs 14 and 15 of the Indictment, the Chamber recalls that it has found supra that they constitute direct and public incitement to commit genocide, a crime punishable under Article 2(3)(c) of the Statute as distinct from the crime of genocide[178].

709. With respect to the Prosecutor's allegations in **paragraph 16** of the Indictment, the Chamber is satisfied beyond a reasonable doubt that on 19 April 1994, Akayesu on two occasions threatened to kill victim U, a Tutsi woman, while she was being interrogated. He detained her for several hours at the Bureau communal, before allowing her to leave. In the evening of 20 April 1994, during a search conducted in the home of victim V, a Hutu man, Akayesu directly threatened to kill the latter. Victim V was thereafter beaten with a stick and the butt of a rifle by a communal policeman called Mugenzi and one Francois, a member of the Interahamwe militia, in the presence of the accused. One of victim V's ribs was broken as a result of the beating.

710. In the opinion of the Chamber, the acts attributed to the accused in connection with victims U and V constitute serious bodily and mental harm inflicted on the two victims. However, while Akayesu does incur individual criminal responsibility by virtue of the acts committed against victim U, a Tutsi , for having committed or otherwise aided and abetted in the infliction of serious bodily and mental harm on a member of the Tutsi group, such acts as committed against victim V were perpetrated against a Hutu and cannot, therefore, constitute a crime of genocide against the Tutsi group.

711. Regarding the acts alleged in **paragraph 17**, the Prosecutor has failed to satisfy the Chamber that they were proven beyond a reasonable doubt.

712. As for the allegations made in **paragraph 18** of the Indictment, it is established that on or about 19 April 1994, Akayesu and a group of men under his control were looking for Ephrem Karangwa and destroyed his house and that of his mother . They then went to search the house of Ephrem Karangwa's brother- in- law, in Musambira commune and found his three brothers there. When the three brothers, namely Simon Mutijima, Thaddee Uwanyiligira and Jean-Chrysostome, tried to escape, Akayesu ordered that they be captured, and ordered that they be killed, and participated in their killing.

---

[178] See findings of the Chamber on Count 4.

713. The Chamber holds that these acts indeed render Akayesu individually criminally responsible for having ordered, committed, aided and abetted in the preparation or execution of the killings of members of the Tutsi group and the infliction of serious bodily and mental harm on members of said group.

714. Regarding the allegations in **paragraph 19**, the Chamber is satisfied that it has been established that on or about 19 April 1994, Akayesu took from Taba communal prison eight refugees from Runda commune, handed them over to Interahamwe militiamen and ordered that they be killed. They were killed by the Interahamwe using various traditional weapons, including machetes and small axes, in front of the Bureau communal and in the presence of Akayesu who told the killers "do it quickly". The refugees were killed because they were Tutsi.

715. The Chamber holds that by virtue of such acts, Akayesu incurs individual criminal liability for having ordered, aided and abetted in the perpetration of the killings of members of the Tutsi group and in the infliction of serious bodily and mental harm on members of said group.

716. The Prosecutor has proved that, as alleged in **paragraph 20** of the Indictment, on that same day, Akayesu ordered the local people to kill intellectuals and to look for one Samuel, a professor who was then brought to the Bureau communal and killed with a machete blow to the neck. Teachers in Taba commune were killed later, on Akayesu's instructions. The victims included the following: Tharcisse Twizeyumuremye, Theogene, Phoebe Uwineze and her fiancé whose name is unknown. They were killed on the road in front of the Bureau communal by the local people and the Interahamwe with machetes and agricultural tools. Akayesu personally witnessed the killing of Tharcisse.

717. In the opinion of the Chamber, Akayesu is indeed individually criminally responsible by virtue of such acts for having ordered, aided and abetted in the preparation or execution of the killings of members of the Tutsi group and in the infliction of serious bodily and mental harm on members of said group.

718. The Chamber finds that the acts alleged in **paragraph 21** have been proven. It has been established that on the evening of 20 April 1994, Akayesu, and two Interahamwe militiamen and a communal policeman, one Mugenzi, who was armed at the time of the events in question, went to the house of Victim Y, a 69 year old Hutu woman, to interrogate her on the whereabouts of Alexia , the wife of Professor Ntereye. During the questioning which took place in the presence of Akayesu, the victim was hit and beaten several times. In particular, she was hit with the barrel of a rifle on the head by the communal policeman. She was forcibly taken away and ordered by Akayesu to lie on the ground. Akayesu himself beat her on her back with a stick. Later on, he had her lie down in front of a vehicle and threatened to drive over her if she failed to give the information he sought.

719. Although the above acts constitute serious bodily and mental harm inflicted on the victim, the Chamber notes that they were committed against a Hutu woman. Consequently, they cannot constitute acts of genocide against the Tutsi group.

720. As regards the allegations in **paragraphs 22 and 23** of the Indictment, the Chamber is satisfied beyond reasonable doubt that on the evening of 20 April 1994, in the course of an interrogation, Akayesu forced victim W to lay down in front of a vehicle and threatened to drive over her . That same evening, Akayesu, accompanied by Mugenzi, a communal policeman, and one Francois, an Interahamwe militiaman, interrogated victims Z and Y. The accused put his foot on the face of victim Z, causing the said victim to bleed, while the police officer and the militiaman beat the victim with the butt of their rifles. The militiaman forced victim Z to beat victim Y with a stick. The two victims were tied together, causing victim Z to suffocate. Victim Z was also beaten on the back with the blade of a machete.

721. The Chamber holds that by virtue of the above-mentioned acts Akayesu is individually criminally responsible for having ordered, committed, aided and abetted in the preparation or infliction of serious bodily or mental harm on members of the Tutsi group.

722. From the foregoing, the Chamber is satisfied beyond a reasonable doubt, that Akayesu is individually criminally responsible, under Article 6(1) of the Statute, for having ordered, committed or otherwise aided and abetted in the commission of the acts described above in the findings made by the Chamber on paragraphs 12, 12A, 12B, 16, 18, 19, 20, 22 and 23 of the Indictment, acts which constitute the killing of members of the Tutsi group and the infliction of serious bodily and mental harm on members of said group.

723. Since the Prosecutor charged both genocide and complicity in genocide with respect to each of the above-mentioned acts, and since, as indicated *supra*, the Chamber is of the opinion that these charges are mutually exclusive, it must rule whether each of such acts constitutes genocide or complicity in genocide.

724. In this connection, the Chamber recalls that, in its findings on the applicable law, it held that an accused is an accomplice to genocide if he or she knowingly and wilfully aided or abetted or instigated another to commit a crime of genocide, while being aware of his genocidal plan, even where the accused had no specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. It also found that Article 6(1) of the Statute provides for a form of participation through aiding and abetting which, though akin to the factual elements of complicity, nevertheless entails, in and of itself, the individual responsibility of the accused for the

crime of genocide, in particular, where the accused had the specific intent to commit genocide, that is, the intent to destroy a particular group; this latter requirement is not needed where an accomplice to genocide is concerned.

725. Therefore, it is incumbent upon the Chamber to decide, in this instant case, whether or not Akayesu had a specific genocidal intent when he participated in the above-mentioned crimes, that is, the intent to destroy, in whole or in part, a group as such.

726. As stated in its findings on the law applicable to the crime of genocide, the Chamber holds the view that the intent underlying an act can be inferred from a number of facts[179]. The Chamber is of the opinion that it is possible to infer the genocidal intention that presided over the commission of a particular act, *inter alia*, from all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators.

727. First of all, regarding Akayesu's acts and utterances during the period relating to the acts alleged in the Indictment, the Chamber is satisfied beyond reasonable doubt, on the basis of all evidence brought to its attention during the trial, that on several occasions the accused made speeches calling, more or less explicitly, for the commission of genocide. The Chamber, in particular, held in its findings on Count 4, that the accused incurred individual criminal responsibility for the crime of direct and public incitement to commit genocide. Yet, according to the Chamber, the crime of direct and public incitement to commit genocide lies in the intent to directly lead or provoke another to commit genocide, which implies that he who incites to commit genocide also has the specific intent to commit genocide: that is, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.

728. Furthermore, the Chamber has already established that genocide was committed against the Tutsi group in Rwanda in 1994, throughout the period covering the events alleged in the Indictment[180]. Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because

---

[1] See above the findings of the Trial Chamber on the law applicable to the crime of genocide.

[2] See above, the findings of the Trial Chamber on the occurrence of genocide against the Tutsi group in Rwanda in 1994.

they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes.

729. With regard, particularly, to the acts described in paragraphs 12(A) and 12(B) of the Indictment, that is, rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims[181] and are even, according to the Chamber, one of the worst ways of inflict harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

730. The rape of Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them. A Tutsi woman, married to a Hutu, testified before the Chamber that she was not raped because her ethnic background was unknown. As part of the propaganda campaign geared to mobilizing the Hutu against the Tutsi, the Tutsi women were presented as sexual objects. Indeed, the Chamber was told, for an example, that before being raped and killed, Alexia, who was the wife of the Professor, Ntereye, and her two nieces, were forced by the Interahamwe to undress and ordered to run and do exercises "in order to display the thighs of Tutsi women". The Interahamwe who raped Alexia said, as he threw her on the ground and got on top of her, "let us now see what the vagina of a Tutsi woman takes like". As stated above, Akayesu himself, speaking to the Interahamwe who were committing the rapes, said to them: "don't ever ask again what a Tutsi woman tastes like". This sexualized representation of ethnic identity graphically illustrates that tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the tutsi group - destruction of the spirit, of the will to live, and of life itself.

731. On the basis of the substantial testimonies brought before it, the Chamber finds that in most cases, the rapes of Tutsi women in Taba, were accompanied with the intent to kill those women. Many rapes were

---

[181] See above, the findings of the Trial Chamber on the Chapter relating to the law applicable to the crime of genocide, in particular, the definition of the constituent elements of genocide.

perpetrated near mass graves where the women were taken to be killed . A victim testified that Tutsi women caught could be taken away by peasants and men with the promise that they would be collected later to be executed. Following an act of gang rape, a witness heard Akayesu say "tomorrow they will be killed" and they were actually killed. In this respect, it appears clearly to the Chamber that the acts of rape and sexual violence, as other acts of serious bodily and mental harm committed against the Tutsi, reflected the determination to make Tutsi women suffer and to mutilate them even before killing them, the intent being to destroy the Tutsi group while inflicting acute suffering on its members in the process.

732. In light of the foregoing, the Chamber finds firstly that the acts described *supra* are indeed acts as enumerated in Article 2 (2) of the Statute, which constitute the factual elements of the crime of genocide, namely the killings of Tutsi or the serious bodily and mental harm inflicted on the Tutsi. The Chamber is further satisfied beyond reasonable doubt that these various acts were committed by Akayesu with the specific intent to destroy the Tutsi group, as such. Consequently, the Chamber is of the opinion that the acts alleged in paragraphs 12, 12A, 12B, 16, 18, 19, 20, 22 and 23 of the Indictment and proven above, constitute the crime of genocide, but not the crime of complicity; hence, the Chamber finds Akayesu individually criminally responsible for genocide.

7.9. Count 3 - Crimes against Humanity (extermination)

733. Count 3 of the indictment charges the Accused with crimes against humanity (extermination), pursuant to Article 3(b) of the Statute, for the acts alleged in paragraphs 12 to 23 of the indictment.

734. The definition of crimes against humanity, including the various elements that comprise the enumerated offences under Article 3 of the Statute have already been discussed.

735. The Chamber finds beyond a reasonable doubt that during his search for Ephrem Karangwa on 19 April 1994, the Accused participated in the killing of Simon Mutijima, Thaddée Uwanyiligra and Jean Chrysostome, by ordering their deaths and being present when they were killed.

736. The Chamber finds beyond a reasonable doubt that on 19 April 1994, the Accused took eight detained refugees and handed them over to the local militia, known as the Interahamwe with orders that they be killed.

737. The Chamber finds beyond a reasonable doubt that the Interahamwe and the local population, acting on the orders of the Accused killed five teachers namely; a professor known as Samuel; Tharcisse who was killed in the presence of the Accused; Theogene, Phoebe Uwineze and her fiancé.

738. The Chamber finds beyond a reasonable doubt that the eight refugees as well as Simon Mutijima, Thaddée Uwanyiligra, Jean Chrysostome, Samuel, Tharcisse, Theogene, Phoebe Uwineze and her fiancé were all civilians, taking no active part in the hostilities that prevailed in Rwanda in 1994 and the only reason they were killed is because they were Tutsi.

739. The Chamber finds beyond a reasonable doubt that in ordering the killing of the eight refugees as well as Simon Mutijima, Thaddée Uwanyiligra, Jean Chrysostome, Samuel, Tharcisse, Theogene, Phoebe Uwineze and her fiancé, the Accused had the requisite intent to cause mass destruction, directed against certain groups of individuals, as part of a widespread or systematic attack against the civilian population of Rwanda on ethnic grounds.

740. The Chamber finds beyond a reasonable doubt that in ordering the killing of the eight refugees as well as Simon Mutijima, Thaddée Uwanyiligra, Jean Chrysostome, Samuel, Tharcisse, Theogene,

Phoebe Uwineze and her fiancé, the Accused is individually criminally responsible for the death of these victims, pursuant to Article 6(1) of the Statute.

741. The Chamber finds beyond a reasonable doubt that there was a widespread and systematic attack against the civilian population in Rwanda on 19 April 1994 and the conduct of the Accused formed part of this attack.

742. Therefore the Chamber finds, beyond a reasonable doubt that the killing of the eight refugees as well as Simon Mutijima, Thaddée Uwanyiligra, Jean Chrysostome, Samuel, Tharcisse, Theogene, Phoebe Uwineze and her fiancé, constitute extermination committed, as part of a widespread or systematic attack on the civilian population on ethnic grounds and as such constitutes a crime against humanity. Accordingly, the Chamber finds beyond a reasonable doubt that the Accused is guilty as charged in count 3 of the indictment.

8. VERDICT

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER unanimously finds as follows:

Count 1:	Guilty of Genocide
Count 2:	Not guilty of Complicity in Genocide
Count 3:	Guilty of Crime against Humanity (Extermination)
Count 4:	Guilty of Direct and Public Incitement to Commit Genocide
Count 5:	Guilty of Crime against Humanity (Murder)
Count 6:	Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)
Count 7:	Guilty of Crime against Humanity (Murder)
Count 8:	Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)
Count 9:	Guilty of Crime against Humanity (Murder)
Count 10:	Not guilty of Violation of Article 3 common to the Geneva Conventions (Murder)
Count 11:	Guilty of Crime against Humanity (Torture)
Count 12:	Not guilty of Violation of Article 3 common to the Geneva Conventions (Cruel Treatment)
Count 13:	Guilty of Crime against Humanity (Rape)

Count 14: Guilty of Crime against Humanity (Other Inhumane Acts)

Count 15: Not guilty of Violation of Article 3 common to the Geneva Conventions and of Article 4(2)(e) of Additional Protocol II (Outrage upon personal dignity, in particular Rape, Degrading and Humiliating Treatment and Indecent Assault)

Done in English and French,
Signed in Arusha, 2 September 1998,

Laïty Kama	Lennart Aspegren	Navanethem Pillay
Presiding Judge	Judge	Judge

(Seal of the Tribunal)

ANNEX 9:

Prosecutor v Kordic and Cerkez, Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3, Case No. IT-95-14/2-PT, Trial Chamber III, 2 March 1999.

UNITED
NATIONS

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

Case No.: IT-95-14/2-PT

Date: 2 March 1999

Original: English

IN THE TRIAL CHAMBER

Before: **Judge Richard May, Presiding**
Judge Mohamed Bennouna
Judge Patrick Robinson

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Decision of: **2 March 1999**

PROSECUTOR

v.

DARIO KORDIJ
MARIO ČERKEZ

DECISION ON THE JOINT DEFENCE MOTION TO DISMISS THE AMENDED INDICTMENT FOR LACK OF JURISDICTION BASED ON THE LIMITED JURISDICTIONAL REACH OF ARTICLES 2 AND 3

The Office of the Prosecutor
Mr. Geoffrey Nice
Mr. Rodney Dixon

Counsel for the Accused
Mr. Mitko Naumovski, Mr. Leo Andreis, Mr. David F. Geneson, Mr. Turner T. Smith, Jr., and Ms. Ksenija Turkovi}, for Dario Kordi}

Mr. Bo`idar Kova~i}, for Mario Čerkez

I. INTRODUCTION

Pending before this Trial Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 ("the International Tribunal"), is the "Jurisdictional Motion #2 – Joint Defense Motion to Dismiss the Amended Indictment Based on the Limited Jurisdictional Reach of Articles 2 and 3" filed by counsel for the two accused, Dario Kordi} and Mario ^erkez, (together "the Defence") on 22 January 1999 ("the Defence Motion"). The Office of the Prosecutor ("Prosecution") responded to the Defence Motion on 5 February 1999 ("the Prosecutor's Response"). On 15 February 1999 the Defence filed an application for leave to file a reply to the Prosecutor's Response, with a "Joint Defence Reply in Support of Jurisdictional Motion #2" ("the Defence Reply") attached. The Defence application was granted orally on 16 February 1999.

THE TRIAL CHAMBER, HAVING CONSIDERED the written submissions and oral arguments of the parties heard on 16 February 1999,

HEREBY ISSUES ITS WRITTEN DECISION.

II. SUBMISSIONS

A. Arguments of the Defence

1. The Defence challenges the jurisdiction of the International Tribunal on the grounds that:
   - first, the scope of Article 3 of the Statute of the International Tribunal ("Statute") is limited to matters covered by the "Hague law"[1], which is concerned with the conduct of hostilities, and therefore does not cover common article 3 of the 1949 Geneva Conventions[2] and their Additional Protocols[3],
   - second, Articles 2 and 3 of the Statute are only applicable to international armed conflicts.

2. As to its first argument, the Defence requests that the Trial Chamber dismiss the counts of the indictment based on Article 3[4], or in the alternative, strike all references to the Geneva Conventions of 12 August 1949 and Additional Protocols I and II. As to its second argument, the Defence requests the Trial Chamber to dismiss the charges brought under Articles 2 and 3 on the ground that there was no international armed conflict, at the time and place relevant to the indictment. In its brief, the Defence recognises that this second issue involves mixed questions of fact and law that may more properly be resolved at trial.

3. The Defence puts emphasis on the principle of *nullum crimen sine lege*[5], which underlies all of its arguments. Accordingly, it submits that the International Tribunal is only empowered to prosecute serious violations of international humanitarian law which are covered by the language of its Statute, and which beyond any doubt codify customary international law.

---

[1] 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and annexed Regulations.
[2] 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 1949 Geneva Convention III Relative to the Treatment of Prisoners of War; 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War ("Geneva Conventions").
[3] 1977 Geneva Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts; 1977 Geneva Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts ("Protocols").
[4] Counts 3, 4, 5, 6, 9, 13, 16, 20, 24, 26, 28, 32, 34, 36.
[5] As referred to in paragraph 34 of the Report of the Secretary-General submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), and Annex thereto, U.N. Doc. S/25704 ("*Report of the Secretary-General*").

4. Starting with its second argument, and only addressing it briefly, the Defence submits that Article 2 of the Statute refers to the "grave breaches" provisions of the Geneva Conventions, and thus is only applicable to international conflicts. Likewise, it contends that Article 3 is based on the Hague Conventions, which are only applicable to international conflicts. In the opinion of the Defence, "at trial, the facts will show that there was no international armed conflict connected with the allegations in the Amended Indictment, that there was no armed conflict at all during a large part of the time period covered by such allegations..."[6].

6. As to its first contention, concerning the scope of Article 3 of the Statute, the Defence contends that Article 3 can be construed as referring to "Hague law" only (arguments relying on interpretation of the Security Council's intent), which is only applicable to international armed conflicts. The Defence further state that violations of common article 3 of the 1949 Geneva Conventions cannot be included within the ambit of Article 3 of the Statute, as common article 3 is not part of customary international law and does not entail individual criminal responsibility. The Defence relies on a wide range of arguments and expands the argument to discuss the scope of Article 2 of the Statute as regards the requirement of the existence of an international conflict. It also discusses serious violations of the Geneva Conventions and the Additional Protocols.

7. The Defence *inter alia* relies on the following arguments, mainly discussing the Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction ("*Appeals Chamber Decision on Jurisdiction*") in the *Tadi}* case[7], which the Defence claims "is in serious fundamental and widely acknowledged error"[8]:

- Article 3 is based on "Hague law" and does not mention the type of conflict it is applicable to: if the intention of the drafters of the Statute was to render it applicable also to internal conflicts, it would have been specifically mentioned, since "Hague law" is traditionally only applicable to international conflicts;
- The conclusion of the Appeals Chamber as to the residual character of Article 3, and its broad interpretation of the scope of Article 3, based on its interpretation of the term "international humanitarian law", is in violation of the principle of legality;

---

[6] Joint Defence Motion to dismiss the amended indictment for lack of jurisdiction based on the limited jurisdictional reach of Articles 2 and 3 ("*Defence Motion*").
[7] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, *Prosecutor v. Du{ko Tadi}*, Case IT-94-1-AR72, A. Ch., 2 Oct. 1995 ("*Appeals Chamber Decision on Jurisdiction*").
[8] Unofficial transcript of the hearing on 16 February 1999, pp. 472-73.

5526

- The Security Council did not intend to criminalize through Article 3 of the Statute all violations of international humanitarian law not covered by the other subject-matter Articles of the Statute;
- The Security Council intended a distinction between "Hague law" and "Geneva law": referring to the approach taken by the Statute of the International Criminal Court ("ICC Statute"), the Defence asserts that it is "a completely novel approach, which has no basis in customary law."
- The statements of certain Security Council's members after the Security Council approved the Statute, to which the Appeals Chamber referred to support its conclusion, "do not reflect the Security Council intent" and only constitute "carefully manufactured *ex post facto* legislative history";
- The Appeals Chamber's conclusion is not supported by commentators;
- The Appeals Chamber's conclusions (as to all infringements of provisions of Geneva Conventions other than grave breaches being part of customary law; serious breaches of the Geneva Conventions and certain Hague rules being applicable to non-international conflicts; common article 3 and Additional Protocol II not being part of customary law; common article 3 being applicable to international as well as to internal conflicts) are not justified under customary law and "represent progressive development of law"; the Defence further contends that the Appeals Chamber instead of relying on State practice "relied principally on perceived changes in *opinio juris*",
- Provisions of common article 3, Additional Protocol II, serious breaches of the Geneva Conventions, and violations of certain Hague rules, do not entail individual criminal responsibility, and thus cannot fall within the scope of the jurisdiction of the International Tribunal;
- The standard established by the International Court of Justice ("ICJ") in its Decision in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua,* ("*Nicaragua Decision*")[9], as relied on by the Trial Chamber in its Judgement in the *Tadi}* case[10], should be applied by this Chamber to assess the existence of an international armed conflict.

5. In the Defence Reply, the Defence discusses the Prosecution argument that the Trial Chamber is bound by the *Appeals Chamber Decision on Jurisdiction*, and responds to the

[9] (Nicar. v U.S.) (Merits) 1986 I.C.J. Reports, 14.

5527

submissions as to the proper interpretation of Article 3 of the Statute and the applicability of the *Nicaragua Decision* to the present case.

B. Arguments of the Prosecution

8. The Prosecution submits two arguments in support of its contention that the Defence Motion should be denied.

(a) A decision as to the scope of Article 3 of the Statute, discussing and rejecting the same arguments as those raised by the Defence, has already been rendered by the Appeals Chamber in the *Tadi}* case. The Trial Chamber is bound by this decision and should uphold it. The Prosecution refers to paragraphs 87-89, 90-94, 103, 127, 134, and 143 of the *Appeals Chamber Decision on Jurisdiction.*

(b) The Defence "offers no compelling arguments for limiting the scope of Article 3 to the offences listed in the Statute." In support of its arguments, the Prosecution *inter alia* states the following:

- "all of the rules incorporated in Article 3 must either have been part of customary law or conventional law, binding on the parties, at the time the offences were committed". Thus common article 3 and Additional Protocols I and II "fall within the scope of Article 3 on the basis that they are clearly part of customary law, and in any event are binding on the parties as a matter of treaty law."

- The Defence arguments that the Security Council did not intend Article 3 to cover more than the Hague law are erroneous. Statements of members of the Security Council "demonstrate that the Council intended Article 3 to incorporate a broad range of offences", and the fact that no other members disagreed "adds extra weight to the interpretative value of the statements."

- "An expansive interpretation of Article 3 is justified by taking account of the context of the Statute as a whole". "Laws and customs of war" cover in fact "violations of international humanitarian law", which refer to "all violations of the rules of international and internal armed conflict."

- The Security Council intended to put an end to all serious violations of international humanitarian law, not just grave breaches and the Hague law.

---

[10] Opinion and Judgment, *Prosecutor v. Du{ko Tadi}*, Case No. IT-94-1, T.Ch. II, 7 May 1997.

- Even though common article 3 provides that it applies to non-international armed conflicts, the rules contained "within" common article 3 are applicable to all conflicts as a matter of customary law.
- The fact that a treaty provision or rule itself does not mention criminal liability will not preclude punishment for breaches thereof (referring to the Nürnberg Judgment[11]).
- The issue of the correct standard for assessing whether an international conflict exists, argued by the Defence which relied on the *Nicaragua Decision*, "is a legal dispute to be litigated at trial in relation to the facts of the case." The Prosecution submits that the "precise elements and proof of this requirement can only be determined at trial." The Prosecution further disputes the Defence contention that the *Nicaragua Decision* establishes the correct standard for assessing the existence of an international armed conflict.

[11] Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, Germany (1947).

III. DISCUSSION

A. Applicable law

9. Both parties rely on Articles 2 and 3 of the Statute, which provide as follows:

Article 2
Grave breaches of the Geneva Conventions of 1949

The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(a) wilful killing;
(b) torture or inhuman treatment, including biological experiments;
(c) wilfully causing great suffering or serious injury to body or health;
(d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
(g) unlawful deportation or transfer or unlawful confinement of a civilian;
(h) taking civilians as hostages.

Article 3
Violations of the laws or customs of war

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
(d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;
(e) plunder of public or private property.

5530

10. Common article 3 of the 1949 Geneva Conventions, as well as Articles 51(2) and 52(1) of Additional Protocol I and Article 13(2) of Additional Protocol II are also relevant to the issue at hand:

Article 3 common to the Geneva Conventions

In the case of an armed conflict not of an international character occuring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(b) taking of hostages;
(c) outrages upon personal dignity, in particular humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
(2) The wounded and the sick shall be collected and cared for.
...

Additional Protocol I
Article 51
Protection of the civilian population

1. ...

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. ...

Additional Protocol I
Article 52
General protection of civilian objects

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. ...

5531

Additional Protocol II
Article 13
Protection of the civilian population

1. ...
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. ...

11. Both parties also rely on paragraphs 89, 91, 94, 103, 127, 134 and 143 of the *Appeals Chamber Decision on Jurisdiction*.

B. Analysis

12. This Trial Chamber is of the view that it may not disregard a previous ruling of the Appeals Chamber that has already discussed in depth most of the arguments presently put forward by the Defence, and in this regard it notes the *Appeals Chamber Decision on Jurisdiction*. The Trial Chamber has nonetheless carefully reviewed the arguments presented by the Defence in support of its Motion, as well as the arguments submitted by the Prosecution in response.

13. The Trial Chamber will first address the second argument of the Defence as to the applicability of Articles 2 and 3 of the Statute to international armed conflicts, before turning to its first argument concerning the scope of Article 3 of the Statute.

14. As to the argument concerning Article 2 of the Statute raised in the Defence Motion, this is not, as argued by the Defence during the hearing, an issue of scope only, which can be addressed at the pre-trial stage, as the arguments of the Defence also pertain to the applicability of Article 2 insofar as they relate to the existence of an international armed conflict. The Defence contends that "at trial, the facts will show that there was no international armed conflict connected with the allegations in the amended indictment"[12]. The Defence itself acknowledges that the Trial Chamber "may choose to defer factual determinations at trial". The Trial Chamber is of the view that this is

[12] Defence Motion, *supra n. 6*, at p. 3.

an issue that will be more properly addressed at trial as it depends on the assessment of a factual situation which can only be properly made after hearing the evidence submitted by both parties.

15. According to the jurisprudence of the International Tribunal, Article 2 of the Statute is applicable to international armed conflicts. This is not put into question here, although the Appeals Chamber in the *Appeals Chamber Decision on Jurisdiction* and Trial Chamber II in *Prosecutor v. Delali} et al.*[13] did not exclude the possibility that customary law may be evolving to apply the system of grave breaches to internal conflicts as well. However, the question of the applicability of Article 2 of the Statute in the present case is an issue that will be addressed at trial, as this Trial Chamber is not in a position, at this stage of the proceedings, to decide whether to dismiss or not charges brought under Articles 2 and 3 of the Statute on the ground that there was no international armed conflict in Central Bosnia at the time and place relevant to the indictment[14].

16. The Trial Chamber is also of the opinion that the applicable standard to assess the existence of an international armed conflict, and in particular whether, as argued by the Defence, the standard set out in the *Nicaragua Decision* should be applied, should not be discussed at this stage but would be more properly addressed at trial, as suggested by the Prosecution.

17. As to the scope of Article 3 of the Statute, the Trial Chamber is of the view that it is not necessary to respond to all the arguments raised by the Defence, as it finds that the relevant main issue as to the scope of Article 3 of the Statute at this stage, is, as stated in the *Appeals Chamber Decision on Jurisdiction*, whether the relevant norms are customary in nature, and whether they entail individual criminal responsibility[15].

18. In the *Appeals Chamber Decision on Jurisdiction,* the Appeals Chamber held that Article 3 "is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 and 5"[16], and that it "functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable."[17] The

---

[13] Judgement, *Prosecutor v. Delali} et al.*, Case No. IT-96-21, T.Ch. II, 16 Nov. 1998 (*"^elebi}i Judgement"*) at para. 202.
[14] Defence Motion, *supra n. 6,* at p. 3.
[15] It is not appropriate to discuss the other criteria set out by the Appeals Chamber in paragraph 94 of the *Appeals Chamber Decision on Jurisdiction* at this pre-trial stage, as they involve questions of facts.
[16] *Appeals Chamber Decision on Jurisdiction, supra n.* 7, at para. 89.
[17] *Ibid.*, at para. 91.

Appeals Chamber then went on to spell out four requirements that must be met in order for a violation of international humanitarian law to be subject to Article 3 of the Statute[18].

19. To support its argument that the Appeals Chamber Decision is in error, the Defence relies on the Report of the Secretary-General and, in particular on paragraph 34: "...the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law...".

20. The Trial Chamber agrees that the principle of legality is the underlying principle that should be relied on to assess the subject-matter jurisdiction of the International Tribunal, and that the International Tribunal only has jurisdiction over offences that constituted crimes under customary international law at the time the alleged offences were committed. Thus the arguments of the parties were examined in the light of this principle.

21. As stated by the Appeals Chamber in the *Appeals Chamber Decision on Jurisdiction*, Article 3 of the Statute has a "residual character"[19]. It means, practically, that Article 3 covers the list of offences enumerated in the provision as well as other serious violations of international humanitarian law provided they are customary in nature and entail individual criminal responsibility. Thus, Article 3 is not only based on conventional rules, such as the Hague Conventions, which are now part of customary law, but also "refers" to customary international law.

22. Indeed, this interpretation of the scope of Article 3 concerned with the "Violations of the laws or customs of war" is consistent with contemporary customary law as it stood at the time the alleged offences were committed. This is evidenced by the codification process that has taken place in the last decades since the adoption of the Hague Conventions in 1907. Violations of the laws or customs of war encompass what is called "war crimes" in contemporary customary law. It follows that the term "Violations of the laws or customs of war" cannot be limited to "Hague Law". It is encompassed in the larger "generic" term of "war crimes", as is evidenced by the codification of the notion of war crimes. The term "war crimes" is now considered as covering violations of customary norms of humanitarian law entailing individual criminal responsibility. It encompasses both grave breaches of the Geneva Conventions and violations of the laws and customs of war.

---

[18] *See Appeals Chamber Decision on Jurisdiction, supra n.* 7, at para. 94.

5534

23. That this was the approach taken by the drafters of the Statute of the International Tribunal has subsequently been confirmed by the work of the United Nations International Law Commission ("ILC") on the draft Statute of an International Criminal Court ("draft ICC Statute") adopted in 1994. The draft ICC Statute listed among the offences subject to the jurisdiction of the Court "serious violations of the laws and customs of war applicable in armed conflicts". In its commentary under Article 20 entitled "Crimes within the jurisdiction of the Court", the Commission stated that subparagraph (c) concerning "serious violations of the laws and customs of war applicable in armed conflicts" reflects the provisions contained in Article 2 and 3 of the International Tribunal, adding the "Commission shares the widespread view that there exists the category of war crimes in customary international law. That category overlaps with but is not identical to the category of grave breaches of the 1949 Geneva Conventions and Additional Protocol I of 1977."[20] It is also worth mentioning Article 85(5) of Additional Protocol I which states that grave breaches are to be regarded as war crimes. This can be considered as reflecting a consensus among the States participating in the 1977 Diplomatic Conference that adopted the Additional Protocols to the Geneva Conventions, that it is accepted that "war crimes" is a broad category, and that it covers crimes based on Geneva rules as well as crimes based on Hague rules.

24. The Draft Code of Crimes against the Peace and Security of Mankind adopted by the ILC in 1996 contains Article 20 concerned with "War crimes". The Commission stated in its report that although it retained the expression "war crimes" as the title of the provision, the "expressions 'violations of laws and customs of war' and 'violations of the rules of humanitarian law applicable in armed conflicts' are ... also used in the body of the report"[21]. According to the ILC, war crimes in the context of Article 20 refer, among others, to violations covered by the 1907 Hague Convention and annexed Regulations, the grave breaches provisions of the 1949 Geneva Conventions and of Additional Protocol I, violations of common article 3 of the four 1949 Geneva Conventions, and to Additional Protocol II.

25. This is finally illustrated by Article 8 of the ICC Statute adopted in Rome on 17 July 1998. It is entitled "War Crimes", and covers both "grave breaches" of the Geneva Convention and

---

[19] "caractère supplétif" in French.
[20] Commentary under Article 20 of the Draft Statute for an International Criminal Court at page 74, in *Report of the I.L.C. on the work of its Forty-ninth Session*, (1994) G.A.O.R., 49th sess., Supp. No. 10, U.N. Doc. A/49/10.
[21] Commentary under Article 20 of the Draft Code of Crimes against the Peace and Security of Mankind, in *Report of the I.L.C. on the work of its Forty-ninth session* (1996), G.A.O.R., A/51/10.

violations of the laws and customs of war. The ICC Statute subjects to individual criminal responsibility violations of common article 3. It can be considered as reaffirming without any doubt a customary norm. Further, it is accepted that fundamental norms of international humanitarian law that are customary in nature are applicable to all types of armed conflicts, excluding situations of internal disturbances and tensions.

26. As also pointed out by the Prosecution, the customary status of common article 3 of the Geneva Conventions, which requires that parties abide by certain minimum fundamental humanitarian standards, was confirmed by the International Court of Justice in the *Nicaragua* case in 1986. The Court held:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called 'elementary considerations of humanity' (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22).[22]

27. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons[23], the International Court of Justice also confirmed the customary nature of the Hague and Geneva law. The Court stated:

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" (...), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.

28. The scope of Article 3 of the Statute, and the customary status of certain provisions of humanitarian law are also addressed in the jurisprudence of the International Tribunal. As noted in the *^elebi}i Judgement*, the Report of the Secretary-General made reference to specified particular norms of humanitarian law as being incorporated in custom: "Included in these are the four Geneva Conventions of 1949, with no mention of the exclusion of certain of their provisions, such as common article 3."[24] In a recent judgement, in *Prosecutor v. Furund`ija*, the Trial Chamber also

---

[22] *Nicaragua Decision, supra n. 9.* para. 218.
[23] 8 July 1996, at paragraph 79.
[24] *^elebi}i Judgement, supra n. 13,* at para. 305.

discussed the scope of Article 3 of the Statute in relation to, among others, Geneva law. It found that "torture", which is, *inter alia*, mentioned in common article 3, is covered by Article 3 of the Statute, even though it is not specifically prohibited under the Article[25].

29. The Defence refers to statements made by certain members of the Security Council after the vote on the establishment of the International Tribunal, stating that it is not possible to rely on them to assess the scope of Article 3 of the Statute, as they can only be considered as "carefully manufactured *ex post facto* legislative history". In the Trial Chamber's view, this argument cannot stand, since these statements can be considered as an important part of the legislative history of the Statute and due account may be taken of them in assessing the scope of Article 3.

30. Besides common article 3 of the Geneva Conventions, the Defence also disputes that Additional Protocols I and II to the Geneva Conventions are part of customary law, and therefore argues that the International Tribunal is not competent to prosecute persons charged under these provisions. While both Protocols have not yet achieved the near universal participation enjoyed by the Geneva Conventions, it is not controversial that major parts of both Protocols reflect customary law.

31. It is not appropriate at this stage to embark on a general assessment of the customary status of the Additional Protocols as a whole, as suggested by the Defence arguments. It is sufficient here only to address the provisions of Additional Protocols I and II specifically referred to in the indictment. Counts 3, 4, 5 and 6 of the indictment against Dario Kordi} and Mario ^erkez refer specifically to Articles 51(2) and 52(1) of Additional Protocol I, and Article 13(2) of Additional Protocol II. These provisions concern unlawful attacks on civilians or civilian objects and are based on Hague law relating to the conduct of warfare, which is considered as part of customary law. To the extent that these provisions of the Additional Protocols echo the Hague Regulations, they can be considered as reflecting customary law. It is indisputable that the general prohibition of attacks against the civilian population and the prohibition of indiscriminate attacks or attacks on civilian objects are generally accepted obligations[26]. As a consequence, there is no possible doubt as to the customary status of these specific provisions as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts.

---

[25] Judgement, *Prosecutor v. Anto Furund`ija,* Case No. IT-95-17/1, T.Ch. II, 10 Dec. 1998, at para. 158.

32. The Trial Chamber will now address the requirement that a customary rule should entail individual criminal responsibility in order to be included in the scope of Article 3 of the Statute. That serious violations of both the Geneva Conventions, outside of the grave breaches provisions, and Hague law entail individual criminal responsibility has, for instance, been recognised by most States when enacting domestic legislation, including the Socialist Federal Republic of Yugoslavia. The ILC also stated in 1994, as to the Draft ICC Statute, that it is "not its function to define new crimes", thereby acknowledging the prior existence of the offences listed in Article 20 as crimes under customary law. While acknowledging that not every violation of the rules of international humanitarian law is a war crime, it is generally accepted that serious violations of both Geneva and Hague law entail individual criminal responsibility.

33. There can be no doubt that common article 3, and the relevant provisions of Additional Protocols I and II, constitute an appropriate basis to prosecute individuals. As already discussed in the jurisprudence of the International Tribunal, from which this Trial Chamber sees no reason to depart, common article 3 is considered as entailing individual criminal responsibility. Also, as was mentioned before, the relevant provisions of the Protocols are based on Hague law. The Charter of the International Military Tribunal at Nürnberg accepted individual criminal responsibility for violations of Hague rules although the Hague Conventions did not contain specific provisions on individual criminal responsibility. This was subsequently reaffirmed in the Principles of International Law Recognized in the Charter of the Nürenberg Tribunal and in the Judgement of the Tribunal ("Nürenberg Principles") adopted by the ILC in 1950[27].

34. To conclude, this Trial Chamber is in no doubt that common article 3 and the relevant above-mentioned provisions of Additional Protocols I and II, to which counts 3, 4, 5, 6, 9, 13, 16, 20, 24, 26, 28, 32, 34 and 36[28] refer, are covered by Article 3 of the Statute. The principle of legality relied on by the Defence and referred to by the Secretary-General in his Report is respected, and the above-mentioned counts are legally founded. The Trial Chamber has jurisdiction to try the accused Dario Kordi} and Mario ^erkez for alleged violations under Article 3 of the Statute.

---

[26] *See Appeals Chamber Jurisdiction Decision, supra n.* 7, at paras 117-120.
[27] Nürenberg Principles, Ybk I.L.C., 1950, Vols I and II.
[28] Other counts under Article 3 do not refer to provisions not specifically mentioned in the Statute.

IV. DISPOSITION

For the foregoing reasons

PURSUANT TO Rule 72 of the Rules of Procedure and Evidence of the International Tribunal,

THE TRIAL CHAMBER DISMISSES the Joint Defense Motion to Dismiss the Amended Indictment Based on the Limited Jurisdictional Reach of Articles 2 and 3.

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

Richard May
Presiding

Dated this second day of March 1999
At The Hague
The Netherlands

[Seal of the Tribunal]

ANNEX 10:

Prosecutor v Kayishema and Ruzindana, Judgement, Case No. ICTR-95-1-T, Trial Chamber II, 21 May 1999.

5540

United Nations
Nations Unies

International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

Before:
Judge William H. Sekule, Presiding
Judge Yakov A. Ostrovsky
Judge Tafazzal Hossain Khan

Registrar:
Mr. Agwu U. Okali

Decision of: 21 May 1999

THE PROSECUTOR
versus
CLÉMENT KAYISHEMA
and
OBED RUZINDANA

Case No. ICTR-95-1-T

JUDGEMENT

The Office of the Prosecutor:
Mr. Jonah Rahetlah
Ms. Brenda Sue Thornton
Ms. Holo Makwaia

Counsel for Clément Kayishema:
Mr. André Ferran
Mr. Philippe Moriceau

Counsel for Obed Ruzindana:
Mr. Pascal Besnier
Mr. Willem Van der Griend

List of Contents

I. INTRODUCTION

1.1 The Tribunal and its Jurisdiction
1.2 The Indictment

5541

1.3 The Accused
1.4 Procedural Background of the Case

II. Historical Context of the 1994 Events in Rwanda

III. EVIDENTIARY MATTERS

3.1 Equality of Arms
3.2 Reliability of Eyewitnesses
3.3 Witness Statements
3.4 Specificity of the Indictment

IV. THE LAW

4.1 Genocide
4.2 Crimes Against Humanity
4.3 Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II, thereto
4.4 Criminal Responsibility, Articles 6(1) and 6(3)

V. FACTUAL FINDINGS

5.1 Alibi
5.2 Did Genocide Occur in Rwanda and Kibuye in 1994?
5.3 An Introduction: The Massacres at the Catholic Church and Home St. Jean Complex, Stadium in Kibuye Town and the Church in Mubuga
5.4 The Massacres in the Area of Bisesero

VI. LEGAL FINDINGS

6.1 Kayishema's Command Responsibility
6.2 Genocide
6.3 Crimes Against Humanity
6.4 Common Article 3 and Additional Protocol II

VII. Cumulative Charges

VIII. The Verdict

Sentencing Order

Separate and Dissenting Opinion of Judge Khan regarding the Verdicts under Charges of Crimes Against Humanity/Murder and Crimes Against Humanity/Murder

Dissenting Opinion

5542

I. INTRODUCTION

1.1 THE TRIBUNAL AND ITS JURISDICTION
1.2 THE INDICTMENT
1.3 THE ACCUSED
1.4 PROCEDURAL BACKGROUND OF THE CASE

1.1 The Tribunal and its Jurisdiction

1. This Judgement is rendered by Trial Chamber II of the International Tribunal for the prosecution of persons responsible for the serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January and 31 December 1994 (the Tribunal). The Judgement follows the Indictment and the joint trial of Clement Kayishema and Obed Ruzindana.

2. The Tribunal was established by the United Nations Security Council's Resolution 955 of 8 November 1994.[1] After official investigations, the Security Council found indications of wide spread violations of international humanitarian law and concluded that the situation in that country in 1994 constituted a threat to international peace and security within the meaning of Chapter VII of the United Nations Charter, thus giving rise to the establishment of the Tribunal.

3. The Tribunal is governed by its Statute (the Statute), annexed to the Security Council Resolution 955, and by its Rules of Procedure and Evidence (the Rules), adopted by the Judges on 5 July 1995 and amended subsequently.[2] The Judges of the Tribunal, currently fourteen in all, are selected by the General Assembly and represent the principal legal systems of the world.

4. The *ratione materiae* jurisdiction of the Tribunal is set out in Articles 2, 3 and 4 of the Statute. Under the Statute, the Tribunal is empowered to prosecute persons who are alleged to have committed Genocide, as defined in Article 2, persons responsible for Crimes Against Humanity, as defined in Article 3 and persons responsible for serious violations of Article 3 Common to the Geneva Conventions of 12 August 1949 on the Protection of Victims of War, and of Additional Protocol II thereto of 8 June 1977, a crime defined under Article 4 of the Tribunal's Statute.[3] Article 8 of the Statute provides that the Tribunal has concurrent jurisdiction with national courts over which, however, it has primacy. The temporal jurisdiction of the Tribunal is limited to acts committed from 1 January 1994 to 31 December 1994.

5. Finally, the Statute stipulates that the Prosecutor, who acts as a separate organ of the Tribunal, is responsible for the investigation and prosecution of the perpetrators of such violations. The Prosecutor is assisted by a Deputy Prosecutor, a team of senior trial attorneys, trial attorneys, and investigators

based in Kigali, Rwanda.

5543

5544

1.2 The Indictment

The amended Indictment, against the accused persons, is reproduced, in full, below.

INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

CASE NO: ICTR-95-1-1 (sic)

THE PROSECUTOR OF THE TRIBUNAL

AGAINST

CLEMENT KAYISHEMA
OBED RUZINDANA

[Registry date stamped
11 April 1997]

First Amended Indictment

Richard J. Goldstone, Prosecutor of the International Criminal Tribunal for Rwanda, pursuant to his authority under Article 17 of the Statute of the International Criminal Tribunal for Rwanda (Tribunal Statute), charges:

1. This indictment charges persons responsible for the following massacres which occurred in the *Prefecture* of Kibuye, Republic of Rwanda:

   1.1 The massacre at the Catholic Church and the Home St. Jean complex in Kibuye town, where thousands of men, women and children were killed and numerous people injured around 17 April 1994.

   1.2 The massacre at the Stadium in Kibuye town, where thousands of men, women and children were killed and numerous people injured on about 18 and 19 April 1994.

   1.3 The massacre at the Church in Mubuga, where thousands of men, women and children were killed and numerous people injured between about 14 and 17 April 1994.

   1.4 The massacres in the area of Bisesero, where thousands of men, women and children were killed and numerous people injured between about 10 April and 30 June 1994.

5545

THE MASSACRES SITES

2. The Republic of Rwanda is divided into eleven *Prefectures*. These eleven *Prefectures* are further divided into communes. The *Prefecture* of Kibuye consists of nine communes. The massacres which form the basis of the charges in the indictment occurred in the *Prefecture* of Kibuye, in Gitesi, Gishyita and Gisovu communes.

3. The first massacre site addressed in this indictment, namely, the Catholic Church and Home St. Jean complex, is located in Kibuye town, Gitesi commune, on a piece of land which is surrounded on three sides by Lake Kivu. A road runs past the entrance to the Catholic Church and Home St. Jean complex. The Catholic Church is visible from the road. The Home St. Jean is behind the Church and is not visible from the road.

4. The second massacre site addressed to in this indictment, the Stadium, is located near the main traffic circle in Kibuye town, Gitesi Commune. The town's main road runs past the Stadium. Immediately behind the Stadium is a high hill.

5. The third massacre site addressed in this indictment, the Church of Mubuga, is located in Gishyita Commune. Gishyita Commune is located in the southern part of Kibuye *Prefecture*. The Church in Mubuga is located approximately 20 kilometres from Kibuye town.

6. The fourth massacre site addressed in this indictment is the area of Bisesero. The area of Bisesero extends through two communes in the *Prefecture* of Kibuye: Gishyita and Gisovu. Bisesero is an area of high rolling hills, located in the southern portion of Kibuye *Prefecture*. The hills are very large, and are often separated by deep valleys.

BACKGROUND

7. The structure of the executive branch, and the authority of the members therein, is set forth in the laws of Rwanda. In the *Prefecture*, the Prefect is the highest local representative of the government, and is the trustee of the State Authority. The Prefect has control over the government and its agencies throughout the *Prefecture*.

8. In each commune within a *Prefecture* there exists the council of the commune, which is led by the *Bourgmestre* of that Commune. The *Bourgmestre* of each commune is nominated by the Minister of the Interior and appointed by the President. As representative of the executive power, the *Bourgmestre* is subject to the hierarchical authority of the Prefect, but, subject to this authority, the *Bourgmestre* is in charge of governmental functions within his commune.

9. The Prefect is responsible for maintaining the peace, public order, and security of persons and goods within the *Prefecture*. In fulfilling his duty to maintain peace, the Prefect can demand assistance from the army and the *Gendarmerie Nationale*. The *Bourgmestre* also has authority over those members of the *Gendarmerie Nationale* stationed in his *commune*.

10. The *Gendarmerie Nationale* is an armed force established to maintain the public order and execute the laws. It is lead by the Minister of Defence, but can exercise its function of safeguarding the public order at the request of the competent national authority, which is the *Prefect*. The *Gendarmerie Nationale* has an affirmative duty to report to the *Prefect* information which has a bearing on the public order, as well as a duty to assist any person who, being in danger, requests its assistance. From January - July 1994, there were approximately 200 gendarmes in the *Prefecture* of Kibuye.

5546

11. The members of the executive branch also have control over the communal police. Each commune has Police Communale, who are engaged by the *Bourgmestre* of the commune. Normally the *Bourgmestre* has exclusive authority over the members of the Police Communale. In case of public calamities, however, the *Prefect* can claim the policemen of the Police Communale and place them under his direct control.

12. The Interahamwe, an unofficial paramilitary group composed almost exclusively of extremist Hutus, had significant involvement in the events charged in this indictment. The National Revolutionary Movement for Development (MRND) party created the members of the Interahamwe as a military training organisation for MRND youth and based the members of the Interahamwe's leadership on the MRND's own structure, with leaders at the national, prefectoral, and communal levels. There was no official link between the Interahamwe and the Rwandan military, but members of the Army and Presidential Guard trained, guided and supported the Interahamwe. Occasionally, members of the Army or Presidential Guard participated in Interahamwe activities.

13. On 6 April 1994, the airplane carrying then-president of Rwanda Juvenal Habyarimana crashed during its approach into Kigali airport in Rwanda. Almost immediately, the massacre of civilians began throughout Rwanda. During that time, individuals seeking Tutsis were able to focus their activities on specific locations because Tutsis, who believed themselves to be in danger, often fled in large numbers to perceived safe areas such as churches and communal buildings. This practice, which was widely known, was based on the fact that in the past Tutsis who had sought refuge in such places had not been attacked. Thus, during the period of time relevant to this indictment, groups of people seeking refuge in the same area were most likely predominantly Tutsis.

14. Also, during the times relevant to this indictment, the Rwandan government required all Rwandans to carry, at all times, identity cards that designated the bearer's status as Hutu, Tutsi, Twa or "naturalised". Individuals seeking Tutsis could identify their targets simply by asking individuals to show their identification card.

GENERAL ALLEGATIONS

15. All acts of (sic) omissions by the accused set forth in this indictment occurred during the period of 1 January 1994 to 31 December 1994 and in the territory of the Republic of Rwanda.

16. In each paragraph charging genocide, a crime recognised by Article 2 of the Tribunal Statute, the alleged acts or omissions were committed with intent to destroy, in whole or in part, an ethnic or racial group.

17. In each paragraph charging crimes against humanity, crimes recognised by Article 3 of the Tribunal Statute, the alleged acts or omissions were part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds.

18. At all times relevant to this indictment, the victims referred to in this indictment were protected under Article 3 common to the Geneva Conventions and by the Additional Protocol II thereto.

19. At all times relevant to this indictment, there was an internal armed conflict occurring within Rwanda.

20. At all times relevant to this indictment, Clement Kayishema was Prefect of Kibuye and exercised control over the *Prefecture* of Kibuye, including his subordinates in the executive branch and members of the Gendarmerie Nationale.

21. Each of the accused is individually responsible for the crimes alleged against him in this indictment, pursuant to Article 6 (1) of the Tribunal Statute. Individual responsibility includes planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation and execution of any of the crimes referred to in Articles 2 to 4 of the Tribunal Statute.

22. In addition, Clement Kayishema is also or alternatively individually responsible as a superior for the criminal acts of his subordinates in the administration, the Gendarmerie Nationale, and the communal police with respect to each of the crimes charged, pursuant to Article 6 (3) of the Tribunal Statute. Superior individual responsibility is the responsibility of a superior for the acts of his subordinate if he knew or had reasons to know that his subordinate was about to commit such criminal acts or had done so and failed to take the necessary and reasonable measures to prevent such acts, or to punish the perpetrators thereof.

THE ACCUSED

23. **Clement Kayishema** was born in 1954 in Bwishyura Sector, Gitesi Commune, Kibuye *Prefecture*, Rwanda. Kayishema's father was Jean Baptiste Nabagiziki, and his mother was Anastasie Nyirabakunzi. He was appointed to the position of Prefect of Kibuye on 3 July 1992, and assumed his responsibility as Prefect soon after. **Clement Kayishema** acted as Prefect of Kibuye until his departure to Zaire in July 1994. He is believed to be currently in Bukavu, Zaire.

24. **Obed Ruzindana** is believed to have been borne around 1962 in Gisovu Sector, Gisovu Commune, Kibuye Prefecture, Rwanda. **Ruzindana's** father was Elie Murakaza. **Obed Ruzindana** was a commercial trader in Kigali during the time period in which the crimes alleged in this indictment occurred. He is believed to be currently somewhere in Zaire.

The Massacre at the Catholic Church and Home St. Jean

COUNTS 1-6

25. By about 17 April 1994, thousands of men, women and children from various locations had sought refuge in the Catholic Church and Home St. Jean complex (the Complex) located in Kibuye town. These men, women and children were unarmed and were predominantly Tutsis. They were in the complex seeking protection from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

26. Some of the people who sought refuge in the Complex did so because Clement Kayishema ordered them to go there. When Clement Kayishema ordered people to the Complex, he knew or had reason to know that an attack on the complex was going to occur.

27. After people gathered in the Complex, the Complex was surrounded by persons under Clement Kayishema's control, including members of the *Gendarmerie Nationale*. These persons prevented the men, women and children within the Complex from leaving the Complex at a time when

5548

Clement Kayishema knew or had reason to know that an attack on the Complex was going to

28. On about 17 April 1994, Clement Kayishema ordered members of the Gendarmerie Nationale, communal police of Gitesi *commune*, members of the *Interahamwe* and armed civilians to attack the Complex, and personally participated in the attack. The attackers used guns, grenades, machetes, spears, cudgels and other weapons to kill the people in the Complex.

29. The attack resulted in thousands of deaths and numerous injuries to the people within the complex. (Attachment A contains a list of some of the individuals killed in the attack, members of the Gendarmerie Nationale, the Interahamwe and armed civilians searched for and killed or injured survivors of the attack.

30. Before the attack on the Complex, Clement Kayishema did not take measures to prevent an attack, and after the attack Clement Kayishema did not punish the perpetrators.

31. By these acts and omissions, Clement Kayishema is criminally responsible for:

Count 1: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 2: CRIMES AGAINST HUMANITY, a violation of Article 3 (a) (murder) of the Tribunal Statute;

Count 3: CRIMES AGAINST HUMANITY, a violation of Article 3 (b) (extermination) of the Tribunal Statute;

Count 4: CRIMES AGAINST HUMANITY, a violation of Article 3 (i) (other inhumane acts) of the Tribunal Statute;

Count 5: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 6: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

The Massacre at the Stadium in Kibuye Town

COUNTS 7 – 12

32. By about 18 April 1994, thousands of men, women and children from various locations had sought refuge in the Stadium located in Kibuye town. These men, women and children were unarmed and were predominantly Tutsis. They were in the Stadium seeking refuge from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

33. Some of the people who sought refuge in the Stadium did so because Clement Kayishema ordered them to go there. When Clement Kayishema ordered people to go to the Stadium, he knew or had reason to know that an attack on the Stadium was going to occur.

34. After people gathered in the Stadium, the Stadium was surrounded by persons under Clement Kayishema's control, including members of the Gendarmerie Nationale. These persons prevented the men, women and children within the Stadium from leaving the Stadium at a time when

5549

Clement Kayishema knew or had reason to know that an attack on the Complex (sic) was occur.

35. On or about 18 April 1994, Clement Kayishema, went to Stadium and ordered the Gendarmerie Nationale, the communal police of Gitesi Commune, the members of the Interahamwe and armed civilians to attack the Stadium. Clement Kayishema initiated the attack himself by firing a gun into the air. In addition, Clement Kayishema personally participated in the attack. The attackers used guns, grenades, pangas, machetes, spears, cudgels and other weapons to kill the people in the Stadium. There were survivors of the attack on 18 April 1994. During the night of 18 April 1994 and the morning of 19 April 1994 gendarmes surrounding the Stadium prevented the survivors from leaving. The attack on the Stadium continued on 19 April 1994. Throughout the attacks, men, women and children attempting to flee the attacks were killed.

36. The two days of attacks resulted in thousands of deaths and numerous injuries to the men, women and children within the Stadium (Attachment B contains a list of some of the individuals killed in the attacks).

37. Before the attacks on the Stadium Clement Kayishema did not take measures to prevent an attack from occurring, and after the attacks Clement Kayishema did not punish the perpetrators.

38. By these acts and omissions Clement Kayishema is criminally responsible for:

Count 7: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 8: CRIMES AGAINST HUMANITY, a violation of Article 3 (a) (murder) of the Tribunal Statute;

Count 9: CRIMES AGAINST HUMANITY, a violation of Article 3 (b) (extermination) of the Tribunal Statute;

Count 10: CRIMES AGAINST HUMANITY, a violation of Article 3 (i) (other inhumane acts) of the Tribunal Statute;

Count 11: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 12: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

The Massacre at the Church in Mubuga

COUNTS 13 - 18

39. By about 14 April 1994, thousands of men, women and children congregated in the Church in Mubuga, Gishyita Commune. These men, women and children were predominantly Tutsis. They were in the church seeking refuge from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

40. After the men, women and children began to congregate in the Church, Clement Kayishema visited the Church on several occasions. On or about 10 April Clement Kayishema brought

55 50

gendarmes, under his control, to the Church. These gendarmes prevented the men, women and children within the church from leaving.

41. On or about 14 April 1994 individuals, including individuals under Clement Kayishema's control, directed members of the Gendarme Nationale, communal police of Gishyita commune, the Interahamwe and armed civilians to attack the Church. In addition, each of them personally participated in the attacks. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the people in the Church. Not all the people could be killed at once, so the attacks continued for several days. Both before and during these attacks persons under Clement Kayishema's control, including members of the Gendarmerie Nationale and communal police, prevented the men, women and children within the church from leaving.

42. The attacks resulted in thousands of deaths and numerous injuries to the men, women and children within the Church (Attachment C contains a list of some of the victims killed in the attacks).

43. Before the attacks on the Church in Mubuga, Clement Kayishema did not take measures to prevent the attacks, and after the attacks Clement Kayishema did not punish the perpetrators.

44. By these acts and omissions Clement Kayishema is criminally responsible for:

Count 13: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 14: CRIMES AGAINST HUMANITY, a violation of Article 3 (a) (murder) of the Tribunal Statute;

Count 15: CRIMES AGAINST HUMANITY, a violation of Article 3 (b) (extermination) of the Tribunal Statute;

Count 16: CRIMES AGAINST HUMANITY, a violation of Article 3 (i) (other inhumane acts) of the Tribunal Statute;

Count 17: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 18: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

The Massacres in the Area of Bisesero

COUNTS 19-24

45. The area of Bisesero spans over two communes of the Kibuye *Prefecture*. From about 9 April 1994 through 30 June 1994, thousands of men, women and children sought refuge in the area of Bisesero. These men, women and children were predominantly Tutsis and were seeking refuge from attacks on Tutsis which had occurred throughout the *Prefecture* of Kibuye.

46. The area of Bisesero was regularly attacked, on almost a daily basis, throughout the period of about 9 April 1994 through about 30 June 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero. At various times the men, women and children seeking refuge in Bisesero attempted to defend themselves from these attacks

5557

with stones, sticks and other crude weapons.

47. At various locations and times throughout April, May and June 1994, and often in concert, Clement Kayishema and Obed Ruzindana brought to the area of Bisesero members of the Gendarmerie Nationale, communal police of Gishyita and Gisovu communes, Interahamwe and armed civilians, and directed them to attack the people seeking refuge there. In addition, at various locations and times, and often in concert, Clement Kayishema and Obed Ruzindana personally attacked and killed persons seeking refuge in Bisesero.

48. The attacks described above resulted in thousands of deaths and numerous injuries to the men, women and children within the area of Bisesero (Attachment D contains a list of some of the individuals killed in the attacks).

49. Throughout this time, Clement Kayishema did not take measures to prevent the attacks, and after the attacks Clement Kayishema did not punish the perpetrators

50. By these acts and omissions Clement Kayishema and Obed Ruzindana are criminally responsible for:

Count 19: GENOCIDE, a violation of Article 2 (3) (a) of the Tribunal Statute;

Count 20: CRIMES AGAINST HUMANITY, a violation of Articles 3(a) (murder) of the Tribunal Statute;

Count 21: CRIMES AGAINST HUMANITY, a violation of Article 3(b) (extermination) of the Tribunal Statute;

Count 22: CRIMES AGAINST HUMANITY, a violation of Article 3(1) (other inhumane acts) of the Tribunal Statute;

Count 23: A VIOLATION OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, a violation of Article 4 (a) of the Tribunal Statute; and

Count 24: A VIOLATION OF ADDITIONAL PROTOCOL II, a violation of Article 4 (a) of the Tribunal Statute.

1996
Arusha, Tanzania

Signed
Richard J. Goldstone
Prosecutor

This rearranged version conforms to the Order of Trial Chamber II in its decision of 10 April 1997 on the indictment of 28 November 1995 confirmed by the Honourable Judge Pillay and amended on 29 April 1996, to serve as the Indictment for the accused Clement Kayishema and Obed Ruzindana in the case ICTR 95-1-I.

5552

5553

1.3 The Accused

Clement Kayishema

6. According to Clement Kayishema's (Kayishema), own testimony, he was born into a Hutu family in the Bwishyura Sector, Kibuye *Prefecture* in Rwanda, in 1954. His father was a teacher and later worked as a janitor in a hospital. Subsequently, he was hired as the commune secretary and was finally appointed judge at the Canton Tribunal. His mother and seven siblings were uneducated farmers.

7. In 1974, Kayishema was appointed registrar in Kagnagare Canton Tribunal. The following year he was granted a scholarship to attend the faculty of medicine of the National University of Rwanda, in Butare. Upon graduation, he practiced general medicine and surgery. In 1984, he was sent by the Rwandan Government to work as a doctor in an Ugandan refugee camp. From 1986 to 1991, he held the position of medical director of the hospital of Nyanza. He was then transferred to the Kibuye hospital.

8. Kayishema married a Rwandan woman by the name of Mukandoli, in 1987 with whom he had two children. Mukandoli holds a degree in education science from the National University of Rwanda, with a specialization in psychology.

9. Kayishema joined the Christian Democratic Party (PDC), whose motto was "work, justice and fraternity," in April 1992. On 3 July 1992, Kayishema was appointed the *Prefect* of Kibuye *Prefecture*. This occurred at a time when the multiparty system came into effect in Rwanda. He was re-appointed to his post, after the death of the President in 1994, by the Interim Government.

Obed Ruzindana

10. According to the testimony of witnesses, Obed Ruzindana (Ruzindana) was born in 1962 into a wealthy Hutu family in Gisovu Commune, Kibuye *Prefecture*, Rwanda. His father, Elie Murakaza, had been a *Bourgmestre* in the Mugonero Commune, where the family resided. Murakaza and, by extension, his family were well known and respected in the community.

11. Ruzindana left his home in Kibuye for Kigali in 1986-1987 and engaged in transporting merchandise out of Rwanda and importing goods into the country. He employed four drivers and by all accounts became a successful businessman in his own right.

12. In 1991 he married a woman whom he had known since childhood. Mrs. Ruzindana testified that although both her parents were Tutsi, her father's identity card indicated that he was a Hutu. According to Mrs. Ruzindana it was possible to "pay" to change one's ethnicity on the identity card.

5554

Two children were born from this union in 1991 and 1993. Ruzindana and his family lived in Remera, Kigali until the tragic events of 1994 when they returned to Ruzindana's parents' home in Mugonero.

1.4 Procedural Background of the Case

Pre-trial

13. Kayishema and Ruzindana were initially charged in the original Indictment submitted by the Prosecutor, Richard Goldstone,[4] on 22 November 1995 together with six other suspects. The charges included conspiracy to commit genocide, Genocide and Crimes Against Humanity and violations of Common Article 3 and Additional Protocol II. The Indictment was confirmed by Judge Navanethem Pillay on 28 November 1995. Judge Pillay ordered that the Indictment be amended on 6 May 1996 to remove the conspiracy charges. It should be noted that a second Indictment was brought against Ruzindana on 17 June 1996, the trial of which is still pending. That Indictment was confirmed by Judge Tafazzal H. Khan on 21 June 1996.

14. Kayishema was arrested on 2 May 1996 in Zambia and transferred to the United Nations Detention Unit Facility (the UNDF) in Arusha, on 26 May 1996. His initial appearance was held on 31 May 1996 before Trial Chamber I. Kayishema, represented by Mr. André Ferran, of the bar of Montpellier, France, and Philippe Moriceau of the bar of Montpellier, France, pleaded not guilty to all of the charges.

15. Ruzindana was arrested on 20 September 1996 in Nairobi, Kenya and transferred to the UNDF on 22 September 1996. His initial appearance was held on 29 October 1996 before the Trial Chamber II. Ruzindana, represented by Mr. Pascal Besnier, of the bar of Paris, France, and Mr. Willem Van der Griend of the Bar of Rotterdam, the Netherlands, pleaded not guilty to all of the charges. The Chamber set a date for trial for 20 February 1997 while reserving the right to join with Kayishema.

16. At the pretrial stage, the Trial Chamber received and decided many written motions from the Parties. Some of the more pertinent ones are detailed below.

17. Kayishema filed a preliminary Motion on 26 July 1996 in which he requested the annulment of the proceedings, and consequently, his provisional release. The Parties were heard on 5 November 1996 and the Defence request was rejected. Kayishema filed a further Motion on 23 October 1996 for postponement of the trial in order to enable him to prepare his case. The Prosecutor did not oppose the Motion but on 5 November 1996, filed a Motion for joinder of Kayishema and Ruzindana. The Tribunal ordered the joinder of the two accused. The trial date for Kayishema consequently was postponed to the trial date set for Ruzindana, which as mentioned above was 20 February 1997.[5]

18. On 30 December 1996 Ruzindana filed a preliminary Motion objecting to the form of the Indictment and against joinder of his case with that of Kayishema based on various alleged procedural difficulties with the Indictment and the warrant of arrest. The request for annulment of the two

Indictments and for his release was rejected as was the objection to the joinder.

19. On 27 March 1997, the Prosecution brought a Motion for leave to sever and to join in a superseding Indictment and to amend the superseding Indictment in the cases against Kayishema, Gérard Ntakirutimana, and Ruzindana on the grounds of involvement in a same transaction. The Chamber rejected the Motion because the Prosecutor did not offer any evidence that demonstrated the nature of the common scheme.

20. Kayishema brought another Motion on 7 March 1997 calling for the application of Article 20(2) and (4)(b) (Rights of the accused) of the Statute of the Tribunal by the Prosecution. The Defence further requested the Prosecution to divulge and limit its number of lawyers, consultants, assistants and investigators working on the case. The Chamber ruled[6] that the rights of the accused and equality between the parties should not be confused with the equality of means and resources. The Chamber concluded that the Defence had not proved any violation of the rights of the accused as provided in Article 20(2) and (4)(b) of the Statute.

Trial

21. On 11 April 1997 the trial of Kayishema and Ruzindana commenced before Trial Chamber II, composed of Judge William H. Sekule, presiding, Judge Yakov A. Ostrovsky and Judge Tafazzal H. Khan, based on the First Amended Indictment filed with the Registry on that day. The Prosecution team consisted of Mr. Jonah Rahetlah, Ms. Brenda Sue Thornton, and Ms. Holo Makwaia. Kayishema was represented by Mr. Andre Ferran and Mr. Philippe Moriceau. Mr. Pascal Besnier and Mr. Van der Griend formed the Defence team for Ruzindana. The Prosecution completed its case on 13 March 1998, having called a total of 51 witnesses and having tendered into evidence over 350 exhibits.

22. The Prosecution filed a Motion on 18 February 1998, pursuant to Rule 73 of the Rules, requesting the Trial Chamber to order the uninterrupted continuation of the trial of the accused and the consultation of both Parties in respect of the scheduling of this continuation. The Chamber was of the view that pursuant to Article 20(4)(b) of the Statute, the accused should be accorded adequate time and facilities for the preparation of their case.[7]

23. The Defence commenced their case on 11 May 1998 and closed on 15 September 1998. It should be noted that at the conclusion of the Prosecution's case, the Defence requested an adjournment in order to prepare its case. In the interest of justice, the Trial Chamber granted the Defence Teams a generous two-month adjournment to prepare. The Defence presented a total of twenty-eight witnesses, sixteen of whom testified on behalf of accused, Ruzindana, seven for Kayishema and five for both accused persons. Kayishema testified on his own behalf. Over 59

5557

Defence exhibits were admitted.

24. The Prosecutor presented closing argument from 21 October to 28 October 1998, Ruzindana's Defence from 28 October to 2 November 1998 and Kayishema's Defence from 3 to 16 November 1998. The Prosecutor presented the argument in rebuttal on 17 November 1998. The case was adjourned the same day for deliberation by the Trial Chamber.

25. During the trial, numerous written and oral motions were heard. On 17 April 1997, the Defence challenged the credibility of a witness, where the oral testimony varied from the previous written statement taken by the prosecutor's investigators. The Chamber opined that variation may occur at times for appreciable reasons without giving cause to disregard the statement in whole or in part. [8] The Chamber ordered that when counsel perceives there to be a contradiction between the written and oral statement of a witness, Counsel should raise such question by putting to the witness the exact portion in issue to enable the witness to explain the discrepancy before the Tribunal. Counsels should then mark the relevant portion and submit it as an exhibit if they find that the contradiction or discrepancy raised was material to the credibility of the witness concerned.

26. On 9 July 1997, Ruzindana filed a Motion pursuant to Rule 75 of the Rules seeking protective measures for potential witnesses noting that this protection should not extend to providing immunity from prosecution by an appropriate authority. The Trial Chamber[9] granted the Motion. A Motion filed by Kayishema seeking general protective measures for witnesses who would testify on his behalf was also granted by the Chamber in its Decision on 23 March 1998.[10]

27. On 12 March 1998 the Prosecutor filed a Motion requesting the Trial Chamber to order the Defence to comply with the provisions of rules 67(A)(ii) and 67(C) of the Rules of Procedure and Evidence. The Prosecutor submitted that if the Defence intended to offer the defence of alibi, it should notify the Prosecution as early as practicable but in any event prior to the commencement of the trial. The Chamber opined that Kayishema should make the necessary disclosure immediately if they intend to rely upon the defence of alibi or special defence. However, the Defence filed a joint Motion on 30 April 1998 requesting the Trial Chamber to interpret the notion of 'defence of alibi' and 'special defence' as stipulated in Rule 67 of the Rules of Procedure and Evidence. The Chamber dismissed the Defence Motion on the ground that it can not define rule 67 of the Rules in an abstract form without a specific problem to address. [11]

28. Due to the Defence's continued non compliance with Rule 67(A)(ii) of the Rule of Procedure and Evidence, the Prosecution filed another Motion on 11 August 1998, seeking, *inter alia*, an order prohibiting the Defence of Kayishema from invoking the Defence of alibi or any special Defence. The Defence responded that, under Rule 67(B), failure of the Defence to notify

5558

the Prosecutor of the Defence of alibi or any special Defence as required by rule 67(A)(ii), does not limit the right of the accused to raise the Defence of alibi or special Defence. The Trial rejected the Defence's reasons for not providing details noting that the accused himself could have provided at least some details. The Chamber therefore reiterated its previous decision on this matter.[12]

29. On 22 June 1998, the Prosecution filed a Motion, seeking for a ruling that evidence of a Defence expert witness, a psychiatrist, be ruled inadmissible. The Chamber noted that it is important to observe the rights of the accused to a fair trial guaranteed under the provisions of Article 20 of the Statute in particular 20(4)(e) which provides that the accused shall have the rights to obtain the attendance of witnesses on his or her behalf. The expert was heard.[13]

30. On 19 August 1998, the Chamber dismissed a Motion filed by the Defence requesting to re-examine witness DE. The Trial Chamber found that the case of Kayishema would not suffer prejudice in the absence of additional evidence from this witness and rejected the Motion. [14]

---

1 UN Doc. S/RES/955 of 8 Nov. 1994.

[2] The Rules were successively amended on 12 Jan. 1996, 15 May 1996, 4 Jul. 1996, 5 Jun. 1997 and 8 Jun. 1998.

[3] The provisions of these offences are detailed in Part IV of the Judgement, entitled The Law.

[4] On 1 October 1996, Louise Arbour succeeded Richard Goldstone as Prosecutor of the Tribunal.

[5] Decision on the joinder of the Accused and Setting the Date for Trial, the Prosecutor v. ClJment Kayishema, Case No. ICTR-95-1-T, 6 November 1996.

[6] Order on the Motion by the Defence Counsel for Application of Article 20 (2) and (4) (b) of the Statute of the International Tribunal for Rwanda, the Prosecutor v. ClJment Kayishema, Case No. ICTR-95-1-T, Obed Ruzindana, Case No. ICTR-96-10-T, 5 May 1997.

[7] Decision on the Prosecution Motion for Directions for the Scheduling of the Continuation of the Trial of ClJment Kayishema and Obed Ruzindana on the Charges as Contained in the Indictment No. ICTR-95-1-T, 12 March 1998.

[8] Order on the Probative Value of Alleged Contradiction between the Oral and Written Statement of A Witness During Examination, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 17 April 1997.

[9] Decision on the Motion for the Protection of Defence Witnesses, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 6 October 1997.

[10] Decision on the Motion for the Protection of Defence Witnesses, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 23 February 1998.

[11] Decision on the Prosecution Motion for An Order Requesting Compliance by the Defence with Rules 67 (A)(ii) and 67 (C) of the Rules, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, 15 June 1998.

[12] Decision on the Prosecution Motion for A Ruling on the Defence Continued non Compliance with Rule 67 (A) (ii) and with the Written and Oral Orders of the Trial Chamber, the prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 3 September 1998.

[13] Decision on the Prosecution Motion Request to Rule Inadmissible the Evidence of Defence Expert Witness, Dr. Pouget, the Prosecutor v. ClJment Kayishema and Obed Ruzindana, Case No. ICTR-95-1-T, 29 June 1998.

[14] Decision on the Defence Motion for the Re-examination of Defence Witness DE, the Prosecutor v. ClJment Kayishema

5559

and Obed Ruzindana, Case No. ICTR-95-1-T, 19 August 1998.

55160

II. Historical Context of the 1994 Events in Rwanda

31. It is necessary to address the historical context within which the events unfolded in Rwanda in 1994, in order to understand fully the events alleged in the Indictment and the evidence before the Trial Chamber. We will not engage in a lengthy examination of the geo-political or historical difficulties faced by Rwanda as a number of reports and other publications have been written on these issues to which interested persons can refer.

32. The Trial Chamber is of the opinion that an attempt to explain the causal links between the history of Rwanda and the suffering endured by this nation in 1994 is not appropriate in this forum and may be futile. It is impossible to simplify all the ingredients that serve as a basis for killings on such a scale. Therefore, the account presented below is a brief explanation of issues related to the division of ethnic groups in Rwanda, a brief history of Rwanda's post-independence era, including a look at the 1991 Constitution, the Arusha Accords, and the creation of militias.

33. The Trial Chamber has chosen to relay the events using neutral language and, where necessary, to discuss the cross-examination of the Prosecution witnesses. The summary is based exclusively on the evidence presented to this Trial Chamber and no reference has been made to sources or materials that do not constitute a part of the record of the present case.

The Question of Ethnicity in Rwanda

34. In 1994, apart from some foreign nationals, there were three officially recognised ethnic groups living in Rwanda, the Hutus, the Tutsis and the Twas. The Hutus constituted the overwhelming majority of the population. The Rwandan use of the term "ethnicity" requires some explanation because according to Prosecution witness, André Guichaoua, Professor of Sociology and Economics at the University of Lille, France, all Rwandans share the same national territory, speak the same language, believe in the same myths and share the same cultural traditions. The Trial Chamber opines that these shared characteristics could be tantamount to a common ethnicity. Thus, it is recognised that prior to the colonisation of Rwanda, by Germany and later Belgium, the line separating the Hutus and Tutsis was permeable as the distinction was class-based. In other words, if a Hutu could acquire sufficient wealth, he would be considered a Tutsi.

35. This begs the question of how it became possible permanently to seal a person into one category after the Belgian colonisation. The Belgians instituted a system of national identification cards bearing the terms Hutu, Tutsi and Twa, under the category of ethnicity, which were used for administrative purposes in 1931. Although prior to the arrival of the European colonisers the Rwandans had referred to themselves as Hutus, Tutsis or Twas, it was after this point that the group identity solidified and this former sociological categorisation became a means of ethnic identification. From its inception, the

5561

identification card has been used to facilitate discrimination against one group or another in it in the implementation of an ethnic based quota system in educational and employment opportunities or in implementing a policy of genocide as was done in 1994.

36. For decades some claimed that Hutus and Twas were the original inhabitants of Rwanda and that Tutsis were "people from the Nile."[1] During cross-examination Guichaoua deposed that this idea has never been proven scientifically and that no one "category of occupants has more legitimacy than others."[2] Nonetheless, certain Hutu politicians have periodically used this concept to legitimise their call for "Hutu Power" and to incite hatred and division amongst the Rwandan population, as outlined below.

A Brief Glance at the Post-Independence Era

37. In 1959, shortly prior to gaining independence, Rwanda witnessed the beginnings of intense ethnic tensions. During that year a number of Tutsi chiefs, farmers and other persons were massacred and their houses were set ablaze. Thousands of other Tutsis were forced to flee to neighbouring countries. Guichaoua stated that the deterioration of ethnic relations could be attributed to the legacy of Tutsi favouritism by the colonial powers.

The First Republic

38. The country's first President, Gregoire Kayibanda, was elected in 1962 at which time the Hutu movements began to display their radicalisation more openly. Professor Guichaoua testified that anti-Tutsi movements had become so hostile that by 1963, 200,000 to 300,000 Tutsis sought refuge in neighbouring countries. Between 1962 and 1966 there were repeated attempts by armed Tutsi groups (labelled *Inyenzi* -- cockroach) to regain power through incursions organised from neighbouring countries, mainly from Burundi. According to Professor Guichaoua, because an incursion in December 1963 reached the gates of Kigali, a hunt for Tutsis ensued throughout the country thereafter. The worsening tensions led to the consolidation of power by "the radical Hutu elements and helped to suppress the deep divisions within the regime in power which was increasingly marked by the personal and authoritarian style of government of President Kayibanda."[3]

39. President Kayibanda's attempt to maintain his hold on power is evident from the institution of a *de facto* single-party system in Rwanda in 1965. His party, the Republican Democratic Movement (MDR-PARMEHUTU) eliminated the Tutsi parties as well as other Hutu parties such as the Association for the Social Advancement of the Masses (APROSOMA). Factional political divisions, based on regions of origin from within the country, added further strain on the ethnic-base difficulties at that time. A new sense of supremacy, based on the existence of a legitimate majority population was fostered and contributed to the massacres of the Tutsis that occurred in Rwanda and Burundi in 1972-73. Thus, the inability of the First Republic to overcome ethnic tensions lead to its downfall and the

5582

assassination of President Kayibanda.

The Second Republic

40. On 5 July 1973, the Chief of Staff, Major Juvenal Habyarimana, a native of Gisenyi *Prefecture*, seized power in a *coup d'etat*. His then Chief of Security, Alexis Kanyarengwe "implemented a strategy of political and ethnic tension, aimed at making the *coup d'etat*" seem necessary for restoring order to the country. Although the 1973 coup was interpreted as "simply settling scores between rival factions"[4] and having nothing to do with ethnic tensions, those in power encouraged the Hutus to chase away their Tutsi friends and colleagues from educational establishments and places of employment. Again, like in 1959, many Tutsis died at the hands of Hutu assailants and thousands of others fled the country. This brought about the advent of Rwanda's Second Republic.

41. Two years later, in 1975, the National Revolutionary Movement for Development (MRND) was created to replace the MDR. At its helm was President Habyarimana. This party controlled the country until the time of the tragic events in 1994. In 1978, President Habyarimana declared that the Hutu-Tutsi problem would be solved by ensuring that all Rwandans, from birth, were members of the MRND. Compulsory and exclusive membership in this party effectively erased any distinction between the party and the State. Habyarimana also promised that all segments of society would be ensured representation in high ranking government posts, taking into account its percentage in the total population. Of course this idea inherently contained a quota system that would further frustrate the efforts in reconciling ethnic difficulties.

42. For the next few years the Habyarimana government focused its efforts on issues of development. According to Professor Guichaoua, throughout the late 1970s and a part of the 1980s this government's efforts met with undeniable success in terms of low national debt, maintaining macroeconomic balances, monetary stability, food self-sufficiency, etc. Also during this time, the government re-introduced the system of *umuganda* -- the Rwandan concept of communal work -- meant to promote the value of organised or spontaneous solidarity (mutual help among neighbours) among the people living in the hills.[5] Additionally, "the social cohesion of this peasant state and the submission of the peasantry to an extremely authoritarian and constraining order was due largely to a policy which succeeded in establishing a weakly differentiated social system."[6] Thus the misplaced belief and confidence the Rwandans had in their leadership, that existed during the colonial era, was put to use once again in 1994.

43. Despite this economic success and the government's ability to bring its citizens together to engage in community work, the largely agrarian population of Rwanda did not benefit. Rwandans began to protest the inequities, noticing the nepotism and widespread corruption in the government. The quota system mentioned above was another source of difficulties for the population. As gross social

5563

inequalities persisted and with other economic problems and food shortages that arose in 1988 , time was ripe for Tutsis outside the country to attempt to regain power once more.

44. On a number of occasions members of the Tutsi diaspora had attempted to return to Rwanda, only to be stopped at the boarder by claims that the small country could not absorb the returnees. For example, in 1982, when Uganda expelled various categories of refugees, Rwanda responded by closing its borders, refusing assistance to the thousands in need and only later allowing a small fraction of the Tutsi refugees to enter and resettle. Following these incidents, the thousands of Rwandans that remained in the neighbouring countries of Burundi, Tanzania, Uganda and Zaire began to pressure the world community and these governments to find a solution to their plight.

45. The Rwandan Patriotic Front (the RPF) was created as a response to the Tutsi Diaspora's frustration with the international community's minimal attention to the emotionally charged refugee problem. In October 1990, the RPF launched an attack into northeastern Rwanda from Uganda. This attack was supported by, *inter alia*, the majority of Tutsis living abroad and brought an intense period of diplomatic negotiations which produced some noticeable results. For instance, by November 1990, the system of ethnic based scholastic and professional quotas was officially abolished and in December the Rwandan government declared an amnesty for certain prisoners. By March 1991 a cease-fire was called. Certain elements of the then Rwandan government however, were not eager to begin the process and therefore ensured that some of the more significant promises made were not implemented with due haste. Additionally, the extreme violence targeting the Tutsi population, especially in rural areas, continued unabated. Therefore, the RPF continued its strategy of a protracted war. Nevertheless, attempts were made at a democratic transition between 1991 and 1993.

The 1991 Constitution and Multi-Partism

46. Francois Nsanzuwera, a Rwandan scholar, testified that the 1991 Rwandan Constitution replaced the single party system with a multiparty system. It entrusted the National Assembly and the President of the Republic with legislative and executive power, respectively. The Constitution however did not render the President of the Republic accountable to the National Assembly.

47. The officially recognised parties were forbidden to use paramilitary forces (Article 26) and were granted access to the official media. Thereafter, the following parties were created: the *Mouvement Democratique Républic* (MDR), the *Parti Libéral* (PL), the *Parti Social-democrate* (PSD), the *Parti Democrate-chrétien* (PDC) and the *Coalition pour la Défense de la République* (CDR).

48. With the advent of multi-party politics, a very distinctive constitutional and administrative *status quo* would have purportedly manifested itself in Rwanda. This was the view of Professor Guibal, a titular Professor of constitutional and administrative law, Montpellier University, France. He was

5564

commissioned by the Defence to produce a report on the constitutional landscape of Rwand upon the laws promulgated and in effect during and prior to the events of 1994.[7]

49. It was Professor Guibal's opinion that as a result of the multi-partyism that emerged after the 1991 Constitution, the traditional delineation of the branches of Government was not discernible. Thus, there was no clear separation of powers between the executive, judiciary and central and regional administration. Rather, the witness testified, the constitutional framework that existed after 1991 was one that was delineated on a party-political basis also. Consequently, a dichotomy of hierarchies and relationships would have emerged throughout, and even transcended the branches of Government – one on an administrative level and one on a party political basis.

50. Professor Guibal then went on to describe the theoretical consequence of the system that existed in Rwanda, when faced with the events and turmoil of 1994. He was of the opinion that such a paradigm of multi-partyism, when confronted with these chaotic and unstable times, would have become a system of *crisis* multi-partyism. The Chamber was informed that such crisis multi-partyism would arise as pivotal governmental figures were moved to resolve the turmoil and conflicts upon party-political lines, rather than by the delineated constitutional means.

The Arusha Accords

51. Nsanzuwera testified that the Rwandan government and the RPF signed the Arusha Accords on 4 August 1993 in Arusha, Tanzania in order to bring about a peaceful settlement to the political and military crisis in Rwanda. The Accords constituted a compilation of several agreements and protocols previously signed, concerning notably cease-fire and power sharing between the warring factions. 47 articles of the 1991 Constitution were replaced by the provisions of the Arusha Accords, including articles on power sharing and the entrusting of additional power to the Prime Minister and certain organs of the government.

The Creation of Militias

52. While the negotiations for peace and power sharing were underway in Arusha, the MRND and the CDR stepped up their efforts to recruit members, especially from the youth segment of the population. Both the MRND and the CDR, two Hutu based parties, intensified their efforts to fortify membership in their youth organisations known as the *Interahamwe* and the *Impuzamugambi*, respectively. Within a short period of time these recruits were converted to paramilitary forces. The parties ensured that the young recruits, made up mostly of former soldiers, gendarmes and prisoners, were militarily trained and indoctrinated. All these activities were carried out in direct violation of Article 26 of the 1991 Constitution and with the knowledge of the then Minister of Internal Affairs who was entrusted with the duty to suspend the activities of any political party for such activities.

5565

53. By the end of 1993 CDR speeches, broadcast from government owned radio stations, re... the Tutsis and Hutus from the opposition parties as collaborators of the RPF. These speeches encouraged the militias to target Tutsis in their daily acts of vandalism. Between 1992 and 1994 there were claims that the militias were supported by certain member of the military and the Presidential Guard. During this period many members of the judiciary were said to have turned a blind eye to the criminal acts of the militias either because they supported their activities or out of fear of reprisals. Assassination attempts, some of which were successful, were made on the lives of certain judges or magistrates who sought to carry out their duties faithfully. According to Nsanzuwera, by that time some claimed that members of the militias had become more powerful than members of the armed forces. As indicated in the parts that follow, the militias did in fact play a substantial role in the 1994 Genocide that occurred in this country.

Conclusion

54. The ethnic tensions were used by those in power in 1994 to carry out their plans to avoid power sharing. The responsible parties ignored the Arusha Accords and used the militias to carry out their genocidal plan and to incite the rest of the Hutu population into believing that all Tutsis and other persons who may not have supported the war against the RPF were in fact RPF supporters. It is against this backdrop that of thousands of people were slaughtered and mutilated in just three short months.

---

[1] Pros. exh. 103A, p. 8.

[2] *Ibid.*

[3] Pros. exh. 103A, p. 12.

[4] *Ibid.*, p. 15. Professor Guichaoua cited to a proclamation following the coup by commander Theoneste Lizinde, which made no reference to the ethnic confrontations.

[5] *Ibid.*, p. 16.

[6] *Ibid.*, p. 18.

[7] What follows is a synopsis of this report and Professor Guibal's testimony on 27 and 28 May 1998.

5566

III. EVIDENTIARY MATTERS

3.1 EQUALITY OF ARMS

3.2 RELIABILITY OF EYEWITNESSES

3.3 WITNESS STATEMENTS

3.4 SPECIFICITY OF THE INDICTMENT

3.1 Equality of Arms

55. The notion of equality of arms is laid down in Article 20 of the Statute. Specifically, Article 20 (2) states, ". . . the accused shall be entitled to a fair and public hearing. . . ." Article 20(4) also provides, ". . . the accused shall be entitled to the following minimum guarantees, in full equality. . . ," there then follows a list of rights that must be respected, including the right to a legal counsel and the right to have adequate time and facilities to prepare his or her defence.

56. Counsel for Kayishema filed a Motion, on 13 March 1997, calling for the application of Rule 20 (2) and 20(4).[1] The Defence submitted that in order to conduct a fair trial, full equality should exist between the Prosecution and the Defence in terms of the means and facilities placed at their disposal. To this end, the Defence requested the Chamber to order the disclosure of the number of lawyers, consultants, assistants and investigators that had been at the disposal of the Prosecution since the beginning of the case. The Motion also requested the Chamber to order the Prosecutor to indicate the amount of time spent on the case and the various expenditures made. Finally, the Motion called upon the Chamber to restrict the number of assistants utilised by the Prosecution during trial to the same number as those authorised for the Defence.

57. On the first two points raised by the Defence (request for information on the Prosecutor's resources), the Prosecution submitted that the information requested by Defence was not public and was intrinsically linked to the exercise of the Prosecutor's mandate, in accordance with Article 15 of the Statute.[2]

58. On the third point (request to limit the number of assistants to the Prosecutor), the Prosecution submitted that Article 20 of the Statute establishes an equality of *rights*, rather than an equality of *means and resources*.

59. The Chamber considered that the Defence did not prove any violation of the rights of the accused as laid down in Article 20(2) and 20(4).[3] The Chamber considered that the Defence should have

5567

addressed these issues under Article 17(C) of the Directive on Assignment of Defence Counsel (Defence Counsel Directive). This provision clearly states

> the costs and expenses of legal representation of the suspect or accused necessarily and reasonably incurred shall be covered by the Tribunal *to the extent that such expenses cannot be borne by the suspect or the accused because of his financial situation.* [emphasis added]

60. This provision should be read in conjunction with Article 20(4)(d) of the Statute which stipulates that legal assistance shall be provided by the Tribunal, ". . . *if* he or she does not have sufficient means to pay for it." [emphasis added]. Therefore, at this juncture, the Trial Chamber would reiterate its earlier ruling on this Motion that the rights of the accused should not be interpreted to mean that the Defence is entitled to same means and resources as the Prosecution. Any other position would be contrary to the *status quo* that exists within jurisdictions throughout the world and would clearly not reflect the intentions of the drafters of this Tribunal's Statute.

61. The question of equality of arms was verbally raised on other occasions. The Defence Counsel complained, for example, of the impossibility to verify the technical and material data about Kibuye *Prefecture* submitted by the Prosecution.[4] However, the Trial Chamber is aware that investigators, paid for by the Tribunal, was put at the disposal of the Defence. Furthermore, Article 17(C) establishes that any expenses incurred in the preparation of the Defence case relating, *inter alia*, to investigative costs are to be met by the Tribunal. The Trial Chamber is satisfied that all of the necessary provisions for the preparation of a comprehensive defence were available, and were afforded to all Defence Counsel in this case. The utilisation of those resources is not a matter for the Trial Chamber.

62. Counsel for Kayishema also raised the issue of lack of time afforded to the Defence for the preparation of its case.[5] In this regard the Trial Chamber notes that Kayishema made his initial appearance before the Tribunal on 31 May1996, Counsel having been assigned two days prior. The trial began on 11 April 1997 and the Defence did not commence its case until 11 May 1998, almost two years after the accused's initial appearance. As such, the Trial Chamber is satisfied that sufficient time was accorded to both Parties for the preparation of their respective cases.

63. Specifically, on the time designated for the preparation of the closing arguments, the Defence expressed further dissatisfaction.[6] Having expressed his opinion that "the trial has been fair," Counsel for Kayishema however went on to submit that the eight days allowed him to prepare for his closing arguments was inequitable in light of the one month time frame afforded to the Prosecution. However, the Chamber pronounced itself on this issue from the bench when it was declared,

> . . . for the record, I think the parties . . . agreed that the presentation of oral argument and filing of the relevant documents will be done within a time frame . . . So the concept of either one party being given one month does not arise . . [I]t was discussed openly with the understanding that

5568

each and every respective party had some work to do . . . That is the defence could pr own case . . . right from the word go . . . (President of the Chamber)[7]

64. Moreover, were any particular issues of dispute or dissatisfaction to have arisen, the Trial Chamber should have been seized of these concerns in the appropriate manner and at the appropriate time. A cursory reference in the closing brief, and a desultory allusion in Counsel's closing remarks is not an acceptable mode of raising the issue before the Chamber.

3.2 Reliability of Eyewitnesses

65. Unlike the leaders of Nazi Germany, who meticulously documented their acts during World War II, the organisers and perpetrators of the massacres that occurred in Rwanda in 1994 left little documentation behind. Thus, both Parties relied predominantly upon the testimony of witnesses brought before this Chamber in order to establish their respective cases.

66. A majority of the Prosecution witnesses were Tutsis who had survived attacks in Kibuye *Prefecture* (survivor witnesses), in which both accused allegedly participated. As such the Defence presented Dr. Régis Pouget to address the Trial Chamber on the credibility of eyewitness testimonies generally and, more specifically, upon the reliability of testimony from persons who had survived attacks having witnessed violent acts committed against their families, friends and neighbours. [8]

67. The Prosecution contested the submission of the report, submitting that it was unnecessary and without probative value.[9] Nevertheless, the Trial Chamber, in exercising its discretion on this issue, received the report and heard the testimony of Dr. Pouget between 29 June and 2 July 1998.

Eyewitness Testimonies Generally

68. The issue of identification is particularly pertinent in light of the defence of alibi advanced by the accused. The report prepared by Dr. Pouget and submitted on behalf of the Defence suggests that eyewitnesses often are not a reliable source of information.

69. In order to support such a conclusion, Dr. Pouget proffered a number of reasons. It was his opinion, for example, that people do not pay attention to what they see yet, when uncertain about the answer to a question, they often give a definite answer nonetheless. He went on to describe various other, common-place factors that may affect the reliability of witness testimony generally. He observed, *inter alia*, that the passage of time often reduces the accuracy of recollection, and how this recollection may then be influenced either by the individual's own imperfect mental process of reconstructing past events, or by other external factors such as media reports or numerous conversations about the events.

70. The Chamber does not consider that such general observations are in dispute. Equally, the

Chamber concurs with Dr. Pouget's assertion that the corroboration of events, even by many v does not necessarily make the event and/or its details correct. However, the Trial Chamber is equally cognisant that, notwithstanding the foregoing analysis, all eyewitness testimony cannot be simply disregarded out-of-hand on the premise that it *may* not be an exact recollection. Accordingly, it is for the Trial Chamber to decide upon the reliability of the witness' testimony in light of its presentation in court and after its subjection to cross-examination. Thus, whilst corroboration of such testimony is not a guarantee of its accuracy, it is a factor that the Trial Chamber has taken into account when considering the testimonies.

71. Similarly, prior knowledge of those identified is another factor that the Trial Chamber may take into account in considering the reliability of witness testimonies. For example, in the Tanzanian case of *Waziri Amani v. Republic*[10] the accused called into question his identification by witnesses. The Court of Appeals held that,

> if at the end of his (the witness') examination the judge is satisfied that the quality of identification is good, for example, when the identification was made by a witness after a long period of observation or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, we think, he could in those circumstances safely convict on the evidence of identification.

The case of *United States v. Telafaire*[11] also offers persuasive guidance on the other factors which may be taken into account. Firstly, the court in *Telafaire* held that the trier of fact must be convinced that the witness had the capacity and an adequate opportunity to observe the offender. Secondly, the identification of the accused by the witness should be the product of his own recollection and, thirdly, the trier of fact should take into consideration any inconsistency in the witness's identification of the accused at trial. Finally, it was held that the general credibility of the witness – his truthfulness and opportunity to make reliable observations – should also be borne in mind by the trier of fact.

72. The Trial Chamber, in its examination of the evidence, has been alive to these various approaches and, where appropriate, has specifically delineated the salient considerations pertinent to its findings.

Survivors as Witnesses

73. The report of Dr. Pouget, an expert in the field of psychology, address the reliability of testimony from those who have witnessed traumatic events. It was his opinion that strong emotions experienced at the time of the events have a negative effect upon the quality of recollection. During traumatic events, he expounded, the natural defensive system either prevents the retention of those incidents or buries their memories so deep that they are not easily, if at all, accessible.

74. This is the view of the expert Defence witness. However, as the Prosecutor highlighted, other

5570

views do exist. She produced, for example, other academic views which stated that stressful co[illegible] lead to an especially vivid and detailed recollection of events.[12] What is apparent to the Trial Chamber is that different witnesses, like different academics, think differently.

75. The Chamber is aware of the impact of trauma on the testimony of witnesses. However, the testimonies cannot be simply disregarded because they describe traumatic and horrific realities. Some inconsistencies and imprecision in the testimonies are expected and were carefully considered in light of the circumstances faced by the witnesses.

5571

3.3 Witness Statements

76. The Parties raised apparent discrepancies or omissions that arose with regard to certain evidence when the witnesses' written statements were juxtaposed with their testimony given orally in Court. These written statements were drafted after the witnesses were interviewed by Prosecution investigators as part of the investigative process. Alleged inconsistencies were raised in relation to both Prosecution and Defence witnesses. The procedure adopted by the Trial Chamber for dealing with apparent inconsistencies was expounded during the hearing of evidence by Prosecution witness A. There, the Trial Chamber ordered that an alleged inconsistency be put to the witness and the witness be offered an opportunity to explain. In light of this explanation, if Counsel asserted that the inconsistency remained, the Counsel would mark the relevant portion of the witness statement and submit it as an exhibit for consideration by the Trial Chamber. Both Prosecution and Defence Counsel submitted such exhibits. [13]

77. The witness statements are not automatically evidence before the Trial Chamber *per se*. However, the statements may be used to impeach a witness. Where the relevant portion of the statement has been submitted as an exhibit, this portion will be considered by the Trial Chamber in light of the oral evidence and explanation offered by the witness. The Chamber is mindful that there was generally a considerable time lapse between the events to which the witnesses testified, the making of their prior statements, and their testimony before the Trial Chamber. However, notwithstanding the above, inconsistencies may raise doubt in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material, to the witnesses' evidence as a whole.

78. Whether or not the explanation by the witness is enough to remove the doubt is determined on a case-by-case basis considering the circumstances surrounding the inconsistency and the subsequent explanation. However, to be released from doubt the Trial Chamber generally demands an explanation of substance rather than mere procedure. For example, a common explanation provided by witnesses was that the interviewing investigator did not accurately reflect in the written statement what the witness said. Although such an explanation may well be true, particularly considering the translation difficulties, in the absence of evidence that corroborates the explanation, it is generally not enough to remove doubt. Indeed, it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution's investigative process.

79. Conversely, where the witness provides a convincing explanation of substance, perhaps relating to the substance of the investigator's question, then this may be sufficient to remove the doubt raised.

80. Doubts about a testimony can be removed with the corroboration of other testimonies. However,

5572

corroboration of evidence is not a legal requirement to accept a testimony. This Ch nevertheless aware of the importance of corroboration and considered the testimonies in this light. This notion has been emphasised in the Factual Findings of this Judgement.

5573

3.4 Specificity of the Indictment

Introduction

81. The Indictment, in setting out the particulars of the charges against the accused, refers to events "around" and "about" a specific date, or between two specified dates. Kayishema is charged separately for massacres at the sites of the Catholic Church and Home St. Jean, the Stadium in Kibuye and Mubuga Church. Paragraphs 28, 35 and 41 of the Indictment detail these massacres as occurring on or about the 17, 18 and 14 April 1994 respectively. The fourth crime site for which both Kayishema and Ruzindana are charged is the Bisesero area between 9 April and 30 June. The question arises, therefore, as to whether sufficient certainty exists to enable an adequate defence to be advanced, thus to ensure the right of the accused to a fair trial.

The Allegations in Relation to the Massacres in the Bisesero Area

82. The Trial Chamber considers it appropriate to distinguish between the first three sites in the Indictment, and the charges raised in respect of the Bisesero area. The exact dates on which massacres occurred at the Catholic Church and Home St. Jean, the Stadium and Mubuga Church were identified in the course of the trial by the Prosecution's case-in-chief. Accordingly, the findings made by this Chamber are set out below in the Factual Findings Part.

83. The Chamber is aware of the difficulties of raising a defence where all of the elements of the offence are not precisely detailed in the Indictment. The difficulties are compounded because the alibi defence advanced by both accused persons does not remove them from the Bisesero vicinity at the time in question. The accused in the *Tadic* case faced similar difficulties.[14] In that instance the Trial Chamber observed the near impossibility of providing a 24-hour, day-by-day, and week-by-week account of the accused's whereabouts for an alibi defence which covers a duration of several months. The Trial Chamber is of the opinion that this is a substantive issue.

84. Nevertheless, it is important to note here that throughout the trial the burden of proving each material element of the offence, beyond a reasonable doubt, has remained firmly on the Prosecution. Whilst, *prima facie*, the accused should be informed in as greater detail as possible of the elements of the offence against them, such details will necessarily depend on the nature of the alleged crimes. The Trial Chamber finds that during its case-in-chief the Prosecution did focus upon various sites throughout the Bisesero region, but because of the wide-ranging nature of the attacks no further specificity was possible in the Indictment.

85. It is unnecessary, however, for the Prosecution to prove an exact date of an offence where the date or time is not also a material element of the offence. Whilst it would be preferable to allege and

5574

prove an exact date of each offence, this can clearly not be demanded as a prerequisite for [illegible] where the time is not an essential element of that offence.[15] Furthermore, even where the date of the offence is an essential element, it is necessary to consider with what precision the timing of the offence must be detailed. It is not always possible to be precise as to exact events; this is especially true in light of the events that occurred in Rwanda in 1994 and in light of the evidence we have heard from witnesses. Consequently, the Chamber recognises that it has balanced the necessary practical considerations to enable the Prosecution to present its case, with the need to ensure sufficient specificity of location and matter of offence in order to allow a comprehensive defence to be raised.

86. However, because of the foregoing observations, the Trial Chamber opines that where timing is of material importance to the charges, then the wording of the count should lift the offence from the general to the particular.[16] In this respect, the Trial Chamber notes that the *ratione temporis* of this Tribunal extends from 1 January 1994 to 31 December 1994, and the Indictment only refers only to events that occurred in the Bisesero area between the 9 April and 30 June. In fact, during its case-in-chief, and with the more precise definition of massacre sites within the Bisesero area, the Prosecution was able to pinpoint specific periods during which the alleged events occurred. Therefore, the date need only be identified where it is a material element of the offence and, where it is such a necessary element, the precision with which such dates need be identified varies from case to case. In light of this, the Trial Chamber opines that the lack of specificity does not have a bearing upon the otherwise proper and complete counts, and it did not prejudice the right of the accused to a fair trial.

---

[1] Motion by the Defence Counsel for Kayishema Calling for the Application by the Prosecutor of Article 20(2) and 20(4) (b) of the Statute. Filed with the Registry, 13 March 1997. The issue was raised again by Mr. Ferran in his closing arguments, Trans., 3 Nov 1998, from p. 30.

[2] The Prosecution's response to the Motion was filed with the Registry on 29 April 1997 and additional information was filed on 5 May 1997.

[3] Order on the Motion by the Defence Counsel for Application of Article 20(2) and (4)(b) of the Statute, 5 May 1997.

[4] Defence Closing Brief for Kayishema, 16 Oct. 1998, p. 3.

[5] *Ibid.*, p. 2-3.

[6] See Mr. Ferran's closing arguments, Trans., 3 Nov. 1998, pp. 54-55.

[7] Trans., 3 Nov. 1998, pp. 55-56.

[8] Def. exh. 59, Report on the Crowd Psychology. Dr. Pouget has been , *inter alia*, Professor of Psychiatry and Psychology, Director of Education, Montpellier University, France; and the appointed expert in psychology for Nimes and Montepellier Courts of Appeal, France.

[9] Motion by the Prosecutor that Evidence of a Defence Expert Witness, Dr. Pouget, be Ruled Inadmissible Pursuant to Article 19(1) of the Statute and Rules 54 and 89 of the Rules.

[10] 1980 TLR 250, 252.

[11] 469 F.2d 552 (D.C. Cir. 1972).

5575

[12] An article by Ann Maass and Gautier Kohnken, in the Law and Human Behaviour Journal, vol. 13, no. 4, 198. shown to the witness and discussed in cross-examination. Trans., 2 Jul. 1998, p. 104.

[13] See Pros. exh. 350A, 350B and 350C.

[14] *Prosecutor v. Dusko Tadic*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-94-1-T, 7 May 1997, para. 533. (*Tadic* Judgement.)

[15] See, the *Tadic* Judgement, para. 534 and the cases cited therein.

[16] See, for example, the Canadian cases of, *G.B., A.B. and C.S. v. R* (1990) 2 S.C.R. 30, and *R v. Colgan* (1986) 30 C.C.C. (3d) 193 (Court of Appeal), where Monnin C.J.M. found an offence specified as occurring at some point within a six year period to be sufficiently precise.

5576

IV. THE LAW

4.1 GENOCIDE
4.2 CRIMES AGAINST HUMANITY
4.3 VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II, THERETO
4.4 CRIMINAL RESPONSIBILITY, ARTICLES 6(1) AND 6(3)

4.1 GENOCIDE

87. Article 2(2) of the ICTR Statute reads:

> *Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:*
>
> *a. Killing members of the group;*
> *b. Causing serious bodily or mental harm to members of the group;*
> *c. Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;*
> *d. Imposing measures intended to prevent births within the group;*
> *e. Forcibly transferring children of the group to another group.*

The above definition reproduces Articles II and III of the Genocide Convention of 1948 and Article 17 of the International Law Commission Report 1996, Draft Code of Crimes Against the Peace and Security of Mankind (ILC Draft Code of Crimes).

88. The concept of genocide appeared first in the International Military Tribunal (Nuremberg) Judgement of 30 September and 1 October 1946, referring to the destruction of groups. The prohibition of genocide then was recognised by the General Assembly of the United Nations as a principle of international law. Resolution 260(A)(III) of 9 December 1948, adopting the Draft Genocide Convention, crystallised into international law the prohibition of that crime. The Genocide Convention became widely accepted as an international human rights instrument. Furthermore, the crime of genocide is considered part of international customary law and, moreover, a norm of *jus cogens*.

89. The definition of the crime of genocide was based upon that of crimes against humanity, that is, a combination of "extermination and persecutions on political, racial or religious grounds" and it was intended to cover *"the intentional destruction of groups in whole or in substantial part"* (emphasis added). The crime of genocide is a type of crime against humanity. Genocide, however, is different from other crimes against humanity. The essential difference is that genocide requires the aforementioned specific intent to exterminate a protected group (in whole or in part) while crimes against humanity require the civilian population to be targeted as part of a widespread or systematic attack. There are instances where the discriminatory grounds coincide and overlap. This scenario is detailed in the present Judgement, in the Part VII on Cumulative Charges.

5577

90. For the crime of genocide to be committed, two elements are required, namely, the *mens rea*, the requisite specific intent, and the *actus reus*, the prohibited act or omission.

4.1.1 The Mens Rea

91. A distinguishing aspect of the crime of genocide is the specific intent *(dolus specialis)* to destroy a group in whole or in part. The *dolus specialis* applies to all acts of genocide mentioned in Article 2(a) to (e) of the Statute, that is, all the enumerated acts must be committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.' It is this specific intent that distinguishes the crime of genocide from the ordinary crime of murder.[1] The Trial Chamber opines that for the crime of genocide to occur, the *mens rea* must be formed prior to the commission of the genocidal acts. The individual acts themselves, however, do not require premeditation; the only consideration is that the act should be done in furtherance of the genocidal intent.

92. Under Article 6(3) of the Statute, the superior is criminally responsible for the acts committed by his subordinates if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Proof of the Requisite Intent

93. Regarding the assessment of the requisite intent, the Trial Chamber acknowledges that it may be difficult to find explicit manifestations of intent by the perpetrators. The perpetrator's actions, including circumstantial evidence, however may provide sufficient evidence of intent. The Commission of Experts in their Final Report on the situation in Rwanda also noted this difficulty. Their Report suggested that the necessary element of intent can be inferred from sufficient facts, such as the number of group members affected.[2] The Chamber finds that the intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action.[3] In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing. Furthermore, the number of victims from the group is also important. In the Report of the Sub-Commission on Genocide, the Special Rapporteur stated that "the relative proportionate scale of the actual or attempted destruction of a group, by any act listed in Articles II and III of the Genocide Convention, is strong evidence to prove the necessary intent to destroy a group in whole or in part."[4]

94. It is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation. Morris and Scharf note that "it is virtually impossible for the crime of genocide to be

5578

committed without some or indirect involvement on the part of the State given the magnitud[illegible] crime."[5] They suggested that "it is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy." The Chamber concurs with this view.

Destruction of a Group

95. The perpetrator must intend to destroy a group in whole or in part. This begs the question of what constitutes the "destruction of a group." The Prosecution suggests that the term should be broadly interpreted and encompass acts that are undertaken not only with the intent to cause death but also includes acts which may fall short of causing death.[6] In the *Akayesu* Judgement, acts of sexual violence, which occurred in Taba Commune were found to form an integral part of the process of destruction, specifically, targeting Tutsi women and contributing to their destruction and the destruction of the Tutsi as a group.[7] The Trial Chamber concurs with this view and that of the International Law Commission (ILC) which stated that "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe."[8]

Whole or in Part

96. Another aspect for consideration is that the intent to destroy the group must be "in whole or in part." The ILC stated that "the crime of Genocide by its very nature requires the intention to destroy at least a substantial part of a particular group."[9] In the Report of the Sub-Commission on Genocide, the Special Rapporteur stated that "in part" would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership. Hence, both proportionate scale and total number are relevant.[10]

97. The Trial Chamber opines, therefore, that "in part" requires the intention to destroy a considerable number of individuals who are part of the group. Individuals must be targeted due to their membership of the group to satisfy this definition.

A National, Ethnical, Racial or Religious Group

98. The intent must exist to "destroy a national, ethnical, racial or religious group, as such." Thus, the acts must be directed towards a specific group on these discriminatory grounds. An ethnic group is one whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs.

Destroying in whole or in part a National, Ethnical, Racial or Religious Group as Such

99. This phrase speaks to specific intent (the requisite *mens rea*). The "destroying" has to be

5579

directed at the group *as such*, that is, *qua group*, as stipulated in Article 2(2) of the Statute.

4.1.2 Actus Reus

100. Article 2(2)(a) to (e) of the ICTR Statute and Article II (a) to (e) of the Genocide Convention lists acts which, if committed with the specific intent, amount to genocide.

Killing Members of the Group

101. Article 2(2)(a) of the Statute, in the English language version, states that genocide means the act of "killing" committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such. The French language version refers to *meurtre,* a term that requires the additional mental element of intent.

102. The Parties in their closing remarks addressed the differences between the English and French versions. The Prosecutor submitted that the term *meurtre* has a legal meaning in French law, that is, a deliberate homicide, whereas the term "killing" is merely the act of causing the death to another.[11] The Prosecutor contended that the language used in the English version is more flexible and would permit, if the need arises, a broadening of the meaning or interpretation.[12] The Defence teams submitted that "*meurtre*" should be applied, as it was in the *Akayesu* Judgement. The Defence submitted that where doubt exists then, as a general principle of criminal law, that doubt should be interpreted in favour of the accused.

103. The Trial Chamber agrees that if a doubt exists, for a matter of statutory interpretation, that doubt must be interpreted in favour of the accused. Therefore, the relevant act under Article 2(2)(a) is "*meurtre,*" that is, unlawful and intentional killing. The Trial Chamber notes, however, that all the enumerated acts must be committed with intent to destroy a group in whole or in part. As stated by the ILC the enumerated acts "are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. They are not the type of acts that would normally occur by accident or even as a result of mere negligence . . . the definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act."[13] Hence, there is virtually no difference between the two as the term "killing" is linked to the intent to destroy in whole or in part.

104. The Chamber observes that the *Akayesu* Judgement does not fully define the term "killing."[14] It is the opinion of the Trial Chamber that there is virtually no difference between the term "killing" in the English version and "*meurtre*" in the French version of Article 2 (2)(a) of the Statute within the context of genocidal intent. Hence "killing" or "meurtre" should be considered along with the specific intent of genocide, that is, the intent to destroy in whole or in part, a national, ethnical, racial or religious group as such.

5580

Causing Serious Bodily or Mental Harm to Members of the Group

105. Pursuant to Article 2(2)(b) of the Statute states "causing serious bodily or mental harm to members of the group."

106. This phrase, which is not defined by the Statute, was the subject of contention during the closing submissions of the Parties. The Prosecution submitted that "causing a bodily or a mental harm" means: to undertake an action that might cause injury to the physical and mental fullness, the total being of a person; that a human being is to be considered as a whole with structures and elements functioning in concert and harmony; that the term "serious" is applicable to both the bodily and the mental part of a person and is dependant upon the extent to which the physical body or mental well being is injured.

107. The Prosecution submitted that serious harm may include impact on one or more elements of the human structure, which disables the organs of the body and prevents them from functioning as normal. To this end, the harm caused need not bring about death but causes handicap such that the individual will be unable to be a socially useful unit or a socially existent unit of the group. The Prosecution submitted that blows and wounds inflicted would constitute serious harm when they are so violent or have such intensity that they immediately cause the malfunctioning of one or many essential mechanisms of the human body. The Prosecution also submits that non-physical aggressions such as the infliction of strong fear or strong terror, intimidation or threat are also serious mental harm.[15]

Serious Bodily Harm

108. The phrase serious bodily harm should be determined on a case-by-case basis, using a common sense approach. In the *Akayesu* Judgement, it was held that serious bodily harm does not necessarily mean harm that is permanent or irremediable.[16] The *Akayesu* Judgement further held that acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death, were all acts that amount to serious bodily harm.[17] The Trial Chamber concurs with these determinations.

109. It is the view of the Trial Chamber that, to large extent, "causing serious bodily harm" is self-explanatory. This phrase could be construed to mean harm that seriously injures the health, causes disfigurement or causes any serious injury to the external, internal organs or senses.

Serious Mental Harm

110. The phrase "serious mental harm" should also be determined on a case-by-case. The Prosecution submits that there is no prerequisite that mental suffering should be the result of physical harm. The Prosecution relies upon the commentary offered in the Preparatory Committee's Definition of Crimes that suggests that serious mental harm should include "more than minor or temporary impairment on

mental faculties."[18] The Prosecution suggested that the inflicting of strong fear or terror, intimidation or threat may amount to serious mental harm.

111. The Defence teams submitted that the serious bodily and mental harm alleged by the Prosecution was merely a consequence of attempts to kill and did not amount to genocidal offences in themselves. It argued that the Prosecution witnesses who had been wounded did not demonstrate that the perpetrators had intention to cause serious bodily or mental harm. The Defence contends therefore, that there was intention to cause murder and not to cause serious bodily or mental harm.

112. The Chamber considers that an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental harm in pursuit of the specific intention to destroy a group in whole or in part.

113. The Chamber opines that "causing serious mental harm" should be interpreted on a case-by-case basis in light of the relevant jurisprudence.

Deliberately Inflicting on the Group Conditions of Life Calculated to Bring About its Physical Destruction in Whole or in Part

114. Article 2(2)(c) of the Statute covers the act of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." The Prosecution submits that Article 2(2)(c) applies to situations likely to cause death regardless of whether death actually occurs and allows for the punishment of the perpetrator for the infliction of substandard conditions of life which, if left to run their coarse, could bring about the physical destruction of the group.[19]

115. The Trial Chamber concurs with the explanation within the Draft Convention, prepared by the U.N. Secretariat which interpreted this concept to include circumstances which will lead to a slow death, for example, lack of proper housing, clothing, hygiene and medical care or excessive work or physical exertion.[20]

116. It is the view of the Trial Chamber that "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part," includes methods of destruction which do not immediately lead to the death of members of the group. The Chamber adopts the above interpretation.[21] Therefore the conditions of life envisaged include rape, the starving of a group of people, reducing required medical services below a minimum, and withholding sufficient living accommodation for a reasonable period, provided the above would lead to the destruction of the group in whole or in part.

Imposing Measures Intended to Prevent Births Within the Group

117. Article 2(2)(d) of the Statute covers the act of imposing measures intended to prevent within the group. The Trial Chamber concurs with the explanation provided in the *Akayesu* Judgement.

Forcibly Transferring Children of the Group to Another

118. Article 2(2)(e) of the Statute covers the act of forcibly transferring children of the group to another. The Trial Chamber concurs with the explanation provided in the *Akayesu* Judgement.

4.2 CRIMES AGAINST HUMANITY

119. Article 3 of the ICTR Statute states:

> The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:
>
> *a) Murder;*
> *b) Extermination;*
> *c) Enslavement;*
> *d) Deportation;*
> *e) Imprisonment;*
> *f) Torture;*
> *g) Rape;*
> *h) Prosecutions;*
> *i) Other inhumane acts.*

120. Crimes against humanity were prosecuted at the Nuremberg trials. The Charter of the International Military Tribunal of Nuremberg[22] in its Article 6(c) (Annex to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis (London Agreement)), describes the crimes against humanity as follows:

> ...namely murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian populations, before or during the war; or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

121. Crimes against humanity were also applied under Article II of Law No. 10 of the Control Council Law[23] and went through a gradual evolution in the domestic cases of *Eichmann,*[24] *Barbie,*[25] and *Touvier*. More recently, crimes against humanity have been applied in the International Criminal Tribunals for both Rwanda and the Former Yugoslavia.

4.2.1 The Attack

122. The enumerated crimes must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The attack is the event in which the enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example murder, rape and deportation. The

elements of the attack effectively exclude from crimes against humanity, acts carried out for pu. personal motives and those outside of a broader policy or plan; a position which was adopted by the Defence.

Widespread or Systematic

123. The attack must contain one of the alternative conditions of being widespread or systematic.[26] A widespread attack is one that is directed against a multiplicity of victims.[27] A systematic attack means an attack carried out pursuant to a preconceived policy or plan. Either of these conditions will serve to exclude isolated or random inhumane acts committed for purely personal reasons.[28]

The Policy Element

124. For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan. Additionally, the requirement that the attack must be committed against a "civilian population" inevitably demands some kind of plan and, the discriminatory element of the attack is, by its very nature, only possible as a consequence of a policy.

125. Who or what must instigate the policy? Arguably, customary international law requires a showing that crimes against humanity are committed pursuant to an action or policy of a State. However, it is clear that the ICTR Statute does not demand the involvement of a State. Guidance on this issue may be gained from the ILC who, in the Draft Code of Crimes, stated that crimes against humanity are inhumane acts "instigated or directed by a Government or by any organisation or group."[29] The ILC explains that this requirement was,

> intended to exclude the situation in which an individual commits an inhumane act whilst acting on his own initiative pursuant to his own criminal plan in the absence of any encouragement or direction from either a Government or a group or an organisation...The instigation or direction of a Government or any group, which may or may not be affiliated with a Government, gives the act its great dimension and makes it a crime against humanity imputable to private persons or agents of the State.[30]

126. The Trial Chamber concurs with the above view and finds that the Tribunal's jurisdiction covers both State and non-State actors. As *Prefect*, Kayishema was a State actor. As a businessman Ruzindana was a non-State actor. To have jurisdiction over either of the accused, the Chamber must be satisfied that their actions were instigated or directed by a Government or by any organisation or group.

Civilian Population

127. Traditionally, legal definitions of 'civilian' or 'civilian population' have been discussed within the context of armed conflict. However, under the Statute, crimes against humanity may be committed inside or outside the context of an armed conflict. Therefore, the term civilian must be understood within the context of war as well as relative peace. The Trial Chamber considers that a wide definition of civilian is applicable and, in the context of the situation of Kibuye *Prefecture* where there was no armed conflict, includes all persons *except* those who have the duty to maintain public order and have the legitimate means to exercise force. Non-civilians would include, for example, members of the FAR, the RPF, the police and the Gendarmerie Nationale.

128. With regard to the targeting of any civilian population, the Trial Chamber concurs with the finding in the *Tadic* decision that the targeted population must be predominantly civilian in nature but the presence of certain non-civilians in their midst does not change the character of that population.[31]

129. In any event, the Defence teams did not challenge the assertion that the victims of the alleged attacks were civilians. And, the Prosecution submitted that the victims in the four massacre sites were farmers, teachers and those seeking refuge from the attacks.

Discriminatory Grounds

130. The Statute contains a requirement additional to both the Nuremberg Charter and the ICTY Statute; that the attack be committed on national, political, ethnic, racial or religious grounds. The Prosecution submits that the discrimination at issue was based on ethnic or, alternatively, political grounds.[32] The Prosecution asserted that the discrimination was on ethnic grounds because the victims were Tutsis and political grounds because the Tutsis were accomplices or supporters of the RPF. The Defence did not contest that the Tutsis were considered an ethnic group.[33] Political grounds include party political beliefs and political ideology.

131. The Prosecution submit that it is the intent of the perpetrator to discriminate against a group that is important rather than whether the victim was, in fact, a member of that targeted group. In this regard there are two issues for the Chamber to address. Firstly, in a scenario where the perpetrator's intention is to exterminate the Tutsi group and, in furtherance of this intent, he kills a Belgium Priest who is protecting the Tutsi, the Trial Chamber opines that such an act would be based on discrimination against the Tutsi group.

132. The second relevant scenario is where the perpetrator attacks people on the grounds and in

5586

the *belief* that they are members of a group but, in fact, they are not, for example, where perpetrator believes that a group of Tutsi are supporters of the RPF and therefore accomplices. In the scenario, the Trial Chamber opines that the Prosecution must show that the perpetrator's belief was objectively reasonable - based upon real facts - rather than being mere speculation or perverted deduction.

The Mental Element

133. The perpetrator must knowingly commit crimes against humanity in the sense that he must understand the overall context of his act. The Defence for Ruzindana submitted that to be guilty of crimes against humanity the perpetrator must know that there is an attack on a civilian population and that his act is part of the attack.[34] This issue has been addressed by the ICTY where it was stated that the accused must have acted with knowledge of the broader context of the attack;[35] a view which conforms to the wording of the Statute of the International Criminal Court (ICC) Article 7.

134. The Trial Chamber agrees with the Defence. Part of what transforms an individual's act(s) into a crime against humanity is the inclusion of the act within a greater dimension of criminal conduct; therefore an accused should be aware of this greater dimension in order to be culpable thereof. Accordingly, actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act(s) is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan, is necessary to satisfy the requisite *mens rea* element of the accused. This requirement further compliments the exclusion from crimes against humanity of isolated acts carried out for purely personal reasons.

4.2.2 The Crimes

135. Article 3 entitles the International Criminal Tribunal for Rwanda to prosecute persons responsible for crimes enumerated within the Statute. The crimes must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The crimes themselves need not contain the three elements of the attack (i.e. widespread or systematic, against any civilian population, on discriminatory grounds), but must form *part of* such an attack. Indeed, the individual crimes contain their own specific elements. For an accused to be found guilty under crimes against humanity the Prosecution must prove that the accused is responsible for one of the crimes charged pursuant to Article 6(1) and/or 6(3) of the Statute. The following crimes are charged in the Indictment: murder, extermination and other inhumane acts.

Murder

136. The Prosecution charges Kayishema with crimes against humanity for murder in Counts 2, 8,

5587

14 and 20 of the Indictment, and Ruzindana with crimes against humanity for murder in Count [illegible] the Indictment.

137. Article 3(a) of the English version of the Statute uses the term "murder," whilst the French version of the Statute uses the term "*assassinat.*"[36] The use of these terms has been the subject of some debate because the *mens rea* for murder, as it is defined in most common law jurisdictions, includes but does not require premeditation; whereas, in most civil law systems, premeditation is always required for *assassinat.*[37] The *Akayesu* Judgement, which is the only case to have addressed the issue, stated that customary international law dictates that it is the act of murder that constitutes a crime against humanity and not *assassinat.* In *Akayesu*, the Chamber held that there were sufficient reasons to assume that the French version of the Statute suffers from an error in translation.[38] The Defence argued, *inter alia,* that the *Akayesu* solution of an error in translation was too simple and not convincing as both the French and the English versions of the Statute are originals. According to the Defence, murder was meant to be the equivalent of *assassinat.* However, the Prosecution argued that premeditation was not a necessary element and suggested that the "unlawful killing of a human being as the result of the perpetrator engaging in conduct which was in reckless disregard for human life" is enough.

138. The Trial Chamber agrees with the Defence. When interpreting a term from one language to another, one may find that there is no equivalent term that corresponds to all the subtleties and nuances. This is particularly true with legal terms that represent jurisprudential concepts. Here, the *mens rea* for murder in common law overlaps with both *meurtre* and *assassinat* (that is, a *meurtre aggravé*) in civil systems.[39] The drafters chose to use the term *assassinat* rather than *meurtre.* As a matter of interpretation, the intention of the drafters should be followed so far as possible and a statute should be given its plain meaning.[40] Since the concepts of murder and *assassinat* can correspond to one another, in the opinion of this Trial Chamber, there is no need to change the wording of the Statute. Although it may be argued that, under customary international law, it is murder rather than *assassinat* that constitutes the crime against humanity (a position asserted by the Chamber in the *Akayesu* Judgement), this court is bound by the wording of the ICTR Statute in particular. It is the ICTR Statute that reflects the intention of the international community for the purposes of trying those charged with violations of international law in Rwanda. Furthermore, the ICTR and ICTY Statutes did not reflect customary international law at the time of drafting. This is evident by the inclusion of the need for an armed conflict in the ICTY Statute and the inclusion of the requirement that the crimes be committed with discriminatory intent in the ICTR Statute. Accordingly, it may be presumed that the drafters intended to use *assassinat* alongside murder. Indeed, by using *assassinat* in French, the drafters may have intended that only the higher standards of *mens rea* for murder will suffice.[41]

5588

139. If in doubt, a matter of interpretation should be decided in favour of the accused; in this c the inclusion of premeditation is favourable to the accused. The Chamber finds, therefore, that murder and *assassinat* should be considered together in order to ascertain the standard of *mens rea* intended by the drafters and demanded by the ICTR Statute. When murder is considered along with *assassinat* the Chamber finds that the standard of *mens rea* required is intentional and premeditated killing. The result is premeditated when the actor formulated his intent to kill after a cool moment of reflection.[42] The result is intended when it is the actor's purpose, or the actor is aware that it will occur in the ordinary course of events.

140. The accused is guilty of murder if the accused, engaging in conduct which is unlawful:

1. causes the death of another;
2. by a premeditated act or omission;
3. intending to kill any person or,
4. intending to cause grievous bodily harm to any person.

Thus, a premeditated murder that forms part of a widespread or systematic attack, against civilians, on discriminatory grounds will be a crime against humanity. Also included will be extrajudicial killings, that is "unlawful and deliberate killings carried out with the order of a Government or with its complicity or acquiescence."[43]

Extermination

141. The Prosecution charges Kayishema with crimes against humanity for extermination in Counts 3, 9, 15 and 21 of the Indictment, and Ruzindana with crimes against humanity for extermination in Count 21 of the Indictment.

142. The crime of extermination was not specifically defined in the Statute or the Nuremberg Charter. Indeed, there is very little jurisprudence relating to the essential elements of extermination. In the *Akayesu* Judgement, Chamber I considered that extermination is a crime that by its very nature is directed against a group of individuals and differs from murder in that it requires an element of mass destruction that is not required for murder.[44] The Prosecution asserted that there is no need for a defined number of people to die for the killing to rise to an act of extermination; it is determined on a case-by-case basis even though there is the need for a numerical requirement.[45] Notably, Akayesu was found guilty of extermination for ordering the killing of sixteen people.[46] The Chamber agrees that the difference between murder and extermination is the scale; extermination can be said to be murder on a massive scale. The Defence did not address the numerical question but argues that "the essence of extermination lies in the fact that it is an indiscriminate elimination."[47]

5589.

143. Cherif Bassiouni states that extermination is murder on a massive scale and may include unintentional killing:

> Extermination implies intentional and unintentional killing. The reason for the latter is that mass killing of a group of people involves planning and implementation by a number of persons who, though knowing and wanting the intended result, may not necessarily know their victims. Furthermore, such persons may not perform the *actus reus* that produced the deaths, nor have specific intent toward a particular victim.[48]

The ICC Statute (Article 7(2)(b)), offers an illustrative rather than definitive statement regarding extermination: "Extermination includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population."

144. Having considered the above, the Chamber defines the requisite elements of extermination:

> The actor participates in the mass killing of others or in the creation of conditions of life that lead to the mass killing of others, through his act(s) or omission(s); having intended the killing, or being reckless, or grossly negligent as to whether the killing would result and; being aware that his act(s) or omission(s) forms part of a mass killing event; where, his act(s) or omission(s) forms part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

145. The term "mass", which may be understood to mean 'large scale,' does not command a numerical imperative but may be determined on a case-by-case basis using a common sense approach. The actor need not act with a specific individual(s) in mind.

146. The act(s) or omission(s) may be done with intention, recklessness, or gross negligence. The 'creation of conditions of life that lead to mass killing' is the institution of circumstances that ultimately causes the mass death of others. For example: Imprisoning a large number of people and withholding the necessities of life which results in mass death; introducing a deadly virus into a population and preventing medical care which results in mass death. Extermination includes not only the implementation of mass killing or the creation of conditions of life that leads to mass killing, but also the planning thereof. In this event, the Prosecutor must prove a nexus between the planning and the actual killing.

147. An actor may be guilty of extermination if he kills, or creates the conditions of life that kills, a single person providing the actor is aware that his act(s) or omission(s) forms part of a mass killing event.[49] For a single killing to form part of extermination, the killing must actually form part of a mass killing event. An 'event' exists when the (mass) killings have close proximity in time and place.

Other Inhumane Acts

148. The Prosecution charges Kayishema with crimes against humanity for other inhumane acts in Counts 4, 10, 16 and 22 of the Indictment, and Ruzindana with crimes against humanity for other inhumane acts in Count 22 of the Indictment.

149. Since the Nuremberg Charter, the category 'other inhumane acts' has been maintained as a useful category for acts not specifically stated but which are of comparable gravity. The importance in maintaining such a category was elucidated by the ICRC when commenting on inhumane treatment contained in Article 3 of the Geneva Conventions,

> It is always dangerous to try to go into too much detail – especially in this domain. However much care were taken in establishing a list of all the various forms of infliction, one would never be able to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes. The form of wording adopted is flexible and, at the same time, precise.[50]

150. Other inhumane acts include those crimes against humanity that are not otherwise specified in Article 3 of the Statute, but are of comparable seriousness. The ICC Statute (Article 7(k)), provides greater detail than the ICTR Statute to the meaning of other inhumane acts: "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health." The ILC commenting on Article 18 of its Draft Code of Crimes states

> The Commission recognized that it was impossible to establish an exhaustive list of the inhumane acts which may constitute crimes against humanity. First, this category of acts is intended to include only additional acts that are similar in gravity to those listed in the preceding subparagraphs. Second, the act must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity.

151. The Chamber notes the International Law Commission's commentary. In relation to the Statute, other inhumane acts include acts that are of similar gravity and seriousness to the enumerated acts of murder, extermination, enslavement, deportation, imprisonment, torture, rape, or persecution on political, racial and religious grounds. These will be acts or omissions that deliberately cause serious mental or physical suffering or injury or constitute a serious attack on human dignity. The Prosecution must prove a nexus between the inhumane act and the great suffering or serious injury to mental or physical health of the victim. The Chamber agrees with the Prosecution submission that the acts that rise to the level of inhumane acts should be determined on a case-by-case basis.[51]

152. The Defence asserts that for an accused to be found guilty of mental harm, there must be a

5591.

direct relation between the assailant and the victim.[52] The Prosecution on the other hand suggests that victims have suffered mental harm amounting to other inhumane acts due to them having witnessed atrocities for which the accused is responsible. For example, in relation to Count 4 the Prosecution submits,

> [w]ith respect to serious mental harm, six survivors testified (and the survivors of all the other massacres testified) that they witnessed family members and friends being killed. As established by the evidence, Tutsi civilians were placed in an environment of fear and desperation and were forced to witness the killing and the severe injuring of friends, family and other Tutsi civilians. The killings were brutal in manner. The people saw carnage and heard the people singing exterminate them, exterminate them....The Prosecutor submits that such an environment inherently causes serious mental harm.[53]

153. The Chamber is in no doubt that a third party could suffer serious mental harm by witnessing acts committed against others, particularly against family or friends. However, to find an accused responsible for such harm under crimes against humanity, it is incumbent on the Prosecution to prove the *mens rea* on the part of the accused. Indeed, as stated above, inhumane acts are, *inter alia,* those which *deliberately* cause serious mental suffering. The Chamber considers that an accused may be held liable under these circumstances only where, at the time of the act, the accused had the intention to inflict serious mental suffering on the third party, or where the accused knew that his act was likely to cause serious mental suffering and was reckless as to whether such suffering would result. Accordingly, if at the time of the act, the accused was unaware of the third party bearing witness to his act, then he cannot be held responsible for the mental suffering of the third party.

154. In summary, for an accused to be found guilty of crimes against humanity for other inhumane acts, he must commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act, and with knowledge that the act is perpetrated within the overall context of the attack.

5592

4.3 VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND ADDITIONAL PROTOCOL II, THERETO

155. Pursuant to Article 4 of the Statute, the Trial Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 Common to the Four Geneva Conventions of 1949 (Common Article 3) for the protection of War Victims, and Additional Protocol II thereto of 1977 (Protocol II).

4.3.1 Customary Law

156. The Trial Chamber is cognisant of the ongoing discussions, in other forums, about whether the above-mentioned instruments should be considered customary international law that imposes criminal liability for their serious breaches. In the present case, such an analysis seems superfluous because the situation is rather clear. Rwanda became a party to the Conventions of 1949 on 5 May 1964 and to Protocol II on 19 November 1984. These instruments, therefore, were in force in the territory of Rwanda at the time when the tragic events took place within its borders.

157. Moreover, all the offences enumerated in Article 4 of the Statute, also constituted crimes under the laws of Rwanda. The other Party to the conflict, the RPF, also had stated to the International Committee of the Red Cross (ICRC) that it was bound by the rules of international humanitarian law. Therefore, there is no doubt that persons responsible for the breaches of these international instruments during the events in the Rwandan territories in 1994 could be subject to prosecution.

158. Thus, the question before the Trial Chamber is not about the applicability of these instruments in a general sense, but to what extent they are applicable in the instant case. In order to answer this question, a more detailed legal analysis of these instruments as well as the historical background to their adoption is necessary.

4.3.2 Historical Background of Common Article 3

159. The Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War, convened by the Swiss Federal Council, was held in Geneva from 21 April to 12 August 1949 (the Conference). The Conference was seized by the working documents that passed through the many preparatory stages. After four months of continuous debate, the Conference established the first, second, third and fourth Geneva Conventions.[54]

5593

160. From the very beginning, it was understood that these four Conventions could be applic in international armed conflicts. However, the ICRC proposed at the Conference to apply these Conventions to non-international armed conflicts as well. The proposal of the ICRC was rejected as a result of almost universal opposition by the states.

161. During the debate on this issue, special attention was focused on the fourth Geneva Convention. For a long period, it was considered evident that civilians would remain outside hostilities. The ICRC recognised that "when the Second World War broke out, civilians were not provided with effective protection under any convention or treaty."[55]

162. It was emphasised by the ICRC that the Fourth Convention represented "an important step forward in written international law in the humanitarian field."[56] Therefore, in the opinion of the ICRC, it was necessary to apply it to internal armed conflicts as well. However, from the point of view of the delegations such an application could entail not only political but also technical difficulties.

163. Thus, the situation at the Conference was rather complicated. On the one hand, the idea of the ICRC to apply the four Geneva Conventions to internal armed conflicts had been treated by many delegations as unfriendly attempts to interfere in the internal affairs of the states and to protect all forms of insurrections, rebellion, anarchy and the break-up of states and even plain brigandage. On the other hand, there was an understanding of the necessity to aid the victims of internal conflicts, the horrors of which sometimes surpass the horrors of international wars by reason of the fratricidal hatred they engender.[57]

164. The Conference rejected a considerable number of the alternative drafts on this issue and, as a result of lengthy and tremendous efforts, succeeded in approving Common Article 3 as it appears now in the four Geneva Conventions. Pursuant to this Article, each Party to a non-international conflict is bound to apply certain provisions as a minimum. The words "as a minimum" must be understood in the sense that the applicable provisions represent a compulsory minimum. At the same time, the Parties were encouraged not to limit themselves to the provided minimum. They were invited, in accordance with Common Article 3, "to endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention."

165. On this occasion, the ICRC pointed out: "To borrow the phrase of one of the delegates, Article 3 is like a 'Convention in miniature.' It applies to non-international conflicts only and will be the only Article applicable to them until such time as a special agreement between the Parties has brought into force between them all or part of the other provisions of the Convention." [58]

4.3.3 Historical Background of Additional Protocol II

166. After the Conference in 1949, the idea to improve the situation with the protection of the victims

5594

of internal conflicts remained on the agenda. As a result of compromise, Common Article 3 drafted in a very clear way and there were practical difficulties with its application. Moreover, in light of the number and scale of armed conflicts that occurred in different parts of the world the need to improve the protection of the civilian population during armed conflicts became more urgent. In this respect, the ICRC found it necessary to emphasise that "the development of arms and the increased radius of action given to armed forces by modern inventions have made it apparent that, notwithstanding the ruling theory, civilians were certainly 'in the war', and exposed to the same dangers as the combatants – and sometimes worse."[59]

167. In light of such circumstances, the ICRC began to prepare a new conference, which took place in 1977. One of the main purposes of this conference was to improve the protection of the civilian population during armed conflicts. Two Protocols additional to the Geneva Conventions of 1949 were adopted as a result of this conference. Protocol I deals with international armed conflict and Protocol II with non-international armed conflict. Commenting recently on the general problems in implementing the fourth Geneva Convention, the ICRC noted that this Convention "contains no detailed provisions for the protection of the civilian population against the dangers caused by military operations such as aerial bombardments and shelling. This gap was later filled by Protocol I Additional to the Geneva Conventions."[60] Similarly, Protocol II had to supplement Common Article 3 in order to improve the protection of civilians in internal armed conflicts.

168. One of the very important supplements of Protocol II to Common Article 3 is Part IV entitled "Civilian Population." In this Part the Protocol provides not only for the protection of "individual civilians," but directly addresses the issue of the protection of the "civilian population." Article 13 of Additional Protocol II states, "the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations." This part contains six detailed Articles providing for the protection of objects indispensable to the survival of the civilian population, protection of works and installations containing dangerous forces, protection of cultural objects and places of worship, prohibition of forced movement of civilians, activities of relief societies et cetera.

4.3.4 The Test of Applicability of Common Article 3 and Additional Protocol II

Introduction

169. The Trial Chamber is of the opinion that in order for an act to breach Common Article 3 and Protocol II, a number of elements must be shown. It must be established that the armed conflict in Rwanda in this period of time was of a non-international character. There must also be a link between the accused and the armed forces. Further, the crimes must be committed *ratione loci* and *ratione personae*. Finally, there must be a nexus between the crime and the armed conflict.

The Trial Chamber shall, therefore, consider each of these elements in turn.

5595

The Nature of the Armed Conflict

170. Both international instruments, Common Article 3 and Protocol II, were in force in 1994 in Rwanda. Therefore, it is proper to consider them together taking into account that Protocol II "develops and supplements Common Article 3 without modifying its existing conditions of application."[61] The general criteria in Protocol II for determining whether armed conflict is of a non-international character was one of the important supplements. An armed conflict which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups, in accordance with Protocol II, should be considered as a non-international armed conflict. This requirement reflects the essential distinction between an international armed conflict, conducted by two or more States, and non-international armed conflict conducted by a State and another armed force which does not qualify as a State.

171. Certain types of internal conflicts, which fall below a minimum threshold, are not recognised by Article 1(2) of Protocol II as non-international armed conflict, namely, "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature." The remaining criteria define the necessary characteristics of the dissident armed forces or other organised armed groups, which must:

1. be under responsible command;
2. exercise control over part of the territory of the State;
3. carry out sustained and concerted military operations, and
4. be able to implement the Protocol.

172. Thus, in the present case, all material requirements existed to consider the situation in Rwanda, during April, May, June and July 1994, as an armed conflict, not of an international character. This conflict took place in the territory of Rwanda between governmental armed forces (Forces Armées Rwandaises – the FAR) and the dissident armed forces (Rwandese Patriotic Front – the RPF). These dissidents, under the responsible command of General Kagame, exercised control over part of the territory of Rwanda and were able to carry out sustained and concerted military operations as well as to implement Common Article 3 and Protocol II.

A Link Between the Accused and the Armed Forces

173. In accordance with Article 6 of the ICTR Statute, a person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime." Article 4 of the Statute especially provides for prosecuting persons for serious violations of Common Article 3 and Protocol II. Therefore, the question is whether the accused falls within the class of persons who may be held responsible for serious violations of these international instruments.

174. Violations of Common Article 3 and Protocol II could be committed during, or as a result of, military operations. This means that the Parties to an armed conflict should be responsible for such breaches. In the instant case, this would constitute the FAR and the RPF. The ability of the RPF as a dissident armed force to implement legally binding international instruments is considered in Protocol II as a fundamental criteria in order to recognise the non-international character of the armed conflict. The ability of the governmental armed forces to comply with the provisions of such instruments is axiomatic. In the instant case, the two armies were well organised and participated in the military operations under responsible military command. Therefore, based on Article 6(1) of the ICTR Statute, it could be concluded that the appropriate members of the FAR and RPF shall be responsible individually for violations of Common Article 3 and Protocol II, if factually proven.

175. Thus, individuals of all ranks belonging to the armed forces under the military command of either of the belligerent Parties fall within the class of perpetrators. If individuals do not belong to the armed forces, they could bear the criminal responsibility only when there is a link between them and the armed forces. It cannot be disregarded that the governmental armed forces are under the permanent supervision of public officials representing the government who had to support the war efforts and fulfil a certain mandate. On this issue, in the *Akayesu* Judgement, Trial Chamber I was correct to include in the class of perpetrators, "individuals who were legitimately mandated and expected as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government to support or fulfil the war efforts."[62]

176. Thus, the Trial Chamber is of the opinion that the laws of war apply not only to the members of the armed forces but, in certain cases, to civilians as well, if so established factually. In this case, the accused persons could fall within the class of individuals who may be held responsible for serious violations of Common Article 3 and Protocol II. Violations of these international instruments could be committed outside the theatre of combat. For example, the captured members of the RPF may be brought to any location within the territory of Rwanda and could be under the control or in the hands of persons who are not members of the armed forces. Therefore, every crime should be considered on a case-by-case basis taking into account the material evidence presented by the Prosecution. In other words, the evidence needs to show, beyond a reasonable doubt, that there was a link between the accused and the armed forces.

Ratione Personae

177. Two distinct issues arise with respect to personal jurisdiction over serious violations of Common Article 3 and Protocol II. In addition to the class of perpetrators, which has been considered above, the issue of the class of victims should be addressed.

178. It is delineated in paragraph 1 of the Indictment that, "thousands of men, women, and children

5597

were killed and numerous people injured" at the four sites in the *Prefecture* of Kibuye betwe April and 30 June 1994. It was added in paragraphs 25, 32, 39 and 45 of the Indictment that "these men, women and children were unarmed and were predominantly Tutsis."

179. On the basis of the definition of the civilian population contained in Article 50 of Additional Protocol I, the conclusion could be made that the victims of the massacres which occurred at the four sites, referred to in the Indictment, qualify as the civilian population. This definition stipulates, "the civilian population comprises all persons who are civilians." The first paragraph of the same Article indicates that, "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." Each of these Articles enumerates the various types of combatants. Therefore, in accordance with this definition, for the purpose of protection of victims of armed conflict, all persons who are not combatants might be considered civilians.

180. On this basis, the ICRC comes to the following conclusion: "Thus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces."[63] It should be noted that there is a certain distinction between the terms "civilians" and "civilian population." There are civilians who accompany the armed forces or are attached to them. Civilians could even be among combatants who take a direct part in the hostilities. There is clear confirmation of this fact in Protocol II which stipulates that, "civilians shall enjoy the protection afforded by this part unless and for such time as they take a direct part in the hostilities."[64] However, the civilian population as such does not participate in the armed conflict. Article 50 of Protocol I emphasises, "the presence within the civilian population of individuals who do not come within the definition of civilian does not deprive the population of its civilian character."[65]

181. It is generally known that the civilian population is unarmed and is not in any way drawn into the armed conflict. The Chamber also takes into account the fact that the Defence did not challenge the civilian status of the victims. Whether there is a material averrment for charges involving Article 4 of the Statute is a question of findings which is addressed in Part VI of the Judgement.

Ratione Loci

182. In spite of the fact that there is no clear provision on applicability *ratione loci* either in Common Article 3 or Protocol II, the juridical situation is rather clear. The Chamber has to recall that two Parties in the armed conflict were legally bound by the provisions of these international instruments. Therefore, in accordance with requirements of international public law, these instruments should be applicable in the whole territory of Rwanda. Moreover, in Article 4 of Protocol II, which in principle reproduces Common Article 3, there is a clear indication that the enumerated criminal acts "shall remain prohibited at any time and in any place whatsoever." Therefore, it is unnecessary that serious violations of

5598

Common Article 3 and Protocol II occur in the actual theatre of operations. Captured per example, could be brought to other locations of the territory, but despite this relocation, they should be treated humanely. The expression "at any time whatsoever" means that the temporal factor does not assume a narrow interpretation. This approach was confirmed by the ICTY Appeal Chamber in its decision on jurisdiction in the *Tadic* Judgement wherein it was held that,

> . . . the geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of Common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking an active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations.[66]

183. The Appeal Chamber also remarked in this paragraph that "like Common Article 3, it explicitly protects all persons who do not take a direct part or who have ceased to take part in the hostilities... Article 2(1) [of Protocol II] provides 'this Protocol shall be applied [...] to all persons affected by an armed conflict as defined in Article 1'." After quoting Article 2(2) of Protocol II about persons who have been deprived of their liberty the Appeals Chamber noted that "under this last provision the temporal scope of the applicable rules clearly reaches beyond the actual hostilities...*The nexus required is only a relationship between the conflict and the deprivation of liberty,* not that the deprivation occurred in the midst of battle."[Emphasis added]. On the basis of the foregoing, the Appeal Chambers came to the conclusion that in case of internal conflict, until a peaceful settlement is achieved, international humanitarian law continues to apply in the whole territory under the control of a Party, whether or not actual combat takes place there and the crimes committed in these circumstances should be considered as crimes "in the context of an armed conflict."[67] Thus, the Appeals Chamber found that the alleged crimes should not be considered in the narrow geographical and temporal framework and should be understood as crimes committed in the context of an armed conflict if there is a relationship between this conflict and the offence.

Serious Violations

184. The competence of the Chamber is limited to serious violations of Common Article 3 and Protocol II. Article 4 of the ICTR Statute states that the persons committing or ordering to be committed *serious violations* of Common Article 3 and Protocol II should be prosecuted. The Chamber finds that this is a qualitative limitation of its competence and the phrase "serious violations" should be interpreted as breaches involving grave consequences. The list of prohibited acts, which is provided in Article 4 of the ICTR Statute, as well as in Common Article 3 and in Article 4 of Protocol II, undeniably should be recognised as serious violations entailing individual criminal responsibility.

Nexus Requirement Between the Armed Conflict and the Crime

185. It is important to establish whether all the crimes committed during the non-international armed conflict should be considered as crimes connected with serious violations of Common Article 3 and Protocol II. The Chamber is of the opinion that only offences, which have a nexus with the armed conflict, fall within this category. If there is not a direct link between the offences and the armed conflict there is no ground for the conclusion that Common Article 3 and Protocol II are violated.

186. The jurisprudence in this area of the law requires such a link between the armed conflict and the offence. The ICTY Trial Chamber in the Judgement of *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo* (*Celebic¥* Judgement) stated that "there must be an obvious link between the criminal act and the armed conflict."[68] The same point of view is reflected in the *Tadic* Judgement. In *Tadic*, the Trial Chamber remarked that "the only question to be determined in the circumstances of each individual case was whether the offences were closely related to the armed conflict as a whole."[69] In the *Akayesu* Judgement, the Trial Chamber found that ". . .it has not been proved beyond reasonable doubt that the acts perpetrated by Akayesu ...were committed in conjunction with the armed conflict." Such a conclusion means that, in the opinion of that Chamber, such a connection is necessary.

187. This issue was discussed recently at the first session of the Preparatory Commission for the International Criminal Court (16 to 26 February 1999). From the point of view of the participants, war crimes would occur if the criminal conduct took place in the context of and was associated with the armed conflict.[70]

188. Thus the term "nexus" should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established *factually.* No test, therefore, can be defined *in abstracto.* It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed. It is incumbent upon the Prosecution to present those facts and to prove, beyond a reasonable doubt, that such a nexus exists.

189. The nexus requirement between the offence and the armed conflict is of crucial significance, taking into account that Common Article 3 and Protocol II are designed to protect the victims of the armed conflict. War crimes are inevitably connected with violations of Common Article 3 and Protocol II. Whether there is a nexus between the alleged crimes and the armed conflict in the instant case is an issue of legal findings which will be addressed in Part VI of the Judgement. At this stage it should be highlighted that the consideration of the applicability of the provisions of Common Article 3 and Protocol II would be proper if such a nexus is established.

Conclusion

5600

190. It remains for the Chamber to make a finding in the context of the events alleg - Indictment with regard to the culpability of the accused under Article 4 of the ICTR Statute. This will be addressed in the Legal Findings Part of the Judgement.

4.4 CRIMINAL RESPONSIBILITY, ARTICLES 6(1) AND 6(3)

4.4.1 Individual Responsibility – Article 6(1)

191. The Indictment sets out in its General Allegations (paragraph 21) that both Kayishema and Ruzindana, pursuant to Article 6(1) of the Tribunal's Statute, are individually responsible for the execution of crimes referred to in Articles 2 to 4 of the same Statute. Whilst the Chamber will examine the specific charges raised in the Indictment below, it must first address the inherent requirement that the accused be individually responsible for the commission of these crimes. In this respect the Statute adopts a wide scope of inclusion. Article 6(1) states

> A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation and execution of the crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

192. The Parties addressed the Chamber with regard to the interpretation and application of this paragraph to the events in question. Accordingly, it is necessary to consider the degree of participation required in the crimes delineated in Articles 2 to 4 of the Statute. Only then, and in light of the factual findings set out below, is it possible to identify whether either Ruzindana or Kayishema are individually criminally responsible pursuant to Article 6(1).

193. Before addressing the requisite elements necessary to find individual criminal responsibility under Article 6(1), the Trial Chamber will first examine the issue of statutory construction raised by Counsel for Ruzindana.

194. The Defence focused upon a very specific interpretation of Article 6(1). They contended that the modes of participation, "planning, instigation, ordering, committing", should be read cumulatively, but separately from, "aiding and abetting".[71] Only such a position, it was submitted, would give full weight to the drafters use of "or" within the Article. Furthermore, because "abetting" and "instigating" have the same meaning, to avoid concurrence it was posited that "aiding and abetting" should also be read cumulatively despite the ruling in the *Akayesu* Judgement.

195. The Trial Chamber is of the opinion that the interpretation submitted by the Defence would not only offend common sense, but would also be contrary to the findings of the Chamber in the *Celebici* Judgement, where it stated categorically,

> . . . that individuals may be held criminally responsible for their participation in the commission of offences in *any* of the several capacities is in clear conformity with general principles of criminal law. As concluded by the Trial Chamber II in the *Tadic* Judgement, there can be no

5602

doubt that this corresponds to the position under customary international law.[72] [e... added]

196. Similar reasoning is found in the *Akayesu* Judgement where the Chamber remarked, "Article 6(1) covers *various* stages of the commission of a crime."[73] [emphasis added]. Trial Chamber I in the *Akayesu* Judgement also held that, "aiding and abetting" were not synonymous, thus could separately give rise to individual responsibility. After stating these principles the Chamber in *Akayesu* proceeded to find the accused guilty of nine counts pursuant to one or more of the modes of participation expressed in Article 6(1).

197. The Trial Chamber can see no reason to depart from these logical and well-founded expressions of international law. Therefore, if any of the modes of participation delineated in Article 6(1) can be shown, and the necessary *actus reus* and *mens rea* are evidenced, then that would suffice to adduce criminal responsibility under this Article.

198. The Trial Chamber is of the opinion that, as was submitted by the Prosecution, there is a further two stage test which must be satisfied in order to establish individual criminal responsibility under Article 6(1). This test required the demonstration of (i) participation, that is that the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime.[74]

199. The first point of this test, the *actus reus* of participation, was considered in great detail by Trial Chamber I in the *Akayesu* Judgement and by the ICTY in the *Tadic* Judgement.[75] It is now firmly established that for the accused to be criminally culpable his conduct must have been proved, beyond a reasonable doubt, to have contributed to, or have had an effect on, the commission of the crime.[76] What constitutes the *actus reus* and the requisite contribution inevitably varies with each mode of participation set out in Article 6(1).[77] What is clear is that the contribution to the undertaking be a substantial one, and this is a question of fact for the Trial Chamber to consider.

200. It is not presupposed that the accused must be present at the scene of the crime, nor that his contribution be a direct one. That is to say, in light of the decision rendered in the *Furundzjia* Judgement and the jurisprudence set out therein, the role of the individual in the commission of the offence need not always be a tangible one. This is particularly pertinent where the accused is charged with the "aiding" or "abetting" of a crime. In *Furundzija* it was held, ". . . an approving spectator who is held in such respect by the other perpetrators that his presence encourages them in their conduct, may be guilty of complicity in a crime against humanity."[78]

201. This Chamber concurs. The presence of such a spectator need not be a *conditio sine qua non* for

5603

the principal. Therefore, subject to the caveat that the accused knew the effect that his presen have, he may be found responsible under Article 6(1) for such a contribution to the commission of any of the offences specified in the Tribunal's Statute.

202. This jurisprudence extends naturally to give rise to responsibility when the accused failed to act in breach of a clear duty to act. The question of responsibility arising from a duty to act, and any corresponding failure to execute such a duty is a question that is inextricably linked with the issue of command responsibility. This is because under Article 6(3) a clear duty is imposed upon those in authority, with the requisite means at their disposal, to prevent or punish the commission of a crime. However, individual responsibility pursuant to Article 6(1) is based, in this instance, not on the duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission.[79]

203. In view of such a broad scope of participation that may give rise to responsibility under Article 6 (1), there must be a clear awareness that this participation will lead to the commission of a crime.[80] The Trial Chamber has set out, in Chapter 5.1 of this Judgement, that the clear objective of the atrocities occurring throughout Rwanda and the Kibuye *Prefecture*, in 1994, was to destroy the Tutsi population. The perpetrators of these crimes, therefore, were united in this common intention. On this point, the Chamber in the *Celebici* Judgement declared that where,

> . . . a plan exists, or where there otherwise is evidence that members of a group are acting with a common criminal purpose, all those who knowingly participate in, and directly and substantially contribute to, the realisation of this purpose may be held criminally responsible . . and . . .[d] epending upon the facts of a given situation, the culpable individual may, under such circumstances, be held criminally responsible either as a direct perpetrator of, or as an aider and abettor to, the crime in question.[81]

204. The Trial Chamber concludes, therefore, that the members of such a group would be responsible for the result of any acts done in furtherance of the common design where such furtherance would be probable from those acts.

205. Thus, the accused need not necessarily have the same *mens rea* as the principal offender. Whilst knowledge or intention will give rise to individual responsibility under Article 6(1), the distinction is only of importance in distinguishing whether the accused aids or abets a crime or is a co-perpetrator.[82]

206. Such a requirement of *mens rea* refutes the contention by Counsel for Kayishema that the burden of proof is reversed when the *actus reus* for responsibility, under this Article, arises through the failure to perform an act. The Prosecution must prove that the accused was aware that his failure to act would contribute to the commission of a crime.

5604

207. In short, therefore, the Chamber finds that each of the modes of participation may, independently, give rise to criminal responsibility. The Prosecution must prove that through his mode of participation, whether it be by act(s) or omission(s), the accused contributed substantially to the commission of a crime and that, depending on the mode of participation in question, he was at least aware that his conduct would so contribute to the crime.

4.4.2 Command Responsibility – Article 6(3)

208. The Indictment further alleges that Kayishema was, "also or alternatively individually responsible for the criminal acts of his subordinates". In this respect, Article 6(3) is pertinent. It states,

> The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew, or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[83]

Ruzindana is not charged under Article 6(3).

209. The principle of command responsibility is firmly established in international law, and its position as a principle of customary international law has recently been delineated by the ICTY in the *Celebici* Judgement.[84] The clear recognition of this doctrine is now reflected in Article 28 of the Rome Statute of the ICC.

210. The finding of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding responsibility additionally, or in the alternative, under Article 6(3). The two forms of responsibility are not mutually exclusive. The Chamber must, therefore, consider both forms of responsibility charged in order to fully reflect the culpability of the accused in light of the facts.

211. There were no submissions made by the Defence with regard to the legal underpinning of Article 6(3). As such, the Trial Chamber will consider the position advanced by the Prosecution concomitantly with its examination of the various elements that must be satisfied in order to establish criminal liability under the doctrine of command responsibility.

212. It is essential to consider first whether Kayishema, in his role as *Prefect*, is subject to the notion of command responsibility set out in Article 6(3). Secondly, it is incumbent upon the Chamber to consider who constitutes the subordinates over whom Kayishema would exercise command. In this respect it would also be necessary to clarify whether those subordinates must be under his *de jure*

5605

command, or if *de facto* subordination would suffice. Thirdly, the requisite degree of knowled subordinate's actions required to establish command responsibility must also be considered. Finally, the Chamber must address the question of when an individual becomes responsible under this doctrine for failing to prevent a crime or punish the perpetration thereof.

Responsibility of a Non-Military Commander

213. The Prosecution submitted that the principle of superior responsibility applies not only to military commanders, but also extends to civilians in positions of authority.[85] The Chamber finds that the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one. There are a number of reasons for this.

214. The construction of the Statute itself is clear. It makes no limited reference to the responsibility to be incurred by military commanders alone.[86] Rather, the more generic term of "superior" is used. The Chamber concurs with the observation in the *Celebici* Judgement that this generic term, coupled with its juxtaposition to the individual criminal responsibility of "Head[s] of State or Government" or "responsible Government officials" in Article 6(2), clearly reflects the intention of the drafters to extend this provision of superior responsibility beyond military commanders, to also "encompass political leaders and other civilian superiors in positions of authority."[87]

215. The jurisprudence also supports this interpretation. Before Trial Chamber I of this Tribunal, the former Prime Minister, Jean Kambanda, pleaded guilty to crimes against humanity and genocide by virtue, *inter alia*, of Article 6(3).[88] Similarly, Omar Serushago, a prominent local civilian and leader of the members of the *Interahamwe* in Gisenyi *Prefecture*, also pleaded guilty to crimes against humanity and genocide and acknowledged responsibility for these crimes pursuant to Article 6(3).[89] In addition, the *Celebici* Judgement, which addressed this issue in great detail, highlighted the practice of the Military Tribunal for the Far East (Tokyo Tribunal), and the Superior Military Government Court of the French Occupation Zone in Germany, where senior politicians and even leading industrialists were charged with the commission of war crimes committed by their subordinates.[90]

216. The crucial question in those cases was not the civilian status of the accused, but of the degree of authority he exercised over his subordinates.[91] Accordingly the Chamber accepts the submission made by the Prosecution that a civilian in a position of authority may be liable under the doctrine of command responsibility. The Chamber will turn, therefore, to consider in what instances a civilian can be considered a superior for the purposes of Article 6(3), and the requisite "degree of authority" necessary to establish individual criminal culpability pursuant to this doctrine of superior responsibility.

Concept of Superior: de Jure and de Facto Control

217. This superior-subordinate relationship lies at the heart of the concept of command

5606

responsibility. The basis under which he assumes responsibility is that, if he knew or had r know that a crime may or had been committed, then he must take all measures necessary to prevent the crime or punish the perpetrators. If he does not take such actions that are within his power then, accordingly, he is culpable for those crimes committed. The Trial Chamber in *Celebici* set out the guiding principle in this respect, when it stated that, "[T]he doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates".[92] The Chamber then elaborated upon this principle by warning that, "[We] must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts."[93]

218. In order to 'pierce the veils of formalism' therefore, the Chamber must be prepared to look beyond the *de jure* powers enjoyed by the accused and consider the *de facto* authority he exercised within Kibuye during April to July 1994. The position expounded by the ILC that an individual should only be responsible for those crimes that were within his legitimate legal powers to prevent,[94] does not assist the Trial Chamber in tackling the, 'realities of any given situation'. Therefore, in view of the chaotic situation that which prevailed in Rwanda in these pivotal months of 1994, the Chamber must be free to consider whether Kayishema had the requisite control over those committing the atrocities to establish individual criminal liability under Article 6(3), whether by *de jure* or *de facto* command.

219. A concentration upon the *de jure* powers of the *prefect* would assist neither Party. For example, focussing upon the *de jure* power of the *prefect* under the 1991 Constitution would be to prevent proper consideration of the Defence's case that the climate in Rwanda and the practical realities at that time were such that the *prefect* not only had no control over certain *de jure* subordinates, but also that he had no means to effectively prevent the atrocities that were occurring. Equally, a restricted view of the concept of superior to those exercising *de jure* control would not enable the Chamber to adequately consider the arguments of the Prosecution. She submitted that Kayishema exercised both legal command over those committing the massacres and *de facto* authority over these and other assailants such as the members of the *Interahamwe*.

220. This approach is also congruent with the *Celebici* case and the authorities cited therein.[95] For example, having examined the Hostage and High Command cases the Chamber in *Celebici* concluded that they authoritatively asserted the principle that, "powers of influence not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility." This Trial Chamber concurs.

221. Moreover, the Rome Statute for the ICC, having delineated the circumstances in which a military commander would incur responsibility as a superior, stipulates in Article 28(2) that all other superiors shall be criminally responsible for acts, "committed by subordinates under his or her *effective*

5607

control." [emphasis added].

222. Article 6 of this Tribunal's Statute is formulated in a broad manner. By including responsibility of all government officials, all superiors and all those acting pursuant to orders, it is clearly designed to ensure that those who are culpable for the commission of a crime under Articles 2 to 4 of the Statute cannot escape responsibility through legalistic formalities. Therefore, the Chamber is under a duty, pursuant to Article 6(3), to consider the responsibility of all individuals who exercised effective control, whether that control be *de jure* or *de facto*.

223. Where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to found command responsibility. The Chamber need only consider whether he knew or had reason to know and failed to prevent or punish the commission of the crimes if he did not in fact order them. If the Chamber is satisfied beyond a reasonable doubt that the accused ordered the alleged atrocities then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish.

224. However, in all other circumstances, the Chamber must give full consideration to the elements of 'knowledge' and 'failure to prevent and punish' that are set out in Article 6(3) of the Statute.

Knowledge of Subordinates' Actions

225. The *mens rea* in Article 6(3) requires that for a superior to be held criminally responsible for the conduct of his subordinates he must have known, or had reason to know, of their criminal activities. If it can be proven beyond a reasonable doubt that the superior knew of the crimes that were being committed by those over whom he exercised control then the requisite *mens rea* is clearly established.

226. However, when we consider that individual responsibility arises when the superior "had reason to know" that a crime had or was about to be committed, the requisite *mens rea* is not so clear. The expansive approach to apportioning command responsibility in the cases following the Second World War was observed by the Trial Chamber in the *Celebici* Judgement. These cases first imposed a duty for the commander to know everything that occurred within his ambit of jurisdiction, and then imposed responsibility upon the commander for failure to fulfil that duty.[96] The Chamber in the *Celebici* case did not follow this reasoning. Instead it preferred it be proven that some information be available that would put the accused on notice of an offence and require further investigation by him.

227. On this issue, the Chamber finds the distinction between military commanders and other superiors embodied in the Rome Statute an instructive one.[97] In the case of the former it imposes a more active duty upon the superior to inform himself of the activities of his subordinates when he, "knew or, owing to the circumstances at the time, should have known that the forces were committing or

5608

about to commit such crimes." This is juxtaposed with the *mens rea* element demanded of superiors who must have, "[known], or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes."

228. The Trial Chamber agrees with this view insofar that it does not demand a *prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control. In light of the objective of Article 6(3) which is to ascertain the individual criminal responsibility for crimes as serious as genocide, crimes against humanity and violations of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto, the Chamber finds that the Prosecution must prove that the accused in this case either knew, or consciously disregarded information which clearly indicated or put him on notice that his subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal's Statute.

Effective Control: Failure to Prevent or Punish a Crime

229. The principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. This material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3). The International Law Commission in its Draft Code went so far as to suggest that for a superior to incur criminal responsibility, he must have, "the legal competence to take measures to prevent or repress the crime *and* the material possibility to take such measures."[98] [emphasis added].

230. However, as the Chamber highlighted above, to give such prominence to the *de jure* power bestowed upon an individual is to provide justice to neither Party. There is a need to shed this legalistic formalism and to focus upon the situation which prevails in the given fact situation. Therefore, the Chamber prefers the position as set out in the *Celebici* Judgement where it was held that,

> . . . the superior have effective control over the persons committing the underlying violations of humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character. . .[99]

231. Accordingly, the ability to prevent and punish a crime is a question that is inherently linked with the given factual situation. Thus, only in light of the findings which follow and an examination of the overall conditions in which Kayishema had to operate as *Prefect*, can the Chamber consider who were the subordinates to Kayishema from April to July 1994 and whether he exercised the requisite degree of control over them in order to conclude whether he is individually criminally responsible for the atrocities committed by them.

5609

[1] Virginia Morris & Michael Scharf, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, 167 (1998)

[2] Cited in Bassiouni, in THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FOI YUGOSLAVIA, p. 524, and UN AND RWANDA, 1993-6, p. 432, para. 166.

[3] Wisconsin International Law Journal, 243 (1996).

[4] UN Doc. E/CN.4/Sub.2/1985/6, p. 16, para. 29.

[5] Morris & Scharf, *supra*, p. 168.

[6] Prosecutor's Brief, 9 Oct. 1998, p. 30.

[7] *Akayesu* Judgement, para. 731.

[8] ILC Draft Code of Crimes' p. 42, para. 8.[Throughout the text, page citations to the International Law Commission (ILC) Report 1996 may refer to the Internet version at http://www.un.org/law/ilc/reports/196/chap02.htm]

[9] *Ibid.*

[10] Mr. Whitaker, in UN Doc. E/CN.4/Sub.2/1985/6, p. 16, para. 29.

[11] Trans., 21 Oct. 1998, p. 91.

[12] *Ibid.*

[13] ILC Draft Code of Crimes, p. 42, (commenting upon sub-paragraph (a) to (e) of Article 17).

[14] Paras. 500 – 501, p. 206.

[15] Rahetlah, submission, 21 October 1998, pp. 114 to 121.

[16] *Akayesu* Judgement, para 502.

[17] *Akayesu* Judgement, paras 706-07 and 711-12.

[18] Prosecutor's Closing Brief, 9 Oct. 1998, p. 26.

[19] Prosecutor's Closing Brief, 9 October 1998, p.28.

[20] Nehemiah Robinson, the Genocide Convention: A Commentary (1960), p. 123.

[21] Robinson, *supra*, pp. 63-64.

[22] Law No. 10 of the Control Council for Germany.

[23] International Law Reports (ILR)', vol. 36, p. 31.

[24] 36 ILR.

[25] 125 ILR.

[26] Despite the French text containing the conjunctive 'and' instead of the disjunctive 'or' between the terms widespread or systematic, the Trial Chamber is in no doubt that the correct interpretation is the disjunctive. The matter has already been settled in the *Akayesu* Judgement and needs no further debate here.

[27] The ILC Draft Code of Crimes explained „large scale" (the term used in place of 'widespread') to mean acts that are "directed against a multiplicity of victims." Article 18, para. 4 of commentary.

[28] The ILC Draft Code of Crimes defines systematic as "meaning pursuant to a preconceived plan or policy. The implementation of this plan or policy could result in the repeated or continuous commission of inhumane acts. The thrust of this requirement is to exclude random acts that were not committed as part of a broader plan or policy." Article 18, para. 3 of commentary.

[29] ILC Draft Code of Crimes Article 18.

[30] ILC Draft Code of Crimes Art. 18 para. 5 of commentary.

5640

[31] *Tadic* Judgement, at para 638.

[32] Prosecutor's Closing Brief, p. 42.

[33] For detailed discussion regarding ethnicity see the Historical Context Part of the Judgement.

[34] Closing Arguments at p. 26.

[35] *Tadic* Judgement, at para 656, "therefore in addition to the intent to commit the underlying offence the perpetrator must know of the broader context in which his acts occur."

[36] Indeed, the Statute, Article 2(2)(a)(Genocide) refers to "killing" – "*meurtre*" in French, while Article 4(a) refers to "murder" – "*meurtre*" in French.

[37] Nouveau Code PJnal, Article 221-3 "Le meurtre commis avec prJmeditation constitute un assassinat. Il est puni de la rJclusion criminelle < perpetuitJ. [...]"

[38] *Akayesu* Judgement, at para 588.

[39] For example, at the high end of murder the *mens rea* corresponds to the *mens rea* of *assassinat*, i.e., unlawful killing with premeditation. Conversely, at the low end of murder where mere intention or recklessness is sufficient and premeditation is not required, the *mens rea* of murder corresponds to the *mens rea* of *meurtre*.

[40] Notably the text was drafted in English and French, both being original and authentic. The Statute was then translated into the four remaining official UN languages. Therefore, between English and French there was no translation. Accordingly, there can be no 'error in translation' as such; there can only be a mistake in the drafting of an original text. Notably, the term used in the ICTY Statute is also *assassinat* (ICTY Statute Article 5(a)).

[41] Of course, in common law, there is no crime of unlawful killing that provides for a higher standard of *mens rea* than that of murder. Therefore, even if the drafters intended that only the standard of *mens rea* for *assassinat* would suffice, the drafters would still need to use the term murder in English.

[42] This explanation conforms to the French jurisprudence of the criminal court and to the United States Supreme Court case law.

[43] See Amnesty International's 14 Point Program for the Prevention of Extrajudicial Executions.

[44] *Akayesu* Judgement, at para 591.

[45] Prosecutor's Closing Brief, at p. 36.

[46] *Akayesu* Judgement, at para 735-744.

[47] Ruzindana Closing Argument, at p. 8.

[48] Cherif Bassiouni, Crimes Against Humanity in International Law (Martinus Nijhoff Publishers 1992).

[49] For example, if ten FAR officers fire into a crowd of 200 Tutsis, killing them all. FAR officer X is a poor shot and kills only a single person, whereas officer Y kills 16. Because both X and Y participated in the mass killing and were both aware that their actions formed part of the mass killing event, they will both be guilty of extermination.

[50] ICRC COMMENTARY ON THE GENEVA CONVENTIONS p. 54.

[51] Prosecutor's Closing Brief, p. 37.

[52] See, Ruzindana, Closing Arguments, pp. 38-41.

[53] Prosecutor's Closing Brief, p. 80. See also pp. 93, 101, 105 and 134.

[54] "First Convention," "second Convention," "third Convention" and "fourth Convention" mean, respectively, the Geneva Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field of 12 August 1949; the Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked members of Armed Forces at Sea of 12 August 1949; the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949; the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949.

[55] The Geneva Convention of 12 August 1949, Commentary, IV Geneva Convention, p. 3. (ICRC Pub., 1958). Hereafter,

"Commentary on IV Geneva Convention, ICRC".

[56] *Ibid.*, p. 9.

[57] ICRC comments on Additional Protocol II. See the ICRC website, (visited 6 May. 1999) <http://www.icrc.org>.

[58] Commentary on IV Geneva Convention, p. 34.

[59] Preliminary remarks of the ICRC to the Geneva Conventions of August 12, 1949, p. 17.

[60] Report by ICRC Meeting of Experts, Geneva, 27-29 October 1998, p. 2. See the ICRC website (visited 29 Dec. 1998) <http://www.icrc.org>.

[61] See Art. 1 of Additional Protocol II.

[62] *Akayesu* Judgement, para. 631.

[63] COMMENTARY ON THE ADDITIONAL PROTOCOLS (Jean Pictet, ed.) (ICRC, Martinus Nijhoff Publishers, Geneva, 1987), p. 610, section 1913.

[64] Additional Protocol II, Art. 13(3).

[65] Additional Protocol I, Article 50(3).

[66] ICTY Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995, para. 69.

[67] *Ibid.* para. 70.

[68] *Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo,* Case No. IT-96-21-T, 16 Nov. 1998, para. 193.

[69] *Tadic* Judgement, para. 573.

[70] The Second Discussion Paper (PCNICC/1999/WGE/RT.2).

[71] Defence closing arguments, read from written brief submitted by Mr. Van der Griend on behalf of Ruzindana, on 28 October 1998 ("Closing Brief for Ruzindana"), p. 45. In the Closing Brief for Ruzindana, counsel at once urged this cumulative reading, and then endorsed its disjunctive formulation adopted by the *Akayesu* Judgement, p. 45. The Chamber enunciates its view here for the purpose of clarity.

[72] *Celebici* Judgement, para 321. See also the cases and conventions cited therein.

[73] *Akayesu* Judgement, para. 473. See also para. 484 where Trial Chamber I reads "aiding and abetting" disjunctively.

[74] Prosecution Closing Brief, p. 17. This test was drawn from the *Tadic* Judgement applying identical provisions in Article 7(1) of the ICTY Statute.

[75] See, respectively, paras. 480-484, and paras. 673-674 and 688-692.

[76] See *Tadic* Judgement, para. 673-674; *Celebici* Judgement, para. 326; *Akayesu* Judgement, para. 473-475; *Furundzija* Judgement, para. 235; and the authorities cited therein.

[77] See *Akayesu* Judgement, paras. 480-485.

[78] *Furundzija* Judgement, para 207.

[79] See the *Akayesu* Judgement where the accused's failure to oppose the killings, in light of his authoritative position, was found to constitute a form of tacit encouragement, para. 705.

[80] What constitutes a crime is defined by the Tribunal's Statute. Therefore, only the actual commission of a crime will suffice, except for that of genocide where it is specifically stated that an 'attempt' to commit genocide will give rise to criminal responsibility, Article 2(3)(d) of the Statute.

[81] *Celebici* Judgement, para. 328.

[82] See *Furundzija* Judgement, paras. 250-257.

[83] Hereafter, responsibility arising under this Article shall be referred to as "command responsibility", or "superior responsibility". The terms will be used interchangeably.

[84] *Celebici* Judgement, paras. 333-343, in reference to the respective Article in the ICTY Statute.

[85] Closing Brief, p. 20.

[86] *C.f.* the specification of the responsibility of "military commanders" in Article 87 of Protocol I Additional to the Geneva Conventions 1949, (Jean Pictet ed.).

[87] *Celebici* Judgement, para. 356.

[88] *Prosecutor v. Jean Kambanda*, Judgement and Sentence, Case No.: ICTR 97-23-S (Eng.).

[89] *Prosecutor v. Omar Serushago*, Judgement and Sentence, Case No.: ICTR 98-39-S (Eng.).

[90] *Ibid*, paras. 356-362.

[91] See the opinion of Judge Röling in the "Rape of Nanking" case, and the *Akayesu* Judgement, para. 491.

[92] *Celebici* Judgement, para. 376.

[93] *Ibid.*, para. 377.

[94] ILC Draft Code of Crimes.

[95] *Celebici* Judgement, paras. 364-378.

[96] See *Celebici* Judgement, para. 389, and the cases cited therein, particularly the *Hostage* case, the *Toyoda* case, and the *Pohl* case.

[97] Article 28(1)(a), and 28(2)(a).

[98] ILC Draft Code of Crimes, pp. 38-39.

[99] *Celebici* Judgement, para. 378.

5613

V. FACTUAL FINDINGS

5.1 ALIBI
5.2 DID GENOCIDE OCCUR IN RWANDA AND KIBUYE IN 1994?
5.3 AN INTRODUCTION: THE MASSACRES AT THE CATHOLIC CHURCH AND HOME ST. JEAN COMPLEX, STADIUM IN KIBUYE TOWN AND THE CHURCH IN MUBUGA
5.4 THE MASSACRES IN THE AREA OF BISESERO

5.1 ALIBI

232. Both Kayishema and Ruzindana raised the defence of alibi to the charges levied against them. Both accused assert that they were not at the sites when any of the massacres occurred. The Trial Chamber shall consider the arguments advanced by Kayishema and Ruzindana below. Before examining the specifics of the alibi defences, however, it is first necessary to consider the procedural concerns that have accompanied their invocation.

5.1.1 Alibi Defence and Rule 67 of the Rules

The salient provisions of Rule 67 of the Rules state that,

> (A) As early as reasonably possible and in any event prior to the commencement of the trial:
> (ii) the defence shall notify the Prosecutor of its intent to enter:
> (a) the defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi
>
> (B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on any of the above defences.

233. The requirement upon the Defence to disclose its intention to rely upon the defence of alibi reflects the well-established practice in the common law jurisdictions around the world.[1] It is a requirement necessary in many jurisdictions, and in the jurisdiction of this Tribunal, in order to allow the Prosecution to adequately prepare its case. Once the accused has raised the defence of alibi, the burden to prove this defence may or may not rest upon him depending upon the jurisdiction concerned. In some jurisdictions such as India, the burden of proof rests upon individuals, who plead the defence of alibi.[2] In several other jurisdictions as for example in South Africa, the burden of proof rests upon the Prosecution.[3]

234. In the instant case, the Trial Chamber holds that the burden of proof rests upon the Prosecution to prove its case beyond a reasonable doubt in all aspects notwithstanding that the Defence raised alibi. After all, the accused is presumed innocent until the Prosecution has proved his guilt under Article 20(3) of the Statute. The accused is only required to raise the defence of alibi and fulfil the specific requirements of Rule 67(A)(ii) of the Rules, which stipulates the necessary information required about

the defence of alibi.

235. Under Rule 67 aforementioned, the Defence is required to notify the Prosecution about their intent to rely upon the defence of alibi. However, Counsel for Kayishema made absolutely no indication prior to the commencement of the trial of his intention to rely upon the defence of alibi, and Counsel for Ruzindana only submitted limited information with regard to the witnesses that he intended to call. The Prosecution filed a formal complaint by Motion in which it requested the Trial Chamber to order compliance with Rule 67(A)(ii) of the Rules.[4]

236. During the hearing, Kayishema was asked why, in light of the evidence he had heard against him, he had not raised his defence of alibi at an earlier stage. He stated that as far as the Office of the Prosecutor was concerned, the question was never asked of him. Furthermore, he raised the issue at the first opportunity with his Defence Counsel on 31 May 1996.

237. The Trial Chamber has considered the failure of both Defence Counsels to act in accordance with Rule 67(A)(ii). In its Decision on the above Prosecution Motion, the Chamber ruled,

> . . . that where good cause is not shown, for the application of Rule 67(B), the Trial Chamber is entitled to take into account this failure when weighing the credibility of the defence of alibi and/or any special defences presented.[5]

238. The Trial Chamber notes that the Defence had ample time to prepare their client's defence and takes this on board in consideration of the timeliness of Counsel's notification of the Prosecution in accordance with Rule 67(A)(ii) of the Rules. This approach is congruent with those jurisdictions[6] facing similar difficulties in balancing the needs of the Prosecution with the Defendant's right to testify and present a defence.[7]

239. Counsel for the Defence constantly advanced the argument that the Prosecution's concern over the continued violations of this rule was unjustified in light of the Prosecution's late disclosure of witness lists.[8] However, all Parties to the proceedings had the opportunity to raise such lack of disclosure in the appropriate manner before this Chamber. Therefore, the Defence's failure to follow the Rules of Procedure and Evidence is unacceptable and serves neither the interests of the accused nor of justice. Furthermore, the Defence's observation that under Rule 85 the Prosecution may bring evidence to rebut the alibi, does not mitigate the aforementioned duty upon the Defence under Rule 67.[9] Moreover, the mere fact that the Prosecutor did not utilise Rule 85 to bring evidence in rebuttal will not have any bearing upon the Trial Chamber's assessment of the evidence presented. Thus, this Chamber will accord no extra weight to the accused's defence of alibi merely because the Prosecution did not call witnesses in rebuttal. Considering the Decision on the above Motion, in which the Trial Chamber ordered the compliance with Rules 67(A)(ii) and 67(B) and in light of the considerations discussed

above, the Trial Chamber will, despite the non-compliance with its order and the defianc Defence Counsel, consider the defence of alibi advanced by both Kayishema and Ruzindana without prejudice to the accused.

5.1.2 Kayishema's Alibi Defence

240. The essence of Kayishema's alibi is that he was in hiding from the morning of Saturday 16 April 1994, to the morning of Wednesday 20 April 1994. These dates purportedly removed him from the scene of the massacres at Catholic Church, Home St. Jean Complex and the Stadium that occurred on 16, 17, 18, 19 April. It would also remove him from Mubuga Church on the 16 April, the date that the Trial Chamber has found the major attack at this site occurred. It would not, however, account for his whereabouts in the days that preceded this attack. Kayishema also denies ever being present at any of the massacre sites in the Bisesero area during the period set out in the Indictment, but provides no specific alibi.

241. Kayishema testified before this Trial Chamber that in the early hours of Saturday 16 April, upon the departure of the commanding officer Major Jabo, the Tutsi gendarmes were mutinying and were looking for him with harmful intention. Upon receipt of this information he, with his wife and children, went into hiding. Kayishema stated in his testimony that between 9 and 10 a.m. he and his family left the *prefectorial* house and went into hiding. They sought refuge in the houses of white people in Kibuye because they had already been looted and no one was likely to return to them. The first house was that of Mr. Soufflet which lay along from the *Prefectorial* residence on Lake Kivu, approximately three kilometres from Home St. Jean and the Catholic Church. Kayishema stated that they remained there for the nights of 16 and 17 April. He and his family then moved next door, to the last house in that direction, for the remaining two nights. This was owned by a Swiss technical assistant who was working in the forestry department. Kayishema contended that he was absent from his family only when he would investigate a noise outside or when his informant visited their hiding place. This absence was never in excess of 30 minutes.

242. In an earlier account, Kayishema had volunteered details of this Prosecution period to the investigators, as shown in exhibit 350C, a transcript of the interview with investigators. On 6 November 1996, during the interview with investigators, Kayishema stated that he was in his own home during the period of the massacres at Home St. Jean, the Catholic Church, and the Stadium. Although at this time he could not remember the dates, or the days of the week that he was confined to his house, Kayishema identified individuals with whom he had hidden, namely Emmanuel Dusabimana, Alphonse Kayiranga, the wife of Lieutenant Charles Twagirayezu and the Tutsi wife of a Hutu named Francois. He did not, however, call any of these people to testify on his behalf. In this statement he also asserted that he would spend his nights, in the bush, hiding. During his cross-examination Kayishema explained the

difference between his oral testimony and his statement to the investigators. He stated that hi in both was that he had been in hiding during the period of the massacres at the aforementioned sites and, therefore, could not have perpetrated the atrocities alleged.

243. In his testimony, Kayishema went on to describe his activities after he came out of hiding. He talked of travelling around the *Prefecture*, burying bodies and taking wounded or malnourished children to the hospital, around 22 April. He met with the interim Prime Minister, Jean Kambanda, on 3 May and attended a public meeting with him. Kayishema also talked of going to Gitarama on 9 May in order to meet with the interim government that was based there at that time. His diary,[10] the personal diary of the *Prefect*, details meetings on 10, 11, and 13 May with his *sous prefects*. Kayishema referred to these meetings, as well as those on the 14 May with his prefectorial council and on 16 May with the interim president, in his testimony to the Trial Chamber. He also confirmed that he had gone into the Bisesero area throughout May, but only to conduct his prefectorial duties and to investigate the disparities between the information he had received and the actual situation in the area. Kayishema submitted, therefore, that Defence witness DU, who testified that the defendant had not left his prefectorial office in this period, had been mistaken. Kayishema maintained, however, that he never visited any of the massacre sites in the Bisesero area during the months of April, May and June 1994 as charged in the Indictment. Moreover, when questioned in cross-examination about eye-witnesses who had identified him in the Bisesero area at specific sites such as Muyira Hill, and the Cave, Kayishema maintained that he did not know where such sites were even located. He asserted that those witnesses who identified him at various massacre sites either between 16 to 20 April, or in the Bisesero area during the massacres in April, May and June had erred.

Defence Witnesses in Support of Kayishema

244. In support of his alibi defence, the defendant called a number of witnesses, including his wife. In her first statement to investigators Mrs. Kayishema had stated that she, her husband and their children had gone into hiding in mid April. She also stated that on 13 May, the date of one of the major attacks in the Bisesero area, her husband had driven her to work in the morning and after dropping her at her work place, he went directly to his office. She arrived at work that Friday morning at 8 a.m., and returned home with her husband at 11 a.m.

245. In her testimony before the Chamber, however, Mrs. Kayishema, who holds a degree in education science and has served as a school inspector, clarified and elaborated upon her first statement. She contended that they had gone into hiding between 16 and 20 April 1994, following the departure of the commanding officer of the *gendarmerie nationale* in Kibuye Prefecture on 15 April. The corporal who remained was an RPF sympathiser and, she asserted, they had been informed that he had made various threats against the *prefect*. Although in her testimony Mrs. Kayishema referred to just female and sick gendarmes who had remained behind after the meeting on 15 April, she maintained that she and

5617

her husband had gone into hiding on 16 April for fear of their lives. They hid in the houses people who had been building the roads, staying in several houses and changing frequently. No more details about the houses were given. However, when questioned about her initial statement to investigators where she claimed to have gone into hiding in the bush for three days, she was able to clarify to this Chamber that she and her children had been hiding in the houses, and that her husband had spent the nights in the bush.

246. In her testimony, Kayishema's wife further elaborated upon the events of Friday 13 May 1994. In addition to the activities in the morning, she recalled that she had attended a public meeting chaired by her husband. The meeting, which began at 2 p.m., was to present the new *sous prefets*. Mrs. Kayishema did not offer any further testimony regarding her husband's whereabouts over the ensuing weeks, but simply stated that he continued with his duties as *Prefect* until their departure to Zaire on 16 July 1994.

247. Most witnesses for Kayishema had either not seen him at all during the period in question, such as witness DAC, or had seen him for very short periods of time on isolated occasions. Witness DN, for example, had seen him at a meeting in late April, witness DK saw him at a meeting to inaugurate a school in mid May, and witness DM had seen him briefly sometime in May at the roundabout at the centre of Kibuye Town. Consequently, although all Defence witnesses testified to never having heard of the participation of their *Prefect* in these massacres, very little specific evidence was proffered as to the accused's whereabouts during their execution. Only two other witnesses were able to provide further detailed insight into Kayishema's activities from 6 April 1994. With regard to the massacre at Mubuga Church, the only witness presented by the Defence was DV. The witness knew the accused by sight because he had seen him in Gitesi where he undertook his studies. He had not actually been present at the massacre and was unsure of the date it occurred. However, he lived only six to seven hundred meters from Mubuga Church and stated that he had not seen the defendant in the vicinity during the period of the massacres. In fact, witness DV testified that he did not see the defendant at all throughout April, May, June or July.

248. Witness DU testified as to Kayishema's whereabouts from 4 May to 16 July 1994. His testimony covered almost the entire period. He knew the defendant well and stayed in Kayishema's house upon returning to Kibuye on 4 May. DU also worked in a canteen, just fifteen meters from the entrance of the *Prefecture* offices. Although he could not see Kayishema's office, he had a clear view of the entrance of these offices. He testified that he saw Kayishema every day over those two months. He ate breakfast, lunch and evening meals with Kayishema and his family, and often travelled to and from work with him. In the opinion of DU, Kayishema could not have visited the Bisesero area at any time from 4 May to 16 July because the defendant was never absent for periods in excess of 30 minutes. The witness felt able to state this with some certainty because of the proximity of the canteen to the

defendant's offices and the fact that the noise of Kayishema's vehicle as he arrived at or depa. the offices made his whereabouts very obvious. The one exception that the witness could recall to these minimal absences was when Kayishema led a meeting and was gone for six hours. Mrs. Kayishema informed witness DU that Kayishema was at a meeting. Like the many other witnesses called for the Defence, DU had never heard any reference to the participation in any massacres by his *Prefect*, Kayishema.

Examination of Kayishema's Alibi Defence

249. Having set out the defence propounded by Kayishema, the Trial Chamber has also given consideration to the various arguments raised by the Prosecution with regard to the issue of Kayishema's alibi. Particularly, the Chamber has taken note of the many contradictions in the defence raised by Kayishema. These are contradictions not only within his own testimony, but also contradictions between his testimony and the testimony of his wife and the other witnesses called on his behalf.

250. The Trial Chamber observes Kayishema's various statements to the investigators and to the Chamber do not correlate. For instance, in his first voluntary statement to investigators in July 1996 Kayishema made no reference to being in hiding or to the events which supposedly led to his being in hiding, namely the 'mutiny' of the *gendarmerie nationale*. A number of observations may be made in this regard. In the first instance, the Trial Chamber does not make a negative finding due solely to Kayishema's non-disclosure of his alibi during the initial interviews with investigators. However, in addition to this non-disclosure within his interviews, in Kayishema's diary there was no mention of him either being in hiding or of the gendarme mutiny. The diary, Kayishema confirmed, was the personal diary of the *Prefect*. Whilst this Chamber appreciates that it is not possible to note every event which occurred, it is surprising that no mention was made of such major events, in particular those that precluded him from undertaking his official functions as *Prefect*.

251. The second statement given by Kayishema to investigators, on 6 November 1996, also differs in many respects from his testimony before this Chamber. In that interview, Kayishema did not remain silent, but gave specific details of his whereabouts during the massacres at the Home St. Jean complex, the Catholic Church and Gatwaro Stadium. He stated that he was in his home, the residence of the *Prefect*. When questioned specifically if he was in his home, for the whole time, Kayishema affirmed, "Home, in *my* house." Kayishema further provided the names of those individuals with whom he was hiding, as set out above. He also went on to describe how he would have to spend entire nights in the bush. Kayishema's statement that he was in his own home contradicts his testimony in court where he testified that he was in hiding in houses belonging to others. In his testimony, responding to a judicial question inquiring whether he was in *his* home or in hiding, Kayishema confirmed that he was hiding in the bush *at night*. This answer does not clear up the discrepancy. In his oral testimony Kayishema gave specific details of being in two houses for two nights each, moving from one to the other. Further, when

5619

questioned specifically as to why he had told investigators that he had been in *his* home. Ka referred to the need to protect the identity of those in whose houses he had occupied. Responding to another judicial question inquiring why, therefore, he had not told investigators that he had been in hiding could not reveal the identity of Kayishema simply asserted that he had not lied. Kayishema suggested that his response to investigators that he had been in his house had served its purpose, namely to protect the identity of those in the houses of whom he sought refuge.

252. One final point was raised with regard to Kayishema's presence at the sites of Home St. Jean, and the Stadium. In his statement to the investigators he was asked specifically if he had ever visited any of these sites between 7 April and the end of May. He answered emphatically, no. Yet in cross-examination before this Chamber, he stated that he had been at the Catholic Church and Home St. Jean sometime between 13 April and the massacres. When questioned on this discrepancy, he answered that he understood that the investigator was asking whether he had been to these sites on a daily basis. This explanation is not entirely convincing.

Contradictions Between Kayishema's Evidence and the Evidence of his Wife and Others

253. The contradictions within this defence extend beyond the statements and testimonies of Kayishema alone. Discrepancies exist, for example, between his account and that of his wife's. In her statement to the investigators on 28 April 1998 Mrs. Kayishema maintained that she and her family were in hiding for three days in the bush, but she could not remember the days or dates. Almost two months later, before this Trial Chamber, she testified that they went into hiding on 15 April, and finally concluded under cross-examination that they had actually gone into hiding on 16 April. She made no mention of others being in their house prior to their departure. Whilst Mrs. Kayishema confirms that they were in hiding until 20 April, she talks of moving from house to house "frequently".[11] Her husband said that they were in just two houses. She testified that he spent the nights in the bush. He testified that for these four nights and days he did not leave her in excess of 30 minutes.

254. With respect to those dates outside of 16 to 20 April, Mrs. Kayishema's testimony offers little further insight. She does not provide any information of her husband's whereabouts on 15 April, during the massacres at Mubuga Church. Similarly, she provides little information on his movements after they came out of hiding. She does confirm that he continued his activities as *Prefect* and she also testified as to his activities on Friday 13 May 1994. It was on this date that one of the major attacks in the Bisesero area occurred. It was her testimony, however, that during that day Kayishema had driven her to work at around 8 a.m. They then returned home at approximately 11 a.m. that same morning where they stayed until she and her husband attended a public meeting where the defendant presented the new *sous préfets* at 2 p.m. that afternoon. When asked why Mrs. Kayishema had not mentioned this meeting in the afternoon when speaking to investigators two months prior to her testimony she claimed that she had simply not remembered it. This meeting was entered in Kayishema's diary. However, whereas two

previous meetings with regard to the new *sous prefects* had been written in French, this mee noted in another ink and written in Kinyarwanda. Furthermore, this note states that it was a meeting with all staff members to present the new *sous prefects.*[12] There is no mention of the meeting being a public one as Mrs. Kayishema had claimed. The Trial Chamber has some doubt whether the entry regarding this meeting was in fact entered at the time of events.

255. Beyond these specific days, and a few other notable days of interest such as when the Cardinal visited the region, the Mrs. Kayishema does not offer any further testimony as to her husband's actions during the remaining period when massacres were occurring in the Bisesero area. However, Witness DU, a friend of Kayishema who claims to have been resident in his house from 4 May, offers this alibi. He testified that apart from one day when the defendant was attending a meeting all morning, Kayishema never left his offices for more than half an hour. It is a testimony that is discredited initially by its improbability, especially in light of Kayishema's position as *Prefect* that demanded his presence over the whole *Prefecture*. It is also a testimony that is discredited by its contradictions with Mrs. Kayishema's and the defendant's own testimony before this Chamber. Kayishema gave detailed evidence of his continuing activities as *Prefect* throughout April, May and June. He specifically confirmed, contrary to the opinion of DU, that he had been to the Bisesero area. The testimony of witness DU, therefore, adds little weight to Kayishema's alibi defence for the massacres that occurred in the Bisesero region.

Kayishema's Elaboration

256. A further phenomenon highlighted by the Prosecution was the Kayishema's ability to recall exact dates, days and even times that he was in hiding during his testimony. It is a matter of concern to this Trial Chamber because it is in sharp contrast to his interview, almost two years prior. In that interview in November 1996 Kayishema could not provide any dates or even days that he was in hiding. Kayishema was asked in cross-examination before this Trial Chamber why he had given the response to the investigators that he did not remember what days he was in hiding. His considered response was that, in the first place, he did not know what were going to be the key issues for his defence. Secondly, he asserted that he had the right to remain silent. However, this Chamber notes that he did not remain silent. Rather, he specifically said that he did not remember.[13] The Chamber also notes that Kayishema could not have an answer what had aided his memory, in light of the absence of any entry in his diary, since that last interview. Although not conclusive in itself, the Trial Chamber has taken such elaboration into consideration.[14]

Finding

257. In light of these contradictions, this Chamber does not find any merit in the defence advanced by Kayishema. Whilst the burden of proof rests upon the Prosecution to prove the case against Kayishema, the defence of alibi that has been raised on his behalf has not been sufficient to levy any doubt against

5621

that Prosecution case which is set out and considered below.

5.1.3 Ruzindana's Alibi Defence

258. In total, 21 witnesses appeared on behalf of Ruzindana alone and gave testimony pertinent to his defence of alibi. Most of these witnesses did not give a comprehensive account of Ruzindana's whereabouts during the period when massacres were known to have occurred in the Bisesero region. Nevertheless, a picture was built by the Defence of a man continuing his business in the town of Mugonero.

259. After the death of President Habyarimana, on 6 April 1994, Ruzindana and his family left Remera, a neighbourhood of Kigali, where they had been living. They returned to Mugonero where Ruzindana's father continued to run a shop. Ruzindana was a businessman and a well-known figure in the area. A number of witnesses testified to having seen Ruzindana for varying periods of time between April and July 1994. Witnesses testified to having seen Ruzindana serving customers in his father's shop, others observed Ruzindana at the local market which was held every Wednesday, or noticed him on the roads between Kibuye, Cyangugu and Gisenyi.

260. Specifically, witnesses such as DD testified to frequenting the store of Ruzindana's father "almost everyday" where, on most occasions, Ruzindana had served him.[15] Witness DD, a friend of Ruzindana's was not more specific but witness DAA apparently corroborated his account. Like DD, witness DAA worked in a store opposite the Ruzindana family shop and confirmed that Ruzindana was never away from Mugonero for more than a week. However, like all other witness who testified for the accused, he never accompanied Ruzindana on these business trips. Moreover, the only exact dates to which he could confirm that Ruzindana was present at Mugonero were the 12 to 14 April.

261. Ruzindana was also seen regularly in the Mugonero market, which was held every Wednesday. Witnesses DB, DE, DF, DN, DQ, DS and DY identified Ruzindana in the market on numerous occasions throughout April, May and June. However, no exact dates were ever given by these witnesses. Witness DB, for example, saw the accused one Wednesday in early May; witness DF recollected seeing him four times in these three months; witness DQ saw him once in April and twice in May. Thus, it is possible to see that these sightings, which would last only a few minutes, are utilised by the Defence to reflect the activities of an individual continuing his normal course of business. They are not, and cannot, be offered as a comprehensive alibi for his whereabouts during the massacres in the Bisesero area.

262. Similarly, the Defence offered a number of examples where witnesses had seen Ruzindana on the roads in the conduct of his business. Other witnesses referred to Ruzindana driving one of his four

trucks in the course of his trading, transporting beer or coffee to and from Mugonero. Witness [illegible] example, testified that Ruzindana passed by on the road to Kibuye on at least nine occasions in this period; witness DS saw him with empty beer bottles on the way to Kibuye; witness DD, who worked opposite the Ruzindana shop, talked of the accused leaving with empty beer bottles and returning, a few hours later, with full ones; and witness DR, who owned a kiosk near the roadside, testified that Ruzindana would often drive past with his driver in his green Toyota pick-up truck – leaving at approximately 8 a.m. with empty beer bottles and returning around 4 p.m. with full ones. Although none of these witnesses were able to give the Trial Chamber any specific dates as to when they saw Ruzindana undertaking these trips, they were able to further elaborate upon the impression of an individual continuing his daily business activities. To this end, witnesses DB and DA also testified that Ruzindana was in the areas of Cyangugu and Gisenyi for business purposes. Once again, their information is very imprecise and relate his whereabouts for only very limited periods of time. For example, witness DB described how he met Ruzindana in Mugonero approximately one week after the President's death, in Cyangugu *Prefecture* on a Tuesday one month after that, and then in Mugonero on Wednesday of the next week.

263. The Chamber is cognisant of the difficulties often encountered by witnesses in recalling such details and we have, accordingly, set out our approach elsewhere.[16] However, the Trial Chamber observes that virtually none of the witnesses presented on behalf of the accused were able to give any substantial idea of his whereabouts in their testimony before this Tribunal. Beyond those already stipulated, only witness DH was able to verify a certain date that Ruzindana was in Mugonero. He described how the accused was present when he arrived in Mugonero on the morning of Saturday 16 April. Witness DH, a relative of the accused, remained there until 3 p.m. and described how Ruzindana had also stayed in the town for the duration of his visit. Beyond that, like those witnesses set out above, witness DH simply describes how he had met Ruzindana one day in mid May on the road to Kibuye, about twenty kilometres from Mugonero, and that Ruzindana had just bought supplies of beer.

264. Ruzindana's wife was one of the few who is able to give a more comprehensive picture of his movements during this period. She testified that whilst he went to work, she would remain in the house during the day. However, because they shared a midday meal every day she could be certain that Ruzindana was within the vicinity of Mugonero on most days. Mrs. Ruzindana testified that the Ruzindana had only left for prolonged periods of time on four or five occasions. These periods could be either one or two days if Ruzindana had gone to Cyangugu or Gisenyi on business. Employees working in Ruzindana's house supported this testimony. The houseboy, DC, testified that Ruzindana would leave very early some mornings and would not return for up to two days. Although he had no personal knowledge of why Ruzindana was away, DC testified that on such occasions Ruzindana had instructed him to inform his family that he had gone for supplies. No clear indication of the days or dates that the accused would spend away from the home were offered. This is in common with those other witnesses

5623

set out above who corroborated the fact that Ruzindana would go away for either day trips or p[illegible] periods of time, but could also offer no certainty as to when those occasions were. Accordingly, as with sightings at the market and on the road, the Trial Chamber is unable to assess whether the sightings and trips away that have been alluded to were congruent or separate.

265. Each witness further testified that at no time did they see Ruzindana in the company of the militia or the armed forces or in the possession of any form of weapon during the period set out in the Indictment.

Examination of Ruzindana's Alibi Defence

266. The Prosecution questioned the reliability, credibility and relevance of various Defence witnesses. They raised the issue of reliability *vis-à-vis* the testimony of various witnesses who had close relationships with Ruzindana. Not only was there Ruzindana's wife who testified, but also two other relations, a number of close friends, and two employees of Ruzindana. The Prosecution also raised the issue of credibility of a number of these witnesses. For example, witness DB states that he saw Ruzindana in Cyangugu on 26 June as Ruzindana headed for Zaire. The Prosecution noted, however, that DC also testified before the Chamber that Ruzindana was at home the entire day on 26 June.

267. The final point raised by the Prosecution is the pertinence of the testimony of many Defence witnesses. The majority of the witnesses were close relatives or former employees, who are likely to benefit from shielding Ruzindana from any criminal responsibility. Many individuals testified to having seen him on market day for various lengths of time between five minutes and one hour. Several more testified to having seen him on the road to Kibuye, even those who did not know Ruzindana nevertheless remembered his frequent journeys. However, even those who spent a great deal of time with Ruzindana: his wife, his sister, and his brother-in-law, as well as his servants, all testify that they did not travel with him on the frequent business trips that he supposedly made. They, like all of the other witnesses for the Defence, were not in a position to corroborate Ruzindana's location when he left on his 'business trips.'

268. These witnesses cannot account for the activities of Ruzindana even on a day-to-day basis, let alone 24-hours-a-day. His wife, after all, confirmed that Ruzindana was gone for two-day periods on a number of occasions. Furthermore, in cross-examination his wife conceded that the Defendant made many more daylong journeys to Kibuye although he did not spend the night.[17] The many witnesses who had seen him on the road to Kibuye confirmed these apparent trips. However, in cross-examination these witnesses also stated that this same road from Mugonero to Kibuye divided, branching off into the direction of Gishyita and the area of Bisesero.

269. Bisesero lies approximately twenty kilometres from Mugonero. Given the proximity, therefore,

5624

these day trips would have more than sufficed to enable Ruzindana to reach the massacre sites a[illegible] return home. Accordingly, it is not sufficient for the purposes of his alibi defence, for witnesses to state that Ruzindana was the road from Mugonero or for Ruzindana's sister to state that whenever he was not on a business trip, that the accused would enjoy the family meal with them.

270. Furthermore, the Prosecution does not deny that Ruzindana continued trading throughout April, May and June, or that he made several other trips to locations such as Cyangugu. Rather, this supports the contention of Prosecution witnesses, X, FF and II who had not only heard reference to their attackers coming from Gisenyi, Gikongoro and Cyangugu, but had also noticed the accents peculiar to these regions.

Finding

271. The Chamber is cognisant of the difficulties raised in advancing this defence due to the time period covered in the Indictment. The legal issues that this gives rise to have already been considered. [18] At this juncture it is sufficient to note that, on a factual basis, many witnesses for the Defence were unable to provide specific dates as to when they had seen Ruzindana in Mugonero.

272. The burden of proof is, of course, on the Prosecution to prove their case beyond a reasonable doubt. In the opinion of the Trial Chamber, however, the alibi defence provided by Ruzindana does not diminish the Prosecution case. Even if the evidence proffered by the Defence in support of alibi is accepted in its entirety, it remains insufficient to raise doubt in relation to Ruzindana's presence in Bisesero at the times of the massacres. Accordingly, the Trial Chamber rejects the defence of alibi advanced by Ruzindana and has set out its factual findings below.

5625

5.2 DID GENOCIDE OCCUR IN RWANDA AND KIBUYE IN 1994?

273. A question of general importance to this case is whether genocide took place in Rwanda in 1994, as the Prosecution has alleged. Considering the plethora of official reports, including United Nations documents,[19] which confirm that genocide occurred in Rwanda and the absence of any Defence argument to the contrary, one could consider this point, settled. Nevertheless, the question is so fundamental to the case against the accused that the Trial Chamber feels obliged to make a finding of fact on this issue. The Trial Chamber underscores that a finding that genocide took place in Rwanda is not dispositive of the question of the accused's innocence or guilt. It is the task of this Chamber to make findings of fact based on the Indictment against the accused and assess the evidence to make a finding of the possible responsibility of each person under the law only.

274. According to Article 2 of the Tribunal's Statute, genocide means various enumerated acts committed with intent to destroy in whole or in part, a national, ethnic, racial or religious group as such. The enumerated acts include, *inter alia*, killing members of a group and causing serious bodily or mental harm to members of the group. The purpose of this Chapter is not to decide whether specific acts by particular individuals amounted to genocidal acts, that is, acts committed with the special intent to destroy the Tutsi group in whole or in part. Rather, this Chapter assesses whether the events in Rwanda as a whole, reveal the existence of the elements of the crime of genocide. Such a finding allows for a better understanding of the context within which perpetrators may have committed the crimes alleged in the Indictment. Additionally, because the Indictment concerns events that took place in Kibuye, this Chapter of the Judgment includes a general examination of the events in that *prefecture*.

275. The Trial Chamber heard testimony from the United Nations Special Rapporteur of the Commission on Human Rights, Dr. René Degni-Segui, whose credentials qualified him as an expert and whose testimony was convincing. The Trial Chamber is seized of his reports to the Security Council on the situation of human rights in Rwanda in 1994, which he submitted after conducting investigations throughout Cyangugu, Butare and Kibuye *prefectures*. *Inter alia,* Degni-Segui proffered evidence[20] before the Trial Chamber that perpetrators planned the genocide of the Tutsi population prior to 7 April 1994, and produced reports concerning the massacres, which occurred during hostilities. He testified that although to date no one has found any official written document outlining the genocidal plan, there exist sufficient indicators that a plan was in place prior to the crash of the President's plane on 7 April 1994. These indicators include (1) execution lists, which targeted the Tutsi elite, government ministers, leading businessmen, professors and high profile Hutus, who may have favoured the implementation of the Arusha Accords; (2) the spreading of extremist ideology through the Rwandan media which facilitated the campaign of incitement to exterminate the Tutsi population; (3) the use of the civil defence programme and the distribution of weapons to the civilian population; and, (4) the "screening"

5626

carried out at many roadblocks which were erected with great speed after the downing of the Pre plane.[21] The outcome of the implementation of these indicators was the massacres carried out throughout the country.

276. It is the opinion of the Trial Chamber that the existence of such a plan would be strong evidence of the specific intent requirement for the crime of genocide. To make a finding on whether this plan existed, the Trial Chamber examines evidence presented regarding the more important indicators of the plan.

Background to the Events of 1994

277. The time was ripe in early 1994 for certain so-called Hutu extremists in power in Rwanda who opposed the Arusha Accords, to avoid having to share decision-making positions with opposition groups. After attending a meeting on the implementation of the Arusha Peace Accords, in Tanzania, President Juvénal Habyarimana was en route to Rwanda when his plane was shot down over Kigali airport and crashed on 6 April 1994. Witness O testified that he on 8 April heard a broadcast on Radio France International (RFI) that the Rwandan People's Army (RPA or FAR) had announced the end of the cease-fire. The state of fear that ensued, caused by the rumours about the intentions of the RPF to exterminate the Hutus and the terror and insecurity that prevailed in Rwanda, served as a pretext for the execution of the genocidal plan and consequently the retention of power by the extremist Hutus. Based on eyewitness and expert testimony and reports, immediately after the plane crash, on 7 April 1994, massacres began throughout Rwanda.

278. A radio announcement on the morning of 7 April, concerning the death of the President, ordered people to remain at home. This announcement was made in order to facilitate the movement of the soldiers and gendarmes from house to house to arrest and execute real and perceived enemies of the Hutu extremists, specifically those named on execution lists. Witnesses, including Degni-Segui and Prosecution witness RR, confirmed this fact.

The Effects of Extremist Ideology Disseminated Through the Mass Media

279. Military and civilian official perpetuated ethnic tensions prior to 1994. *Kangura* newspaper, established after the 1990 RPF invasion, Radio Television Mille Colline (RTLM) and other print and electronic media took an active part in the incitement of the Hutu population against the Tutsis. *Kangura* had published the "Ten Commandments" for the Hutus in 1991, which stated that the Tutsis were the enemy. In addition, according to witnesses, in 1991 ten military commanders produced a full report that answered the question how to defeat the enemy in the military, media and political domains. These witnesses also testified that in September 1992 the military issued a memorandum, based on the 1991 report, which also defined the "enemy" as the Tutsi population, thereby transferring the hostile intentions of the RPF to all Tutsis. According to one report, prior to 6 April, the public authorities did

5627

not openly engage in inciting the Hutus to perpetrate massacres. On 19 April however, the Pr the Interim Government, told the people of Butare to "get to work" in the Rwandan sense of the term by using their machetes and axes.

280. Several witnesses stated that during the atrocities "the Rwandese carried a radio set in one hand and a machete in the other."[22] This demonstrates that the radio was a powerful tool for the dissemination of ethnic hatred. Radio National and RTLM freely and regularly broadcasted ethnic hatred against the Tutsis. For example, a UNICEF report refers to an RTLM broadcast stating that "for babies who were still suckling . . . they [the assailants] had to cut the legs so that they would not be able to walk."[23] In 1992 Leon Mugesera, a professor turned propagandist for the MRND, declared in a public meeting *"nous ne commettrons pas l' erreur de '59 ou nous avons fait échoppé des plus jeunes"* (we will not make the 1959 mistake where we let the younger ones [Tutsis] escape.)[24] Mugusera also incited the Hutus by explaining that " . . . we must remove the entrails but there is shorter way, let us throw them into the river so they can go out of the country that way."[25] These speeches and reports became widely diffused through repetition in public meetings and through the mass media.

281. The dissemination and acceptance of such ideas was confirmed by a Hutu policeman to Prosecution witness Patrick de Saint-Exupery, a journalist reporting for the French newspaper *Le Figaro*. De Saint-Exupery remarked that the policeman had told him how they killed Tutsis "because they were the accomplices of the RPF" and that *no Tutsis should be left alive*.[26] (emphasis added.) This witness, who went to the Bisesero region late June 1994, described how "the hill was scattered, literally scattered with bodies, in small holes, in small ditches, on the foliage, along the ditches, there were bodies and there were many bodies."[27]

282. As a result of the diffusion of the anti-Tutsi propaganda, the killings "started off like a little spark and then spread."[28] Degni-Segui stated that many communities were involved. Butare was an exception as there was resistance to carrying out the killings because the *prefect* was a Tutsi. The killings did not start in Butare until 19 April, after the Interim Government sacked the *prefect* and after a visit and an inciting speech by the Interim President. The speech urged the inhabitants of Butare to engage in a murderous manhunt by appealing to the populace that "the enemies are among you, get rid of them."[29]

The Civil Defence Program and the Militias

283. In 1994, Rwandan officials controlled the militias and civil defence forces. The militias trained in military camps. During times of unrest or emergency states call such groups into duty to supplement its armed forces. The evidence before the Trial Chamber moreover reveals that both the militias and the civil defence forces programme became an integral part of the machinery carrying out the genocidal plan in 1994.

5628

284. One of the means by which an ordinary Rwandan became involved in the genocide was through the civil defence programme. Initially both Hutus and Tutsis were involved in the civil defence programme. Authorities established the civil defence programme in 1990 for the security of the civilian population, whereby they could arm persons at all administrative levels, from the top of the *prefecture*, down to the cellule. Degni Segui confirmed this scheme during a conversation with Bisimungu, the Chief of Staff of the Armed Forces, the chief of the police and the Commander of the Gendarmerie, during one of his visits to Rwanda. Unfortunately, the civil defence programme was used in 1994 to distribute weapons quickly and ultimately transformed into a mechanism to exterminate Tutsis. Numerous eyewitnesses such as Witnesses C and F confirmed this fact. They testified that they witnessed the distribution of machetes to civilians by the Prefectoral and Communal authorities in early April 1994. Other evidence before this Chamber shows that 50,000 machetes were ordered and distributed through this programme shortly before the commencement of the 1994 massacres, to the militias of the MRND (members of the *Interahamwe*) and CDR (members of the *Impuzamugambi*), and the Hutu civilian population. Degni-Segui concluded that in the end this "system served to kill innocent people, namely Tutsis."[30]

285. Prosecution evidence, including letters from Rwandan authorities confirmed that "the population must remain watchful in order to unmask the enemy and his accomplices and hand them over to the authorities."[31] Witness R who was familiar with the administrative structure of Rwanda in 1994, affirmed that the people were told to "protect themselves within the Cellules and the Sectors," by organising patrols and erecting roadblocks.[32]

286. Other eyewitnesses recounted their versions of the occurrences at the massacre sites and almost all affirmed the presence of members of the *Interahamwe* and other armed civilians. In fact, several witnesses averred that the majority of the attackers were members of the militias and other civilians who were singing songs of extermination as they approached their victims. Several witnesses further stated that most of these attackers carried machetes and other traditional agricultural tools, as opposed to the gendarmes or police who were armed with guns and grenades.

Roadblocks and Identification Cards

287. The perpetrators of the genocide often employed roadblocks to identify their victims. Both Prosecution and Defence witnesses testified to this fact. Degni-Segui testified that within hours of the President's death, the military personnel, soldiers, the members of the *Interahamwe* and armed civilians erected and manned roadblocks. In fact, some roadblocks were erected within thirty to forty-five minutes after the crash of President's plane and remained throughout Rwanda for at least the following three months. According to this witness "what they had to do was to use identity cards to separate the Tutsis from the Hutus. The Tutsis were arrested and thereafter executed, at times, on the spot."[33]

5629

288. De Saint-Exupery confirmed the existence of roadblocks in Rwanda during the time in question. He testified that from Goma to Kibuye on 25 June 1994, "at the approach . . . to each locality, there was a roadblock."[34] Witness Sister Julianne Farrington stated that in May 1994 as she travelled from Butare to Kibuye, she went through 45 roadblocks. She further stated that at some roadblocks military personnel monitored movements, while others were manned by young Hutus in civilian dress. Other witnesses, including witnesses G, T, and Defence witness DA and DM, who travelled through various parts of Rwanda during the genocide, confirmed these facts before this Trial Chamber. The Trial Chamber notes that those who produced identity cards bearing the indication Hutu and those with travel documents were able to pass through these roadblocks without serious difficulties. Conversely, those identified as Tutsis were either arrested or killed. The Trial Chamber recognises that the erection of roadblocks is a natural phenomenon during times of war. However, the roadblocks in Rwanda were unrelated to the military operations. Sadly, they were used to identify the Tutsi victims of the genocide.

Conclusion

289. In summary, the Trial Chamber finds that the massacres of the Tutsi population indeed were "meticulously planned and systematically co-ordinated" by top level Hutu extremists in the former Rwandan government at the time in question.[35] The widespread nature of the attacks and the sheer number of those who perished within just three months is compelling evidence of this fact. This plan could not have been implemented without the participation of the militias and the Hutu population who had been convinced by these extremists that the Tutsi population, in fact, was the enemy and responsible for the downing of President Habyarimana's airplane.

290. The cruelty with which the attackers killed, wounded and disfigured their victims indicates that the propaganda unleashed on Rwanda had the desired effect, namely the destruction of the Tutsi population. The involvement of the peasant population in the massacres was facilitated also by their misplaced belief and confidence in their leadership,[36] and an understanding that the encouragement of the authorities to guaranteed them impunity to kill the Tutsis and loot their property.

291. Final reports produced estimated the number of the victims of the genocide at approximately 800,000 to one million, nearly one-seventh of Rwanda's total population.[37] These facts combined prove the special intent requirement element of genocide. Moreover, there is ample evidence to find that the overwhelming majority of the victims of this tragedy were Tutsi civilians which leaves this Chamber satisfied that the targets of the massacres were "members of a group," in this case an ethnic group. In light of this evidence, the Trial Chamber finds a plan of genocide existed and perpetrators executed this plan in Rwanda between April and June 1994.

5.2.1 Genocide in Kibuye

292. Having determined that perpetrators carried out a genocidal plan in Rwanda in 1994, this Chamber now turns to assess the situation in Kibuye *Prefecture*. After the death of the President on 6 April 1994, the relatively calm co-existence of the Hutus and Tutsis came to a halt in Kibuye. According to the Prosecutor, Kibuye was among the first of the *prefectures* "to enter into this dance of death."[38] In Kibuye, the first incidents took place on 8 and 9 April 1994 in various *communes*. The Chamber heard testimony and received documentary evidence that the perpetrators of the genocide in Kibuye acted with requisite intent to destroy the Tutsi population in whole or in part and that they in fact succeeded in achieving this goal. In this Chapter , this Chamber examines briefly the occurrences in Kibuye *Prefecture* from April to June 1994.

Background

293. The Chamber finds that events in Kibuye unfolded as follows. After the crash of the President's plane, the atmosphere quickly began to change. The Hutu population began openly to use accusatory or pejorative terms, such as *Inkotanyi* (Kinyarwanda for RPF accomplice/enemy)[39] and *Inyenzi* (Kinyarwanda for cockroach) when referring to the Tutsis. The members of the *Interahamwe* and other armed militant Hutus began a campaign of persecution against the Tutsis based on the victims' education and social prominence. Simultaneously, the Tutsi population, as a whole, suffered indiscriminate attacks in their homes. Perpetrators set on fire their houses and looted and killed their herds of cattle. Witness A testified that on the morning of 7 April 1994 his Hutu neighbours began to engage in looting, attacking Tutsi-owned houses and slaughter Tutsi-owned livestock. Witnesses C, F, OO and E, corroborated these occurrences.

294. On their way to the gathering places many witnesses saw roadblocks where the perpetrators separated Tutsis from the Hutus. Once the Tutsis reached these places they were injured, mutilated and some of the women were raped. In the end the Tutsis were massacred by Hutu assailants who sang songs whose lyrics exhorted extermination during the attacks. These attackers were armed and led by local government officials and other public figures. The fact that these massacres occurred is not in dispute. In fact, Kayishema testified that he and others engaged in a clean-up operation after the massacres.

295. To illustrate implementation of the genocidal plan, the Trial Chamber now turns to examine the occurrences in the commune in Kibuye, immediately following the death of President Habyarimana, and other related issues which serve as further proof, such as meetings and documentary evidence, of the genocidal events in Kibuye.

5631

Initial Attacks at the Residences of the Tutsis

296. There is sufficient evidence to find that in communes such as Gishyita Gitesi, Mabanza and Rutsiro the initial persecution of the Tutsis and individual attacks on their houses began almost immediately after the death of the President. The fact that killings took place throughout Kibuye is corroborated by a diary entry[40] which was tendered by Witness O. Witness O testified that initially after the President's death, in Gitesi Commune, there was relative calm. He also stated, however, that on 7 April "he saw wounded people everywhere, by the roadside, bushes and very close to the administrative headquarters of the *Prefecture*."[41] Witness O, under cross-examination, told the Trial Chamber that the first people to be killed were in Kigali and they were *alleged* to be RPF collaborators. Witness O testified there was a cause-and-effect relationship correlation between the 8 April radio announcement of the purported resumption of the war and the first deaths in Rwanda and, in particular, in Kibuye *Prefecture*.

297. Witness F's testimony is illustrative of many other witnesses and of the situation as a whole. A resident of Gitesi commune, Witness F testified that he heard the news of the crash at 10 a.m. on 7 April and that as a result, the mood of the people changed to one of panic in his neighbourhood. On 7 or 8 April, a meeting took place at Mutekano Bar, situated some 400-500 meters from the Kibuye prison, along the road heading to the Kibuye *Prefecture* Office. Witness F testified during that period, he interacted with one Mathew, who was participating in the said meeting. Witness F observed the meeting, the topic of which was security – addressing the "Tutsi problem" -- from the roadside for about twenty minutes. Many local officials participated in the meeting.

298. Witness F testified that after the meeting of 8 April, he witnessed machetes being distributed by Ndida, the Commune Secretary. The machetes had been transported into the commune by Prefectoral trucks and the Secretary of Gitesi Commune supervised the unloading. They were taken towards the Petrol Rwanda fuel Station. About twenty persons received a machete each including, Eriel Ndida, Rusigera, Siriaki, Emmanuel, the Headmaster and many others. On 9 April, the local officials departed to other commune after the distribution of machetes. That evening around his neighbourhood in Gitesi, Witness F noticed that the situation had changed and that militant Hutus openly were attacking the Tutsi. The proximity of the distribution of weapons to the massacres of Tutsi civilians is evidence of the genocidal plan. He noticed that militant Hutu had begun throwing rocks at Tutsis and throwing some persons into Lake Kivu. He also observed similar acts of violence in Gishyita commune. He stated that some persons from Gishyita crossed Lake Kivu to take refuge in the commune of Gitesi.[42]

299. On 12 April, the first person in Witness F's neighbourhood was killed. Munazi, who was with other militant Hutu and members of the Interahamwe killed Nyirakagando, an elderly Tutsi. Witness F and others saw her dead body in the morning of 13 April, as they were fleeing their homes. Witness F stated that "the Hutus killed her because she was Tutsi."[43] Militant Hutus started by chasing Tutsi

men. Witness F stated that "when the Tutsi realised that they were being pursued by the H started to flee through the bushes."[44] Witness F's wife was gang-raped by the Hutus before her children's eyes on 13 April. Witness F's mother "was killed with the use of a spear to her neck" during the same attack.[45] Witness F left his wife who was no longer able to walk and first hid in the bush, within sight of his house and on 13 April fled to a Pentecostal church at Bukataye.

300. Witness F spent the night at the church parish at Bukataye. During the night, there was an attack on the church parish, led by the Headmaster of the Pentecostal school. People carrying clubs and spears accompanied the Headmaster of the school. He said, "the Tutsi who were in the Church should come out so that they could be killed."[46] Those who were unable to flee the Church were separated. Tutsi women separated from the Hutu women. The latter remained and watched as the attackers killed the former. Witness F stated that the men, including him, then fled to the bushes.

Mass Movement of the Tutsi Population

301. Witness B testified that, when the attacks began in her commune, she and others decided to flee, stating "we did not want to be killed in our homes, and the people were saying that if you go to the Church no one could be killed there."[47] Witness B along with her mother, young sister and brother as well as four other Tutsis, left their village in Kabongo, Bishura sector, Gitesi commune, for the Catholic Church in Kibuye. As they fled, there were armed Hutus around their home.

302. Because the Tutsis were targets in their homes, they began to flee and seek refuge in traditional safety. Witness T, who worked at the Catholic Church and Home Saint Jean, (the Complex) testified that in the days following the President's death, a curfew was announced and people were told to stay at home. Tutsis, however, began to arrive on the peninsula, where the Complex is located, shortly thereafter. These Tutsis were from the hill of Bururga. Others came from Gitesi, Bishunda, Karongi and Kavi. They had converged at the communal office but they were not allowed to stay. Witness T stated that she helped lodge the thousands refugees, comprised of the elderly, women and children, in the dormitories at the Complex. Those seeking refuge were worried because their homes had been burnt. The first incidents of burning homes started between 7 and 10 April in Burunga, the hill to the left of the Home St. Jean, and other hills nearby. Witness T stated that she saw the home of a friend aflame.

303. Explaining a diary entry from 14 April 1994 to the Trial Chamber, Witness O stated that those seeking refuge from Gitesi Commune, who were on their way to the Stadium, told him that they were fleeing massacres which had begun in their area. Witness O observed many massacres during that time and aided Tutsi survivors to reach Kibuye Hospital.

304. Witness C testified that two days after the President's death people in Burunga, Mabanza

5633

commune started fleeing. She testified that attackers were attacking the Tutsi for being burning their houses. She explained that there was no apparent reason for these attacks besides these persons' ethnicity. Regarding the militant Hutu, she stated that "they themselves really could not find a reason for this because they would share everything on a day-to-day basis."[48] She saw people fleeing from Mabanza, including a member of her extended family, and the family of Nyaribirangwe. Her relative had been dealt a machete blow to his head.

305. Witness B testified that they fled to the Catholic Church "because people like my father who had lived through other periods of unrest as in 1959, when there was an attack against the Tutsi, at that time people took refuge at the Church."[49] Witness T had a similar reason for going to a place of refuge. She testified that since the 1959 revolutions, whenever people felt insecure, they would go to churches, parishes and would be protected and be "respected in these places."[50] Additionally, witness F testified, that they arrived at the Catholic Church on 15 April at about 4 a.m. and found scores of other Tutsis who had come from other commune such as Mabanza, Rutsiro, Kaivere and Gishyita as well as Gisenyi *Prefecture*.

306. Witness A testified that on 7 April, militant Hutu began to attack Tutsi-owned houses, slaughtered Tutsi-owned livestock. The Abakiga (Hutus from the northern region of Rwanda) joined their fellow Hutu: On 12 April 1994, militant Abakiga Hutu identified the Tutsi by identification cards and massacres started in Gatunda shopping area. Witness A went to the Catholic Church, arrived 13 April between 6 and 7 a.m., and found numerous refugees gathered there.

307. Almost all Prosecution and Defence witness, including Mrs. Kayishema, who travelled throughout Kibuye *Prefecture*, testified that they encountered roadblocks. At these roadblocks the attackers used identification cards to distinguish between and to separate Hutus from Tutsis.

Other Evidence of Intent to Commit Genocide

308. The record in the present case is replete with evidence that reveals the existence of a plan to destroy the Rwandan Tutsi population in 1994. The Trial Chamber explores briefly some of the more pertinent evidence relative to the acts demonstrating the intent to commit genocide that took place in Kibuye *Prefecture*.

309. Evidence presented to the Chamber shows that in Kibuye *Prefecture* the massacres were pre-arranged. For months before the commencement of the massacres, *bourgmestres* were communicating lists of suspected RPF members and supporters from their commune to the *Prefect*.[51] In addition, the Prosecutor produced a series of written communications between the Central Authorities,[52] Kayishema and the Communal Authorities that contain language regarding whether "work has begun" and whether more "workers" were needed in certain commune.[53] Another letter sent by Kayishema

5634

to the Minister of Defence requested military hardware and reinforcement to undertake clean in Bisesero.[54]

310. Some of the most brutal massacres occurred after meetings organized by the *Prefectoral* authorities and attended by the heads of the Rwandan interim government and/or ordinary citizens of the *prefecture* to discuss matters of "security."[55] During one of these meetings Kayishema was heard requesting reinforcement from the central authorities to deal with the security problem in Bisesero. Witness O testified that on 3 May 1994, Interim Governmental Prime Minister Jean Kambanda visited Kibuye *prefecture* with a number of other officials, including Ministers of Interior, Information, and Finance, the *Prefect* of Kibuye, and the General Secretary of MDR party. Witness O attended a meeting with these and other officials in his capacity as an official of Kibuye hospital and voiced his concern regarding seventy-two Tutsi children who survived the massacre at the Complex and were in poor physical condition at Kibuye hospital. Members of the *Interahamwe* had threatened these children, aged between 8 and 15 years. The Prime Minister did not personally respond to Witness O's concern, but asked the Minister of Information to do so. That minister rebuked Witness O, remarking that he should not protect people who don't want to be protected. He also declared that Witness O obviously did not approve of the politics of the Interim Government, and could not recognize the enemy. The Minister of Information gave the impression that the Interim Government recognized these infirm children as enemies. Later, these children were forcibly taken from the hospital and killed.

311. Sister Farrington testified to having witnessed the discriminatory attitude of various Kibuye authorities towards all Tutsis. During the occurrences Sister Farrington went to Kibuye Prefectoral offices to inquire about obtaining a *laissez-passer* that would allow some of the nuns from her convent to leave Rwanda. Over a period of three days she spoke with the Sous-*prefect*, Gashangore as well as Kayishema. Gashangore used hostile language when referring to Tutsis and accused specific people in the *Prefecture* of being "central to the activities of the *Inkontany*." During another attempt to obtain help, Sister Farrington spoke with Kayishema in his office where he spoke to her in an agitated and aggressive tone. Kayishema told her that there was a war prepared by the *Inkotanyi*, and the Tutsi people were collaborators of the enemy. As proof he showed her a list of names of people, maps and other documents allegedly preparing Tutsis to become revolutionaries.

Conclusion

312. Considering this evidence, the Trial Chamber finds that, in Kibuye *Prefecture*, the plan of genocide was implemented by the public officials. Persons in positions of authority used hate speech and mobilised their subordinates, such as the gendarmes the communal police, and the militias, who in turn assisted in the mobilisation of the Hutu population to the massacre sites where the killings took place. Tutsis were killed, based on their ethnicity, first in their homes and when they attempted to flee to perceived safe havens they were stopped at roadblocks and some were killed on the spot. Those who

5635

arrived at churches and stadiums were attacked and as a result tens of thousands perished.

313. Having examined the reasons why Tutsis gathered at the four massacre sites, the Trial Chamber now examines the evidence specific to these sites and the role, if any, of the accused Kayishema, and his subordinates, as well as that of Ruzindana in the alleged crimes.

5636

5.3 AN INTRODUCTION: THE MASSACRES AT THE CATHOLIC CHUR' HOME SAINT-JEAN COMPLEX, STADIUM IN KIBUYE TOWN AND THE CHURCH IN MUBUGA

314. This Chapter addresses the occurences common to the first three massacre sites in the Indictment namely, the Catholic Church and Home Saint-Jean Complex (Complex), located in Kibuye, the Stadium in Kibuye (Stadium), and the Church in Mubuga (Mubuga Church), in Gishyita commune. This introduction does not include the fourth massacre site, Bisesero area, because the masscres in that area followed a slightly different pattern and took place over a much longer period of time than the first three sites. Additionally, under this Indictment, the Bisesro charges include both accused persons where as the first three sites concern Kayishema only. A summary of the witness testimonies for the first three sites paints the following picture.

315. In mid-April 1994, Tutsi seeking refuge from various communes converged on the three sites in order to escape atrocities perpetrated by the Hutus against the Tutsis. Throughout Kibuye *Prefecture*, Tutsis were being attacked, their houses set ablaze and cattle looted or slaughtered. Historically, community centres such as the Churches and the Stadium were regarded as safe havens where people gathered for protection in times of unrest; this was the case in April 1994. Many witnesses testified that they went to these sites with the belief that the prefectorial authorities would protect them. By the time some Tutsi reached the churches they were overflowing and these people continued on to the Stadium, often under the instruction of the gendarmes and local officials. By all accounts, very large numbers of Tutsis amassed in each of the three sites. Estimates varied from 4,000 to over 5,500 at Mubuga, about 8,000 at the Complex and, 5,000 to 27,000 at the Stadium.

316. At all three sites, gendarmes guarded the entrances or completely surrounded the structure. The gendarmes controlled the congregation, maintaining order or preventing people from leaving. Witnesses testified that Tutsi who attempted to exit were killed by armed Hutu assailants. Conditions inside the massacre sites became desperate, particularly for the weak and wounded. The authorities did not provide food, water or medical aid and, when supplies were offered, the Gendarmes prevented them from reaching the Tutsis.

317. With thousands of internally displaced persons (hereinafter refugees)[56] effectively imprisoned at the three sites in Kibuye, five days of almost continuous massacres commenced. First, at Mubuga Church the major killing started on 15 April and continued on 16 April. On 15 and 16 April the Complex suffered preliminary attacks followed by a major slaughter on 17 April. On 18 April, the massacre at the Stadium began with the attackers returning on 19 April to complete the job. Evidence before the Trial Chamber suggests that thousands of Tutsi seeking refuge were killed during these few days.

5637

318. Testimony reveals striking similarities in the assailants' methods both during the initial [illegible] of Tutsis and later during the execution of the massacres. Some of those seeking refuge assembled at the three sites had done so owing to encouragement by Hutu officials. Initially, the gendarmes appeared merely to be maintaining order and allowed people to leave the Churches or Stadium to find food or water. Soon thereafter, however, authorities cut off supplies and prevented those seeking refuge from leaving. Those who attempted to leave were either chased back inside the structure or were killed by the armed attackers while the gendarmes watched. At this stage gendarmes and/or the members of the *Interahamwe* surrounded the Churches and at the Stadium gendarmes guarded the entrances. These conditions of siege soon turned into massive attacks by Gendarmes, communal police, prison wardens, the members of the *Interahamwe* and other armed civilians. Having surrounded the site, they usually waited for the order from an authority figure to begin the assault. The massacres started with the assailants throwing grenades, tear gas, flaming tires into the structure, or simply shooting into the crowds. Those who tried to escape were killed with traditional weapons. Following these hours of slaughter, the attackers would enter the building or Stadium carrying crude traditional weapons and kill those remaining alive.

319. The above background facts for the most part, are not refuted and the Trial Chamber finds ample evidence to support this general picture of events. The real issue for the Trial Chamber is the role, if any, played by Kayishema and/or those under his command or control, at the three crime sites. The Prosecution alleges that Kayishema was present, participated and led others at all three massacre sites. Kayishema admitted that he visited the sites when Tutsi were congregated but prior to the massacres to assess the situation. Kayishema, however, denies his presence during the days of attack. Indeed, Kayishema's alibi states that he was in hiding during the times of the massacres[57] because his life was under threat. He claims to have been hiding from the morning of 16 April through 20 April, coming out on the morning of 20 April.

320. Evidence shows that others saw Kayishema at the three sites during the period of 14 to 18 April. On 14 April Kayishema stated that he visited Mubuga Church, but only to monitor the situation. Testimony, however, places Kayishema at Mubuga in the morning, of 15 April and at the Complex at 3 p.m. in the afternoon. The evidence suggests that the two churches are approximately 40 kilometres apart by road. Again, on 16 April, Kayishema was seen in the morning at Mubuga during the start of the attack and then at the Complex during the preliminary acts of violence. The following day, 17 April, witnesses testified that Kayishema was present at the Complex and played a pivotal role in the massive slaughter of that day. Lastly, Kayishema is said to have initiated the massacre at the Stadium on 18 April. The Trial Chamber now turns to separately assess the evidence for each of the four massacre sites enumerated in the Indictment.

5638

5.3.1 THE MASSACRE AT THE CATHOLIC CHURCH AND HOME ST. JEAN

Background

321. According to the Indictment, the massacre site at the Home St. Jean Catholic Church Complex (Complex) is located in Kibuye, Gitesi commune, on the peninsula surrounded by Lake Kivu. A road runs perpendicular to the entrance to the Complex. One can see the Catholic Church but not Home Saint Jean from the road. The Complex, according to Expert witness Sjouke Eekma, is accessible by either the road from the roundabout or from the *Prefecture*. There were several doors to the Catholic Church.

322. During the unrest occurring in the commune soon after the crash of the President's plane, thousands of people sought refuge in places of worship such as the Complex. For instance, witness F testified, that he arrived at the Catholic Church on 15 April and found many other Tutsis who had arrived from other communes such as Mabanza, Rutsiro, Kaivere and Gishiyita as well as Gisenyi *Prefecture*. Witness B testified that she fled to the Catholic Church "because people like my father who had lived through other unrest as in 1959, when there was an attack against the Tutsi, at that time people took refuge at the (Catholic) Church."[58] Witness T corroborates other witnesses' reason for seeking refuge at the Church. She testified that since the 1959 revolutions, whenever people felt insecure, they would go to churches, parishes and would be protected; that is, they would be "respected in these places."[59]

323. The conditions inside these places of shelter worsened. In the Catholic Church people were crowded. Witness A testified that when a census was made for purposes of food distribution, the number of those seeking refuge was found to be 8,000 people of Tutsi ethnicity.[60] The census is corroborated by Witnesses T and F. The Tutsis seeking refuge received no assistance whatsoever from the *Prefectural* Authorities.

324. The major attack on the Complex took place on 17 April but prior to that attack, members of the *Interahamwe* and local officials launched several smaller attacks. Tutsi seeking refuge threw stones and repulsed the smaller attacks. From about 15 April, the *gendarmerie nationale* surrounded and prevented the Tutsi from leaving

325. Expert witnesses Dr. Haglund, a Forensic Anthropologist, and Dr. Peerwani a Pathologist, testified regarding the victims of the massacre. Both experts examined cadavers of thousands of people and described how they had been killed. Dr. Haglund testified that he had examined the large mass grave near the Catholic Church along with four additional areas that also contained human remains. Dr. Peerwani examined 122 cadavers during January and February 1996. Now part of the evidence, identification cards found on the victims indicated that they were all Tutsi.

326. Dr. Haglund's written report confirms that many people, men, women and children were killed at the Complex. Of the 493 dead examined by Dr. Haglund, only found one gunshot injury. He estimated that 36% of people in the grave had died from force trauma whereas 33% of the people died from an undetermined cause. Dr. Haglund selected an individual as an example who he identified as a fifty year old man. The man's fibula had been completely severed by some sharp object,[61] which "would have severed the achilles" tendon rendering this individual partially crippled.[62] On the neck region "all the soft tissue from the right side of the neck towards the back would have been cut through"[63] and "a sharp cut mark in the tibia body, and in the inferior border of the scapular shoulder blade, another trauma caused by a blow of a sharp object."[64] Dr. Haglund concluded that the fifty-year old man was trying to protect himself by presenting different body aspects to the armed assailant. Dr. Peerwani found stab wounds indicating the use of sharp force instruments and confirmed that many of the victims were young children and the old.

The Attacks

15, 16 April 1994

327. Several witnesses testified about the minor attacks that occurred on 15 and 16 April. Witnesses T and A testified that an attack on the Complex occurred on 15 April at 3:00 p.m. During that attack, Witnesses A and D saw Kayishema snatching a child from its mother. Witness F testified that local officials participated in an attack on the Complex on 16 April. The gendarmes simply watched, but those seeking refuge repulsed the attack. After this event, witness F saw Kayishema and Mugambira, a prosperous Kibuye businessman, transporting weapons in their vehicles. A military pick-up also assisted in transporting weapons to the nearby Petrol Rwanda fuel station. Witness F saw the accused, Kayishema, hold a meeting with other assailants near the Petrol Rwanda fuel station.

17 April 1994 on Catholic Church

328. On 17 April, between 9 and 10 a.m., a major attack occurred at the Catholic Church, where thousands of Tutsi men, women and children had taken refuge. The attackers arrived from three directions, namely from the roundabout, the *Prefecture* and Lake Kivu. Witness F, who was standing in front of the Catholic Church, vividly described the various attackers. Witness F and others testified that the attackers were Hutu civilians; Twa civilians; communal police officers; prison guards and local officials such as the Communal Accountant; Rusizera, the Assistant *Bourgmestre*, Gahima, the Headmaster of the Pentecostal school, Emmanuel Kayihura and Siriaka Bigisimana. Other witnesses identified and corroborated the presence of the local officials. Witness E recognised the *conseillers* of Gishura Sector and witness C named particular officials such as *Conseiller* Ndambizimana; Calixte, the Prison Warden; and the *Bourgmestre* of Gitesi Commune. The attackers carried assorted weapons including machetes, swords, spears, small axes, clubs with nails, the "*impuzamugenzi*" and other agricultural tools. They were singing "let us exterminate them". Kayishema arrived with the attackers

5640

from the *Prefecture* Office in a white Toyota vehicle. Witnesses F, C, D, E and A clearly o Kayishema's arrival. For example, witness F was sufficiently close to the accused to see that he was wearing a pair of white shorts. Witness A, D and F stated that Kayishema was carrying a sword.

329. Witness F saw Kayishema arrive, get out of his vehicle along with the *gendarmes*, and receive applause as he walked towards the group of attackers. Witnesses F, D and E testified respectively that Kayishema ordered the assailants to "begin working, get down to work"[65] "go to work," or "start working."

330. They were all positioned so that they could hear Kayishema utter these words. According to witnesses E and F, the phrase "go to work" in the Rwandan context means "to kill Tutsis." At that point, Witnesses E and F testified that after ordering attackers "to go to work," Kayishema climbed up the hill along the path near the Church, addressed the assembled attackers through a megaphone, informed them that he had received orders from Kigali to kill the Tutsis and commanded the *gendarmes* to shoot. Witness E said that Kayishema then fired three shots.

331. Three witnesses saw Kayishema speak and give orders for the attackers to go to work. Only Witness E, however, claims to have seen Kayishema fire three signal shots. Witness A testified that it was the gendarmes opposite the Church who fired the shots. At that point some attackers began to throw stones at those seeking refuge and the *gendarmes* opened fire. The gendarmes shot the Tutsis who were in front of the Church. Soon thereafter the *gendarmes* and other Hutu assailants started to attack Tutsis inside the Church. They fired grenades and tear gas canisters inside the Church through the doors, and proceeded to fire their guns. Witness F who escaped by climbing a tree nearby, stated that "I could see quite clearly the square or the area in front of the Church. I could see him [Kayishema] with my own eyes."[66] Witness F saw Kayishema walk to the threshold of the Church and send an attacker to bring a jerrican of petrol. The petrol was poured on tires and the doors of the Church, and then set ablaze. According to witness A, the main door of the Church was burnt down. Witness C saw the attackers throw a tire which was doused with petrol, inside the Church. Many witnesses, including Witness F, testified that people were burnt.

332. At some point, Kayishema led the attackers who entered the Church and began to kill the survivors. Witness A, who had hidden under dead bodies and had smeared himself with blood, observed that Kayishema entered the Church with a young man and took steps to ensure that there were no survivors. Witness A stated that he could see Kayishema clearly since at that point the only attackers inside the Church were Kayishema and the young man. Witness A saw Kayishema use his sword to cut a person called Rutabana and a baby who was lying on top of witness A. With regard to this scene, witness A stated that he knew that it was a baby on top of him as he could feel the child's legs kicking him about the chest level.[67] Kayishema with his sword cut witness A, injuring him near his right

clavicle, the right hand and the left elbow. The Trial Chamber was shown the scars of these injurie

333. Several witnesses, such as A, B, C, D and E managed to escape. Others, such as B, C, D fled to the Home St. Jean, whilst witness F fled to the Stadium.

17 April 1994 on Home St. Jean

334. The attacks progressed from Catholic Church to the Home St. Jean when assailants descended upon the scene around 1 or 2 p.m., singing the lyrics "let's exterminate them." The assailants threw grenades inside the building and as a result, people suffocated. When the gendarmes broke the lock of the door, the fleeing Tutsis were faced with members of the *Interahamwe* wielding machetes and spears. Witnesses B and C survived by denouncing their Tutsi ethnicity to the attackers. Attackers allowed them to join a group of 15 to 20 Hutu who were being escorted to safety by the gendarmes and walked away from the Church. On their way, the two and others met Kayishema who asked the accompanying gendarmes "where are you taking these Tutsi?"[68] Notwithstanding that members of the group replied that they were all Hutu, Kayishema struck witness B with his machete.

The Victims

335. The attackers left thousands dead and many injured. Witness D estimated the number of those seeking refuge at the Complex prior to the major attack to be around 8,000. Witness A heard the same figure from Leonard Surasi, a man who had estimated the number in order to supply them with food. Witnesses A, B, C, D and F saw substantial numbers of dead bodies after the attack. Witness O, a local Hutu who had recorded this massacre as an entry in his personal diary, testified that he had participated in burying the dead bodies. Witness E testified that one week after the massacre at the Church, he saw prisoners come to collect bodies for burial. They spent five days burying the dead. Witness G, a Hutu, who had assisted in burying the dead, testified that at the Catholic Church, there were bodies along the road from the *Prefecture*, in front of the main door to the Church, inside the Church, in front of the Father's residence and also inside the Priests' house. He also stated that people assisting in the burial of the Tutsis were being threatened by Ruberanziza and Biseñyamana among other people.[69]

336. At the Home St. Jean, in particular, Witness T, a person employed at Home St. Jean, testified that she lost nine staff members and their children. Witness G saw around 200 to 300 Tutsi corpses scattered in front, behind, in the cellar, on upper floors and around the Home St. Jean buildings. Further, many of the survivors were injured. Witness F observed about forty injured people, whose ankles had been cut.

Case for the Defence

337. The defence for Kayishema offered a defence of alibi on the dates of the massacre, which appears above in Chapter 5.1 on Alibi. In cross-examination, the Defence challenged witness A's ability

to having seen Kayishema when he entered the Church. They further questioned witness A's a' have found space and time to smear himself with blood. This Chamber finds that although witness A's testimony may have lacked certain details, his testimony regarding Kayishema's presence and participation, on the whole, is credible. Moreover, witness A's description of Kayishema's attire and the weapon he carried conforms to the testimony of other witnesses, such as B, C and D. Further, witness A's identification of Kayishema is strengthened because he knew Kayishema prior to the events. Witness A first saw Kayishema in 1993 at the Kibuye Hospital (a friend pointed out Kayishema saying, "there is the *Prefect*.") This Chamber finds reliable witness A's deposition of Kayishema's presence and participation in the attacks of 17 April.

338. Witness B testified regarding the encounter with Kayishema when she and others were being escorted as 'Hutus' by *gendarmes*. Witness B affirmed that Kayishema wore white shorts and uttered "where are you taking these Tutsi?"[70] The *gendarmes* responded "these are not Tutsi but they are Hutus."[71] The Defence in their closing remarks did not deny the scene but claimed that Witness B was involuntarily wounded. The Defence suggested to the witness that the push was intended to put her back in line. The Trial Chamber finds witness B to be a credible witness who identified Kayishema during the attacks and heard him speak. Witness B met Kayishema in 1989 at the Kibuye hospital and thereafter had seen him from time to time. Witness C corroborated witness B's testimony regarding the attack. The Trial Chamber finds no material contradictions in witness B's story.

339. Regarding witness C, the Trial Chamber notes that she knew Kayishema prior to the events. Witness C stated that she and the accused were from Bwishyura Sector and that she knew him and his father. She testified that she saw Kayishema cut the fingers of witness B with a machete. A list tendered into evidence by witness C shows the names of victims and attackers. The names of Kayishema and other local officials appear amongst the alleged attackers.

340. The defence cross-examined witness D on his ability to hear Kayishema utter the words "go to work." Witness D stated that he heard Kayishema ordering the attackers to "go to work" from a distance of approximately ten to fifteen meters away, while standing between the road which leads to the roundabout and to the *Prefecture*. The Defence also challenged witness D's account of his hiding in the ceiling of Home St. Jean. Witness D explained that he left the Church at 1 p.m. and stayed in the ceiling in Home St. Jean with five others, until 4 a.m. Witness T corroborates his account although she did not specifically single out witness A as being one of those in the ceiling.

341. Witness D, identified Kayishema as one of the attackers. He knew Kayishema prior to the events because Kayishema attended meetings at the Home St. Jean in his capacity as the *Prefect* of Kibuye. Witness D saw Kayishema on 15 April in a white vehicle near the Home St. Jean. His account of Kayishema's arrival and description of the attack is corroborated by many witnesses including A, B, C

and F. The Trial Chamber finds that witness D identified Kayishema and finds his accc Kayishema's participation credible.

342. Witness F testified that he was in front of the Church when Kayishema arrived and that there was little distance between him and the attackers. Witness F confirmed seeing Kayishema and stated that he wore "white shorts" and carried a sword. Witness F's account of how Kayishema spoke through a megaphone was corroborated by witness E. Witness F knew Kayishema prior to the events and gave a detailed account of Kayishema's participation during the events of the attack. The Trial Chamber has considered witness F's testimony and finds his account of the events of 17 April is reliable and conforms to that of other witnesses.

343. Witness E testified also that he heard Kayishema use a large megaphone to order attackers "to go to work."[72] According to this witness, Kayishema spoke using the megaphone to deliver a message from Kigali to exterminate the Tutsis, and fired gunshots. The Trial Chamber notes that witness E described Kayishema's arrival at the massacre site, identified Kayishema and described his participation. The Trial Chamber finds witness E's testimony regarding the events credible. Additionally, he knew Kayishema as the chief of Kibuye hospital prior to these events. His account of the occurrences was corroborated by other witnesses. However, witness E was the sole eyewitness to testify that Kayishema fired the shot signaling the start of the massacre. Hence there exists some doubt as to whether Kayishema actually fired the shots, that sparked off the attack. This uncertainty is not surprising in light of the circumstances. Given the confusion of multiple shooters and the prevailing terror, this Chamber cannot find that Kayishema fired the shots. Nevertheless, the Trial Chamber finds that the shooting began following Kayishema's order. The Trial Chamber finds, beyond a reasonable doubt, that Kayishema ordered and instigated the attack upon the Catholic Church.

Conclusion

344. The Trial Chamber finds that the witnesses' testimonies proved, beyond a reasonable doubt, that Kayishema was present at and participated in the 17 April 1994 massacres at the Complex. Witnesses, such as witness T and witness G, constituted "independent" witnesses, in the sense that they were not survivors as such, because they were not the target of the massacres. Their testimonies corroborated the events as recounted by those who survived the massacre. All the witnesses claimed that they previously knew Kayishema and they identified him at the trial. Moreover, the events occurred in broad daylight. The Hutu attackers killed with impunity as the local officials present not only refrained from preventing the massacre, but encouraged them.

345. The defence failed to controvert the credibility of these witnesses or the reliability of the evidence on fundamental issues, in particular the identification of Kayishema during the attack. Minor discrepancies in testimony between witnesses did not raise a reasonable doubt as to the issue of

5644

Kayishema's participation.

Factual Findings

346. With regard to Kayishema's participation in the Complex massacre, the Trial Chamber accepts the evidence of witnesses A, B, C, D, E, F, G and T.

347. Paragraph 25 of the Indictment alleges that by 17 April thousands of unarmed and predominantly Tutsi had gathered at the Complex. The Trial Chamber is satisfied from the evidence presented that there were indeed thousands of men, women and children who had sought refuge at the Complex. Further, the Trial Chamber finds that they were unarmed and predominantly Tutsi.

348. Paragraph 26 of the Indictment alleges that some Tutsis went to the Complex because Kayishema ordered them to do so at a time when Kayishema knew that an attack was going to occur. The Prosecution did not prove that the Tutsis were ordered to go to the Complex or that Kayishema ordered them to go there. Most of the witnesses went there on their own volition. Others such as witness B went there because in the past their parents had gone to such places for safety. It was only witness D, who testified that Kayishema ordered him to go to the Church.[73] This testimony while credible, does not satisfy this Chamber of the facts alleged in paragraph 26. Consequently, the Trial Chamber finds, beyond a reasonable doubt, that the Tutsi men, women and children went to the Complex on their own volition or because their parents had in the past found refuge in such places.

349. Paragraph 27 of the Indictment alleges that people under Kayishema's control, surrounded the Complex and prevented people from leaving at a time when Kayishema knew the attack was going to occur. This Chamber finds that the evidence of witnesses A, B, C, E and F shows that after those seeking refuge had gathered in the Complex it was surrounded by people under Kayishema's orders or control, including *gendarmes* and members of the *Interahamwe*. Witness D described how attackers in boats surrounded the peninsula on which the Complex is located. Witness B, described how the Complex was surrounded by members of the *Interahamwe* carrying machetes and spears. Witness C, testified that gendarmes prevented persons from leaving the Complex on 17 April 1994.

350. The Trial Chamber finds, beyond a reasonable doubt that Kayishema knew or must have known that an attack was about to occur. This is because Kayishema stated that he had received orders from Kigali to kill Tutsis, he initiated the attack on 17 April, and he gave orders for the attack to begin. It follows, therefore, that Kayishema had the requisite knowledge. Kayishema was seen at the Complex twice before the attacks of 17 April and knew or must have known from the massive number of armed attackers that, in the circumstances of Kibuye *Prefecture* at the time, there was potential for a massacre to occur. Indeed, because smaller scale attacks had occurred there on the 15 and 16 April, Kayishema must have been aware of the potential for further attacks. Furthermore, as shown above in paragraph 28

5645

of the Indictment, the Complex massacres followed the massacre at Mubuga Church where Kay had played a major role by initiating a systematic pattern of extermination within Kibuye. For these reasons, the Prosecution proved the allegations in paragraph 27.

351. Paragraph 28 of the Indictment alleges that on 17 April Kayishema went to the Complex, ordered the attackers to commence an attack and participated personally. Witnesses A, B, C, D, E and F testified that, notwithstanding the massive number of people seeking refuge at the Complex, they clearly saw Kayishema. The Trial Chamber finds the identification of Kayishema convincing. In making this finding the Trial Chamber is mindful that all the above-mentioned witnesses had known Kayishema prior to the events and successfully identified Kayishema at trial. In addition, the events occurred in broad daylight. The Trial Chamber finds, beyond a reasonable doubt, that on 15, 16 and 17 April, Kayishema went to the Complex, and that during the attacks it was not possible to leave the premises as those who attempted to flee were killed.

352. The Trial Chamber also finds, beyond a reasonable doubt that Kayishema participated in and played a leading role during the massacres at the Complex. Kayishema led the attackers from the *Prefecture* office to the massacre site at the Complex, he instigated and encouraged all the attackers by the message from Kigali to kill the Tutsis, which he delivered through the megaphone. Kayishema also orchestrated the burning of the Church. Further, he cut one Rutabana inside the Church after the major offensive subsided.

353. Paragraph 29 of the Indictment alleges that the Complex attacks left thousands dead or injured. The Trial Chamber finds, beyond a reasonable doubt, that the single day of the major scale attack, as well as the smaller-scale sporadic attacks upon the Complex, resulted in the death of thousands of Tutsis whilst numerous others suffered injuries. This Chamber bases this finding primarily on the testimony of Dr. Haglund and Dr. Nizam Peerwani, Prosecution expert witnesses. Thus, the Prosecution has proved the facts alleged in paragraph 29.

354. In relation to paragraph 30 of the Indictment: The accusations in this paragraph are addressed in Chapter 6.1 *infra.*

5.3.2 The Massacre at the Stadium in Kibuye

Background

355. The witnesses presented a horrific account of the Kibuye Stadium massacre that occurred in mid-April 1994. Hutu military, police and the members of the *Interahamwe* conducted a massive, systematic, two-day slaughter of thousands of Tutsi civilians. Four witnesses were survivors of this massacre. Dr. Haglund, who visited the Stadium in September 1995, presented photographic slides.

5646

These slides depict a stadium with a field of grass about the size of a football pitch and additio space for viewing; brick walls about eight foot high surround the Stadium on three sides and Gatwaro Hill flanks the fourth side. Spectator grandstands are located at one end. The road runs parallel to the side of the Stadium, facing Gatwaro Hill.

356. On Monday, 18 April 1994, at approximately 1 or 2 p.m., groups of gendarmes, communal police, prison wardens and members of the *Interahamwe* came from the direction of the roundabout in Kibuye town, surrounded the Stadium and started to massacre the Tutsi with tear gas, guns and grenades. The first attack of the massacre finished at approximately 6 p.m. The next day, after celebrating in the local bar, attackers returned to kill survivors. The fact that the massacre at the Stadium occurred does not appear to be in dispute; Kayishema himself testified that a major attack at the Stadium took place on 18 April 1994[74] and witness DO estimated that about 4,000 of those seeking refuge were killed at the Stadium. Witness G, a local Hutu, who helped to bury bodies found in and near the Stadium, stated that dead bodies covered the entire ground of the Stadium and that bodies were buried using machinery over five days. Therefore, the issues for the Trial Chamber to consider here are whether Kayishema was present at the Stadium on 18 April 1994 and, if so, what was his role if any, and the role of anyone acting under Kayishema's orders or control.

The Role of Kayishema and His Subordinates

357. The Trial Chamber now assesses the evidence in relation to Kayishema's role at the Stadium massacre. In short, witnesses testified that Kayishema arrived in a white vehicle at the head of a column of attackers, ordered them to begin the killing and gave the signal by shooting a gun into a crowd of persons. The identification of Kayishema at the Stadium is strengthened by the witnesses' knowledge of the accused prior to the events in 1994. Witness I had known Kayishema since the accused was a child and had been the neighbour of Kayishema's parents. Indeed, Kayishema himself testified that witness I was a friend of his family. Witness K had known Kayishema before he was a *Prefect* and had seen him many times when he went for medical treatment. Witness M claimed to have known Kayishema all his life, but admitted that the accused did not know him well. Witness L had not known Kayishema before and testified that he only knew it was Kayishema at the Stadium because others had informed him so. With some variation in detail, witnesses I, K, L and M gave a similar account, both of the events and of Kayishema's role in particular. The testimony of witness I, the most lucid and complete is discussed thoroughly below, followed by the testimony of witnesses K, L, M, F, and NN.

Witnesses

Witness I

358. Witness I is an elderly carpenter. In mid-April, sometime between 15 and 20 April 1994, witness I and seventeen other family members left their home in search of refuge and protection from massacres occurring throughout the *Prefecture* of Kibuye. Witness I testified that his *Conseiller* had

told him to go to the Stadium where Tutsi would be safe. He explained that they arrived at the St and stayed there for three or four days. When he arrived at the stadium no one was guarding the entrances but soon thereafter gendarmes started to control who could exit and, confiscated weapons from those who entered. Witness I testified that those attempting to leave were killed by members of the *Interahamwe* and, that he saw this happen. In the Stadium there was no firewood, the water had been cut off, and the Tutsi seeking refuge ate raw meat from cows. Sick and wounded were amongst them and those who attempted to seek help from the local hospital just yards from the Stadium were beaten back or killed. Those seeking refuge barely had room to sit down and there was no protection from sun or rain. The authorities provided no assistance. Soon after arrival the Tutsi heard from others about the massacres at Mubuga Church and Home St. John.

359. Witness I testified, describing his feelings, "For me I thought that no one would be able to kill off 15,000 people, and I thought that any authority who would represent so many people would not dare to kill them off, because these people worked for those persons in authority. They paid taxes and they provide assistance and they repair roads . . . . So I told myself that no one was going to be able to use firearms or machetes to kill us off. I said that no person in authority would be able to do such a thing."[75]

360. Witness I testified that at about 2 p.m. on 18 April armed civilians, soldiers, former soldiers and prison wardens armed with guns, clubs and machetes came from the direction of the roundabout in Kibuye. They divided into groups and surrounded the Stadium, taking position on the hills. From his viewpoint in the spectator grandstands witness I testified that he clearly observed Kayishema standing by the main entrance, near a house owned by the MRND. From this location, Kayishema could see into the Stadium. Witness I saw Kayishema ask for a gun, shoot it toward the masses inside the Stadium as if to signal the attack to commence, and then give the gun back to the gendarme. Kayishema's two shots struck two people. At that point the massacre began. The attackers threw tear gas and grenades and fired guns into the Stadium. Witness I described the scene, "some were dead already, others were wounded in a way that they could no longer lift themselves from the ground. There were children who were crying because of the blows they had received. Others were bleeding or looking for water." The massacre stopped at approximately 6:00 or 6.30 p.m. After the attack ceased, witness I heard the attackers gathered in the bar next to the Stadium, drinking and dancing. On that first day witness I did not see attackers enter the Stadium. Those who tried to flee were killed with sharpened bamboo sticks. Witness I discovered that his two wives and fifteen children who accompanied him to the stadium had been killed on that day. During the night of 18 April he managed to escape and fled towards Karongi.

361. The Defence asserted that witness I did not mention to investigators in an interview prior to his testimony that he had seen two people killed by Kayishema's opening shots. Witness I admitted that, although he had seen two people hit by Kayishema's shots, he did not know whether the victims had

died. The Trial Chamber accepts the evidence that Kayishema's shots struck two persons seeking in the Stadium, an assertion that is corroborated by witness M.

Witnesses K, L, and M

362. Witnesses K, L and M are also Tutsis who had sought refuge inside the Stadium and survived the massacre of 18 April. Their testimony regarding the appalling conditions within the Stadium and the gendarmes preventing egress conforms to the evidence of witness I. In addition, the witnesses testified to an incident that occurred on the morning of 18 April; a white man started to count the people in the Stadium in order to bring aid but left when Kayishema, who arrived at the Stadium with gendarmes, threatened the same white man if he helped them. All three witnesses testified that they did not understand the conversation between the white man and Kayishema in French, but that others translated the gist of it from French to Kinyarwanda.

363. Like witness I, witnesses K, L and M testified that on 18 April at around 1 or 2 p.m., Kayishema came from the direction of the Kibuye roundabout accompanied by the members of the *Interahamwe*, gendarmes, communal police and prison wardens. The witnesses saw Kayishema walk to a position just outside the main gate, in front of the MRND building, and order the massacre to commence. Witnesses K and L added further that Kayishema was armed with a sword and that the attackers were singing a song in Kinyarwanda with the lyrics, "exterminate them, exterminate them." These witnesses also testified that the attackers surrounded the Stadium, used tear gas, grenades and guns to kill those inside the Stadium, but did not enter.

364. Witness M gave nearly the same account as witness I with regard to Kayishema firing gunshots into the Stadium. M testified that Kayishema had taken a gun from a gendarme, fired it into the Stadium twice, hitting two people, and then fired once into the air, at which point the massacre started. Witnesses K and L, however, testified that they did not see Kayishema fire into the Stadium but heard him order the gendarmes to "fire on these Tutsi dogs." This difference in testimony is understandable considering that witnesses I and M were observing events from half way up the grandstands whereas witnesses K and L were positioned just inside the Stadium close to the main entrance. When considered together, the witness testimony shows that Kayishema first ordered the gendarmes to fire on the Tutsis and then grabbed a gun and personally fired twice into the Stadium, apparently to lead and set an example to start the massacre. It is reasonable that witnesses K and L did not see Kayishema shoot because, having heard Kayishema's orders to fire, they already were fleeing. Indeed, witness K testified that when he heard Kayishema give the order to shoot he immediately ran further back into the Stadium; witness L testified that when he heard Kayishema's order he ran to find his family and did not see Kayishema again. Witnesses K, L and M testified that the massacre continued until 6 or 6.30 p.m. Witness O, a Hutu doctor, testified that he heard the massacre start with firing and grenades at around 3 p.m. and continue until dark.

365. There is less evidence relating to the massacres on the morning of 19 April. Witness K testified that at 6 a.m. he and others left the Stadium and fled up Gatwaro Hill when he saw the attackers returning to where they appeared to return in order to finish off any survivors with traditional weapons. As he fled, witness K saw the attackers going into the Stadium and heard shouts and screams. Their testimony did not place Kayishema at the Stadium on 19 April.

Witnesses F and NN

366. Witnesses F and NN observed events from hiding places outside the Stadium. The testimony of these witnesses conforms generally to that offered by witnesses I, K, L and M but also differs in some respects. Witness F testified that he survived the massacre at Catholic Church Home St. John and during the night of 17 April fled to Gatwaro Hill, from where he had a good view of the Stadium. He observed the events at the Stadium 18 April and Kayishema's participation, including the opening gunshots. Witness F, however, testified that Kayishema arrived with the attackers between 9.30 and 10 a.m. and estimated that they were there for approximately two hours before the massacre started. Contradicting the other witnesses, witness F testified that killers entered the Stadium on 18 April and began cutting up the Tutsis. The apparent confusion in witness F's account may be explained by the circumstances and the mental state in which he observed the events; responding to a question of what he did when the massacre started, witness F stated "I was astonished. I completely lost my head. I cannot even tell you what I witnessed as regards the massacres and this was because a lot of my family were inside the Stadium and they were being massacred."[76]

367. Witness NN testified that on 18 April he was hiding between two buildings about 40 metres from where Kayishema stopped by the Stadium's main entrance. Witness NN testified that, before shooting into the Stadium, Kayishema murdered a Tutsi child and its mother. He stated that Kayishema then took the child from its mother, held it upside down by one leg, extended the other leg to a soldier and sliced it vertically with a sword. According to NN, Kayishema shot the child's mother as she ran to the Stadium entrance. The Trial Chamber notes that NN observed the events from a different position, which could explain his divergent account. Furthermore, evidence suggests that Kayishema was surrounded by gendarme and members of the *Interahamwe* when he arrived at the main entrance and, therefore, the view of the other witnesses could have been obstructed at the time when Kayishema allegedly killed the child. However, the Stadium witnesses all testified that they had a clear view of Kayishema when he arrived and, that being so, it seems unlikely that they would omit an incident of such horror from their testimony. Furthermore, if Kayishema had first shot the child's mother before he moved to the main entrance from where he shot twice into the Stadium, the other witnesses likely would have observed this. According to their evidence, they did not. For all the above reasons, the Trial Chamber does not rely on the evidence proffered by witnesses F and NN pertaining to the Stadium massacre on 18 April 1994.

The Defence Case

368. In his defence, Kayishema testified that he was in hiding and did not go to the Stadium at the time of the massacres. However, Kayishema testified that he did visit the people seeking refuge at the Stadium sometime after 13 April but before they were killed; "Yes I went to the place but my CV is clear. I'm quite used to this sort of plague. When there are so many people I know how to gather them together, how to seek solution to the problems, how to subdivide them according to their needs . . . ." In other words, Kayishema testified that he went to the Stadium in order to assess the situation. This, however, squarely contradicts his statement to Prosecution investigators. When asked by investigators if he ever went to the Stadium, Home St. John or Mubuga Church from 7 April 1994 until the end of the war, Kayishema gave a categorical "no". When questioned about this apparent contradiction during cross-examination Kayishema testified that he thought the investigator was asking him whether he had visited the sites *everyday* and therefore he answered in the negative.[77] With regard to gendarmes guarding the gates of the Stadium and controlling the movement of people in and out, Kayishema testified that this was "true and normal."

369. The Defence raised further issues of detail. The Defence questioned why the huge number of Tutsis did not escape before the 18 April by overpowering the four or so gendarmes who were guarding the entrances. The witnesses were consistent in their responses, stating that the gendarmes were armed but those seeking refuge were powerless, therefore, those who tried to leave would have been killed. This fear seems reasonable particularly in light of the evidence that Tutsis had initially sought refuge in the Stadium as a means of escaping atrocities occurring throughout Kibuye *Prefecture* and that Tutsis had been killed when they attempted to leave.

370. The Defence further asserts that there is no direct evidence that Kayishema ordered the water supply in the Stadium to be turned off as suggested by some Prosecution witnesses. The Trial Chamber agrees with the Defence; although it is clear that the taps in the Stadium did not supply water, there is no direct evidence that Kayishema was responsible.

Factual Findings

371. With regard to Kayishema's participation in the Stadium massacre, the Trial Chamber accepts the evidence of witnesses I, K, L and M. In cross-examination all four witnesses remained fundamentally faithful to the evidence proffered in chief.

372. Paragraph 32 of the Indictment alleges that by April 18 thousands of unarmed and predominantly Tutsis had gathered in the Stadium. The Defence pointed out that Prosecution witnesses did not give a consistent figure with regard to the number of Tutsi whom had gathered in the Stadium. Witness estimates varied from 5,000 to 27,000. The Trial Chamber does not consider this variation fatal to the

reliability of the witness evidence. Mindful that the Indictment merely states "thousands o women and children had sought refuge in the Stadium located in Kibuye town," the Trial Chamber is satisfied from the evidence that there were indeed thousands of men, women and children who had sought refuge at the Stadium. Further, the Trial Chamber finds that those seeking refuge were predominately Tutsi and, with the exception of a small number of machetes with which they slaughtered cows for food, they were unarmed.

373. Paragraph 33 of the Indictment alleges some refugees went to the Stadium because Kayishema ordered them to do at a time when Kayishema knew that an attack was going to occur. The Prosecution failed to prove this allegation. In fact, almost all witnesses testified to the contrary.

374. Paragraph 34 of the Indictment alleges that people under Kayishema's control, surrounded the Stadium and prevented people from leaving at a time when Kayishema knew the attack was going to occur. The evidence of Prosecution witnesses I, K, L and M, discussed above, is sufficient to show that after those seeking refuge had gathered in the Stadium, it was surrounded by people under Kayishema's control, including gendarmes. Witnesses I, K, L, M and O, testified that gendarmes prevented persons from leaving the Stadium from about 16 April 1994. Kayishema himself accepted that gendarmes were controlling the movement of people in and out of the Stadium. Furthermore, the Stadium massacre followed the massacres at Mubuga Church and Catholic Church, Home St. John. Indeed, a systematic pattern of extermination existed which is a clear demonstration of the specific intent to destroy Tutsis within Kibuye *Prefecture* in whole or in part. The evidence shows that Kayishema played a major role within this system. For these reasons, the Trial Chamber finds that at the time when the Tutsi were prevented from leaving, Kayishema knew or had reason to know that an attack on the Stadium was going to occur.

375. Paragraph 35 of the Indictment alleges that on April 18 Kayishema went to the Stadium, initiated, ordered, and participated in the attack. It further alleges that during the night of April 18, attackers killed Tutsis if they tried to leave. Witnesses I, K, L and M notwithstanding the mass people, testified that they clearly saw and (in relation to K and L) heard Kayishema. The Trial Chamber finds the evidence of Kayishema's identification and participation convincing. In a scenario, such as the Stadium, it is not surprising that those inside would strain to see and hear what was happening outside when a group of attackers arrived *en masse* at the main gate. The photographic exhibits indicate that witnesses I and M, positioned on the spectator stands, would be able to see over the Stadium wall to the main entrance. Witnesses K and L, positioned just inside the Stadium close to the main entrance, explained how, despite many people being between them and Kayishema, they wanted to see who had arrived and succeeded in doing so. All of the identification occurred in broad daylight. In making this finding the Trial Chamber is mindful that witnesses I, K and M had known Kayishema prior to the events and successfully identified Kayishema at the trial. Witness L, however, had not known

Kayishema prior to the Stadium massacre, but others informed him that it was *Prefect* Kayishema time of the events. Therefore, the Trial Chamber must treat the identification of Kayishema by witness L with extra vigilance. The account of witness L is so similar to the other Prosecution witnesses, particularly K, such that the Trial Chamber accepts that his testimony related to the same man. Accordingly, the Trial Chamber considers that the testimony of L further corroborates the evidence of witnesses I, K, and M with regard to Kayishema's participation in the Stadium massacre.

376. The Trial Chamber finds beyond a reasonable doubt that on 18 April 1994 Kayishema went to the Stadium and ordered members of the *Gendarmerie Nationale*, communal police and members of the *Interahamwe* to attack the Stadium. Further, Kayishema initiated the attack by firing a gun into the Tutsi who had assembled in the Stadium and his shots struck two of them. The evidence indicates that the attackers tear gas, guns and grenades were used on 18 April and that the massacre continued on 19 April. However, the evidence relating to the 19 April is not sufficient to show which assailants were attacking the Stadium, or to prove Kayishema's presence. The Trial Chamber is also satisfied that during the attacks some of the Tutsis who attempted to flee were killed.

377. There is conflicting evidence pertaining to whether the Tutsis were prevented from leaving the Stadium during the night of April 18 and the morning of April 19. The Trial Chamber finds that the Prosecution has not proved their case on this issue.

378. Paragraph 36 of the Indictment alleges that the Stadium attacks left thousands dead or injured. The Trial Chamber is convinced by the evidence that the two days of attacks on the Stadium resulted in thousands of deaths and numerous injuries to Tutsi men, women and children. Predominantly Hutu assailants perpetrated these acts.

379. In relation to paragraph 37 of the Indictment: The accusations in this paragraph are dealt with below in Part VI.

5.3.3 THE MASSACRES AT THE CHURCH IN MUBUGA

Background

380. The Church in Mubuga, like other places of worship in Rwanda, was regarded historically as a safe haven in times of unrest. This was also the case in 1994. The Prosecution alleges that by about 14 April 1994 thousands of unarmed men, women and children, most of whom were Tutsi, had gathered at the Church in Mubuga to escape on-going and widespread violent attacks throughout Kibuye *Prefecture*. The Prosecution alleges that on 14 April the authorities of the *Prefecture*, including Kayishema and *Bourgmestre* Sikubwabo, came with gendarmes to the Church located in Gishyita Commune. According to one eyewitness,[78] Sikubwabo stated that he was going to exterminate the

Tutsis. Over the next few days, attackers killed thousands of people. Only a handful of those who sought refuge in the Church would survive this massacre, just one of many in Kibuye *Prefecture*.

381. The allegation that this appalling event occurred at Mubuga Church is not in dispute. In fact, an assortment of witnesses, including various eyewitnesses, Sister Julie Ann Farrington, Defence witness DP, and Kayishema, confirmed that after the massacre, corpses and/or human remains were found inside and/or in the immediate vicinity of Mubuga Church. Witnesses who visited this site shortly after the massacre remarked that the decomposing bodies caused a strong stench in the area. In addition, Dr. Haglund, testified that he went to the Church grounds on 20 September 1995 to investigate two alleged graves sites there. He deposed that one grave had been exhumed previously and the bodies had been reburied nearby. In the second area he found a depression in the ground and there were indications that this area had been disturbed. Upon an attempt to probe the second mass grave he found that the ground was too hard and therefore he did not conduct further investigations there. Due to uncontested evidence showing a massacre near the Church in Mubuga, the questions that remain relate to the presence and the participation of Kayishema and those under his control in this massacre.[79] The Trial Chamber examines the role Kayishema and his subordinates played at this massacre site, in detail, below.

Prosecution Case

382. Five Prosecution eyewitnesses, V, W, OO, PP and UU appeared before the Trial Chamber to recount the events of prior to and during the massacre in mid-April 1994 at Mubuga Church.[80] With slight variations, these five eyewitnesses recounted the events in the following manner. While thousands of Tutsis congregated at this site, between 9 and 14 April 1994, witnesses heard that the *Prefect* had met with the Hutu priest and that the distribution of food to those seeking refuge was forbidden. The same Hutu priest, who had replaced the Tutsi priest at Mubuga Church, refused water to those seeking refuge, and told them to "die, because your time has come."[81]

383. Paragraph 40 of the Indictment alleges that "[a]fter the men, women and children began to congregate in the Church, Clement Kayishema visited the Church on several occasions" and that on or about 10 April he brought gendarmes to this location who prevented those seeking refuge in the Church from leaving. All prosecution witnesses deposed that gendarmes had gathered on the Church grounds and patrolled the Church complex to ensure that those who had sought shelter there would not leave. Witness V stated that gendarmes accompanied Kayishema before and during the attacks and witness PP stated that he saw gendarmes near the Church on 13 April. Witness UU stated that on the 15 April Kayishema arrived with "soldiers." The other three eyewitnesses stated that gendarmes were present throughout the congregation of those seeking refuge and during the massacres. For example, witness V stated that the gendarmes arrived on either the 9 or 10 April.

384. Witnesses V, OO and PP all confirmed the allegation that, prior to the attacks, the Tutsis could

5654

not leave the Church due to a fear of the gendarmes and other armed individuals patrolling the C[illegible] complex. According to one witness, this fear was founded upon the murder of individuals who had attempted to leave the Church building, to find food.

385. Paragraph 41 of the Indictment asserts that individuals under Kayishema's control "directed members of the *Gendarme* [sic] *Nationale*, communal police of Gishyita *commune*, members of the *Interahamwe* and armed civilians to attack the Church," and that these individuals directly participated in the events. What follows is how the events unfolded as recounted by Prosecution eyewitnesses before the Trial Chamber.

15 April 1994

386. A number of Prosecution eyewitnesses stated that after the Tutsis began to gather, the Church doors were kept locked from the inside in order to prevent the assailants, who previously had attempted to attack, from entering the Church. Therefore, on the morning of 15 April, the assailants began the attack by throwing tear gas grenades into the Church and shooting through the windows. Witnesses V, W and UU placed Kayishema and the local authorities at the Church on this day. According to witnesses OO and W, *Bourgmestre* Sikubwabo and *Conseillers* Mika Muhimana and Vincent Rutaganera led the attack. Witness V stated that he saw Kayishema arrive at the Church in the company of gendarmes on 15 April, while UU stated that he saw Kayishema in the company of "soldiers" on this day. Witness V was the only witness that claimed that Kayishema had a gun and opened fire.

387. According to UU, on this day, Kayishema came to the Church and went to the home of the Hutu priest behind the Church. Witness OO confirmed the cooperation of the priest with Kayishema when he deposed that the priest instructed him to conduct a head count of the Tutsis in the Church for the *Prefect*. In addition, the Prosecution eyewitnesses confirmed the presence and/or participation of the communal police and civilians, such as local businessman Rundikayo, on this date. Witnesses indicated that although some people died from the effects of the tear gas, the number of Tutsis killed was relatively low on this day. By all accounts, the attackers left the Church in the afternoon of 15 April.

16 April 1994

388. On the morning of 16 April 1994 the Church doors were finally forced opened and the assailants entered the Church. Witness PP recalled that "we were hoping to be killed by bullets and not by machetes."[82] The attackers again used tear gas grenades, along with other traditional weapons and, during the ensuing panic some Tutsis were trampled to death.

389. Witness OO testified that, on the morning of 16 April, Kayishema came with soldiers of the National Army. Witness W was the other eyewitness who placed Kayishema at the Church on this date. It was claimed that in addition to Kayishema, local authorities such as *Bourgmestre* Sikubwabo and

various *conseiller*s were present at the Church on this date. Soldiers threw grenades and other attackers shot at and hacked with machetes the Tutsis inside the Church. After most people in the Church had been killed, witness OO, who hid under the corpses of fallen Tutsis, stated that he heard the *Prefect* telling the local authorities "to come and collect the Caterpillar [bulldozer] to bury the dead."[83]

The Defence Case

390. The Defence conceded that Kayishema came to Mubuga Church on 14 April, but that he did so only to monitor the situation. In fact, during closing arguments, the Defence reminded the Trial Chamber that his visit to the Church is recorded in Kayishema's diary.[84] This was an obvious mistake as nothing is recorded in the said diary under this date.

391. The Defence also attempted to impeach Prosecution witnesses by stressing that some contradicted themselves, or each other, with regard to the exact hour of the commencement of the attacks or the varying dates of the end of the attacks. For example, the Chamber was asked to recall that witness OO deposed that the attacks did not end until 17 April while others claimed that the massacre, at this site, ended on 16 April. According to Kayishema's Defence Counsel the idea that "a witness can only identify Clement Kayishema if he knew him before" is incorrect.[85] In cross-examination issues of visibility were raised which will be analysed below.

Factual Findings

392. The allegations in paragraph 39 of the Indictment, that by about 14 April 1994 thousands of Tutsis congregated in Mubuga Church and that they were taking refuge from attacks which had occurred throughout Kibuye, are not in dispute. In addition all five Prosecution witnesses and at least one Defence witness confirmed that many Tutsis had come to the Church for protection. The witnesses gave slightly differing numbers about the persons that were gathered at the Church. Witness V estimated that about 4,000 people, mostly women and children had assembled there by 12 April, while witness W remarked that the number of persons taking shelter at this location was between 4,000 to 5,000 by the time of the attacks. Witness OO stated that 5,565 were present at the Church according to a head count he conducted on the instructions of the Hutu priest, who had told OO that this information was needed by the *Prefect* for humanitarian purposes. The Trial Chamber accepts that between 4,000 to 5,000 persons had taken refuge at Mubuga Church.

393. Paragraph 40 of the Indictment charges Kayishema with having visited the Church on several occasions before the attacks and having brought gendarmes to this location on or about 10 April. The gendarmes allegedly prevented the Tutsis within the Church from leaving. As discussed above, all Prosecution eyewitnesses affirmed having seen gendarmes at the Church while they were assembling there and during the attacks. With regard to Kayishema having brought the gendarmes two witnesses testified that prior to the attack they saw him at the Church either arriving with or in the company of

gendarmes. Therefore, we find that whether these gendarmes came to this location with Kayishe arrived without him is irrelevant as Kayishema knew or should have known of their activities, especially given the state of security in his *Prefecture*. The issue is the presence of the gendarmes and not whether they were physically transported to the crime site by Kayishema.

394. Whether the gendarmes prevented the Tutsis from leaving the Church is the second question raised in paragraph 40 of the Indictment. The Defence contended that the gendarmes were present for the protection of the Tutsis. The Prosecution witnesses painted another picture. They stated that while the gendarmes were present before the attacks, armed assailants, including the members of the *Interahamwe*, surrounded the Church and attacked Tutsis attempting to exit, with impunity. Witnesses W and OO both affirmed that Tutsis who initially attempted to leave the Church for food or water were either chased back into the building or beaten to death by the armed assailants outside the Church. Witness OO stated that those seeking refuge could not even leave the Church to use the toilet. One Prosecution eyewitness testified that approximately, twelve to fifteen gendarmes were present at the Church. If this number was accurate, coupled with the fact that gendarmes are usually armed, then it would be conceivable that the gendarmes could engage in the prevention of the departure of the Tutsi seeking refuge from this site. Moreover, during the attacks, the gendarmes were seen throwing grenades and shooting into the crowds of the unarmed civilians inside the Church. All these facts leave no doubt that the gendarmes were involved in the virtual imprisonment and later the massacre of the Tutsis in Mubuga Church until the attacks began inside the Church on the morning of 15 April.

395. Paragraph 41 of the Indictment, surprisingly, does not charge Kayishema with having been present during the attacks. It states "on or about 14 April 1994 individuals, including individuals under Clement Kayishema's control, directed members of the *Gendarme* [sic] *Nationale*, communal police of Gishyita *commune*, members of the *Interahamwe* and armed civilians to attack the Church." The Indictment goes on to allege that the attacks continued for several days as not all the persons within the Church could be killed at one time. As aforementioned, all five Prosecution eyewitnesses to the events at Mubuga Church were there on the 14 and 15 April. Two witnesses deposed that they had been there on the 16 April and only one on 17 April 1994. These witnesses stated that they closed the doors to the Church to avoid being attacked by assailants. The Trial Chamber finds that, with regard to the date, there were no material contradictions in the oral testimonies of these five witnesses, as claimed by the Defence. The Trial Chamber further finds that the attackers, who surrounded the Church, began their attempts to kill the Tutsis before 15 April, but that the dates on which the massacres were carried out inside the Church were in fact 15 and 16 April in the presence, and at the direction of, local authorities.

396. Because a number of eyewitnesses placed Kayishema at Mubuga Church during the attacks, at this juncture, it is appropriate to consider the identification of the accused at this location before and during the attacks. Preliminarily, we are cognizant of the fact that the events took place during the

daytime, which renders visibility less problematic. Secondly, we note that because those seeking were awaiting attacks, they must have been constantly seeking to know about the goings-on around the Church and were therefore, as mentioned by some witnesses, such as W, looking outside through the windows and doors.

397. Having observed the demeanor of the witnesses and listened closely to their oral testimony the Trial Chamber is satisfied that the eyewitnesses were credible and did not attempt to invent facts. This credibility was helpful in determining the reliability of the identification of the accused at the massacre site. Mubuga Church has three doors and several windows[86] and according to the eyewitnesses' accounts, the assailants, including Kayishema and his subordinates came close to the Church building at some point during the time in question. During cross-examination, some concerns of obstructed visibility were raised also in the case of OO, because he had placed Kayishema at the site by stating that while he (witness OO) was lying under the corpses of slaughtered Tutsis, he heard Kayishema speaking with other local authorities. The question then becomes one of voice recognition and not of visibility, as the Defence contend. The Trial Chamber is satisfied that the witnesses' prior familiarity with the accused - he had seen the *Prefect* at the installation of Sikubwabo as *Bourgmestre* and at local rallies - and having heard his voice at other meetings prior to the massacres would enable OO to recognise Kayishema's voice and render the identification of the accused a trustworthy one.

398. The Defence contested the identification of the accused by witness W by pointing to the unfavorable visibility conditions caused by the tear gas released into the Church. Since there is both oral and pictorial[87] evidence of grenades having been used the Trial Chamber notes that this factor could have made for poor visibility. However, Mubuga Church covers a sizeable amount of space, capable of holding 4,000 to 5,000 persons. Witness W stated that he was not near the part of the Church where the grenade landed and was therefore able to view the persons outside. At any rate, it remains unclear whether the witness saw Kayishema prior to the launching of the tear gas grenade or after. Therefore, the Trial Chamber accepts the testimony of witness W.[88]

399. Questions were also raised by the Defence regarding the reliability of witness UU's identification of the accused. UU testified that he was near the main entrance of Mubuga Church when Kayishema arrived in his vehicle. During cross-examination, however, he stated that he did not recognise Kayishema until he heard other people remark that the *Prefect* had arrived. The Trial Chamber observes that witness UU had met Kayishema on one occasion prior to April 1994, at Kayishema's grandfather's home, but may not have recognised him immediately upon his arrival at Mubuga Church on 15 April. However, the witness stated that after the declaration by others he did recall knowing Kayishema. The Trial Chamber finds this, in fact, to be the case.

400. Each one of these eyewitnesses, with the exception of PP, placed Kayishema at the site on at

5658

least one day either shortly before or during the attacks of 15 and 16 April. Witness PP's h evidence also corroborated the accounts of other eyewitnesses. Additionally all eyewitnesses presented by the Prosecution for this site affirmed having seen at least one or more of the following outside the Church during the time in question: local authorities such as *Bourgmestre* Sikubwabo, *Conseillers* Muhimana and Rutagenera, Minister of Information Niyitegeka as well as gendarmes, members of the *Interahamwe*, communal police and other armed civilians. It is interesting to note that the Defence only contested the presence of local authorities during the cross-examination of Kayishema and not before. [89]

401. Paragraph 42 of the Indictment maintains that as a result of the attacks thousands of deaths and numerous injuries to men, women and children perished and numerous others sustained injuries.

402. The Trial Chamber has made a finding with regard to the number of the Tutsis present at the Church. Therefore, in light of the testimony that most of the persons assembled at the Church were slaughtered, the Trial Chamber deems it unnecessary to focus on exact numbers. Suffices to say we find that thousands of persons were massacred at this site and therefore the Prosecution has met its burden beyond a reasonable doubt with regard to this allegation.

403. Paragraph 43 of the Indictment asserts the Kayishema did not attempt to prevent this massacre and failed to punish those responsible. This allegation is addressed in Chapter 6.1.

Conclusion

404. It is clear from the evidence presented to the Trial Chamber that of the thousands of Tutsis gathered at Mubuga Church, only a few survived this weekend massacre. The Trial Chamber is satisfied, beyond a reasonable doubt, that Kayishema and his subordinates, including local authorities, the gendarmes, the communal police and the members of the *Interahamwe* were present and participated at the attacks at Mubuga Church between 14 and 16 April. As aforementioned, Kayishema, is not charged with having been present during the attacks under paragraph 41 of the Indictment. In light of the testimony of the five witnesses the Chamber nevertheless finds that Kayishema was present during the actual attacks. We further find that his presence and the presence and the participation of other local authorities, encouraged the killings of the Tutsis who had assembled to seek refuge there.

5.4 THE MASSACRES IN THE AREA OF BISESERO

5.4.1 Introduction

405. The evidence before the Trial Chamber presents a picture of a massive, horrific assault on the Tutsis gathered in the Bisesero area by extremist Hutu military, communal police, members of the *Interahamwe* and armed civilians. These attacks continued throughout April, May and June 1994. The Bisesero area was home and area of refuge to many Tutsis during the genocide. Many Tutsis from other regions, hid in caves, scattered through woods and bushes, or gathered on the high hills in the area. Some Tutsis congregated in Bisesero because they had heard that they would be protected. This was not the case. Relentlessly, they were pursued by Hutus bent on genocide, who shot or hacked all the Tutsis they found.

406. The most severe attacks occurred in the Bisesero area on 13 and 14 May 1994, after an apparent two-week lull in the attacks. Some evidence asserted that this two-week pause in the attacks resulted from a resistance by the Tutsis assembled in Bisesero and attackers used this pause to regroup. Witness G attended a meeting, held on 3 May by Prime Minister Jean Kambanda at Kayishema's offices, in which Kayishema reported there was serious insecurity caused by those gathered in Bisesero and requested reinforcement to resolve the problem.[90] Soon after in mid May, the assailants again pursued those seeking refuge from place to place. At times, Hutu operations were conducted on a huge, organised scale with hundreds of assailants transported in buses to areas where Tutsi civilians had gathered. At other times, minor military or *Interahamwe* patrols throughout the region attacked Tutsis whenever they were found. The ultimate aim of these assaults appeared to be the complete annihilation of the entire Tutsi population. In pursuit of this objective, attackers killed thousands of Tutsi civilians.

General Allegations

407. Paragraph 45 of the Indictment alleges, that the Bisesero area spans two communes, Gishyita and Gisovu, in Kibuye *Prefecture*. The Prosecution alleges that from about 9 April until 30 June 1994, thousands of men, women and children sought refuge in the area of Bisesero. Most were Tutsis seeking refuge from attacks that had occurred throughout the *Prefecture* of Kibuye.

408. Bisesero's geography is not in dispute. The Trial Chamber is seized of Prosecution exhibits, including maps and photographic slides, which depict the area of Bisesero.

409. Furthermore, the Defence did not contest the allegation that from about 9 April until 30 June 1994, Tutsis sought refuge in Bisesero from Hutu attacks that had occurred in other parts of Rwanda

5660

and, in particularly, other areas of Kibuye *Prefecture*. Many eyewitnesses confirmed having seen Tutsis amongst thousands of Tutsis fleeing other attacks within Kibuye *Prefecture*[91] and other witnesses confirmed having seen many Tutsis fleeing various areas in Kibuye to Bisesero. Kayishema testified: "I can tell you that the, [*sic*] aggressors were Hutu and the attacked were the Tutsis, some who came from Bisesero and others who had gathered in the hills of Bisesero. On both sides – on either side there were cases of mortality."[92] Numerous witnesses confirmed the mass murder of Tutsis in the Bisesero area. For instance, Chris McGreal, a journalist for the London-based *Guardian* newspaper, testified that he spoke to Tutsis seeking refuge on a hill in Bisesero in June 1994. While there, he saw evidence of mass killings in the area including human corpses. The Tutsis whom he interviewed told him that these bodies remained unburied because they (the Tutsis) feared attacks by the armed Hutus near the water. Patrick de Saint Exupery, a journalist for the Paris-based *Le Figaro*, visited Bisesero in June 1994. He confirmed that a "Bisesero Hill was scattered, literally scattered with bodies, in small holes, in small ditches, on the foliage, along the ditches, there were bodies and there were many bodies."[93]

410. Paragraph 46 of the Indictment, alleges that "the area of Bisesero was regularly attacked on almost a daily basis, throughout the period of about 9 April 1994 through 30 June 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero. At various times the men, women and children seeking refuge in Bisesero attempted to defend themselves from these attacks with stones, sticks and other crude weapons."

411. The above allegations were not contested. Most Prosecution witnesses, including survivors of attacks, confirmed that attacks took place on a regular basis, during the time in question. Witness OO testified that "the attacks were every day in Bisesero, but most frequent in Muyira and Gitwa. The attacks began at about 6 a.m. and would continue until about 4 to 5 p.m." Kayishema himself testified that "major attack",[94] and "massacres",[95] took place in Bisesero. There is sufficient evidence to show that attacks occurred at approximately twelve sites in the Bisesero area.[96] Dr. Haglund observed the aftermath of the massacres in September 1995 at various sites at Bisesero. Testifying about his visit to a hill on the border of Gishyita and Gisovu Commune, Dr. Haglund stated "[a]nd if one looks through field glasses or a magnifying instrument across . . . this hillside there were many white spots – it looks almost like strange mushrooms growing here and they represented skeletons, the heads of human bodies that were littered on this landscape . . .",[97] and "in a brief walk around I observed a minimum of 40 to 50 individual skeletons lying about on the hill. These were skeletons on the surface. They represented men, women, children and adults."[98]

412. All types of weapons were used by the attackers, witness JJ confirmed that attackers were carrying "clubs, machetes and grenades." Witness HH also reported that the assailants were armed with guns, machetes, swords and spears. The forensic evidence presented by Dr. Haglund confirmed that the victims were killed with such weapons during the massacres. Tutsis, who had gathered at Bisesero, also

5661

attempted to defend themselves with crude weapons. Witness X, along with other witnesses, this fact. Witness EE stated that the Tutsis threw rocks at the assailants to thwart attacks and escape.

5.4.2 Massacres Where Kayishema and Ruzindana Acted in Concert

413. The Prosecution alleges that at various massacre sites in Bisesero, Kayishema and Ruzindana often in concert, brought and directed groups of armed attackers. Moreover, the Prosecution accuses both of personally attacking and killing persons seeking refuge in Bisesero area. Evidence shows that assailants attacked the Tutsis seeking refuge over a vast area. For clarity, the Chamber discusses the evidence chronologically and site by site, with emphasis on the most severe attacks.

Bisesero Hill

414. Witness FF saw Kayishema, Ruzindana and Mika Muhimana, the *Conseiller* of the Gishyita sector, arriving at Bisesero in a white vehicle on 11 May. Kayishema was wearing a green shirt and carrying a megaphone. Ruzindana wore a white shirt and carried a weapon. Mika said through a megaphone that they were working for the Red Cross and that peace had returned. He urged people to bring the wounded and the handicapped to the Church in Mubuga where they would get blankets and beans. As those seeking refuge emerged from their hiding places Ruzindana stepped out of his vehicle and shot at a woman and two girls. Witness FF observed these events from a distance of approximately ten meters. This Chamber finds this uncontroverted testimony.

Attacks at Muyira Hill in May

415. Muyira Hill is located in the Bisesero area on the border between Gishyita and Gisovu commune on the Gishyita side of the road that separates the two communes at this location. As Saint Exupery deposed, it was a manhunt for Tutsis. Many witnesses identified Kayishema and/or Ruzindana at this massacre site including witnesses PP, OO, II, JJ, NN, HH, UU, FF, KK. Witnesses PP and OO were survivors of the Church in Mubuga massacres who then escaped to Bisesero. Witness PP testified that on 13 May Kayishema and Ruzindana were at the foot of Muyira Hill participating in the attacks. Witness PP clearly observed the attackers throwing grenades, chasing those seeking refuge and, before nightfall, Kayishema and Ruzindana shooting at the fleeing Tutsis. On 14 May, also at Muyira, PP heard Kayishema addressing a group of attackers who had come from other *prefectures*.

416. Witness OO testified that the Muyira attacks were led by the *Bourgmestre*, the *Prefect*, *conseillers* and Ruzindana. The attackers separated into groups and encircled the Tutsis seeking refuge. According to OO, he stated that before the attacks, Ruzindana had distributed traditional weapons to the attackers. Witness OO stated that on 13 May Kayishema and Ruzindana came to Muyira Hill leading a convoy of vehicles, including buses, which were transporting soldiers. He testified that Kayishema signalled the start of the attack by firing a shot. Witness OO stated that he

5662

saw Kayishema clearly and described that Kayishema wore a green suit on that day. Witne saw Ruzindana who was armed, leading one of the group of attackers. Ruzindana shot witness OO, striking him in the foot that day. The Defence noted that the witness had told the Prosecution investigator he had been shot in the leg rather than foot. The witness explained that the Kinyarwanda word he had used on both occasions was *"ikirenge,"* which means foot. The Trial Chamber is satisfied that, any discrepancy is not a material contradiction.

417. With regard to the events of 14 May, OO saw Ruzindana and Kayishema arrive with members of the *Interahamwe*. From his hiding place that morning he heard Kayishema address the attackers who came from the other *prefectures* and remembered Kayishema saying "the dirt should be cleaned that day and that they should finish the job . . ." and that Kayishema and others would take care of what remained to be done.[99]

418. Witness II, testified that on 13 May he observed the government owned ONATRACOM buses arrive along with many other vehicles from which soldier exited. As the assailants began the attack, the Tutsis fled, after an initial attempt to defend themselves using stones. Witness II testified that he saw Ruzindana arrive with the soldiers and appear to lead them. Although during examination-in-chief II testified that he witnessed Ruzindana firing a gun at the Tutsis, in cross-examination, this statement proved to be based on an assumption rather than his direct observation. In addition, on the evening of 13 May, while he was hiding at Uwingabo Cellule, II observed the attackers regrouping. There he saw and heard Kayishema thanking those attackers from the surrounding commune and *prefectures*, including Ruzindana, for having shown such devotion to their work.

419. On 14 May II observed the attackers as they again arrived in buses and cars. From a literal stone's throw away, II saw Kayishema and Ruzindana leading the group and observed both shoot at the Tutsis. Witness II fled in the direction of Karongi Hill and escaped. Witness II further claimed that he saw Ruzindana, on several occasions, giving money to several of the attackers.

420. Witness JJ testified to the events at Muyira Hill on 13 May. He affirmed that Kayishema, dressed in a green civilian suit, arrived in a white vehicle with military escort and Ruzindana was seen to be transporting assailants. Kayishema held a short barrelled, black gun and a hand megaphone. He divided the attackers into groups, gave instructions and fired the first shot. Witness JJ recalled that at the end of the attack, Kayishema presided over the regrouped assailants. During the examination-in-chief, JJ initially stated that he was 300 meters away from Kayishema, but later approximated the distance to have been 120 meters.

421. On 14 May, witness JJ again saw Kayishema between Gishyita Hill and Gisovu where the assailants parked their vehicles. At the end of the large-scale attack, Kayishema brought together and

5663

congratulated the assailants from other areas. Attackers shot witness JJ in the hand during th attacks.

422. Witness NN testified that on 13 May 1994, he recognised Kayishema, Ruzindana and *Bourgmestre* Ndimbati, among the attackers. Kayishema was waiting for those seeking refuge on the road and shot in the direction of three Tutsis named Mbunduye, Munyandamutsa and Hakizimana. The record is unclear whether the witness observed the death of any of these persons. Witness NN, who stated that Ruzindana transported members of the *Interahamwe* to the massacre site on 13 May. There he fired gunshots at two Tutsis named Ragasana and Birara and shot at OO, but missed. Witness NN, who lost an eye from a grenade explosion at this site recalled how the Hill was covered with dead at the end of the attack.

423. Witness HH testified that assailants during the attack of 13 May included Kayishema, Ruzindana, Musema, Ndimbati and Sikubwabo. As OO was hiding in the forest Kayishema and Ruzindana were quite close when OO saw them shoot at a group of Tutsis seeking refuge who were at the top of the hill. Witness HH remembered the attackers singing: "The Tutsis should be exterminated and thrown into the forest . . . don't spare the newly born baby, don't spare the elderly man, don't spare the elderly woman. Kagame left the country when he was a young baby."[100] In cross-examination, HH explained that he had not mentioned Ruzindana in his written statement because the Prosecution investigator had inquired only about the presence of responsible officials. Having reviewed the written statement, the Trial Chamber finds credible the witness's explanation.

424. Witness UU observed Kayishema at Mpura Hill, a 30-minute walk from Muyira Hill, on 14 May. There, he saw Kayishema near the top of Mpura, drinking beer with other assailants before the start of the attacks. He then saw Kayishema directing other leaders to the location of Tutsis nearby. Thereafter, the attackers began to pursue the Tutsis on Mpura Hill. Witness UU testified that he saw Ruzindana giving money to the attackers on 15 May on Gitwa Hill in Mubuga and that he had heard a conversation between him and the attackers regarding additional payments. The witness's testimony clarified that he was able to observe the exchange of money. However, UU stated that he heard only the conversation between the attackers, and not that between Ruzindana and these assailants, who confirmed that they expected Ruzindana to pay them more in the following days. If the latter version of UU's testimony regarding additional payment is how the events unfolded, the evidence proffered amounts to hearsay. However, because other witnesses, such as II corroborate Ruzindana's disbursement of payments to the attackers at various sites, the Trial Chamber finds this discrepancy to be a minor one.

425. The witnesses above provide a thorough account of the role of Kayishema and Ruzindana in the Muyira attacks of 13 and 14 May 1994. The Trial Chamber need not detail the further evidence that supports the Prosecution's case. It suffices to say that the evidence of witnesses Z and AA affirms

5664

Ruzindana was participating in the Muyira Hill attacks.

Witnesses FF and KK

426. Witnesses FF and KK provided evidence that conforms generally to the accounts of the above witnesses. However, doubt exists as to the quality or reliability of their testimony. Witness FF stated that he observed the events from the peak of Gitwa Hill. The Defence proffered evidence that Gitwa Hill is about three kilometres from Muyira Hill and suggested that FF was testifying to events that were at least half that distance away. The Prosecution failed to prove otherwise. Accordingly, the Trial Chamber is not satisfied that FF had a clear view of events and deems his evidence unreliable.

427. Witness KK was a public official in Rwanda in 1994. He testified that on 13 May, he heard the attackers singing: "let's exterminate them, let's exterminate them, we must finish off these people who are hiding in bushes. Let's look for men, everywhere so that no one remains."[101] He further testified that on 14 May, Kayishema led the attackers, shot at those seeking refuge as they descended Muyira Hill, and addressed a crowd of assailants using a megaphone. In his written statements, however, KK had made no mention of Kayishema except in reference to a radio broadcast where the former Prime Minister had thanked Kayishema for being valiant. Witness KK explained this omission by stating that the Prosecution investigators had only asked him about those who came from his commune. A close review of his witness statement, however, reveals that this was not the case. The two statements made by witness KK to the investigating team, show that the investigators inquired about leaders of the attacks in general. They did not ask specific questions about the attackers' origins. For the above reasons, the Trial Chamber gives little weight to the evidence proffered by witness KK.

Attacks at Muyira Hill and Vicinity in June

428. The attacks in the Bisesero area continued into June 1994. A letter dated 12 June 1994 shows Kayishema's continued involvement in the massacres. In this letter, Kayishema requested from the Ministry of Defence a plethora of ammunition, such as "gun-propelled and hand grenades, bullets for R4 rifles and magazines for machine guns" to undertake a "clean-up operation" ("*ratissage*" in French) in Bisesero.[102]

429. Witness PP, who had seen Kayishema and Ruzindana at the attacks on Muyira Hill on 13 and 14 May, saw them again in June at Kucyapa. As PP was running through Kucyapa he saw Kayishema and Ruzindana who fired a gun at him and at the group with which he was fleeing. Later in June, PP saw Kayishema and Ruzindana for the last time near Kabanda's house. Here PP was with a group of unarmed Tutsis and saw both the accused and others fire guns and kill people. Witness PP also testified that Kabanda, a prominent businessman, was a particularly sought after target by both Kayishema and Ruzindana. Witness PP deposed that Kabanda was eventually shot by *Bourgmestre* Sikubwabo, decapitated and his head was delivered to Kayishema for reward. PP was hiding in a nearby bush when

5665

he saw Sikubwabo shoot Kabanda, but only heard about the beheading from others. The acc beheading, given by PP, is not sufficient to prove particular direct acts of participation of the accused. However, with regard to the acts of those under his control, in this instance *Bourgmestre* Sikubwabo, the Trial Chamber finds the evidence of this witness convincing.

430. In light of the above evidence, the Trial Chamber finds that Kayishema and Ruzindana were present at the massacres in Muyira Hill and its vicinity beginning on about 13 May 1994. Further, the Trial Chamber finds that Kayishema and Ruzindana helped transport other assailants to Muyira Hill and vicinity, instigated them to attack the Tutsis gathered there, orchestrated the method of attack, led the attacks, and personally participated in them. Additionally, with regard to Kayishema, this Chamber finds that the Prosecution has proved the participation in the massacres of his subordinates, including the gendarmes, communal police, members of the *Interahamwe*, and local officials, such as *Bourgmestre* Sikubwabo.

The Cave

431. One of the most horrific mass killings in Bisesero took place at a site simply called the "cave," located in Gishyita commune, Bisesero Sector, Kigarama cellule. Hutu assailants launched an attack on the cave where Tutsis sought refuge. The assailants came in the morning and fired guns and threw grenades into the crowd of Tutsis who sought refuge at this location. The attackers then fetched and piled wood at the entrance of the cave and set fire to it. The smoke killed hundreds of people inside. By all accounts, there was apparently only one survivor. The Prosecution asserts that Kayishema and Ruzindana were amongst those leading the attack.

432. Dr. Haglund visited the cave in September 1995 and described it by stating: "I went back perhaps 40 or 50 feet – about 10 metres. It got gradually smaller and smaller and narrower and it would make sharp turns and drops . . . ." Dr. Haglund took photographs from inside and outside the cave which the Prosecution entered into evidence.[103] Dr. Haglund further stated "as I went [further back into the cave] . . . I did observe [the remains] of many individuals, men, women and children protruding from the mud that had covered them up in the intervening rainy season, and at minimum, I observed at least 40 people in this area." Witness QQ, who's sister died at the cave, testified that he saw the smoke coming from the cave on the day of the attack, as he was fleeing from the hill. Later, when he went back to the cave, he discovered that the attackers had set the fire at the entrance.

433. Witness CC is the sole survivor of the massacre at the cave. On the day of the attack, in June 1994, witness CC was inside the cave. According to witness CC, the attack was launched at 9 a.m. when the attackers threw grenades into the cave that did not explode. Members of the *Interahamwe* then went to look for wood and dry grass and piled it and firewood and earth at the entrance of the cave and ignited. On several occasions, during the attack witness CC heard the members of the *Interahamwe*

talking of Kayishema and Ruzindana in a manner that would suggest they orchestrated the atta inside the cave, however, CC never actually saw Kayishema or Ruzindana. CC claimed that he was able to stay alive by rubbing mud on his body and sipping dripping water. He did lose consciousness later but came to when cool air flowed into the cave after other Tutsis unblocked the entrance from outside.

434. Two witnesses, witness W and HH were hiding outside the cave and confirmed that Kayishema and Ruzindana were present and participated in the cave massacre. Witness W, who was hiding in a thorny bush less than five minutes walk from the cave entrance, testified that in May or June 1994, more than one hundred people, mostly the elderly, women and children took refuge in the cave. As the attackers arrived he heard them singing: "[w]e are going to exterminate them and put them in a hole." Kayishema, Ruzindana, *Bourgmestre* Sikubwabo and other local authorities were among the attackers. Witness W confirmed that the attack started in the morning when the attackers fired into the cave. Later they piled wood at the entrance of the cave and set the wood ablaze. Witness W further testified that Kayishema appeared to be leading a group of attackers and that Ruzindana was leading those attackers from Ruhengeri. After attackers departed at 5 or 6 p.m., Witness W and others re-opened the entrance to rescue any survivors.

435. Witness HH testified that he fled to the cave after his wife and children were killed in another part of Kigarama. He remained outside watching the assailants in the nearby forest. He recognised Kayishema, Ruzindana, Sikubwabo, Ndimbati, and other civil authorities amongst the attackers. He recounted that the assailants fired into the cave, then closed the mouth of the cave, piled wood at the entrance and set the wood ablaze on the orders of Kayishema and Ruzindana. Witness HH confirmed W's account that Kayishema and Ruzindana were leading the groups of assailants and he saw the two men giving them instructions, "just like an overseer who is demonstrating to workers how the work should be done." After the attack, HH and others removed the earth from partially blocking the cave's entrance. Although his testimony is not completely clear on this point, it appears that when HH went into the cave he found no survivors, but later one person came out alive. Among the victims were HH's mother, sister, sister-in-law and her three children.

436. The Defence claims that there is a discrepancy between the testimony of witnesses CC, W and HH with regard to when CC was rescued from the cave. The Defence asserts that CC claimed to have stayed in the cave for three days and nights after the attack, while HH and W testified that after the departure of the assailants on the same evening, the cave entrance was opened and CC was rescued. The Trial Chamber does not find such a discrepancy. It is true that CC deposed that he remained in the cave for three days and nights after the attack. However, careful review of the transcript shows that HH stated that, although the rescuers opened the cave the same evening, they did not find any survivors on that day. HH testified that later one person came out alive. This conforms with CC's account. Witness W supported HH's account that the rescuers opened the cave on the same day and that they were able to

5667

save one survivor but did not mention the day that the survivor emerged from the cave. Witn[illegible] W both named the survivor as CC. It is also possible that CC lost track of time as he was unconscious for an unknown period of time. Whatever the exact day of CC's exit from the cave, the testimony of the three witnesses in relation to the presence and role of Kayishema, his subordinates and Ruzindana at the cave are a consistent and credible.

437. The Chamber notes that no exact date of this event was established. Witness CC stated it was in June. Witness W indicated it happened in late May or June, but added that he was disoriented during this period due to starvation and other factors. According to witness HH, the massacre at the cave took place after French soldiers arrived, which he thought to be 30 June. The problem that witnesses have recollecting precise dates, and the consequential lack of specificity on when the events occurred, has been discussed above. In any event, the essential elements of the crimes depicting the location and nature of the atrocities correlate, thus clearly showing that the witnesses were testifying to the same massacre.

438. The Trial Chamber finds that an attack occurred at the cave and assailants killed scores of Tutsis. Further, both Kayishema and Ruzindana were present at the attack and played a leading role in directing the perpetrators of this massacre; Ruzindana of a particular group of attackers and Kayishema in general. This Chamber finds that gendarmes, members of the *Interahamwe* and various local officials were present and participated.

5.4.3 Massacres Where Kayishema and Ruzindana Acted Separately

439. There are a number of sites within the area of Bisesero area where the witnesses testified to having seen one of the two accused. The Trial Chamber first turns to evidence in relation to Kayishema, followed by that in relation to Ruzindana. Again, the evidence is presented and analysed chronologically and per site.

Attacks for Which Kayishema is Accused Separately

Karongi Hill

440. Testimony reveals that after the massacre at the Stadium, many Tutsi civilians fled to Karongi. Witness U testified that one morning in mid April Kayishema arrived with the *Conseiller* of Gitesi Commune, soldiers, gendarmes and Hutu civilians. Witness U was close to the arriving vehicles and observed Kayishema wearing a black, short sleeve shirt and a pair of black trousers. They proceeded to attack Tutsis on Karongi Hill. During the siege, gendarmes and soldiers shot at the Tutsi crowd on the Hill while the Hutu civilians surrounded the Hill preventing escape. Witness U heard Kayishema, who was speaking through a megaphone, demand help for the attack. According to witnesses, the attack started around 10 a.m. and ended about 3 p.m.

441. After this attack at Karongi, witness U fled to Kigarama Hill (in the record transcribed as Muchigarama). Here, in late April, he witnessed another attack led by Kayishema. He stated that although Kayishema was not armed, "[i]t was as though he was a general of the army,"[104] and that thousands of Tutsis lost their lives during these attacks.

442. Witness DD testified that a large-scale attack took place at Karongi Hill towards the end of April. He saw, from a hiding place 30 to 35 meters away, that Kayishema arrived in a white car with other civic authorities, soldiers, gendarmes, communal police, members of the *Interahamwe* and civilians at about 9 a.m. Witness DD testified that Kayishema was wearing a white shirt, a black jacket and a pair of dark trousers and was carrying a long gun. After having given instructions to the attackers, Kayishema proceeded to the top of the Hill with other attackers. Kayishema shot at Rutazihana, a fleeing Tutsi refugee, and killed him instantaneously. The attack continued until the evening. Witness DD described how the slaughtered bodies on the Hill were like "small insects which had been killed off by insecticide."[105] On that day, DD lost many members of his family, including his mother, wife, nine children, four sisters and their children, five of his brother's children, two brothers and their wives.

443. During the cross-examination, the Defence Counsel stressed the difference between the written statement signed by DD and his oral testimony. In his statement to investigators the witness had described how his friend Rutazimana was killed by the bullet of a soldier, whereas in his testimony, he asserted that Kayishema had shot Rutazimana. The doubt raised by this inconsistency, of which the accused is entitled to the benefit, was not dispelled by the explanation of the witness. With regard to prior inconsistent statements, the Trial Chamber is of the opinion that greater emphasis should be placed on direct testimony than on unchallenged prior statements. Although the witness's oral testimony was truthful overall and the accused bears responsibility for the acts of his subordinates at this site as one of the leaders of the attack, we find that with regard to the shooting incident a reasonable doubt has been raised.

Gitwa Cellule and Gitwa Hill

444. Yet another site where Kayishema allegedly led and participated in the attacks is Gitwa Cellule and Gitwa Hill. Witness MM, who lost his wife, four children, two brothers and one sister during the attacks, testified that he (the witness) saw Kayishema when he was hiding at Mukazirandimbwe. Kayishema came in a white double-cabin vehicle with soldiers and members of the *Interahamwe* who were carrying guns, clubs, machetes and spears. Kayishema ordered and urged the assailants to exterminate the Tutsis seeking refuge there. Witness MM saw Kayishema three times at Gitwa in similar circumstances during May. He testified that although he did not see Kayishema carry a weapon or observe any killing, he stated that, "wherever one went one saw nothing but bodies."[106]

5669

Attacks for Which Ruzindana is Accused Separately

Mine at Nyiramuregro Hill

445. Nyiramurego Hill, where a mine is located, is in Bisesero sector. Witness RR testified that he saw Ruzindana arrive in a vehicle with members of the *Interahamwe*, park his car at the foot of the hill and distribute machetes and guns about 15 April. According to this witness Ruzindana told the attackers to "hurry up, I'm going to bring other people to help you. But each time bring me an identity card or a head and I will pay you." Although after cross-examination the exact distance at which RR observed Ruzindana remained unclear, RR maintained that he was close enough to hear and see Ruzindana on that occasion.

446. Two witnesses gave specific accounts regarding another incident involving Ruzindana at Nyiramurego Hill. Witnesses II and EE stated that a group of Tutsis, who had taken refuge in the Mine, in this Hill, were killed by Ruzindana, members of the *Interahamwe* and soldiers. Both witnesses testified that a young Hutu boy who knew of these Tutsis hiding place brought the attackers to this site. Specifically, II testified that one morning after the Muyira attack on 14 May (either in May or June), while he was hiding near the road by this Hill, he saw Ruzindana arrive in a vehicle accompanied by the members of the *Interahamwe*. Ruzindana stayed by the roadside while the assailants began to uncover the mine entrances and kill those hiding within. Two young Tutsi women were discovered in the Mine by the members of the *Interahamwe* and Ruzindana ordered that they be brought to him. One of these young women, named Beatrice, a former schoolmate of II's, was approximately sixteen years old. Ruzindana tore open her blouse and then slowly cut off one of her breasts with a machete passed to him by an members of the *Interahamwe*. After he finished, Ruzindana cut off her other breast while mockingly telling her to look at the first breast as it lay on the ground. He then tore open her stomach. Beatrice died as a result of the assault. A member of the *Interahamwe*, following Ruzindana's lead, immediately proceeded to kill the second young woman while Ruzindana watched. With some slight variation, witness EE confirmed this account. Both witnesses observed this event from hiding places alongside the road, adjacent to where Ruzindana and the assailants stopped to carryout the attack. Witness EE added that his family members were killed before his eyes as members of the *Interahamwe* and soldiers uncovered the holes in which the Tutsis were hiding and proceed to kill them and other Tutsis using firearms and machetes.

447. The Trial Chamber is satisfied that both witnesses were able to observe the incident with sufficient visibility because the event occurred during the daytime and both were hiding within viewing distance. Furthermore, they both had known Ruzindana previously. Accordingly, the Trial Chamber is satisfied that the witnesses made proper identification of Ruzindana.

Bisesero Hill

448. During the second half of April 1994, witness Z observed regular attacks during which

5670

Ruzindana was present with members of the Presidential Guard and members of the *Inter* During these attacks Ruzindana would generally wait by his vehicle and give instructions to the attackers. At one of these attacks, on 14 April 1994, witness Z was hiding close to Ruzindana, on Bisesero Hill. Witness Z heard Ruzindana give orders to the assailants to surround the hill and begin the attack. This witness also claimed that Ruzindana was armed and shot at the Tutsis. However, the witness stated that "not many people died during this time period," but that there was pillaging of property that was distributed later amongst the attackers. The Trial Chamber is satisfied that Ruzindana was present and played a pivotal role in the massacres at this site by ordering the assailants to surround the Hill and kill the Tutsis hiding there.

Gitwa Cellule

449. Another massacre site where Ruzindana was present was Gitwa Cellule. On 15 April 1994, witness KK saw Ruzindana transport assailants to this site in a vehicle, which he knew belonged to Ruzindana. Furthermore, witness KK was approximately 50 meters away when he saw Ruzindana shoot a Tutsi man named Ruzibiza in the leg. Ruzibiza fell to the ground.

450. Later, in early May, witness MM observed Ruzindana leading members of the *Interahamwe* during a massacre at this location. The assailants began to chase MM and other Tutsis. MM's wife, who was carrying their child on her back, was running behind MM when she was shot. As he was fleeing the scene, MM turned around to see the attackers, and claims to have seen Ruzindana aiming and firing at his wife. After the attack he returned to the place where his wife had fallen and saw that she had a bullet wound and had been mutilated by traditional weapons. Both his wife and baby were dead. When questioned by the Defence about the circumstances under which MM saw Ruzindana firing the gun, he admitted that he only saw Ruzindana for a short time and that he didn't know how a gun worked.

451. The Trial Chamber is satisfied that Ruzindana was amongst a group of attackers at the site who pursued the Tutsis hiding there in an attempt to kill them and that witness MM's wife and baby died as a result of this attack. The Trial Chamber is also satisfied that Ruzindana attempted to kill MM's wife because MM deposed that he saw Ruzindana aim in her direction. However, the Trial Chamber is not satisfied, beyond a reasonable doubt, that Ruzindana's gunshot actually struck MM's wife or that she in fact died from the bullet wound she received. The Prosecution did not establish that Ruzindana was the only assailant amongst the group who was firing into the fleeing Tutsis and the actual cause of her death remains unclear. The Defence challenged the credibility of MM on the ground that, in cross-examination, MM said that he had not met other Rwandans during his stay in Arusha. The Defence pointed out that it is well known that Prosecution witnesses are lodged together in the same house during their stay in Arusha. On re-examination, when asked why he refused to admit such a fact, MM claimed that he thought the question had referred to people with whom he was sharing his bed. Despite the

5671

confusion of this response the Trial Chamber is satisfied that MM's testimony represented a s accurate account of the events in Bisesero.

The Vicinity of Muyira Hill

452. Attacks in the vicinity of Muyira Hill continued into June 1994. Witness II testified to one event at a hole formed by water running under the road in an area called Gahora in Gitwa Cellule. According to II, in early June many Tutsis children, as well as adults, were hiding in this hole; amongst them II's younger brother and sister. While hiding in the bush, just five meters away, witness II saw members of the *Interahamwe* coming down the valley to drink water from a tap near the hole. On discovering the Tutsis hiding there, the members of the *Interahamwe* informed Ruzindana that they had found "inyenzi." Ruzindana sent soldiers to monitor the hole and II heard him say that he was going to Gishyita to look for tools. Ruzindana returned with spades and a hose at about 1 p.m., at which time the soldiers and members of the *Interahamwe* began to unearth the Tutsis. The massacre started when Ruzindana and other soldiers opened fire. Many Tutsis died in the hole while others were shot or hacked to death near the roadside as they tried to escape. After the attack, II found his brother and sister murdered in the nearby bushes. During cross-examination, II remained true to this account. The Trial Chamber finds beyond reasonable doubt that Ruzindana was present, participated and led the attack on the hole where an unknown number of Tutsi civilians were killed, including II's brother and sister.

5.4.4 Bisesero Analysis and Findings

453. Paragraphs 45 and 46 of the Indictment have been discussed above and the allegations therein, were not contested by the Defence.

454. Paragraph 47 of the Indictment directly implicates both the accused persons in the attacks at Bisesero. The most consequential evidence is the identification of the accused at the massacre sites by Prosecution witnesses. Also of grave importance in the case of Kayishema, is evidence of the participation of those under his control. The Trial Chamber is mindful of its obligation to vigorously analyse the evidence. Very pertinent is the witnesses' who knew the accused prior to the massacres; identification is far more reliable when it is based upon recognition of a person already known to the witness. Equally important are the conditions under which the witnesses identified the accused.[107] These issues are discussed below.

455. The Prosecution presented numerous eyewitnesses who testified that they saw Kayishema at various massacre sites in Bisesero. Most Prosecution witnesses claimed that they knew Kayishema before the events. Most commonly the witnesses recognised or knew Kayishema because he was the highest government official in Kibuye. For instance, OO and HH claimed to 'know' Kayishema because he was the *Prefect* of Kibuye *Prefecture* and OO had met Kayishema at the installation of the

5672

Bourgmestre Sikubwabo. Witness OO added that all the inhabitants of Gishyita commu Kayishema because he was seen at civic rallies and meetings. In this regard, witness II stated that he saw Kayishema at the swearing ceremony of Sikubwabo. Witness DD had seen Kayishema at meetings and recalled one such meeting at the Stadium. Witness HH testified that he used to see Kayishema at meetings and NN claimed to have participated in meetings organised by Kayishema. Witness KK had worked with Kayishema each time there was a meeting to organise. Witness PP knew Kayishema when the accused was a medical doctor at Kibuye hospital. A number of witnesses also knew Kayishema's family. For example, witness OO, knew Kayishema's grandfather and mother; witness JJ knew Kayishema's father; and witness UU greeted Kayishema in 1992 or 1993 when Kayishema came to visit his (Kayishema's) grandfather. Witness PP met Kayishema at Kibuye church when Kayishema had gone to see a priest there. All Prosecution survivor witnesses successfully identified of Kayishema in court. This prior familiarity with Kayishema enhanced the reliability of the witness's identification of Kayishema heard by the Trial Chamber.[108]

456. Similarly, most of the witnesses testified that they knew Ruzindana in some capacity prior to the massacres. Evidence suggests that Ruzindana was one of the most prominent traders in Kibuye and that his family was well known generally because his father had been the *Bourgmestre* of Gisovu. Some knew him personally, that is they had had contact with him previously or knew his family. For example, witness FF studied with Ruzindana. Ruzindana attended social functions at which witness OO was also present and had business dealings with him. Witness NN claimed to have been Ruzindana's friend and that he knew some members of his family. Witness RR had known Ruzindana since he was old enough to recognise people, and had been a fellow guest at the marriage of a local man named Antoine. Witness Z had known Ruzindana since at least 1986 and HH had known him long before 1994, having met him at the market and being a customer at his family's shop. Ruzindana was also a neighbour of witness BB's parents and they had played football together.

457. Other witnesses, knew Ruzindana by sight due to his reputation as a prominent businessman in their community and/or because of his father's standing in the community.[109] Examples of such witnesses are II, KK, MM and PP. All Prosecution survivor witnesses successfully identified Ruzindana in court. This prior familiarity with the identity of Ruzindana enhanced the reliability of the identification evidence heard by the Trial Chamber.[110]

458. It is apparent that when the witnesses stated that they 'knew' the accused they were not always referring to a personal acquaintance or friendship. Rather, the witnesses were sometimes referring to 'knowing of' or 'knowing who the accused was,' due to his prominence in the community. The Trial Chamber is satisfied that the use of such phraseology was not an attempt by the witnesses to mislead the Trial Chamber. Indeed, it is consistent with common usage in much the same way as one would say that they 'knew' President Nelson Mandela, even though they have never met him through his image in the media. In any event, for the purposes of identification, it is the physical recognition of the accused

5673

rather than personal acquaintance which is most pertinent. The above evidence suggests that m witnesses who identified Kayishema and/or Ruzindana, were aware of the physical appearance of the accused prior to seeing them at the massacre sites.

459. The conditions under which the witnesses saw the accused was closely scrutinised by the Defence teams. The Trial Chamber notes that all of the identifications at the massacre sites occurred in daylight. The witnesses were generally questioned about the distance from which they observed the accused. The evidence indicates that almost all of the witnesses were close enough to clearly observe the accused during the attacks and the level of detail provided by the witnesses supports this assertion. For example, at the Muyira Hill attack, where the witnesses were looking down at the accused from higher positions during daylight, the witnesses provided precise details regarding the accused participation. Witness PP saw both accused shooting at Tutsi; OO was close enough to see Kayishema wearing a green outfit and the following day recalled hearing specific words as Kayishema addressed the attackers; JJ also remembered Kayishema's green suit on May 13 and added that Ruzindana was carrying a gun; II observed Kayishema thanking assailants on 13 May and saw both accused shoot at Tutsis on 14 May; NN testified that Ruzindana chased and shot at him; and HH, from his hiding place in the forest, observed both accused as they shot at those seeking refuge on top of the Hill.

460. A further example is the massacre at the cave; witnesses W and HH insisted that they had a clear view of the accused from their hiding places. Witness W stated that he was in bushes 'less than five minutes walk away,' whereas HH was concealed in the nearby forest. The ability of HH to see these events is supported by photographic exhibit 310, which represents HH's view of the cave from his hiding place. Lastly, witnesses EE and II identified Ruzindana as Beatrice's killer, at the Mine, from their respective hiding places alongside the road; both witnesses testified that they were close enough to hear Ruzindana. Prosecution photographic exhibits regarding these hiding places indicates that these witnesses could have clearly seen Ruzindana whist remaining concealed.

461. After reviewing the witness testimonies and Prosecution exhibits, the Trial Chamber is satisfied, beyond a reasonable doubt, that Kayishema was properly identified by prosecution witnesses FF, PP, OO, II, JJ, NN, HH, UU, W, U, DD and MM, as having participated in one or more of the assaults on the Tutsi population. And, that Ruzindana was properly identified by Prosecution witnesses FF, PP, OO, II, JJ, NN, HH, UU, W, EE, Z, KK, RR and MM, as having participated in one or more assaults.

462. Paragraph 47 of the Indictment alleges specifically that at various locations throughout April, May and June 1994, and often in concert, Clement Kayishema and Obed Ruzindana brought to the area of Bisesero members of the *gendarmerie nationale*, communal police, *Interahamwe* and armed civilians and directed them to attack people seeking refuge there. The Trial Chamber opines that bringing attackers to Bisesero could mean either personally transporting them in the same vehicle, or leading a convoy of vehicles. Furthermore, evidence to prove that the accused transported or lead the attackers from one area within Bisesero to another area within Bisesero is enough to satisfy the wording of paragraph 47 of the Indictment. It is not incumbent on the Prosecution to prove from

5674

where the attackers came.

463. In relation to the 13 and 14 May assault at Muyira Hill, witnesses OO, II, JJ and NN testified that they had seen Kayishema and Ruzindana arrive at the head of the convoy of vehicles which transported the assailants to the massacre site. Testimony reveals that Ruzindana personally transported attackers. The witnesses confirmed that soldiers, members of the *Interahamwe*, communal police and armed civilians, were amongst the attackers. Evidence provided by OO, JJ and UU proves how Kayishema directed the assaults, by splitting the assailants into groups, leading a group as it advanced up the Hill and indicating places where the Tutsis could be found. Indeed, PP, OO, II and JJ heard Kayishema address a group of attackers, encouraging them to 'work' harder or thanking them for "work" done. Evidence shows that Kayishema used a megaphone to address the congregated attackers. Witness OO and JJ further testified that Kayishema signalled the start of the attacks by firing a shot into the air. Ruzindana also played a leadership role, heading a group of attackers up the Hill and shooting at those seeking refuge, as evidenced by II and OO. Witness OO also saw Ruzindana distributing traditional weapons prior to the attacks.

464. Evidence proffered in relation to other sites confirms the leadership role of both the accused. At the cave, W testified that Kayishema was directing the siege generally and Ruzindana was commanding the attackers from Ruhengeri; HH added that both the accused appeared to be giving instructions, as if demonstrating how the cave should be blocked, wood collected and fire built. At Karongi Hill, U saw Kayishema arrive with soldiers, gendarmes and Hutu civilians and use a megaphone to address the attackers; DD also observed Kayishema at this site giving instructions to soldiers, gendarmes, communal police and members of the *Interahamwe*. Ruzindana was also seen transporting members of the *Interahamwe* to the Mine at Nyiramurego Hill and then directing the attackers. At Bisesero Hill witness Z heard Ruzindana give orders to the assailants to surround the Hill and begin the assault. Witness KK testified that Ruzindana transported attackers to Bisesero Hill and, in the following month, MM observed Ruzindana there leading members of the *Interahamwe*. Witness II testified that the massacre at the hole near Muyira Hill was orchestrated by Ruzindana and that it commenced on his instruction.

465. The strength and reliability of this evidence was not effectively challenged in Court. Accordingly, the Trial Chamber is satisfied that both Kayishema and Ruzindana brought members of the *gendarmerie nationale*, communal police, members of the *Interahamwe* and armed civilians to the area of Bisesero and directed them to attack those Tutsis seeking refuge.

466. Paragraph 47 of the Indictment further alleges that Kayishema and Ruzindana personally attacked and killed people seeking refuge in Bisesero. There is an abundance of evidence that reveals how Kayishema and Ruzindana participated in the attacks. Along with the evidence

discussed in paragraphs above, many witnessed testified that they observed Kayishema and Ruzindana personally shoot at Tutsi those seeking refuge. At Bisesero Hill in April, Z recognised Ruzindana as he shot at those seeking refuge. Later, at a similar spot in May, FF was just metres from Ruzindana when he observed him shooting at women and two girls. At Muyira Hill in May PP, II, NN and HH witnessed both the accused shooting at Tutsis as they fled. In June, PP was shot at by Kayishema and Ruzindana at Kucyapa. Two eyewitnesses testified that Ruzindana killed a young girl named Beatrice. At Gitwa Cellule in April, KK was approximately 50 metres from Ruzindana as he shot Ruzibiza, hitting him in the leg. And, MM testified that Ruzindana shot his wife in May.

467. The major contention of the reliability of witnesses, which was raised by the Defence, has been discussed within the analysis of evidence relating to the particular site. Defence challenges did not negate the quality and strength of the above evidence. The Trial Chamber is satisfied beyond reasonable doubt that Ruzindana and Kayishema personally attacked Tutsis seeking refuge during the assaults described in Bisesero.

468. There is also strong evidence to show that both accused persons personally aided in the killings. The Trial Chamber is left with no doubt that Kayishema and Ruzindana aided and abetted, the killings through orchestration and direction.[111] Kayishema further abetted through his inciting speeches to assailants, and Ruzindana by his provision of transportation and weapons. The evidence proves that Kayishema and Ruzindana personally assisted in attacks that resulted in the killing of Tutsi civilians.

469. Cases of personal killing by Kayishema or Ruzindana relating to specific individuals is less certain. There is ample evidence to show that both the accused personally attempted to kill or injure those seeking refuge, generally by shooting at them. However, as discussed within the above text, in most instances where a witness testified to one or both of the accused shooting at a refugee, the Prosecution failed to establish a resulting death.[112] This is not surprising considering the circumstances under which the witnesses observed the events. One would not expect a fleeing refugee to risk his or her life in order to verify the death of a victim. Nonetheless, it is not for the Trial Chamber to speculate if Tutsis died as a direct consequence of shooting, or other acts, by an accused.

470. One instance where sufficient evidence has been proffered is the killing of Beatrice by Ruzindana. Witnesses II and EE both provided a horrific account of Ruzindana cutting off the breasts of Beatrice before killing her by slashing her stomach with a machete. The witnesses clearly observed Ruzindana mutilate and murder her, both heard him mock his victim in the process. Both witnesses recognised the victim, one of them as a former schoolmate and the other as a prominent person from the area. Both witnesses named the victim as Beatrice. Both witnesses deposed that Beatrice died as a result of Ruzindana's actions. For these reasons, the Trial Chamber is satisfied, beyond a reasonable

5576

doubt, that Ruzindana mutilated and personally killed Beatrice.

471. In paragraph 48 of the Indictment the Prosecution alleges that the attacks resulted in the deaths of thousands men, women and children. All survivor witnesses attested to the fact that thousands were killed in the Bisesero area during April through June 1994. Witnesses, including Dr. Haglund and several journalists, confirmed this fact. Kayishema himself testified that massive burial efforts had taken place in this area.

472. Finally, in paragraph 49 of the Indictment it is alleged that Kayishema did not take measures to prevent the attacks or to punish the perpetrators is discussed in Chapter 6.1 of the Judgement, *infra*

---

[1] In this respect see Criminal Justice Act 1967 s.11 of England which specifically legislates to require disclosure of alibi prior to trial. Similar legislation exists in Canada, as well as certain states of the United States and Australia.

[2] Section 103 of the Indian Evidence Act. Refer to Sakar on Evidence, vol. 2 (1993), 14th Ed, p. 1341.

[3] R v. Biya, (1952) 4 SA 514 (Appellate Division); Woolmington v. D.P.P. (1935) A.C. 462 (H.L.) and R v. Wood, Cr. App. R. 74, at 78 (1968) (English Law); Sekitoleko v. Uganda [1967] E.A. 531 (U) (Ugandan Law).

[4] In, Prosecutor v. Kayishema and Ruzindana, in the Decision on the Prosecution motion for a ruling on the Defence continued non compliance with Rule 67(A)(ii) and with the written and oral orders of the Trial Chamber, 3 Sept. 1998, Case No. International Criminal Tribunal for Rwanda-95-1-T.

[5] Decision on non-compliance, *Ibid.*

[6] For example, see Canada, R v. Dunbar and Logan, 68 C.C.C. (2d) 13 at pp. 62-3 (1982); R v. Cleghorn 3 S.C.R. 175 (1995), and Australia, Petty and Maiden v. R, 173 CLR (1991) where, although no inference could be taken from the Defendant's prior silence, where a differing explanation had been given then inferences could be drawn.

[7] Article 20 of the Statute.

[8] This was reiterated once again even in Mr. Ferran's rejoinder, Trans., 17 Nov. 1998, pp. 133-139.

[9] Rule 85(A)(iii) of the Rules.

[10] Def. exh. 58.

[11] Trans., 24 June 1998, p. 121.

[12] Def. exh. 58.

[13] Pros. exh. 350CA.

[14] Similar elaboration by the accused, central to the defence of alibi, were observed by the Trial Chamber in the *Tadic* Judgement, para. 502.

[15] Trans., 20 May 1998, p.105.

[16] Chapter 3.3

[17] This is a point corroborated by Defence witness DAA, who owned a shop opposite the Ruzindana family shop. See Trans., 18 and 19 Aug. 1998.

[18] See, chapter 3.4

[19] *See* Pros. exh. 328 - 331.

[20] The witness produced seven reports for the Security Council. He relied most heavily on one Report, Pros. exh. 331, during his testimony before this Chamber (U.N. Doc. E/CN4/1995/71 1995).

567.7

[21] See Pros. exh. 330B and 331B, p. 5.

[22] Trans., 9 Mar. 1998, p. 47.

[23] Trans., 5 Mar. 1998, at 112; Prosecution exh. 331B.

[24] Trans., 5 Mar. 1998, p. 98.

[25] *Ibid.* p. 85.

[26] Trans., 18 Nov. 1997, p. 136.

[27] Trans., 18 Nov. 1997, p. 153.

[28] Trans., 5 Mar. 1998, p. 110.

[29] Pros. exh. 330B, p. 6.

[30] Trans., 9 Mar. 1998, p. 101-102.

[31] Pros. exh. 52, p. 4.

[32] Trans., 2 Oct. 1997, p. 51.

[33] Trans., 5 Mar. 1998, p. 105.

[34] Trans., 18 Nov. 1997, p. 118.

[35] Trans., 5 Mar. 1998, 84.

[36] See Part II, *supra* discussing the Historical Context of 1994 Events in Rwanda.

[37] Pros. exh. 331B, p. 5.

[38] Trans., 11 Apr. 1997, at 34.

[39] *See* the testimonies of Witnesses G, U and Z explaining that *Inkotanyi* meant "all the Tutsis" or the "enemy".

[40] Prosecution Exhibit 76E, as shown in the Trans., of 13 October 1997.

[41] Trans., of 13 October 1997, p.149

[42] Trans., 22 April 1997, p.36.

[43] Trans., 22 Apr. 1997, p. 46.

[44] Trans., 22 Apr. 1997, p. 47.

[45] Trans., 22 Apr. 1997, p. 49.

[46] Trans., 22 Apr. 1997, p. 51.

[47] Trans., 17 Apr. 1997, p. 8.

[48] Trans., 17 Apr. 1997, p. 116.

[49] Trans., 17 April 1997, p.11

[50] Trans., 6 May 1997, p.24

[51] Pros. exh. 55-58.

[52] Pros. exh. 52, 54 and 296.

[53] Pros. exh. 53. (Letter from Kayishema to all *Bourgmestres* in Kibuye.)

[54] Pros. exh. 296.

[55] Meetings attended by Prime Minister Kambanda and/or his Ministers included that on 3 May 1994.

[56] Because the parties referred to the internally displaced persons as "those seeking refuge"throughout the tria Chamber will remain consistent with this usage, noting however, that this use of the term in this context is inaccurate.
[57] It should be noted that the massacre at Mubuga Church began on 15 April and that Kayishema's claim of alibi did not begin to until the morning of 16 April.
[58] Trans., 17 April 1997, p. 11

[59] Trans., 6 May 1997, p. 24

[60] Trans., 15 Apr. 1997, p. 31

[61] Trans., 26 Nov 1997, p. 29

[62] Trans., 26 Nov 1997 p. 30

[63] Trans., 26 Nov. 1997, p. 32

[64] Trans., 26 Nov. 1997, p. 33

[65] Trans., 22 Apr. 1997.

[66] *Ibid.*, p. 98.
[67] Trans., 15 April 1997, p. 145

[68] Trans., 17 Apr. 1997, p.29

[69] Trans., 24 Apr. 1997, p.4

[70] Trans., 17 Apr. 1997, p. 93

[71] Trans., 17 Apr. 1997, p .97

208 Trans., 16 Apr., p. 156.

[73] Trans., 14 Apr. 1997, p. 12.

[74] Trans., 10 Sept 1998, p. 24.

[75] Trans., 28 April 1997, p. 49.

[76] Trans., 22 April 1997 p. 133.

[77] See Prosecution exhibit 350c(b).

[78] Trans., 3 Mar. 1998, p. 28.

[79] The Prosecutor presented witnesses who testified that Ruzindana was present and participated in the massacre at Mubuga Church. The Trial Chamber will not consider this evidence because the Indictment in question charges Clement Kayishema alone with crimes at this site.
[80] Witness OO deposed that the massacres continued on 17 April 1994. There will be an examination of this potential discrepancy in the Analysis and Findings Chapter on the massacres at Mubuga Church below.
[81] Trans., 20 Nov. 1997, p. 16.

[82] Trans. 3 Mar. 1998. p. 30.

[83] Trans., p. 39, 20 Nov. 1997. The Trial Chamber notes that the witness claimed this conversation took place after the massacres, on 17 April, a date that was not corroborated by other witnesses.
[84] Def. exh. 58.

[85] Trans., 4 Nov. 1998 p. 148.

[86] Pros. ex's. 37, 39 and 40.

[87] Pros. exh. 47.

5679

[88] It should be noted that witness W deposed that he had known Kayishema well before the attacks.

[89] When asked by Ms. Thornton about whom lead the massacres in Kibuye Prefecture, Kayishema stated that none of the local authorities had taken part and that trials were conducted after he fled the country, in July 1994, to find the culprits.

[90] Witness G also testified that in the ensuing days he saw the members of the *Interahamwe* from Gisenyi *Prefecture*, armed with guns, going toward Bisesero.

[91] For example, witnesses OO, PP, W survived the massacres at Mubuga Church and took refuge in the Bisesero area.

[92] Trans., 4 Sept. 1998, p.59.

[93] Trans., 18 Nov. 1997, p.137.

[94] Trans., 9 Sep. 1998, p. 37.

[95] Trans., 8 Sep. 1998, p. 117.

[96] The Trial Chamber notes that some witnesses used specific names of neighbourhoods when testifying about specific attacks. For the purpose of clarity however, we have grouped neighbouring localities together and described the attacks by date.

[97] Trans., 25 Nov. 1997, p. 65.

[98] Trans., 24 Nov. 1997, p. 82.

[99] Trans., 20 Nov. 97, p. 86.

[100] Prosecution exh., 297.

[101] Trans., 26 Feb. 1998, pp. 33-34.

[102] Pros. exh., 296.

[103] Pros. exh., 152-55.

[104] Trans., 6 May 1997, p. 141.

[105] Trans., 25 Feb. 1998, p. 28.

[106] Trans., 24 Feb. 1998, p. 27.

[107] See Part 3 on Evidentiary Matters, *supra*.

[108] For a detailed explanation of the identification requirement see Chapter 3.2, *supra*.

[109] Ruzindana's father, Murakaza was also a businessman and a former *Bourgmestre*.

[110] *Ibid.*

[111] See for example, the evidence relating to the massacres at Muyira Hill, the cave and the Mine at Nyiramuregra Hill.

[112] See the analysis of the evidence within the specific site Chapter s above.

5680

VI. LEGAL FINDINGS

6.1 KAYISHEMA'S COMMAND RESPONSIBILITY
6.2 GENOCIDE
6.3 CRIMES AGAINST HUMANITY
6.4 COMMON ARTICLE 3 AND ADDITIONAL PROTOCOL II

6.1 KAYISHEMA'S COMMAND RESPONSIBILITY

473. The Trial Chamber has made its findings as to fact. It is clear that Kayishema and Ruzindana either planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of many of the criminal acts prohibited by Articles 2 to 4 of this Statute, in relation to each crime site. Their individual criminal responsibility under Article 6(1) has been proven beyond a reasonable doubt and is set out by the Trial Chamber in its legal findings for the relevant counts. The factual findings which go to prove this individual criminal responsibility are also relevant to Kayishema's responsibility as a superior, in particular his knowledge and prevention of the attacks.

474. The extent of the liability to be incurred by Kayishema alone under the doctrine of command responsibility pursuant to Article 6(3) warrants further elaboration. In relation to the crime sites of the Complex, the Stadium, and Mubuga Church the Indictment asserts: 'Before the attack on the [site] Clement Kayishema did not take measures to prevent the attack, and after the attack Clement Kayishema did not punish the perpetrators.' See paragraphs 30, 37, and 43. In relation to the Bisesero Area the Indictment asserts: 'Throughout this time, Clement Kayishema did not take measures to prevent the attack, and after the attack Clement Kayishema did not punish the perpetrators.' See paragraph 49.

475. In relation to the extent of the liability to be incurred by Kayishema under the doctrine of command responsibility, the General Allegations of the Indictment assert, at paragraph 22, that Kayishema is responsible, as a superior, for the criminal acts of his subordinates in the administration, *gendarmerie nationale* and communal police. In relation to the specific sites it is alleged that Kayishema ordered these assailants and others such as the members of the *Interahamwe* and armed Hutu civilians to attack the Tutsi. As such, and in light of the proven facts, it is incumbent upon the Trial Chamber to consider the degree of control exercised by Kayishema over the assailants, and his corresponding culpability for their criminal acts. The Chamber, where appropriate, will then proceed to examine[1] whether Kayishema took measures to prevent the attacks or punish the perpetrators, under each crime site.

The Assailants

476. *Bourgmestres* and other members of the administration, gendarmes, soldiers, communal police, prison wardens, members of the *Interahamwe* and armed civilians were identified at the massacre sites

5681

and the Trial Chamber has found that they participated in the atrocities at these sites. The which the Trial Chamber must address, therefore, is whether Kayishema exercised *de jure* or *de facto* control over these assailants.

477. Both the Prosecution and Defence laid heavy emphasis upon whether Kayishema enjoyed *de jure* control over the appropriate administrative bodies and law enforcement agencies. Notably, both Parties also emphasised the turmoil that prevailed between April and July 1994. The Defence, for example, described, "a society that no longer recognised the rule of law"[2] and, in summarising the evidence of Professor Guibal, submitted that, "in common language, after the crash of the President's plane, the situation that occurred was such that a government had to be invented."[3]

478. The Chamber is mindful of the need, therefore, to view the *de jure* powers of Kayishema with an appreciation that, at the time, a chaotic situation that prevailed. Accordingly, any consideration as to the *de jure* powers exercised by Kayishema must be subject to an elucidation of the *de facto* power, or lack thereof, that he held over the assailants.

De Jure Control

479. The Indictment states that the *Prefect* as trustee of the State Authority in the *Prefecture* had control over the *Prefectoral* administration and its agencies. The Chamber has found that, *inter alia*, *Bourgmestre* Sikubwabo, a number of communal police, and members of the *gendarmerie nationale* were responsible for numerous deaths and injuries inflicted upon innocent Tutsis.

480. The Trial Chamber finds that it is beyond question that the *Prefect* exercised *de jure* authority over these assailants. The Rwandan law is very clear in this respect.

481. The *Prefects'* position *vis-à-vis* the *bourgmestre* is evidently one of hierarchical authority and supervisory jurisdiction. Two Rwandan statutes support this finding. The first, *Loi sur l'organisation de la commune*, 1963, clearly implies in Article 59 that the *bourgmestre* is under the hierarchical authority of the *Prefect*.[4] The same law provides at Article 85 that where a communal authority fails to execute measures prescribed by law or decree, then the *Prefect* may, ultimately, supplant this communal authority in order to remedy their inaction.[5] Moreover, at Articles 46 and 48, the *Loi sur l'organisation de la commune*, 1963, establishes the power of the *Prefect* to take disciplinary sanctions against a *bourgmestre* and even to propose his dismissal to the Minister of the Interior. Coupled with this is the law as promulgated in the second statute submitted to this Trial Chamber, the *Décret-Loi organisation et fonctionnement de la préfecture*, 11 March 1975. Article 15 of this statute makes clear that, in addition to the hierarchical authority that the *Prefect* exercises over the *bourgmestres* and their

services, he also has a general power of supervision over the acts of the communal aut... Therefore, these provisions, coupled with the *Prefect's* overarching duty to maintain public order and security, reflect the ultimate hierarchical authority enjoyed by the *Prefect* over the *bourgmestre*.[6]

482. The communal police are under the direct control over the *bourgmestre*. This matter was not disputed, and reflects the findings of the Trial Chamber in the *Akayesu* Judgement. Even if it is not axiomatic that the *Prefect* would hold the corresponding hierarchical *de jure* authority over the communal police, the law provides that in the situation which faced Rwanda and Kibuye *Prefecture* in 1994, it is the *Prefect* who retains ultimate control. To this end, the *Loi sur l'organisation de la commune*, 1963, allows the *Prefect* to requisition the communal police and place them under his direct authority in cases of grave public disorder or in times when unrest has occurred or is about to occur.[7]

483. Similarly, the *Prefect* exercises this ultimate authority of requisition over the *gendarmerie nationale*. The position set out in the *Décret-Loi sur la création de la Gendarmerie Nationale*, 1974, states that any competent administrative authority may requisition the *gendarmerie nationale*, that the advisability of the requisition cannot be questioned as long as it does not contravene any law or regulation, and that the requisition persists until the requisitioning authority informs the *gendarmerie* otherwise.[8] Moreover, the *gendarmerie nationale* may *only* execute certain functions, notably, ensuring the maintenance and restoration of public order, when it is legally requisitioned to do so.[9] The Trial Chamber recalls that Kayishema requisitioned the *gendarmerie* both by telephone, and in writing, in the face of the public disorder that prevailed in Rwanda in the pivotal months of April to July 1994.

484. This *de jure* power of the *Prefect* was confirmed by the expert Defence witness, Professor Guibal. In his testimony to the Trial Chamber he opined that, even after the 1991 Constitution, in the advent of multiple party politics,

> the *Prefect* had considerable powers with regard to the *prefectorial* conference. The *Prefect*, according to the text of 1975, . . . could even requisition the intervention of the armed forces. The *Prefect* can define regulations for law and order and he can punish directly. . .[10]

485. Further, when Counsel for Kayishema asked whether, in light of the multi-party politics, it was, "a co-ordination role that the *Prefect* plays rather than the exercise of hierarchical power", Professor Guibal replied, "normally the relationships fall under the hierarchy rather than under co-ordination".[11]

486. Professor Guibal then proceeded to describe how the situation would have been very different in the tumultuous realities of Rwanda in 1994. The situation in the country and the peculiar nature of the party-orientated constitution would have led to what he described as "crisis multi-partyism". Although

5683

he did not examine the specific context of the Rwandan crisis, he explained that such a *status q*[illegible] have arisen because each respective party would have felt that the situation should be resolved through them, not the constitution. A dichotomy between political and administrative hierarchy would have emerged. This led Professor Guibal to the conclusion that although the power of the *Prefect* over the forces of law and order existed formally in 1994, these powers were emptied of any real meaning when the ministers, the ultimate hierarchical superiors to the police, gendarmes and army, were of a different political persuasion.

487. The Trial Chamber is of the opinion that such assertions clearly highlight the need to consider the *de facto* powers of the *Prefect* between April and July 1994. Such an examination will be conducted below. However, the delineation of power on party political grounds, whilst perhaps theoretically sound, should only be considered in light of the Trial Chambers findings that the administrative bodies, law enforcement agencies, and even armed civilians were engaged together in a common genocidal plan. The focus in these months was upon a unified, common intention to destroy the ethnic Tutsi population. Therefore, the question of political rivalries must have been, if it was at all salient, a secondary consideration.

488. The actions of Kayishema himself also appear to evidence a continued subordination of the *bourgmestre*s to his *de jure* authority during the events of 1994 or, at least, an expectation of such subordination. Prosecution exhibit 51, for example, is a letter from Kayishema to the *bourgmestre*s requesting that they recruit people to be "trained" for the civil defence programme. Prosecution exhibit 53 is another letter from Kayishema to the *bourgmestre*s, dated 5 May 1994, which requests an urgent report on the security situation in their communes and to inform him of where "the works" had started. In addition, Kayishema testified to this Trial Chamber that in late May 1994, he went to the *Bourgmestre*s in his *prefecture* and instructed them to disregard a letter that they had received directly from the Minister of Interior relating to the civil defence programme. His clear objective in doing so was to prevent the *Bourgmestre*s from implementing the explicit instructions of the Minister.[12]

489. Even in the climate that prevailed, therefore, Kayishema clearly considered that this hierarchical relationship persisted and expected his 'requests' to be executed. Accordingly, the Trial Chamber finds that it is beyond any doubt that Kayishema exercised *de jure* power over the *Bourgmestre*s, communal police, gendarmes and other law enforcing agencies identified at the massacre sites.

De Facto Control

490. However, the jurisprudence on this issue clearly reflects the need to look beyond simply the *de jure* authority enjoyed in a given situation and to consider the *de facto* power exercised. The Trial Chamber in the *Celebici* case stated that in the fact situation of the Former Yugoslavia, where the command structure was often ambiguous and ill-defined,

5684

> . . .persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so. Thus the Trial Chamber accepts the . . . proposition that individuals in positions of authority, whether civilian or military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their *de facto* as well as their *de jure* positions as superiors. *The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude impositions of such responsibility.*[13] [emphasis added]

491. Thus, even where a clear hierarchy based upon *de jure* authority is not present, this does not prevent the finding of command responsibility. Equally, as we shall examine below, the mere existence of *de jure* power does not always necessitate the imposition of command responsibility. The culpability that this doctrine gives rise to must ultimately be predicated upon the power that the superior exercises over his subordinates in a given situation.

492. The Trial Chamber has found that acts or omissions of a *de facto* superior can give rise to individual criminal responsibility pursuant to Article 6(3) of the Statute. Thus, no legal or formal position of authority need exist between the accused and the perpetrators of the crimes. Rather, the influence that an individual exercises over the perpetrators of the crime may provide sufficient grounds for the imposition of command responsibility if it can be shown that such influence was used to order the commission of the crime or that, despite such *de facto* influence, the accused failed to prevent the crime. The *Celebici* case provides an exposition of the jurisprudence on this point.[14] One particularly pertinent example is the *Roechling* case which the Trial Chamber in the *Celebici* Judgement summarised as,

> . . . an example of the imposition of superior responsibility on the basis of *de facto* power of control possessed by civilian leaders. While the accused in this case were found guilty, *inter alia*, of failing to take action against the abuse of forced labourers committed by members of the Gestapo, it is nowhere suggested that the accused had any formal authority to issue orders to personnel under Gestapo command.[15]

493. This passage is instructive not only when considering Kayishema's control over the less explicitly documented command structures which existed in Rwanda in 1994, such as the members of the *Interahamwe* and those armed civilians involved in the 'civil defence programme'; but also when examining the realities of Kayishema's relationship with *bourgmestres*, communal police and the *gendarmerie nationale*.

494. Defence witnesses such as DN and DK testified to the lack of material means available for the *Prefect* to control the public disorder that ensued after the death of the President. Trial Chamber notes, however, that these witnesses did not actually contest the control that the *Prefect* exercised over the law

5685

enforcing and administrative bodies.

495. It was the Defence's position that the *Prefect* had insufficient means to prevent those assailants, including a few defecting members of the army and *gendarmerie nationale*, from committing the massacres of 1994. Kayishema himself testified that he had sent what gendarmes he had at his disposal to the area of Bisesero, but that there was little that could be done.

496. Professor Guibal, for the Defence, described how the *status quo* that emerged in 1994 after the death of the President would have been one where the traditional influence and power of the *Prefect* would have been greatly reduced. He was of the opinion that the authority the *Prefect*, as a member of a political party and in the climate of the "crisis multi-partyism", would have been diminished, both *de jure* and *de facto*.

497. In this respect, Professor Guibal referred to a 'paralysis of power' suffered by the *Prefect*. Accordingly, it was submitted by the Defence, the political and administrative uncertainty that reigned between April and July 1994 was such as to curtail the *Prefect's* power of requisition and his influence over administrative bodies. This uncertainty, the Defence submitted, also manifested itself amongst the population as a whole. Professor Guibal opined that the citizens in such a climate of uncertainty would receive instructions and orders with difficulty.

498. In short, the Defence submitted that in the pivotal months of 1994, Kayishema was in not in a *de facto* position to control the actions of the assailants and that he was neither in a position to prevent nor to punish the commission of the massacres in his *Prefecture*.

499. Once again, however, the theoretical underpinning proffered by Professor Guibal does not reflect the reality that the Trial Chamber has found existed in Rwanda. The *Prefect* was a well-known, respected, and esteemed figure within his community.[16] The testimony of Kayishema provides an illustrative example of the influence that the *Prefect* enjoyed. He related to the Trial Chamber an instance in August 1992 when, soon after taking office, he was telephoned by the *Bourgmestre* of Gishyita Commune. The *Bourgmestre* reported that houses were being burnt down in his commune, people were fleeing and the situation was chaotic. Kayishema told the Trial Chamber that he was requested to go directly to the scene and intervene, that the *Bourgmestre* had said "I just want your presence here on the spot."[17]

500. The Trial Chamber draws three basic conclusions from this. Firstly, it is indicative of the effect that Kayishema's presence at a scene could have, thus is appurtenant to the responsibility he must bear in aiding and abetting the crimes pursuant to Article 6(1). Secondly, in times of crisis it was ultimately the *Prefect* that was called upon, with all the powers of influence that such a bearer of that title wielded.

5686

Finally, it also reflects the *de facto* influence he had and the commensurate *de facto* au[illegible] exercised as *Prefect* in such times. A clear parallel can be drawn with the climate that prevailed in Rwanda in 1994.

501. The facts of the case also reflect the *de facto* control that Kayishema exercised over *all* of the assailants participating in the massacres. Kayishema was often identified transporting or leading many of the assailants to the massacre sites. He was regularly identified, for example, in the company of members of the *Interahamwe* – transporting them, instructing them, rewarding them, as well as directing and leading their attacks. The Trial Chamber, therefore, is satisfied that Kayishema had strong affiliations with these assailants, and his command over them at each massacre site, as with the other assailants, was clearly established by witness testimony.

502. In the Bisesero area, for example, witness W testified that Kayishema was directing the massacre of those Tutsi who had sought refuge at the Cave. Witness U, at Karongi Hill, described to the Trial Chamber how Kayishema arrived at this location leading a number of soldiers, gendarmes, and armed civilians, addressed them by megaphone and then instructed them to attack. Upon these orders, the massacres began. These facts have been proven beyond a reasonable doubt.

503. The massacre that occurred at the Stadium provides a further striking example of the control exercised by Kayishema. The Trial Chamber has found that Kayishema transported gendarmes to the Stadium where, for two days, they simply stood guard and controlled the movement of persons in and out of the Stadium. Kayishema returned on 18 April leading more gendarmes, members of the *Interahamwe*, other armed civilians and prison wardens. Only then, when Kayishema ordered them to commence the attacks, firing into the crowd twice, did the guarding gendarmes begin their massacre. The onslaught by those who had been guarding the Stadium and those assailants who joined them were impromptu and unforeseen, but formed part of an attack that was clearly orchestrated and commanded by, *inter alia*, Kayishema.

504. All of the factual findings need not be recounted here. These examples are indicative of the pivotal role that Kayishema played in leading the execution of the massacres. It is clear that for all crime sites denoted in the Indictment, Kayishema had *de jure* authority over most of the assailants, and *de facto* control of them all. It has also been proved beyond reasonable doubt that the attacks that occurred were commenced upon his orders (Mubuga Church excepted). They were attacks clearly orchestrated by him, and only executed upon his direction.

505. Further, where the perpetrators of the massacres were found to be under the *de jure* or *de facto* control of Kayishema, and where the perpetrators committed the crimes pursuant to Kayishema's orders, the Trial Chamber is of the opinion that it is self-evident that the accused knew or had reason to know

5687

that the attacks were imminent and that he failed to take reasonable measures to prevent them. In such case, the Trial Chamber need not examine further whether the accused failed to punish the perpetrators. Such an extended analysis would be superfluous.

506. The Trial Chamber finds, therefore, that Kayishema is individually criminally responsible, pursuant to Article 6(3) of the Statute, for the crimes committed by his *de jure* and *de facto* subordinates at the Home St. Jean and Catholic Church Complex, the Stadium and the Bisesero area.

507. It only remains for the Trial Chamber to consider whether Kayishema knew, or had reason to know, of those attacks at which he was not present. If he was so aware, or ought reasonably to have known of such impending attacks, then the Chamber must consider whether the accused attempted to prevent or punish the commission of those crimes.

Kayishema's Knowledge and Prevention of the Attack and Punishment of the Perpetrators

508. The Trial Chamber has not found that Kayishema, though present at Mubuga Church before and during the attacks there, specifically ordered the massacres. As such, it is necessary to consider the remaining elements necessary to establish command responsibility under Article 6(3) of the Statute.

509. After examination of the facts presented, the Trial Chamber concludes that Kayishema knew or had reason to know that a large-scale massacre was imminent. The Trial Chamber is convinced of this fact for a number of reasons. First, the Tutsis were the subject of attacks throughout Rwanda by the date of the attack at Mubuga Church, and Kayishema was privy to this information. Second, following Kayishema's conversation with the Hutu priest, witnessed by a number of Tutsis at the Church, the priest refused the Tutsis access to water and informed them that they were about to die. Finally, the attackers included soldiers, gendarmes, and the members of the *Interahamwe*, all of whom he exercised either *de jure* or *de facto* control over.

510. In light of his duty to maintain public order, and seized of the fact that massacres were occurring elsewhere in Rwanda, the Trial Chamber is of the opinion that Kayishema was under a duty to ensure that these subordinates were not attacking those Tutsi seeking refuge in Mubuga Church. Moreover, his identification at the site both before and during the attacks leave the Trial Chamber in no doubt that Kayishema knew of the crimes that were being committed by his subordinates.

511. In order to establish responsibility of a superior under Article 6(3), it must also be shown that the accused was in a position to prevent or, alternatively, punish the subordinate perpetrators of those crimes. Clearly, the Trial Chamber cannot demand the impossible. Thus, any imposition of responsibility must be based upon a material ability of the accused to prevent or punish the crimes in

question.

512. The accused, for instance, testified to the Trial Chamber that because the gendarmes had mutinied, he did not exercise the requisite control over their actions. However, not only did a number of the incursions upon Mubuga Church occur prior to the supposed mutiny (on the evening of 15 April), but the Trial Chamber has found this line of defence untenable in light of the overwhelming evidence presented by the Prosecution that Kayishema was present at, instrumental in, and a participant of the massacres delineated in the Indictment. Kayishema was in *de jure* and *de facto* control of the assailants and others, such as *Bourgmestre* Sikubwabo, identified as directing the attacks at Mubuga Church.

513. In light of this uncontestable control that Kayishema enjoyed, and his overarching duty as *Prefect* to maintain public order, the Trial Chamber is of the opinion that a positive duty upon Kayishema existed to prevent the commission of the massacres. This point was enunciated succinctly by the United States Military Tribunal at Nuremberg in the *Hostage case* where it declared,

> [u]nder basic principles of command responsibility, an officer who merely stands by while his subordinates execute a criminal order of his superiors which he knows is criminal violates a moral obligation under international law. *By doing nothing he cannot wash his hands of international responsibility*",[18] [emphasis added]

No evidence was adduced that he attempted to prevent the atrocities that he knew were about to occur and which were within his power to prevent.

514. On the issue of Kayishema's failure to punish the perpetrators, the Defence submitted that the only power held by the *Prefect* in this respect was the ability to incarcerate for a period not exceeding 30 days. The Trial Chamber concurs with the Defence's submission that this would not be sufficient punishment for the perpetrators of the alleged crimes (though possibly sufficient as a short-term measure to help prevent further atrocities). However, the Trial Chamber is mindful that there is no evidence to suggest that in the 3 months between the start of these attacks and Kayishema's departure from Rwanda, no action was commenced which might ultimately have brought those responsible for these barbarous crimes to justice.

515. It is unnecessary to elaborate upon Kayishema's punishment of these perpetrators, or lack thereof, in any further detail. The task would be a superficial one in light of the Trial Chamber's findings that Kayishema exercised clear, definitive control, both *de jure* and *de facto*, over the assailants at every massacre site set out in the Indictment. It has also been proved beyond a reasonable doubt that Kayishema ordered the attacks or, knowing of their imminence, failed to prevent them.

5689

Conclusion

516. The inherent purpose of Article 6(3) is to ensure that a morally culpable individual is held responsible for those heinous acts committed under his command. Kayishema not only knew, and failed to prevent, those under his control from slaughtering thousands of innocent civilians; but he orchestrated and invariably led these bloody massacres. This Trial Chamber finds that in order to adequately reflect his culpability for these deaths, Kayishema he must be held responsible for the actions and atrocities committed.

5690

6.2 GENOCIDE

517. Kayishema and Ruzindana both are charged with the crime of Genocide, under Article 2(3)(a) of the Statute. Kayishema is charged with Genocide under Counts 1, 7 and 13 for his responsibility for the crimes committed on 17 April 1994 at the Catholic Church and Home St. Jean (Complex), 18 April 1994 at Gatwaro Stadium and 14 and 15 April 1994 at the Mubuga Church, respectively. Kayishema is also charged with Genocide under Count 19 for the crime of Genocide committed in the Bisesero area throughout April, May and June 1994. Kayishema is charged for his criminal responsibility under Articles 6(1) and 6(3) of the Statute.

518. Ruzindana is charged with Genocide under Count 19 for his role in the massacres that occurred in the Bisesero area. For his acts or omission Ruzindana is alleged to be criminally responsible under Article 6(1) of the Statute.

519. Genocide, in accordance with Article 2(2) of the Statute, means the commission of any of the acts enumerated in Article 2(2)(a) through to (e) of the Statute "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The components of the crime of genocide are discussed in the Chapter that examines the law relating to genocide.

520. In this Chapter, the Chamber first examines the accused persons' *mens rea* in order to determine whether they carried out acts with the specific intent to destroy the Tutsi group in whole or in part. In light of those findings, the Chamber examines the culpable genocidal acts for which the accused are responsible and determine their criminal responsibility under Articles 6(1) and 6(3) of the Statute.

6.2.1 The Components of Specific Intent

521. In order to prove the commission of the crime of genocide the Prosecution must prove beyond a reasonable doubt, that the criminal acts were committed with the intent to destroy in whole or in part a national, ethnical, racial or religious group, as such.

The Targeted Group

522. The Prosecution submitted that the targeted group was the Tutsi population in Kibuye that was attacked on the grounds of ethnicity. The Chamber discusses the identity of the victims in detail within the Part on Factual Findings, addressing genocide in Kibuye generally and the massacres at the four crime sites in particular. The evidence proves, beyond a reasonable doubt, that the victims of the acts for which Kayishema and Ruzindana are charged were Tutsis.

5691

523. The Chamber further accepts that the Tutsis were an ethnic group. In support of this contention the Prosecution provided evidence that since 1931, Rwandans were required to carry identification cards which indicated the ethnicity of the bearer as Hutu, Tutsi or Twa.[19] The government-issued identification cards specified the individual bearer's ethnicity. It should be noted that, in accordance with Rwandan custom, the ethnicity of a Rwandan child is derived from that of her or his father.

524. The Prosecution's expert witnesses, Professor Guichaoua and Mr. Nsanzuwera, also offered information on this issue. Through Mr. Nsanzuwera a copy of an identity card was tendered into evidence. He confirmed that all Rwandans were required to identify themselves by ethnicity on official documents. He added that identification based on ethnicity was a highly divisive issue in Rwanda. Therefore, the matter was addressed in the Arusha Peace Accords, which categorically resolved that there would be no mention of ethnicity on the identification cards of Rwandans from that period forth. Identification cards identifying the victims as Tutsis were found on those exhumed from mass graves in Kibuye.

525. Additionally, the scores of survivors who testified before this Chamber stated that they were Tutsis and that those whom they saw massacred during the time in question were also Tutsis.

526. In *Akayesu,* Trial Chamber I found that the Tutsis are an ethnic group, as such. Based on the evidence presented in the present case, this Trial Chamber concurs. The Trial Chamber finds beyond a reasonable doubt that the Tutsi victims of the massacres were an ethnical group as stipulated in Article 2(2) of the Statute, and were targeted as such.

Context of the Massacres

527. In the Law Part, the Trial Chamber acknowledges the difficulty in finding explicit manifestations of a perpetrator's intent. The Trial Chamber states that the specific intent can be inferred from words and deeds and may be demonstrated by a pattern of purposeful action. The evidence, in the present case, is considered in light of this reality.

Genocide in Rwanda and Kibuye Generally

528. The Chamber examines the tragic events in Rwanda and in Kibuye in 1994 in Part V. The examination is useful here as it gives context to the crimes at the four crimes sites. The analysis shows that there indeed was a genocidal plan in place prior to the downing of the President's airplane in April 1994. This national plan to commit genocide was implemented at *prefecture* levels. For instance, Kayishema as the *Prefect*, disseminated information to the local officials above and below him using the established hierarchical lines of communications.[20]

529. The Prosecution submitted that the killings were planned and organised with a clear strategy,

5692

which was implemented by Kayishema and Ruzindana in Kibuye. The plan was executed eff. and successfully in this *Prefecture*. Those who escaped the April massacres in and around Kibuye Town fled to Bisesero where they were relentlessly pursued and attacked. One witness described Bisesero Hill as strewn with dead bodies "like small insects which had been killed off by insecticide."[21] There is documentary evidence that Kayishema requested reinforcement from the national authorities to attack the unarmed Tutsi population under the guise that there was a "security problem" in Bisesero.[22]

530. A letter dated 26 June 1994 written by the then *Bourgmestre* of Mabanza, Bagilishema to the *Prefect* of Kibuye, Kayishema, stated that there was no need for sending additional attackers to Mabanza because there were no Tutsis left in his commune.[23] The letter clearly indicates the knowledge and participation of the civilian authorities in the process of extermination.

Kayishema's Intent to Destroy in Whole or in Part the Tutsi Group, As Such

The Number of Victims

531. The number of Tutsis killed in the massacres, for which Kayishema is responsible, either individually or as a superior, provides evidence of Kayishema's intent. The Trial Chamber finds that enormous number of Tutsis were killed in each of the four crime sites. In the Complex, the number of Tutsis killed was estimated to be about 8,000; there were between 8,000 and 27,000 Tutsis massacred at the Stadium; and, at Mubuga Church between 4,000 and 5,500 Tutsi were massacred. The number killed in Bisesero is more difficult to estimate, however, evidence suggests that the number of those who perished was well into the tens of thousands.

532. Not only were Tutsis killed in tremendous numbers, but they were also killed regardless of gender or age. Men and women, old and young, were killed without mercy. Children were massacred before their parents' eyes, women raped in front of their families. No Tutsi was spared, neither the weak nor the pregnant.

533. The number of the Tutsi victims is clear evidence of intent to destroy this ethnic group in whole or in part. The killers had the common intent to exterminate the ethnic group and Kayishema was instrumental in the realisation of that intent.

Methodology – Persistent Pattern of Conduct

534. The Trial Chamber finds compelling evidence that the attacks were carried out in a methodical manner. The Prosecution submitted that evidence of specific intent (*dolus specialis*) arises from the repetitive character of the planned and programmed massacres and the constant focus on the Tutsi members of the population. The perpetrators did not commit just one massacre but continually killed the Tutsi from April to June 1994.[24]

5693

535. This consistent and methodical pattern of killing is further evidence of the specific Kayishema was instrumental in executing this pattern of killing. Tutsi refugees gathered in places which had served historically as safe havens including the Complex, the Stadium and Mubuga Church. These places were surrounded by Hutu assailants, those inside the structure were not allowed to leave, and were denied food, medicine or sanitary facilities.[25] Eventually, the refugees were massacred. If there were too many Tutsis to kill in one day the killers would return to finish off their 'work' the next morning. This Chamber finds that Kayishema instigated the attacks at the Complex and the Stadium.

536. In the area of Bisesero the attacks continued for several months; April, May and June of 1994. At Bisesero, evidence proves that Kayishema was leading and directing the attacks. The attackers were transported by government buses and other vehicles. This Chamber finds that Ruzindana brought the Hutu attackers in his personal vehicles and that Kayishema did the same in the trucks belonging to the *Prefecture*. The assailants included the local officials such as the *bourgmestres*, *counseillers*, communal police, the *gendarmerie nationale*, members of the *Interahamwe*, other soldiers as well as the accused themselves.

537. The weapons used and the methods by which the Tutsis were killed are also consistent throughout the four crime sites. Generally, the witnesses testified that Kayishema and the gendarmes were armed with guns and grenades while other attackers used traditional farming instruments such as machetes and crude weapons such as bamboo spears. Grenades and guns were used at the crime sites where the Tutsis were taking refuge in enclosed spaces to start the attack, and thereafter victims were hacked to death by machetes. Kayishema and Ruzindana both were seen carrying firearms at the crime sites.

Kayishema's Utterances

538. Kayishema's utterances, as well as utterances by other individuals under his direction before, during and after the massacres, also demonstrate the existence of his specific intent. Tutsis were called *Inkotanyi* meaning an RPF fighter or an enemy of Rwanda, *Inyenzi* meaning cockroach. They also were referred to as filth or dirt. Witness WW testified how she heard the Tutsi were being referred to as "dirt" when Kayishema told *Bourgmestre* Bagilishema that "all the dirt has to be removed,"[26] referring to the Tutsis who had sought shelter in the communal office. During the attacks at the Stadium, Kayishema called the Tutsi: "Tutsi dogs" and "Tutsi sons of bitches," when instigating the attackers to kill the Tutsis gathered there.

539. The Chamber also finds that Kayishema used a megaphone to relay a message from Kigali encouraging the extermination of the Tutsis during the attack at the Complex. Several witnesses who survived the massacres at the Complex heard Kayishema say "go to work" or "get down to work"[27]

5694

which, as many witnesses affirmed, meant to begin killing the Tutsis. Other witnesses testi. having heard the attackers, including members of the *Interahamwe*, who were *de facto* under Kayishema's control, sing songs about exterminating the Tutsi.[28] The Trial Chamber accepts Prosecution exhibit 297, tendered through Witness HH, which was a transcription of the lyrics of one of these extermination songs. Essentially, the song urges attackers not to spare the elderly and even the babies because Kagame (the then RPF leader) left Rwanda as a child.[29] Again, the Chamber notes the common intention of the attackers with that of Kayishema.

540. In sum for all the reasons stated above the Chamber finds beyond a reasonable doubt that Kayishema had the intent to destroy the Tutsi group in whole or in part and, in pursuit of that intent, carried out the acts detailed below.

Ruzindana's Intent to Destroy in Whole or in Part the Tutsi Population, As Such

541. Ruzindana displayed his intent to rid the area of Tutsis by his words and deeds and through his persistent pattern of conduct throughout the Bisesero area.

Ruzindana's Utterances

542. Witnesses heard Ruzindana giving orders to the Hutu attackers in the Bisesero area. Specifically, some testified about Ruzindana's statements about not sparing babies whose mothers had been killed because those attacking the country initially left as children.[30] The Trial Chamber also heard evidence of Ruzindana's anti-Tutsi utterances to the assailants, saying that the Tutsi refugees were "the enemy."

Methodology - Persistent Pattern of Conduct

543. Ruzindana played a leadership role in the systematic pattern of extermination of the Tutsis who had sought refuge in the area of Bisesero. Evidence proves that many of the Tutsis who had survived the massacres in and around Kibuye Town during April fled to Bisesero. Ruzindana was instrumental in the pursuit of these Tutsi persons, by transporting, encouraging, and leading the attacks.

544. The Trial Chamber finds that at many of the crime sites within Bisesero, Ruzindana did bring Hutu assailants to the sites in his vehicles. Once at the site, Ruzindana directed attackers to kill and offered payment in exchange for the severed heads of well known Tutsis or identification cards of murdered Tutsis. Ruzindana was seen carrying firearms at many of the massacre sites. The Chamber accepted evidence from witnesses who testified about overhearing conversations between the Hutu assailants who referred to Ruzindana as their patron. Yet other witnesses affirmed that *gendarmes*, speaking among themselves, stated that they were not concerned about using too many bullets, because Ruzindana would purchase more for them. As a result of Ruzindana's consistent pattern of conduct, thousands of Tutsis were killed or seriously injured; men, women and children alike.

5695

545. The Trial Chamber is satisfied, from all the evidence accepted, that the perpetrators of the culpable acts that occurred within Kibuye *Prefecture*, during the period in questions, were acting with a common intent and purpose. That intent was to destroy the Tutsi ethnic group within Kibuye. Both Kayishema and Ruzindana played pivotal roles in carrying out this common plan.

6.2.2 The Genocidal Acts of Kayishema and Ruzindana

546. The Prosecution alleges that the accused persons committed acts pursuant to Article 2(2). Although Article 2(2) includes a variety of acts, the Prosecution, during closing arguments, only addressed the Trial Chamber on killings (Article 2(2)(a)), causing serious bodily or mental harm (Article 2(2)(b)) to Tutsis, and deliberately inflicting on Tutsis conditions of life calculated to bring about their physical destruction (Article 2(2)(c)) in whole or in part.

547. As a preliminary matter, the Chamber finds that in implementing the policy of genocide, the intent of Kayishema, those under his control and Ruzindana, was to kill members of the Tutsi group at the four crime sites. Inherent in the act of mass killing is the infliction of serious bodily and mental harm. For example, the Trial Chamber was presented with the opportunity to view numerous healing bullet and machete wounds. Furthermore, the Chamber heard the testimony of many witnesses who recounted having watched their loved ones mutilated, raped or killed in a heinous manner. The evidence established that the genocidal act of the accused persons was killing. The Trial Chamber holds Kayishema and Ruzindana responsible for the *results* of the killings and serious bodily and mental harm to the Tutsi population in Kibuye.

548. No evidence was proffered to show that the accused persons, or Kayishema's *de facto* and *de jure* subordinates, deliberately inflicted, on the Tutsi group in Kibuye, conditions of life to bring about their physical destruction in whole or in part. The Chamber acknowledges the Prosecution argument that Tutsis seeking refuge at the four crime sites were deprived of food, water and adequate sanitary and medical facilities. These deprivations, however, were a result of the persecution of the Tutsis, with the intent to exterminate them within a short period of time thereafter. These deprivations were *not* the deliberate creation of conditions of life - as defined in Chapter 4.1 of this Judgement - intended to bring about their destruction. Additionally, the Chamber finds that the time periods during which these deprivation occurred were not of sufficient length or scale to bring about the destruction of the group. Therefore, the Trial Chamber only examines killings.

549. As stated above, the Chamber has found that Kayishema's and Ruzindana's culpable conduct was committed with the intent to destroy the Tutsi group in whole or in part. In relation to Kayishema this intent applies to all four massacre sites. For Ruzindana this intent relates to

5696

Bisesero only.

550. Below, the Chamber addresses the evidence in relation to Kayishema's and Ruzindana's genocidal acts.

COUNT 1:
Charges Kayishema with Genocide in Violation of Article 2(3)(a) of the Statute for the Massacres at the Complex

551. With respect to the Complex, the Trial Chamber finds, *inter alia*, that by about 17 April 1994 thousands of Tutsis had gathered. Persons under Kayishema's control including gendarmes and members of the *Interahamwe* surrounded the Complex. There were also boats surrounding the peninsula on which the Complex was located. The attackers who had surrounded the Complex carried machetes, spears and other traditional weapons and prevented people from leaving. The Trial Chamber is satisfied that those attempting to flee were killed.

552. Kayishema led the attackers from the *Prefecture* office to the Complex. He then ordered them to begin the attack on the Tutsi by relaying a message from Kigali, through a megaphone, to kill the Tutsis. Thus, Kayishema orchestrated and participated in the attack that lasted hours. As a result of the attack, thousands of Tutsis were killed.

553. The Trial Chamber finds that prior to the attack, Kayishema knew that it was imminent. Indeed, along with initiating the attack, he was seen at the Complex twice before the attacks of 17 April.

Kayishema's Criminal Responsibility
554. For the reasons stated above, pursuant to Article 6(1) of the Statute, Kayishema is individually responsible for instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation and execution of genocide by the killing and causing of serious bodily harm to the Tutsis at the Complex on 17 April 1994.

555. Additionally, under Article 6(3) of the Statute, Kayishema is responsible, for genocide, as superior, for the mass killing and injuring of the Tutsi at the Complex on 17 April 1994, undertaken by his subordinates. The assailants at the Complex including gendarmes, members of the *Interahamwe*, local officials, including prison wardens, *conseillers* and *bourgmestres*. The Trial Chamber finds that Kayishema had *de jure* control over most of the assailants and *de facto* control over all the attackers.

5697

The evidence proves that Kayishema was leading and directing the massacre. As stated in t[illegible] Findings on Criminal Responsibility, because Kayishema himself participated in the massacres, it is self-evident that he knew that his subordinates were about to attack and failed to take reasonable and necessary measures to prevent them, when he had the material ability to do so.

COUNT 7:
Charges Kayishema with Genocide in Violation of Article 2(3)(a) of the Statute for the Massacres at the Stadium in Kibuye Town

556. The Trial Chamber finds that by 18 April 1994, thousands of men, women and children, unarmed Tutsis, sought refuge in the Stadium located in Kibuye Town. Once the refugees had gathered, persons under Kayishema's control, including *gendarmes*, prevented refugees from leaving the Stadium and surrounded the Stadium. The Trial Chamber is satisfied that during the attacks, some of the Tutsi who attempted to flee were killed. Kayishema instigated the attacks by ordering the attackers to "shoot those Tutsi dogs" and by firing the first shot into the Stadium. As a result of the attack, thousands of people were killed and numerous sustained serious physical injuries.

557. The Chamber finds beyond a reasonable doubt, that at the time when the Tutsi were prevented from leaving the Stadium, Kayishema knew or had reason to know that an attack was about to occur.

Kayishema's Criminal Responsibility
558. For the reasons stated above, Kayishema is individually criminally responsible under Article 6 (1) of the Statute for instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation and execution of genocide by killing and injuring Tutsis in the Stadium

559. Under Article 6(3) of the Statute, Kayishema is responsible for genocide as a superior for the acts committed by his subordinates during the massacres at the Stadium on 18 April 1994. The assailants at the Stadium included gendarmes, soldiers, members of the *Interahamwe*, prison wardens and armed civilians. The Trial Chamber finds that Kayishema had *de jure* control over most of the assailants and *de facto* control over them all. The evidence proves that Kayishema ordered, led and directed the massacre. Accordingly, it is self-evident that he knew that his subordinates were about to commit the massacres and failed to take reasonable and necessary measures to prevent them, when he had the material ability to do so.

COUNT 13:
Charges Kayishema with Genocide in Violation of Article 2(3)(a) of the Statute for the Massacres at the Church at Mubuga

560. The Trial Chamber finds that, *inter alia,* thousands of Tutsis had gathered at Mubuga Church

5698

seeking refuge from attacks which were occurring throughout Kibuye *Prefecture*. Only a fe those seeking refuge survived the massacres that occurred on 15 and 16 April. Kayishema and his subordinates, including local officials, gendarmes, communal police and members of the *Interahamwe* were present and participated in the attacks. The Trial Chamber finds that those who initially attempted to leave the Church in search of food or water were forced to retreat or beaten to death by armed assailants outside the Church. Kayishema's presence prior and during the major attack and the participation of those under his control encouraged the killings of the Tutsi refugees assembled there. As a result of the attack, thousands of people were killed and numerous sustained serious physical injuries.

561. The Chamber finds, beyond a reasonable doubt, that at the time when the Tutsis were prevented from leaving the Mubuga Church, Kayishema knew or had reason to know that an attack was about to occur.

Kayishema's Criminal Responsibility

562. Under Article 6(1) of the Statute, Kayishema is individually responsible for genocide for the killing and serious injuring of Tutsis at the Mubuga Church on 15 and 16 April 1994. Kayishema visited the Church before the attacks and transported gendarmes. The Hutu Priest of this parish, who had been co-operating with Kayishema, specifically told the refugees that they were about to die, and asked that a headcount be done for the *Prefect*. The gendarmes eventually attacked the refugees. Kayishema also was present during the attacks. These findings prove beyond a reasonable doubt that Kayishema aided and abetted the preparation and execution of the massacre.

563. Additionally, under Article 6(3) of the Statute, Kayishema is responsible for genocide as a superior for the acts of his subordinates that took place at the Mubuga Church on 15 and 16 April 1994. The assailants at Mubuga included the *Bourgmestre* and the *conseillers* of the Commune, gendarmes, soldiers, members of the *Interahamwe*, communal police, other local officials and armed civilians. The Trial Chamber has found that Kayishema had *de jure* control over most of the assailants and *de facto* control over them all. It is clear that Kayishema knew that an attack was imminent by virtue of his presence before and during the massacre. Accordingly, the Trial Chamber finds, beyond a reasonable doubt, that Kayishema knew that his subordinates were about to attack the refugees in the Church and failed to take reasonable and necessary measures to prevent them, when he had the material ability to do so.

COUNT 19:

Charges Kayishema and Ruzindana with Genocide in Violation of Article 2(3)(a) of the Statute for the Massacres at the Area of Bisesero

5699

564. The Trial Chamber finds that both Kayishema and Ruzindana brought the *gendarmerie nationale*, communal police, members of the *Interahamwe* and armed civilians to the area of Bisesero and directed them to attack the Tutsis. Both accused persons also personally participated in the attacks. Furthermore, the Trial Chamber found that Ruzindana mutilated and personally killed a sixteen-year-old girl named Beatrice at the Mine at Nyiramurego Hill. Accordingly, Kayishema and Ruzindana were responsible for the killings at a number of massacre sites during April, May and June 1994. Hutu assailants during these attacks killed and injured thousands of Tutsis.

565. In relation to the 13 and 14 May assault at Muyira Hill, Kayishema and Ruzindana arrived at the head of the convoy of vehicles which transported soldiers, members of the *Interahamwe*, communal police and armed civilians. Some of the vehicles, in which the assailants arrived, belonged to the Rwandan Government. Kayishema signalled the start

566. of the attacks by firing a shot into the air, directed the assaults by dividing the assailants into groups, and headed one group of them as it advanced up the Hill and verbally encouraged the attackers through a megaphone. Ruzindana also played a leadership role, distributing traditional weapons, leading a group of attackers up the Hill and shooting at the refugees.

566. The Trial Chamber finds that both accused persons also participated in other massacres. At the cave, Kayishema was directing the siege generally and Ruzindana was commanding the attackers from Ruhengeri; both were giving instructions to the attackers and orchestrating the attack. At Karonge Hill, Kayishema arrived with soldiers, gendarmes and Hutu civilians and used a megaphone to address the attackers, giving them instructions. Ruzindana was seen transporting members of the *Interahamwe* to the Mine at Nyiramurego Hill and then directing the attackers. At Bisesero Hill, Ruzindana was seen transporting attackers and giving orders to the assailants to surround the Hill and begin the assault. Ruzindana orchestrated the massacre at the Hole near Muyira Hill, and the assault commenced upon his instruction.

Kayishema's Criminal Responsibility

567. In light of the factual findings outlined above, the Trial Chamber finds that the killings that took place in Bisesero during April, May and June 1994 were carried out with the intent to destroy the Tutsi group in whole or in part. Further, the Trial Chamber finds, beyond a reasonable doubt, that Kayishema caused the death of and serious bodily harm to Tutsis at numerous places in the Bisesero area including, Karonge Hill at the end of April, Bisesero Hill on 11 May, Muyira Hill on 13 and 14 May, the Cave in Gishyita Commune, Gitwa Cellule in May and Kucyapa in June.

568. Under Article 6(1) of the Statute, Kayishema is individually responsible for genocide for killing and injuring the Tutsi at the attacks in the Bisesero area during April, May and June 1994 with the intent

5700

to destroy the Tutsi ethnic group. Kayishema's involvement varied from crime site to crime si .. Bisesero. At the crime sites where he was found to have participated, Kayishema committed one or more of the following acts: headed the convoy of assailants; transported attackers in his vehicle; directed the initial positioning of the attackers; verbally encouraged them; initiated the attacks by orders or gunshots; lead the groups of attackers; shot at fleeing Tutsis; and, finally, thanked the Hutu attackers for their "work." These facts prove, beyond a reasonable doubt, that Kayishema, instigated, ordered, committed and otherwise aided and abetted in the preparation and execution of the massacre that resulted in thousands of deaths and serious bodily injuries with intent to destroy the Tutsi ethnic group.

569. Additionally, under Article 6(3) of the Statute, Kayishema is responsible for genocide, as superior, due to the killing and injuring that took place in Bisesero area in during April, May and June 1994 by his subordinates. The assailants in Bisesero were identified as gendarmes, soldiers, members of the *Interahamwe*, and armed civilians. The Trial Chamber finds that Kayishema had *de jure* control over most of the assailants and *de facto* control over them all. The evidence proves that Kayishema was leading and directing the massacres at numerous sites throughout the period.

Ruzindana's Criminal Responsibility

570. In light of the factual findings outlined above, the Trial Chamber finds that the killings that took which took place in Bisesero, during April, May and June 1994, were carried out with intent to destroy the Tutsi group in whole or in part. Further, the Trial Chamber finds beyond reasonable doubt that Ruzindana caused the death of Tutsis at numerous places in the Bisesero area including, the Mine at Nyiramurego Hill on 15 April, Gitwa Cellule in early May, Bisesero Hill on 11 May, Muyira Hill on 13 and 14 May, the Cave, Kucyapa in June, the Hole near Muyira in early June. Ruzindana caused these deaths by premeditated acts or omissions, intending to do so.

571. In particular under Article 6(1) of the Statute, Ruzindana is individually responsible for the killings that took place within the attacks that the Trial Chamber has found he participated, in the Bisesero area during April, May and June 1994. Ruzindana's involvement varied from site to site and day to day. At the sites where he was found to have participated, Ruzindana committed one or more of the following acts: Headed the convoy of assailants; transported attackers in his vehicle; distributed weapons; orchestrated the assaults; lead the groups of attackers; shot at the Tutsi refugees; and, offered to reward the attackers with cash or beer. The Trial Chamber further found that Ruzindana personally mutilated and murdered individuals during the attack at the Mine at Nyiramuregra Hill. These findings prove beyond reasonable doubt that Ruzindana, instigated, ordered, committed and otherwise aided and abetted in the preparation and execution of the massacre that resulted in thousands of murders with the intent to destroy the Tutsi ethnic group.

5701

5702

6.3 CRIMES AGAINST HUMANITY

572. Counts 2, 8, 14, of the Indictment charge Kayishema with crimes against humanity for murder and Counts 3, 9, 15, charge him with crimes against humanity for extermination. Kayishema is charged also in Counts 4, 10, 16 with crimes against humanity other inhumane acts.

573. Count 20 charges both Kayishema and Ruzindana with crimes against humanity for murder, Count 21 charges them with crimes against humanity for extermination and Count 22 charges both accused with crimes against humanity for other inhumane acts.

574. Pursuant to Article 3 of the Statute, the Trial Chamber shall have the power to prosecute persons for a certain number of crimes committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The offences which constitute crimes against humanity when committed in such a context include, *inter alia*, murder, extermination, deportation, torture, rape, and other inhumane acts.

575. Under this Article the Prosecution charged the accused only for three crimes: murder, extermination and other inhumane acts committed as part of a widespread or systematic attack against the civilian population on discriminatory grounds.

Murder and Extermination

576. As far as murder and extermination are concerned indeed they took place in Kibuye *Prefecture* within the context of a widespread and systematic attack. The evidence produced proves that the attacks were aimed at the Tutsi civilian population as an ethnic group. Evidence also shows that the Tutsi victims were generally peasant farmers, refugees or persons of similar status, including the elderly, women and children. In light of the overwhelming testimony the Chamber finds, beyond a reasonable doubt, that the massacres were based on the grounds of ethnicity.

577. Thus, all necessary elements exist for the conclusion that the accused could be convicted for crimes against humanity (murder) and crimes against humanity (extermination). However, in this particular case the crimes against humanity in question are completely absorbed by the crime of genocide. All counts for these crimes are based on the same facts and the same criminal conduct. These crimes were committed at the same massacre sites, against the same people, belonging to the Tutsi ethnic group with the same intent to destroy this group in whole or in part.

578. Considering the above and based on the facts the Trial Chamber finds that it will be improper to convict the accused persons for genocide as well as for crimes against humanity based on murder and extermination because the later two offences are subsumed fully by the counts of genocide as discussed

5703

in the Part of the Judgement entitled Cumulative Charges.

579. The responsibility of the accused persons for their criminal conduct is thus fully covered under those counts of genocide.

Other Inhumane Acts

580. As far as counts for other inhumane acts are concerned the accused could be found guilty of crimes against humanity based on other inhumane acts.

581. The crimes must be committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. The accused must be aware that their crimes were committed in the context of such an attack. Furthermore, the policy element demands a showing that the crimes were instigated by a government or by an organisation or group. A detailed consideration of the elements of crimes against humanity can be found in the Part of the Judgement that addresses the Law.[31]

582. As stated above, the Trial Chamber finds, beyond a reasonable doubt, the necessary elements of the attack exist to satisfy the crimes against humanity. The acts for which both accused are charged took place within the context of a widespread and systematic attack. Although only one of the alternative conditions must be proved by the Prosecution, the Trial Chamber finds that both conditions are satisfied. Evidence before this Trial Chamber proves that the attacks in Rwanda generally, and in Kibuye *Prefecture* in particular, were carried out in a systematic manner, that is, pursuant to a pre-arranged policy or plan.[32] The evidence of a policy or plan discussed in relation to the counts of genocide is applicable here. The evidence proves that the attacks in Rwanda generally, and in Kibuye *Prefecture* in particular, were aimed at the civilian population. Indeed, evidence shows that the victims in Kibuye were generally peasant farmers, those seeking refuge or persons of similar status, including the elderly, women and children. An abundance of evidence from witnesses, experts and Kayishema himself proves that the attacks in Kibuye *Prefecture* were carried out against Tutsis based on their ethnicity; again this issue is discussed in more detail in relation to the counts of genocide. Lastly, the Trial Chamber finds that the attack must have been part of a broader policy or plan that had been instigated or directed by any organisation or group and that the accused persons had knowledge that their conduct formed part of that attack.

583. For the accused to be found guilty of crimes against humanity for other inhumane acts they must, *inter alia*, commit an act of similar gravity and seriousness to the other enumerated crimes, with the intention to cause the other inhumane act. This important category of crimes is reserved for deliberate forms of infliction with (comparably serious) inhumane results that were intended or foreseeable and done with reckless disregard. Thus, the category of other inhumane acts demands a crime distinct from

5704

the other crimes against humanity, with its own culpable conduct and *mens rea*. The crime of other inhumane acts is not a lesser-included offence of the other enumerated crimes. In the opinion of the Trial Chamber, this category should not simply be utilised by the Prosecution as an all-encompassing, 'catch all' category.

584. In relation to all four sites the Indictment did not particularise the nature of the acts that the Prosecution relied upon for the charge of 'other inhumane acts.' Nor did the Indictment specify the nature and extent of the accused's responsibility for the other inhumane acts. This is true for both Kayishema and Ruzindana. In relation to the culpable acts, for each site the Indictment states little more than: The attackers used (specified) weapons to kill people at the site, the accused participated, and the attack resulted in thousands of deaths and numerous injuries. Not one act, allegedly perpetrated either by Ruzindana, Kayishema, or the other assailants, was specified as an 'other inhumane act'. Therefore, it was incumbent upon the Prosecution to rectify the vagueness of the counts during its presentation of evidence. Indeed, "the question of knowing whether the allegations appearing in the Indictment are vague will, in the final analysis, be settled at Trial."[33]

585. At trial, the Prosecution proffered evidence that the Hutu assailants, under Kayishema's and/or Ruzindana's control and direction, deliberately attempted to kill the Tutsi civilians at the sites for which they are respectively charged. As a result of the intent to massacre, most of the Tutsi were killed whilst others sustained injuries. The Prosecution presented its case on this basis. As such it was not difficult to identify the conduct and evidence that supported the charges of crimes against humanity for extermination and murder. However, the conduct to support the crimes of other inhumane acts was not so easily identified.

586. The Chamber heard horrific testimony of mutilation and other conduct by the Hutu assailants that could potentially amount to other inhumane acts. However, throughout trial the Prosecution failed to adequately particularise which pieces of evidence supported the other inhumane act charges. The most specific identification came in response to Defence objections. On a couple of occasions the Defence objected to the evidence of certain injuries proffered by the Prosecution, submitting that it was outside the nature and parameters of the charges. In response, the Prosecution identified the injuries as evidence of other inhumane acts. This method of using the crime as a 'catch-all' – specifying which acts support the count almost as a postscript - does not enable the counts of other inhumane acts to transcend from vagueness to reasonable precision. Further, the fact that some of the survivors displayed their injuries to the Trial Chamber did not mitigate the Prosecution's obligation to distinguish the specific acts, along with the resultant injuries, as those that support the other inhumane act charges. Only in its Closing Brief did the Prosecution submit that the injuries sustained by the survivors amounted to other inhumane acts and, that the environment of fear and desperation where victims were forced to witness the killing and severe injuring of friends, family and other Tutsi inherently caused

5705

serious mental harm.[34] Accordingly, the Defence teams were not properly seized of the acts that allegedly constituted the other inhumane acts charges until the end of the trial.

587. In interests of justice and a fair trial the Defence should be seized as promptly as possible, and at any event during the trial, of the conduct which allegedly offends each individual count of crimes against humanity for other inhumane acts. The Indictment did not identify the offending conduct or the nature and extent of the accused's responsibility. During trial, the Prosecution failed to rectify this imprecision. Accordingly, the fundamental rights of both the accused, namely to be informed of the charges against him and to be in a position to prepare his defence in due time with complete knowledge of the matter, has been disregarded in relation to all the counts of crimes against humanity for other inhumane acts. A right that is particularly important considering the gravity of the charges.

588. For all the above reasons, the Trial Chamber finds that the Prosecution has not proved its case against Kayishema pursuant to Counts 4, 10, 16, and 22 crimes against humanity for other inhumane acts.

589. For all the above reasons, the Trial Chamber finds that the Prosecution has not proved its case against Ruzindana pursuant to Count 22 crimes against humanity for other inhumane acts.

6.4 COMMON ARTICLE 3 AND ADDITIONAL PROTOCOL II

Counts 5, 11, 17, 23 - Violations of Common Article 3 (a violation of Article 4(a) of the ICTR Statute) and Counts 6, 12, 18, 24 - Violations of Protocol II (a violation of Article 4(a) of the ICTR Statute).

590. Counts 5, 11 and 17 of the Indictment charge Kayishema with violations of Common Article 3 and Counts 6, 12 and 18 charge Kayishema with violations of Protocol II.

591. Count 23 charges both Kayishema and Ruzindana with violations of Common Article 3 and count 24 charges them with violations of Protocol II. All these counts are covered by Article 4 of the ICTR Statute.

592. During the trial, evidence was produced that between about 10 April and 30 June 1994 thousands of men, women and children were killed and numerous persons injured as a result of massacres at the Catholic Church and Home St. Jean Complex, at the Stadium in Kibuye Town, at the Church in Mubuga and in the area of Bisesero in the *Prefecture* of Kibuye, Republic of Rwanda.

593. These men, women and children were unarmed and were predominantly Tutsis seeking protection from attacks that had occurred throughout various regions in Rwanda and Kibuye *Prefecture*. The Prosecution considers the massacred people as victims of the armed conflict and charges Kayishema and Ruzindana with serious violations of Common Article 3 and Protocol II.

5706

594. From the point of view of the Prosecutor, under international law, in order to hold an individual liable for violations of Common Article 3 and/or Protocol II, the following five requirements must be met:

> First, the alleged crime(s) must have been committed in the context of a non-international armed conflict.
>
> Second, temporal requirements for the applicability of the respective regime must be met.
>
> Third, territorial requirements for the applicability of the respective regime must be met.
>
> Fourth, the individual(s) charged must be connected to a Party that was bound by the respective regime; and
>
> Fifth, the victims(s) of the alleged crimes(s) must have been individual(s) that was (were) protected under the respective regime.[35]

595. The first requirement should be considered as a corner stone to clarify the situation in order to establish whether the alleged crimes referred to in the Indictment could be qualified as violations of Common Article 3 and Protocol II.

596. In order to hold Kayishema and Ruzindana criminally responsible for the above mentioned counts, from the point of view of the Prosecution, it must be proved that Common Article 3, as well as Protocol II applied to the situation in Rwanda in 1994.[36]

597. The Trial Chamber finds that this is not a question that need be addressed. It has been established, beyond a reasonable doubt, that there was an armed conflict, not of an international character, in Rwanda. This armed conflict took place between the governmental armed forces, the FAR, and the dissident armed forces, the RPF, in the time of the events alleged in the Indictment, that is from April to July 1994. It has also been shown, beyond a reasonable doubt, that Rwanda was bound by Common Article 3 and Protocol II, which were applicable to "the situation in Rwanda in 1994." The Parties in this non-international conflict confirmed their readiness to comply with the rules of these international humanitarian instruments. As far as the second, temporal requirements, and the third, territorial requirements, are concerned, it should be added that these international instruments, as it was shown above, were applicable in the entire territory of Rwanda with the understanding that the alleged crimes should be considered in the context of the armed conflict and interpreted in a broad territorial and temporal framework.

598. Therefore, the question which should be addressed is not whether Common Article 3 and Protocol II were applicable to "the situation in Rwanda in 1994," but whether these instruments were

5707

applicable to the alleged crimes at the four sites referred to in the Indictment. It is incumbe Prosecutor to prove the applicability of these international instruments to the above-mentioned crimes.

599. However, the Prosecution limited itself to state, "in order to hold Clement Kayishema and Obed Ruzindana criminally responsible for the above mentioned counts, the Prosecutor must prove that the alleged crimes must have been committed *in the context* of a non-international armed conflict." [37] [emphasis added]

600. The Prosecutor did not specify the meaning of the words "in the context." If she meant "during" an internal armed conflict, there is nothing to prove as it was recognised, and this matter was not in dispute, that in this period of time Rwanda was in a state of armed conflict not of international character. Therefore, in this case the words "in the context" are too general in character and do not clarify the situation in a proper way. When the country is in a state of armed conflict, crimes committed in this period of time could be considered as having been committed in the context of this conflict. However, it does not mean that all such crimes have a direct link with the armed conflict and all the victims of these crimes are victims of the armed conflict.

601. There is recognition, nevertheless, in the Prosecutor's Closing Brief that "the Prosecutor must also establish a nexus between the armed conflict and the alleged offence."[38] The following paragraph of this document was intended to prove such a nexus,

> In the present case, the Prosecutor submits that the evidence shows, beyond a reasonable doubt, that for each of the alleged violations there was a nexus between the crimes and the armed conflict that was underway in Rwanda. The Tutsis who were massacred in Kibuye went to the four sites seeking refuge from attacks that were occurring on the Tutsis throughout Kibuye and Rwanda. These attacks were occurring because hostilities had broken out between the RPF and the FAR and the Tutsis were being sought out on the pretext that they were accomplices of the RPF, were "the enemy" and/or were responsible for the death of the President.[39]

602. It is true that "the Tutsis went to the four sites seeking refuge from attacks that were occurring on the Tutsis throughout Kibuye and Rwanda." However, the Tutsi were attacked by neither the RPF nor the FAR in the places where they sought refuge in Kibuye. It was proved through witness testimony that these attacks were undertaken by the civilian authorities as a result of a campaign to exterminate the Tutsi population in the country. Therefore, there is no ground to assert that there was a nexus between the committed crimes and the armed conflict, because "the Tutsis went to the four sites seeking refuge from attacks. . ." The Prosecutor's next allegation is that "these attacks were occurring because hostilities had broken out between the RPF and the FAR and the Tutsis were being sought out on the pretext that they were accomplices of the RPF, were "the enemy" and/or were responsible for the death of the President."

5708

603. It is true that "hostilities had broken out between the RPF and the FAR" in this period. However, evidence was not produced that the military operations occurred in Kibuye *Prefecture* when the alleged crimes were committed. Furthermore, it was not shown that there was a direct link between crimes committed against these victims and the hostilities mentioned by the Prosecutor. It was also not proved that the victims were accomplices of the RPF and/or were responsible for the death of the President. The Prosecutor herself recognised that the Tutsis were being sought out *on the pretext* that they were accomplices etc. These allegations show only that the armed conflict had been used as pretext to unleash an official policy of genocide. Therefore, such allegations cannot be considered as evidence of a direct link between the alleged crimes and the armed conflict.

604. The term "nexus" should not be understood as something vague and indefinite. A direct connection between the alleged crimes, referred to in the Indictment, and the armed conflict should be established factually. The Prosecutor must show that material provisions of Common Article 3 and Protocol II were violated and she has to produce the necessary evidence of these violations.

In this respect, the Prosecutor stated the following:

> A final requirement for the applicability of Common Article 3 and Additional Protocol II is that the victim be an individual that was protected by Common Article 3 and/or Additional Protocol II.
>
> Common Article 3 applies to persons taking no active part in the hostilities including members of the armed forces who have laid down their arms and those who are *hors de combat.*
>
> Additional Protocol II applies to all persons which do not take a direct part or who have ceased to take part in the hostilities (Article 4), persons whose liberty has been restricted (Article 5), the wounded, sick, and shipwrecked (Article 7), medical and religious personnel (Article 9) and the civilian population (Article 13).[40]

605. The Prosecutor did not specify whether she finds that all or only some of the enumerated Articles of Protocol II have been violated. In any case, Article 5 of
Protocol II is not applicable to the alleged crimes because there is no evidence that the victims of these crimes were interned or detained persons, deprived of their liberty for reasons related to the armed conflict. It is sufficient to read all four paragraphs of this Article to realise its non-applicability to the crimes in question.

606. Again, no evidence was produced that Article 7 of Protocol II, which aims to protect the wounded, sick and shipwrecked persons, is applicable to the alleged crimes. It was not shown that the victims of the alleged crimes fall into this category.

5709

607. The Prosecutor raised also the question of applicability of Article 9 of Protocol II which with the protection of religious and medical personnel. In the instant case, pursuant to the evidence, the victims were not religious and medical personnel. Therefore, Article 9 cannot be applicable to the alleged crimes.

608. Article 13 of Protocol II is more pertinent to the case before the Trial Chamber, since it is devoted to the protection of the civilian population during armed conflicts. This Article, entitled "Protection of the Civilian Population" stipulates,

> 1. The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
>
> 2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

609. From these two paragraphs of Article 13 it could be understood that military operations in all circumstances should be conducted in such a way not to create dangers for the civilian population, as well as individual civilians, and in any case this category of persons shall not be the object of attacks during military operations.

610. The Prosecutor emphasised that the attacks against the Tutsis at the four sites, referred to in the Indictment, "were occurring because hostilities had broken out between the RPF and the FAR."[41] It is true that such hostilities had broken out in different parts of the country. In accordance with Article 13, as well as Articles 14 to 18 of Protocol II, each Party in the conflict was obliged to conduct the hostilities without affecting the civilian population and individual civilians or creating dangers for them. The Prosecutor claimed,[42] and the witnesses confirmed, that there were no military operations in Kibuye Town nor in the area of Bisesero in this period of time. There is also no evidence that the civilian population, at the four sites in question, was affected by military operations which were under way in other regions of Rwanda.

611. On the basis of the foregoing, it could not be asserted *pleno jure* that Articles 5, 7, 9 or 13 to 18 of Protocol II were violated in the case of the alleged crimes.

612. In charging Kayishema and Ruzindana with serious violations of Common Article 3 and Protocol II the Prosecutor specifically refers to Article 4(a) of the ICTR Statute. A separate analysis of Article 4(a) of the Statute is not merited, since this Article, Common Article 3 and Article 4 of Protocol II, are interconnected. Article 4(a) of the Statute coincides with Article 4(2)(a) of Protocol II which reproduces, without substantial changes, Common Article 3. These three Articles contain an

5710

enumeration of certain prohibited acts. Article 4(2) of Protocol II indicates that these acts are p. against persons referred to in the first paragraph.[43] This category of persons is defined in this paragraph in the following way, "All persons who do not take a direct (active) part or who have ceased to take part in the hostilities."

613. In paragraph 192 of its Closing Brief the Prosecution pointed out that "in this case, the victims of the crimes *took no part* in the hostilities . . . they were unarmed and not affiliated with an armed force of any kind." [emphasis added]. In paragraph 193 and 194 the Prosecutor expressed her satisfaction that "the Defence did not challenge the civilian status of the victims by making any submissions or leading evidence connecting any victims to the RPF or hostilities that prevailed in 1994." However, in the next paragraph the Prosecution took another position by asserting that "the victims in this Indictment were civilians and *were taking no active part* in the hostilities" [emphasis added].[44]

614. Thus, the position of the Prosecutor is not expressed *claris verbis*. If the victims "took no part in the hostilities" this is one situation, but if these persons "were *taking no active part* in the hostilities" this is another situation and in this case there is a need to prove that these men, women and children participated indirectly in the hostilities or at least committed harmful acts against the Party in the conflict. If there is no such evidence of a nexus this statement sounds like *petitio principii*, and there is no legal ground for the conclusion that it met the fifth requirement established by the Prosecutor as necessary in order to hold individuals liable for violations of this treaty regime.[45]

615. Since the Prosecutor did not produce evidence of a nexus between the alleged crimes and the armed conflict, the Trial Chamber is of the opinion that there is no ground to consider the applicability to the instant case of Article 4(a) of the Statute which covers Common Article 3 and Article 4(2)(a) of Protocol II.

616. It has already been illustrated that the FAR and the RPF were Parties in the internal armed conflict in Rwanda during the period of time in question. Pursuant to the above mentioned fourth requirement of the Prosecution, Kayishema and Ruzindana must be connected to one of these Parties and bound by the respective regime. In other words, to hold both accused criminally responsible for serious violations of Common Articles 3 and Protocol II it should be proved that there was some sort of a link between the armed forces and the accused.

617. It was shown that both accused were not members of the armed forces. However, it was recognised earlier in this Judgement that civilians could be connected with the armed forces if they are directly engaged in the conduct of hostilities or the alleged civilians were legitimately mandated and expected, as persons holding public authority or *de facto* representing the Government, to support or fulfil the war effort.

618. However, the Prosecution did not produce any evidence to show how and in what capacity Kayishema and in particular Ruzindana, who was not a public official, were supporting the Government efforts against the RPF.

619. Presenting her case, the Prosecutor pointed out that Kayishema and Ruzindana carried rifles and participated in the massacres alleged in the Indictment. However, the Prosecutor herself recognised that the FAR or the RPF were not involved in these massacres, which were organised and directed by the civilian authorities of the country. She further recognised that the overwhelming majority of the attackers were civilians, armed with traditional weapons. This was proved through witness testimony, and also recognised by the Prosecutor in her Closing Brief, when she stated "the Hutu civilian population was mobilised to attack and kill the Tutsi population under the guise of the Civilian Defence Program."[46] Therefore, these men, women and children were killed not as a result of the military operations between the FAR and the RPF but because of the policy of extermination of the Tutsi, pursued by the official authorities of Rwanda. Therefore, it does not follow from the participation of the accused in these massacres that they were connected with the armed forces of the FAR or the RPF.

620. The struggle for power between the FAR and the RPF, which was underway in 1994, meant that each Party in this armed conflict, in all circumstances, had to treat humanely all persons belonging to the adverse Party. In this period of time, Rwanda had been invaded by the armed forces of the RPF and, in accordance with international law, the Government of this country was undoubtedly entitled to take all necessary measures to resist these attacks. But it does not follow that crimes could be committed against members of the RPF who were under the protection of Common Article 3 and Protocol II.

621. However, the crimes committed at the four sites, referred to in the Indictment, were not crimes against the RPF and its members. They were committed by the civilian authorities of this country against their own civilian population of a certain ethnicity and this fact was proven beyond a reasonable doubt during the trial. It is true that these atrocities were committed during the armed conflict. However, they were committed as part of a distinct policy of genocide; they were committed parallel to, and not as a result of, the armed conflict. Such crimes are undoubtedly the most serious of crimes which could be committed during or in the absence of an armed conflict. In any event, however, these crimes are beyond the scope of Common Article 3 and Protocol II which aim to protect victims of armed conflict.

622. In this respect, it is important to recall a recent statement of the ICRC that, "It should be stressed that in war time international humanitarian law coexists with human rights law, certain provisions of which cannot be derogated from. Protecting the individual *vis-à-vis* the enemy, (as opposed to protecting the individual *vis-à-vis* his own authorities) is one of the characteristics of the law of armed

5712

conflicts. A state at war cannot use the conflict as a pretext for ignoring the provisions of th. . .".[47] This is just what happened in Rwanda with only one clarification. The armed conflict there was used not only as a pretext for ignoring the provisions of human rights laws but, moreover, as a pretext for committing extremely serious crimes.

623. Considering the above, and based on all the evidence presented in this case, the Trial Chamber finds that it has not been proved, beyond a reasonable doubt, that the crimes alleged in the Indictment were committed in direct conjunction with the armed conflict. The Trial Chamber further finds that the actions of Kayishema and Ruzindana, in the alleged period of time, had no direct connection with the military operations or with the victims of the armed conflict. It has not been shown that there was a direct link between the accused and the armed forces. Moreover, it cannot be concluded *pleno jure*, that the material provisions of Common Article 3 and Protocol II have been violated in this particular case. Thus both accused persons, *ipso facto et ipso jure,* cannot be individually responsible for violations of these international instruments.

624. The Trial Chamber finds, therefore, that Kayishema did not incur individual criminal responsibility for breaches of Article 4 of the Statute under counts 5, 6, 11 ,12, 17 and 18, and neither Kayishema nor Ruzindana incurred liability under counts 23 and 24.

---

[1] The law relating to this area has been discussed *supra* in Chapter 4.4

[2] Closing arguments, Mr. Ferran, Trans., p. 112, 3 Nov. 1998.

[3] *Ibid.*, p. 90, 4 Nov 1998.

[4] Article 59: En tant que représentant du pouvoir exécutif, le *Bourgmestre* est soumis à l'autorité hiérarchique du préfet.

[5] Article 85: Lorsque les autorités communales font preuve de carence et n'exécutent pas des mesures prescrites par les lois ou règlements, le préfet peut après deux avertissements écrits restés sans effet se substituer à elles. Il peut prendre toutes les mesures appropriées pour parer à leur défaillance.

[6] *Article 15: Le préfet, en plus du pouvoir hiérarchique qu'il a sur les Bourgmestres et leurs services administratifs, dispose sur les actes des autorités communales, du pouvoir général de tutelle, determiné par les dispositions de la loi communale.*

[7] *Article 104 (para. 2): Toutefois, en cas de calamité publique ou lorsque des troubles menacent d'éclater ou ont éclaté, le préfet peut réquisitionner les agents de la Police communale et les placer sous son autorité directe.*

[8] *Article 29: L'action des autorités administratives compétentes s'exerce à l'égard de la Gendarmerie Nationale par voie de réquisition; Article 33: L'autorité requise de la Gendarmerie Nationale ne peut discuter l'opportunité de la réquisition pour autant qu'elle n'aille pas à l'encontre d'une loi ou d'un règlement; Article 36: Les effets de la réquisition cessent lorsque l'autorité requérante signifie, par écrit ou verbalement, la levée de la réquisition à l'autorité de Gendarmerie qui était chargée de son exécution.*

[9] Décret-Loi sur la création de la Gendarmerie Nationale, reading Articles 4 and 24 in conjunction: Article 4 (para. 3): Les fonctions extraordinaires sont celles que la Gendarmerie Nationale ne peut remplir que sur réquisition de l'autorité compétente; Article 24 (Under section 23, Extraordinary functions): La Gendarmerie Nationale assure le maintien et le rétablissement de l'ordre public lorsqu'elle en est légalement requise.

5713

[10] Trans., 27 May 1998, p.125.

[11] *Ibid.*

[12] Trans., 3 Sept. 1998, p. 113. The Trial Chamber was never seized of the details of these instructions. However, the contents of these instructions are only of secondary importance.

[13] Celebici Judgement, para. 354.

[14] *Ibid.*, paras. 375-376.

[15] *Ibid.*, para. 376.

[16] See Part II, Historical Context.

[17] Trans., 3 Sept. 1998, p. 113.

[18] Cited, *Celebici* Judgement, para 338.

[19] Prosecutor's Closing Brief, 9 October 1998, p. 28. See *supra* Part II, Historical Context.

[20] See, for example, Pros exh's. 51 and 53.

[21] See Chapter 5.4 , *supra* (Bisesero Factual Findings.)

[22] Pros. exh. 296.

[23] Pros. exh. 59.

[24] Trans., 21 Oct. 1998, pp. 125 and 141.

[25] See *supra* Chapter 5.3 (discussing safe places).

[26] Trans., 19 Feb. 1998, p.34 and Chapter on Genocide in Kibuye

[27] See *supra* (discussing Factual Findings).

[28] See testimony of witnesses F, W, B, PP,NN.

[29] See Chapter 5.4 , *supra* (Bisesero Factual Findings.).

[30] Trans., 14 Oct. 1997, p. 17.

[31] *See* Crimes Against Humanity, Chapter 4.2.

[32] *Ibid*

[33] *The Prosecutor v. Tihomir Blaskic*, IT-95-14-PT, Decision on the Defence Motion Based Upon Defects in the Form Thereof, 4.4.97, at p. 12.

[34] See, for example, Prosecutor's Closing Brief at p. 80.

[35] Closing Brief of the Prosecutor, p. 45, para. 149-154 (Closing Brief).

[36] *Ibid*, p. 81, para. 306; p. 82, para. 312-33; p 93, para.370; p.94, para. 377; p. 106, para. 436; p. 107, para.442; p.135, para. 559 and 565; p. 150, para. 75 and 82.

[37] *Ibid*, p. 81, para. 306; p. 93 para. 370; p. 106, para. 436; p. 135, para. 559; p. 150 para. 75.

[38] *Ibid*, p. 48, para.163.

[39] *Ibid*, p. 48, para. 165.

28 Closing Brief, p. 55, Paras. 188-190.

29 Closing Brief, p. 48, para. 165.

[42] See *Ibid*, p. 56, para. 195.

5714

291 The same indications are provided under Common Article 3.

292 *Ibid*, p. 56, para 196.

293 During this analysis, the Prosecutor noted that it may appear that an expert witness, Professor Degni-Segui, took the position that the victims were not protected persons under the regimes. But the Trial Chamber, from point of the view of the Prosecutor, is free to reject or accept the testimony of experts. See Closing Brief, p. 56.

294 *Ibid*, p. 49, para. 165.

295 ICRC, Report of the Meeting of Experts, October 1998.

5715

VII. CUMULATIVE CHARGES

Introduction

625. The Indictment charges both accused persons cumulatively, *inter alia*, for Genocide, Crimes Against Humanity/Extermination (extermination) and Crimes Against Humanity/Murder (murder). Within each crime site, the three types of crimes in question[1] are based on the same conduct, and the Defence submits that these crimes amounts to the same offense. Therefore the Chamber must consider the facts of the present case as they apply to the charges. The focus of the analysis that follows therefore is whether the charges, as framed in the Indictment, are proper and sustainable. The issue is not one of concurrent sentencing.

Arguments of the Parties

626. The Defence Teams submitted that the Trial Chamber should not convict for both genocide and Crimes Against Humanity because there is a *concur d'infraction* or concurrence of violations. The Defence for Ruzindana submitted that "Crimes Against Humanity have been largely absorbed by the Genocide Convention."[2] Furthermore, they argue that there is a partial overlap in the protected social interest of the two Articles of the Statute.[3] The Defence for Kayishema submitted that "The criterion which makes it possible to give separate recognition to the two concepts in law (genocide and extermination) is that the special interests served by genocide are different from those served by extermination. In the instant case, the interests were the same, no convincing argument having been advanced to the contrary."[4] The Prosecution does not argue the substantive issues involved in the possibility of a *concur d'infractions* or the overlapping elements of the crimes.

The Test of Concurrence of Crimes

627. It is only acceptable to convict an accused of two or more offences in relation to the same set of facts in the following circumstances: (1) where offences have differing elements, or (2) where the laws in question protect differing social interests. To address the issue of concurrence, that is whether two or more crimes charged in the Indictment could be considered the same offense, the Trial Chamber examines two factors: Firstly, whether the crimes as charged contain the same elements, and secondly, whether the laws in question protect the same social interests.[5] The Chamber first analyses the issue of concurrence as it applies to the laws of genocide and Crimes Against Humanity generally; that is, examine whether the violation of these laws *could* overlap? The Chamber will follow this analysis with an application to the case at bench; that is, ask whether the crimes *do* overlap given the factual circumstances of the present case?

General Analysis of Concurrence in Relation to Genocide and Crimes Against Humanity; Could the Violation of these Laws Overlap?

628. The Trial Chamber first examines concurrence as it relates to the umbrella laws of genocide and

5716

Crimes Against Humanity, addressing the elements that could be invoked when the laws are ap[illegible] different factual scenarios. This allows the Trial Chamber to determine whether concurrence *could* occur where genocide and one or more of the enumerated crimes within Crimes Against Humanity are charged in relation to the same set of facts.

629. In relation to the elements of the crimes in question, not all the elements of genocide or Crimes Against Humanity will be invoked in every case. Between the two crimes there are three elements that, if applied in a particular case, could be relied upon to prove one crime but not the others. In such a case there would be no overlap of elements. In other circumstances however, the elements relied upon to prove each of the crimes could be the same.

630. Firstly, and most fundamentally, some of the enumerated crimes under Crimes Against Humanity would not be carried out with the objective to *destroy* a group in whole or in part; the primary requirement for genocide. For example, Crimes Against Humanity of deportation or imprisonment would not generally lead to the destruction of a protected group. Within Crimes Against Humanity, however, the enumerated crimes of murder (when carried out on a large scale) or extermination would, by their very nature, be committed with the objective to eliminate a part of the population based on discriminatory grounds. Indeed, the terms extermination and destroy are interchangeable in the context of these two crimes. Thus, the element could be the same, given the right factual circumstances.

631. Secondly, under Crimes Against Humanity all of the enumerated crimes must be committed specifically against a "civilian population"[6] where as to commit the crime of genocide one must commit acts to destroy "members of a group." The victims' civilian or military status has no bearing on proving an allegation of genocide. However, in some factual scenarios where the victims are members of the civilian population only, the element would be the same.

632. Third, the discriminatory grounds under Crimes Against Humanity include a type of discrimination not included under genocide, that is political conviction. Where the Prosecution case is based on the same discriminatory grounds, the element would be the same.

633. Fourthly, extermination requires a showing that at least one murder was a part of a mass killing event. Mass killing is not required for the crime of murder. Further, under the Statute, premeditation is required for murder but not for a killing that is a part of a policy of extermination. However, as in the case before this Chamber, where all murders are premeditated and form a part of a mass killing event, the elements of the offences are the same.

634. In sum, the Chamber finds that one may have the specific intent required to commit genocide and also to act pursuant to a policy that may fulfil the intent requirement for some Crimes Against

5717

Humanity, while carrying out acts that satisfy the material elements of both Crimes.

635. Similarly, in relation to protecting differing "social interests," the elements of the two crimes may overlap when applied in some factual scenarios, but not in others. Under the crimes of genocide and Crimes Against Humanity the social interest protected is the prohibition of the killing of the protected class of persons. The class of persons is limited to the civilian population under Crimes Against Humanity whereas under genocide it is not limited to attacks against the civilian population. Where the status of the victims and the elements of the crimes are the same however, the laws may be said to protect the same social interests.

636. Having examined the elements, both mental and physical, and the protected social interests, the Trial Chamber finds that genocide and Crimes Against Humanity may overlap in some factual scenarios, but not in others. This is not surprising. Both international crimes are offenses of mass victimization that may be invoked by a wide array of culpable conduct in connection with many, potentially different, factual situations. Accordingly, whether such overlap exists will depend on the specific facts of the case and the particular evidence relied upon by the Prosecution to prove the crimes.

Do the Crimes Overlap in the Present Case ?

637. For his conduct at the Complex, Kayishema is charged cumulatively with Genocide (Count 1), Murder (Count 2) and Extermination (Count 3); for his conduct at the Stadium cumulatively with Genocide (Count 7), Murder (Count 8) and Extermination (Count 9); for his conduct at Mubuga Church cumulatively with Genocide (Count 13), Murder (Count 14) and Extermination (Count 15); and, for his conduct in Bisesero cumulatively with Genocide (Count 19), Murder (Count 20) and Extermination (Count 21). Ruzindana is charged cumulatively for his conduct in Bisesero with Genocide (Count 19), Murder (Count 20) and Extermination (Count 21).

638. In the instant case, both accused persons participated in the three-month long killing event that subsumed Rwanda, committing crimes in Kibuye *Prefecture*. In short, the Prosecution alleges and the Trial Chamber finds, that Kayishema and Ruzindana intended to kill vast numbers of Tutsis in Kibuye *Prefecture* and committed numerous acts, including aiding and abetting others, in pursuit of this objective. Evidence proves that the killings for which the accused were responsible were perpetrated against a civilian population. The Trial Chamber finds that the massacres were carried out solely on the basis of ethnicity. Moreover, in the present case the evidence produced indicates that the murders committed were part of the mass killing event. Each one of these issues is examined in detail below.

The Conduct Relied Upon to Prove All Three Crimes Was the Same – the Physical and Mental Elements

5718

639. The Prosecution case was based on the accused's objective to kill Tutsis in Kibuye *Prefe* their aiding and abetting other Hutus to do so, over a three-month period. The policy of genocide in Kibuye, also served to prove the policy element for Crimes Against Humanity. With regard to the *actus reus* of both accused persons, the Trial Chamber finds that the attacks in which the accused participated and/or led resulted in thousands of deaths and numerous injuries. The same acts or omissions serve as the basis for the Prosecution case in all three types of crimes in question. For example, the widespread or systematic element of the attack required for Crimes Against Humanity also served to prove that the acts perpetrated by the accused were genocidal acts namely, killings with intent to destroy the Tutsi ethnic group in whole or in part.

640. With regard to the *mens rea,* the Trial Chamber finds this case to be one of intentional extermination or destruction of the Tutsi population; all the killings and serious injuries occurred as a result of this objective. It is the same intent that has served as the basis for all three types of crimes in question.

641. Therefore, the elements and the evidence used to prove these elements were the same for genocide and the crimes of extermination and murder, in the instant case.

The Protected Social Interest - The Victims Were the Same

642. The Trial Chamber finds that the victims of the massacres were Tutsi civilians.[7] The discriminatory ground upon which the attacks were based was solely one of ethnicity. Accordingly, the discriminatory element, which is a requirement for both genocide and Crimes Against Humanity, was the same. Furthermore, the Tutsi victims of the attacks were civilians; members of the civilian population in Kibuye *Prefecture*. The victims held the same status whether they were victims of the genocidal acts or the crimes of extermination or murder. Thus, in this case, the same evidence established that the acts of the accused were intended to destroy the Tutsi group, under genocide, and were equally part of a widespread or systematic attack against civilians on the grounds that they were Tutsis, under extermination and murder.

643. Therefore, in the instant case, the social interest protected, that is, the lives of Tutsi civilians, was the same for genocide and the crimes of extermination and murder under Crimes Against Humanity.

All Murders Were a Part of the Mass Killing Event

644. The Trial Chamber finds that the murders at each one of the crime sites took place as part of the policy of genocide and extermination within Kibuye *Prefecture*. All the killings were premeditated and were part of the overall plan to exterminate or destroy the Tutsi population. The killings go to prove the charges of Crimes Against Humanity for murder as well as extermination and genocide. None of the killings were presented to the Trial Chamber as a separate or detached incident from the massacres that

5719

occurred in the four crime sites in question. Therefore, the Trial Chamber finds that the elements of crimes are the same for all three types of crimes and that evidence used to prove one crime is used also prove the other two.

Findings

The Same Offence?

645. The Prosecution uses the same elements to show genocide, extermination and murder, and relies upon the same evidence to prove these elements. The evidence produced to prove one charge necessarily involved proof of the other. The culpable conduct that is, premeditated killing, relied upon to prove genocide, also satisfied the *actus reus* for extermination and murder. Additionally, all the murders were part of the extermination (the mass killing event) and were proved by relying on the same evidence. Indeed, extermination could only be established by proving killing on a massive scale.[8]

646. The widespread or systematic nature of the attacks in Kibuye satisfied the required elements of Crimes Against Humanity, and also served as evidence of the requisite acts and Genocidal intent. The *mens rea* element in relation to all three crimes was also the same that is, to destroy or exterminate the Tutsi population. Therefore, the special intent required for genocide also satisfied the *mens rea* for extermination and murder. Finally, the protected social interest in the present case surely is the same. The class of protected persons, i.e., the victims of the attacks, for which Kayishema and Ruzindana were found responsible were Tutsi civilians. They were victims of a genocidal plan and a policy of extermination that involved mass murder. Finally, the Prosecutor failed to show that any of the murders alleged was outside the mass killing event, within each crime site. These collective murders all formed a part of the greater events occurring in Kibuye *Prefecture* during the time in question.

647. Therefore, the Trial Chamber finds that, in the peculiar factual scenario in the present case, the crimes of genocide, extermination and murder overlap. Accordingly, there exists a *concur d' infractions par excellence* with regard to the three crimes within each of the four crime sites, that is to say these offenses were the same in the present case.

The Consequences of Concurrence

648. During the trial, the Prosecution used the same elements to prove all three types of crimes as they applied to the four crime sites. In the context of the present case the three laws in question protected the same social interests. Therefore, the counts of extermination and murder are subsumed fully by the counts of genocide. That is to say they are the same offence in this instance.

649. The Trial Chamber is therefore of the view that the circumstances in this case, as discussed

5720

above, do not give rise to the commission of more than one offence. The scenario only allow finding of either genocide or extermination and/or murder. Therefore because the crime of genocide is established against the accused persons, then they cannot simultaneously be convicted for murder and/or extermination, in this case. This would be improper as it would amount to convicting the accused persons twice for the same offence. This, the Trial Chamber deems to be highly prejudicial and untenable in law in the circumstances of this case. If the Prosecution intended to rely on the same elements and evidence to prove all three types of crimes, it should have charged in the alternative. As such, *these* cumulative charges are improper and untenable.

650. Further, even if the Trial Chamber was to find that the Counts of extermination and murder were tenable, the accused persons could not have been convicted for the collective murders, in this case, under Article 3(a) and extermination under Article 3(b) of the Statute, as charged. This is because, as stated above, the Prosecutor failed to prove that any of the murders alleged was outside the mass killing event, within each crime site. In this situation as well, the Prosecutor should have charged the accused in the alternative.

---

[1] The Trial Chamber does not address the other three crimes charged in the present Indictment because, for various reasons outlined in the Legal Findings Part, the accused have not been found criminally responsible for each of these crimes.

[2] Defence Closing Brief (Ruzindana), 29 Oct. 1998, at 6.

[3] *Ibid.*

[4] Defence Brief of Clement Kayishema at 7.

[5] Many national jurisdictions have adopted such concepts in conducting criminal proceedings. *See* Blockburger v. United States, 284 U.S. 299 (1932).

[6] For a detailed discussion on the definition of the civilian population, under Crimes Against Humanity, *see* Chapter 4.2, *supra.*

[7] See Legal Findings on Crimes Against Humanity.

[8] It is important to note that an accused may be guilty of extermination, under Crimes Against Humanity, when sufficient evidence is produced that he or she killed a single person as long as this killing was a part of a mass killing event.

S721

VII. CUMULATIVE CHARGES

Introduction

625. The Indictment charges both accused persons cumulatively, *inter alia*, for Genocide, Crimes Against Humanity/Extermination (extermination) and Crimes Against Humanity/Murder (murder). Within each crime site, the three types of crimes in question[1] are based on the same conduct, and the Defence submits that these crimes amounts to the same offense. Therefore the Chamber must consider the facts of the present case as they apply to the charges. The focus of the analysis that follows therefore is whether the charges, as framed in the Indictment, are proper and sustainable. The issue is not one of concurrent sentencing.

Arguments of the Parties

626. The Defence Teams submitted that the Trial Chamber should not convict for both genocide and Crimes Against Humanity because there is a *concur d'infraction* or concurrence of violations. The Defence for Ruzindana submitted that "Crimes Against Humanity have been largely absorbed by the Genocide Convention."[2] Furthermore, they argue that there is a partial overlap in the protected social interest of the two Articles of the Statute.[3] The Defence for Kayishema submitted that "The criterion which makes it possible to give separate recognition to the two concepts in law (genocide and extermination) is that the special interests served by genocide are different from those served by extermination. In the instant case, the interests were the same, no convincing argument having been advanced to the contrary."[4] The Prosecution does not argue the substantive issues involved in the possibility of a *concur d'infractions* or the overlapping elements of the crimes.

The Test of Concurrence of Crimes

627. It is only acceptable to convict an accused of two or more offences in relation to the same set of facts in the following circumstances: (1) where offences have differing elements, or (2) where the laws in question protect differing social interests. To address the issue of concurrence, that is whether two or more crimes charged in the Indictment could be considered the same offense, the Trial Chamber examines two factors: Firstly, whether the crimes as charged contain the same elements, and secondly, whether the laws in question protect the same social interests.[5] The Chamber first analyses the issue of concurrence as it applies to the laws of genocide and Crimes Against Humanity generally; that is, examine whether the violation of these laws *could* overlap? The Chamber will follow this analysis with an application to the case at bench; that is, ask whether the crimes *do* overlap given the factual circumstances of the present case?

General Analysis of Concurrence in Relation to Genocide and Crimes Against Humanity; Could the Violation of these Laws Overlap?

628. The Trial Chamber first examines concurrence as it relates to the umbrella laws of genocide and

Crimes Against Humanity, addressing the elements that could be invoked when the laws are ap[illegible] different factual scenarios. This allows the Trial Chamber to determine whether concurrence *could* occur where genocide and one or more of the enumerated crimes within Crimes Against Humanity are charged in relation to the same set of facts.

629. In relation to the elements of the crimes in question, not all the elements of genocide or Crimes Against Humanity will be invoked in every case. Between the two crimes there are three elements that, if applied in a particular case, could be relied upon to prove one crime but not the others. In such a case there would be no overlap of elements. In other circumstances however, the elements relied upon to prove each of the crimes could be the same.

630. Firstly, and most fundamentally, some of the enumerated crimes under Crimes Against Humanity would not be carried out with the objective to *destroy* a group in whole or in part; the primary requirement for genocide. For example, Crimes Against Humanity of deportation or imprisonment would not generally lead to the destruction of a protected group. Within Crimes Against Humanity, however, the enumerated crimes of murder (when carried out on a large scale) or extermination would, by their very nature, be committed with the objective to eliminate a part of the population based on discriminatory grounds. Indeed, the terms extermination and destroy are interchangeable in the context of these two crimes. Thus, the element could be the same, given the right factual circumstances.

631. Secondly, under Crimes Against Humanity all of the enumerated crimes must be committed specifically against a "civilian population"[6] where as to commit the crime of genocide one must commit acts to destroy "members of a group." The victims' civilian or military status has no bearing on proving an allegation of genocide. However, in some factual scenarios where the victims are members of the civilian population only, the element would be the same.

632. Third, the discriminatory grounds under Crimes Against Humanity include a type of discrimination not included under genocide, that is political conviction. Where the Prosecution case is based on the same discriminatory grounds, the element would be the same.

633. Fourthly, extermination requires a showing that at least one murder was a part of a mass killing event. Mass killing is not required for the crime of murder. Further, under the Statute, premeditation is required for murder but not for a killing that is a part of a policy of extermination. However, as in the case before this Chamber, where all murders are premeditated and form a part of a mass killing event, the elements of the offences are the same.

634. In sum, the Chamber finds that one may have the specific intent required to commit genocide and also to act pursuant to a policy that may fulfil the intent requirement for some Crimes Against

5723

Humanity, while carrying out acts that satisfy the material elements of both Crimes.

635. Similarly, in relation to protecting differing "social interests," the elements of the two crimes may overlap when applied in some factual scenarios, but not in others. Under the crimes of genocide and Crimes Against Humanity the social interest protected is the prohibition of the killing of the protected class of persons. The class of persons is limited to the civilian population under Crimes Against Humanity whereas under genocide it is not limited to attacks against the civilian population. Where the status of the victims and the elements of the crimes are the same however, the laws may be said to protect the same social interests.

636. Having examined the elements, both mental and physical, and the protected social interests, the Trial Chamber finds that genocide and Crimes Against Humanity may overlap in some factual scenarios, but not in others. This is not surprising. Both international crimes are offenses of mass victimization that may be invoked by a wide array of culpable conduct in connection with many, potentially different, factual situations. Accordingly, whether such overlap exists will depend on the specific facts of the case and the particular evidence relied upon by the Prosecution to prove the crimes.

Do the Crimes Overlap in the Present Case ?

637. For his conduct at the Complex, Kayishema is charged cumulatively with Genocide (Count 1), Murder (Count 2) and Extermination (Count 3); for his conduct at the Stadium cumulatively with Genocide (Count 7), Murder (Count 8) and Extermination (Count 9); for his conduct at Mubuga Church cumulatively with Genocide (Count 13), Murder (Count 14) and Extermination (Count 15); and, for his conduct in Bisesero cumulatively with Genocide (Count 19), Murder (Count 20) and Extermination (Count 21). Ruzindana is charged cumulatively for his conduct in Bisesero with Genocide (Count 19), Murder (Count 20) and Extermination (Count 21).

638. In the instant case, both accused persons participated in the three-month long killing event that subsumed Rwanda, committing crimes in Kibuye *Prefecture*. In short, the Prosecution alleges and the Trial Chamber finds, that Kayishema and Ruzindana intended to kill vast numbers of Tutsis in Kibuye *Prefecture* and committed numerous acts, including aiding and abetting others, in pursuit of this objective. Evidence proves that the killings for which the accused were responsible were perpetrated against a civilian population. The Trial Chamber finds that the massacres were carried out solely on the basis of ethnicity. Moreover, in the present case the evidence produced indicates that the murders committed were part of the mass killing event. Each one of these issues is examined in detail below.

The Conduct Relied Upon to Prove All Three Crimes Was the Same – the Physical and Mental Elements

5724

639. The Prosecution case was based on the accused's objective to kill Tutsis in Kibuye *Prefe* their aiding and abetting other Hutus to do so, over a three-month period. The policy of genocide in Kibuye, also served to prove the policy element for Crimes Against Humanity. With regard to the *actus reus* of both accused persons, the Trial Chamber finds that the attacks in which the accused participated and/or led resulted in thousands of deaths and numerous injuries. The same acts or omissions serve as the basis for the Prosecution case in all three types of crimes in question. For example, the widespread or systematic element of the attack required for Crimes Against Humanity also served to prove that the acts perpetrated by the accused were genocidal acts namely, killings with intent to destroy the Tutsi ethnic group in whole or in part.

640. With regard to the *mens rea,* the Trial Chamber finds this case to be one of intentional extermination or destruction of the Tutsi population; all the killings and serious injuries occurred as a result of this objective. It is the same intent that has served as the basis for all three types of crimes in question.

641. Therefore, the elements and the evidence used to prove these elements were the same for genocide and the crimes of extermination and murder, in the instant case.

The Protected Social Interest - The Victims Were the Same

642. The Trial Chamber finds that the victims of the massacres were Tutsi civilians.[7] The discriminatory ground upon which the attacks were based was solely one of ethnicity. Accordingly, the discriminatory element, which is a requirement for both genocide and Crimes Against Humanity, was the same. Furthermore, the Tutsi victims of the attacks were civilians; members of the civilian population in Kibuye *Prefecture*. The victims held the same status whether they were victims of the genocidal acts or the crimes of extermination or murder. Thus, in this case, the same evidence established that the acts of the accused were intended to destroy the Tutsi group, under genocide, and were equally part of a widespread or systematic attack against civilians on the grounds that they were Tutsis, under extermination and murder.

643. Therefore, in the instant case, the social interest protected, that is, the lives of Tutsi civilians, was the same for genocide and the crimes of extermination and murder under Crimes Against Humanity.

All Murders Were a Part of the Mass Killing Event

644. The Trial Chamber finds that the murders at each one of the crime sites took place as part of the policy of genocide and extermination within Kibuye *Prefecture*. All the killings were premeditated and were part of the overall plan to exterminate or destroy the Tutsi population. The killings go to prove the charges of Crimes Against Humanity for murder as well as extermination and genocide. None of the killings were presented to the Trial Chamber as a separate or detached incident from the massacres that

5725

occurred in the four crime sites in question. Therefore, the Trial Chamber finds that the elem crimes are the same for all three types of crimes and that evidence used to prove one crime is used also prove the other two.

Findings

The Same Offence?

645. The Prosecution uses the same elements to show genocide, extermination and murder, and relies upon the same evidence to prove these elements. The evidence produced to prove one charge necessarily involved proof of the other. The culpable conduct that is, premeditated killing, relied upon to prove genocide, also satisfied the *actus reus* for extermination and murder. Additionally, all the murders were part of the extermination (the mass killing event) and were proved by relying on the same evidence. Indeed, extermination could only be established by proving killing on a massive scale.[8]

646. The widespread or systematic nature of the attacks in Kibuye satisfied the required elements of Crimes Against Humanity, and also served as evidence of the requisite acts and Genocidal intent. The *mens rea* element in relation to all three crimes was also the same that is, to destroy or exterminate the Tutsi population. Therefore, the special intent required for genocide also satisfied the *mens rea* for extermination and murder. Finally, the protected social interest in the present case surely is the same. The class of protected persons, i.e., the victims of the attacks, for which Kayishema and Ruzindana were found responsible were Tutsi civilians. They were victims of a genocidal plan and a policy of extermination that involved mass murder. Finally, the Prosecutor failed to show that any of the murders alleged was outside the mass killing event, within each crime site. These collective murders all formed a part of the greater events occurring in Kibuye *Prefecture* during the time in question.

647. Therefore, the Trial Chamber finds that, in the peculiar factual scenario in the present case, the crimes of genocide, extermination and murder overlap. Accordingly, there exists a *concur d' infractions par excellence* with regard to the three crimes within each of the four crime sites, that is to say these offenses were the same in the present case.

The Consequences of Concurrence

648. During the trial, the Prosecution used the same elements to prove all three types of crimes as they applied to the four crime sites. In the context of the present case the three laws in question protected the same social interests. Therefore, the counts of extermination and murder are subsumed fully by the counts of genocide. That is to say they are the same offence in this instance.

649. The Trial Chamber is therefore of the view that the circumstances in this case, as discussed

5726

above, do not give rise to the commission of more than one offence. The scenario only allov finding of either genocide or extermination and/or murder. Therefore because the crime of genocide is established against the accused persons, then they cannot simultaneously be convicted for murder and/or extermination, in this case. This would be improper as it would amount to convicting the accused persons twice for the same offence. This, the Trial Chamber deems to be highly prejudicial and untenable in law in the circumstances of this case. If the Prosecution intended to rely on the same elements and evidence to prove all three types of crimes, it should have charged in the alternative. As such, *these* cumulative charges are improper and untenable.

650. Further, even if the Trial Chamber was to find that the Counts of extermination and murder were tenable, the accused persons could not have been convicted for the collective murders, in this case, under Article 3(a) and extermination under Article 3(b) of the Statute, as charged. This is because, as stated above, the Prosecutor failed to prove that any of the murders alleged was outside the mass killing event, within each crime site. In this situation as well, the Prosecutor should have charged the accused in the alternative.

---

[1] The Trial Chamber does not address the other three crimes charged in the present Indictment because, for various reasons outlined in the Legal Findings Part, the accused have not been found criminally responsible for each of these crimes.

[2] Defence Closing Brief (Ruzindana), 29 Oct. 1998, at 6.

[3] *Ibid.*

[4] Defence Brief of Clement Kayishema at 7.

[5] Many national jurisdictions have adopted such concepts in conducting criminal proceedings. *See* Blockburger v. United States, 284 U.S. 299 (1932).

[6] For a detailed discussion on the definition of the civilian population, under Crimes Against Humanity, *see* Chapter 4.2, *supra.*

[7] See Legal Findings on Crimes Against Humanity.

[8] It is important to note that an accused may be guilty of extermination, under Crimes Against Humanity, when sufficient evidence is produced that he or she killed a single person as long as this killing was a part of a mass killing event.

5727

VIII. THE VERDICT

FOR THE FORGOING REASONS, having considered all of the evidence and the arguments of the parties, THE TRIAL CHAMBER finds as follows:

(1) By a majority, Judge Khan dissenting,

Decides that the charges brought under Articles 3(a) and (b) of the Statute (Crimes Against Humanity (murder) and Crimes Against Humanity (extermination) respectively) were in the present case, fully subsumed by the counts brought under Article 2 of the Statute (Genocide), therefore finding the accused, Clement Kayishema, NOT GUILTY on counts 2, 3, 8, 9, 14, 15, and both accused persons, Clement Kayishema and Obed Ruzindana, NOT GUILTY on counts 20 and 21.

(2) Unanimously **finds** on the remaining charges as follows:

In the case against **Clement Kayishema**:

Count 1: Guilty of Genocide
Count 4: Not Guilty of Crimes Against Humanity/Other Inhumane Acts
Count 5: Not Guilty of a violation of Article 3 Common to the Geneva Conventions
Count 6: Not Guilty of a violation of Additional Protocol II
Count 7: Guilty of Genocide
Count 10: Not Guilty of Crimes Against Humanity/Other Inhumane Acts
Count 11: Not Guilty of a violation of Article 3 Common to the Geneva Conventions
Count 12: Not Guilty of a violation of Additional Protocol II
Count 13: Guilty of Genocide
Count 16: Not Guilty of Crimes Against Humanity/Other Inhumane Acts
Count 17: Not Guilty of a violation of Article 3 Common to the Geneva Conventions
Count 18: Not Guilty of a violation of Additional Protocol II
Count 19: Guilty of Genocide
Count 22: Not Guilty of Crimes Against Humanity/Other Inhumane Acts
Count 23: Not Guilty of a violation of Article 3 Common to the Geneva Conventions
Count 24: Not Guilty of a violation of Additional Protocol II

In the case against **Obed Ruzindana**:

Count 19: Guilty of Genocide
Count 22: Not Guilty of Crimes Against Humanity/Other Inhumane Acts

5728

Count 23: Not Guilty of a violation of Article 3 Common to the Geneva Conventions

Count 24: Not Guilty of a violation of Additional Protocol II

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

William H. Sekule
Presiding

Yakov A. Ostrovsky

Tafazzal Hossain Khan

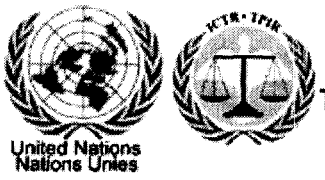
Judge Khan appends a Separate and Dissenting Opinion to this Judgement.

Dated this twenty-first day of May 1999
Arusha
Tanzania

ANNEX 11:

Prosecutor v. Musema, Judgement, Case No. ICTR-96-13-T, Trial Chamber I, 27 January 2000.

5730



International Criminal Tribunal for Rwanda
Tribunal pénal international pour le Rwanda

TABLE OF CONTENTS

1. INTRODUCTION

1.1 The International Criminal Tribunal
1.2 Jurisdiction of the Tribunal
1.3 The Indictment
1.4 The Accused

2. PROCEEDINGS

2.1 Procedural background
2.2 Evidentiary matters
2.3 The Defence of alibi

3. THE APPLICABLE LAW

3.1 Individual criminal responsibility (Article 6 of the Statute)
3.2 The Crime of Genocide (Article 2 of the Statute)
3.2.1 Genocide
3.2.2 Complicity in Genocide
3.2.3 Conspiracy to Commit Genocide
3.3 Crime against Humanity (Article 3 of the Statute)
3.4.Violation of Common Article 3 and Additional Protocol II
3.5 Cumulative charges

4. THE DEFENCE CASE

4.1 General admissions
4.2 The alibi
4.3 Further arguments

5. FACTUAL FINDINGS

5.1 Context of the events alleged
5.2 Massacres in the Bisesero region
5.3 Sexual crimes
5.4 Musema's authority

6. LEGAL FINDINGS

6.1 Count 1 - Genocide & Count 2 - Complicity in Genocide
6.2 Count 3 - Conspiracy to Commit Genocide
6.3 Count 5 - Crime against Humanity (extermination)

5731

6.4 Count 4 - Crime against Humanity (murder)
6.5 Count 6 - Crime against Humanity (other inhumane acts)
6.6 Count 7 - Crime against Humanity (rape)
6.7 Counts 8 and 9 -Violation of Common Article 3 and Additional Protocol II 274

7. VERDICT

8. SENTENCING

ANNEXES

Annex A - The Indictment
Annex B - Mission order
Annex C - Musema's calendar
Annex D - Glossary of terms

SEPARATE OPINION OF JUDGE ASPEGREN

SEPARATE OPINION OF JUDGE PILLAY

SUMMARY

5732

1. INTRODUCTION

1.1 The International Criminal Tribunal

1.2 Jurisdiction of the Tribunal

1.3 The Indictment

1.4 The Accused

1.1 The International Criminal Tribunal

1. This Judgement is rendered by Trial Chamber I of the International Criminal Tribunal for Rwanda (the "Tribunal"), composed of Judge Lennart Aspegren, presiding, Judge Laïty Kama, and Judge Navanethem Pillay, in the case of *The Prosecutor v. Alfred Musema.*
2. The Tribunal was established by United Nations Security Council Resolution 955 of 8 November 1994(1) after it had studied official United Nations reports(2) which revealed that genocide and other widespread, systematic, and flagrant violations of international humanitarian law had been committed in Rwanda. The Security Council determined that this situation constituted a threat to international peace and security, and was convinced that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to the process of national reconciliation and to the restoration and maintenance of peace in Rwanda. Accordingly, the Security Council established the Tribunal, pursuant to Chapter VII of the United Nations Charter.
3. The Tribunal is governed by its Statute (the "Statute") annexed to Security Council Resolution 955, and by its Rules of Procedure and Evidence (the "Rules"), which were adopted by the Judges on 5 July 1995 and subsequently amended.(3)

1.2 Jurisdiction of the Tribunal

1. Pursuant to the provisions of the Statute, the Tribunal has the authority to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda. The Statute has also empowered the Tribunal with the authority to prosecute Rwandan citizens, who are natural persons, responsible for such violations committed in the territory of neighbouring States. Under Article 7 of the Statute, the Tribunal's jurisdiction *rationae temporae* limits prosecution to acts committed between 1 January 1994 and 31 December 1994. Individual criminal responsibility, pursuant to Article 6, shall be established for acts falling within the Tribunal's jurisdiction *rationae materiae,* as provided in Articles 2, 3, and 4 as follows:

"**Article 2: Genocide**

1. The International Criminal Tribunal for Rwanda shall have the power to prosecute persons committing genocide, as defined in paragraph 2 of this Article, or of committing any of the other acts enumerated in paragraph 3 of the Article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such:

   a) Killing members of the group;

5733

b) Causing serious bodily or mental harm to members of the group;

c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group.

3. The following acts shall be punishable:

a) Genocide;

b) Conspiracy to commit genocide;

c) Direct and public incitement to commit genocide;

d) Attempt to commit genocide;

e) Complicity in genocide.

Article 3: Crimes Against Humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes, when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds:

a) Murder;

b) Extermination;

c) Enslavement;

d) Deportation;

e) Imprisonment;

f) Torture;

g) Rape;

h) Persecutions on political, racial, and religious grounds;

i) Other inhumane acts.

Article 4: Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or

5734

ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

b) Collective punishments;

c) Taking of hostages;

d) Acts of Terrorism;

e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

f) Pillage;

g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

h) Threats to commit any of the foregoing acts."

5. In addition, Article 6 states the principle of individual criminal responsibility:

"**Article 6: Individual Criminal Responsibility**

1. A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires."

6. Although the Tribunal and national courts shall have concurrent jurisdiction to prosecute persons suspected of serious violations of international humanitarian law and whose identity and acts fall within the said limits of personal and temporal jurisdiction, the Tribunal shall have primacy over national courts pursuant to Article 8 of the Statute and may formally request that national courts defer to its competence.

1.3 The Indictment

5735

7. The initial Indictment against Alfred Musema was submitted by the Prosecutor on 11 Ju[illegible] and was confirmed by Judge Yakov A. Ostrovsky on 15 July 1996.
8. On 14 December 1998, the Chamber confirmed an amended Indictment, submitted on 20 November 1998 by the Prosecutor. In this Indictment, the count of Complicity in Genocide was added *alternatively* to the existing count of Genocide. The Prosecutor submitted a second significantly amended Indictment on 29 April 1999, which the Chamber confirmed on 6 May 1999. This Indictment contains the final version of the Prosecutor's charges, and is the basis of the present judgement.
9. The amended Indictment, as confirmed on 6 May 1999, is printed in full in *Annex A*.

1.4 The Accused

10. Alfred Musema-Uwimana, here called Musema, was born on 22 August 1949 in the Byumba *Préfecture*. He is from Butare *Commune*. He began his studies in 1968 at the "*Université d'État, Faculté des Sciences Agronomiques*" in Gembloux, Belgium, and graduated in 1974.
11. Musema and his wife Claire Kayuku were married in 1975. They have three children. Like Musema, his wife is from Butare *Commune*.
12. Musema began his career in the Rwandan Ministry of Agriculture & Livestock Breeding, working in association with ORSTOM, a French company. In 1984, by presidential decree, Musema, then 35 years of age, was appointed as the director of the public enterprise, the Gisovu Tea Factory (under the parastatal organization *OCIR-thé*).
13. The Gisovu Tea Factory, constructed during the years 1977 to 1983, was in production for only a short time before Musema assumed responsibility in 1984. Although the tea plantations were young, the factory soon rose to the same standing as other, more established tea factories. By 1993, the Gisovu tea factory was one of the most successful tea factories in Rwanda. Indeed, its excellence was reflected in its volume of trade on the London Tea Market. (See Exhibit D11, a table of figures from Wilson Smith & Co., on the London Tea Exchange.)
14. Though the Head office of the Gisovu tea factory was located in Kibuye, Musema's area of responsibility encompassed the *préfectures* of Kibuye and Gikongoro.
15. Between 1984 and 1994, Musema participated in two missions abroad. The first mission was to Kenya, where Musema visited the Kenya Tea Development Authority, and the second mission was to Morocco, where he examined alternative types of teas. Musema was chosen to participate in the mission to Morocco on the recommendation of Japanese businessmen, who identified the Gisovu tea factory as the most suitable Rwandan factory to produce several varieties of tea.
16. Musema was a member of the "*conseil préfectorial*" in Byumba *Préfecture* and a member of the Technical Committee in the Butare *Commune*. Both positions of responsibility involved socio-economic and developmental matters and did not focus on *préfectorial* politics.

---

1. UN Document S/RES/955 of 8 November 1994.

2. Preliminary Report of the Commission of Experts established pursuant to Security Council Resolution 935(1994), Final Report of the Commission of Experts established pursuant to Security Council Resolution 935(1994)(Document S/1994/1405) and Reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (Document S/1994/1157, Annexes I and II)

3. The Rules were successively amended on 12 January 1996, 15 May 1996, 4 July 1996, 5 June 1997, 8 June 1998, and 4 June 1999.

S736.

2. PROCEEDINGS

2.1 Procedural background

2.2 Evidentiary matters

2.3 The Defence of alibi

2.1 Procedural background

17. On 11 February 1995, Alfred Musema was arrested in Switzerland by the national authorities, on the basis of a warrant of arrest issued by the examining magistrate. Musema was detained by the Swiss authorities, confirmation of the detention being extended on a monthly basis in conformity with Articles 56 and ff. of the Code of the Martial Criminal Procedure. On 4 March 1996, the then Prosecutor, Richard J. Goldstone, applied to the Tribunal for a formal request for deferral by Switzerland concerning Alfred Musema(1). By decision of 12 March 1996(2), Trial Chamber I, constituted of Judge Laïty Kama, Presiding, Judge Lennart Aspegren and Judge Navanethem Pillay, formally requested the Swiss federal Government to defer to the Tribunal all investigations and criminal proceedings currently being conducted in its national courts against Alfred Musema. The Chamber further requested the Government of Switzerland to continue to detain Alfred Musema until an indictment was established and confirmed and a warrant of arrest was issued against him by the Tribunal.
18. In conformity with Articles 17 and 18 of the Statute, and Rules 28 and 47 of the Rules, the Prosecutor presented an indictment dated 11 July 1996 against Alfred Musema to Judge Yakov Ostrovsky, who confirmed all the counts therein by decision of 15 July 1996(3). A warrant of arrest and order for surrender addressed to the Swiss authorities was issued by Judge Ostrovsky on the same day(4). Musema was transferred to the Tribunal's Detention Facility in Arusha on 20 May 1997.
19. Musema's initial appearance had to be rescheduled on two occasions, 16 June 1997 and 3 September 1997 respectively. Defence Counsel, Ms Marie- Paule Honegger of the Geneva Bar, failed to attend on both occasions and declined to accept the appointment of alternate counsel. Musema insisted on his right to have his appointed counsel present before entering a plea. After further delays were caused by the Defence Counsel to the scheduling of the initial appearance, the Chamber found that the Defence Counsel's conduct and lack of co-operation was obstructing the proceedings and was contrary to the interests of justice. The Chamber thus issued a warning to Ms Honegger, pursuant to Rule 46(A) of the Rules, that she may be sanctioned by the refusal of further audience before the Chamber if she defaulted in complying with the Chamber's request to represent in person her client during his initial appearance scheduled anew for 18 November 1997, in which case the Chamber would instruct the Registrar to replace her as counsel for Musema under Rule 46(C)(5).
20. On 18 November 1997, the Defence Counsel, despite the said warning and notice, failed to be present at the initial appearance of Musema. Finding no reasonable or compelling grounds in the response of the assigned counsel for refusing to be present at the Tribunal for the hearing, the Chamber gave effect to the said warning by refusing her further audience before the Tribunal. The Chamber instructed the Registrar to immediately assign a new counsel to Musema(6).
21. Prior to formally charging Musema by having the Indictment read out to him during the initial appearance, the Chamber informed Musema that his pleading guilty or not guilty to the charges without the presence of his lawyer did not deprive him of his right to counsel, and further explained to him that should he fail to enter a plea to the charges, a plea of not guilty would be entered on his behalf. After having satisfied itself that Musema had understood and accepted this,

the Chamber proceeded with the initial appearance. The Chamber recalled that, in any event, Musema would be entitled to conduct his own defence if he so chose, pursuant to Rule 45(F) of the Rules. Thereafter, Musema pleaded not guilty to all the counts preferred against him.

22. Furthermore, pursuant to Rule 69 of the Rules, the Chamber granted permission to the Prosecutor to temporarily redact the names and other identifying information of her witnesses in the supporting material until such time as the Chamber had ordered protective measures for the Prosecutor's witnesses(7).
23. On 30 October 1998, the Prosecutor requested leave to file an amended Indictment against Alfred Musema. The proposed 39 page amended Indictment was filed on 3 November 1998(8). On 18 November 1998, after having heard the parties during the audience held to that end, Trial Chamber I rendered its decision thereon(9). The Chamber granted leave to the Prosecutor to add the count of Complicity in Genocide as an alternative Count to the Count of Genocide in the Indictment and on the same facts adduced in respect of the latter Count. Furthermore, leave was granted to the Prosecutor to amend paragraph 5 of the Indictment to include the allegation of Individual Criminal Responsibility under Article 6(3) of Statute in respect to every count. The Chamber directed the Prosecutor to withdraw the draft amended Indictment, and to immediately amend the original Indictment in conformity with the Decision. The new Indictment was filed by the Prosecutor on 20 November 1998. On the same day, Musema pleaded not guilty to the new charges therein before Trial Chamber I, constituted for this hearing of Judge Lennart Aspegren, Presiding, Judge Tafazzal H. Khan and Judge Navanethem Pillay.
24. By decision of 20 November 1998, the Chamber granted the motion of the Prosecutor for protective measures for her witnesses(10).
25. On Monday 25 January 1999, before Trial Chamber I, constituted of Judge Lennart Aspegren, Presiding, Judge Laïty Kama and Judge Navanethem Pillay, the case on the merits of Musema commenced with the opening arguments of the Prosecutor, and the hearing of the first prosecution witness. Defence Counsel, Mr. Steven Kay QC, reserved his right to make an opening statement at the commencement of the case for the defence.
26. On 17 March 1999, the Chamber denied the application of 23 November 1998 and the 22 February 1999 corrigendum thereto filed by African Concern, a charitable non-governmental organization, to file a written brief as Amicus Curiae in the case(11) on the subject of restitution of property to victims.
27. By Decision of the Chamber rendered on 6 May 1999, the Prosecutor was granted leave to amend the Indictment against Musema, *inter alia*, by adding of one new count against Musema and by expanding on the facts adduced in the then existing Indictment in support of the new count. The Chamber acknowledged that although the filing of the motion for leave to amend the Indictment came at a late stage in the presentation of the Prosecutor's case, this did not cause prejudice to Musema. Furthermore, the Chamber held that no undue delay would be caused to the proceedings by allowing the amendments as all the pertinent witness statements had already been disclosed to the Defence and as all witnesses the Prosecutor intended to rely upon in support of the new count had already testified in the case(12).
28. With regard to witnesses, the Chamber granted leave to both the Prosecutor and the Defence to call additional witnesses(13). The Chamber also ordered, pursuant to a request of the Prosecutor and on the basis of Rule 90*bis* of the Rules, on 19 April 1999, that three of the Prosecutor's protected witnesses be transferred temporarily to the Tribunal's Detention Facilities in Arusha in order to testify in the trial of Musema. The co-operation of the Government of Rwanda was sought in the matter(14).
29. In total, twenty-two protected witnesses, one investigator and one expert witness appeared for the Prosecutor and she closed her case on 7 May 1999. The Defence opened its case on 10 May 1999 with the testimony of Musema. Five other witnesses, including two protected witnesses and one

investigator appeared for the Defence. The Defence closed its case on 23 June 1999.

30. Closing arguments were heard on 25 and 28 June 1999 and the case put into deliberation. In all, the Trial covered 39 days between 25 January and 28 June 1999.

2.2 Evidentiary matters

31. The Chamber will here address general evidentiary matters of concern which arose during this trial, including general principles of the evidence evaluation, assessment of documentary evidence, false testimony, impact of trauma on the testimony of witnesses, interpretation and cultural factors affecting the testimony of witnesses.

2.2.1 General Principles of the Assessment of Evidence

32. The Chamber has considered the charges against Musema on the basis of testimony and exhibits offered by the Parties to prove or disprove allegations made in the Indictment.
33. The Chamber also relies on facts not in dispute and on other elements relevant to its decision, such as constitutive documents pertaining to the establishment and the jurisdiction of the Tribunal. The Chamber notes that, under Rule 89(A) of the Rules, it is not bound by any national rules of evidence. The Chamber has thus applied, in accordance with Rule 89, the rules of evidence which in its view best favour a fair determination of the matter before it and are consonant with the spirit and general principles of the law.
34.

Admissibility

34. The admission of all evidence, regardless of its form, is governed by Rule 89(c) of the Rules, which states:

"A Chamber may admit any relevant evidence which it deems to have probative value."

Reliability

35. The application of these criteria of admissibility (relevance and probative value) has been clarified by a majority of Trial Chamber II of the ICTY in the Tadi case(15). This decision established that evidence which is both relevant and probative must also enjoy some component of reliability.
36. The role that reliability plays in determining the admissibility and the probative value of evidence is further clarified by the decision of the ICTY in the Delali case(16). The Trial Chamber there stated that:

"for evidence to be relevant, and to have a nexus between it and the subject matter, such evidence must be reliable. The same is true for evidence which is said to have probative value."(17)

37. The Chamber went on to state that reliability is the invisible golden thread which runs through all

the components of admissibility.

38. The Chamber concurs with this understanding of the relationship between relevance, probative value, and reliability. The reliability of evidence does not constitute a separate condition of admissibility; rather, it provides the basis for the findings of relevance and probative value required under Rule 89(c) for evidence to be admitted.

Probative Value

39. As a general principle, the Chamber attaches probative value to evidence according to its credibility and relevance to the allegations at issue.
40. As the Chamber has noted above, the probative value of evidence is based upon an assessment of its reliability.
41. The Chamber has assessed the relative weight and probative value to be accorded to each piece of evidence in the context of all other evidence presented to it in the course of the trial.

Corroboration

42. The Chamber notes that during trial, the corroboration of evidence was an important factor in assessing the probative value of much of the evidence presented by the Parties, in particular where only one testimony was presented in support of certain facts alleged in the Indictment, and also in relation to documentary evidence. (Documentary evidence is dealt with below.) The Chamber now turns to the question of the corroboration of testimonies.
43. The Chamber recalls that it is bound only to the application of the provisions of its Statute and Rules, in particular Rule 89 of the Rules. Rule 89 sets out the general principle of the admissibility of any relevant evidence which has probative value, provided that such evidence meets the requirements for the conduct of a fair trial. The Chamber may rule on the basis of a single testimony if, in its opinion, that testimony is relevant and credible.
44. The manner of application of the only Rule which deals specifically with the issue of corroboration of testimony, Rule 96(i) - which states that no corroboration shall be required for the testimonies of victims of sexual assault - was also raised during the trial.
45. The Chamber recalls that, as is stated in the *Akayesu* Judgement(18) and the *Rutaganda* Judgement (19), sub-Rule 96(i) accords to the testimony of a victim of sexual assault the same basis of evaluation of reliability as the testimony of victims of other crimes. In the opinion of the Chamber, it cannot be concluded on the basis of this sub-Rule that in cases of crimes other than sexual assault, corroboration is required; nor does it follow from the sub-Rule, as Counsel for the Defence argued in this case, that corroboration is required where a witness is testifying to the occurrence of a sexual assault. On the contrary, it is proper to infer that the ability of the Chamber to rule on the basis of testimonies and other evidence is not bound by any rule of corroboration, but rather on the Chamber's own assessment of the probative value of the evidence before it.
46. The Chamber may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which *are* corroborated: the corroboration of testimonies, even by many witnesses, does not establish absolutely the credibility of those testimonies.

Corroboration in relation to Count 3 (Conspiracy to Commit Genocide)

47. The Chamber notes that this freedom extends to evidence pertaining to a Count of Conspiracy to Commit Genocide, as is present in the Indictment in the instant case. The Chamber notes that the probative value of the testimony of alleged co-conspirators will be assessed in relation to its

5740

credibility and relevance, on the same basis as other evidence.

48. However, the presence of a Count of Conspiracy to Commit Genocide may allow the admission of evidence which does not pertain specifically to the facts alleged in the Indictment, since such evidence may serve to establish the existence of and/or the participation of the Accused in the conspiracy alleged in the Indictment. In particular, evidence relating to the acts and declarations of fellow members of the alleged conspiracy performed or made in pursuance of the objects of the conspiracy *may* have probative value, and may, as a result, be deemed admissible, though such evidence does not pertain to facts alleged in the Indictment.
49. The admissibility of such evidence shall, as shall all other evidence, be determined through reference to the criteria of relevance and probative value, under Rule 89(C) of the Rules. Relevance is to be assessed through reference to the nexus between the evidence and the existence and/or commission of the conspiracy. As Judge Pal said in the *Tokyo Judgement*, speaking only of declarations and not acts:

"In order to be competent as evidence the declaration must have been made in furtherance of the prosecution of the common object, or must constitute a part of the *res gestae* of some act done for the accomplishment of the object of the conspirators, otherwise such a statement should not be competent evidence against the others."(20)

50. The extent to which such evidence will prove merely the existence of a conspiracy, rather than the participation of the Accused in that conspiracy, will be a matter of assessment by the Chamber.

Hearsay evidence

51. The Chamber notes that hearsay evidence is not inadmissible *per se*, even when it cannot be examined at its source or when it is not corroborated by direct evidence. Rather, the Chamber has considered such hearsay evidence, with caution, in accordance with Rule 89. The Chamber further notes that, where it has relied upon such evidence, that evidence has, as with all other evidence, been subject to the tests of relevance, probative value and reliability discussed above.

Evidence not presented

1. The value of the evidence presented to the Chamber is in no way altered by the non-provision of *other* evidence(21). The Chamber is free to evaluate all evidence before it on the basis of its relevance and probative value. The absence of forensic or real evidence shall in no way diminish the probative value of the evidence which is provided to the Chamber; in particular, the absence of forensic evidence corroborating eyewitness testimonies shall in no way affect the assessment of those testimonies, the relevance, reliability and probative value of which shall be assessed as discussed above. Similarly, the failure of one Party to present evidence to the Chamber shall not in any way affect the Chamber's assessment of the probative value of such evidence if it is presented by the other Party(22).

2.2.2 The Assessment of Documentary Evidence

53. Documentary evidence consists of documents produced as evidence for evaluation by the Tribunal. For the purposes of this case, the term "document" is interpreted broadly, being understood to mean anything in which information of any description is recorded. This

interpretation is wide enough to cover not only documents in writing, but also maps, sketches, plans, calendars, graphs, drawings, computerized records, mechanical records, electro-magnetic records, digital records, databases, sound tracks, audio-tapes, video-tapes, photographs, slides and negatives. Many, though not all, of these types of documents were produced in this case by both Parties in support of their respective cases.

54. Considered as a distinct form of evidence, documentary evidence raises a number of particular issues, both in the assessment of its admissibility and the assessment of its probative value.

The burden of proof in relation to admissibility

55. The Chamber notes that in order for a document to be admissible as evidence, the Party that seeks to rely on the document must first prove that it meets with the standards of relevance and probative value (discussed above) laid out by sub-Rule 89(C). In other words, the burden of proof of the reliability (which, as discussed above, "runs through" the criteria of admissibility, namely relevance and probative value) of the document lies on the Party that seeks to rely on the document. When documents are admitted with the consent of both Parties, as has occurred in the instant case, the issue of proof of reliability does not arise. A similar situation arises when a document is admitted by way of judicial notice, as a "fact of common knowledge" under Rule 94, since no proof of the fact is required. When, however, the reliability of documentary evidence is questioned, the issue arises as to the required standard of proof of reliability for the admission of evidence.
56. With certain exceptions, discussed below, the Chamber is of the opinion that the standard of proof required to establish the reliability of documentary evidence is proof on the balance of probabilities. The admission of evidence requires, under sub-Rule 89(C), the establishment in the evidence of *some* relevance and *some* probative value. Accordingly, the standard of proof required for admissibility should be lower than the standard of proof required in the final determination of the matter at hand through the weighing up of the probative value of all the evidence before the Chamber. The admission of evidence does not require the ascertainment of the exact probative value of the evidence by the Chamber; that comes later. Admission requires simply the proof that the evidence has *some* probative value. Different standards of proof are appropriate for the process of admission and the process of determining the exact probative value of the same evidence.
57. Furthermore, the determination of admissibility does not go to the issue of *credibility*, but merely *reliability*. Accordingly, documentary evidence may be assessed, on the balance of probabilities, to be reliable, and as a result admitted. Later, that same evidence may be found, after examination by the Chamber, not to be credible.(23)
58. The circumstances which give rise to exceptions to this general rule include (but are not limited to) those circumstances in which the rights of the Accused are threatened by the admission of the evidence in question, or wherever the allegations about the unreliability of the evidence demand for admissibility the most exacting standard, consistent with the allegations. In such cases, a standard of proof of "beyond reasonable doubt" may, in the opinion of the Chamber, be justified. (24)

Probative Value

59. The Chamber notes that the general principles governing the assessment of the probative value of documentary evidence do not differ in any way from the general principles governing the assessment of the probative value of evidence presented in other forms. Documentary evidence is assessed in accordance with the Rules, in particular Rule 89.

60. Notwithstanding this commonality of general principles, the Chamber notes that the *means* by which credibility (and to a lesser extent relevance) will be assessed *do* differ according to the form and nature of the evidence before the Chamber. The Chamber has considered a number of factors specific to documentary evidence in assessing the credibility of this evidence. These are discussed in detail below.
61. Distinct from the question of the authenticity of a document is the issue of the relationship between the document and its *source*, or *authorship*. Many national, and indeed some previous international, jurisdictions, have disallowed evidence which is deemed "self-serving": that is, those documents written or produced by one Party (usually by the Accused) in order to support, in a propagandistic way, his or her own claims(25).
62. The Chamber has deemed it inappropriate to exclude such evidence unless, as sub-Rule 89© suggests, it is deemed either irrelevant or devoid of probative value.
63. The Chamber notes, nevertheless, that the source of a document may, taken in context, impact upon the assessment of the reliability or credibility (or both) of the document. For example, evidence produced in support of a defence of alibi from a source other than the Accused may be of greater probative value than evidence provided or produced by the Accused. While noting this, the Chamber emphasizes that such an understanding of the relationship between the source of documentary evidence and its probative value must in no way be interpreted as a presumption of the guilt of the Accused. The Chamber has not, in any way, allowed its assessment of the probative value of documentary evidence to interfere with the right of the accused to a fair trial.
64. Central to the establishment of the credibility and reliability of documentary evidence is the establishment (by the Party that seeks to rely on the document) of the *authenticity of the document, and of its contents*. The central importance of authenticity in the Tribunal's assessment process is manifest in sub-Rule 89(D) of the Rules, which states that a Chamber may request verification of the authenticity of evidence obtained out of court.
65. In assessing the authenticity of these documents and their contents, the Chamber has, as with all forms of evidence, relied on its power under sub-Rule 89(C) to admit any relevant evidence which it deems to have probative value. In particular, it has acted under sub-Rule 89(B), applying rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law.
66. In assessing the authenticity of documentary evidence, the Chamber has taken into account, amongst other factors, the form, contents and purported use of the document, and the position of the Parties thereon.
67. Form includes such matters as:

- whether the document provided to the Chamber is an original or a copy. Originals will, as a general rule, have a higher probative value than copies;

- whether, a document being a copy, is in any way registered or enrolled with some institutional authority;
- whether the document is signed, sealed, certified, stamped or in any other way officially authorized by some authority or organization;

- whether or not the document has been duly executed. In general terms this involves showing that it was written, produced or authorized by the person or party by whom it purports to be written, produced or authorized.

68. Resolution of such matters may be effected by the Chamber through a variety of means, pursuant to sub-Rule 89(D), which states that a Chamber may request verification of the authenticity of evidence obtained out of court. The means available to the Chamber are limited by sub-Rule 89 (B), which states that a Chamber shall apply rules of evidence which will best favour the fair

5743

determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law. Accordingly, while the Chamber may order the production of a sample of a witness' handwriting for purposes of comparison against documentary evidence, it cannot order such a sample to be produced from the Accused against his or her will, since such an order would compel the Accused to testify against himself or herself(26).

69. The Chamber notes that among the means available to the Chamber to resolve such matters of form is resort to expert testimony.

Other factors affecting probative value:

70. The content of a document may be direct evidence of the existence of a fact or a state of affairs, and of the authenticity of the document itself. The probative value of the content of a document will be assessed by the Chamber in light of all the circumstances of the case, including its relation to oral testimony given before the Chamber pertaining to the content of the document.
71. Similarly, the purported use of the document, whether provided by the content of the document, its form, or oral testimony, may, in certain circumstances, be relevant in the assessment of the authenticity and the probative value of the document.
72. While all of these factors are relevant in assessing the authenticity and probative value of documentary evidence, other factors may also be considered. Further, in assessing authenticity, the Chamber observes that as a general rule, it is insufficient to rely on any one factor alone as proof or disproof of the authenticity of the document. Authenticity must be established through reference to all relevant factors.

The relationship between oral testimony and documentary evidence:

73. In many instances in this case, doubt as to the probative value of a document has arisen not through the form or content of the document, but through inconsistencies between the document and oral testimony rendered before the Chamber. The Chamber wishes, therefore, to address this matter in detail.
74. Concerning the question of oral testimony as "corroboration" of documentary evidence, the Chamber notes the following matters.
75. In assessing the probative value of the documents submitted, the Chamber has distinguished between those documents of which the form, contents and purported use are found to be supported by secondary evidence, primarily oral testimony, and those documents which are found to lack secondary support. Any evidence which is supported by other evidence logically possesses a greater probative value than evidence which stands alone, unless both pieces of evidence are not credible. Accordingly, oral testimony may serve to support, or "corroborate", documentary evidence. The Chamber notes that this approach is wholly in accord with its stated views on the free assessment of evidence and the use of corroborating evidence, and with Rule 89 of the Rules.
76. The Chamber notes that such an approach to the assessment of the probative value of documentary evidence is supported by earlier practice in international criminal proceedings. In the *Tokyo Judgement* of 1946,(28) Judge Pal stated that "where a written instrument is not a fact in issue but only a piece of evidence in proof of some act, other independent evidence is admissible"(29). In relying on this statement as authority for its approach to the assessment of documentary evidence, the Chamber notes that many of the documents submitted as evidence in this case unambiguously fall into the second category to which Judge Pal made reference - that of "evidence in proof of some other act". The Chamber notes further that the principles outlined by Judge Pal in relation to admissibility are applicable to the assessment of probative value, since

5744

what is at stake in both situations is the reliability of the evidence in question.

77. Judge Pal went on to discuss the use of extrinsic evidence in the interpretation of written instruments:

"The words of a written instrument may, to all appearance, appear to be free from ambiguity in themselves. Yet external circumstances may create some doubt or difficulty as to the proper application of the words. In such cases the question of construction may admit of extrinsic evidence.

Whether it be 'the intention of the writer' or 'the meaning of the words', the aim really is to ascertain the true nature of the transaction. Neither 'intention' nor meaning of the words can be the sole object. The primary object is to determine what it was that was really intended and the primary source of determining such intention is the language used"(30).

78. This statement further supports the rule that oral testimony, or other independent evidence, may be used to "corroborate" documentary evidence. Since documentary evidence is not limited to written material, the use of independent or secondary evidence to "corroborate" documentary evidence should not be limited to those situations where the ambiguity or uncertainty arises from the *words*.
79. The Chamber finds that independent evidence may be used to "corroborate", support, prove or disprove the authenticity and probative value of documentary evidence, once that independent evidence has been admitted. This principle is not limited to the use of oral testimony in supporting documentary evidence: it permits the use of multiple documents in mutual support (for example the combined use of maps, photographs and videos), and it also permits the use of documentary evidence in support of oral testimony.
80. The Chamber notes that the use of documents in support of oral testimony will extend to the use of documents as *aides mémoires* to refresh the memory of witnesses. However, where documents appear to be used not simply to refresh the memory of the witness, but as a crutch without which the testimony of the witness would fall, the Chamber notes that the credibility of the witness and the probative value of his or her testimony may be undermined.
81. Concerning the question of the assessment of prior statements, the Chamber notes the following.
82. Firstly, it notes that a significant problem arises where the oral testimony of a witness contradicts, or is inconsistent with, prior statements made by the witness which have been admitted as documentary evidence into the proceedings.
83. Secondly, the Chamber also notes that the probative value of the respective pieces of evidence will, in part, depend on the conditions under which the prior statement was provided, as well as on other factors relevant to, or indicia of, the prior statement's reliability or credibility, or both. Accordingly, the Chamber will address separately three classes of prior testimony submitted as documentary evidence in this case:
    1. witness statements and other non-judicial testimonies;
    2. testimonies before this Tribunal; and
    3. statements before other judicial bodies.

84. Firstly, regarding witness statements and other non-judicial testimonies, the Chamber notes that a large number of witnesses who appeared before the Chamber in this case had previously made statements, which included witness declarations and, in one case, a radio interview(31).
85. The Chamber has evaluated the probative value of such testimonies in light of the circumstances in which they were made, and in view of other factors pertaining to the reliability of the testimonies. The circumstances it has taken into consideration include such matters as: the language in which the testimony was made or in which the interview was conducted; the access of the Chamber to transcripts of the testimonies or the interviews, and its corresponding ability to scrutinise the nature of the questions put to a witness; the accuracy of interpretation and

5745

transcription; the time lapse between the prior testimonies and the testimony at trial; the difficulties of recollection; the use or non-use of solemn declarations; and the fact of whether or not a witness had read or reviewed the statement at the time at which it was made(32).

86. In light of these factors, it is the Chamber's opinion that the probative value of such prior witness statements is, generally, lower than the probative value of positive oral testimony before a Court of law, where such testimony has been subjected to the test of cross-examination.
87. Secondly, regarding testimonies before this Tribunal, in accordance with this principle of assessing prior statements in the light of the circumstances in which those statements were provided, the Chamber must confront the situation, which arose in this case, where the testimony of a witness appears to conflict with a prior statement made by the same witness before this Tribunal in separate proceedings.
88. The Chamber notes that in such cases, witnesses may have provided conflicting evidence under solemn declaration. The Chamber will, in accordance with the general principles of the assessment of evidence discussed above, assess such evidence on a case-by-case basis. It will address the admissibility of such evidence, and, in evaluating the probative value of the evidence, will address the explanations given by the witness for the discrepancies between his or her testimonies, and the materiality of such apparent discrepancies.
89. The Chamber further notes that inconsistency between two testimonies of the same witness, both given under solemn declaration, affects the credibility and reliability of the later testimony.
90. Where a conflict between testimonies exists, it is not the task of the Chamber to assess the credibility and reliability of the testimony in the earlier proceedings (for example the *Kayishema* and *Ruzindana* case), since these issues have been determined previously (and possibly, as in this case, by another Trial Chamber) in light of all the information available to it.
91. Thirdly, the Chamber notes that the issue of the assessment of the probative value of prior statements made before other judicial bodies arose in this case in relation to the "Swiss Files". The "Swiss Files" is the name given in this trial to the transcripts of interviews given by the Accused to a Swiss *juge d'instruction* following his arrest in Switzerland on 11 February 1995. The "Swiss Files" include eight voluntary statements and a number of accompanying documents, all submitted as evidence by the Prosecution, with the consent of the Defence(33). The truth and probative value of the "Swiss Files" were not in question, to the extent that the files establish an accurate account of the interviews conducted by the Swiss authorities. However, both the Prosecutor and the Defence did, at different points in the Trial, contest the truth of Musema's prior statements and the probative value of some of the documents, contained in those Files.
92. In assessing the probative value of the "Swiss Files", the Chamber has relied on the general principle discussed above, taking into account the circumstances and conditions in which the documents were produced.
93. The Chamber makes two further observations relevant to the assessment of the probative value of such evidence.
94. Firstly, the Chamber notes that judicial testimonies (and other testimonies made under oath or solemn declaration) tend, as a general rule, to demonstrate greater reliability than non-judicial testimonies(34).
95. Secondly, the Chamber notes that the probative value of such evidence must be assessed in the light of the minimum standards expected by the Tribunal for the production of such evidence. These minimum standards provide a general yardstick against which the Chamber is able to measure the reliability of such evidence. However, the standards which comprise this yardstick differ according to the nature of the interview or investigation.
96. Rules 42 and 43 establish the standard expected of an interview of a suspect by the Prosecutor. These Rules do not, however, specifically address interviews of the Accused by someone other than the Prosecutor, or interviews involving witnesses.
97. The issue then arises as to what standards constitute the yardstick against which the probative

5746

value of evidence obtained in such interviews may be assessed. The Chamber finds that the relevant standards are embodied in Rules 39(i), 39(ii), 42, 43 and 95, which should be read together. These Rules provide the minimum standards constituting the yardstick against which both the admissibility and probative value of pre-Trial interview testimonies should be measured (35).

2.2.3 False testimony

98. On a number of occasions in this case direct, or indirect, implications were made by one of the Parties that one or more of the witnesses had deliberately or otherwise misled the Chamber. The Chamber notes that such submissions, if seriously intended as allegations of false testimony, should be submitted to the Tribunal in proper motion form, under Rule 91(B).
99. The Chamber reaffirms its position that false testimony is a deliberate offence, which presupposes wilful intent on the part of the perpetrator to mislead the Judges and thus to cause harm(37), and a miscarriage of justice. In such a motion, the onus is on the party pleading the case of false testimony to prove the falsehood of the witness' statements and to prove either that these statements were made with harmful intent or that they were made by a witness who was fully aware both of their falsehood and of their possible bearing upon the Judge's decision. In order to establish a strong basis for believing that the witness may have knowingly and wilfully given false testimony, it is insufficient to raise only doubt as to the credibility of the statements made by the witness. The Chamber affirms its opinion that, inaccurate statements cannot, on their own, constitute false testimony; an element of wilful intent to give false testimony must exist. As the Appeals Chamber has previously confirmed(38), there is an important distinction between testimony that is incredible and testimony which constitutes false testimony. The testimony of a witness may, for one reason or another, lack credibility even if it does not amount to false testimony within the meaning of Rule 91(39).

2.2.4 The impact of trauma on the testimony of witnesses

100. Many of the witnesses who testified before the Chamber in this case have seen or have experienced terrible atrocities. They, their family or their friends have, in many cases, been the victims of such atrocities. The trauma that may have arisen, and may continue to arise, from such experiences is a matter of grave concern to the Chamber. The Chamber notes that recounting and revisiting such painful experiences is likely to be a source of great pain to the witness, and may also affect her or his ability fully or adequately, to recount the relevant events in a judicial context. The Chamber has, accordingly, considered the testimony of those witnesses in this light.
101. The Chamber also notes that some of the witnesses who testified before it may, in its opinion, have suffered, or may continue to suffer stress-related disorders. The Chamber has assessed the testimonies of such witnesses, in light of this possibility, and has taken into account their personal background and the nature of the atrocities to which they may have been subjected(40).

2.2.5 Interpretation

102. The Chamber notes the difficulties presented by the consecutive translation of three languages (Kinyarwanda, French and English) in assessing evidence. In particular, it notes the significant syntactical and grammatical differences between the three languages. These difficulties have been taken into consideration by the Chamber in its assessment of all evidence presented to it, including evidence for which the source was not available for examination by the Chamber.

5747

2.2.6 Cultural factors affecting the evidence of witnesses

103. The testimonies of many of the witnesses in this case were affected by cultural factors. The Chamber has not drawn any adverse conclusions regarding the credibility of witnesses when cultural constraints appeared to induce them to answer indirectly certain questions regarded as delicate. Further, the Chamber recalls that the assessment of all evidence tendered to it is conducted in accordance with the Rules, in particular Rule 89. Accordingly, as the Chamber noted earlier, evidence which appears to be "second-hand" is not, in and of itself, inadmissible; rather it is assessed, like all other evidence, on the basis of its credibility and relevance. While there appears, as the Defence argued, to be in Rwandan culture a "tradition that the perceived knowledge of one becomes the knowledge of all"(41), the Chamber notes that, as in other cultures, Rwandan individuals are clearly able to distinguish between what they have heard and what they have seen(42). The Chamber made a consistent effort to ensure that this distinction was drawn throughout the trial, and has taken such matters into careful consideration in assessing the evidence before it.
104. Finally, the Chamber notes the impact on the testimony of witnesses of cultural factors relating to the use of documents and the witnesses' unfamiliarity with spatio-temporal identification mechanisms and techniques. Certain witnesses had difficulty in being specific as to dates, times, distances and locations, and appeared unfamiliar with the use of maps, films, photographs and other graphic representations. The Chamber has carefully considered witnesses' responses in light of this understanding. It has not drawn any adverse conclusions regarding the credibility of a witness based only on a witness' reticence or circuitousness in responding to questions of such a nature; however, it has taken the accuracy and other relevant elements of such responses into account when assessing such evidence.
105. The Chamber further notes that sensitivity has, and should, be shown by the Parties in addition to the Bench, in relation to these cultural factors. This sensitivity should extend not only to courtroom proceedings but also to the gathering and preparation of evidence. The Chamber notes that it is not in the interests of either Party, let alone the Tribunal, to require witnesses to utilize identification mechanisms which are not familiar to them when other alternatives are readily available to the Parties. In particular, the Chamber draws attention to the use of aerial photography by the Prosecutor(43).

2.3 The Defence of alibi

106. Pursuant to Rule 67 (A) of the Rules, ("Reciprocal Disclosure of Evidence"), the Prosecutor shall, as early as reasonably practicable and in any event prior to the commencement of the trial, notify the Defence of the names of the witnesses that he intends to call to establish the guilt of the accused, and in rebuttal of any defence plea of which the Prosecutor has received notice. The Defence shall notify the Prosecutor of its intent to enter the defence of alibi, in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi.
107. Pursuant to Rule 67 (B), failure of the Defence to provide notice under Rule 67(A) shall not limit the right of the accused to rely on the defence of alibi. Although this Rule prevails, the Chamber notes that failure to provide notice may be relevant to the judicial consideration of the merits of the defence. In the *Kayishema* and *Ruzindana* Judgement, Trial Chamber II noted:

"Where good cause is not shown, for the application of Rule 67(B), the Trial Chamber is entitled to take into account this failure when weighing the credibility of the defence of alibi and/or any special defence presented."(44)

108. In raising the defence of alibi, the Accused not only denies that he committed the crimes for which he is charged but also asserts that he was elsewhere than at the scene of these crimes when they were committed. The onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the Accused. In establishing its case, when an alibi defence is introduced, the Prosecution must prove, beyond any reasonable doubt, that the accused was present and committed the crimes for which he is charged and thereby discredit the alibi defence. The alibi defence does not carry a separate burden of proof. If the defence is reasonably possibly true, it must be successful.

1. *See* "Application by the Prosecutor for a formal request for deferral by Switzerland concerning Musema Alfred", Case No. ICTR-96-5-D, (4 March 1996).

2. *See* "Decision on the formal request for deferral presented by the Prosecutor", Case No. ICTR-96-5-D, (12 March 1996).

3. *See* "Decision on the review of the Indictment", Case No. ICTR-96-13-I, (15 July 1996).

4. *See* "Warrant of Arrest, Order for Surrender", Case No. ICTR-96-13-I.

5. *See* "Warning and notice to Counsel in terms of Rule 46(A) of the Rules of Procedure and Evidence", Case No. ICTR-96-13-I, (31 October 1997).

6. *See* "Decision to withdraw counsel and to allow the Prosecutor to redact identifying information of her witnesses",Case No. ICTR-96-13-I, (18 November 1997).

7. *See infra.*

8. *See* "Prosecutor's request for leave to file an amended indictment"(Case No. ICTR-96-13-I), dated 30 October 1998; "Brief in support of Prosecutor's request for leave to file an amended indictment", Case No. ICTR-96-13-I, (30 October 1998); "Amended Indictment", Case No. ICTR-96-13-I, (filed 3 November 1998).

9. *See* "Decision on the Prosecutor's request for leave to amend the Indictment"(Case No. ICTR-96-13-I), dated 18 November 1998.

10. *See* "Decision on the Prosecutor's Motion for Witness Protection",Case No. ICTR-96-13-T, (20 November 1998).

11. *See* "Decision on an Application by African Concern for Leave to Appear as an Amicus Curiae", Case No. ICTR-96-13-T, (17 March 1999).

12. *See* "Decision on the Prosecutor's Request for Leave to Amend the Indictment", Case No. ICTR-96-13-T, (6 May 1999).

13. *See* "Decision on the Prosecutor's Request for Leave to Call Six New Witnesses", Case No. ICTR-96-13-T, (20 April 1999), and "Decision on the Motion of the Defence for Two Additional Witnesses and for Witness Protection", Case No. ICTR-96-13-T, (6 May 1999).

14. *See* "Order for Temporary Transfer of Three Detained Witnesses (Q, L, AB) Pursuant to Rule 90*bis* of the Rules of Procedure and Evidence", Case No. ICTR-96-13-T, (19 April 1999).

15. *The Prosecutor v. Dusko Tadi. See* "Decision on Defense Motion on Hearsay", Case No. IT-94-1-T (5 August 1996).

16. *The Prosecutor v. Zejnil Delali, Zdravko Muci a/k/a "Pavo", Hazim Deli and Esad Lando a/k/a "Zenga". See* "Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Muci, to Provide a Handwriting Sample", Case No. IT-96-21-T (21 January 1998) (RP D5395-D5419).

17. *Id.* para. 32.

5764

18. *Akayesu* Judgement, para. 134.

19. *Rutaganda* Judgement, para. 17.

20. The International Military Tribunal for the Far East (29 April 1946 - 12 November 1948). *See* Röling, B.V.A and Rüter, C.F. (eds), *The Tokyo Judgment*, vol. II (Amsterdam, APA-University Press Amsterdam BV, 1977), p. 630.

21. Although the provision of copies of documentary evidence where originals appear to be available may constitute an exception to this general rule. See further below.

22. Notwithstanding this observation, the Chamber recalls the duties on both parties to disclose evidence of which they have knowledge, subject to Rules 66, 67 and 68.

23. As it was stated by the ICTY in Decision on the Motion of the Prosecution for the Admissibility of Evidence (21 January 1998) (RP D5423-D5440, RP D5431):

"the mere admission of a document into evidence does not in and of itself signify that the statements contained therein will necessarily be deemed to be an accurate portrayal of the facts."

24. *See* "Decision on Zdravko Muci's Motion for the Exclusion of Evidence", IT-96-21-T (2 September 1997) (RP D5082-D5105)), where the ICTY found that the Prosecution bore a burden to prove beyond reasonable doubt that the evidence they sought to admit was obtained voluntarily and not in any way that contradicted the right of the Accused to a fair trial.

25. *See* e.g. the discussion of Judge Pal in the Decision of The International Military Tribunal for the Far East, fn. 23, *supra*, pp. 638, 641-5, note 7.

26. *See* "Decision on the Prosecution's Oral Requests for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Muci, to Provide a Handwriting Sample", IT-96-21-T (21 January 1998) (RP D5395-D5419). It is to be expected that a Chamber would be unable to make any other order which involved a similar self-condemnation by the accused, such as ordering the accused to speak certain words in the presence of a witness for the purposes of aural identification[27]

27. Ibid.

28. The International Military Tribunal for the Far East, fn. 23, *supra.*

29. *Id.*, p. 640.

30. *Id.*, p. 653.

31. Defence Closing Argument (28 June 1999).

32. *See* further *Akayesu* Judgement, para. 134; *Rutaganda* Judgement, para. 19.

33. Prosecution Closing Argument (25 June 1999).

34. *See R. v. B. (K.G.)* (1993), 79 C.C.C. (3d) 257.

35. The Chamber is of a similar mind to that of the Trial Chamber of the ICTY in "Decision on Zdravko Muci's Motion for the Exclusion of Evidence", IT-96-21-T (RP D5082-D5105) where it stated:

"43 ....Rule 42 embodies the essential provisions of the right to a fair hearing as enshrined in Article 14(3) of the International Covenant on Civil and Political Rights and Article 6(3)(c) of the European Convention on Human Rights. These are the internationally accepted basic and fundamental rights accorded to the individual to enable the enjoyment of a right to a fair hearing during trial. It seems to us extremely difficult for a statement taken in violation of Rule 42 to fall within Rule 95 which protects the integrity of the proceedings by the non-admissibility of evidence obtained by methods which cast

substantial doubts on its reliability.

- The Trial Chamber is of the opinion that the surest way to protect the integrity of the proceedings is to read both Rules 42 and 95 together. We read Rule 95 as a summary of the provisions in the Rules, which enable the exclusion of evidence antithetical to and damaging, and thereby protecting the integrity of the proceedings. We regard it as a residual exclusionary provision."(36)

36. Ibid, paras 43, 44.

37. *Rutaganda* Judgement, para. 20.

38. *See The Prosecutor v. Georges Anderson Nderubumwe Rutaganda,* ICTR-96-3-T, "Decision on Appeals Against the Decisions by Trial Chamber I Rejecting the Defence Motions to Direct the Prosecutor to Investigate the Matter of False Testimony by witnesses 'E' and 'CC'" (8 June 1998) para. 28.

39. *Rutaganda* Judgement, para. 20.

40. *Akayesu* Judgement, paras 142-156.

41. Defence Closing Argument (28 June 1999).

42. *Akayesu* Judgement, para. 155.

43. *See* Prosecution exhibits P 20.1 - P 20.10.

44. *See Kayishema* and *Ruzindana* Judgement

5757

3. THE APPLICABLE LAW

3.1 Individual criminal responsibility (Article 6 of the Statute)

3.2 The Crime of Genocide (Article 2 of the Statute)

3.2.1 Genocide

3.2.2 Complicity in Genocide

3.2.3 Conspiracy to Commit Genocide

3.3 Crime against Humanity (Article 3 of the Statute)

3.4.Violation of Common Article 3 and Additional Protocol II

3.5 Cumulative charges

3.1 Individual criminal responsibility (Article 6 of the Statute)

109. The Accused is charged under Article 6(1) of the Statute with individual criminal responsibility for all the crimes alleged in the Indictment and under Article 6(3) of the Statute for acts committed by his subordinates.
110. The Chamber will now examine these two forms of criminal responsibility.

3.1.1 Individual criminal responsibility (Article 6(1) of the Statute)

111. Article 6(1) of the Statute provides that: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute shall be individually responsible for the crime."
112. In the *Akayesu* Judgement(1), the Chamber issued an opinion on the principle of individual criminal responsibility under Article 6(1) of the Statute. The reasoning of this opinion is similar to that in the *Tadic*(2), *Celebici*(3), *Kayishema* and *Ruzindana,*(4) *and Rutaganda*(5) Judgements.
113. The Chamber finds that the aforementioned case-law regarding the principle of individual criminal responsibility, as articulated notably in the *Akayesu* and *Rutaganda* Judgements, is sufficiently established and is applicable in the instant case.
114. The Chamber notes that, under Article 6(1), an accused person may incur individual criminal responsibility as a result of five forms of participation in the commission of one of the three crimes referred to in the Statute. Article 6(1) covers different stages in the commission of a crime, ranging from its initial planning to its execution.
115. The Chamber observes that the principle of individual criminal responsibility, under Article 6(1), implies that the planning or the preparation of a crime actually must lead to its commission. However, the Chamber notes that Article 2(3) of the Statute, pertaining to the crime of genocide, foresees the possibility for the Tribunal to prosecute attempted genocide, among other acts. Since attempt is by definition an inchoate crime, inherent in the criminal conduct *per se,* it may be punishable as a separate crime irrespective of whether or not the intended crime is accomplished.
116. Consequently, the Chamber holds that an accused may incur individual criminal responsibility for inchoate offences under Article 2(3) of the Statute but that, conversely, a person engaging in any form of participation in other crimes falling within the jurisdiction of the Tribunal, such as crimes covered under Articles 3 and 4 of the Statute, may incur criminal responsibility only if the

intended crime is accomplished.

117. The Chamber finds that in addition to incurring responsibility as a principal offender, the accused may also be liable for criminal acts committed by others if, for example, he planned such acts, instigated another to commit them, ordered that they be committed, or aided and abetted another in the commission of such acts.
118. The Chamber defines five forms of criminal participation under Article 6(1) as follows:
119. The first form of participation, planning of a crime, implies that one or more persons contemplate the commission of a crime at both its preparatory and execution phases.
120. The second form of participation, incitement to commit a crime, involves instigating another, directly and publicly, to commit an offence. Instigation is punishable only where it leads to the actual commission of an offence intended by the instigator, except with genocide, where an accused may be held individually criminally liable for incitement to commit genocide under Article 2(3)(c) of the Statute, even where such incitement fails to produce a result.(6)
121. The third form of participation, ordering, implies a superior-subordinate relationship between the person giving the order and the one executing it, with the person in a position of authority using such position to persuade another to commit a crime.
122. The fourth form of participation in which an accused incurs criminal responsibility is where he actually commits one of the crimes within the jurisdiction *ratione materiae* of the Tribunal.
123. The Chamber holds that an accused may participate in the commission of a crime either through direct commission of an unlawful act or by omission, where he has a duty to act.
124. The fifth and last form of participation where individual criminal responsibility arises under Article 6(1) is "otherwise aid[ing] and abett[ing] in the planning, preparation, or execution of a crime referred to in Articles 2 to 4".
125. The Chamber is of the view that aiding and abetting alone may be sufficient to render the accused criminally liable. In both instances, it is not necessary that the person aiding and abetting another to commit an offence be present during the commission of the crime. The relevant act of assistance may be geographically and temporally unconnected to the actual commission of the crime.
126. The Chamber holds that aiding and abetting include all acts of assistance in the form of either physical or moral support; nevertheless, it emphasizes that any act of participation must substantially contribute to the commission of the crime. The aider and abettor assists or facilitates another in the accomplishment of a substantive offence.

3.1.2 Responsibility of the Superior for Subordinates

127. Article 6(3) of the Statute provides that :

"The fact that any of the acts referred to in Articles 2 to 4 of the present Statute was commited by a subordinate does not relieve his or her superior of criminal responsiblity if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

128. The principle enunciating the responsibility of command derives from the principle of individual criminal responsiblity as applied by the Nuremberg and Tokyo Tribunals. It was subsequently codified in Article 86 of the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 1949.
129. It is significant to note that there are varying views regarding the *mens rea* required for command responsibility. According to one view, *mens rea* derives from the legal concept of strict liability that is, the superior is criminally responsible for acts committed by his subordinates solely on the basis of his position of responsibility, with no need to prove the criminal intent of the superior.

Another view holds that the superior's negligence, which is so serious as to be tantamount to consent or criminal intent, is a lesser requirement to establish the accused's *mens rea*.

130. Another position was articulated in one of the "Commentaries on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949", which provides that the *mens rea* required, as an essential element, to establish superior responsibility "must be so serious that it is tantamount to malicious intent, apart from any link between the conduct in question and the damage that took place."(7)

131. The Chamber reiterates its determination in the *Akayesu* Judgement, where it found that the requisite *mens rea* of any crime is the accused's criminal intent. This requirement, which amounts to at least a negligence that is so serious as to be tantamount to acquiescence, also applies in determining the individual criminal responsibility of a person accused of crimes defined in the Statute, for which it is certainly proper to ensure that there existed malicious intent, or, at least, to ensure that the accused's negligence was so serious as to be tantamount to acquiescence or even malicious intent.

132. As to whether the form of individual criminal responsibility referred to under Article 6(3) of the Statute also applies to persons in both military and civilian authority, it is important to note that during the Tokyo Trials, civilian authorities were convicted of war crimes under this principle.

133. Thus Hirota, former Foreign Minister of Japan, was convicted, *inter alia* of mass rape, known as the "Rape of Nanking", under a count that he had "recklessly disregarded" his legal duty by virtue of his offices to take adequate steps to secure the observance and prevent breaches of law and customs of war. The Tokyo Tribunal held that:

"Hirota was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women and other atrocities were being committed daily. His inaction amounted to criminal negligence."(8)

134. Judge Roling, dissenting from this finding, held that Hirota should have been acquitted, insofar as:

"[...] a Tribunal should be very careful in holding civil government officials responsible for the behaviour of the army in the field. Moreover, the Tribunal is here to apply the general principles of law as they exist with relation to the responsibility for 'omissions'. Considerations of both law and policies of [...] justice [...] indicate that this responsibility should only be recognized in a very restricted sense."

135. In view of such disparate legal interpretations, it is disputable whether the principle of individual criminal responsibility, articulated in Article 6 (3) of the Statute, should be applied to civilians. Accordingly, the Chamber reiterates its reasoning in the *Akayesu* Judgement, with which Trial Chamber II concurred in the *Kayishema* and *Ruzindana* Judgement, that it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration. Therefore the superior's actual or formal power of control over his subordinates remains a determining factor in charging civilians with superior responsibility.

136. As the Judges of the Tribunal for the Former Yugoslavia observed in *Celebici*, (with whom Chamber II concurred in *Kayishema* and *Ruzindana*), in explaining their reasoning on the application of the principle of the superior-subordinate relationship to persons in non-military positions of authority:

"[N]o express limitation is made restricting the scope of this type of responsibility to military

commanders or situations arising under a military command. [The principle of superior-subordinate relationship] extends beyond the responsibility of military commanders to also encompass political leaders and other civilian superiors in positions of authority."(9)

137. In a previous decision, in reviewing the Indictment against an accused, the ICTY articulated a similar finding:

"[T]he Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes."(10)

138. From an historical and legal perspective, it is significant to consider different reasoning developed since the Second World War regarding the responsibility of non-military superiors for the actions of their subordinates.
139. It is thus important to note the conviction of General Akiro Muto for acts occurring during his tenure as Chief of Staff to General Yamashita at the time of the "Rape of Nanking", in which The Tokyo Tribunal reasoned that influential power, which is not power of formal command, was sufficient basis for charging one with superior responsibility.(11)
140. The influence at issue in a superior - subordinate command relationship often appears in the form of psychological pressure.(12) This is particularly relevant to the case at bar, insofar as Alfred Musema was a socially and politically prominent person in Gisovu *Commune*.
141. It is also significant to note that a civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law.
142. In the *Herman Roechling* Judgement, civilian industrial leaders were found guilty, *inter alia,* of failing to take action against abuses committed by members of the Gestapo against forced labourers. It appears that the accused had only *de facto* power insofar as the accused was granted no official authority to issue orders to personnel under Gestapo command. The Superior Tribunal of the Military Government for the French Zone of Occupation in Germany determined that because one of the accused was Herman Roechling's son-in-law, he had *de facto* influence, which would have allowed him to arrange with the factory police for better treatment of the workers.(13) The Tribunal rejected his defence of ignorance regarding the actions of his subordinates and held that:

"[n]o superior may prefer this defence indefinitely; for it is his duty to know what occurs in his organization and lack of knowledge, therefore, can only be the result of criminal negligence."(14)

143. Such power of control, even if it is merely *de facto,* generally implies "indirect subordination", which, according to Article 87 of Additonal Protocol I to the Geneva Conventions, extends beyond the commander's duty to his direct subordinates to "other persons under his responsiblity," to prevent violations of the Geneva Conventions.(15)
144. In accord with such reasoning that a superior's authority may be merely *de facto*, deriving from his influence or his indirect power, the determining question is the extent to which Alfred Musema had power of control over persons who *a priori* were not under his authority during the period from April to July 1994, namely, the soldiers, the Gisovu *Commune* police, and the *Interahamwe.*
145. Regarding the criteria to be met to establish superior responsibility of a civilian, it is important to consider the reasoning behind the adoption of Article 86(2) of Additional Protocol I to the Geneva Conventions, which states:

"The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all necessary measures within their power to prevent or repress the breach."(16)

146. During deliberations for adoption of Article 86(2) (which the provisions of Article 6(3) of the ICTR Statute closely resemble in spirit and in form) delegates held that the mental standard "should have known" was too broad and would subject the commander, *a posteriori*, to arbitrary judgements with respect to what he should have known.(17)
147. Therefore, in an attempt to avoid ambiguities in applying a mental standard to criminal resonsibility, the drafters of Article 86(2) followed juridical and legal textual authorities that do not distinguish between civilian or military superior authority.
148. Accordingly, the Chamber finds that the definition of individual criminal responsibility, as provided under Article 6(3) of the Statute, applies not only to the military but also to persons exercising civilian authority as superiors. Thus the fundamental issue is to determine the extent to which the superior -- notably Alfred Musema -- exercised power, whether *de jure* or *de facto*, over the actions of his indirect subordinates.

3.2 The Crime of Genocide (Article 2 of the Statute)

3.2.1 Genocide

149. Article 2(3)(a) of the Statute provides the Tribunal with the power to try crimes of genocide. Accordingly, Musema is charged under Article 2(3)(a) of the Statute.
150. The definition of genocide, as provided in Article 2 of the Statute, cites, *verbatim*, Articles 2 and 3 of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention").(18) Article 2(2) of the Statute reads as follows:

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

151. The Genocide Convention is undeniably considered part of customary international law, as reflected in the advisory opinion issued in 1951 by the International Court of Justice on reservations to the Genocide Convention, and as noted by the United Nations Secretary-General in

his Report on the establishment of the International Criminal Tribunal for the Former Yugoslavia. (19)

152. The Chamber notes that Rwanda acceded, by legislative decree, to the Convention on Genocide on 12 February 1975(20), and that the crime of genocide was therefore punishable in Rwanda in 1994.
153. The Chamber notes that the crime of genocide has been defined in several cases considered by the Tribunal, notably in the *Akayesu* and *Rutaganda* Judgements. The Chamber adheres to the definition of the crime of genocide as defined in those judgements.
154. The Chamber is therefore of the opinion that for the crime of genocide to be established, it is necessary, firstly, that one of the acts listed under Article 2(2) of the Statute be committed; secondly, that such an act be committed against a national, ethnical, racial or religious group, specifically targeted as such; and, thirdly, that the "act be committed with the intent to destroy, in whole or in part, the targeted group".

The acts enumerated under Article 2(2)(a) to (e) of the Statute

155. Article 2(2)(a) of the Statute, like the corresponding provisions of the Genocide Convention, refers to "*meurtre*" in the French version and to "killing" in the English version. The Chamber believes that the term "killing" includes both intentional and unintentional homicides, whereas the word "*meurtre*" covers homicide committed with the intent to cause death. The Chamber holds that, given the presumption of the innocence of the Accused, and pursuant to the general principles of criminal law, the version more favourable to the Accused should be adopted. The Chamber therefore finds that Article 2(2)(a) of the Statute must be interpreted in accordance with the definition of murder in the Criminal Code of Rwanda, which provides, under Article 311, that "Homicide committed with intent to cause death shall be treated as murder".
156. For the purposes of interpreting Article 2(2)(b) of the Statute, the Chamber understands the words "serious bodily or mental harm" to include, but not limited to, acts of bodily or mental torture, inhumane or degrading treatment, rape, sexual violence, and persecution. The Chamber is of the opinion that "serious harm" need not entail permanent or irremediable harm.
157. In the Chamber's opinion, the words "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part", as indicated in Article 2(2)(c) of the Statute, are to be construed "as methods of destruction by which the perpetrator does not necessarily intend to immediately kill the members of the group", but which are, ultimately, aimed at their physical destruction. The Chamber holds that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or in part, include subjecting a group of people to a subsistence diet, systematic expulsion from their homes and deprivation of essential medical supplies below a minimum vital standard.
158. In its interpretation of Article 2(2)(d) of the Statute, the Chamber holds that the words "measures intended to prevent births within the group" should be construed as including sexual mutilation, enforced sterilization, forced birth control, forced separation of males and females, and prohibition of marriages. The Chamber notes that measures intended to prevent births within the group may be not only physical, but also mental.
159. The Chamber is of the opinion that the provisions of Article 2(2)(e) of the Statute, on the forcible transfer of children from one group to another, are aimed at sanctioning not only any direct act of forcible physical transfer, but also any act of threat or trauma which would lead to the forcible transfer.

Potential groups of victims of the crime of genocide

160. It is the Chamber's view that it is necessary to consider the potential groups of victims of genocide

in light of the provisions of the Statute and the Genocide Convention, which stipulate that genocide aims at "destroy[ing], in whole or in part, a national, ethnical, racial or religious group, as such."

161. The Chamber notes that, as stated in the *Rutaganda* Judgement, the concepts of national, ethnical, racial and religious groups have been researched extensively and, at present, there are no generally and internationally accepted precise definitions thereof. Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as a member of said group.
162. Nevertheless, the Chamber is of the view that a subjective definition alone is not enough sufficient to determine victim groups, as provided for in the Genocide Convention. It appears, from a reading of the *travaux préparatoires* of the Genocide Convention(21), that certain groups, such as political and economic groups, have been excluded from the protected groups, because they are considered to be "non stable" or "mobile" groups which one joins through individual, voluntary commitment. That would seem to suggest *a contrario* that the Convention was presumably intended to cover relatively stable and permanent groups.
163. Therefore, the Chamber holds that in assessing whether a particular group may be considered protected from the crime of genocide, it will proceed on a case-by-case basis, taking into account both the relevant evidence proffered and the specific political, social and cultural context in which the acts allegedly took place.

The special intent of the crime of genocide

164. Genocide is distinct from other crimes because it requires a *dolus specialis*, a special intent. The special intent of a crime is the specific intention which, as an element of the crime, requires that the perpetrator clearly intended the result charged. The *dolus specialis* of the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". A person may be convicted of genocide only where it is established that he committed one of the acts referred to under Article 2(2) of the Statute with the specific intent to destroy, in whole or in part, a particular protected group.
165. For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone. The perpetration of the act charged, therefore, extends beyond its actual commission - for example, the murder of a particular person - to encompass the realization of the ulterior purpose to destroy the group in whole or in part.
166. The *dolus specialis* is a key element of an intentional offence, which offence is characterized by a psychological nexus between the physical result and the mental state of the perpetrator. With regard to the issue of determining the offender's specific intent, the Chamber applies the following reasoning, as held in the *Akayesu* Judgement:

" [...] intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact. The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same

5758

offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."(22)

167. Therefore, the Chamber is of the view that, as stated in the *Rutaganda* Judgement: "[...] in practice, intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused."(23)

3.2.2 Complicity in Genocide

168. The Prosecutor has charged the Accused with this crime under Count 2 of the Indictment, as an alternative to Count 1 of genocide. The Statute indeed provides, under Article 2(3)(e), the Tribunal with the power to prosecute persons with complicity in genocide.
169. The Chamber notes that complicity is a form of criminal participation both under the Anglo-Saxon legal tradition (or Common Law) and the Roman-Continental legal tradition (or Civil Law).
170. According to the Chamber, the definition of complicity in genocide articulated in the *Akayesu* Judgement, states that an accomplice to an offence may be defined as someone who associates himself in an offence committed by another, complicity necessarily implying the existence of a principal offence.
171. The issue before the Chamber is whether genocide must be committed for a person to be found guilty of complicity in genocide. The Chamber notes that complicity can only exist when there is a punishable, principal act committed by someone, the commission of which the accomplice has associated himself with.
172. In this regard, the Chamber notes from the *Travaux Préparatoires* of the Genocide Convention that the crime of complicity in genocide was recognised only where genocide had actually been committed. The Genocide Convention did not provide the possibility for punishment of complicity in an attempt to commit genocide, complicity in incitement to commit genocide nor complicity in conspiracy to commit genocide, all of which were, in the view of some States, too vague to be punishable under the Convention.
173. Consequently, the Chamber is of the opinion that in order for an accused to be found guilty of complicity in genocide, it must be proven beyond a reasonable doubt that the crime of genocide has been committed.
174. In regard to the issue of whether a person can be prosecuted for complicity, even where the perpetrator of the principal offence has himself not been tried, the Chamber notes that all criminal systems provide that a person may very well be tried as an accomplice, even where the principal perpetrator of the crime has not been identified, or where, for any other reasons, the latter's guilt can not be proven. The Rwandan Penal code is clear on this subject, and stipulates under Article 89 that accomplices:

"may be prosecuted even where the perpetrator may not face prosecution for personal reasons, such as double jeopardy, death, insanity or non-identification".

175. The Chamber notes that the logical inference from the foregoing is that an individual cannot thus be both the principal perpetrator of a particular act and the accomplice thereto. An act with which an accused is charged cannot, therefore, be characterised as both an act of genocide and an act of

5759

complicity in genocide. Consequently, since the two are mutually exclusive, the same individual cannot be convicted of both crimes for the same act(24).

176. In regard to the physical elements of complicity in genocide (*actus reus*), three forms of accomplice participation are recognised in most criminal Civil Law systems: complicity by instigation, complicity by aiding and abetting, and complicity by procuring means(25).
177. Under Common Law, the forms of accomplice participation, namely *"aiding and abetting, counselling and procuring"*, to a large extent, mirror those conducts characterised under Civil Law which, as indicated above, are *"l'aide, l'assistance, et la fourniture des moyens"*.
178. Complicity by aiding or abetting implies a positive action which excludes, in principle, complicity by failure to act or omission. Procuring means is a common form of complicity. It covers those persons who procured weapons, instruments or any other means to be used in the commission of an offence, with the full knowledge that they would be used for such purposes.
179. For the purposes of interpreting Article 2 (3) (e) of the Statute, which does not define the concept of complicity, the Chamber is of the opinion that it is necessary to define complicity as per the Rwandan Penal Code, and to consider the first three forms of criminal participation referred to in Article 91 of said Code, which defines the elements of complicity in genocide, thus:

> (a) Complicity by procuring means, such as weapons, instruments or any other means, used to commit genocide, with the accomplice knowing that such means would be used for such a purpose;
>
> (b) Complicity by knowingly aiding or abetting a perpetrator of a genocide in the planning or enabling acts thereof;
>
> (c) Complicity by instigation, for which a person is liable who, though not directly participating in the crime of genocide, gave instructions to commit genocide, through gifts, promises, threats, abuse of authority or power, machinations or culpable artifice, or who directly incited the commission of genocide.

180. The intent or mental element of complicity in general implies that, at the moment he acted, the accomplice knew of the assistance he was providing in the commission of the principal offence. In other words, the accomplice must have acted knowingly.
181. As far as genocide is concerned, the intent of the accomplice is thus to knowingly aid or abet one or more persons to commit the crime of genocide. Therefore, the Chamber is of the opinion that an accomplice to genocide need not necessarily possess the *dolus specialis* of genocide, namely the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such.(26)
182. Thus, if an accused knowingly aided or abetted another in the commission of a murder, while being unaware that the principal was committing such a murder, with the intent to destroy, in whole or in part, the group to which the murdered victim belonged, said accused could be prosecuted for complicity in murder, and certainly not for complicity in genocide. However, if an accused knowingly aided and abetted in the commission of such a murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer's intent to destroy the group.
183. In conclusion, the Chamber is of the opinion that an accused is liable for complicity in genocide if he knowingly and voluntarily aided or abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such.

5760

3.2.3 Conspiracy to Commit Genocide

184. Article 2(3)(b) of the Statute provides that the Tribunal shall have the power to prosecute persons charged with the crime of conspiracy to commit genocide. The Prosecutor has charged the Accused with such a crime under Count 3 of the Indictment.
185. The Chamber notes that the crime of conspiracy to commit genocide covered in the Statute is taken from the Genocide Convention. The *"Travaux Préparatoires"* of the Genocide Convention suggest that the rationale for including such an offence was to ensure, in view of the serious nature of the crime of genocide, that the mere agreement to commit genocide should be punishable even if no preparatory act has taken place(27). Indeed, during the debate preceding the adoption of the Convention, the Secretariat advised that, in order to comply with General Assembly resolution 96 (I), the Convention would have to take into account the imperatives of the prevention of the crime of genocide:

> "This prevention may involve making certain acts punishable which do not themselves constitute genocide, for example, certain material acts preparatory to genocide, an agreement or a conspiracy with a view to committing genocide, or systematic propaganda inciting to hatred and thus likely to lead to genocide."(28)

186. The Chamber notes that Common Law systems tend to view "*entente*" or conspiracy as a specific form of criminal participation, punishable in itself. Under Civil Law, conspiracy or "*complot*" derogates from the principle that a person cannot be punished for mere criminal intent (*"résolution criminelle"*) or for preparatory acts committed. In Civil Law systems, conspiracy (*complot*) is punishable only where its purpose is to commit certain crimes considered as extremely serious, such as, undermining the security of the State.
187. With respect to the constituent elements of the crime of conspiracy to commit genocide, the Chamber notes that, according to the "*Travaux Préparatoires*" of the Genocide Convention, the concept of conspiracy relied upon the Anglo-Saxon doctrine of conspiracy. In its Report, the Ad hoc Committee states that conspiracy "is a crime under Anglo-American law": Ad Hoc Committee Report (1948) 8. This reflected the assumptions made during debates on conspiracy. The French representative initially observed that conspiracy was a foreign concept to French law. The US representative, speaking as Chair, explained that "in Anglo-Saxon law 'conspiracy' was an offence consisting in the agreement of two or more persons to effect any unlawful purpose".(29) Venezuela's representative later remarked that in Spanish the word "conspiration" meant a conspiracy against the Government and that the English term "conspiracy" was rendered in Spanish by "*asociación*" (association) for the purpose of committing a crime.(30) The representative of Poland observed that in Anglo-Saxon law the word "complicity" extended only to "aiding and abetting" and that the offence described as "conspiracy" did not involve complicity. Poland recalled that the Secretariat draft made separate provision for complicity and conspiracy. (31) In the Sixth Committee debates, Mr Maktos of the United States of America stated that "conspiracy" had "a very precise meaning in Anglo-Saxon law; it meant the agreement between two or more persons to commit an unlawful act".(32) Mr. Raafat of Egypt noted that the notion of conspiracy had been introduced into Egyptian law and "meant the connivance of several persons to commit a crime, whether the crime was successful or not".(33)
188. For its part, the United Nations War Crimes Commission defined conspiracy as follows:

> "The doctrine of conspiracy is one under which it is a criminal offence to conspire or to take part in an allegiance to achieve an unlawful object, or to achieve a lawful object by unlawful means."(34)

5761

189. Civil Law distinguishes two types of *actus reus,* qualifying two "levels" of *'complot'* or conspiracy. Following an increasing level of gravity, the first level concerns (*le complot simple*) simple conspiracy, and the second level (*le complot suivi d'actes matériels*) conspiracy followed by material acts. Simple conspiracy is usually defined as a concerted agreement to act, decided upon by two or more persons (*résolution d'agir concertée et arrêtée entre deux ou plusieurs personnes*) while the conspiracy followed by preparatory acts is an aggravated form of conspiracy where the concerted agreement to act is followed by preparatory acts. Both forms of *'complot'* require that the following three common elements of the offence be met: (1) an agreement to act [la résolution d'agir];(35) (2) concerted wills [*le concert de volontés*]; and (3) the common goal to achieve the substantive offence [*l'objectif commun de commettre l'infraction principale*].
190. Under Common Law, the crime of conspiracy is constituted when two or more persons agree to a common objective, the objective being criminal.
191. The Chamber notes that the constitutive elements of conspiracy, as defined under both systems, are very similar. Based on these elements, the Chamber holds that conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide.
192. With respect to the *mens rea* of the crime of conspiracy to commit genocide, the Chamber notes that it rests on the concerted intent to commit genocide, that is to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Thus, it is the view of the Chamber that the requisite intent for the crime of conspiracy to commit genocide is, *ipso facto,* the intent required for the crime of genocide, that is the *dolus specialis* of genocide.(36)
193. It emerges from this definition that, as far as the crime of conspiracy to commit genocide is concerned, it is, indeed, the act of conspiracy itself, in other words, the process ("*procédé*") of conspiracy, which is punishable and not its result. The Chamber notes, in this regard, that under both Civil and Common Law systems, conspiracy is an inchoate offence ("*infraction formelle*") which is punishable by virtue of the criminal act as such and not as a consequence of the result of that act.(37)
194. The Chamber is of the view that the crime of conspiracy to commit genocide is punishable even if it fails to produce a result, that is to say, even if the substantive offence, in this case genocide, has not actually been perpetrated.
195. Moreover, the Chamber raised the question as to whether an accused could be convicted of both genocide and conspiracy to commit genocide.
196. Under Civil Law systems, if the conspiracy is successful and the substantive offence is consummated, the accused will only be convicted of the substantive offence and not of the conspiracy. Further, once the substantive crime has been accomplished and the criminal conduct of the accused is established, there is no reason to punish the accused for his mere *résolution criminelle* (criminal intent), or even for the preparatory acts committed in furtherance of the substantive offence. Therefore an accused can only be convicted of conspiracy if the substantive offence has not been realized or if the Accused was part of a conspiracy which has been perpetrated by his co-conspirators, without his direct participation.
197. Under Common Law, an accused can, in principle, be convicted of both conspiracy and a substantive offence, in particular, where the objective of the conspiracy extends beyond the offences actually committed. However, this position has incurred much criticism. Thus, for example, according to Don Stuart:

> "The true issue is not whether evidence has been used twice to achieve convictions but rather whether the fundamental nature of the conspiracy offence is best seen [...] as purely preventive, incomplete offence, auxiliary offence to the principal offence and having no true independent rationale to exist on its own alongside the full offence. On this view it inexorably follows that once the completed offence has been committed there is no justification for also punishing the incomplete offence."(38)

5762

198. In the instant case, the Chamber has adopted the definition of conspiracy most favourable to Musema, whereby an accused cannot be convicted of both genocide and conspiracy to commit genocide on the basis of the same acts. Such a definition is in keeping with the intention of the Genocide Convention. Indeed, the "*Travaux Préparatoires*" show that the crime of conspiracy was included to punish acts which, in and of themselves, did not constitute genocide. The converse implication of this is that no purpose would be served in convicting an accused, who has already been found guilty of genocide, for conspiracy to commit genocide, on the basis of the same acts.

3.3 Crime against Humanity (Article 3 of the Statute)

199. The Chamber notes that the *Akayesu* Judgement traced the historical development and evolution of crimes against humanity as far back as the Charter of the International Military Tribunal of Nuremberg.(39) The *Akayesu* Judgement also examined the gradual evolution of crimes against humanity in the cases of *Eichmann*, *Barbie*, *Touvier* and *Papon.* After consideration, the Chamber concurs with the historical development of crimes against humanity, as articulated in the *Akayesu* Judgement.

200. The Chamber notes that Article 7 of the Statute of the International Criminal Court defines a crime against humanity as any of the enumerated acts committed, as part of a widespread or systematic attack directed against any civilian population, with the Perpetrator having knowledge of the said attack. These enumerated acts are murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this article, or any other crime within the jurisdiction of the Court: enforced disappearance of persons; the crime of apartheid; other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health.(40)

Crimes against humanity, pursuant to Article 3 of the Statute of the Tribunal

201. Article 3 of the Statute confers on the Tribunal the jurisdiction to prosecute persons for acts which constitute crimes against humanity. The Chamber concurs with the reasoning in the *Akayesu* and *Rutaganda* Judgements, that offences falling within the ambit of crimes against humanity may be broadly broken down into four essential elements, namely:

(a) the *actus reus* must be committed as part of a widespread or systematic attack;

(b) the *actus reus* must be committed against the civilian population;

(c) the *actus reus* must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds;

(d) the *actus reus* must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health.(41)

5763

(a) The *actus reus* must be committed as part of a widespread or systematic attack

202. The Chamber is of the opinion that the *actus reus* cannot be a random inhumane act, but rather is an act committed as part of an attack. With regard to the nature of this attack, the Chamber notes that Article 3 of the English version of the Statute reads "as part of a widespread or systematic attack [..].", while the French version of the Statute reads "dans le cadre d'une attaque généralisée et systématique [...]". The French version requires that the attack be both of a widespread and systematic nature, while the English version requires that the attack be of a widespread or systematic nature and need not be both.
203. The Chamber notes that customary international law requires that the attack be either of a widespread or systematic nature and need not be both. The English version of the Statute conforms more closely with customary international law, and the Chamber therefore accepts the elements as set forth in Article 3 of the English version of the Statute, and follows the interpretation in other ICTR judgements, namely: that the "attack" under Article 3 of the Statute, must be either of a widespread or systematic nature and need not be both.(42)
204. The Chamber considers that "widespread", as an element of crimes against humanity, is a massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against multiple victims, while "systematic" constitutes organized action, following a regular pattern, on the basis of a common policy and involves substantial public or private resources. It is not essential for such policy to be adopted formally as a policy of a State. However, there must exist some form of preconceived plan or policy.(43) The Chamber notes that these definitions were endorsed in the *Akayesu* and *Rutaganda* Judgements.(44)
205. The Chamber notes that "attack", as an element of a crime against humanity, was defined in the *Akayesu* Judgement, as an unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute. An attack may also be non-violent in nature, such as imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, which may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.(45) The definition of "attack", as defined in the *Akayesu* Judgement, was later endorsed in the *Rutaganda* Judgement.(46) The Chamber concurs with this definition.
206. The Chamber concurs with the *Kayishema* and *Ruzindana* Judgement, which held that the perpetrator of an act falling within the ambit of crimes against humanity must have "actual or constructive knowledge of the broader context of the attack, meaning that the accused must know that his act[s] is part of a widespread or systematic attack on a civilian population and pursuant to some kind of policy or plan."(47)

(b) The *actus reus* must be committed against the civilian population

207. The Chamber notes that the *actus reus* for any of the enumerated acts in Article 3 of the Statute must be directed against the civilian population if it is to constitute a crime against humanity. In the *Akayesu* and *Rutaganda* Judgements, "civilian population", pursuant to Article 3 of the Statute, was defined as people who were not taking any active part in the hostilities.(48) The fact that there are individuals among the civilian population who themselves are not civilians does not deprive the population of its civilian character.(49) The Chamber concurs with this definition.

5764

(c) The *actus reus* must be committed on discriminatory grounds

208. The Statute stipulates that inhumane acts committed against the civilian population must be committed on "national, political, ethnic, racial or religious grounds". Discrimination on the basis of a person's political ideology satisfies the requirement of "political" grounds as envisaged in Article 3 of the Statute.
209. Inhumane acts committed against persons not falling within any one of the discriminatory categories may constitute crimes against humanity if the perpetrator's intention in committing such acts was to further his attack on the group discriminated against on one of the grounds specified in Article 3 of the Statute. The perpetrator must have the requisite intent for the commission of a crime against humanity.(50)
210. In the 15 July 1999 *Tadi* Judgement, the Appeals Chamber held that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. The Appeals Chamber ruled that discriminatory intent is an indispensable element of the offence only with regard to those crimes for which such intent is expressly required: namely, the offence of persecution, pursuant to Article 5(h) of the ICTY Statute.(51)
211. The Chamber has compared the provisions of Article 5 of the ICTY Statute with the provisions of Article 3 of the ICTR Statute. Accordingly, the Chamber notes that, although the provisions of both aforementioned Articles pertain to crimes against humanity, except for the offence of persecution, there is a material and substantial difference in the respective elements of the offences, that constitute crimes against humanity. This difference stems from the fact that Article 3 of the ICTR Statute expressly requires "national, political, ethnic, racial or religious" discriminatory grounds with respect to the offences of murder, extermination, deportation, imprisonment, torture, rape, and, other inhumane acts, whereas Article 5 of the ICTY Statute does not stipulate any discriminatory grounds with respect to these offences.

(d) The Enumerated Acts

212. Article 3 of the Statute enumerates various acts that constitute crimes against humanity, namely: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds, and other inhumane acts. This list is not exhaustive. Any act which is inhumane in nature and character may constitute a crime against humanity, provided the other elements are satisfied. This is evident in (i) which caters for all other inhumane acts not stipulated in (a) to (h) of Article 3.(52)
213. The Chamber notes that with respect to crimes against humanity, Musema is indicted for murder, extermination, rape and other inhumane acts. The Chamber, in interpreting Article 3 of the Statute, will focus its discussion on these offences only.

Murder

214. Pursuant to Article 3 (a) of the Statute, murder may constitute a crime against humanity. The Chamber notes that Article 3(a) of the English version of the Statute refers to "Murder", while the French version of the Statute refers to "Assassinat". Customary international law dictates that the offence of "Murder", and not "Assassinat", constitutes a crime against humanity.
215. In both the *Akayesu* and *Rutaganda* Judgements, murder was defined as the unlawful, intentional killing of a human being. The requisite elements of murder, as a crime against humanity, were defined as follows:

    (a) The victim is dead;

5765

(b) The death resulted from an unlawful act or omission of the Accused or a subordinate;

(c) At the time of the killing the Accused or a subordinate had the intention to kill or inflict grievous bodily harm on the deceased having known that such bodily harm is likely to cause the victim's death, and is reckless as to whether or not death ensures;

(d) The victim was discriminated against, on any one of the enumerated discriminatory grounds;

(e) The victim was a member of the civilian population;

(f) The act or omission was part of a widespread or systematic attack on the civilian population.(53)

216. The *Rutuganda* Judgement further held that the act or omission that constitutes murder must be discriminatory in nature and directed against a member of the civilian population.(54)

Extermination

217. Pursuant to Article 3 (c) of the Statute, extermination constitutes a crime against humanity. By its very nature, extermination is a crime which is directed against a group of individuals. Extermination differs from murder in that it requires an element of mass destruction, which is not a prerequisite for murder.
218. In both the *Akayesu* and *Rutaganda* Judgements, the elements of extermination were defined as follows:

(a) the Accused or his subordinate participated in the killing of certain named or described persons;

(b) the act or omission was unlawful and intentional;

(c). the unlawful act or omission must be part of a widespread or systematic attack;

(d) the attack must be against the civilian population;

(e) the attack must be on discriminatory grounds, namely: national, political, ethnic, racial, or religious grounds.(55)

219. The *Rutaganda* Judgement further held that the act or omission that constitutes extermination must be discriminatory in nature and directed against members of the civilian population. Further, this act or omission includes, but is not limited to, the direct act of killing. It can be any act or omission, or cumulative acts or omissions that cause the death of the targeted group of individuals.(56)

Rape

220. Rape may constitute a crime against humanity, pursuant to Article 3(g) of the Statute. In the *Akayesu* Judgement, rape as a crime against humanity was defined as:

5766

"[...] a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:

(a) as part of a widespread or systematic attack;

(b) on a civilian population;

(c) on certain catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds."(57)

221. The Chamber notes that, while rape has been defined in certain national jurisdictions as non-consensual intercourse, variations on the acts of rape may include acts which involve the insertions of objects and/or the use of bodily orifices not considered to be intrinsically sexual.
222. The Chamber also observes that in defining rape, as a crime against humanity, the Trial Chamber in the *Akayesu* Judgement acknowledged:

"that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts. The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment does not catalogue specific acts in its definition of torture, focussing rather on the conceptual frame work of state sanctioned violence. This approach is more useful in international law. Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."(58)

223. The Chamber notes that the definition of rape and sexual violence articulated in the *Akayesu* Judgement was adopted by the Trial Chamber II of the ICTY in its *Delalic* Judgement(59).
224. The Chamber has considered the alternative definition of rape set forth by Trial Chamber I of the ICTY in its *Furundzija* Judgement, which relies on a detailed description of objects and body parts. In this judgement the Trial Chamber looked to national legislation and noted:

"The Trial Chamber would emphasise at the outset, that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault; the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration."(60)

225. The *Furundzija* Judgement further noted that "most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body by the penis or the forcible insertion of any other object into either the vagina or the anus".(61) Nevertheless, after due consideration of the practice of forced oral penetration, which is treated as rape in some States and sexual assault in other States, the Trial Chamber in that case determined as follows:

> "183. The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law, indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape."(62)

226. The Chamber concurs with the conceptual approach set forth in the *Akayesu* Judgement for the definition of rape, which recognizes that the essence of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion.
227. The Chamber considers that the distinction between rape and other forms of sexual violence drawn by the *Akayesu* Judgement, that is "a physical invasion of a sexual nature" as contrasted with "any act of a sexual nature" which is committed on a person under circumstances which are coercive is clear and establishes a framework for judicial consideration of individual incidents of sexual violence and a determination, on a case by case basis, of whether such incidents constitute rape. The definition of rape, as set forth in the *Akayesu* Judgement, clearly encompasses all the conduct described in the definition of rape set forth in *Furundzija.*
228. The Chamber notes that in the *Furundzija* Judgement, the Trial Chamber considered forced penetration of the mouth as a humiliating and degrading attack on human dignity and largely for this reason included such conduct in its definition of rape even though State jurisdictions are divided as to whether such conduct constitutes rape.(63) The Chamber further notes, as the *Furundzija* Judgement acknowledges, that there is a trend in national legislation to broaden the definition of rape.(64) In light of the dynamic ongoing evolution of the understanding of rape and the incorporation of this understanding into principles of international law, the Chamber considers that a conceptual definition is preferable to a mechanical definition of rape. The conceptual definition will better accommodate evolving norms of criminal justice.
229. For these reasons, the Chamber adopts the definition of rape and sexual violence set forth in the *Akayesu* Judgement.

Other Inhumane Acts

230. The Chamber notes that Article 3 of the Statute provides a list of eight enumerated acts that may constitute crimes against humanity. The enlisted acts are murder, extermination, enslavement, deportation, imprisonment, torture, rape and persecution on political, racial and religious grounds. This list of acts is not exhaustive and Article 3(i) of the Statute provides for "Other inhumane Acts" that may constitute crimes against humanity.
231. The Chamber notes that the ICC Statute provides that:

> "Other inhumane acts [are acts] of a similar character [to the other specified enumerated acts] intentionally causing great suffering, or serious injury to body or to mental or physical health"(65).

5768

232. The Chamber finds that an act or omission will fall within the ambit of "Other inhumane Acts", as envisaged in Article 3(i) of the Statute, provided the nature and character of such act or omission is similar in nature, character, gravity and seriousness to the other acts, as enumerated in sub-articles (a) to (h) of Article 3. Further, the inhumane act or omission must:

(a) Be directed against member(s) of the civilian population;

(b) The perpetrator must have discriminated against the victim(s), on one or more of the enumerated discriminatory grounds;

(c) The perpetrator's act or omission must form part of a widespread or systematic attack and the perpetrator must have knowledge of this attack.

233. The Chamber agrees that the perpetrator's act(s) must be assessed "on a case-by-case basis"(66), with a view to establishing whether such act(s) fall within the ambit of "Other inhumane Acts", as envisaged in Article 3 of the Statute.

3.4. Violation of Common Article 3 and Additional Protocol II

Article 4 of the Statute

234. Pursuant to Article 4 of the Statute, the Chamber shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the four Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977.
235. According to the Statute, these violations shall include, but shall not be limited to:

a) violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

b) collective punishments;

c) taking of hostages;

d) acts of terrorism;

e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

f) pillage;

g) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;

h) threats to commit any of the foregoing acts.

Applicability of Common Article 3 of the Geneva Conventions and Additional Protocol II

5769

236. The Chamber esteems that, before discussing the elements for the above cited offences, it is necessary to comment upon the applicability of Common Article 3 and Additional Protocol II regarding the situation which existed in Rwanda in 1994 at the time of the events referred to in the Indictment.
237. In the light of the principle *nullum crimen sine lege*, the Chamber must examine whether the above-mentioned instruments, as incorporated in Article 4 of the Statute, were in force on the territory of Rwanda at the time the tragic events took place within its borders.
238. In the *Kayishema* and *Ruzindana* Judgement, Trial Chamber II adjudged, without addressing the question whether or not the instruments incorporated in Article 4 of the Statute are to be considered as customary international law, that these instruments were indisputably in force in Rwanda at the time, as Rwanda became a Party to the Conventions of 1949 on 5 May 1964 and to Protocol II on 19 November 1984. Moreover, the Trial Chamber stated that, as all the offences enumerated in Article 4 of the Statute also constituted offences under the laws of Rwanda, there was no doubt that persons responsible for the breaches of these international instruments during the events in the Rwandan territories in 1994 could be subject to prosecution(67).
239. These findings were affirmed by Trial Chamber I in the *Rutaganda* Judgement.(68)
240. In the *Akayesu* Judgement, Trial Chamber I acknowledged the binding nature of the obligation as well, but focused upon customary international law as the source of this obligation rather than treaty law. With regard to Common Article 3, the Trial Chamber held that the "norms of Common Article 3 had acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of Common Article 3"(69). This is in line with the view of both the ICTY Trial Chambers(70) and the ICTY Appeals Chamber(71) stipulating that Common Article 3 beyond doubt formed part of customary international law. In relation to Additional Protocol II, the Trial Chamber in the aforesaid *Akayesu* Judgement stated that, although not all of Additional Protocol II could be said to be customary law, the guarantees contained in Article 4(2) (Fundamental Guarantees) thereof, which reaffirm and supplement Common Article 3, form part of existing customary international law(72).
241. All of the norms reproduced in Article 4 of the Statute are covered by Article 4(2) of Additional Protocol II.
242. The Chamber therefore concludes that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and convention, attracted individual criminal responsibility and could result in the prosecution of the authors of the offences.
243. The question remains however to what extent these instruments are applicable in the instant case.

Test of applicability of Common Article 3 and Additional Protocol II

244. The Chamber having deemed Common Article 3 and Additional Protocol II, as incorporated in Article 4 of the Statute, to be in force in Rwanda at the time of the events alleged in the Indictment, the issue the Chamber must address at this stage is the material requirements of applicability of Common Article 3 and Addition Protocol II to be met for an act to be deemed a serious violation thereof.

Ratione Materiae

245. The four 1949 Geneva Conventions and Additional Protocol I thereto generally apply to *international armed conflicts*, whereas Common Article 3 to the Geneva Conventions extends a minimum threshold of humanitarian protection as well to all persons affected by a *non-*

5770

international conflict, a protection which was further developed and enhanced in the [illegible] Additional Protocol II. Offences alleged to be covered by Article 4 of the Statute must, as a primary matter, have been committed in the context of a *non-international armed conflict*, satisfying the requirements of Common Article 3 and Additional Protocol II.

Common Article 3

246. Common Article 3 applies to "armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties"(73). In absence of a general definition of non-international armed conflict, which may take very different forms, the Chamber finds it necessary to describe situations of this type in relation to the objective facts characterizing them.
247. First, a non-international conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory.
248. The expression "armed conflicts" introduces a material criterion: the existence of open hostilities between armed forces which are organized to a greater or lesser degree. Internal disturbances and tensions, characterized by isolated or sporadic acts of violence, do not therefore constitute armed conflicts in a legal sense, even if the government is forced to resort to police forces or even armed units for the purpose of restoring law and order. Within these limits, non-international armed conflicts are situations in which hostilities break out between armed forces or organized armed groups within the territory of a single State.(74)
249. Having defined the term in an abstract manner, to the Chamber it is apparent that whether a conflict meets the criteria of Common Article 3 is to be decided on a case by case basis.
250. In dealing with this issue, the *Akayesu* Judgement suggested an 'evaluation test' whereby the Trial Chamber evaluated the intensity and organization of the parties to the conflict to make a finding on the existence of an armed conflict not of an international character(75).
251. This approach, followed as well in the *Rutaganda* Judgement, finds favour with the Trial Chamber of this instance.

Additional Protocol II

252. As aforesaid, Common Article 3 does not in itself define "armed conflict not of an international character". Before the elaboration of Additional Protocol II, the absence of clarity on this concept gave rise to a great variety of interpretations and in practice its applicability was often denied.(76) In order to reinforce and improve the protection granted to victims of non-international armed conflict the Additional Protocol II was adopted in 1977, giving a number of objective criteria which would not be dependent on the subjective judgements of the parties. Additional Protocol II, in other words, develops and supplements the brief rules contained in Common Article 3 without modifying its existing conditions of application. As a result, in circumstances where the material requirements of applicability of Protocol II are met, it is self-evident that they also satisfy the threshold requirements of the broader Common Article 3.
253. Additional Protocol II applies to "all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. The Protocol explicitly does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being

5971

armed conflicts."(77)

254. Thus the conditions to be met to fulfil the material requirements of applicability of Additional Protocol II at the time of the events alleged in the Indictment would entail showing that:

- an armed conflict took place in Rwanda, between its armed forces and dissenting armed forces or other organized armed groups;
- the dissident armed forces or other organized armed groups were:
    - -under responsible command;
    - -able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
    - -able to implement Additional Protocol II.

255. The Protocol applies automatically as soon as the material conditions as defined in the Article are fulfilled. However, prior to the making of a finding thereon, this Chamber deems it necessary to make a number of precisions as regards the said criteria.

256. The concept of armed conflict has already been discussed under the above section pertaining to Common Article 3. It is sufficient to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict. Under Additional Protocol II, the parties to the conflict will usually either be the government confronting dissident armed forces, or the government fighting insurgent organized armed groups. The term "armed forces" of the High Contracting Party should be understood in the broadest sense, so as to cover all armed forces as described within national legislation.(78)

257. Furthermore, the armed forces opposing the government must be under responsible command. This requirement implies some degree of organization within the armed groups or dissident armed forces, but this does not necessarily mean that there is a hierarchical system of military organization similar to that of regular armed forces. It means an organization capable of, on the one hand, planning and carrying out sustained and concerted military operations- operations that are kept up continuously and that are done in agreement according to a plan, and on the other, of imposing discipline in the name of the *de facto* authorities(79).

258. In addition to this, these dissident armed forces must be able to dominate a sufficient part of the territory so as to maintain these sustained and concerted military operations and the insurgents must be in a position to implement this Protocol(80).

The nexus between the crime and the armed conflict

259. The Chamber must also be satisfied that there is a link or nexus between the offence committed and the armed conflict for Article 4 of the Statute to apply.

260. In other words, the alleged crimes, referred to in the Indictment, must be closely related to the hostilities or committed in conjunction with the armed conflict.

261. The *Akayesu* Judgement addressed this subject stating that the acts perpetrated by the accused had to be "[...] acts, committed in conjunction with the armed conflict".(81)

262. In the *Rutaganda* Judgement it was held that the term nexus should not be defined *in abstracto*. Rather, the evidence adduced in support of the charges against the accused must satisfy the Chamber that such a nexus exists. Thus, the burden rests on the Prosecutor to prove beyond a reasonable doubt, that, on the basis of the facts, such a nexus exists between the crime committed and the armed conflict(82). This approach finds favor with the Chamber in this instance.

Ratione personae

5772

263. Two distinct issues arise with respect to personal jurisdiction over serious violations of Common Article 3 and Additional Protocol II; the class of perpetrators and the class of victims.

The class of perpetrators

264. Under Common Article 3 of the Geneva Conventions, the perpetrator must belong to a "Party to the conflict", whereas under Additional Protocol II(83) the perpetrator must be a member of the "armed forces" of either the government or of the dissidents.
265. Neither the Geneva Conventions nor the Additional Protocols give an exact definition of "Party to the conflict" or "armed forces". Taken literally, the duties and responsibilities of the Geneva Conventions and the Additional Protocols will only apply to individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties.
266. In the *Akayesu* Judgement, the Chamber, however, expressed the opinion that, due to the overall protective and humanitarian purpose of these international legal instruments, the delimitation of this category of persons bound by the provisions in Common Article 3 and Additional Protocol II should not be too restricted.(84) Indeed, according to the Judgement, a too restrictive definition of these terms would dilute the protection afforded by these instruments to the victims and potential victims of armed conflicts. Hence, in the opinion of the Trial Chamber, the categories of persons covered by these terms should not be limited to individuals of all ranks belonging to the armed forces under the military command of either belligerent parties but should be interpreted in their broadest sense, to include individuals who are legitimately mandated and expected as public officials or agents or persons otherwise holding public authority *de facto* representing the Government to support or fulfil the war efforts. This was affirmed in both the *Rutaganda* Judgement and the *Kayishema* and *Ruzindana* Judgement.
267. It could be objected that the Accused, as a civilian, cannot be considered as being a member of the "armed forces" (in the broadest sense).
268. Yet, jurisprudence on this issue emanating from both the Nuremberg and Tokyo Tribunals and from the ICTR clearly established that civilians can be held responsible for violations of international humanitarian law committed in an armed conflict. The Nuremberg and Tokyo Tribunals, however, dealt with the matter in the context of an international armed conflict, while in the instant case, the question arises in the context of an internal conflict.
269. Nevertheless, the Chamber, in cognisance of the importance and relevance of these trials with respect to the instant case, deems it necessary to review such decisions prior to making its findings thereon.
270. In the *Zyklon B case*, the decision of the British military court was a clear example of the application of the rule that the provisions of the laws and customs of war are addressed not only to combatants and to members of State and other public authorities, but to anybody who is in a position to assist in their violation. The military court, who sentenced two civilians, Tech-the owner of a gas company- and Weinbacher-his second in command-, to death, (85) acted on the principle that any civilian who is as accessory to a violation of the laws and customs of war is himself liable as a war criminal.(86)
271. In the *Essen Lynching Case*, three civilians -Braschoss, Kaufer and Boddenberg- were found guilty of the killing of unarmed prisoners of war, because they had taken part in the ill-treatment of which eventually led to the death of the victims.(87)
272. In the *Hadamar Trial* decision, another application was given of the rule that the provisions of laws and customs of war are addressed not only to combatants but also to civilians, and that civilians, by committing illegal acts against nationals of the opponent, may become guilty of war crimes. *In Casu*, part of the staff of a civilian institution - a sanatorium were found guilty for killing allied nationals by means of injections.(88)
273. These principles were also followed in Tokyo by the International Tribunal for the Far East, that

5773

accused Hirota, the former Foreign Minister of Japan, of various violations of war crimes.

274. So it is well-established that the post-World War II Trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favoured by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities."(89)

275. Therefore, the Chamber concludes that the Accused could fall in the class of individuals who may be held responsible for serious violations on international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II.

The class of victims

276. Common Article 3(1) of the Geneva Conventions states that protection must be afforded to "persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat"*. Article 4 of Additional Protocol II refers to "all persons who do not take a direct part in the hostilities or who have ceased to take part in the hostilities".

277. Article 50 of Additional Protocol I stipulates in its first paragraph that "a civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol." Each of these Articles enumerates the various types of combatants.

278. On this basis, the ICRC concluded that: "thus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces or placed *hors de combat*".(90)

279. Pursuant to Article 13(2) of the Additional Protocol II, the civilian population, as well as individual civilians, shall not be the object of attack. However, if civilians take a direct part in the hostilities, they then lose their right to protection as civilians *per se* and could fall within a class of perpetrators. To take a 'direct' part in the hostilities means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.

280. The Chamber considers, following the findings of the *Rutaganda* Judgement, that a civilian shall be anyone who falls out with the categories of "perpetrator" developed *supra,* namely individuals of all ranks belonging to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts. The class of civilians thus broadly defined, it will be a matter of evidence on a case by case basis whether a victim has the status of civilian.

281. Concerning this issue, the Chamber recalls that, from a reading of the Indictment, the victims were all allegedly civilians, being usually men, women and children seeking refuge from the massacres.

Ratione loci

282. Having commented upon the criteria *ratione materiae* and *ratione personae*, the Chamber will now evaluate if the criteria of *ratione loci* are met.

283. In spite of the fact that there is no clear provision on the applicability *ratione loci* either in Common Article 3 or Additional Protocol II, the protection afforded to individuals by these instruments applies throughout the territory of the State where the hostilities are occurring, once the objective material conditions for applicability of the said instruments have been satisfied. Indeed, from that moment, persons affected by the conflict are covered by the Protocol wherever they are in the territory of the State engaged in conflict.(91)

5774

284. This approach was confirmed in the *Akayesu* Judgement(92), the *Rutaganda* Judgement(93) and the *Tadic* Judgement(94) (with regard in particular to Common Article 3), which all conclude that Common Article 3 and Additional Protocol II apply in the whole territory where the conflict is occurring and are not limited to the "war front" or to the "narrow geographical context of the actual theater of combat operations".

Specific violation

285. Musema is charged under Count 8 and 9 of the Indictment for violations of Articles 3 Common to the 1949 Geneva Conventions and of Additional Protocol II thereof, in violation of Articles 4(a) and (e) of the Tribunal's Statute . If all the requirements of applicability of Article 4 of the Statute as developed *supra* are met, the onus is on the Prosecutor to then prove that the alleged acts of the accused constituted the required *actus reus* and *mens rea* of 4Articles 4(a) and (e) of the Statute.

Required elements of Article 4 (a) of the Statute of the Tribunal

a) *Murder*: The specific elements of murder are stated in Section 3.3. on Crime against Humanity in the Applicable Law.

b) *Torture*: Intentionally inflicting severe pain or suffering, whether physical or mental, on a person for such purposes as obtaining from him or a third person information or a confession, or punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering only arising form, inherent in or incidental to, lawful sanctions.

c) *Mutilation*: causing severe physical injury or damage to victims.

Required elements of Article 4 (e) of the Statute of the Tribunal

a) *Humiliating and degrading treatment*: Subjecting victims to treatment designed to subvert their self-regard. Like outrages upon personal dignity, these offences may be regarded as a lesser forms of torture; moreover ones in which the motives required for torture would not be required, nor would it be required that the acts be committed under state authority.

b) *Rape*: The specific elements of rape are stated in Section 3.3. on Crime against Humanity in the Applicable Law.

c) *Indecent assault*: The accused caused the infliction of pain or injury by an act which was of a sexual nature and inflicted by means of coercion, force, threat or intimidation and was non-consensual.

The violation must be serious

286. Article 4 of the Statute states that "The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Common Article 3 and of the Additional Protocol II ". The Trial Chamber in the *Akayesu* Judgement understood, in

5775

line with the Appeals Chamber Decision in *Tadic*(95) that the phrase "serious violation" means "a breach of a rule protecting important values which must involve grave consequences for the victim"(96).

287. The list of serious violations provided in Article 4 of the Statute is taken from Common Article 3 of the Geneva Conventions and of Additional Protocol II, which outline "Fundamental Guarantees"as a humanitarian minimum of protection for war victims. The list in Article 4 of the Statute thus comprises serious violations of the fundamental humanitarian guarantees which, as has been stated above, are recognised as customary international law.
288. In the opinion of the Chamber, violations of these fundamental humanitarian guarantees, by their very nature, are therefore to be considered as serious.

3.5 Cumulative charges

289. The Accused, by his alleged acts in relation to the events described in paragraphs 4.1 to 4.11 of the Indictment, is cumulatively charged with eight counts. Assuming that the Chamber is satisfied beyond a reasonable doubt that a specific act alleged in the Indictment was committed and that several legal characterizations under different counts have been established, it should adopt only a singular legal characterization given to such act, or whether it may the Chamber may find the Accused guilty of all the counts arising from the said act.
290. The Chamber notes that the principle of cumulative charges was applied by the Nuremberg Tribunal, especially regarding war crimes and crimes against humanity.(97)
291. Regarding the concurrence of the various crimes covered under the Statute, the Chamber, in the *Akayesu* Judgement, held that:

> "[...] it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, [...]or (b) where one offence charges accomplice liability and the other offence charges liability as a principal."(98)

292. Trial Chamber II of the Tribunal, in its *Kayishema* and *Ruzindana* Judgement, endorsed the afore-mentioned test of concurrence of crimes and found that it is only acceptable:

> "(1) where offences have differing elements, or (2) where the laws in question protect differing social interests."(99)

293. Trial Chamber II ruled in the *Kayishema* and *Ruzindana* Judgement that the cumulative charges were legally improper and untenable. It found that in that particular case all elements including the *mens rea* element requisite to show genocide, extermination and murder, and the evidence relied upon to prove the alleged commission of the crimes, were the same. Furthermore, in the opinion of Trial Chamber II, the protected social interests were also the same. Therefore, it held that the Prosecutor should have charged the Accused in the alternative.(100)
294. Judge Tafazzal H. Khan, one of the Judges sitting in Trial Chamber II to consider the said case, expressed a dissenting opinion on the application of the issue of cumulative charges. Relying on consistent jurisprudence he pointed out that the Chamber should have placed less emphasis on the

5776

overlapping elements of the cumulative crimes.

> "What must be punished is culpable conduct; this principle applies to situations where the conduct offends two or more crimes, whether or not the factual situation also satisfies the distinct elements of the two or more crimes, as proven."(101)

295. In his dissenting opinion, the Judge goes on to emphasize that the full assessment of charges and the pronouncement of guilty verdicts are important in order to reflect the totality of the accused's culpable conduct.

> "[...] where the culpable conduct was part of a widespread and systematic attack specifically against civilians, to record a conviction for genocide alone does not reflect the totality of the accused's culpable conduct. Similarly, if the Majority had chosen to convict for extermination alone instead of genocide, the verdict would still fail to adequately capture the totality of the accused's conduct."(102)

296. This Chamber fully concurs with the dissenting opinion thus entered. It notes that this position, which endorses the principle of cumulative charges, also finds support in various decisions rendered by the ICTY. In the case of the *Zoran Kupreskic and others*, the Trial Chamber of the ICTY in its decision on Defence challenges to form of the indictment held that:

> "The Prosecutor may be justified in bringing cumulative charges when the articles of the Statute referred to are designed to protect different values and when each article requires proof of a legal element not required by the others."(103)

297. Furthermore, the Chamber holds that offences covered under the Statute - genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II - have disparate ingredients and, especially, that their punishment is aimed at protecting discrete interests. As a result, multiple offences may be charged on the basis of the same acts, in order to capture the full extent of the crimes committed by an accused.

298. Finally, the Chamber notes that in Civil Law systems, including that of Rwanda, there a rule of *concours idéal d'infractions* which allows multiple charges for the same act under certain circumstances. Rwandan law allows multiple charges in the following circumstances:

> 'Penal Code of Rwanda: Chapter VI - Concurrent offences:
>
> Article 92: Where a person has committed several offences prior to a conviction on any such charges, such offences shall be concurrent.
>
> Article 93: Notional plurality of offences occurs:
>
> 1. Where a single conduct may be characterized as constituting several offences;
>
> 2. Where a conduct includes acts which, though constituting separate offences, are interrelated as deriving from the same criminal intent or as constituting lesser included offences of one another.
>
> 3. In the former case, only the sentence prescribed for the most serious offence shall be passed while, in the latter case, only the sentence provided for the most severely punished

offence shall be passed, the maximum of which may be exceeded by half."

299. Consequently, in light of the foregoing, notably of the *Akayesu* and *Rutaganda* Judgements, the Chamber maintains that it is justified to convict an accused of two or more offences for the same act under certain circumstances.

1. The *Akayesu* Judgement

2. Judgement of the International Criminal Tribunal for the Former Yugosalvia, Case No.: IT -94-1-T, 7 May 1997.

3. Judgement of the International Criminal Tribunal for the Former Yugoslavia, Case No.: IT 96-21-T, The Prosecutor versus Zejnil Delalic, Zdravko Mucic, Hazim Delic, Esad Landzo, "The Celebici Case",16 November 1998.

4. The *Kayishema* and *Ruzindana* Judgement.

5. The *Rutaganda* Judgement

6. *Akayesu* Judgement, para. 562.

7. Claude Pilloud et al., "Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949", 1987, p. 1012.

8. Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, reprinted in R. John Pritchard and Sonia Magbanua Zaide (ed), the Tokyo War Crimes Trials,Vol. 20, Garland Publishing : New York and London 1981, Edition Garlands (Tokyo Trials Official Transcripts) 49, 791.

9. *Celebici Judgement*, para. 214.

10. The Prosecutor v. Milan Martic, Case No.: ICTR 95-11-1, 8 March 1996.

11. Tokyo Trial Official Transcript, pp. 49 820-21.

12. See Kai Ambos, *Individual Criminal Responsibility in International Criminal Law*, in G. K. McDonald/o. Swaak Goldman, Substantive and Procedural Aspects of International Criminal Law (1999, forthcoming).

13. The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Herman Roechling and Others, Law Reports, Vol. XIV, Appendix B, p. 1075, para. 1092.

14. Ibid, Law Reports, Vol. XIV, Appendix B, p.1097, para. 1106.

15. Commentary to the Additional Protocols, n.9

16. The ICRC commentary to the Protocol makes it clear that "superior" refers to civilian as well as military leaders. "It should not be concluded that this provision [Article 86] only concerns the commander under whose direct orders the subordinate is placed. The role of commanders as such is

5778

dealt with in Article 87 (Duty of Commanders). The concept of a superior is broader and should be seen in terms of a hierarchy encompassing the concept of control." Yves Sandoz and al. Ed., 1987.

17. Analysis of the Additional Protocols to the Geneva Conventions of 12 August 1949, p. 1-86-1

18. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the United Nations General Assembly on 9 December 1948.

19. Secretary-General's Report pursuant to para. 2 of Resolution 808 (1993) of the Security Council, 3 May 1993, S/25704.

20. Legislative Decree of 12 February 1975, Official Gazette of the Republic of Rwanda, 1975, p.230. Rwanda acceded to the Genocide Convention but stated that it shall not be bound by Article 9 of this Convention.

21. Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly.

22. *Akayesu* Judgement, para. 523.

23. *Rutaganda* Judgement, para. 63.

24. In this regard, the Chamber notes that, in the *Akayesu* Judgement, the Trial Chamber, having made this observation on the applicable law and having found Jean-Paul Akayesu guilty of the crime of genocide for certain acts, therefore found him not guilty of the crime of complicity in genocide for the same acts.

25. See, for example, Article 46 of the Senegalese Penal Code, Article 121-7 of the *Nouveau code pénal français* (New French Penal Code). It should be noted that the Rwandan Penal Code includes two other forms of participation, namely, incitement to commit a crime through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, and complicity by harbouring or aiding a criminal.

26. See the conclusions of the Chamber on the *dolus specialis* of genocide, Section 3.2.2 of the Judgement.

27. *See* Summary Records of the meetings of the Sixth Committee of the General Assembly, 21 September - 10 December 1948, Official Records of the General Assembly.

28. Note by the Secretariat (1948) 8.

29. *See* UN Doc E/AC. 25/SR.16, p.4 (USA).

30. *See* UN Doc E/AC. 25/SR.16, p.5.

31. *See* UN Doc E/A.25/SR.16, p.5.

32. *See* Sixth Committee Report art. III(b), at 10.[Lippman (1994) 40].

33. *Id.*

34. United Nations War Crimes Commission (1948) 196.

35. According to the French *Cour de Cassation,* the agreement to act shall consist of a well-decided and positive will to act in relation to the common goal to commit the substantive offence.

36. *See supra* the Chamber's findings with respect to the *mens rea* of the crime of genocide, or the *dolus specialis*.

37. The crime of conspiracy to commit genocide is to that extent akin to the crime of direct and public incitement to commit genocide. In its findings on the crime of incitement to commit genocide in paragraph 52 of the *Akayesu* Judgement, the Chamber stated with respect to inchoate offences that: "[...] In the opinion of the Chamber, the fact that such acts are in themselves particularly dangerous because of the high risk they carry for society, even if they fail to produce results, warrants that they be punished as an exceptional measure. The Chamber holds that genocide clearly falls within the category of crimes so serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.

38. Don Stuart, *Canadian Criminal Law: a Treatise*, 1995, 3rd edition, p. 647.

39. *See Akayesu* Judgement, para. 563 to 576.

40. *See* Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court on 17 July 1998.

41. *See Akayesu* Judgement, para. 578; *Rutaganda* Judgement, para. 66.

42. *See Akayesu* Judgement, fn 144, *Kayishema* and *Ruzindana* Judgement, fn 63 and *Rutaganda*; para. 68.

43. Report on the International Law Commission to the General Assembly, 51 U.N. GAOR Supp. (No 10) at 94 U.N.Doc. A/51/10 (1996)

44. *See Akayesu* Judgement, para. 580 and *Rutaganda* Judgement, para. 69.

45. *See Akayesu* Judgement, para. 581.

46. *See Rutaganda* and Judgement, para. 70.

47. *Kayishema and Ruzindana* Judgement, para. 134.

48. *See Akayesu* Judgement, para. 582; *Rutaganda* Judgement, para. 72.

49. *See* Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict; Article 50.

50. *See Akayesu* Judgement, para 584; *Rutaganda* Judgement, para. 72.

51. *See* 15 July 1999 *Tadi* Judgement of the Appeals Chamber, para. 305.

52. *See id.* para. 585.

53. *See Akayesu* Judgement, para. 589 and 590.

54. *See Rutaganda* Judgement, para. 81.

55. *Akayesu* Judgement, para. 589 and 590;*Rutaganda* Judgement, para.83.

56. *See Rutaganda* Judgement, para. 81.

57. *Id.* para. 598.

58. *Akayesu* Judgement, para. 597.

59. *See Delalic* Judgement, para. 478-9.

60. *See Furundzija* Judgement, para. 179.

61. *Id.* para. 181.

62. *Id.* para. 183

63. *Id.* para. 184-6.

64. *Id.*. para. 179.

65. Rome Statute of the International Criminal Court, Article 7(k).

66. *See Kayishema* and *Ruzindana* Judgement, para. 151.

67. *See Kayishema* and *Ruzindana* Judgement para. 156-158.

68. *See Rutaganda* Judgement, para. 90.

69. *See Akayesu* Judgement, para. 608.

70. *See* ICTY *Tadi* Judgement (7 May 1997).

71. *See* "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" (2 October 1995).

72. *See Akayesu* Judgement, para. 610.

73. Common Article 3 states:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in hostilities, including members of armed forces who have laid down

their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d)the passing of sentences and the carrying out of executions without previous judgement pronounced by a regular constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and the sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreement, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

74. *See* ICRC Commentary on Additional Protocol II, para. 4338-4341.

75. *See Akayesu* Judgement, para. 619-620.

76. *See* ICRC Commentary on the Additional Protocols of June 1977 to the Geneva Conventions of 12 August 1949, para. 4448.

77. *See* Article 1 of the Additional Protocol II.

78. *See* ICRC Commentary on the Additional Protocol, para. 4460-4462.

79. *See* ICRC Commentary on the Additional Protocol, para. 4463.

80. *Ibid.*, para. 4464-4471.

81. *See Akayesu* Judgement, para. 643.

82. *See Rutaganda* Judgement, para 102-103. The findings on this matter are in line with the findings of the *Kayishema* and *Ruzindana* Judgement, para. 188.

83. *See* Article 1(1) of the Additional Protocol II.

84. *See Akayesu* Judgement, para. 630 to 634.

85. *See* LRTWC, Vol. I. p. 103.

86. *See* LRTWC, Vol.I, p. 103.

87. *See* LRTWC,Vol. I. p.88.

88. *See* LRTWC, Vol. I, o. 46-55.

89. *See Akayesu* Judgement para. 633

90. *See* ICRC Commentary on the Additional Protocols, p.610, section 1913.

91. *See* ICRC Commentary on Additional Protocol II, para. 4490.

92. *See Akayesu* Judgement para. 635-636.

93. *See Rutaganda* Judgement, para. 104.

94. *See* ICTY "Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction" (2 October 1995), para. 69.

95. *See* " Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction" (2 October 1995), para. 94.

96. *See Akayesu* Judgement, para. 616.

97. The indictment against the major German War Criminals presented to the International Military Tribunal stated that "the prosecution will rely upon the facts pleaded under Count Three (violations of the laws and customs of war) as also constituting crimes against humanity (Count Four)." Several accused persons were convicted of both war crimes and crimes against humanity. The judgement of the International Military Tribunal delivered at Nuremberg on 30 September and 1 October 1946 ruled that "[...]from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity." The commentary on the *Justice* case held the same view: "It is clear that war crimes may also constitute crimes against humanity; the same offences may amount to both types of crimes." The trials on the basis of Control Council Law No. 10 followed the same approach. *Pohl, Heinz Karl Franslau, Hans Loerner,* and *Erwin Tschentscher* were all found to have committed war crimes and crimes against humanity. National cases, such as *Quinn v. Robinson*, the *Eichmann* case and the *Barbie* case also support this finding. In the *Tadi* case, Trial Chamber II of ICTY, based on the above reasoning, ruled that "acts which are enumerated elsewhere in the Statute may also entail additional culpability if they meet the requirements of persecution." Thus, the same acts, which meet the requirements of other crimes--grave breaches of the Geneva Conventions, violation of the laws or customs of war and genocide, may also constitute the crimes against humanity for persecution.

98. *Akayesu* Judgement, para.468.

99. *Kayishema* and *Ruzindana* Judgement, para. 627.

100. *Kayishema* and *Ruzindana* Judgement, para. 645, 646 and 650.

101. *Kayishema* and *Ruzindana* Judgement, "Separate and Dissenting Opinion of Judge Tafazzal Hossain Khan Regarding the Verdicts Under the Charges of Crimes Against Humanity/Murder and Crimes Against Humanity/Extermination", para. 13.

5783

102. *Ibid.* para.33.

103. The Prosecutor v. Zoran Kupreskic and others, "Decision on Defence Challenges to Form of the Indictment", IT-95-16-PT, (15 May 1998).

5784

4. THE DEFENCE CASE

4.1 General admissions

4.2 The alibi

4.3 Further arguments

300. Musema pleaded not guilty to all counts of the initial Indictment at his initial appearance on 18 November 1997. Following amendments to the Indictment, Musema, on 20 November 1998 and 6 May 1999, pleaded not guilty to the new charges.

301. The Defence case comprised three general arguments:

1. that the Prosecution did not discharge its burden of proving Musema guilty;

2. that the Prosecution did not present sufficient evidence to satisfy the Chamber beyond reasonable doubt of Musema's guilt; and

3. that the Prosecution did not rebut the Defence alibi[(1)].

302. In support of these arguments, the Defence made a number of admissions and presented a defence of alibi as well as a number of further arguments. These are dealt with separately in the sections that follow.

4.1 General admissions

303. Musema made the following admissions pertaining to paragraphs 4.1-4.5, 4.9 and 4.11 of the Indictment.

Paragraph 4.1 of the Indictment

304. During the events referred to in the Indictment, Rwanda was divided into eleven *Préfectures*: Butare, Byumba, Cyangugu, Gikongoro, Gisenyi, Gitarama, Kibungo, Kibuye, Kigali-Ville, Kigali-Rural and Ruhengeri. Each *préfecture* was subdivided into *communes* which were divided into *secteurs,* and each *secteur* was divided into *cellules*.

Paragraph 4.2 of the Indictment

305. During the events that occurred in Rwanda between 1 January and 31 December 1994, the Hutus, the Tutsis and the Twas were respectively identified as racial or ethnic groups.

Paragraph 4.3 of the Indictment

306. On 6 April 1994, the plane carrying, among other passengers, the President of the Republic of Rwanda, Juvénal Habyarimana, was shot down on its approach to Kigali airport. In the hours that followed the crash of President Habyarimana's plane, violence set in and the massacres began in Kigali and in other *préfectures* in the country, marking the beginning of the genocide.

Paragraph 4.4 of the Indictment

5785

307. From about 9 April 1994 through 30 June 1994, thousands of men, women and children sought refuge in various locations in Bisesero. These men, women and children were predominantly Tutsis and were seeking refuge from attacks on Tutsis which had occurred throughout the *préfecture* of Kibuye. The area of Bisesero spans over two *communes* in Kibuye *Préfecture*.

Paragraph 4.5 of the Indictment

308. The individuals seeking refuge in the area of Bisesero were regularly attacked, throughout the period beginning on or about 9 April 1994 and ending on or about 30 June 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero. The attacks resulted in thousands of deaths and numerous injuries to men, women and children within the area of Bisesero.

Paragraph 4.9 of the Indictment

309. By 13 May 1994, Tutsi civilians had sought refuge at Muyira hill located in Gisovu *Commune*, Rwamkuba *Secteur*. Musema further admits that a major attack against these Tutsi civilians occurred on 13 May 1994 at Muyira hill.
310. On 13 May 1994 at Muyira Hill, genocide was committed against the Tutsi population. Musema also admits that on the same day at Muyira Hill, murder, extermination and other inhumane acts occurred as part of a widespread or systematic attack against a civilian population on ethnic grounds.

Paragraph 4.11 of the Indictment

311. The interim government, sworn in on 9 April 1994 and composed solely of prominent Hutus, espoused the objective of extermination of Tutsis. Members of the interim government incited the population to eliminate "the enemy"and its "accomplices". Musema admits that some members of the interim government participated directly in the massacres. During the genocide, the FAR, particularly units of the Presidential Guard, the Para-Commando Battalion and Reconnaissance Battalion, in complicity with militia men, actively participated in the massacres of the Tutsi population throughout Rwanda.
312. In the years following independence, the political scene was dominated by people identified as Hutus. Those identified as Tutsis were excluded from senior positions in the civil service and the army.
313. Musema admits there were ethnic confrontations between the Hutus and Tutsis and that there was a mass exodus of the Tutsi minority from Rwanda into neighbouring countries. On several occasions individuals perceived and identified as Tutsis were the targets of oppressive treatment. For instance, a few days following the invasion of Rwanda on 1 October 1990 by the FPR (made up mainly of Tutsi refugees), Tutsi and any Hutu political opponents characterized as FPR accomplices were arrested by the MRND Habyarimana regime. Between 1990 and April 1994, according to Musema, the same regime assassinated certain political opponents and massacred many Tutsi civilians in the rural areas. The interim government that was established after Habyarimana's death was characterized by Hutu extremism and overt incitement to extermination of Tutsis and of the enemy and its accomplices. Prominent figures close to Habyarimana carried out propaganda campaigns via the radio and the press with the intention of ensuring widespread dissemination of hate propaganda, calls to ethnic violence, and extermination of Tutsis and their accomplices. The MRND party also organized and trained youth wings of the ethnically founded political parties, notably the *Interahamwe* (the youth wing of the MRND). The interim government executed the objective of exterminating the Tutsis and their accomplices by inciting the public to exterminate the Tutsis and their accomplices.

5786

314. The military and militiamen set up roadblocks throughout Kigali. At the roadblocks, the identity cards of anyone wishing to pass were checked, and people were killed. Military patrols, often involving militia men, scoured the city to execute Tutsis and certain political opponents. Musema admits that all along the road from Kigali to Gitarama there were road blocks manned by individuals, some of whom were drunk, armed with machetes and other weapons. He admits that he saw many bodies by the road side and witnessed pillaging. Musema admits that the people who were killed at the roadblocks were so killed because they were accused of being *Inyenzi*, because they were Tutsis, or because they looked Tutsi.
315. The incitement to ethnic hatred took the form of public speeches by people sharing the extremist ideology.
316. During the months of April, May, and June 1994, in *Gisovu* and *Gishyita communes*, *Kibuye Préfecture*, in the Territory of Rwanda, genocide was committed against the Tutsi population. Musema admits that between 1 January and 31 December 1994, throughout Rwanda, there were widespread or systematic attacks, which were directed against a civilian population on the grounds of political persuasion, ethnic affiliation, and racial origin.

4.2 The Alibi

317. The Defence Case included the submission of an alibi defence. The Defence alleged that Musema was in locations other than those alleged to be crime sites, or was involved in activities other than those alleged during the times at which the crimes specified in the Indictment were allegedly committed. To support these claims, the Defence relied on three sources of evidence:

    (a) the testimony of the Accused, supported by documentary evidence;

    (b) the testimony of Defence Witnesses in support of the testimony of Musema;

    (c) the testimony of Witnesses which tended to confirm the authenticity of certain documents.

318. The Chamber has already addressed the legal requirements of a defence of alibi(2).
319. The arguments raised by the Defence in relation to the alibi were of two forms. Firstly, concerning the content of the alibi; secondly, in response to the Prosecutor's rebuttal of the alibi.

4.2.1 The content of the alibi

The whereabouts of Alfred Musema from 6 to 14 April 1994

320. Defence counsel argued that Musema was absent from the Tea Factory on 6 April 1994 and on subsequent days. This is based on a number of documents, including letters sent by Musema during that period to Rwagapfizi and Pletscher(3). Musema testified that he was in Kigali, at the *OCIR-Thé*, from 1 to12 April, in Gitarama from 12 to13 April, in Rubona from 13 to14 April, and in Gisovu from 14 to 17 April. The Defence argued that even if Musema were present at the Gisovu Tea Factory at the time of the alleged crimes, this itinerary reveals that as Musema was not present in the early stages, he did not inspire the atrocities which had already begun.
321. Mrs Claire Kayuku, wife of Musema, testified that he was with the family in their house in Remera, Kigali, from 6 April to 12 April. She stated that they left Kigali on the afternoon of 12 April for Butare, but, due to difficulties at roadblocks, stayed a night in Gitarama. She stated that they left Gitarama on the afternoon of the next day, 13 April, and went to her mother's home in Rubona, 15 kilometres north of Butare.

5787

The whereabouts of Alfred Musema from 14 to 22 April 1994

322. Musema testified that he went to the Gisovu Tea Factory on 14 April, 1994, with one soldier. Upon arrival he saw a number of bodies of employees and their families, including the body of the Chief Accountant, at the factory.
323. Musema testified that he spent 15 April at the tea factory until early 17 April when, learning that the factory was being attacked, he fled towards Butare and then to Rubona. Musema remained in Rubona until 22 April, except for two day-trips to Gitarama on 18 and 21 April, where he met with the Minister of Industry, Trade and Handicrafts and was told that he would be sent on a mission to contact the director-general of *OCIR-Thé*.
324. Claire Kayuku testified that Musema was with the family in Rubona on 13 April. On 14 April he went to Butare to look for an escort, returning very early on 16 or 17 April, having, in the meantime, visited the Gisovu Tea Factory. Musema told her that Annunciata was killed while he was at the factory.

The whereabouts of Alfred Musema from 22 April until the end of April 1994

325. The Defence Counsel submitted as evidence the *Ordre de Mission* of 21 April (*Annex B*), discovered at the Gisovu Tea factory by the Swiss *Juge* in 1995(4). The Defence claimed that this document confirms the activities of Musema between 22 April and 7 May. Musema agreed that the documents referred to and the actual mission did not follow regular procedure, but stated that the *deplacement* of the government, and the unknown whereabouts of the *OCIR-Thé* Director-General, occurred as a result of the prevailing security situation in April 1994.
326. Further documents support that Musema undertook a mission to different tea factories, such as Pfunda Tea Factory in Gisenyi *Préfecture,* between 22 to 25 April(5). He testified, supported by documentary evidence, that he remained in Rubona during 26 to 29 April, visiting Kitabi Factory on 28 April(6). Reports from meetings of 29 and 30 April from Gisovu Tea Factory indicate that Musema was at the factory as part of his mission, and that he presented an authorisation to travel, dated 30 April, from the *Préfet* of Kibuye(7). The Defence Counsel argued that was this document a forged document, Musema would not have mentioned his presence at Gisovu during this time period. Other documents also provide evidence of Musema's presence in Gisovu until 2 May(8).
327. Claire Kayuku testified that her husband was in Rubona between 16 April and 22 April, travelling once or twice in that period to Gitarama, but spending every night at home in Rubona. According to her, Musema left for Gisenyi *Préfecture* on 22 April. He returned on 26 April.

The whereabouts of Alfred Musema in early to mid May 1994

328. Musema presented further documentary material, and oral testimony in support of his alibi defence for the month of May, 1994. The Defence submitted that between 3 May and 19 May, Musema visited Rubona, Butare, and Gitarama. The *Ordre de Mission* has stamps dated 3-5 May from Shagasha and Gisakura Tea Factories, and from Mata Tea Factory 7 May(9). Musema testified that he spent from 5 to 19 May in Rubona, making one day trip to Mata 7 May, and that during such period he never set a foot near Kibuye *Préfecture*.
329. Defence Witness MG testified to having met Musema twice in Gitarama on dates, in late April or in early May, before 16 May, and Defence Witness MH testified to having met Musema in Gitarama on 10 May and in Rubona on 13 May, and Defence Counsel submitted documentary evidence that Musema was present in Rubona on and around 17 May(10).

The whereabouts of Alfred Musema in mid to late May 1994

5788

330. Following the *Ordre de Mission,* Musema returned to Gisovu on 19 May where he remained until 21 May, making a visit to Kibuye on 20 May.(11) Musema returned to Rubona on 21 May, where he allegedly stayed until 27 May. He allegedly returned to Gisovu on 27 May. The Defence presented letters to show that Musema was only present in Gisovu from 19 May to 21 May, dealing with documents for the months of April and May(12). Together, the Defence claimed, these documents demonstrate Musema's absence from Gisovu during the period from 21 May to 29 May, as he had not dealt with administrative matters in his usual pattern.
331. Upon Musema's return on 27 May to Gisovu, he only remained there until 29 May, making a visit to Kibuye on 28 May, before leaving to Shagasha on 29 May. Musema remained in Shagasha until 30 May when he left for Cyangugu. On 31 May he left Cyangugu to visit Zaïre. Musema's Defence Counsel presented further documentary evidence in support of Musema's whereabouts for the end of May.
332. Claire Kayuku supported Musema's alibi concerning his whereabouts from the end of April until the end of May. She testified that he did not travel a great deal after 26 April, but according to her, he spent most nights in Rubona with her.

The whereabouts of Alfred Musema in June and July 1994

333. According to the testimony of Claire Kayuku, on 10 June, Musema went to the tea factory in Gisovu until17 June when he went to Shagasha. From Shagasha he visited his family in Gikongoro on 19 June, and left on 20 June for Gisovu and drove towards Gisenyi on 21 June. Claire Kayuku did not see him again until 24 July 1994, in Bukavu in Zaïre.
334. The Defence submitted documentary evidence and witness testimonies in support of the claims that Musema was at the Shagasha Tea Factory from 1 June to 10 June, in Gisovu on 20 June, and on mission to Cyangugu, Gikongoro, Butare and Gisenyi between 17 June and 17 July. When he returned to Gisovu, Musema responded to correspondence received throughout June, which allegedly indicates his prior absence.
335. The Defence introduced further documents as evidence that Musema was in Gisovu from 28 June until 25 July. On or about 4 July 1994, French troops arrived at the tea factory where they stayed until Musema's departure. Musema testified that he had no knowledge of what occurred on 16 July, after which many prominent leaders left Rwanda for Zaïre. The Defence submitted a letter, dated 18 July, from the French military, and correspondence from employees, dated 20 July. Musema testified that he replied to the letter from the French Army, thanking the soldiers for their protection, and that he surrendered his personal pistol(13).

4.2.2 Arguments in response to the Prosecutor's rebuttal of the alibi

336. The Prosecutor argued that Musema's alibi is untruthful, and that the documents in the Swiss Files, including a personal calendar written by Musema (Annex C), along with the testimonies of the prosecution witnesses, provide a more accurate representation of Musema's true whereabouts during the relevant period.
337. The Defence presented several arguments to counter the Prosecutions rebuttal. The Defence argued that the Swiss Files are unreliable because of the circumstances and conditions of the Swiss interviews and investigations. Musema testified that during the first two interrogations conducted by Swiss officials he was not represented by counsel, and that at other interrogations he was represented only by a trainee lawyer; that he was not advised of his right to remain silent; that both he and his counsel were denied access to transcripts of the interviews and to his files; that he was pressured to sign every page of the transcript of the interviews without having read it; that the information recorded in the transcripts was at times inaccurate(14); and that he produced the calendars and schedules without the assistance of his files (or *dossier*).

5789

338. The Defence introduced four exhibits (D85, D86, D87, D88) to prove that Musema did not see his files until more than one year after his arrest. The Defence argued that the files are unreliable because not all interrogations conducted by the Prosecutions are admissible under the Rules.(15)
339. The Defence argued that documents provided by Musema to the Swiss *juge d'instruction*, are, by their nature, truthful. The Defence suggested that, if Musema had fabricated these documents with a view to providing a defence before any future criminal proceedings, he would have known the dates, nine months after the alleged incidents at Muyira Hill, when he provided dates to the Swiss *juge d'instruction*; he would not have given the *juge* a calendar placing him in Gisovu on 13 May if he had known what had happened there at that time; he would have fabricated a document specifically for 13 May 1994, instead of providing documents around that date(16). The Defence further argued that the documents were reliable business records compiled during the normal course of every day proceeding. (17)

4.3 Further arguments

4.3.1 The requirement that the Accused respond to Counts 7, 8 and 9 of the Indictment

340. The Defence argued that, pursuant to Articles 19(2) and 20(4)(a) of the Statute, and in accord with the spirit of the Rules, the Accused had no cause to answer on the amended or added counts 7, 8 and 9 of the Indictment, since the Indictment, as amended by order of the Chamber on 6 May 1999, was never served on the Accused. The last Indictment served on the Accused was the amended Indictment of 18 November 1998.
341. In relation to this argument the Chamber notes briefly:

- that in its Decision on the Prosecutor's Request for Leave to Amend the Indictment of 6 May 1999, the Chamber reminded "the Prosecutor of her obligation to immediately serve on the Accused and his Counsel the amended indictment in English and in French";

- that the fact that the Accused entered pleas of Not Guilty to Counts 7, 8 and 9 of the amended Indictment on 6 May 1999 is evidence that the Accused received and had knowledge of the amended Indictment; and

- that the failure to formally serve the Accused with the amended Indictment did not infringe his rights under Article 19 and sub-Article 20(4)(a) of the Statute.

342. The Chamber accordingly finds that the Accused does have a cause to answer on Counts 7, 8 and 9.

4.3.2 The authority of Alfred Musema

343. The Defence argued that Musema's political activity was minimal, and that the prosecution failed to produce evidence to support Witness W's claim of Musema's involvement in the regime's politics. Musema testified that he was never involved in political activities at school or at University, but that, like other Rwandan citizens, he was a member of the MRND. He admitted that his father-in-law was a member of Parliament. Musema testified that he was the Director of Gisovu Tea Factory, but denied being the eyes and ears of the government in Gisovu or Kibuye

because of his position as director. The Defence argued that the Prosecutor produced no evidence to establish that Musema was an influential person in Kibuye *Préfecture*, or to show that he exercised civic authority.

344. The Defence argued that the nature of Musema's appointment as Director of Gisovu Tea Factory was not conclusive evidence of any association with the government regime. While Musema's appointment by Presidential decree to this position was unusual, it was not unique insofar as one other tea factory director was appointed during the same period by Presidential decree. Since no other tea factory directors were appointed subsequently, it is unclear whether this was a new form of procedure being adopted for such appointments(18).
345. The Defence argued that Musema was a dedicated businessman and nothing more. Musema testified that the Gisovu Tea Factory, one of the top tea factories in Rwanda traded on the London tea market. Defence Exhibit 11, a table of figures from Wilson Smith & Co., was tendered by the Defence as evidence of the quality of tea produced by the factory.
346. Musema testified that although the factory was situated in Kibuye, his zone of responsibility as Director spanned two *préfectures*, Kibuye and Gikongoro. He stated that the *bourgmestre* and *préfet* had no influence on the management of the tea factory. The only influence either the *bourgemestre* or the *préfet* might exert was in the recruitment of family members for employment. Musema testified that the tea factory was not the largest employer in the region and that his position as a director was not political. He explained that two trips between 1984 and 1994 to the Kenya Tea Development Authority and to Morocco were not related to politics(19).
347. Claire Kayuku testified that Musema, as Director of the Tea Factory, was an influential person in the area. However, he was not part of the interim government, politically or in any other manner.

4.3.3 Arguments concerning the reliability of evidence

348. The Defence argued that much of the Prosecution evidence was unreliable.
349. The Defence argued that much of the investigation, which is the basis of the Prosecution's evidence, was unreliable. Specifically, the Defence challenged the absence of forensic and real evidence, and the Prosecutions failure to introduce relevant evidence from the Gisovu Tea Factory, which the Defence later presented(20).
350. The Defence also challenged the testimonies of Prosecution witnesses whose memories were affected by the passage of time. The Defence also argued that witnesses mistakenly identified Musema by erroneously associating him with vehicles and employees of the tea factory(21).
351. The Defence contended that documents may be more reliable than oral testing to re-establish events which occurred many years ago, especially when such documents relate to the ordinary affairs of an individual. The Defence argued that the passage of time impeded the Musema's defence, since documents may disappear, and access to evidence may become limited(22).
352. The Defence argued that many of the documents on which Musema relied where intended only as a means of refreshing his memory. The Defence contended that Musema may have made errors concerning dates when he drafted the documents for the Swiss *juge d'instruction*, but only the specific dates, not the events were in error(23).
353. The Defence argued that the Prosecutor's allegations that Musema lied are untrue and irrelevant. The Defence claimed that inconsistencies may have arisen not because Musema intentionally lied, but because he was merely mistaken in his recollections. The Defence further argued that, even if the Chamber were convinced that Musema did lie, the Chamber should not necessarily conclude that he is guilty. The Defence argued that Musema might, should he be lying, have many "innocent" reasons for doing so.(24)

5791

1. *See* Defence Closing Argument, 28 June 1999

2. See Section 2.3 of the Judgement

3. See exhibits D 25 & 36

4. *See* exhibits D 10 & 29

5. *Id*

6. *Id*

7. *See* exhibits D 30, 31, 32 & 33

8. *See* exhibits D 28, 34 & 35

9. *See* exhibits D 10 & 35

10. *See* exhibits D 92, 101 & 102

11. *See* exhibit D 10

12. *See* exhibits D 47, 48 & 49

13. *See* exhibits D 81, 82, 83 & 22

14. *See* Defence Closing Argument, 28 June 1999

15. *See* Defence Closing Argument, 28 June 1999

16. See exhibits D 36,45 & 46; Defence Closing Argument, 28 June 1999

17. See *supra*, Section 2.2 of the Judgement

18. *See* Defence Closing Argument, 28 June 1999

19. *Id.*

20. *See* Defence Closing Argument, 28 June 1999

21. *See* Defence Closing Argument, 28 June 1999

22. *See* Defence Closing Argument, 28 June 1999

23. See Defence Closing Argument, 28 June 1999

24. See Defence Closing Argument, 28 June 1999

5792

5. FACTUAL FINDINGS

5.1 Context of the events alleged

5.2 Massacres in the Bisesero region

5.3 Sexual crimes

5.4 Musema's authority

5.1 Context of the events alleged

354. *Paragraphs 4.1, 4.2* and *4.3* of the Indictment, under the heading "A concise statement of the facts", contain allegations on the general context in Rwanda in 1994, as well as general elements of the crimes which the Accused is charged with committing.
355. Musema admits that during the relevant events, Rwanda was divided into eleven *Préfectures*, one of which was Kibuye, as alleged in **Paragraph 4.1** of the Indictment.
356. Musema admits that during the relevant events, Tutsis were identified as members of an ethnic or racial group, as alleged in **Paragraph 4.2** of the Indictment.
357. Musema's admissions also include the fact that for many years prior to 1994, the Tutsis, like the Hutus and Twas, were perceived and identified as an ethnic or racial group and that the Tutsis were the targets of discrimination and killings as such, which prior to 1994 stemmed from the socio-political situation in Rwanda. As noted under "General Admissions" (*supra*),[1] Musema admitted that in the years following independence, the political scene was dominated by people identified as Hutus. The targeting of the people identified as Tutsi for oppression and discrimination also involved their exclusion from senior positions in politics, the civil service and the army, their arrest and detention and, toward 1993, the overt incitement to violence and extermination of the Tutsi group.
358. In addition to that, Musema admits that in 1994 widespread or systematic attacks were directed against civilians on the grounds of ethnic or racial origin. Musema testified that the massacres in 1994 were targeted and directed against the Tutsi civilians not as individuals but as members of the said group.
359. Musema admits that on 6 April 1994, the plane transporting President Juvénal Habyarimana of Rwanda crashed on its approach to Kigali airport, Rwanda and that attacks and killings of civilians began soon thereafter throughout Rwanda, as alleged in **Paragraph 4.3** of the Indictment.
360. Musema testified that while in his house in Kigali, he heard and saw the shots aimed at the plane, heard an explosion, although he did not see the plane crash, nor was he aware of those who were on board. The following day, on RTLM, he learnt of the crash and of those on board. He also admitted the occurrence of this incident and the inception of violence in Rwanda soon thereafter. Musema testified that in the days following the plane crash he witnessed massacres, the destruction of houses and the displacement of people from Kigali. Musema admitted that in the hours following the crash of the President's plane, violence set in and massacres began in Kigali and other *préfectures* in the country, marking the beginning of massacres described by him as a genocide. As he travelled between Kigali and Gitarama during the time of the massacres, he saw individuals manning roadblocks. These persons separated people they identified as Tutsi or those accused of being *Inyenzi* by asking for identity cards which indicated the ethnic group of the holders. Musema stated that these persons manning the roadblock threatened him and his family with death. At the roadsides he saw many bodies. He stated that the victims of the massacres were killed, because they were Tutsis (so-called *Inyenzi*) or because they looked Tutsi or because they

were accused of helping the Tutsis. The majority of the victims were Tutsis. Musema stated that the victims included Tutsi children, who naturally could not have been among the FAR or FPR fighters.

361. In light of these admissions, these facts are not in dispute. The Chamber finds, therefore, that the allegations set forth in Paragraphs 4.1, 4.2 and 4.3 of the Indictment have been established beyond reasonable doubt.

5.2 Massacres in the Bisesero region

362. *Paragraphs 4.4 to 4.6* and *4.11 of the Indictment* charge Musema for his involvement in massacres which occurred in the region of Bisesero from 9 April 1994 until 30 June 1994. They read as follows:

> "**4.4** The area of Bisesero spans two communes in Kibuye Prefecture. From about 9 April 1994 through 30 June 1994, thousands of men, women and children sought refuge in various locations in Bisesero. These men, women and children were predominantly Tutsis and were seeking refuge from attacks on Tutsis which had occurred throughout the Prefecture of Kibuye.
>
> **4.5** The individuals seeking refuge in the area of Bisesero were regularly attacked, throughout the period of about 9 April 1994 through about 30 June 1994. The attackers used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis in Bisesero.
>
> **4.6** At various locations and times throughout April, May and June 1994, and often in concert with others, Alfred Musema brought to the area of Bisesero armed individuals and directed them to attack people seeking refuge there. In addition, at various locations and times, and often in concert with others Alfred Musema personally attacked and killed persons seeking refuge in Bisesero.
>
> **4.11** The attacks described above resulted in thousands of deaths and numerous injuries to the men, women and children within the area of Bisesero in Gisovu and Gishyita communes, Kibuye Prefecture."

363. As already developed by the Chamber in the section on the General Admissions of the Defence(2), it is not contested that regular attacks occurred in the Bisesero region from 9 April 1994 until about 30 June 1994. The victims were thousands of men, women and children who were predominantly Tutsis and who had sought refuge in the Bisesero region. The attackers were armed with guns, grenades, machetes, spears, pangas, cudgels and other weapons. Thousands of Tutsis were killed, injured and maimed. On 13 May 1994, thousands of Tutsis who had sought refuge on Muyira hill in Gisovu *Commune*, Rwankuba *Secteur*, were subjected to a major attack and massacred.
364. The Defence, however, denies the involvement, whether by direct participation or by aiding and abetting in the execution of these massacres, of Musema. Reliance is placed upon the alibi and on the lack of credibility of the Prosecution witnesses testifying on these allegations.
365. The evidence adduced by the Prosecutor in this case concentrates on a number of specific massacres mainly in the Bisesero region, in which Musema is said to have participated. The Chamber shall deal with these matters in a chronological manner along with any other sightings

and movements of Musema.

April and May 1994

366. A number of witnesses testify they saw Musema in April and May 1994 participate in massacres against Tutsi civilians.
367. The position of the Defence is that Musema went to Rubona from Gisovu by 17 April and that he was then, from 22 April, on mission visiting a number of tea factories and thus was not present at the locations referred to by these witnesses. Support for this alibi stems in the main from exhibit D10, an "*ordre de mission*" (mission order), which was said to be issued to Musema in Gitarama, and then stamped, signed and dated at each tea factory he visited. Other documents and a number of witnesses were also presented by the Defence as further evidence of the movement of Musema. The Prosecutor submitted that this mission order had been falsified so as to hide the extent of Musema's involvement in the massacres which occurred in the Bisesero region.
368. For the sake of clarity, in view of the complexity and number of issues which arise from the pertinent evidence during this period, the Chamber will first recall the testimony of prosecution witnesses relevant to massacres as they occurred in a chronological manner. The Chamber will then deal with the alibi presented by Musema, after which the factual findings will be made.

•Gisovu Tea Factory, 15 April 1994

369. The Chamber notes that evidence presented during trial, namely the testimony of two Prosecution witnesses and Musema, relate to the alleged killing of a number of children at the tea factory. The Chamber is of the opinion that this evidence was unclear and inconsistent, and moreover, the events are not specifically averred to in the Indictment. As such, the Chamber shall not make any findings on these allegations.

•Muko and Musebeya *Communes*, 15 April 1994

370. Prosecution *Witness BB* testified as to the whereabouts of Musema on 15 April 1994. The witness, who was based at the Gisakura Tea Factory in 1994, was not physically at this tea factory between 12 and 24 April 1994, as he was hiding in the *communes* of Muko and Musebeya. He heard that, on 15 April, the director of the Gisovu Tea Factory was seen in the *communes* of Musebeya and Muko at the wheel of a Daihatsu truck transporting individuals armed with spears and machetes. He received this information from workers from Gisakura and Muko.

•Karongi hill FM Station, 18 April 1994

371. Prosecution *Witness* M testified that, on 15 April 1994, his mother, his three children and himself went to the Karongi hill FM station, which he identified in exhibit 20.18. According to the witness, the hill is about 2000 metres high, with only one access road to the top. They hid there with friends of his who were guards at the FM station. On 18 April, he saw Musema lead a meeting of approximately 150 people. Some of these people came on foot whereas others, about 80 people, including Musema, had arrived aboard two vehicles, both Daihatsus, each bearing the inscription "*Usine à thé Gisovu*". The witness recognized the driver of the Daihatsu transporting Musema and knew him to be an employee of the tea factory.
372. The witness stated that he was hiding in the guard's hut 10 metres away from where the meeting had convened and was able to see everything through holes in the walls of mud and wood. The hut was three metres by four metres, with one main door, no windows, was split into two rooms and

was used by the guards while working at the FM station. He saw people from Gisovu and Mwendo, having first spotted them as the vehicles had commenced the ascent of the hill while he was at the summit. Most of the people at the meeting wore banana leaves and grass on their heads. Musema wore a sports tracksuit. Certain employees of the tea factory were dressed in blue "*Usine à thé*" overalls. Musema was carrying a medium length gun and a small number of other people were also carrying weapons, namely machetes, clubs and some rifles. The witness was only able to recognize Rekayabo, a communal policeman from Gisovu *Commune*, and Munyanziza, unemployed and a member of the MRND, because he was too scared and he could not observe very well.

373. According to the witness, Musema addressed those who had convened in Kinyarwanda, telling them to rise together and fight their enemy the Tutsis and deliver their country from the enemy. Questions were put to him by the crowd, asking what would be their rewards considering that they might lose their lives in this war. Musema answered that there would be no problem in finding rewards, that the unemployed would take the jobs of those killed, and that they would appropriate the lands and properties of the Tutsis. He stated that those who wanted to have fun could rape the women and girls of the Tutsis without fearing any consequences. The crowd applauded Musema. Musema then told the crowd to be patient and wait for all those who had hidden to come out and go to the camp where the Tutsis had sought refuge.
374. Witness M went on to state that, at this point, Musema asked the witness' friend, the only guard then on duty at the Station, to hand over rifles and ammunition as the crowd wanted to attack the camp on that very day. It was common knowledge that there were weapons at the Station. The guard hesitated in complying, saying that there was a need to get authorization from the commander of Kibuye. Musema shouted at him, telling him that it was a crime not to hand over weapons to defend the country and that if the commander knew of this refusal, the guard could be severely punished.
375. The witness stated that he observed that the guard, unaccompanied, then went to the hut to collect the rifles and ammunition. According to the witness, the Lee Enfield rifles and ammunition were stored in the room next to the one in which he was hiding. The ammunition was stored in a metallic box against a wall. In the same room were a few pots and pans, foodstuffs and a large folded military tent. The bed was simply grass strewn onto the floor. He described that on walking into the hut, one would first see stones on which the cooking was carried out. Witness M was in the first room and his family were in the adjoining room with the ammunition and rifles. When the guard came to collect the rifles, the witness joined his family in the other room, the walls of which he was unable to see through. When the guard left, closing the front door behind him, the witness went back into the front room so that he could see what was happening outside.
376. According to the witness, the guard then gave Musema the two Lee Enfield rifles and some ammunition, and showed him how to use the weapons, and then loaded bullets into the magazine. Musema and the crowd left immediately thereafter in the direction of the Gitwa "Tutsi" refugee camp. During the whole meeting, none of those who had gathered at the top of Karongi hill had gone to the hut to see what or who was inside.
377. Witness M concluded his testimony in this regard by stating that he saw Musema, in the company of two policemen from the factory, stay with the vehicles which were parked away from the camp so that they would not be damaged if the refugees pushed the attackers back. The rest of the attackers went towards the refugee camp in Gitwa, Rubazo *Secteur*, Gitesi *Commune*. According to the witness, who had an electronic watch, the attack commenced between 12:30hrs and 13:00hrs and finished around 15:00hrs. The victims were mainly the refugees. After the attack, Musema left Gitwa with the attackers who had come from different regions. Some were on foot, others aboard vehicles.
378. During cross-examination, witness M affirmed the testimony he had given in direct examination. He provided further details regarding the hut, access to the Karongi hill FM Station and other physical aspects of the locality. Witness M also confirmed that he was able to see and hear the

meeting and that he saw Musema, as he had testified in direct examination. 5796

•Near the Gisovu Tea Factory, on or about 20 April 1994

379. Prosecution *Witness K*, who hid in tea plantations in Twumba, in the Gitabura *Secteur* from 8 April 1994 for two weeks, stated that he saw Musema during this period transporting assailants to the Bisesero region.
380. Questioned as to his hiding place during this period, the witness specified that he was in the "*villageois*" tea plantation, which he identified on the left hand side of photo exhibit P27.1. However, when asked to point out in the same photo the Gikongoro road about which he testified, he was unable to do so, indicating rather that it would be easier for him to be on the terrain as it was not very clear from the photo.
381. Witness K went on to say that in April 1994, he saw Musema in his Pajero driving in front of a tea factory Daihatsu going in the direction of Gikongoro. Aboard the Daihatsu, a person using a microphone was calling for others to come to help as the tea factory had been attacked by *Inyenzi*. The Witness said that "*Inyenzi*" meant "Tutsis" and that in April 1994 the tea factory had not been attacked by the Tutsis. According to the witness, this was a way of assembling at the tea factory people from Gikongoro and tea factory workers so as to take them to Bisesero.
382. When questioned as to how he knew the vehicles were going to Gikongoro, the witness stated that he first saw Musema as he returned from Gikongoro with a vehicle loaded with persons armed with spears and clubs. On arriving at a bridge where there was an "*arc de triomphe*", Musema showed them the road to take while he went up to the factory. The witness testified that they were singing "Let's exterminate them, let's finish them from the forest in which they are hiding". The witness added that he was able to see all of this from the tea plantation in which he was hiding. After the vehicle from Gikongoro had been to the tea factory, all three tea factory Daihatsus went to Bisesero. The vehicles were identifiable as belonging to the tea factory as they bore the inscription "*Usine à thé Gisovu*".
383. Amongst those who were taken to Bisesero, Witness K said he recognized employees of the tea factory. The names of these people form part of exhibit P35. Only a certain Mushoka was armed; the others were dancing in the back of the vehicle. The witness added that there were also Twas with them and that they were armed with spears and clubs.
384. According to the witness, after the attack in Bisesero, certain of the people from Gikongoro were on foot and had cattle and crops in their possession. Musema was travelling in front of the Daihatsu. The witness indicated that fewer people returned from Bisesero than had gone there. The vehicles then parked at the tea factory.
385. The Chamber notes that it became apparent during the proceedings that there exist discrepancies between the witness' testimony and previous statements he had made to the Prosecutor and to the Swiss authorities. In his statement of 13 October 1995, Witness K stated that for three days from 7 April 1994, there were killings in Gitabura, after which he went to Bisesero. Thus, no mention of the tea plantation. The witness denies having stated this and reaffirmed that he went to the tea plantation on 8 April 1994 where he stayed for two weeks, and then he went to Bisesero. He explained that the investigator must have presumed that everyone sought refuge in Bisesero which would explain why in the statement it was indicated that he had gone to Bisesero after three days.
386. In his statement of 17 June 1995 to the Swiss authorities, Witness K said that he had stayed in the tea plantations from 8 April to 20 May 1994. In responding to questions on this statement, the witness testified that the date of 20 May should rather be 20 April.
387. The Chamber notes that the date of 20 May 1994 is mentioned seven times in the statement, while there is no mention of 20 April 1994.
388. The witness then explained that although the statement read that he did not see Musema before "20 May", it should actually read "20 April". In answer to the next question, he confirmed that he had seen Musema before 20 April 1994.

389. Furthermore, in the statement, the witness says that he remembered the date of 20 May as he had written it on a piece of paper, and that he had not seen Musema prior to that date. He added that this note was in actual fact the one he referred to as regards 13 May 1994, being the note he had found amongst cadavers after an attack, and which had been read by many people. Witness K continued by explaining that on 20 May he did see vehicles, and that as he was on a hill in the rain he had not written the date but had memorized it. Thus the verb "to write", he stated, should read "to memorize".
390. In his statement of 17 November 1998, the witness had asked for the date of 20 May 1994 to be changed to 20 April 1994 in his statement of 17 June and 13 October 1995.

•Gitwa Hill, 26 April 1994

391. *Witness M* is the sole prosecution witness to have specifically testified about an attack which occurred on Gitwa hill on 26 April 1994. The witness who had been hiding in a hut at Karongi hill FM station, as discussed above, left his hiding place on 20 April 1994 having been told by his friend that other guards were coming to the FM station to replace those who had left their posts. He and his family hid in the bush.
392. Witness M told the Tribunal that on 26 April 1994 he witnessed an attack led by Musema. The attack started between 12:00hrs and 12:30hrs on Gitwa hill where the refugees had assembled. A total of eight vehicles, three Toyotas and a Suzuki belonging to the Gasenyi school group, two yellow MINITRAPE vehicles, and two Daihatsus from the Gisovu Tea Factory came to the hill. According to the witness, in addition to those in the vehicles, the people on the road and paths going to the hill numbered the same as people coming out of a stadium after a great event, "a manifestation".
393. Witness M said he saw Musema aboard one of the Daihatsus with tea factory workers wearing blue uniforms. He was carrying a firearm, while the other attackers bore traditional weapons and were dressed in banana leaves and grass belts called "*Umuhurura*"(3) in Kinyarwanda. The attackers killed with a determination unlike before to such an extent that, apart from a few men, no woman or child was able to survive. Musema and others shot into the crowd as such, individuals fell as they fled. Thousands were killed, including many of the witness' relatives.
394. The witness said he knew that the attack took place on 26 April as he had consulted his electronic watch which worked during that period. He explained that as this was the biggest attack he had seen, he consulted his watch so that he could remember the date while alive. He had also consulted his watch during the meeting of 18 April 1994, as he had done for all other important events. However, when questioned as to the date of his statement (in fact 13 January 1999), the witness recalled that it was in January but was not sure of the precise date.

•End of April - beginning of May

395. *Witness F* testified that, between 17 and 30 April 1994, assailants coming on the one hand from the *commune* of Gishyita, and, on the other hand, from Gisovu, converged on Muyira hill. Amongst the Gisovu group he saw Ndimbati, *bourgmestre* of Gisovu *Commune*, Eliezer Niyitegeka, Minister of Information, and the Director of the tea factory in Gisovu. The witness testified that the assailants were pushed back after the first attack but returned after 30 minutes to launch a second attack. He specified that it was during this second attack that he saw Musema amongst the assailants. Musema shot at refugees who had surrounded a policeman, and then ran away to his car, which was red. The witness affirmed that Musema was carrying a black rifle of medium length.
396. *Witness R* testified about an attack which took place around the end of April, or the beginning of May, on Rwirambo hill opposite Muyira hill in Bisesero, during which he was injured.
397. He explained that this attack started in the morning and came from Gisovu. The leaders of the attack were Aloys Ndimbati, the *bourgmestre* of Gishyita, and Musema, the Director of the tea factory. Musema, who was armed with a rifle of unspecified length, was within rifle range of the witness. Musema had arrived in his red Pajero, followed shortly afterwards by the vehicle of

Ndimbati. Other vehicles seen by the witness were 4 tea factory Daihatsu "*camionettes*" aboard which were *Interahamwe*. The witness was able to identify the *Interahamwe* as they wore blue uniforms, on the back of which was printed "*Usine à thé de Gisovu*". Two of the *camionettes* were green, one was yellow and one was white. All had "*Usine à thé Gisovu*" printed on their side panelling.

398. The witness said he saw that the attackers were armed with clubs, rifles and spears. While in a nearby valley looking for water, Witness R was injured from a shot which came from the direction of Ndimbati and Musema. In cross-examination he described how he was injured on Rwirambo hill, which is two hills and a river away from Muyira hill. The hill was next to the road going to Gishyita from Gisovu.
399. Witness R explained that as the attackers arrived, the refugees fled in two groups. He fell behind as he was weak from lack of food, and was shot in the arm near the elbow, the bullet entering the front of his body and exiting behind as he had turned to look at the attackers.
400. In cross-examination, Witness R confirmed that he had already testified in the *Kayishema* and *Ruzindana* case. Defence Counsel indicated that he appeared under the pseudonym "JJ" on 13 November 1997. During his testimony in that case, the witness had advanced the date of 29 April as that on which he had been injured.
401. When details of his previous testimony were put to the witness, he stated that he was injured on the arm between 27 April and 3 or 4 May. He was able to remember the date as there had been a week of calm before the attacks of 13 and 14 May. The witness told the Chamber that as he had been unable to get hospital treatment, a benefactor put cow butter on his injury. To this statement, the Defence noted that in the *Kayishema* and *Ruzindana* case, the witness, in answer to a question from Judge Khan, had stated that "[a]t that time the situation was not yet too serious and one could find one or two Hutus who were kind hearted and one could give them money for the purchase of penicillin". The witness also testified that he had been treated in Rwirambo.
402. Witness R denied having ever said anything about going to Rwirambo as he couldn't have gone to Rwirambo hospital as there were barriers. He was able to recall however that he did speak about penicillin as regards to serious injuries and that some individuals were able to find ways of getting penicillin. The witness stated, after being asked by the Defence and the bench, that he did apply penicillin to his injury much later when his injury had scarred, and that he had never gone to a Hutu to ask for penicillin.

•Muyira hill, 13 May 1994

403. On 13 May 1994, after a period of calm, Tutsis, estimated by witnesses to number between 15000 and 40000, had sought refuge on Muyira hill and in neighbouring areas. These unarmed Tutsi civilians were subjected to the biggest attack to date, during which thousands lost their lives. The Defence admitted that such an attack occurred and that Tutsi civilians were murdered and exterminated. However, as with all other massacres in which Musema is alleged to have participated, the Defence, by way of alibi, denies Musema's presence at this attack. The Chamber shall thus consider the testimonies of prosecution witnesses specifically in light of this argument.
404. *Witness F* testified that, following two weeks of calm a large scale attack took place on Muyira hill on 13 May 1994. He stated that around 08:00hrs, a large number of vehicles, including lorries and a bus, arrived from Gishyita and Gisovu *Communes* and stopped on the border of the said two *communes*. Witness F explained how the attackers approached the hill from all sides, splitting up into groups, those from Gisovu including the *bourgmestre* of the *commune*, Eliezer Niyitegeka, Alfred Musema, and the *conseillers* of the *secteurs* of Gisovu *Commune*, and amongst those attacking from the other side of the hill were Kayishema, the *Préfet* of Kibuye, Charles Sikubwabo, the *bourgmestre* of Gishyita, Karasankima Charles, Sikubwabo's predecessor, *conseillers* of the *commune* of Gishyita, and many armed persons. The witness said the weapons carried by the assailants included firearms, traditional weapons, and bamboo sticks cut into spears. The refugees on Muyira hill were overpowered by the assailants and consequently had to flee.

5799

During the attack many old people, women, and children, including his five children, aged from 1 year and 1 month old to 10 years old, who were trying to flee, were killed. His wife was seriously injured leaving her disabled today. Witness F estimated that only 10000 of the 40 - 50000 refugees on Muyira hill on 13 May 1994 survived the attack. As far as he knew, all the victims were Tutsis, while all the assailants were Hutus. Questioned by the Bench, he confirmed that the assailants used to chant slogans as they approached the hills. The witness quoted two such slogans, "Exterminate them"(4), "them" meaning the Tutsis, and "Even the Tutsi God is dead"(5).

405. The witness added that he saw Musema carrying a firearm, although he did not personally see Musema fire the weapon.

406. In cross-examination, the Defence put to the witness prior statements he had given to the Office of the Prosecutor. As pertains to the first statement (20 March 1996), the Defence asked why the witness had made no specific mention of Musema during the May attacks, whereas the witness had specified Musema's presence during the April attacks. Witness F explained that he had mentioned Musema in connection with the May attacks, and referred to the phrase "[...] [l]eading these attackers who were divided into groups were the same persons I listed before. [...]". The Defence then put the second statement (14 and 16 February 1998) to the witness and asked the same question, namely why there was no specific mention of Musema in the 13 May 1994 attack. Again, the witness explained that he did re-cite the names of the leaders of the April attacks and reaffirmed that the leaders of the 13 May attack were the same as those of April.

407. In re-direct examination of Witness F, the Prosecutor entered into evidence page 52 of the transcripts of 11 February 1998 in the *Kayishema* and *Ruzindana* case, where Witness F appeared as Witness QQ. Witness F confirmed having testified on that day that he had seen Musema, the director of the Gisovu Tea Factory, amongst others, during the Muyira attacks of 13 May 1994.

408. *Witness P* had sought refuge on Muyira hill with many others up until 13 May 1994. On that day he and other refugees, numbering 40000, on Muyira hill, were the victims of a massive attack during which his wife and two children were killed. Such was the attack, that the refugees were unable to resist the assailants and as a result had to flee. He identified attackers from Rwamatamu, Gisovu, Gitesi, Gishyita and Cyangugu. He said that amongst the attackers from Gitesi were the *Préfet* Clément Kayishema, a communal policeman by the name of Claude, and Mucungurampfizi, who worked at Electrogaz. Amongst the leaders of the Gisovu group were the *bourgmestre* Aloys Ndimbati, Alfred Musema, communal policemen called Rukazamyambi and Sebahire, and the *conseiller* Segatarama. He said that he was also able to recognize workers from the tea factory, who wore a blue uniform on which was written "*Usine à thé de Gisovu*".

409. However, Witness P testified that, because he was fleeing, he did not personally see Musema during the attack of 13 May 1994, although he did see the Daihatsus of the tea factory, and Musema's red Pajero.

410. In cross-examination, Witness P testified that he did not see Musema on that particular day, but that he saw the tea factory vehicles which could only be taken from the factory with the permission of Musema, and that he also saw the vehicle of Musema which only Musema ever drove. Witness P presumed that Musema must have been present as his vehicle was there.

411. *Witness R* testified that on 13 May 1994, because he was unable to climb Muyira hill as he was injured, he was hiding in bushes near the Gisovu-Gishyita road, from where he saw the refugees on Muyira hill being attacked.

412. He explained that the leaders of the attackers regrouped on the Gishyita and Gisovu boundary before attacking the Tutsi refugees on Muyira hill. The first vehicle belonged to Kayishema, *Préfet* of Kibuye, which was followed by the businessman Ruzindana's car and a number of buses. From the direction of Gisovu came the vehicles of the tea factory led by Musema and Ndimbati. Witness R stated that each of the leaders bore long rifles.

413. Witness R further testified that when the two groups met on the boundary of the two *communes*, Kayishema gave instructions on the attack. He heard Kayishema give instructions to the attackers and assign one or more leaders to each group. Musema, Ndimbati and Eliezer Niyitegeka were

5800

assigned to the Gisovu and Gikongoro groups, while Elizaphan Ntakirutimana and Ruzindana were assigned to another group. The witness explained that Kayishema then fired the first shot in the direction of Muyira hill after which the leaders, including Musema, and their respective groups, went towards Muyira hill. The witness was unable to see what happened on the hill, but he heard gunfire, grenade explosions and people screaming.

414. Witness R stated that he stayed hidden until the departure of the attackers, including Musema, at which point he went to Muyira hill to find the bodies of his family. He found the cadavers of his wife, child, mother and older brothers, amongst the many bodies which covered Muyira hill. All the dead were Tutsis and all were civilians.

415. In cross-examination, Witness R gave more details as to where he hid, namely, in bushes below Muyira hill, approximately 30 metres from the roadside. These bushes were not very far from where the attackers had gathered.

416. The Defence noted that in the *Kayishema* and *Ruzindana* case, Witness R had stated that he was three hundred metres from where Kayishema had stood. The witness confirmed this during this trial and explained that he was able to hear Kayishema give instructions as everyone was quiet and listening to him, and that Kayishema had a megaphone. Witness R stated that all the attackers had their backs to him. The witness testified that the leaders used the megaphone while they were forming the groups. However, the leaders did not use the megaphone when speaking amongst themselves and as such, said the witness, he could not hear everything that they were saying. However, Witness R then stated that as Niyitegeka was speaking in a loud voice, he heard Niyitegeka tell others that they must not go towards their *secteurs* of origin but that they should go towards Muyira and push the Tutsis to the other side.

417. Witness R testified further in cross-examination that all the Hutus and the Twas wore white clothing so as to be distinguishable from the Tutsis. The Defence noted that on page 130 of the English transcripts of 13 November 1997 in the *Kayishema* and *Ruzindana* case, the witness had said that the *Interahamwe* of Kayishema wore black, and those from Cyangugu wore white, and that Kayishema had said that to recognise one another, those wearing black should be on one side, and those wearing white should be on another side. The witness remembered having said that and added that although most of the attackers wore white, some of the leaders chose a different colour to set their groups apart.

418. *Witness Z*, who had sought refuge on Muyira hill, testified that attackers came on 13 May 1994 to the hill from Gisenyi, Ruhengeri, Gitarama, Kibuye, Gikongoro, Cyangugu, from Yusufu's, and from the Gisovu Tea Factory. He listed the leaders of the attack as the *Préfet* Kayishema, Obed Ruzindana, Musema, and the *bourgmestres* Ndimbati and Sikubabwo. The witness identified Musema as he saw him arrive alone in his car.

419. Witness Z explained that Musema, who was armed with a rifle, led the group of attackers coming from Gisovu, while Ruzindana and Kayishema led a group coming from another direction. All the attackers grouped on the border of Gishyita and Gisovu *Communes*. The witness stated that amongst the attackers were civilians belonging to the MDR, CDR and MRND, while amongst Musema's group were *Interahamwe* trained by Musema, *Interahamwe* from Cyangugu, soldiers, gendarmes, and employees of the tea factory, including guards. Witness Z explained that from his position on the side of the hill he was able to see Musema addressing the attackers aloud as though he was using a microphone, and that, although Musema was at a distance which would take 5 minutes to cover by running, he was still able to hear Musema give instructions to the attackers. He heard Musema say "Go that way, the attackers from Kibuye and Gishyita will come from the other direction", and indicate the directions with his arms.

420. Witness Z then stated that the leaders of the various groups, including Musema, distributed weapons to attackers trained in the use of such weapons. The weapons, he said, were returned at the end of each day, and redistributed at the start of each day.

421. In cross-examination, Witness Z added that from his position at the top of Muyira hill, he was able to hear Musema at the bottom of the hill give instructions to various groups of attackers. The

witness was able to hear all that was being said as everyone else on Muyira hill was quiet, and the attackers were listening attentively to the authorities as they gave instructions. The Defence also referred to the statement of the witness dated 13 May 1995, wherein the witness lists the attackers he saw yet makes no mention of Musema. The witness explained that, unlike in statements to the Prosecutor, before the court he would speak of everything he knew.

422. Witness Z described how the attackers made their way up the hill, while the refugees threw stones at them. As the refugees were overpowered by the attackers, a group of about two or three hundred refugees charged the attackers to force a way through them. He told the Chamber that many of the refugees were killed, including his family members.

423. During cross-examination, Witness Z explained that at the end of the attack, the military kept their weapons, whereas those who had been trained returned their weapons to Musema and were given rewards such as cattle. In the morning the weapons were distributed to the attackers, and if an attacker did not receive a weapon then that attacker would complain that another had received his. Witness Z testified to having seen all of this.

424. The witness said that he sustained his eye injuries from a grenade thrown by attackers coming from Gishyita while near the road on the Gishyita-Gisovu borders. In cross-examination, Witness Z testified that he could not remember the exact date on which he sustained his injuries. As such the Defence referred the witness to transcripts from the *Kayishema* and *Ruzindana* case, of 2 March 1998, wherein the witness, then under the pseudonym NN, testified as to how he was injured on 13 May 1994. The Defence Counsel referred to other pages of the said transcripts, in which the witness states that he can clearly remember the day of 13 May 1994 as it was on this day that he lost many members of his family.

425. In response to these questions from the Defence, Witness Z stated that he was now testifying in the Musema case and not in the *Kayishema* and *Ruzindana* case. The witness then stated that he was indeed injured on 13 May 1994, but that he could not remember clearly the dates during that period.

426. *Witness N* testified that there were many attacks on Muyira hill on 13 May 1994, and that very few people survived. He explained that the attackers arrived around 10:00hrs from Gisovu, Kibuye, Rwamatamu, Mubuga and Cyangugu. With regard to the group that came from Gisovu, Witness N specified that, because of the distance between him and the group, he was only able to recognize those in the cars at the front. He stated that he saw the car of Musema, nicknamed a "Benz" by the witness as it was an expensive car, at the head of the others, three Daihatsus from the Gisovu tea factory, three buses belonging to the ONATRACOM and a lorry from Gisovu prison. Witness N was unable to see any other vehicles as they were hidden by the forest. These vehicles came to a stop near a road sign on meeting vehicles coming from "the road below".(6)

427. Witness N stated that he was unable to say precisely how many people formed the Gisovu group, but he estimated that in total there must have been 50000 people, which included people from Gikongoro and Burundi. When asked how many people came on foot, the witness explained that those on foot had come from neighbouring *secteurs*, namely Rugaragara and Gitabura, whereas those in vehicles had come from further afield, namely the commune of Gisovu. Questioned from the bench as to the number of people, the witness explained that when speaking of 50000 people, he was talking about the Gisovu group. The witness clarified that he saw Musema aboard his vehicle, and that this was first time that he had seen Musema during the attacks.

428. Witness N testified that all the attackers had regrouped and that he could see them move their arms and speak, although he was unable to hear what they were saying. He said he was able to hear Musema once the group moved to within a few metres of him. The witness testified that Musema spoke to a policeman named Ruhindura, and asked him whether a young woman called Nyiramusugi was already dead, to which the policeman answered "no". He stated that Musema then asked that before anything, this young woman be brought to him . In cross-examination, the witness specified that he was able to hear Musema as the refugees were speaking amongst themselves softly and the attackers were getting organized. He added that the attackers spoke

5802

loudly so that everyone could hear them.

429. The witness stated that he knew this young woman, who was a teacher, as he used to see her when she walked to school, and that he used to take his cows to graze in front of her parents' house.

430. Immediately after these instructions, stated Witness N, those from Gishyita started shooting so that everyone else would start shooting. The attacks lasted until 15:00hrs, at which point the witness fled to the commune of Ruhindura. He added that some of the "refugees" fled towards the top of the hill and others towards the bottom of the hill. The witness explained that Musema searched for the young woman throughout this period and also shot at people.

431. In cross-examination, the witness confirmed his above testimony. The Defence questioned the witness as to why it had taken him five years to come forward with this statement, to which Witness N explained that he had been approached by two investigators to do so and that he had already brought charges in 1997 against Musema at the prosecutor's office of Kibuye. He indicated that when one knows somebody has committed a crime, it is one's duty to report it.

432. *Witness G*, who is not originally from the Bisesero region, testified that he saw Musema participate in an attack on 13 May 1994, shooting at refugees, with all the other leaders of the region, whom he said he knew as he visited Kibuye regularly during his holidays. Musema was seen by the witness at Kucyapa on the Gishyita and Gisovu border with Kayishema, Ruzindana and Sikubabwo and many other persons. The witness saw Musema when he was fleeing an attack on Muyira hill.

433. Witness G testified that the attackers had arrived aboard a number of vehicles, including buses belonging to ONATRACOM and at least two vehicles bearing the inscription "*Usine à thé Gisovu*". According to the witness, he was able to see from where he had sought refuge on Muyira hill, attackers come from Mugonero, Ngoma, Gisovu, Gishyita, Mubuga, Gitesi and Rubazo.

434. Witness G explained that as he fled from Muyira hill, attackers caught a woman by the name of Goretti Mukangoga, whom the witness knew as a teacher from his time in primary school. Musema, who was still with Kayishema, Sikubwabo, Ruzindana and Mika, asked for her to be brought to him. According to the witness, he then proceeded to cut open her stomach with a long sword "to see what the insides of a Tutsi woman looked like". The victim crumbled to the ground and was then encircled by the attackers. When asked by the Prosecutor to give more details as to the attackers surrounding the victim, the witness stated that there were men and women, and after a long explanation stated that he could not say how many they numbered.

435. Witness G described that, as he was tired and thought he would not be found, he hid in a bush near the vehicles of the attackers at which point he saw Musema's red car.

436. In cross-examination, when photo exhibits of the Bisesero region were put to Witness G, except for one where he thought he recognized the summit of Muyira hill, for all the others he explained that he was not from Bisesero and that it would be easier for him to be able to identify the various hills on site. When pressed as to details on distances and the numbers of vehicles and people that he saw while hidden in a bush in Kucyapa, the witness stated that he was unable to give such details, even though he was an educated man. Further, the witness was unable to explain where and how Musema came into possession of a sword or why in his testimony he had failed to make mention of blood, which, according to the Defence would have inevitably spurted out as Goretti was cut open.

437. *Witness T*, who had sought refuge on Muyira hill, stated that on 13 May 1994 a large attack occurred on the hill. Numerous attackers including policemen, civilians, *Interahamwe*, tea factory workers, soldiers and some officials arrived in an array of vehicles, namely eight ONATRACOM buses, one white and one green Daihatsu belonging to the tea factory and pick-up trucks, all seen by the witness. Witness T explained that the attackers had come from Mwendo, Gisenyi, Gitesi, Rwamatamu, Ruhengeri and Cyangugu.

438. From Gisovu, said Witness T, came armed civilians, tea factory workers in blue and khaki uniforms, prison guards in yellow uniforms carrying firearms, soldiers with rocket launchers, and policemen wearing green uniforms and bearing firearms. Amongst the leaders of the attack the

5803

witness saw Ndimbati, Musema, Sikubabwo, Segatarama and Mika.

439. The witness explained how the attackers gathered for an hour before launching the attack with gunfire around 10:00hrs. According to the witness, those who had firearms, including Musema, would protect the attackers armed with traditional weapons who were in close proximity against the refugees during the attack. The witness stated that although he did not personally see Musema shoot at the refugees, he presumed that he had done so as he was carrying a rifle. The attackers chased the refugees and threw grenades at them when in range, the refugees retaliating with stones. Witness T testified that the refugees were forced to flee and many were killed during that attack.

440. In cross-examination, the Defence put to Witness T his previous statement taken during the Swiss investigations in which the witness makes no specific mention of Musema as being present at the massacres or being a leader thereof, although he did mention a number of the leaders he named in his testimony. Moreover, the Defence referred to passages in the statement where explicit mention is made by the witness of the tea factory vehicles transporting killers from Gikongoro to Bisesero without there being any mention of Musema. The only mentions therein of Musema by the witness are "I know Musema, we saw each other sometimes" and after having identified him from a photograph, he states "After the arrival of the French, I saw Musema about 2-3 days later [...]".

441. In response, Witness T explained that, during that interview, he had not been asked specific questions about Musema, save whether he knew him and could identify him, and whether he had seen him after the arrival of the French.

442. The Chamber notes at this juncture that, during the cross-examination of Witness T on this issue, as a consequence of a suggestion by the Defence relating to the apparent discomfort of the witness, Witness T requested the permission of the Chamber to continue his testimony standing up as he felt tired.

•14 May 1994, Muyira hill

443. Witnesses for the Prosecutor also testified that a second large scale attack took place on Muyira hill on 14 May 1994.

444. *Witness AC* described a big attack which took place on 14 May 1994 on Muyira hill and which resulted in the deaths of many children and old persons. The attack, he said, was led by Musema, who arrived at the site in a red Pajero followed by four other vehicles, one being from Gisovu. He said that other "*dirigeants*" were Ndimbati, *bourgmestre* of Gisovu, Niyitegeka, the Minister of Information, as well as Kayishema, Ruzindana, Sikubwabo, *bourgmestre* of Gishyita, Samson, the Minister of Agriculture, Elizaphan Ntakirutimana, the Mugonero pastor, Gérard Ntakirutimana, and Kajerijeri from Mukingo.

445. Witness AC explained there were about 5000 predominantly Hutu attackers, many armed with rifles, clubs called "*ntampongano*", and small axes. Amongst the attackers were members of the Presidential Guard, military personnel and gendarmes from Kigali and Gitarama who had been informed that *Inkotanyi* had hoisted their flag in Bisesero, and workers from the Gisovu Tea Factory. The witness testified that he was able to recognize these workers as their clothes bore the words "*Thé Gisovu*". Other identifiable emblems worn by the attackers as seen by the witness were "MRND", "MDR" and "CDR", while other attackers wore banana leaves.

446. Witness AC described the first attack which was led by Ndimbati and Musema. He testified that the attackers disembarked from their vehicles on the Gisovu road at approximately 50 metres from the position of the Tutsi refugees. He further specified that Musema was on the Mirambi side of the river, the refugees being on the Muyira side of the river. The attack started when Ndimbati shot in the air, followed by Musema who fired his rifle. The witness added that Musema's rifle had a belt of ammunition around it. According to AC, Musema's shots hit an old man by the name of Ntambiye and another person by the name of Iamuremye.

447. Witness AC stated that, on being attacked, the refugees threw stones to defend themselves but the military fired tear gas at them, after which the *Interahamwe* entered the fray using bladed

5804

weapons. The refugees were attacked on the one side by the Musema group and on the other by the Ndimbati group. The refugees were forced towards the attackers from Gisenyi and Ruhengeri, but managed to flee into the Muyira forest. Around 18:00hrs the attackers left.

448. Although there was no cross-examination specific to Witness AC's testimony regarding Muyira, other issues raised and cross-examined during his testimony are relevant inasmuch as they go to the credibility of Witness AC.

449. Witness AC testified that, on the night of 6 April 1994, he had taken a lift with gendarmes going to Kibuye. Asked as to the names of the gendarmes, he explained that he was unable to remember them as it had been over five years since the events and being an old man his memory was failing him. However, after having been reminded by the Defence of his testimony in the *Kayishema* and *Ruzindana* case, the witness recalled having cited the names of the gendarmes.

450. The witness then testified that a certain Innocent came on the trip and that they had met a certain Major Jabo in Kibuye. Yet, when transcripts of the hearing of 6 October 1997 in the *Kayishema* and *Ruzindana* case were put to the witness, he testified that Major Jabo, a friend of his in charge of the Kibuye military camp, a person by the name of Cyprien, a Lieutenant, were on the trip. Witness AC confirmed having said this but continued that, because it all happened so long ago that, he could not remember; had he known these questions would have been asked, Witness AC said, he would have consulted his documents. He added he could not even remember the names of his wife and children. Witness AC then reaffirmed that Major Jabo was in Kibuye and that others, namely Cyprien and Munyankindi, were on the trip. When re-questioned about the presence of Major Jabo on the trip, the witness explained that there were two persons by the name of Jabo, both Majors, one who worked in Gisenyi and the other in Kibuye. Witness AC said it was only at this point that he remembered Major Jabo who went from Karago to Kibuye.

451. Furthermore, Witness AC testified that during the above trip, he and his travelling companions stopped over in Kibuye before going to Bisesero. Witness AC explained that as he did not have access to the gendarmes' camp in Kibuye, he remained by the side of the road, until his companions rejoined him to continue the trip.

452. Defence Counsel referred to a statement given by Witness AC on 12 June 1996 to the investigators of the Office of the Prosecutor. In the statement Witness AC describes a meeting he attended in Kibuye during his trip to Bisesero. He explained therein how, by staying close to a certain Lieutenant Kaburuga Cyprien, he was able to attend the meeting which was being held by the authorities, and saw Niyitegeka and Bagasora. He said that he stayed at the meeting for two to three hours while waiting for the soldiers with whom he was travelling.

453. When questioned by the Defence as to the contents of this statement, Witness AC refused to answer the questions on the basis that he was not called to testify in the Bagasora case. Furthermore, Witness AC refused to answer questions emanating from the Chamber on his attendance at the meeting in Kibuye, saying he did not attend the meeting and that he would prefer to be questioned on matters in relation to the Musema case. After further cross-examination, Witness AC testified that on arrival at Kibuye, he found out that there was a meeting but that he was unable to attend it as he was a simple civilian, and not a gendarme nor a civil or political authority.

454. In re-examination on these divergences, Witness AC confirmed that the divergence in his answers emanated from the specific questions relating to certain events and people as put to him by the investigators of the Office of the Prosecutor.

455. *Witness R* stated that on 13 May 1994 he had heard Niyitegeka tell the other attackers to be aware of Tutsis hiding in Hutu areas. As a result, testified the witness, on 14 May he went back to the place where he had hidden the day before. The witness testified that the attackers who came on Friday 13 May to Muyira Hill also came on Saturday 14 May to kill the survivors. Witness R said that Musema came back on 14 May in his own vehicle with attackers and with all the tea factory vehicles. Witness R stated he had heard that Musema had brought with him people from Gikongoro. The witness specified that as he was not standing very far from the attackers, he was

able to hear Kayishema, who was speaking aloud, thank Musema for bringing the attackers from Gikongoro. Witness R said that Kayishema also thanked Ruzindana for having brought people from afar.

456. *Witness F* testified that on 14 May 1994 the attacks continued on Muyira hill and surrounding hills during which he was shot in his right arm and was hit by shrapnel in his shoulder. Though he saw Musema's red car amongst the vehicles of other attackers he was able to identify, the witness testified that he did not personally see Musema on that day. The witness added that the hills were strewn with bodies of those who had died the day before.
457. Issues raised during the cross-examination of this witness have been dealt with above as regards his testimony of 13 May 1994.
458. *Witness Z* testified that the refugees on Muyira hill were also attacked on 14 May 1994. At around 09:00hrs, the witness saw Musema arrive with vehicles of the tea factory. He explained that, on seeing the vehicles, he fled. The witness stated that three members of his family were shot by Musema as the refugees came down the hill to break through the attackers. He saw this from where he was standing approximately 15 metres away.
459. Issues raised during the cross-examination of Witness Z have been dealt with above by the Chamber as regards his testimony of 13 May 1994.
460. *Witness T* testified that he saw Musema participate in a large scale attack against Muyira hill on 14 May. The witness indicated that Musema was on an opposite hill and carried a rifle which the witness presumed was used by Musema during the attack.
461. The Chamber dealt with the cross-examination of Witness T in the context of his testimony on the events of 13 May 1994.
462. *Witness D* spoke of a large scale attack which took place on a day of Sabbath, thus a Saturday, between 08:00hrs and 16:00hrs. The Chamber notes that 14 May 1994 was indeed a Saturday. During this attack at Muyira Witness D saw Musema, Sikubabwo, Kayishema and Ndimbati. She saw attackers, numbering approximately 15000, armed with rifles, grenades and traditional weapons arrive in numerous vehicles, including lorries and nine buses, and heard them sing "Let's exterminate them". According to the witness, those with traditional weapons were to finish off refugees who had been injured by bullets. The refugees numbering approximately 15000 fought back with stones.
463. In cross-examination, Witness D specified that as the vehicles approached, she was unable to identify the vehicles or those aboard. Moreover, she indicated, when the vehicles parked, they were out of her sight. She only saw the attackers once they had disembarked and were making their way towards the refugees, after which she fled. The Defence noted that in her previous statements she had described how as refugees, including her, fled, they mixed with the attackers so as not to be shot.

•A mid-May attack 1994 on Muyira hill

464. The Chamber notes that "mid-May" means at some time between 10 May and 20 May.
465. Prosecution, *Witness H*, spoke of an attack which took place on Muyira hill directed against the Tutsi refugees. He testified that attackers came from Gisovu led by Musema, while those who came from Mugonero were led by Ruzindana and those from Gishyita by the *bourgmestre* Sikubwabo.
466. Witness H explained that he saw four vehicles from the tea factory and Musema's red Pajero in front of them which stopped at Kurwirambo. The Chamber notes that at a later stage in his testimony, the witness indicated that Musema's Pajero was behind the convoy of vehicles coming from the tea factory and stopped first at Kurwirambo. Aboard the vehicles were *Interahamwe* who were, according to the witness, living with Musema in Gisovu. When asked whether he could see anyone else aboard Musema's vehicle, Witness H stated that he was not close to the area and observed everything from a distance. When asked by the Prosecutor whether he was correct in

identifying Musema, the witness simply replied that he knew his vehicle. The witness explained that he had seen Musema's vehicle on numerous occasions before 1994, specifically in 1992 while he worked on a Swiss road project.

467. Witness H described the attackers he saw on that day as being made up, firstly, of workers from the tea factory, dressed in blue factory uniforms with inscriptions on the back and armed with machetes and clubs, secondly, of *Interahamwe* dressed in white who came on a bus from Kigali to assist the local population, armed with rifles and clubs, thirdly, of soldiers in "smoke" uniform with black berets and gendarmes wearing red berets, all of whom were armed with rifles, and, fourthly, civilian Hutus (men, young people) who had come on foot from Gisovu.

468. The witness testified that, upon reaching the foot of the hill, Musema came forward and gathered the assailants who were scattered. He then fired a shot which marked the beginning of the attacks around 09:00hrs. Although the villagers only had stones to defend themselves, they were able to drive the assailants back down to the foot of the hill, with the intention of grabbing Musema. However, other assailants, led by Ruzindana and Sikubwabo, surrounded them, and they had to flee. Many refugees, including his wife and children, were killed during this attack. According to the witness, Musema was leading the *Interahamwe* and personally shot at the refugees, although the witness could not say whether Musema actually hit anyone. Witness H stated that the attack finished around 18:00hrs.

>

469. In cross-examination, Witness H specified that during the attack on Muyira hill, he was at the top of the hill from where he could see the vehicles parked on the road about twenty to thirty minutes from where he stood, there being a valley and a river between the road and the top of the hill. He was able to recognize the factory vehicles, because he had seen them several times before. The witness added that he was able to read the inscriptions on the factory uniforms as during the attack he had been close to the workers of the tea factory.

•An attack in mid-May 1994, Mumataba hill

470. *Witness S* stated that sometime near the middle of May while he was in refuge on Mpura hill, he saw Musema participate in an attack in Birembo. The witness testified that, around 10:00hrs he saw Musema and many other people (between 120 and 150) on the Gishyita and Gisovu road. He also saw three Daihatsu vehicles, one yellow, one green and one blue, belonging to the tea factory and bearing the inscription "*OCIR-thé Gisovu*" and Musema's red Pajero. The group of attackers included communal policemen recognizable from their uniforms, people dressed in white, and employees of the factory in blue uniforms and *casquettes* all bearing the inscription "*Usine à Thé*". The factory employees carried traditional weapons, machetes, spears and clubs.

471. The vehicles dropped off the attackers and then all, save Musema's, went to pick up other individuals in Gisovu, returning 45 minutes to an hour later. Other attackers led by Ruzindana and Sikubwabo were also seen by the witness coming from Gishyita with two vehicles, a lorry and a Toyota Stout. Witness S said the attackers first grouped and had a "meeting" before blowing their whistles and launching the attack against Sakufe's house on Mumataba hill. The attack was aimed at between 2000 and 3000 Tutsis who had sought refuge in and around the house. The majority of the refugees, including relatives of the witness, were killed during the attack. The witness stated that Musema stayed by his car during the attack in the company of persons dressed in white.

472. At the end of the attack the assailants headed towards Gisovu. Musema left the site at the end of the day around 17:00hrs heading in the same direction, while Ruzindana and Sikubwabo went towards Gishyita.

473. In cross-examination, Witness S described the locations of Mpura hill and Birembo in exhibits P20.1 and P20.2, and their situation in relation to Sakufe's house. He stated that Sakufe's house was ten minutes walk from the Gisovu road, while Birembo is one kilometre from Mpura hill.

Even though the vehicles had parked less than one kilometre from where the witness and another person were hiding, the Defence called into question the witness' assertion that he was able to read the inscriptions on the tea factory vehicles.

•End of May at the Nyakavumu cave

474. *Witness AC* recalled an incident which took place at a cave in Kigarama *Commune*, Nyakavumu *cellule*. He testified that he was 40-50 metres away from the cave and saw Kayishema, Musema, Ruzindana and the *bourgmestres* of Gishyita and Gisovu come to the cave and order it to be sealed by having it covered in firewood. The witness told the Chamber that a man from Gisovu was ordered by Ndimbati, Ruzindana, Musema, Niyitegeka and Kayishema to light the wood. The man then set the wood on fire using grass and kerosene.
475. Witness AC recalled that of the 300 people inside the cave, only one survived, all others being suffocated to death by the smoke. Following questions from the bench, the witness affirmed that he had heard Musema give orders at the cave, however, he gave two answers, namely that he had heard Musema say on the one hand, "Bring some wood, make some fire", and, on the other hand, "Bring some wood, bring some sods of earth". The witness also reaffirmed that Musema ordered that a fire be lit.
476. In cross-examination of Witness AC, the Defence put questions to Witness AC pertaining to his previous testimony in the *Kayishema* and *Ruzindana* case during which he made no mention of Musema in the attack perpetrated at the cave. The witness explained that on all the previous occasions he had been interviewed by the Office of the Prosecutor, the questions had been relevant to specific individuals, and so he did not mention Musema. However, in a previous statement of Witness AC of 12 June 1996 which contained the witness' description of events at the cave with a list of people he had seen there, there was no mention of Musema. The Defence further questioned the witness as to his sighting of Prime Minister Kambanda at the cave, Kambanda not being mentioned when Witness AC testified in the *Kayishema* and *Ruzindana* case, whereas in the said statement the witness cited Kambanda as one of the attackers taking a prime role in the events. The witness said he did not find it surprising that a person as important as the Prime Minister should be present at the cave.
477. *Witness H* testified that around the end of May or early June, an attack led by Musema and Ndimbati was directed against a cave in Nyakavumu. Although he was not present at the attack, he had seen Musema shortly before it in a convoy with others going in the direction of the cave and thus presumed that Musema must have been at the attack. This convoy was made up of vehicles of the tea factory, buses from Kibuye, vehicles belonging to the *commune,* and Musema's Pajero.
478. During the attack on the cave, said Witness H, he had hid on the hill at about thirty minutes walk from the cave. This hill was separated from the cave by a small valley and hillock. He explained that the assailants proceeded to destroy the fence of the surrounding houses for firewood to the set the entrance of the cave alight, and gathered branches to produce more smoke. After the attack, the witness said he went to the cave and saw that everything was burnt. He testified that only one person survived.
479. In cross-examination, the witness confirmed that he was able to see the events as he testified above and explained to the Chamber that it was only recently that he had developed eye problems.
480. *Witness S* testified seeing Musema lead attackers towards Nyakavumu cave. He explained that near the end of May, while on Nyirandagano hill with 2000 other refugees, in Gitwa *cellule*, he saw Musema arrive with tea factory vehicles aboard which were attackers, comprised of tea factory workers and inhabitants of Gisovu. These vehicles, explained the witness, stopped at Birambo around 09:00hrs and 10:00hrs, and Musema's vehicle stopped behind them.
481. The witness testified that the refugees sent "spies" to see what the attackers were up to. Having received information from these spies that the attackers were too numerous to fight, the refugees fled to Kigarama hill. Witness S described how the attackers chased the refugees who were forced

to separate into three groups, the first going to Nyakavumu cave, the second group went towards Nyarukagarata, and the third group, including the witness, fled to Gitwa hill. Witness S said that his group was not chased by the attackers as they had gone to Nyarukagarata and to Nyakavumu cave. The witness testified that, through trees, he saw Musema with a long rifle following the assailants.

482. Witness S said that those with Musema then blew whistles and shouted out three times for the attackers ahead of them to backtrack as they had passed by the Nyakavumu cave. Those who returned gathered around Musema for approximately two minutes. The witness explained that the attackers exchanged a few words after which they destroyed the house of a certain Munyanbamutsa for firewood which they took to the cave. Witness S was unable to see what then happened at the cave, but saw smoke rise a short while later. The witness indicated to the Chamber that he had hidden his wife in the cave that very same day. The attackers, said the witness, stayed at the cave for four hours after which they left for Gisovu.

483. Witness S said that he went down to the cave with eight other men after the attackers had left and noted that wood and leaves had been burnt at its entrance. Only three survivors, one man, one woman and one child were pulled out; the last two died during an attack the next day.

484. The witness indicated that Musema's group had been joined at some point by attackers from Gishyita led by Sikubabwo, Rutagananira and Ruzindana. The Chamber notes that it is unclear exactly where the witness saw these individuals.

485. In cross-examination, Witness S specified that the vehicles from the Gisovu tea factory had parked at Birembo, while those of the other groups of attackers parked at Gisoro and Mubuga. The Defence referred to the witness' written statement in which he describes in more detail the attack on the cave after having seen Musema with three soldiers and a gun slung over his shoulder. Witness S confirmed that he could not see the attack on the cave from his position on Gitwa hill.

486. *Witness D* described an attack which occurred at a cave, although no indication was forthcoming from her testimony as to exactly where and when this attack occurred. She testified that approximately 400 people, including children and women, had sought refuge in the cave. From where she was hiding she was able to see attackers start a fire with grass at the entrance of the cave, the smoke thus suffocating those inside. Amongst those who started the fire, Witness D recognized Musema and Ndimbati. Once the attackers had left, said the witness, she went with others to the entrance of the cave where she saw many bodies. She then fled.

487. In cross-examination, Witness D specified that she was unable to see any vehicles from where she was hiding on the side of the hill.

488. *Witness AB* testified that he saw Musema sometime in the month of June at the military camp in Kibuye in the company of Second Lieutenant 'Buffalo' Ndagijimana, Ndimbati and Doctor Gérard Ntakirutimana. Ndimbati was carrying a pistol and wearing military trousers and a black jacket. He said that Musema was armed with a pistol and was wearing a military jacket. The witness said that he overheard them discussing one last operation that had to be carried out in Bisesero. Witness AB added that he was able to hear them as they were speaking with raised voices, and as he was responsible for the camp security he had the right to know who was there and why they were there.

489. According to the witness, Musema said that information that he had received indicated that Tutsi were hiding in the tin mines. Musema explained that he therefore needed a lorry load of firewood to start a fire at the entrance of the hole where they were hiding, and consequently to block the hole to prevent anyone getting out. The witness said that Musema asked the second Lieutenant for the firewood. The witness explained that although it was with 'Buffalo' that they carried out the operations, permission for the wood could only be given from Masengesho, the camp commander. Witness AB testified that he was unable to say whether they succeeded in getting the wood as he did not spend all day at the camp.

490. In cross-examination, Witness AB confirmed that Musema had come to the camp in his red Pajero and had requested a pick up full of firewood. When questioned as to why Musema had not used a

5809

tea factory pick-up, the witness stated that Musema would be in a better place to answer. The witness testified that he knew that there was a plantation of wood for burning at the tea factory, but that he did not know whether during the war the wood had become Musema's personal property, whether Musema had come for assistance by asking for this pick-up or whether there remained any wood at the tea factory. He stated that he had never been to the cave where many people had died.

•Attack of 31 May 1994, Biyiniro

491. *Witness E* testified that during an attack on Muyira hill directed against 20000 refugees, he and others fled to Biyiniro hill at which point he saw Musema on the road with soldiers, guards, *Interahamwe*, tea factory workers who were wearing "*Usine à thé Gisovu*" caps, uniforms and tea leaves, and gendarmes who had come from Gisovu, Gishyita and Kibuye in array of vehicles including a green and a blue Daihatsu from the tea factory. The attackers, who were armed with firearms and traditional weapons, continued shooting at these refugees. The witness explained that the refugees decided to catch Musema as they saw him as a leader and because he had provided vehicles for the attackers. Musema then fled in his Pajero while soldiers continued firing at the refugees, many of whom, including the witness' older brother, were killed during the attack.
492. In cross-examination, Witness E specified that he fled from Muyira hill before midday in the direction of Biyiniro. According to him, it would take five minutes to walk from the summit of Muyira hill to the Bisesero road. He gave further details as to the vehicles he saw on that day but was unable to enlighten the Chamber as to the exact number of attackers.

•Attack of 5 June 1994, near Muyira hill

493. In addition, *Witness E* also saw Musema on 5 June 1994 near Muyira hill. He explained that he saw Musema's car and tea factory Daihatsus, among others, parked on the road at the Gishyita-Gisovu border, near Muyira hill. Aboard these vehicles were gendarmes, tea factory workers, communal policemen, *Interahamwe* and guards. The witness said he saw Musema carrying a rifle, and other leaders, including Kayishema, Sikubabwo and Ruzindana, give instruction to the attackers. Witness E said the attackers killed many refugees, including his younger sister, and that Musema also fired shots with a rifle during the attack.

•22 June 1994, Nyarutovu *cellule*

494. Prosecution *Witness P* said that in June 1994 while in Nyarutovu *cellule* he witnessed a number of attacks, and particularly remembered that of 22 June 1994, which he testified was led by Musema, and which occurred six days before the arrival of the French.
495. The witness described how this particular attack took place near a precious stone mine belonging to a company called Redemi, between 11:00hrs and midday. Musema and a number of tea factory workers, whom he recognized by virtue of their uniforms, were in a blue Daihatsu. The witness said that the vehicle stopped on the Gishyita road next to him and the young woman with whom he was.
496. He explained that he was with a young woman and a certain François who was crossing the road looking for somewhere to hide. The witness was 30 metres from the road but was unable to specify how many people there were aboard the Daihatsu as he fled while they disembarked. He testified that Musema was standing on the road next to the vehicle when he shot him, Musema holding the firearm with two hands. The witness stated that when the shot was fired he had his back to Musema. In his mind, there was no doubt that it was Musema who fired because he saw him aim at him and because Musema was the only person in the group who had a rifle. Witness P testified that after being shot in the ankle, he fell to the ground face down and feigned death. He then heard another gunshot and he again presumed that it was Musema who fired the shot. When

the attackers left, the witness saw the body of François, so he concluded that it was Musema who had killed him. Most of these details pertinent to the gunshots came out during cross-examination.

497. Witness P stated that after the gunshots, the young woman ran away. He then heard Musema tell his workers to catch this young woman and to bring her back alive, so that they could see how Tutsi women were made. The attackers ran after the young woman, caught her, and put her in the vehicle. The witness said the attackers, including Musema, then drove off in the direction of Gisovu. He said that he never saw the young woman again.

The Alibi

•15/17 April to 22 April 1994

498. According to the alibi, around 03:00hrs on 17 April 1994 Musema and a soldier who was with him in Gisovu were woken by the supervisor of the Gisovu Tea Factory and by two guards who had come to the residence to warn him that the factory was being attacked. Musema testified that the supervisor told him that he had heard that Musema was going to be killed. The soldier suggested the only course of action was to flee. Musema thus fled towards Butare and then to Rubona aboard the red Pajero, registration A7171. He arrived in Butare around 09:00hrs. During the journey, he came across more roadblocks than he had seen before.

499. Musema testified that once at Butare, he dropped off the soldier and sought out a certain gendarme to inform him of his brother's death in Gisovu. Musema then went to his mother-in-law's in Rubona where he rested for the remainder of the day. Musema explained that, at this time, what was happening in Rwanda was "*du jamais vu*"; people were desperate not knowing what was going to happen, hoping that the massacres would stop in the region and that the war would cease in Kigali and in the north of the country.

500. Claire Kayuku, Musema's wife, testified that he returned to Rubona on either 16 April or 17 April in a state of shock, as a result of the killing of the tea factory employees. She specified that Musema had gone to Gisovu and returned two days later.

501. The Prosecutor referred in her cross-examination of Musema to exhibit P63, a Swiss asylum interview, wherein Musema states that he left the factory on the night of 15 April 1994. The Chamber notes that Musema then explained that this particular document was not the interview but rather his notes in preparation for an asylum request. The questions/headers were inserted by himself, he said.

502. In exhibit P56, a Swiss interview of 8 March 1995, Musema states he arrived at Gisovu on 14 April 1994 and left on 15 April around 03:00hrs, and in exhibit P54, a Swiss interview of 11 February 1995, he states he left Gisovu on the night of 15-16 April after being warned by factory guards of an imminent attack. Similarly the calendar of Musema, exhibit P68, indicates that he went to Butare (Rubona) on 15 April 1994. In exhibit P68, it is also indicated that Musema was on mission from 18 April 1994 to 21 April 1994 in tea factories.

503. During trial, the Chamber sought clarification as to the discrepancies concerning the dates of departure from the factory and the start of the mission. Musema then explained that at the time of preparing the calendar he was not certain of the exact dates of his mission(s). He added that it was only after the Swiss *juge d'instruction* returned with documentation from a visit of the Gisovu Tea Factory that he was able to recall that between 18 and 22 April he was in Rubona, and that the mission started on 22 April 1994.

504. Exhibit D27, tendered by the Defence, is a document entitled "*Préparation réunion du 15 Avril 1994*". Musema confirmed in Court that his annotations appeared on the document which, he stated, had been given to him by the Chief of the Secretariat at either some time in the afternoon of 15 April or in the morning of 16 April, although no meeting was held on 15 April 1994. He also confirmed that, as could be seen from the document, he was concerned about the security

5811

situation at the factory, and the human and material damage which had occurred at the factory.

•18 April 1994

505. On the morning of 18 April 1994, testified Musema, he went to Gitarama, the "transit" area for those fleeing Kigali, in the hope of meeting authorities, including the Director-General of *OCIR-thé*, who he thought had fled the seat of *OCIR-thé* in Kigali and, considering the war situation, would have had to go to or through Gitarama. By then the government had already left Kigali, although the transfer to Gitarama had been very disorganized. Once in Gitarama, Musema went to look for the heads of service of *OCIR-thé* and searched for relatives who could be among the refugees.
506. According to Musema, he did not meet anyone from *OCIR-thé*, but spoke with the Minister of Industry, Trade and Handicraft, Justin Mugenzi, to whom he reported the events and situation at the Gisovu Tea Factory, and asked for protection for the factory. According to Musema, the Minister appeared shocked at the news and assured him that he would take the appropriate measures to ensure the security of the factory. Musema testified that it was on this day that the Minister had indicated to him that he would be sent on mission to contact the Director-General of *OCIR-thé* to start up the factories. Musema returned the same day to Rubona where he stayed until 22 April 1994, although he did visit Gitarama on 21 April 1994, again to look for relatives among the refugees.
507. In support of the movements of Musema on these dates, the Defence tendered exhibit D45, a document in the name of Musema, requesting payment of expenses incurred for the Pajero, registration A7171. The form was filled out by the secretary of the factory and signed by the accountant and Musema. Attached are receipts from a garage in Butare, for cash payment for a broken windscreen, dated 19 April 1994, and from a garage in Gitarama for petrol on 14 May 1994.
508. Claire Kayuku told the Chamber she remembered that between 16 and 22 April Musema went to Gitarama twice to see his family. During that period Musema would spend every night at his mother-in-law's. She testified that on 22 April, he went on mission to Gisenyi and returned to Rubona on 26 April.
509. Exhibit D89, tendered by the Defence, is an undated letter from Claire Kayuku to Nicole Pletscher in which it is written "[i]magine how we all came together on 18 April whereas each one thought the other person was dead"(7).
510. With reference to exhibit P56, where he states that he left Gitarama around 19 April(8), Musema affirmed that at the time of this interview, the dates were just estimations and not necessarily correct, and that it was only after receiving documentation collected by the *juge d'instruction* and his lawyers that he was able to say with certainty on which dates his mission was effected.

The mission order and the subsequent mission

511. The Defence tendered exhibit D10, an "*ordre de mission*" (mission order), dated 21 April 1994. Musema testified that this order was given to him in Gitarama on 21 April 1994, even though it is written "*fait à Kigali*" on the document. By accident he met Minister Justin Mugenzi near a FINA petrol station at the entrance of Gitarama, who told him that he had tried to contact the *Gendarmerie* for protection at the factory, and that he had not been able to reach the Director-General of *OCIR-thé*, Michel Baragaza. The minister then ordered him to go to the north of the country, in particular Gisenyi, to find Michel Baragaza so that the status of each factory could be established.
512. Musema went on to testify that the minister said he would arrange the security modalities and prepare a mission order necessary for circulation around Rwanda. Musema was to collect the mission order at the residence of Faustin Nyagahima, a director within the Ministry of Industry,

Trade and Handicraft. The Minister of Public Works, Water and Energy, Hyacinthe Nsengiyumva, who was also at the station, gave him petrol coupons. The Minister of Industry, Trade and Handicraft authorized the Minister of Public Works, Water and Energy to sign the mission order on his behalf as he had to take care of other business. The meeting lasted 30 minutes.

513. On 22 April 1994, said Musema, Faustin Nyagahima told him that the Ministry of Foreign Affairs was the only ministry at that time which possessed a stamp/seal and that consequently it is this stamp which appears on the bottom of the mission order.

514. Musema declared that the mission was in the context of the *OCIR-thé*, but not in the name of *OCIR-thé* or for the government. He explained that, in normal times, such missions were ordered by the Director-General of *OCIR-thé*. Musema believed that he had been given the mission as the minister had found no one else from *OCIR-thé* to whom to assign it. The expenses were to be met by *OCIR-thé*/Gisovu Tea Factory. The length of the mission, indicated Musema, must have been decided by the Minister of Industry, Trade and Handicraft. The mission order was not drafted on the basis of particular factories but rather on the basis of *Préfectures* where tea factories or tea projects were located. In normal times, Musema stated that a memorandum would be drafted outlining the objectives of the mission whereas during this period he had received the objectives of his mission orally.

515. According to Musema's testimony, the mission extension on the document was typed on at a later stage, around 7-10 May 1994 in Gitarama. Musema explained that more ministries had stamps by then, thus the stamp of the Minister of Defence, Augustin Bizimana, and his signature appear on the document. Musema conceded that to have the stamp of the Minister of Defence as authority for the extension of his mission was not usual practice, though he recalled that, during that whole period, the situation in Rwanda was not normal, which would explain why the Minister of Defence had signed the extension.

516. Musema further specified that he happened to meet the Minister of Defence in Gitarama. The Minister was an agronomist, originally from Byumba, and he and Musema had begun discussing the situation of finding relatives and about the past four years' conflict. The situation was still very unstable and although Musema's mission had come to an end he still had to visit a number of factories to establish inter-factory contacts. The stamp was to serve as a travel document. It did not extend his original mission with *OCIR-thé* but came into the context of the visits he wanted to make to other factories, to facilitate his movements and so as to provide him with more personal security. He added that there was no need for him to have the stamp of his ministry as the extension did not have any administrative value but only practical value. Musema was unable to explain why the Minister of Defence had not just given him a travel document for safe passage.

517. Musema conceded that it was a mistake that there was no indication as to the date on which the extension was issued. He testified that he would not have gone on the mission had the minister not guaranteed his security, and that he had to respect the mission order from a superior.

518. The Prosecutor contested the veracity of the mission order, submitting that the circumstances in which the mission order was provided, namely through a chance encounter at a petrol station, were unconvincing. Had the mission been simply to contact the Director-General of *OCIR-thé*, as Musema had indicated in his testimony, then, argued the Prosecutor, the mission should have been terminated on the day Musema established contact with the said Director-General. The Prosecutor did not accept the explanations given by Musema in relation to the stamps on the mission order of the Ministry of Foreign Affairs and of the Ministry of Defence and contended that the documents and stamps are complete fabrications. The mission order, in the mind of the Prosecutor, was designed simply to mislead the Chamber and to conceal the extent of the involvement of Musema in the massacres. Other supposed inconsistencies in the mission order were raised by the Prosecutor during the testimony of Musema as to his whereabouts.

519. Prosecutor's *Witness BB* testified that the mission order was unusual and not one normally used in *OCIR-thé*. Details missing included the length of time to be spent away from one's factory and space for expenses incurred. He also stated that it was odd that a minister should sign the order

S813

and also that it was odd to send a director of a factory to visit other factories.

•22 April 1994

520. Musema testified that on 22 April 1994, he went to Gitarama to pick up the mission order from Faustin Nyagahima who was in a house in the commercial district(9).
521. Musema also said that he then went to the military camp in Gitarama where he was given two gendarmes to escort him, and then drove off in the direction of Kabaya around 10:00hrs. In Kabaya, Musema stopped at the house of the Director-General of *OCIR-thé*, where he met the Director-General's wife. She informed him that the Director-General was somewhere in Gisenyi. Musema asked the Director-General's wife to tell her husband that he would like to meet with him.
522. Musema stated that he reached the tea factory of Pfunda at the end of the day, around 16:00hrs - 17:00hrs. The director of the tea factory of Pfunda signed the back of the mission order and stamped it with the factory seal. Musema wrote next to the stamp "*arrivée à Pfunda le 21/04/1994*". Although the date of 21 April 1994 appears next to the signature, Musema was adamant that he arrived at the tea factory of Pfunda the following day, on 22 April 1994.
523. Musema explained that at the time they did notice the error. He said that the mistake was rectified for accounting purposes but not so reflected on the mission order as it was not expected to be used as an itinerary.
524. In support of this explanation, the Defence tendered exhibit D28, a "*Déclaration de Créances*" for expenses incurred by *OCIR-thé* (Gisovu Tea Factory) for the use of two gendarmes from 22 April 1994 up to 2 May 1994. This document is signed by the chief accountant and Musema and dated 2 May 1994.
525. Musema stated in his testimony that he stayed at the factory until 25 April 1994. The factory was operational and most of the troubles and massacres were outside the vicinity of the factory. Although he did not see him while at Pfunda, Musema had hoped that the Director-General of *OCIR-thé* would pass by the factory on his way back from Gisenyi.
526. The Defence tendered exhibit D29, a "*Rapport de Mission*" and a covering letter, dated 24 April 1994 and written and signed by Musema in Gisenyi. According to the Defence, these documents were found by the Defence in the archives of the Gisovu Tea Factory.
527. Musema testified that the interim report was typed at Pfunda factory and was to be sent to the Director-General of *OCIR-thé*, although Musema acknowledged that the lack of the recipient's full address was an oversight on the part of the typist. Musema explained that he had planned to drop off the report and annexes on his way back to Rubona at the house of the Director-General in Kabaya, but that by accident he bumped into him at Mukamura. He was thus able to hand over the documents in person. Other copies were also given by Musema to the directors of the Pfunda and Nyabihu tea factories whom he also met.
528. During cross-examination, Musema gave further details as to his mission. He only visited in person the factory of Pfunda, having gone to the factory of Nyabihu which was closed although he met its director. Besides the directors of these two factories Musema also met the director of Rubaya.
529. The Prosecutor referred to exhibit P56, the Swiss interview of 8 March 1995, where Musema says "[...] I left Gitarama to visit the factories in Gisenyi (Nyabihu, Rubaya and Pfunda)" and to exhibit P58, Swiss interview of 6 April 1995, where he states "Pfunda factory was the first I visited. I met there the factory director, we discussed, and I was accommodated at his house. [...] At Nyabihu, I met the director Mr. Gasongero at his residence. I did not reach Rubaya, but I met the factory director Mr. Jaribu".
530. Musema explained during the trial that he was able to make a report on these factories based on the discussions he had had with the respective directors. The mission report D29, dated 24 April 1994, contains recommendations for the above three factories.
531. The Prosecutor argued that this report was "strikingly thin" considering the importance of the

5814

alleged mission and the calibre of the requesting official, a minister. The recommendations and issues contained in the report were vague and could have been written at any time without having been on mission, stated the Prosecutor.

• 25 April 1994

532. Musema testified that he and the gendarmes left Pfunda factory on 25 April 1994 around 08:00hrs and met the Director-General of *OCIR-thé*, who was with his wife, and the director of the Nyabihu tea factory, at Mukamura. The Director-General of *OCIR-thé* read the mission report, approved it, added a couple of aspects, and confirmed that Musema could continue his mission. Musema stated that the meeting lasted approximately one hour, after which he drove to Gitarama. He arrived there late at night because of the number of dangerous road barriers, and stayed overnight because of the curfew.

• 26 April 1994

533. According to Musema, on 26 April 1994, Musema went to Rubona where by now the security situation had completely deteriorated. Pillagers and killers had taken over the ISAR. He stayed overnight with the rest of his family at the house of his brother-in-law, who worked at ISAR.
534. Claire Kayuku testified that Musema returned to Rubona on 26 April from Gisenyi.

• 27 April 1994

535. Musema stated in Court that he remained in Rubona on 27 April 1994. Although he did not see any killings he witnessed much pillaging of cattle and plantations.

•28 April 1994

536. During his testimony, Musema stated that on 28 April 1994, he went to Kitabi where he stayed for the day before returning to Rubona in the evening. The director of the Kitabi tea factory signed and stamped Exhibit D10. Musema heard that some of the factory staff had been massacred but on his visit there, it was calm at the factory.

• 29 April 1994

537. Musema declared that he left Rubona with the gendarmes between 09:00hrs and 10:00hrs, still in the red Pajero, and travelled back to Gisovu via Butare, Gikongoro and Gasaranda. They arrived in late afternoon. On the mission order appears the Gisovu tea factory stamp with "*Arrivée Gisovu 29/04/94*" written next to it.
538. Musema described the situation then as being calmer, with fewer people on the barriers and no movement of groups of killers. The factory was calm, the guards were present while the other employees were in their homes. The bodies he had seen previously on the roads were no longer there.
539. Musema confirmed that he held a meeting with the higher factory officials between 16:00hrs and 17:00hrs at the factory. There were four participants, excluding Musema, according to the report on the meeting. The report was made by the secretary Nyarugwiza and filed. The minutes were tendered as exhibit D30. The second paragraph of the minutes reads that "[t]he director informed the participants that he had not neglected the workers but rather that the Government had entrusted him with the assignment of going round factories to see how to ensure resumption of operations in such factories".
540. Musema testified that he stayed at the factory that night.

• 30 April 1994

541. Exhibit D31, the minutes of a meeting held on 30 April 1994 at the tea factory, was tendered by the Defence.
542. Musema confirmed that he signed the minutes that were taken by the secretary Nyarugwiza.

5815

Musema explained that the meeting took place in two phases, the first with the department heads of service and the second with the technicians so as to hear their opinions on restarting the factory. During the meeting, it was decided that Musema, as director of the factory should be the one to ask for fuel from the *Préfet* of Kibuye, because in time of war, the *Préfets* would requisition petrol stations and control the distribution of fuel.

543. Point 2.7 of the minutes reflects that the disappearance of employees of the tea factory was discussed. Musema stated that the atmosphere at the meeting was cold as everyone knew that there still existed dangers and that there was a general situation of insecurity in the region. Issues discussed included security at the factory, the date for the start of the picking of tea and the amount to be picked and the route to be used for the transport of tea.
544. Exhibit D32, a letter dated 30 April 1994 from Musema to a Ms Annociathe Nyiratabaruka assigning her as storekeeper, was tendered by the Defence to show the implementation of a decision taken at the meeting of 30 April 1994.
545. Exhibit D33, dated 30 April 1994 and signed and stamped by the Préfet Clément Kayishema, is an "*Autorisation de Circulation*". In this particular document, travel permission is granted with reference to the mission order of 21 April 1994.
546. Musema testified that he met the *Préfet* on 30 April 1994 for the issuance of this authorization needed to further his mission and travel outside of the *Préfecture*. The *Préfet* had previously decreed that all travel outside the *Préfecture* had to be authorized by him and that all travel between *communes* had to be authorized by a *bourgmestre*.
547. Musema went on to tell the Chamber that during his trip to Kibuye along Lake Kivu he saw burnt and destroyed houses. In Kibuye, the Stadium doors had been destroyed. There were red stains on the walls, and a putrid smell of decomposing bodies hung in the air. The Home Saint Jean and the catholic church had been damaged, and the church's front entrance damaged by fire.

• 1 May 1994

548. Exhibit D34 was tendered by the Defence to show that, during this period, Musema was still taking care of the running of the tea factory. The exhibit is a letter sent by Musema from Gisovu to Gaspard Bitihuse, in which he reprimands the addressee for not attending the meeting of 30 April 1994 and delegating instead to his subordinates. Musema indicated therein that work at the factory was to restart on 2 May 1994.

•2 May 1994

549. According to Musema, exhibit D28, the "*Déclaration de Créances*" dated 2 May 1994, was drafted prior to him leaving Gisovu on that same day. He left for Shagasha tea factory between 10:00hrs and 11:00hrs and arrived between 18:00hrs and 18:30hrs. Musema stated that the reference of 3 May 1994 as the date of arrival at Shagasha on Exhibit D10 was an error and that he arrived in Shagasha on 2 May 1994. The visit to the factory took place the next day, which may explain the date of 3 May 1994.
550. During cross-examination the Prosecutor referred to exhibit P56, a Swiss interview of 8 March 1995, where Musema states that he travelled on 2 May 1994 to the factory of Kitabi where he met with the director.

• 3 May 1994

551. Musema said he carried out his visit to Shagasha tea factory on the morning of 3 May 1994 and then visited the Gisakura factory afterwards. At Shagasha the teamaker signed the *ordre de mission* but did not have a stamp. Musema could not explain to the Chamber why the Shagasha signature appears further down the page after the Gisakura stamp, but assured the court that he did

visit the former first. He stated that he came back to Shagasha after visiting Gisakura and that it may have been then that the teamaker signed.

552. Musema stated that the chief accountant of the Gisakura factory put his factory's stamp on the mission order on 3 May 1994. Musema visited Gisakura on at least two more occasions before leaving Shagasha on 5 May 1994.
553. However, prosecution *Witness BB* stated that on 3 May 1994, he was at the Gisakura tea factory. He also stated that Musema did not meet with the director of the Gisakura factory, although the stamp of the factory appears on Musema's mission order (exhibit D10, discussed below). In the opinion of the witness, had they met, the Gisakura director would have signed mission order, and not the chief accountant, whose signature the witness recognized.
554. According to Witness BB, the factory had two stamps: one was kept by the director and the other by the chief of personnel. In his opinion, the chief accountant, who was superior in rank to the chief of personnel, must have requested the latter for the stamp of the factory at the time of stamping the mission order for Musema. The usual procedure was to have the chief of personnel stamp the document if the director was unavailable. The witness added that as the chief accountant was a member of MDR Power, he would have had good relations with Musema.
555. The witness added that he believed that it was peculiar that the director had not been informed by his staff or wife of the visit of Musema.
556. During cross-examination of Claire Kayuku, the Prosecutor suggested in a question to her that on 3 May 1994, Musema attended a meeting in Kibuye town with the Prime Minister. The witness had no knowledge of this.

•5 May 1994

557. Musema testified he left for Rubona on 5 May 1994, and hoped to visit the tea factory of Mata. He departed from Shagasha around 08:00hrs and arrived in Rubona around 18:00hrs, staying there overnight. Although there were no massacres at Rubona, tension had risen as a result of all the refugee movements and because of all the news of the intensifying war.

• 6 May 1994

558. Musema said he believed he stayed in Rubona on 6 May 1994.
559. The Prosecutor put exhibit P56 to Musema wherein he states that "[o]n 3 May, I once again visited the factories in the south west, that is, Gisakura and Shagasha. I then returned to Butare. On 7 or 8 May, I returned to Gisovu and on 9 May, I supervised the resumption of operations of the factory. I remained there until 19/20 May and travelled to Butare to join my family."
560. During his testimony, Musema affirmed that between 7 and 19 May 1994 he was at Rubona and visited Gitarama on occasions.

•7 May 1994

561. Musema testified that on 7 May 1994, he went to Mata tea factory. The visit lasted no more than six hours after which he returned to Rubona. The chief accountant of Mata tea factory affixed his stamp to the mission order which is dated 7 May 1994.
562. According to Claire Kayuku, Musema visited a number of tea factories at the end of the month of April and the beginning of May.

• 7 to 19 May 1994

563. Musema stated that he stayed in Rubona from 7 May 1994 until 19 May 1994, never going beyond the towns of Butare and Gitarama and thus did not set foot in Kibuye *Préfecture*, and that he did not visit any other factory.
564. Exhibit D35, a letter dated 8 May 1994, to which is annexed the mission report, was typed up by the secretarial services of ISAR at Rubona. Reference is made therein to the date of the start of the mission, its objectives and to the interim report of 24 April 1994. There is mention of the dates on

which the various tea factory started up production and existing stocks at the Gisakura and Shagasha factories. These last figures, according to Musema, could be made available by the teamaker, the accountant or even by the director. Conclusions rendered by Musema deal with fuel provisions, payment of salaries, security of the tea factories, recruitment of new staff and the setting up of transport routes for black tea via Gisenyi.

565. Musema indicated that he made approximately ten copies of the report for transmission to the directors of the visited tea factories. Musema handed a copy for the Director-General of *OCIR-thé* on 10 May 1994 to the commercial bank in Gitarama which had a convoy going to Gisenyi. The manager of the bank had promised to deliver this report to the Director-General.
566. Defence *Witness MH* said he saw Musema on 10 May and 13 May 1994. On 10 May, the witness saw Musema in Gitarama. He talked with him but did not remember asking him where he had come from or what he was doing. Musema had arrived in a vehicle, but Witness MH could not remember the type of vehicle it was, nor the colour of the vehicle. He recalled that these events dated back five years which may account for his inability to remember such details.
567. MH added that, on 13 May 1994, he was fleeing on his own to Burundi and had left Gitarama in the afternoon between 12:00hrs to 13:00hrs, travelling in his vehicle from Gitarama to Butare, towards the Kanyaru-Haut border post. After 45 minutes to an hour, he stopped at Rubona where he spent no more than 20 minutes. In Rubona, the witness went to the residence of the Kayuku family, being the family of Musema's mother-in-law, to say goodbye to them and to inform them that he was leaving Rwanda for Burundi, in transit to Kenya. He saw and spoke with Musema. Although he was unable to specify exactly when he met with Musema, he estimated it to have been around 14:00hrs, roughly one hour after leaving Gitarama.
568. A copy of Witness MH's passport with the entry stamp for Burundi on 13 May 1994 was introduced by the Defence as exhibit D102. On the same page as this stamp is a stamp issued at the Bujumbura airport showing the exit of Witness MH from Burundi territory on 15 May 1994.
569. Exhibit D45 contains a copy of a receipt dated 14 May 1994 from a FINA petrol station in Gitarama for a cash payment made by Musema for fuel for the Pajero, registration number A7171. This document, contends the Defence, strikes at the Prosecutor's case by placing Musema elsewhere than at the scene of the massacres in Bisesero.
570. Defence *Witness MG*, the wife of MH, said she saw Musema on two occasions between mid-April and 16 May when he came to visit her family in Gitarama. Although she was not sure of the exact dates, she believes that one of these visits was in May. MG left Gitarama on 15 May and Rwanda on 17 May. On 7 June 1994, she wrote a letter (exhibit D92) from Nairobi to Nicole Pletscher in which she indicates that on 17 May 1994 Musema and his family were in Butare at the house of Claire Kayuku's mother. She specified in her testimony that she did not personally see Musema in the days preceding her departure from Rwanda, but that she had heard of his whereabouts from one of her brothers and indirectly from her husband. MG indicated that she had written the date of 17 May in her letter as it was then that she had finally left Rwanda, and that she would be unable to confirm whether or not Musema had left the house of his mother in law on 16 May.
571. Defence witness Claire Kayuku, Musema's wife, declared she remembered that he returned to Gisovu at some time around the middle of May to pay the tea factory employees. She recalled that at the beginning of the month of May, Musema's red Pajero spent one or two weeks in a garage in Butare for repairs.
572. Exhibit D36, a letter, was tendered to demonstrate that Musema was a man not taking part in the events but just watching the events unfold and that by being in Butare on 14 May 1994, he could not have been in Muyira as alleged[10].
573. According to Musema, this letter was written by him on 14 May 1994 in Butare and addressed to a Swiss friend called Nicole Pletscher. He gave it to a person going to Burundi on 14 May 1994, and hoped that it would be posted in Bujumbura. Musema had known Nicole Pletscher since 1986 and his family and hers had become friends. The last time he saw her was on 3 April 1994 in Kigali. The next time he saw this letter was during his testimony in this case.

5818

574. In further support of Musema's absence from Gisovu, the Defence tendered exhibit D46, a letter from Musema sent to the prefect of Kibuye, dated 18 May 1994 requesting gendarmes for the factory. On the letter is written ACL, meaning "*à classer*". Annexed to this letter is a note, headed "*A qui de droit*", which Musema said was given to him by the Minister of Defence then based in Gitarama on 10 May 1994. By this note drafted by the minister, the commander of Kibuye *groupement* is requested, taking into account its importance, to ensure the close security of the tea factory. Musema stated that on 18 May 1994, as he still had car trouble, the letter and annex were given by Musema to someone in Gitarama who was going to Kibuye.
575. Were Musema in Gisovu, contends the Defence, he would not have waited eight days to transmit this note.
576. A number of other documents were tendered by the Defence to prove that Musema was absent from the Gisovu tea factory in mid-May 1994. Exhibit D41, a request for employment, received 5 May 1994 at the tea factory, was only dealt with by Musema on 14 June 1994. Exhibit D42, a request for accommodation for security reasons, was received on 11 May 1994, yet there appears no date as to when the request was dealt with. Exhibit D44, a request for accommodation, received at the tea factory on 16 May 1994 was dealt with by Musema on 14 June 1994.
577. Exhibit D43, is a letter sent from Joseph Nyarugwiza, head of personnel to the *bourgmestre* of Gisovu, dated 16 May 1994. Before the Chamber, Musema stated that the author of the letter forwarded the list of security personnel who requested to be trained in weapons, in furtherance of their discussions of 13 May and 16 May 1994. Musema was not aware of this letter, the first time he had seen it being upon its discovery by his Counsel during investigations at the Gisovu Tea Factory.
578. The Defence contends that, were Musema acting in concert with the *bourgmestre* Ndimbati during the massacres, Musema would have acted on the letter D43 or commented upon it, yet he did neither.
579. Exhibit D49, entitled "*demande de trésorerie*" and dated 21 May 1994, according to the Defence, was written by Musema for the attention of the Director-General of *OCIR-thé*. Annexed thereto is the *trésorerie* for April and May 1994. The annex is dated 7 May 1994 and signed by Musema.
580. Musema testified that this date referred to the date document D49 was prepared and not when it was signed by him, being 21 May.
581. Musema continued his testimony to say that as the situation was deteriorating in Rwanda, he and his family tried to formulate a plan in case they had to leave the country. Exhibit D37 is a certificate of complete identity issued for his eldest son Patrick Olivier Rukezamiheto, certified by the *bourgmestre* of Ruhashya *Commune* on 16 May 1994. By having this identity certificate, Musema hoped, the task of getting a passport for his son would be facilitated. Copies of the passports of his sons were tendered as exhibit D38, D39 and D40. According to Musema, all the passports were issued in Gitarama on 18 May 1994 in his presence. The passport tendered as exhibit D40 was signed by Musema as his son was not old enough to hold an identity card, and was then personally given to Musema.
582. Musema said he also went to the Commercial Bank in Gitarama on 18 May 1994 to find out about operations since the bank had moved from Kigali. He left his mission report for the Director-General of *OCIR-thé* with the manager of the bank who would deliver it on the occasion when funds were to be taken to Gisenyi.
583. Musema added he spent the night of 18 May in Rubona.
584. During cross-examination, reference was made to Musema's handwritten calendar, exhibit P68, which indicates that he was in Gisovu from 4 May to 14 May. Musema testified that this was an error and that he was not in Gisovu at that time.
585. In exhibit P57, a Swiss interview of 16 March 1995, Musema said that he was in Gisovu in the week of 4 to 13 May. The Prosecutor also recalled exhibit D49, the "*demande de trésorerie*". Musema reiterated that the date of 7 May referred to the date the document was prepared and not the date when signed by him, which was on 21 May.

5819

586. Musema confirmed that, although he did not know the specific names of hills in the Bisesero region, he knew that there had been attacks in the Bisesero region on 13 and 14 May and before. When asked how he knew that there had been attacks when he had not been there, he stated that the agronomists had informed him during the meeting of 19 May 1994 and that he had so heard on radio RTLM and the FPR radio, Muhabura. He also testified that he did not participate in attacks on Muyira hill or elsewhere on 13 and 14 May. Musema did not have any proof or reason to suspect that employees of the tea factory participated in the attacks or that tea factory vehicles were used. He did add, however, that there were times when he was absent from the tea factory, and as such could not be sure that a certain individual or a certain vehicle was not part of the attacks.

• 19 May 1994

587. Musema testified that on 19 May 1994, he returned to the Gisovu Tea Factory. He travelled in the company of two soldiers, Félicien and Alphonse, who had been with him since the start of the mission, and a locksmith who came to help with the safes and doors. They travelled aboard the Pajero. Having left around 09:00hrs they arrived between 15:00hrs and 16:00hrs. The stamp of the Gisovu Tea Factory and "*Arrivée à Gisovu le 19.05.94*" appear on Exhibit D10. The writing is that of Musema and the signature imposed on the seal that of the chief of personnel.

588. Musema went on to say that a meeting was held at the factory. Those present were Musema, Gaspard Bitihuse, teamaker, James Barawigirira, chief mechanic *ad interim*, Joseph Nyarugwiza, chief of personnel, and François Uwamugura, accountant of the factory. The minutes of the meeting, drafted by Joseph Nyarugwiza and signed by him and Musema, were tendered by the Defence as exhibit D47. Most issues dealt with stocks and operations of the tea factory. Paragraph 2 of the minutes indicates that the Director of the tea factory had been on "*tournée*" and that when he was to return his car had broken down and that although he had sought assistance from the factory, none had been forthcoming.

589. During his testimony, Musema explained that his Pajero had developed problems on 7 May 1994 during his visit to Mata tea factory. As the problems were not solved, he had to stay in the Butare region. He had asked for a replacement car from the factory which was only sent on 19 May 1994 by which time the Pajero had been repaired. Exhibit D45, the "*Déclaration de Créance*", requesting payment of expenses incurred by Musema for the Pajero reg. A7171, is dated 19 May 1994. The form was filled out by the secretary of the factory and signed by the accountant and Musema. Attached, *inter alia*, is a bill from a garage in Butare, for spare parts, dated 19 April 1994.

590. Also tendered by the Defence was exhibit D48, a letter dated 19 May 1994, from Musema to the manager of the *Banque Commerciale du Rwanda* requesting withdrawal of funds. The letter also explained that the chief accountant, Canisius Twagura-Kayego, the usual co-signatory, had not been seen since 13 April 1994. In cross-examination, Musema stated that he could not indicate explicitly in the letter that people had died, but that it was implied by saying that they had disappeared. The bench confirmed that in French the term "*disparu*" could be used to indicate that someone had died.

591. Musema told the Chamber that he stayed at the Gisovu Tea Factory on the night of 19 May 1994.

•20 May 1994

592. Musema testified that on 20 May 1994, he went to the Commercial Bank in Kibuye to deliver the letter and collect funds for the salaries. He was accompanied by the two soldiers and the cashier.They stayed at the Gisovu Tea Factory on the night of 20 May 1994.

•21 to 27 May 1994

593. Musema testified that he returned to Rubona to see his family on 21 May 1994. He left Gisovu

Tea Factory with the locksmith around 11:00hrs after having distributed the salaries.

594. Musema added that he stayed in Rubona until 27 May 1994. While in Rubona, Musema and his family again discussed leaving the country. At some point during this period, he said he travelled to Gitarama to drop off documents for the factory at the commercial bank and to search for family members. He also went to Nyanza one day to visit a friend of his who was a priest.

• 27 May 1994

595. Musema stated that he returned to the tea factory on 27 May 1994. His family had moved to Kitabi as result of the advancing soldiers. He stayed the night of 26 May in Rubona and then passed via Kitabi to collect his family on his return to the factory in Gisovu. His wife, two of his children and the soldiers, Alphonse and Félicien, accompanied him to the tea factory.
596. According to Musema, a meeting with eight participants and chaired by himself was held at the factory 27 May. The report of such a meeting was tendered as exhibit D51. The report refers to the meetings of 29 April, 30 April and 19 May. The atmosphere at the tea factory was tense due to news of the war and the ongoing massacres in the Bisesero region. The meeting addressed a number of issues pertaining to the security and production of the tea factory, including losses incurred due to a breakdown which had not been repaired. This breakdown had occurred ten days before 19 May. This, concludes the Defence, demonstrates that Musema was not in the vicinity of the tea factory during these ten days, i.e. 10 - 19 May 1994.
597. One recommendation of the meeting referred to an agreement reached between Musema and the *bourgmestre* of Gisovu for weapons training. It was also decided that gendarmes would come and help the factory guards due to the general insecurity.
598. Musema added that he and his family stayed at the Gisovu Tea Factory on 27 May 1994.
599. The Prosecutor referred to exhibit D51, and to the recommendation regarding civil defence as proof of Musema's involvement in the training of tea factory employees. Musema stated that this point constituted an issue raised by an employee. He did not send people for training as it was not of direct concern for the tea factory, but was rather the concern of the *bourgmestre* and the *commune*. This, Musema explained, was the agreement between him and Ndimbati.

•28 May 1994

600. Musema testified that, by 28 May 1994, he had two plans in mind, one to evacuate his family to the border, and the other to participate in a technical mission headed by a certain Claudien Kanyarwanda, to prospect a corridor for import and export.
601. According to Musema, a meeting was held on 28 May 1994 at the factory in which he participated. Exhibit D52 is a report thereof, signed by Musema. In the report it is stated that Musema handed over three Kalashnikov rifles. During his testimony, Musema stated that he had obtained them in Gitarama, from the military camp on the order of the Minister of Defence, Augustin Bizimana after having explained to the minister his security concerns for the tea factory, and that no help had been forthcoming from the *Préfet*. The minister agreed to give Musema three rifles to complement the two at the factory and to equip all five military reservists.
602. Support for the movements of Musema was put forward by the Defence in exhibit D53, "*Autorisation de sortie de fonds*" dated 28 May 1994, which authorized the payment of funds for expenses to Harelimana for mission expenses with Musema from 21 May to 29 May 1994. Exhibit D55, "*Déclaration de créance*" confirmed the payment of funds to corporal Félicien Harélimana for the mission with Musema from 21 to 29 May 1994. This is signed by Musema and the accountant of the tea factory.
603. Exhibit D54, "*Autorisation de sortie de fonds*" dated 29 May 1994, authorized advance payments of funds to Musema for his mission to Zaïre.
604. In the penultimate paragraph of a letter from the witness Claire Kayuku to the witness Nicole Pletscher, tendered by the Defence as exhibit D90, there is mention of the fact that Musema and

5821

she stopped over in Gisovu on 27 and 28 May on their way from Butare to Shagasha.

•29 May 1994

605. Defence exhibit D10, shows a stamp of Gisovu Tea Factory, with "*Fin de mission: 29/05/94*" written by Musema. The signatures of the chief of personnel and of Musema also appear.
606. Musema testified that he left Gisovu with his family on 29 May 1994. They first went to Shagasha tea factory where they stayed at the "*maison de passage*".
607. Musema explained in cross-examination that the date of 29 May 1994 pertained to the end of the mission with the *OCIR-thé* and that between 19 May and 29 May he finalized his reports. Although he dealt with personal issues, the expenses he incurred during this eleven day period were billed only for the official work he carried out. Normal procedure required more precise dates, usually on a daily basis, than those on the exhibit D10 for payment of expenses. For this particular period, stated Musema, he was paid for six to eight days, on the basis of his oral representations.
608. Musema affirmed that the date of 29 May was clearly indicated on the exhibit and that the "2" had not been written over a "1". The bench accepted this statement.
609. The Defence filed exhibit D63, a "Prime" for Corporal Ndindabahizi for the period 29 May to 17 June 1994 signed by Musema on 17 June 1994. The corporal was one of two gendarmes who had been sent to the tea factory by the Kibuye gendarmerie for security purposes.

•30 May 1994

610. Musema testified that on 30 May 1994 he left Shagasha between 08:00hrs and 09:00hrs and went to Cyangugu to join the technical mission. After a number of meetings, he returned to Shagasha where he stayed overnight.

•31 May 1994

611. On 31 May 1994, stated Musema, he rejoined the mission in Cyangugu and stayed overnight at the Chutes Hotel.
612. The Defence tendered photocopies of the passport of Musema as exhibit D56. On page 12 of the passport are stamps dated 31 May 1994. Musema explained that he travelled with the technical mission to Zaïre leaving Rwanda through Bugarama and entering Zaïre at Kamanyoma. He testified that they came back from Zaïre on the same day. Exhibit D54 is an "*Autorisation de sortie de fonds*" dated 29 May 1994, which authorized advance payments of funds to Musema for his mission to Zaïre.
613. Also tendered was exhibit D59, letter of 2 June 1994, sent to Musema and received at the tea factory on 4 June 1994. In annex are the minutes of a meeting held by the agronomists on 31 May 1994, Musema not being marked as present at the meeting.

•1 to 10 June 1994

614. Musema testified that after meeting a delegation from Bukavu in Cyangugu, he travelled back to Shagasha where he stayed at the *maison de passage*. His family and he remained at Shagasha until 10 June 1994. He testified that for the first few days he stayed at the *maison de passage*, and that he also spent one night in Kitabi where he searched for his mother-in-law. He stated that he had to wait longer than he expected for the return of the directors of the Shagasha and Gisakura tea factories with news from the Director-General of the *OCIR-thé*.
615. The Defence produced exhibit D57, an "*Autorisation spéciale de circulation CEPGL*", issued on 3 June 1994 in Cyangugu. Musema explained that this document was valid for travel in Burundi, Rwanda and Zaïre.
616. Exhibit D58 is a letter signed by Musema, dated 6 June 1994, sent to a merchant in Cyangugu

requesting fuel for the Gisovu Tea Factory and the calculation of costs. Although the letter is addressed from Gisovu, Musema testified that he was in Shagasha when he drafted it. He explained that the directors of Shagasha and Gisakura Tea Factories had recommended the merchants based in Cyangugu who were buying fuel from Zaïre.

617. Defence Witness Claire Kayuku testified that from 29 May 1994, until 7 or 10 June, Musema stayed with her and the family at the Shagasha tea factory, except for one or two nights which he spent in Bukavu as the border had closed. She explained that during this period he was with a delegation working between Cyangugu and Zaïre looking for ways to export tea to Zaïre.

•10 - 17 June 1994

618. Musema testified that he returned to Gisovu Tea Factory on 10 June 1994, without the two soldiers who had received the order to return to Gitarama. Musema testified that this order had been sent by Colonel Bagarameshe head of the Cyangugu Gendarmerie. As such, the colonel had given him a gendarme from Cyangugu to accompany him to Gisovu.
619. On 10 June, said Musema, the factory was functioning normally save for the uncertainty that hung in the air as regards the war. He said that he stayed at the factory until 17 June 1994 and carried out his normal duties.
620. He denied ever transporting people in factory cars to massacres, and stated that he could not have control over all the factory workers, especially not those outside the premises of the factory. He stated that he had noted an unusual increase in fuel consumption since 6 April 1994.
621. A number of exhibits were filed by the Defence to demonstrate that Musema worked as per normal during this period. Exhibit D60 is a "*note de service*" requesting drivers to maintain certain standards, to service their vehicles and to account for all fuel consumption, dated 14 June 1994, and signed by Musema. Exhibit D63 is the "prime" authorizing payment to Corporal Ndinbabahizi signed on 17 June 1994 by Musema. Exhibit D61 is a *fiche de déplacement*, dated 16 June 1994, signed and stamped by the *Préfet* of Kibuye, Clément Kayishema, giving Musema the two gendarmes, and a driver permission to travel for 30 days (17 June to 17 July) between Cyangugu, Gikongoro, Butare and Gisenyi on mission in vehicle reg. A9095. Musema stated that this last document was collected by an agronomist who went to Kibuye on 16 July.
622. The Defence produced exhibit D64, a letter dated 31 May 1994, sent to Musema by the two gendarmes ensuring security at the factory, wherein they request means of transport to make a trip to their camp in Kibuye. Musema testified that he never received the letter, and that it must have been signed by one gendarme only as the other had accompanied Musema on his trip during the first ten days of June.
623. In cross-examination, the Prosecutor referred to this exhibit and suggested that Musema exerted control over the gendarmes. Musema denied this saying that they were at all times under the command of the *Gendarmerie* of Kibuye.

• 17 June 1994

624. Musema testified that on 17 June 1994 he went to Shagasha tea factory to see his family and to buy some goods. He was accompanied by a gendarme and travelled aboard a Daihatsu to bring the goods back to Gisovu.
625. He arrived in Shagasha around 15:00hrs or 16:00hrs. He first went to see his family at the Shagasha Tea Factory *maison de passage*, and then went to the tea factory and to Cyangugu to inquire and purchase the necessary goods. He spent the night with his family at Shagasha.
626. Exhibit D65, a mission order given to the gendarme accompanying Musema, and delivered to the commanding officer of the *Gendarmerie* of Kibuye, was filed by the Defence as support for the alibi during this period. Dates thereon are those of departure from Gisovu to Cyangugu, 17 June 1994, return to Gisovu from Cyangugu, 20 June 1994, departure from Gisovu to Gisenyi, 21 June 1994, and return to Gisovu from Gisenyi, 28 June 1994.

627. The Defence produced exhibit D66, "*Pièce de Caisse Sortie*", dated 17 June 1994, which indicates the amount advanced to Musema for the purchase of goods for the factory. Also produced was exhibit D67, a handwritten note dated 17 June 1994 and left by Kanyarwanda Claudien - the director of Magerwa who headed the earlier mission to Zaïre, with Musema's family at Shagasha. The Defence submitted that this note clearly indicates that the author expected to meet Musema in the near future.
628. Defence Witness Claire Kayuku testified that she remained in Shagasha until 18 July 1994.

• 18 June 1994

629. On 18 June 1994, stated Musema, he went to Gihundwae, Cyangugu to visit family members who had come from Rubona. At Cyangugu he also bought the goods he needed and met with a merchant called Elias Bakundukiza. Musema added that he stayed in Shagasha overnight.

•19 June 1994

630. Musema testified that on 19 June 1994 he travelled to Kitabi and Gikongoro to see other relatives including his mother-in-law. He went to Rubona to look for other relatives and spent the night in Gikongoro.
631. In support of this travel, the Defence filed exhibit D90, a letter from its Witness Claire Kayuku dated 21 June 1994 from Shagasha. She writes therein "Alfred is still on the move, he is going back and forth and serving as a link between everybody, Butare, where my elder sister is, my mother who has fled to Gikongoro with two brothers and three children, with us in Cyangugu guest house [...]".

• 20 June 1994

632. Musema stated that he returned to Shagasha in the morning of 20 June and later on the same day he travelled to Gisovu. He explained that he returned to Gisovu as his family had heard a *communiqué* on the radio from a Mr Kanyarwanda asking him to join him in Gisenyi. Musema testified that as he arrived late in Gisovu he stayed overnight.
633. The Defence presented a number of exhibits to show that Musema had returned to Gisovu on this date. Exhibit D70 is a letter from the tea factory to the *bourgmestre* of Gisovu, Ndimbati, dated 21 June 1994, on which appear handwritten notes of Musema, also dated 21 June. The subject concerned a night guard, a "*Zamu*", who had been working at the tea factory and who, according to Musema, was suspected of participating in massacres and had thus been sent to the *bourgmestre*. Exhibit D52 is the report of a meeting held on 28 May 1994 on which Musema wrote on 21 June that this report should be circulated to a number of individuals.
634. During cross-examination concerning exhibit D70, Musema explained that this night guard "*Zamu*" was paid and worked on a day-to-day basis. Contrary to the feeling of the Prosecutor, Musema did not find anything peculiar in this system. The Prosecutor tendered exhibit P70, a response to exhibit D70, indicating that the guards' training would be terminated. Musema explained that this training was that given by the gendarmes to guards at the factory, in the context of the factory security. The rest of the cross examination on this exhibit and on exhibits P71 and P72 pertained to the type of training received by the guards and others, and whether this involved weapons and was carried out with the full knowledge of Musema. Such matters are not alleged in the Indictment and have thus been left out here.

•21 to 28 June 1994

635. Musema stated that he drove to Gisenyi on 21 June 1994, leaving around 09:00hrs in the A7171 Pajero with a gendarme, and arriving around 18:00hrs. He stayed in Gisenyi to finalize the tea export mission and to access funds from the *Banque Commerciale* which had moved from Kigali to Gisenyi. He indicated that he was very concerned for his family and tried to contact individuals

outside Rwanda.

636. During this period, and in the context of the tea exportations, Musema said that he went to Goma in Zaïre, only returning to Gisovu on 28 June with the gendarmes who had accompanied him. Musema explained that he returned on this day to Gisovu so as to deposit cash at Kibuye bank for the salaries of the tea factory personnel, to supervize the factory and also to be able to join his family for whom he was concerned. On their return trip, they followed a French military convoy and arrived in Gisovu late afternoon.

637. As regards these dates, the Defence referred to exhibit D65 again, the mission order given to the gendarme accompanying Musema, and delivered to the commanding officer of the *Gendarmerie* of Kibuye. The departure from Gisovu to Gisenyi is 21 June 1994, and the return to Gisovu from Gisenyi is on 28 June 1994. The Defence also referred to exhibit D69, a letter written by Musema on 23 June 1994 from Gisenyi and addressed to Swiss friends. The letter was sent through the intermediary of the Belgian director of SOTRAG who was returning to Europe.

638. The Defence presented two exhibits to show that Musema travelled to Gisenyi during this period. In exhibit D90, a letter dated 21 June 1994 from Defence Witness Claire Kayuku in Shagasha, it is written of Musema that "for the time being he is in Gisenyi after satisfying everybody's needs especially to make them secure. [...] He will certainly try to contact you through Goma [near Gisenyi], he has been called urgently by his Minister we do not know for what reason." In exhibit D91, another letter from Claire Kayuku, this one dated 6 July 1994, she writes "Alfred has not returned since 20/6. On his return from Gisenyi last week he passed through Gisovu. On arrival there he fell ill and was confined to bed without medication for 3 days. He wrote a short letter to inform me yesterday [...]".

639. During the cross-examination of Claire Kayuku, the Prosecutor suggested that during this period Musema was part and parcel of the interim government, and that he was in Kapgayi and Gisenyi at the same time as the interim government were in these locations. The witness refuted these allegations and stated that she described Musema in the letter as "*impertubable*" because he would go to any length to ensure that the factory was safe and that it stayed in operation as directed by the Minister.

• 29 June to 24 July 1994

640. Musema testified that he stayed at the Gisovu Tea Factory until 24 July 1994. On or about 4 July 1994, French troops came to the tea factory where they stayed until the departure of Musema. Some moved into a church being built by Musema, while others stayed in the houses of the tea factory.

641. Musema explained that on 16 July, "there was an event" after which the *Préfet*, gendarmes, shopkeepers, *bourgmestres* - everybody - left the *Préfecture* of Kibuye and went to Zaïre. The *bourgmestre* of Gisovu and his colleagues fled in the night of 17 July. Musema said he did not know what was happening and that he was not associated to it. Employees of the tea factory also wanted to flee, but Musema believed that they should wait to see how the situation developed in the south of the country at the Shagasha and Gisakura factories.

642. He testified that tea production ended on 19 July 1994 at the factory.

643. On 20 July 1994, said Musema, he sent a messenger to the Shagasha tea factory to contact his wife. However the messenger found the factory destroyed and abandoned. When he received this information, being worried, he decided to leave for Cyangugu and Shagasha.

644. Musema stated that on 24 July, he drove to Cyangugu and crossed the border by foot into Zaïre where he went to Bukavu blindly looking for his family amongst the thousands of refugees. By luck, he saw one of his sons near a petrol station and managed to meet his family and other relatives. Musema said that he explained to his wife that he couldn't just abandon the factory and thus returned to Gisovu the same day.

645. A number of exhibits were presented by the Defence to show that Musema was present at the factory during this period and that he dealt with matters left unattended during his travels between

21 and 28 June. Exhibit D71, are two letters from the prefect of Kibuye, dated 21 June 1994, the first addressed to Musema requesting information on the personnel status at the Gisovu tea factory, and the second, addressed to the *bourgmestre* and to the head of service of the tea factory informing them of the need for funds and the bank account for the civil defence. Musema's handwritten notes dated 29 June 1994 appear on both letters. Musema stated that he did not deem it necessary to respond to the second letter, an inaction which, according to the Defence, goes against the Prosecutor's allegation as regards Musema's participation in the massacres.

646. Exhibit D72, is a letter received by the tea factory on 29 June 1994. Musema confirmed that the date of 28 June 1994 as written by him on this letter was an error on his part. The letter was sent by the *bourgmestre* Ndimbati informing the addressees of the bank account for the civil defence and of the need to contribute funds to fight and vanquish the *Inkotanyi*. Musema testified that he did not provide any funds in this regard. His handwritten remarks are that the letter should be circulated to the heads of service for dissemination.

647. Other evidence tendered by the Defence include exhibit D73, a letter received 27 June 1994 by the tea factory, with handwritten notes of Musema dated 29 June; exhibit D74, a letter received 8 July 1994 by the tea factory, sent by the *bourgmestre* of Gisovu to Musema in response to the letter filed as exhibit D70. Musema wrote comments on the letter on 9 July 1994. The individual, the "Zamu" was not to be allowed to be trained in the use of weapons. Also tendered were exhibit D75, an inventory of materials given to the French troops, dated 5 July 1994 and signed by the Adjudant Jean-Pierre Peigne; exhibit D76, a letter dated 8 July 1994 and sent by Musema to Swiss friends through the French troops; exhibit D77, dated 13 July 1994 and signed by Musema, a payment of Corporal Ndindabahizi for his expenses while he stayed at the tea factory from 18 June to 13 July 1994; exhibit D78, a letter dated 13 July 1994 from Musema forwarding to the Director-General of *OCIR-thé* the figures of the Gisovu Tea Factory for the first quarter of 1994; exhibit D80, a letter sent on 18 July 1994 from Musema to the directors of the Gisakura and Shagasha Tea Factories enquiring as to the possibility of housing the families of his personnel at their factories in view of the security situation; exhibit D81, a letter from Captain Lecointre of the French military, addressed to Musema and dated 18 July 1994, in which the author of the letter explains that he is leaving to go to another zone and that Lieutenant Beauraisain is henceforth in charge of the troops staying in Gisovu; exhibit D82, a letter dated 20 July 1994, sent from employees to Musema requesting overtime payment; exhibit D83, a letter sent from Musema to Colonel Sartre on 22 July 1994 thanking him for the security provided at the factory; and exhibit D22, a handwritten note indicating the return of a gun by Musema to the French army on 24 July 1994.

• 25 July 1994

648. Musema testified that he finally left Gisovu tea factory on 25 July 1994, passing into Zaïre without a vehicle, leaving Rwanda for the last time.

Factual Findings

649. The Chamber has considered the testimonies of the witnesses, the evidence in support of the contested facts and the alibi of Musema. It shall now present in chronological order, its factual findings thereon. The burden of proof being on the Prosecutor, the Chamber will first consider the Prosecutor's evidence, and then, if the Chamber deems there to be a case to answer, it will consider the alibi before finally making its findings.

•15 April 1994

As pertains to the facts alleged:

650. Although *Witness BB* testified, concerning the alleged events of 15 April 1994, that he received information from workers from Gisakura and from Muko that Musema had been seen in the *communes* of Musebeya and Muko at the wheel of a Daihatsu truck transporting individuals armed with spears and machetes, the Chamber notes that this testimony is hearsay corroborated by no other witness brought to testify. Furthermore, the Prosecutor did not advance any other arguments or evidence in support of this testimony.
651. Consequently, the Chamber finds that it has not been established beyond reasonable doubt that Musema was in the *communes* of Musebeya and Muko at the wheel of a Daihatsu truck transporting individuals armed with spears and machetes.

• Karongi hill FM Station, 18 April 1994

As pertains to the facts alleged:

652. The Chamber has considered the testimony of *Witness M* with regard to the meeting at Karongi hill on 18 April 1994. As already indicated in the section on evidentiary matters, the Chamber may in principle rely on the testimony of a single witness as to certain events, without necessitating corroboration thereof.
653. The Chamber finds Witness M to be credible, his evidence proving to be consistent throughout his testimony. Under cross-examination, no inconsistencies with prior testimony emerged and the Chamber was satisfied that the witness was able to see and hear Musema make statements to the people at the meeting on Karongi hill. Among these statements, he said that they had to rise together and fight their enemy the Tutsis and deliver their country from the enemy. Musema also said that as compensation the unemployed would take the jobs of those killed, and that they would appropriate the lands and properties of the Tutsis. Witness M also heard Musema say that those who wanted to have fun could rape the women and girls of the Tutsis without fearing any consequences.
654. The Defence, in its closing brief, submitted that Witness M was not credible on the grounds that it was improbable that the witness would not have been discovered in the hut; that it was improbable that the meeting would have been held at the top of the hill rather than at the bottom of the hill; and that it was peculiar that the witness should wait nearly five years (the witness statement being dated 13 January 1999) before making a statement on the events he witnessed.
655. The Chamber has considered all of these arguments and finds that they do not impair the credibility of the witness. The Chamber does not find it inherently improbable that his presence at the hut would not have been discovered. The witness clearly described his movements from one room to another within the hut to avoid detection. He gave two reasons as to why the meeting should be held at the top of Karongi hill - firstly that the assailants could get the guns there and secondly because from this vantage point they could see the refugee camp which was subsequently attacked. In the opinion of the Chamber, for the witness to have waited five years before making a statement is not significant because he only made the statement in response to an approach from the Office of the Prosecutor at that time.

As pertains to the alibi:

656. According to the alibi, Musema was in Rubona and Gitarama on 18 April 1994 having left Gisovu on 17 April.
657. The Prosecutor contested this last date by referring to numerous previous interviews and a calendar prepared by Musema in 1996, all of which tend to suggest that Musema left Gisovu two days before that date, namely on 15 April. Furthermore, the Defence Witness Claire Kayuku, Musema's wife, testified that she saw him on his return to Rubona on 16 or 17 April 1994.
658. Although there appears to be some doubt as to the exact date of departure of Musema, in the

5827

opinion of the Chamber, the submissions of the Prosecutor on this issue, the testimony of Musema and of Claire Kayuku and the other evidence, all tend towards demonstrating not that Musema was at or in the vicinity of Karongi hill FM Station on 18 April, but rather that he had actually left Gisovu on a date earlier than that which he indicated in his testimony during the trial. No evidence, save the testimony of Witness M, places Musema at Karongi FM station on that day. The Prosecutor has not demonstrated how and when Musema may have traveled from Rubona to Kibuye *Préfecture* to lead the meeting. This, in the opinion of the Chamber, creates doubt in the facts as alleged by the Prosecutor as pertains to the participation of Musema in a meeting convened at Karongi hill FM Station on 18 April 1994.

Findings:

659. Therefore, in the opinion of the Chamber, there still remains doubt on Musema's presence at the 18 April 1994 meeting on Karongi hill, taking into account his and Claire Kayuku's testimonies on the alibi, and the arguments of the Prosecutor which indicate only that Musema had left Gisovu earlier than he stated, without questioning whether he was in Gitarama on 18 April or not.
660. Under these circumstances, the Chamber finds the sole testimony of Witness M in the matter to be insufficient to prove beyond reasonable doubt that Musema participated in a meeting at the Karongi hill FM Station on 18 April 1994.

•On or about 20 April and on 26 April 1994

661. Prosecution witnesses testified in relation to events which occurred on or about 20 April and on 26 April 1994 respectively. As the alibi of Musema is not specific to these dates but covers the period as a whole, the Chamber shall first consider each of the events alleged and the credibility of the witnesses, and it shall then consider the alibi for that period before making its findings.

•On or about 20 April 1994, near the Gisovu Tea Factory

As to the facts alleged:

662. *Witness K* testified that on or about 20 April 1994, while in hiding, he saw Musema transport armed attackers in the vicinity of the Gisovu Tea Factory. The witness stated that the assailants, including tea factory employees and persons from Gikongoro, were taken to the Bisesero region to kill *Inyenzi*.
663. Regarding the alleged events on or about 20 April 1994, the Chamber has considered the testimony of Witness K, including his previous statements. A number of discrepancies arose during the course of his cross-examination between his oral testimony and previous statements. Questions were addressed to the witness by the Chamber and by the Defence regarding these discrepancies, in particular with regard to the dates during which he was hiding in the tea plantation, the note allegedly discovered by the witness on Muyira hill after a massacre, and the basis of his remembering important dates.
664. The Chamber finds that, in answering these questions, the witness was evasive and often contradictory as to a number of important details. The witness sought during his testimony to have the verb "to write" substituted by the verb "to memorize" in one of his statements, essential to his testimony inasmuch as it supports the means by which he could remember the dates of the events about which he was testifying.
665. The Chamber accepts that, considering the prevailing circumstances in which pre-trial statements are taken, errors and inaccuracies may occur therein. However, in the present instance, the alleged errors which the witness is seeking to amend are key to his testimony of the participation of Musema in events and in the way he remembers such events. Furthermore, in the opinion of the

Chamber, such discrepancies cannot be solely attributed to the investigators and the methods used in the taking of pre-trial statements. Rather, the Chamber deems such discrepancies to cast doubt as to the veracity and consistency of the witness' testimony and to be contradictions serious enough to put into doubt the credibility of the witness. Consequently, the Chamber deems the testimony of Witness K insufficiently reliable to be admitted as evidence.

666. Therefore, the Chamber is not satisfied beyond reasonable doubt that on or about 20 April, Musema transported tea factory workers and attackers from Gikongoro in tea factory vehicles to massacres in the Bisesero region as alleged by Witness K.

•Gitwa hill, 26 April 1994

As pertains to the facts alleged:

667. The Chamber has considered the sole testimony of *Witness M* as regards to an attack he described seeing on 26 April 1994 led by Musema on Gitwa hill, six days after having left his hiding place at the Karongi hill FM station. The witness said that during this attack he saw Musema aboard a tea factory Daihatsu, and a number of other vehicles which he described during his testimony. Musema and many others, some of whom wore banana leaves and *Imihurura* belts, are then said to have taken part in a large scale attack on Gitwa hill. Musema fired shots into the crowd of refugees.

668. The witness stated that this had been the most sweeping attack he had seen and one he had memorized very well by consulting his electronic wrist-watch at the time. Although in cross-examination the witness was unable to remember the precise date of the statement he had given three months earlier, the Chamber does not find such a lapse of memory sufficient to cast doubt on the credibility of the witness. Rather, the Chamber finds Witness M overall to be credible and consistent, without at any time being evasive during his testimony.

As pertains to the Alibi:

669. The Chamber notes that the alibi of Musema is not specific to 26 April 1994, but is linked with the mission order and travel consequent thereto. The Defence purports that on 18 April 1994, Musema, while searching for the heads of service of *OCIR-thé* in Gitarama, ran into the Minister of Industry, Trade and Handicraft, Justin Mugenzi. Having conveyed to Musema his concerns for the Gisovu Tea Factory, the minister indicated to him that he would be sent on mission to contact the Director-General of *OCIR-thé* to start up the tea factories.

670. According to the alibi, Musema, who during this period was staying in Rubona, returned to Gitarama on 21 April 1994 where again he ran into Justin Mugenzi and also the Minister of Public Works, Water and Energy, this time at a FINA petrol station. Mugenzi told Musema of the security measures he had taken for the factory, and informed him that he had been unable to contact Mr Baragaza the Director-General of *OCIR-thé*. As such, Musema was to go to the north of the country to find him. The minister said he would prepare the necessary paperwork which Musema should pick up from the residence of Faustin Nyagahima, a director within the Ministry of Industry, Trade and Handicraft. During the meeting at the FINA station, Mugenzi authorized the Minister of Public Works, Water and Energy to sign the eventual mission order.

671. On 22 April, Musema picked up the mission order (exhibit D10) from Faustin Nyagahima. The order was stamped by the Minister of Foreign Affairs, who, according to Musema, was the only minister at that time in Gitarama to possess a stamp. Musema was given two gendarmes from the military camp in Gitarama and then traveled up to the factory of Pfunda where he stayed until 25 April. With reference to exhibit D10, where Musema wrote "*arrivée à Pfunda le 21/04/1994*", Musema attributed this date to an error, and affirmed that he arrived at the factory in Pfunda on 22

5829

April. Exhibits in support of this contention include exhibit D28, a "*Déclaration de Créances*" for expenses incurred by *OCIR-thé* (Gisovu Tea Factory) for the use of two gendarmes from 22 April 1994 up to 2 May 1994, which is signed by the Chief accountant of the Gisovu tea factory.

672. Although he only visited the Pfunda Tea Factory during this part of his mission, Musema admitted that he was able to include the factories of Nyabihu and Rubaya in his interim report (exhibit D29), having met the respective directors during the trip.
673. According to the alibi, on 25 April Musema returned to Gitarama after meeting the Director-General of *OCIR-thé* at Mukamara, who read the interim report and confirmed that Musema could continue his mission. Having stayed overnight in Gitarama, Musema traveled on to Rubona.
674. Defence Witness Claire Kayuku testified that Musema left Rubona on 22 April for Gisenyi and returned on 26 April where he stayed overnight.
675. The Chamber has considered the contentions of the Prosecutor that the mission order was false and that the stamps of the ministries were fabrications. The Prosecutor also contends that chance encounters with ministers, as described by Musema, were hardly convincing as the basis of the mission. In the opinion of the Prosecutor, the mission order was designed simply to mislead the Chamber and to conceal the extent of Musema's involvement in the massacres. The Prosecutor further contends that the interim report was strikingly thin considering the apparent nature of the mission. Moreover, Prosecution Witness BB stated that the mission order was unusual, and not one normally used by *OCIR-thé*.
676. The Chamber has considered the alibi and the Defence witness. The Chamber finds that the documentary evidence, read in conjunction with the testimony of Musema, raised a number of contradictions, many of which were addressed by the Prosecutor. These contradictions related, *inter alia*, to the plausibility of the chance meetings, the date the mission actually started, the array of ministry stamps on the mission order and the content of the interim report prepared by Musema.
677. The Chamber moreover considered the answers given by Musema to explain these discrepancies. However, the Chamber was not convinced by the relevant explanations, and, as such, must reject the alibi for this period.

Findings:

678. As stated above, the Chamber finds that Witness M appeared credible during his testimony as regards the attack on Gitwa hill of 26 April 1994. Moreover, the Chamber finds that the alibi of Musema for this date is doubtful and contains a number of material inconsistencies. The explanations given by Musema for these inconsistencies were unconvincing, in the opinion of the Chamber.
679. As such, the Chamber finds that it has been proved beyond reasonable doubt that Musema led and participated in the attack of 26 April 1994 on Gitwa hill. It has been proved beyond reasonable doubt that Musema arrived aboard one of the Gisovu Tea Factory Daihatsus. It has been established beyond reasonable doubt that Musema and others, some of whom wore *Imuhura* belts and banana leaves, participated in a large scale attack against refugees. The Chamber finds that it has been established beyond reasonable doubt that Musema shot into the crowd of refugees.

•End of April - beginning of May 1994, Muyira and Rwirambo hills

As pertains to the facts alleged:

680. The Chamber has considered the testimonies of Witnesses F and R as regards the alleged participation of Musema in attacks near the end of April and the beginning of May 1994.
681. *Witness F* spoke of an attack he witnessed at some point between 17 and 30 April 1994 on Muyira hill. He described how assailants from Gisovu and Gishyita converged on the hill and launched a

5830

first attack on Muyira hill during which they were forced back by the refugees. Half an hour later, they regrouped, and launched a second attack. Witness F told the Chamber that he saw Musema during these attacks, carrying a medium length black rifle and firing shots at refugees who had surrounded a policeman, before running away to his own red car.

682. As for *Witness R*, he described to the Chamber an attack which he said took place on Rwirambo hill around the end of April or the beginning of May 1994. The witness identified Musema, armed with a rifle, amongst others, and saw a number of vehicles, including four tea factory pick-ups aboard of which were *Interahamwe.* The witness explained that as he fled the attackers, he was wounded in the arm by a gunshot coming from the direction of Musema and another.

683. The Chamber notes that Witness R previously testified in the *Kayishema* and *Ruzindana* trial under the pseudonym "JJ". The Defence raised a number of apparent contradictions between the witness' testimony in that trial and in this trial as regards the treatment he received for his gun shot wound.

684. Having considered the arguments of the Defence as to these discrepancies and the answers of the witness thereon, the Chamber finds Witness R to be credible. The questions raised by the Defence relating to the date of his injury and the manner in which it was treated did not elicit inconsistencies between the witness' testimony in this trial and his earlier testimony in the trial of *Kayishema* and *Ruzindana*. He clarified that he had obtained penicillin not soon after the injury, which is when it was treated with cow butter, but much later. With regard to dates, the Chamber notes that the 29 April falls within the time period 27 April to 3-4 May. While the specific date testimony is clearly more precise, the two testimonies are not inconsistent.

As pertains to the alibi:

685. The Chamber notes that the Prosecutor has alleged that the attack of 13 May followed a week and a half to two weeks of calm. The Chamber is therefore to assume that the attacks witnessed by R and F occurred before 3 May 1994.

686. It remains, as a result, for the Chamber to consider the alibi from 26 April to 2 May.

687. Musema stated that on 27 April he was in Rubona. On 28 April, he said he visited Kitabi factory, the stamp and date of arrival appearing on exhibit D10, and then returned to Rubona. These dates and movements were not contested by the Prosecutor. On 29 April he travelled to Gisovu with two gendarmes via Butare, Gikongoro and Gasaranda, arriving in Gisovu late in the afternoon. Exhibit D10 carries the stamp of Gisovu Tea Factory and the date of arrival, namely, 29 April 1994. Musema remained at the factory until 2 May taking care of business. A number of exhibits, including reports of minutes of meetings held on 29 and 30 April, and correspondence, were tendered by the Defence to support this. On 30 April he visited the *Préfet* of Kibuye who issued Musema with an "*Autorisation de Circulation*", in which reference is made to the mission order. On 2 May, Musema said he left for Shagasha, departing between 10:00hrs and 11:00hrs and arriving there before 19:00hrs. Musema explained that he visited the Shagasha Tea Factory the next day which would explain why the date of 3 May 1994 appears on D10 as the date of arrival at this factory.

Findings:

688. The Chamber has considered the testimonies of Witnesses F and R and finds them to be credible. Musema admits to being in Gisovu from 29 April to 2 May attending to factory business. Thus, in the opinion of the Chamber, it is not excluded, considering the distance between Gisovu and the locations of the attacks, that Musema was both at the tea factory working and taking part in attacks, although at different times. Also, to have visited Kibuye on 30 April does not rule out that an attack involving Musema may have occurred on the same day.

689. However, of concern to the Chamber is the lack of specificity on the part of the Witness F as

S831

regards the date of the attacks. Witness F speaks of an attack which occurred between 17 and 30 April. Witness F's approximation, which takes 17 April as the earliest date, would suggest the attack he witnessed occurred closer to the middle of the month rather than later in the month.

690. For further guidance on this issue, the Chamber also considered the closing arguments of the Prosecutor, which includes a detailed chronology of the events and massacres as they evolved during April and May. However, no mention is made therein of the testimonies of Witness F and the attack involving Musema. This thus creates further ambiguity and doubt in the matter.

691. Consequently, the Chamber finds that it has not been established beyond reasonable doubt during the trial that Musema participated in the alleged attacks which occurred between 17 and 30 April.

692. As regards Witness R, who testified to Musema's participation in an attack which occurred around the end of April and the beginning of May, the Chamber notes that there also existed ambiguity during this testimony as to the exact date of the attack. Notwithstanding this, while testifying in the *Kayishema* and *Ruzindana* case, the witness was clear that he was injured on 29 April, the date of the attack. Thus, the Chamber is satisfied that it has been established beyond reasonable doubt that an attack occurred between 27 April and 3 May 1994 on Rwirambo hill.

693. Furthermore, the Chamber is of the opinion that the alibi does not cast doubt on the testimony of Witness R, and that his testimony is consistent and reliable. The Chamber consequently finds that Musema, who was armed with a rifle, others unknown and *Interahamwe* aboard a number of vehicles, including four tea factory pick-ups, participated in an attack between 27 April and 3 May 1994 on Rwirambo hill. The Chamber also finds that as Witness R fled the attackers, he was wounded in the arm by a gunshot coming from the direction of Musema.

•The mid-May 1994 attacks, Muyira hill

694. The Chamber will now consider events which are alleged to have taken place in the middle of May 1994, namely the 13 and 14 May attacks and two other mid-May attacks. As the alibi pertains to this period as a whole, the Chamber will first deal with all the relevant witnesses for these attacks, and, if there is a case to answer, will consider the alibi for the period, before finally making its findings.

As pertains to the facts alleged:

•13 May 1994, Muyira hill

695. As already stated, the attack which occurred on 13 May 1994 on Muyira hill took place after two and a half weeks of relative calm. This day was to see the biggest attacks so far launched against unarmed Tutsi refugees, who numbered between 15000 and 40000. According to witnesses, thousands of attackers came from all over the region in vehicles and on foot intent on killing the refugees.

696. The Prosecutor presented a number of witnesses to this attack. However, having considered the testimonies, the Chamber disregards the testimonies of Witnesses Z and G for a lack of reliability.

697. As regards *Witness Z*, it is questionable whether the witness could have heard what he claims to have heard Musema say, at the distance he says he was, namely the length of a five minute run, and from his position at the top of Muyira hill. The Chamber notes that in his prior statement dated 13 May 1995, Witness Z made no mention of the presence of Musema at the 13 May 1994 attack. His explanation for this omission in the main was that unlike in statements, before the court he could speak of everything he knew. The Chamber is not convinced by this explanation. Similarly, when questions were put to him relating to his testimony in the *Kayishema* and *Ruzindana* case and the discrepancies with his testimony in this case, he was resistant and evasive. Consequently, the Chamber does not find the testimony of Witness Z to be reliable.

698. Considering *Witness G*, who said he saw attackers catch a woman on the instructions of Musema and subsequently that she was killed by Musema, the Chamber is also not convinced of the

reliability of this witness. The Chamber notes that, whenever pushed for further details as to the number of attackers around the victim, the number of vehicles and distances, the witness consistently evaded the questions and presented long winded explanations as to why he could not remember such details, although he is an educated man. Whenever pressed for more information the witness seemed uncomfortable and very evasive. The Chamber notes, in contrast, that the witness had no difficulty in remembering the exact words of Musema during the unfolding of the events. Consequently the Chamber does not find the testimony of Witness G reliable.

699. Notwithstanding this, many witnesses presented a consistent account of events as they unfolded in the attack of 13 May 1994.

700. Witnesses F, P, T, and N all described how attackers from Gisovu, Gishyita, Gitesi, Cyangugu, Rwamatamu and Kibuye arrived in an array of vehicles, including Daihatsus belonging to the tea factory and ONATRACOM buses. Amongst the attackers, who were armed with traditional weapons, firearms, grenades and rocket launchers, the witnesses saw communal policemen, workers from the Gisovu Tea Factory wearing their uniforms, *Interahamwe*, prison guards, armed civilians, and soldiers. Leading the attackers from Gisovu were the *bourgmestre* of the commune Aloys Ndimbati, Eliezer Niyitegeka, Alfred Musema, and the *conseillers* of the *secteurs* of Gisovu *Commune*. Leading attackers from other regions were Kayishema, the *Préfet* of Kibuye, Charles Sikubwabo, the *bourgmestre* of Gishyita, Charles Karasankima, Sikubwabo's predecessor, *conseillers* of the *commune* of Gishyita, Obed Ruzindana and others. As the attackers approached the hill, they sang slogans such as "Exterminate them" and "Even the Tutsi God is dead".

701. *Witness F* said the attack against the Tutsi refugees started around 08:00hrs. He saw Musema, amongst the Gisovu group and bearing a firearm, although he did not personally see him fire the weapon. Witness F estimated that only 10000 or so of the 40-50000 Tutsi refugees survived the attack, those killed being old people, women and children, including five of his own children.

702. The testimony of Witness F, in the opinion of the Chamber, went virtually unchallenged by the Defence. On cross-examination the witness was questioned as to why he had not specifically mentioned Musema in his description of the May attack in his 1996 statement to the Prosecutor but had mentioned him in his description of an April attack. The witness in response cited the passage in his statement where he said of the May attack, "Leading these attackers who were divided into groups were the same persons I listed before [...]". The Chamber notes that the cross-examination of Witness F, which was brief, in no way impaired his credibility, and the Chamber considers his evidence to be reliable. Moreover, the Chamber recalls that during his testimony in the *Kayishema* and *Ruzindana* case, as confirmed during his examination in this case, Witness F stated that he had seen Musema during the 13 May 1994 attacks.

703. *Witness P* lost his wife and two children during the attack. He explained how the assailants overpowered the refugees who, including himself, were forced to flee. Although the witness did not personally see Musema during the attack, he saw Musema's red Pajero and tea factory Daihatsus which led him to conclude that Musema must have been present. Amongst the attackers he recognised tea factory workers by virtue of their uniforms.

704. The Chamber notes that in cross-examination, asked as to how he could conclude that Musema was present during the attack, Witness P stated that, in his view, the tea factory vehicles could not have been used without the permission of Musema, and that only Musema ever drove the red Pajero. While the Chamber finds the witness to be credible, his evidence is not probative of Musema's presence at or participation in the attack at Muyira on 13 May. Nevertheless, it corroborates the testimony of other witnesses in important respects.

705. *Witness T* saw a green and a white Daihatsu belonging to the tea factory and tea factory workers wearing blue and khaki uniforms. Musema was seen by the witness amongst the leaders of the attack, bearing a firearm. The witness described how the attackers who had firearms protected those who were fighting in close against the refugees. Many refugees were killed and the survivors fled, their stones useless against the grenades of their assailants. The witness specified that he did not see Musema fire his weapon but presumed that he had.

5833

706. The Chamber notes that in cross-examination, the witness was questioned by the Defence as to his previous statements and the lack of mention therein of Musema in relation to the above attack. Witness T explained that at the time he had not been asked specific questions about Musema save whether he knew him and could identify him, and whether he had seen him after the arrival of the French. The Chamber is satisfied with this explanation. The Chamber also notes that the cross-examination as a whole did not impair the credibility of the witness and the Chamber thus finds his evidence to be reliable.
707. *Witness N*, whose specific testimony on the fate of a certain Nyiramusugi will be dealt with in section 5.3 below, witnessed many attacks on Muyira hill on 13 May 1994. Amongst the attackers who arrived around 10:00hrs from Gisovu, the witness saw Musema aboard his vehicle which he described as a "Benz" because it was expensive, leading other vehicles, including three Daihatsus from the Gisovu Tea Factory. He elaborated, saying that save for these and four or five other vehicles, he was unable to identify others as they were hidden by trees.
708. He could not hear the attackers when they regrouped, though he could see them gesticulating and speaking. Witness N was able to hear Musema once the group had moved to within a few metres of him. Musema asked a policeman named Ruhindira to fetch a young woman called Nyiramusugi after having found out from him that she was still alive. Immediately after this, said the witness, the attackers from Gishyita launched the attack with gunfire. The attack lasted until 15:00hrs, and, according to the witness, Musema searched for the young woman throughout this period and shot people.
709. The Chamber notes that in cross-examination, the witness confirmed his testimony. To the issue of when and how he made his statement, the Chamber is satisfied with his explanation and does not find his credibility to have been impaired. Consequently, the Chamber finds the testimony to be reliable.

•14 May 1994, Muyira hill

710. A number of witnesses testified that the attacks continued on 14 May 1994 against the surviving refugees on Muyira hill.
711. *Witness AC* described a big attack he saw on 14 May. He saw Musema arrive in his red Pajero and recognized a number of other "*dirigeants*", which he cited in his testimony. The 5000 or so attackers, armed with rifles and traditional weapons, were predominantly Hutu and comprised gendarmes, soldiers, *Interahamwe*, tea factory workers recognizable by their uniforms and other assailants some of whom wore political party emblems.
712. The witness described the attack which was led by Musema and Ndimbati. It was started by Ndimbati who fired a gunshot into the air. Musema, carrying a firearm and a belt of ammunition then fired gunshots, which, according to Witness AC hit an old man by the name of Ntambiye and another person by the name of Iamuremye. On being attacked by the assailants led by Musema and Ndimbati, the refugees defended themselves with stones but the military fired tear gas at them. Overpowered, the refugees fled. Around 18:00hrs the attackers left.
713. The Chamber notes that there was no cross-examination of this witness specific to this attack. Other issues raised on cross-examination, however, raise questions as to the reliability of the witness' testimony. There are many confusing elements in the testimony. It is unclear, for example, whether or not he attended the meeting in Kibuye. It is also unclear why he had such difficulty remembering names of gendarmes, whose names he was able to recall during his testimony in the *Kayishema* and *Ruzindana* case. When asked to explain these divergences in his testimony he was willing to provide them in this case. The Chamber considers that the Defence did not establish that the testimony of Witness AC was untruthful in any material respect. However, in light of the confusion which emerges from the cross-examination, the Chamber is willing to accept the evidence of this witness only to the extent that it is corroborated by other testimony.
714. *Witness F* was injured by shrapnel and a gunshot during an attack of 14 May on Muyira hill and

surrounding hills. Although he did not see Musema during the attacks, he did see Musema's red car among the vehicles of other attackers. As previously stated with regard to the 13 May 1994 attack, the Chamber finds the testimony of Witness F to be reliable.

715. *Witness T* also saw Musema participate in a large scale attack on Muyira hill. He explained that he saw Musema on an opposite hill, armed with a rifle which he presumed Musema utilized during the attack. The Chamber recalls its findings as pertains to this witness on his testimony on the 13 May attack, and thus considers him to be reliable.
716. *Witness D* spoke of a large scale attack which took place on the day of Sabbath, 14 May 1994, during which she saw Musema and other leaders including Kayishema and Ndimbati. The assailants, numbering 15000, armed with firearms, grenades and traditional weapons, and singing "Let's exterminate them", arrived in an array of vehicles and attacked the refugees, the attackers being armed with traditional weapons, and finishing off the refugees who had been injured with bullets.
717. In cross-examination, Witness D confirmed her above testimony. The Chamber notes that she was careful to explain that she could only see certain vehicles but could not identify those aboard and that when the vehicles parked she lost sight of them. Witness D gave the further precision that she only saw the attackers once they had disembarked and were making their way to the refugees, after which she fled. The Chamber notes that the cross-examination did not impair the credibility of the witness' testimony and therefore finds it to be reliable.

•The two attacks in mid-May 1994

718. The Chamber notes that, in its opinion, the expression mid-May would seem to indicate a day between 10 and 20 May, and shall thus consider the testimonies of Witnesses H and S with this in mind.
719. *Witness H* testified about a first attack which occurred in mid-may 1994 against Tutsi refugees on Muyira hill, Musema leading attackers from Gisovu, including *Interahamwe*, and tea factory workers in blue uniforms. The witness saw Musema's red Pajero and four tea factory vehicles stop at Kurwirambo. The witness gave a detailed description of the attackers he saw, in terms of dress and weapons. Amongst the attackers were soldiers, gendarmes and civilians. According to the witness, Musema launched the attack with a gunshot and personally shot at refugees although he could not say whether he actually hit anyone.
720. At some point during the attack, the refugees were able to drive back the assailants and attempted to grab Musema but were prevented from doing so by other attackers.
721. The Chamber is satisfied with the explanations given in cross-examination by Witness H as to how he could identify the tea factory vehicles and Musema's Pajero. Other issues raised in cross-examination did not impair the credibility of Witness H. The Chamber therefore considers the testimony of Witness H to be reliable.
722. *Witness S* saw Musema take part in an attack involving between 120 and 150 assailants sometime near the middle of May on Mpura hill and in Birembo. The witness saw three Daihatsus belonging to the tea factory and Musema's red Pajero. Amongst the attackers were communal policemen and tea factory employees wearing tea factory uniforms and caps, and armed with traditional weapons.
723. The vehicles, except Musema's, collected more assailants from Gisovu, while more persons arrived from Gishyita. Once all the assailants were in place, they held a small "meeting" and, with a blow of whistles, launched their attack against Sakufe's house on Mumataba hill, the place of refuge for 2000-3000 Tutsis. Most of the refugees, including relatives of the witness, were killed. Throughout the attack, Musema stayed by his car with persons dressed in white, and left for Gisovu with other attackers around 17:00hrs.
724. In cross-examination, Witness S described in more detail the area of the attack by reference to Prosecutor photo exhibits 20.1 and 20.2. Other issues raised during the cross-examination of the witness, in the opinion of the Chamber, in no way lessened his credibility and his testimony is, as such, reliable.

5835

As pertains to the alibi for all the Muyira hill mid-May attacks:

725. The Chamber has considered the alibi of Musema for the period of 7 to 19 May, during which Musema testified that he was in Rubona and visited Gitarama on occasions. The Defence presented a number of documents to support the alibi and also the testimony of Witnesses MG, MH and Claire Kayuku.
726. The Chamber notes that Musema stated that he visited Mata tea factory on 7 May 1994, the signature of the chief accountant of the Mata tea factory and the stamp appearing on the mission order not being specifically contested by the Prosecutor. After this visit, asserts Musema, he returned to Rubona where he stayed until 19 May 1994, not visiting any other factories, nor going beyond the town of Butare and Gitarama and thus not setting foot in Kibuye *Préfecture*.
727. Witness MH remembers meeting Musema in Gitarama on 10 May and in Rubona on 13 May 1994. In direct examination, Witness MH stated that he met Musema only once in Gitarama, most probably on 10 May 1994, although he was unable to provide the Chamber with details as to the length or subject of the conversation he had with Musema on this day, save that he believed they may have discussed the situation in Rwanda. The Chamber notes that in cross-examination, he indicated that they did not speak about why Musema had come to Gitarama and that he could not remember five years later the type and colour of the vehicle driven by Musema. In support of the alibi for this date, the Defence presented exhibit D46, a letter 18 May 1994, and a note entitled "*A qui de droit*" dated 10 May 1994 in Gitarama. Musema testified to receiving this note from the Minister of Defence on 10 May 1994, and contended that, had he been in Gisovu, he would not have waited eight days to transmit it.
728. As regards 13 May 1994, Witness MH, who on this day was fleeing to Burundi, stated that he saw Musema on 13 May 1994 for approximately 20 minutes in Rubona at the residence of the Kayuku family. He confirmed this in cross-examination.
729. The Chamber notes that the witness testified that he had last used his passport in 1994, when in fact it was evident from the document that it had been used in 1995.
730. According to Claire Kayuku, Musema returned to Gisovu around the middle of May to pay the tea factory employees. She added that, in the beginning of May, Musema's Pajero spent one or two weeks in a Butare garage undergoing repairs. Musema had explained that he had developed car problems on 7 May while in Mata, and that he remained in the Butare region until the car was repaired. A replacement car from the factory only reached him on 19 May by which time his Pajero was roadworthy. Exhibit D47, the minutes of a 19 May 1994 meeting at the factory, refers to Musema's broken down car and the resultant delay in returning to the factory.
731. According to Exhibit P68, the handwritten calendar personally made by Musema, he was in Gisovu from 4-14 May 1994. The Chamber recalls also that according to the record of an interview with Swiss authorities which took place on 16 March 1995, Musema again said he was in Gisovu during the week of 4-13 May 1994. When presented with these dates during the cross-examination, Musema indicated that these were errors. The Chamber notes at this juncture that, according on the handwritten calendar (P68) Musema indicated that the Gisovu Tea Factory started production again on 9 May 1994.
732. A number of documents were tendered by the Defence to demonstrate that Musema was absent from Gisovu Tea Factory between 7 and 19 May 1994. Exhibit D35 is a letter dated 8 May 1994 from Musema to the Director-General of *OCIR-thé* in Kigali, annexed to which is the mission report, which Musema says was typed by the secretarial services of ISAR at Rubona. Musema explained that he made ten copies of the report for transmission to the directors of the visited tea factories and handed over a copy for the Director-General of *OCIR-thé* on 10 May 1994 to the Commercial Bank in Gitarama which had a convoy going to Gisenyi. The Chamber notes that this letter, signed by Musema, is on Gisovu Tea Factory headed paper and moreover would appear to have been written in Gisovu.
733. Exhibit D45 contains a copy of a receipt dated 14 May 1994 from a FINA petrol station in

5836

Gitarama for a cash payment made by Musema for fuel for the Pajero, registration number A7171. Exhibit D36 is a letter written by Musema on 14 May 1994 in Butare, by which the Defence alleges Musema appears to be a man just observing the events. Exhibit D92 is a letter written by MG in Nairobi on 7 June 1994, in which she writes that, before 17 May, the Musema family was still in Butare. During her testimony Witness MG specified that she could not confirm whether or not the family was in Butare at that date. Exhibit D37, dated 16 may 1994, is a certificate of complete identity issued for one of Musema's sons and required for the issuance of a passport. Exhibits D38, D39 and D40 are copies of passports issued on 18 May 1994 in Gitarama, for Musema's sons, D40 being signed by Musema for his thirteen year old son. Numerous other documents were produced, including letters which were received at the tea factory during this period but which were either not acted upon until much later by Musema or not even seen by Musema, for instance exhibit D43, a letter dated 16 May 1994 from the Chief of Personnel to the *bourgmestre* of Gisovu, in furtherance of discussions held on 13 and 16 May respectively and regarding weapons training of security personnel. Exhibit D41, a request for employment, received 5 May 1994 at the tea factory, was only dealt with by Musema on 14 June 1994. Exhibit D42, a request for accommodation for security reasons, was received on 11 May 1994, yet there appears no date as to when the request was dealt with. Exhibit D44, a request for accommodation, received at the tea factory on 16 May 1994 was dealt with by Musema only on 14 June 1994.

734. The Chamber has considered all the above evidence. As regards the testimony of MH, the Chamber notes that, as regards the meeting of 10 May with Musema, the witness was unable to provide any specific details, this contrasting with his testimony on the meeting of 13 May 1994, which is detailed and specific in a number of ways. The Chamber notes however that the latter testimony is uncorroborated by other Defence evidence, including Musema's testimony. Claire Kayuku testified that Musema returned to Gisovu during the middle of May to pay the employees, whereas the handwritten calendar drafted by Musema, exhibit P68 and his statement to the Swiss *juge d'instruction* of 16 March 1995, similarly place Musema in Gisovu between 4 and 14 May. The testimony of MH is thus of little probative value as it is unsupported by any other direct evidence.

735. Other evidence would suggest that Musema was indeed in Gisovu during this period. Exhibit D35, the cover letter for the mission report, is dated 8 May 1994 in Gisovu. According to Musema, this letter was typed up in Rubona.

736. In the handwritten calendar, Musema clearly indicates that on 9 May 1994, the tea factory re-started production. This date is confirmed in his mission report. Moreover in exhibit P56 Musema states that "[o]n 3 May, I once again visited the factories in the South West, that is, Gisakura and Shagasha. I then returned to Butare. On 7 or 8 May, I returned to Gisovu and on 9 May, I supervised the resumption of operations of the factory. I remained there until 19/20 May and travelled to Butare to join my family."

737. The Chamber finds Musema's supposed absence from the factory on this occasion irreconcilable with his evidence during this case, evidence which tends to portray Musema as a dedicated director of the tea factory who at all times shared equivalent concerns for the safety of his family and for the factory, often, according to him, leaving the former to rejoin the latter, for example in April, May, June and July 1994, despite threats to his safety. Moreover, in exhibit D51, the report of the meeting of 27 May 1994, recalls the minutes of the meeting of 19 May 1994, and states "[t] he meeting of 19 May 1994 also discussed the breakdown that the manager had asked the Agronomist Benjamin KABERA to repair and which was not done in good time (after 10 days) giving rise to heavy loses (*sic*);[...]". This would presuppose that the Agronomist had received instructions on 9 May 1994. The Chamber also presupposes that as it was now Musema himself dealing with this breakdown, as the Director of the tea factory, he must have either directly or indirectly given the original instructions.

738. Musema, throughout his testimony, affirmed that his handwritten calendar and the Swiss statements were inaccurate, and that any errors therein were subsequently corrected as documents

5837

were uncovered during investigations from, amongst other places, Gisovu Tea Factory. In some instances, such an explanation is valid. However, as regards the present period, the Chamber cannot accept such an explanation. In the said calendar and the 16 March 1995 Swiss statement, Musema clearly remembers being in Gisovu between 4 and 14 May 1994, and recalls that he was present the day the tea factory started up production. To remember such an occasion and one's presence thereat, is not, in the opinion of the Chamber, something one forgets and recalls only after seeing newly uncovered documents. Rather, it is an event which, as Director of the tea factory, Musema would beyond any doubt not have forgotten.

739. The Chamber notes other discrepancies in the alibi as regards his vehicle, registration A7171, which he says developed problems on 7 May 1994 and was not repaired until 19 May 1994 in Butare, being the date on which he finally returned to Gisovu. Exhibit D45, dated 19 May 1994, includes a bill for repairs to the vehicle in April 1994 and a petrol receipt from a FINA petrol station in Gitarama dated 14 May 1994. The Chamber must raise a number of issues as regards this exhibit. If the Chamber were to follow Musema's version of the events, the Pajero, registration A7171, could not have been fit enough to drive from Butare, where he says it was being repaired, to Gitarama before 19 May 1994. Thus, notes the Chamber, the above mentioned petrol receipt puts into doubt Musema's testimony.

740. Whereas, if the Chamber accepts the handwritten calendar and the said Swiss statement, the FINA receipt would support the dates therein by confirming that Musema travelled on 14 May 1994. In the opinion of the Chamber, the receipt, and the letter of 14 May 1994 which Musema says he wrote in Butare, are by themselves, insufficient to refute the possibility that on the same day, yet at a different time, Musema was in the Bisesero region.

741. Moreover, the Chamber notes that Musema advanced no details, namely with which vehicle or other mode of transport, as to how he travelled to Gitarama on 18 May 1994 to collect the passports of his sons. The Chamber finds this at odds with his alibi, as, to have indicated such details would have given support to his testimony.

742. The Chamber notes that Musema kept his receipt for car repairs dated 19 April 1994, and the petrol bill of 14 May 1994, yet kept no such receipts kept for the repairs, which according to Musema, occurred between 7 and 19 May 1994.

743. As regards the specific attacks of 13 and 14 May 1994 and the name of the hills, the Chamber considers, as put to Musema, at trial, that one would remember where one was when such momentous massacres in the Bisesero region occurred, without having to consult a calendar. The Chamber cannot accept the explanations given by Musema that he only knew of these massacres from hearing of them on the radio and because they were discussed at a meeting at the Gisovu tea factory on 19 May 1994. Nor can the Chamber accept that Musema did not know the names of specific hills in the Bisesero region, considering that he had been director of the Gisovu tea factory since 1984 and that, as testified by numerous witnesses, there were many "*thé villageois*" plantations on hills around the Bisesero region. Such plantations, in the opinion of the Chamber, would undoubtedly have been visited by Musema in his capacity as director of the tea factory.

744. The Defence has argued that certain documents, such as receipts and correspondence, and even Musema's delays in replying to correspondence, should be interpreted as supporting his defence of alibi. In the Chamber's view, this evidence, while it may in some cases be consistent with the alibi, is not probative thereof. For example, the failure of Musema to reply to correspondence received in May 1994 until June 1994 could be explained by his absence from the tea factory in Gisovu, or it could be explained in may other ways, for instance that he was attending to other issues. Such delays, in the opinion of the Chamber, do not, in themselves, support the alibi that Musema was absent from the Gisovu tea factory in mid-May 1994.

745. In light of the above, the Chamber must reject the alibi of Musema as regards 13 May, 14 May and mid-May 1994, as it is not supported by evidence sufficient to cast any doubt on the overwhelming reliable evidence for this period presented by the Prosecutor.

Findings on all the mid-May Muyira hill attacks:

746. The Chamber therefore finds that, on the basis of consistent and reliable evidence presented by the Prosecution witnesses discussed above, it has been established beyond reasonable doubt that Musema participated in attacks against Tutsi refugees in the Bisesero region in mid-May 1994, including on 13 and 14 May.
747. Consequently, the Chamber finds that it has been established beyond reasonable doubt that on 13 May 1994, a large scale attack occurred on Muyira hill against up to 40000 Tutsi refugees. The attack started in the morning. The attackers, who had arrived at Muyira hill on foot and in an array of vehicles including Daihatsus belonging to the Gisovu Tea Factory, were comprised of Gisovu Tea Factory workers in uniform, gendarmes, soldiers, civilians, and *Interahamwe*. The attackers were armed with firearms, grenades, rocket launchers and traditional weapons, and sang anti-Tutsi slogans.
748. The Chamber finds that it has been established beyond reasonable doubt that Musema was one of the leaders of the attackers coming from Gisovu and drove his red Pajero to the attack. Musema was armed with a rifle. The Chamber finds that it has been established beyond reasonable doubt that he used the weapon during the attack. The Chamber finds that it has been proved beyond reasonable doubt that thousands of unarmed Tutsi men, women and children were killed during the attack at the hands of the assailants and that many were forced to flee for their survival.
749. The Chamber finds that it has been established beyond reasonable doubt that during the attack, Musema asked one of the attackers, a certain policeman by the name of Ruhindara to fetch a young woman called Nyiramusugi after having found out from him that she was still alive. The Chamber finds that Musema searched for the young woman throughout this period.
750. As regards 14 May 1994, the Chamber finds that it has been established beyond reasonable doubt that a large scale attack occurred on Muyira hill 14 May 1994 against Tutsi civilians, and that the attackers, numbering as many as 15000, were armed with traditional weapons, firearms and grenades, and sang slogans.
751. The Chamber finds that it has been established beyond reasonable doubt that Musema was amongst the leaders of the attack of 14 May 1994 and that his red Pajero was at the site of the attack. The Chamber finds that it has been proved beyond reasonable doubt that Musema was armed with a rifle during the attack.
752. The Chamber does not find that it has been established beyond reasonable doubt that Musema shot a certain Ntambiye and a certain Iamuremye during the attack.
753. The Chamber is satisfied that it has been established beyond reasonable doubt that Musema participated in an attack in mid-May 1994 on Muyira hill against Tutsi refugees. The Chamber finds that it has been established beyond reasonable doubt that Musema led attackers, including *Interahamwe* and tea factory workers from Gisovu. It has been established beyond reasonable doubt that Musema's red Pajero and tea factory vehicles were seen at the attack.
754. The Chamber finds that it has been proved beyond reasonable doubt that Musema launched the attack with a gunshot and personally shot at refugees. It has not been established, however, that Musema actually hit anyone with his gunshots.
755. The Chamber is satisfied beyond reasonable doubt that Musema participated in an attack on Mumataba hill in mid-May 1994. It has been established that the assailants, numbering between 120 and 150, included tea factory employees, armed with traditional weapons, and communal policemen.
756. The Chamber finds that it has been established beyond reasonable doubt that in the presence and with the knowledge of Musema, tea factory vehicles transported attackers to the location. It has been established beyond reasonable doubt that the attack was launched on the blowing of whistles, and that the target of the attack were 2000 to 3000 Tutsis who had sought refuge in and around a certain Sakufe's house.
757. The Chamber finds that it has been proved beyond reasonable doubt that Musema remained next

5839

to his vehicle, with others, throughout the attack, and left with attackers for Gisovu around 17:00hrs.

•End of May attack at Nyakavumu cave

As pertains to the facts alleged:

758. Witnesses AC, H, S and D, all testified about an attack which occurred at Nyakavumu cave.
759. *Witness AC* saw Musema amongst others arrive at the cave in which 300 people had sought refuge. Following orders from Ndimbati, Ruzindana, Musema, Niyitegeka and Kayishema, the cave was sealed with wood, then a man from Gisovu set the wood on fire with kerosene and grass. Only one of the refugees survived, while the others were asphyxiated to death by the smoke.
760. The Chamber has considered the issues raised during cross-examination and is satisfied by the explanations given by the witness. Notwithstanding this, and as the Chamber stated in its factual findings on 14 May 1994, the testimony of Witness AC shall only be accepted as evidence to the extent that it is corroborated by other testimony.
761. Sometime around the end of May early June, said *Witness H*, he saw Musema shortly before the attack, in a convoy going in the direction of the cave, and thus presumed that he must have been present at the cave. Within the convoy was Musema's Pajero and tea factory vehicles. The witness observed from a nearby hill assailants destroy the fence of houses in the vicinity for firewood and set light to the entrance of the cave. Only one person survived the fire.
762. The Chamber considered the issues raised in cross-examination and deems them not to have impaired the reliability and testimony of Witness H.
763. *Witness D* observed the attack from a cave and said she saw Musema amongst the assailants. From where she was hiding, she said that she was able to see the attackers start a fire at the entrance of the cave and that the smoke suffocated the 400 refugees inside. After the attack she went down to the cave and saw many bodies, and then fled. The Chamber notes that during her testimony, she was unable to say exactly when the attack occurred.
764. In cross-examination, Witness D specified that she was unable to see any vehicles from where she was hiding on the side of the hill. The Chamber found this witness to be consistent and reliable throughout her testimony.
765. *Witness S* described how sometime near the end of May, attackers chased refugees who were fleeing towards Kigarama hill. Amongst the attackers he saw Musema, who was armed with a long rifle, and tea factory workers aboard factory vehicles. The refugees were forced to split into three groups, one of which went towards Nyakavumu cave.
766. According to the witness, the assailants with Musema blew their whistles and shouted three times to call back those attackers who had gone beyond Nyakavumu cave. The attackers then gathered around Musema for a couple of minutes and exchanged a few words, after which they destroyed a nearby house for firewood which they took to the cave.
767. A short while later, although he did not see the attack on the cave, Witness S saw smoke rise. The witness indicated that he had hidden his wife in the cave the very same day.
768. After the attackers had left, he and eight others went to the entrance of the cave, and pulled out three survivors, two of whom died the next day.
769. In cross-examination, the Defence referred to a previous statement of the witness in which he provided more details on the involvement of Musema in the attack. In this regard, the witness stated, as he had in direct-examination, that he did not actually see the attack on the cave. This and other issues raised in cross-examination did not impair the credibility of Witness S, and thus the Chamber finds him to be credible.
770. The Chamber has also considered the testimony of *Witness AB* who testified that sometime in the month of June he saw Musema, who was armed and wearing a military jacket, at the Kibuye military camp in the company of second Lieutenant 'Buffalo' Ndagijimana, Ndimbati and Doctor

5840

Gérard Ntakirutimana. The witness overheard them discussing one last operation that had to be carried out in Bisesero. According to the witness, Musema said that information that he had received indicated that Tutsis were hiding in the tin mines and that, according to the witness, Musema said that he therefore needed a lorry load of firewood to start a fire at the entrance of the hole where they were hiding, and consequently to block the hole to prevent anyone getting out. Although Musema asked an officer of the camp for the wood, the witness could not say whether any was given to him.

771. In cross-examination, Witness AB confirmed that Musema had come to the camp in his red Pajero. The witness added that he had never been to the cave where many people had died. Other issues raised in cross-examination did not impair on the consistency of the witness' testimony.
772. The Defence admitted that such an attack took place near the end of May or in June 1994 and that those who had sought refuge in the cave were Tutsi civilians.
773. Having considered all the above evidence, it would appear, in the opinion of the Chamber, that the attack on the cave occurred at some point between the end of May and early June.

As pertains to the alibi:

774. The Chamber has considered the alibi for this period.
775. The alibi places Musema in Gisovu on 27 and 28 May 1994, at the Gisovu Tea Factory, and is supported by documentary evidence and the testimonies of Claire Kayuku and of Musema. Musema travelled to Shagasha with his family on 29 April 1994. Then, according to the alibi, on 30 May 1994 until 10 June 1994, Musema was away from the Gisovu Tea Factory, having traveled on 30 May to Shagasha. He rejoined a technical mission in Cyangugu and spent the day in Zaïre on 31 May. Copies of his passport and the pertinent border stamps were filed in support of this alibi.
776. On 1 June 1994, according to the alibi, Musema went to Shagasha where he stayed with his family until returning to Gisovu on 10 June. Exhibit D57, issued in Cyangugu, was produced to support the alibi of Musema for 3 June, and exhibit D58 for 6 June 1994.
777. Claire Kayuku confirmed that Musema stayed with her and the family until 7 or 10 June 1994. The Chamber notes that all of the above evidence is corroborated by Musema's handwritten calendar (P68), which indicates that he left Gisovu on 29 May with his family and returned to Gisovu only on 10 June.

Findings:

778. The Chamber notes that the alibi does not specifically refute the presence of Musema at the cave. Although the exact date of the attack is unclear from the testimonies, the Chamber notes that the witnesses all provided an overall consistent account of the events at Nyakavumu cave throughout their testimonies. The fact that the date of the attack is unclear does not, in the opinion of the Chamber, impair on the reliability of the witnesses.
779. The Chamber therefore finds that on the basis of the overwhelming evidence of four Prosecution witnesses, all of whom presented consistent testimonies as to the attack on the cave, the Chamber rejects the alibi and finds that it is established beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave.
780. The Chamber consequently finds that it has been established beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave at the end of May 1994. It has been established that Musema was aboard his Pajero in a convoy, which included tea factory Daihatsus aboard of which were tea factory workers, travelling towards the cave. It has been proved beyond reasonable doubt that Musema was armed with a rifle. It has been established beyond reasonable doubt that Musema was present at the attack during which assailants closed off the entrance to the cave with wood and leaves, and set fire thereto. The Chamber finds that it has been proven beyond

5841

reasonable doubt that over 300 Tutsi civilians who had sought refuge in the cave died as a result of the fire.

•Attack of 31 May 1994, Biyiniro hill

As pertains to the facts alleged:

781. *Witness E* saw Musema during an attack on Biyiniro hill after fleeing from the adjacent Muyira hill where 20000 refugees were being attacked by assailants from Gishyita and Gisovu. Amongst the attackers were tea factory employees in uniform and gendarmes who had arrived aboard an array of vehicles including tea factory Daihatsus. The refugees, who identified Musema as one of the leaders and as a provider of vehicles for the attackers, tried to catch him. Musema fled in his Pajero under the cover of gunshots of soldiers. The attack continued after the departure of Musema.
782. In cross-examination, the witness provided more details as to the geographical location of the attack and as regards the types of vehicles he saw.

As pertains to the alibi:

783. According to the alibi, Musema, after having spent the night in Shagasha, returned to Cyangugu on 31 May 1994 to continue his participation in a technical mission. Musema travelled with the rest of the mission to and from Zaïre on that day. In support of the alibi, the Defence tendered exhibit D56, containing a photocopy of page 12 of Musema's passport, showing two signed stamps by the Rwandese immigration authority in Bugarama, one of exit and one of entry, and also two signed stamps by the "*Poste frontalier*" of Kamanyoma in Zaïre, all four stamps dated 31 May 1994. The Defence also tendered exhibit D54, being an "*Autorisation de sortie de fonds*" dated 29 May 1994, authorising advance payment of funds to Musema for a mission to Zaïre.

Findings:

784. Although the Chamber finds that the evidence presented by *Witness E* was consistent throughout his testimony, the alibi and the documents tendered in support thereof are such as to cast doubt on the allegations of the Prosecutor. Therefore, the Chamber does not find Musema's alleged participation to the attack on Biyiniro Hill on 31 May 1999 to have been established beyond reasonable doubt.

•Attack of 5 June 1994, near Muyira hill>

As pertains to the facts alleged:

785. *Witness E* saw Musema in his car on 5 June 1994 near Muyira hill and a number of tea factory Daihatsus parked on the road at the Gishyita-Gisovu border, near Muyira hill. The attackers seen by the witness included gendarmes, tea factory workers, communal policemen, *Interahamwe* and guards. Musema, who carried a rifle, and other leaders, including Kayishema, Sikubabwo and Ruzindana, gave instructions to the attackers who subsequently killed many refugees, including the witness' younger sister. Musema is said also to have fired shots with a rifle during the attack.
786. The Chamber recalls its recent findings as regards the cross-examination of this witness on the attack on 31 May 1994 near Biyiniro Hill, and notes that the evidence presented by the witness was consistent throughout his testimony. The Chamber confirms this also with respect to his above testimony.

5842

As pertains to the alibi:

787. Musema's alibi alleged that after meeting in Cyangugu, Musema travelled back to Shagasha where he and his family remained until 10 June 1994. This alibi was supported by exhibits D57, 58 and 59, the testimony of Musema and that of Defence Witness Claire Kayuku. The Chamber notes that cross-examination during Musema's testimony did not specifically challenge the alibi for this period.

Findings:

788. In light of the above, although the evidence presented by Witness E was found to be consistent throughout his testimony, the alibi of Musema for these dates, supported by documentary evidence and oral testimony, and scrutinized by the Chamber is, in the opinion of the Chamber, such as to cast a reasonable doubt on the allegation of the Prosecutor as to the involvement of Musema in the attack of 5 June 1994 as alleged.
789. As such, the Chamber finds that it has not been proved beyond reasonable doubt that Musema participated in the attack of 5 June 1994.

• 22 June 1994, Nyarutovu cellule

As pertains to the facts alleged:

790. It was alleged by *Witness P* that Musema led an attack on 22 June 1994 in Nyarutovu *cellule*. Witness P described how Musema stopped in a blue Daihatsu on the Gishyita road, about 30 metres from where he was. Musema was standing on the road next to the vehicle when he shot him, holding a firearm with two hands. He described how two shots were fired, one of which hit him in the ankle, and one of which hit and killed a certain François, who was with him.
791. Witness P also stated that Musema instructed Tea Factory workers who were with him to catch a young woman that was with the witness, who had run away, and to bring her back alive, so that "they could see how Tutsi women were made". After the attackers caught the young woman and put her in the vehicle, Musema drove off with them in the direction of Gisovu.
792. In cross-examination the witness advanced more details relating to the allegations, including the fact that he had not seen Musema fire the shots, but that he assumed it was he who had fired, since he saw Musema aim, before he was shot in the ankle, and Musema was the only one in the group with a firearm.
793. The Chamber notes that this cross-examination did not undermine his testimony, and, accordingly, finds the evidence presented during his testimony to be consistent.

As to pertains to the alibi:

794. According to the alibi, Musema was in Gisenyi on 22 June until 27 June, conducting business. During this period he also visited Goma, in Zaïre. He returned to Gisovu on 28 June 1994. This alibi was supported by exhibits D65, 90 and 91, and by the testimony of Claire Kayuku.

Findings:

795. Despite the consistent evidence of Witness P, the Chamber finds that Musema's alibi for this date, heavily scrutinized by the Chamber, supported by documentary evidence and oral testimony, is such as to cast doubt on the allegation of the Prosecutor as to the involvement of Musema in the events alleged of 22 June 1994.

796. As a result, the Chamber finds that it has not been proved beyond reasonable doubt that Musema led or participated in an attack in Nyarutovu *cellule* on 22 June 1994. 5843

5.3 Sexual crimes

797. The Chamber will now assess, one by one, four paragraphs (4.7 to 4.10) of the Indictment according to which Musema allegedly committed crimes connected with sexual offences (cf. *Annex A* to the Judgement).

General allegations of rape and of encouraging others to capture, rape and kill Tutsi women throughout April, May and June 1994 (paragraph 4.7)

798. Paragraph 4.7 of the Indictment states the following:

> "At various locations within the area of Bisesero and Gisovu, in the prefecture of Kibuye, throughout April, May and June 1994, Alfred Musema, committed acts of rape and encouraged others to capture, rape and kill Tutsi women, seeking refuge from attacks within the area of Bisesero in Gisovu and Gishyita communes, Kibuye Prefecture."

799. Musema admitted that there had been mass killings at the Gisovu Tea Factory and around.
800. *Witness M* testified that during the meeting held on Karongi hill on 18 April 1994, Musema said that "those who wanted to have fun could rape their women and their children, without fearing any consequences"(11), referring to Tutsi women and children.
801. Witness M also testified that subsequently, the day after, on 19 April, two of the men who had attended this meeting, together with three other men, took part in the rape of his cousin and niece, on the hill of Rushekera, opposite to Mount Karongi. Witness M was hiding in the undergrowth on a hillside opposite the hillside where the rapes took place. He said that he was at no more than 300 metres from where the attackers were. In the course of the cross-examination, witness M confirmed that he saw the five rapists at a distance of between 250 and 300 meters. The witness explained that the women were dragged out of the bushes to a more visible area on the "terraces"on the hillside used for cultivation.

Factual Findings:

802. According to the Chamber, the Prosecutor has not proven beyond reasonable doubt that Musema was present at the meeting on 18 April 1994 on Karongi hill. The Chamber here refers to its factual findings in Section 5.2 above, under the heading "Karongi hill FM Station, 18 April 1994".
803. Under these circumstances, the Chamber considers that there is no evidence that Musema ordered the rapes.
804. Concerning the general allegations in paragraph 4.7 that Musema himself committed acts of rape throughout April, May and June 1994, the Chamber refers to its conclusions below regarding paragraphs 4.8 to 4.10 of the Indictment.

Alleged acts of rape and murder of Annunciata Mujawayezu on 14 April 1994 (paragraph 4.8)

805. Paragraph 4.8 of the Indictment reads as follows:

> "On 14 April 1994, within the area of the Gisovu Tea Factory, Twumba Cellule, Gisovu

5844

Commune, Alfred Musema, in concert with others, ordered and encouraged the raping of Annunciata, a Tutsi woman, and thereafter, ordered, that she be killed together with her son Blaise".

806. *Witness I*, a 32 year-old Tutsi woman, testified that in 1994 she was working as a teacher in a primary school. Her husband worked in the Gisovu Tea Factory from 1992 to 1994, and they lived within the factory premises. The witness testified that when the killing began at the tea factory, she and her youngest child took refuge in the Guest House where they were discovered by *Interahamwe*. The *Interahamwe* showed her a list of people to be killed. The first name on the list was her husband's, and her own name was second. Next on the list were the names of Canisius, the Chief Accountant of the factory, and his wife Annunciata Mujawayezu and their children. Two of Annunciata Mujawayezu's children were killed at that time by the *Interahamwe*. Annunciata Mujawayezu escaped and went to hide in the tea plantations. The witness testified that on that day, 13 April, Canisius was killed.
807. Witness I was held by the *Interahamwe* to wait for the arrival of Musema, together with the children of a certain Ndoli. On the next day, 14 April, the witness saw Musema arrive in his vehicle at the tea factory. He was accompanied by two soldiers, whom she named, in a second vehicle. She said they told her that they had come for her children and for the children of Ndoli. Ndoli's children were killed on the spot by an old man who did not want them to suffer. The witness testified that Musema asked where her children were and ordered them to be taken away to be drowned or put in bags and beaten like rats. Her two children, one and three years old, were then taken from the house. The witness followed the vehicle, throwing stones at it. Though she was later reunited with her own children, Witness I testified that she subsequently discovered sacks which had been thrown away in the forest containing bodies of dead children, some of which had been decapitated, as well as some children still alive, in the throes of death. The witness recognized many of these children whom she named at trial.
808. When asked whether they should kill Witness I, the witness heard Musema say no, that they should take her with him to the guest house. The witness testified that with the help of someone called Mushoka, she was able to escape and hid in a nearby bush. She then met Annunciata Mujawayezu who said she was hiding in Ndoli's house. They decided to go and hide close to the guest house in the tea plantation so that they could hear what was being said and know where attacks would be made and where they could hide. Annunciata Mujawayezu was with her child Blaise.
809. Witness I testified that Musema and other people came to the bungalow, close enough for her to hear what they were saying. Annunciata Mujawayezu's child Blaise, a five year old, then began to cry from hunger, and she told Witness I that she did not want everyone to be killed so she was leaving with the child. She then stood up, and Musema called her from the bungalow and told her, "come we are going to kill you like the Inyenzi killed our own people." According to Witness I, Musema then called the Twas and told them to rape her and to cut one of her breasts off and give it to the child to eat if the child was hungry. There were then many cries. Witness I testified that she was sure the breast was cut because she heard them say to Annunciata Mujawayezu that since she only had one breast nobody could "treat" her for that. Witness I further testified that she was sure that Annunciata Mujawayezu was raped because she heard them say "you slept with the Tutsi now you have slept with the Twa."(12) Witness I said she continued to hear the cries of Annunciata Mujawayezu and later on sounds which she described as snoring. She thought the child was killed before because she heard something like a blow and the child died immediately. Witness I stated that Musema then told Ndimbati and another man, called Bayingana, that they had done a good job, that the list no longer had many names and that he was going to pay them.
810. Witness I testified, on cross-examination, that, she recognized Musema's voice and distinctly heard the cries and comments. Although many people were speaking at the same time, and there was a lot of noise when Musema was speaking, she added that she only heard when Musema

5845

ordered Annunciata Mujawayezu's breast to be cut off. Further, the witness said that someone else told her, after she had taken refuge at her house, that Annunciata Mujawayezu's killers had driven stakes into her corpse.

811. Still on cross-examination, Witness I was presented with a handwritten statement of hers dated 15 April 1995. In this statement she wrote that Musema had undressed Annunciata Mujawayezu. The Witness explained that in her handwritten statement she included information she had been told but that in her testimony she had only related what she herself had seen and heard. She said she did not herself hear anything about Musema undressing Annunciata Mujawayezu. Similarly, she was presented with having written that the hands and ears of Annunciata Mujawayezu, as well as her breast, were cut off and given to her son Blaise to eat. She again explained that this handwritten statement, which she had done for a priest, was an account of everything she had heard others say, and not limited to what she herself heard, which was only related to the cutting off of the breast. Witness I was presented with another portion of the pre-trial statement in which she was recorded as saying that some men in the crowd ordered the Twas to rape Annunciata Mujawayezu without specifically mentioning Musema.
812. The Defence extensively cross-examined Witness I on her physical location and the extent to which she could have been able to see from where she was hiding. In her testimony, which she reaffirmed on cross-examination, she stated that she was approximately 1.5 metres from the bungalow. She clarified that she could not see Musema because she was lying on the ground of the plantation but that she knew and recognized his voice. She also clarified that pieces of wood were missing from the fence, differentiating it from the picture of the fence introduced by the Defence and dated 1995. When questioned about the statement made to a Swiss judge on 16 June 1995 in which she said she saw Musema on 15 April 1994 but that she was not sure of the day, Witness I acknowledged that she had thought it was the following day but had not been able to be specific with regard to the dates.
813. Defence counsel extensively questioned Witness I regarding discrepancies between her pre-trial statements and her testimony as to how she was reunited with her children the night following the death of Annunciata Mujawayezu. The witness maintained repeatedly that she had not spent the night in the forest with her children, as recorded in a statement, but that the watchman had taken the children to his home after he had come to the forest looking for her unsuccessfully. The witness noted on cross-examination that with regard to the long period of several weeks in which she was hiding it would be difficult to recount every single detail of where she stayed and when. She stated that she had in fact hidden in all of the places mentioned in her pre-trial statements at various times.
814. *Witness L*, a thirty nine year-old Hutu employed at the tea factory, testified that Musema returned to the factory around the 18th of April. Witness L said he knew Annunciata Mujawayezu. He recounted that on the day Musema returned, the bourgemestre Ndimbati arrived with some young people, and they said that they had come from Bisesero to have a drink at the guest house. He said he saw them there with Annunciata Mujawayezu and they were drinking, that Musema came and joined them there together with Annunciata Mujawayezu, all standing close to the fence which surrounded the guest house. He said Musema stood by Ndimbati but that the witness was up the road and did not hear what they were saying to each other. The witness testified that after a short while Musema went into his car but in the meantime Annunciata Mujawayezu was made to enter the guest house by those who were with her, through the back door. Witness L, who was observing from the road, continued on his way. The next morning he asked a child whether he had seen a woman in the guest house and the child replied that the woman had been killed.
815. On cross-examination, Witness L stated that he did not see Musema go into the guest house and that he did not see Musema at the guest house with Annunciata Mujawayezu.
816. On re-examination, the witness clarified that he saw Musema standing near the pergola (bungalow) and that Annunciata Mujawayezu was standing with the others behind the pergola. He added that Annunciata Mujawayezu was holding a child in her arms which he was told was hers.

5846

817. In the course of the cross-examination, the witness also said that the killings at the tea factory started before the return of Musema and that the killing at the Guest House occurred a few days after the other killings at the tea factory.
818. In re-examination, the witness added that he was not at the Tea Factory when the killings took place there, as he was off duty. Witness L confirmed that when he saw Musema at the Guest House in the company of the *bourgmestre*, Musema had only just returned from Kigali and not even gone to his residence. The witness further said that he saw Nzamwita but not Musema with Annunciata Mujawayezu enter the Guest House.
819. *Witness PP*, a 46 year-old Hutu was employed at the Gisovu tea factory in 1994, testified that on 13 April 1994 he saw a number of bodies, including the body of Annunciata Mujawayezu, whom he knew, which was below the road near the canteen. He said her body had clothes on its lower part, and the face was turned towards the canteen. The witness testified that he did not observe any injuries on the body from that position. Witness PP identified a number of the bodies as those of Tutsi employees of the factory. Witness PP further testified that he knew Musema was around on the evening of 14 April 1994 because he saw his vehicle near the canteen, which was below the factory. He clarified that this was the same canteen near which he saw the body of Annunciata Mujawayezu.
820. The only witness for the Defence on the allegations relating to the rape and killing of Annunciata Mujawayezu is Musema. According to his testimony, Musema was at the Guest House on 14 April 1994, talking with the *bourgmestre* Ndimbati, when they suddenly heard a woman's cough and the cry of a child. He realized later that it was Annunicata. He then saw a few people, among them a soldier and Emmanuel, a school teacher, going into the Guest House. Emmanuel came out and was wiping blood off his sword. Musema testified that he suspected some complicity between the *bourgmestre* and the others. When the others had gone, he asked his Chief of Personnel what had happened. He did not ask Emmanuel. The Chief of Personnel told him that Annunciata Mujawayezu had been killed and that they had arrived too late. No mention was made of the child.
821. On cross-examination, Musema was confronted with his other accounts of this incident, which differ substantially from his testimony. Prosecution brought forward notably three interviews of Musema given to the Swiss Judge, namely on 12 May and 13 July 1995, and on 4 March 1996, respectively.
822. In a statement he made on 12 May 1995 to Swiss authorities (Exhibit P59), Musema was reported to have said that Annunciata Mujawayezu was murdered while he was touring the factory and en route to the Guest House where the *bourgmestre* joined them. A pick-up truck arrived carrying many people including a teacher and a police inspector. People shouted that Annunciata Mujawayezu had been found and Musema said he shouted back that she was not to be killed. The people with the *bourgmestre* then ran towards her and killed her and the people at her residence. In a statement made on 13 July 1995 to Swiss authorities (Exhibit P60), Musema was reported to have said that Annunciata Mujawayezu was killed at the residence of the Chief Accountant[(13)]. People took her from the tea plantation near the guest house to the staff quarters above the guest house more that 300 metres away. He was inside the guest house together with Ndimbati and several others. He noted that the guest house referred to both the main building and the pergola (bungalow). He said that he and Ndimbati heard cries from the tea plantation, that they both stayed inside while others went out. In a statement made on 4 March 1996 to Swiss authorities (Exhibit P61), Musema was reported to have said that Annunciata Mujawayezu had been killed in her house from where the cries were heard.

Factual Findings:

823. The Chamber notes that the testimony of Witness I was confusing in certain respects, particularly with regard to the details of her movement and the chronology of events. However, her testimony was consistent on cross-examination, and she did provide reasonable and clear answers to the

5847

questions raised on cross-examination with regard to her various pre-trial statements. The Chamber noted the determination of the witness to clarify the distinction between what she had heard others say and what she herself witnessed. She also carefully indicated on numerous occasions what she did not see or hear, as well as what she did see or hear. With regard to her account concerning the rape and murder of Annunciata Mujawayezu, the Chamber finds Witness I to be clear and consistent and accepts her testimony.

824. The testimony of Witness L is limited with respect to its probative value because the witness was not able to hear Musema from where he was standing. What he saw, that is Musema standing near the pergola (bungalow), Annunciata Mujawayezu standing by the fence with the others and subsequently being taken by them into the guest house, is consistent with Witness I's much more detailed account of the event. On cross-examination, the witness clearly stated that Musema did not enter the guest house. This is not inconsistent with the other accounts, all of which indicate that he remained outside and left shortly thereafter in his vehicle.

825. It, it is clear, from Witness L's testimony, Witness I's testimony and Musema's own testimony, that Musema and Annunciata Mujawayezu were at the Guest House on 14 April 1994. It appears that Annunciata Mujawayezu was near the Guest House at the beginning but afterwards she was taken in by the back door. According to Musema's testimony to the Swiss Judge, he was inside the Guest House. The Chamber notes that Witness L places the date of this incident as around 18 April. In light of the evidence of Witness I and Musema himself that this incident took place on the 14 April, the Chamber considers that the witness is mistaken about the date, which he indicated in any event as an estimation.

826. The testimony of Witness PP is limited with respect to its probative value because Witness PP was not present when the killing of Annunciata Mujawayezu occurred. The witness saw her body and testified that there was no clothing on the upper half of the body. This evidence would be consistent with the account of Witness I that sexual violence might have been directed to her upper body. However, Witness PP noted that he did not see injuries to the body from its position. The testimony does not make it clear whether the body was face down or on its back. For this reason, the Chamber finds that the evidence of Witness PP, while credible, is not helpful in establishing what happened other than to corroborate that Annunciata Mujawayezu was killed and that Musema was present at the factory on 14 April. The Chamber further notes that the witness testified that he saw the body of Annunciata Mujawayezu on 13 April, whereas both Witness I and Musema date the death of Annunciata Mujawayezu to 14 April. The Chamber considers that the witness is mistaken about the date.

827. The Chamber has considered the testimony of Musema in light of the pre-trial statements he made to Swiss authorities which differ not only from his testimony but from each other in material respects. In one version of the incident, Musema tried to stop the killing of Annunciata Mujawayezu. In another version, he came too late. In each version, she was killed in a different place. In light of these gross inconsistencies, for which Musema does not have any reasonable explanation, the Chamber concludes that the only reasonable explanation for the inconsistencies is that he is not being truthful.

828. Having considered the evidence, as set forth above, the Chamber finds that the Prosecution has established beyond a reasonable doubt that Musema ordered the rape of Annunciata Mujawayezu, a Tutsi woman, and the cutting off of her breast to be fed to her son. No evidence was introduced to indicate that he ordered her to be killed, although there is conclusive evidence that she was in fact killed. Considering Musema's high position in the *commune*, he must have known that his words would necessarily have had an important and even binding impact on his interlocutors.

829. There is no conclusive evidence that Annunciata Mujawayezu was raped, or that her breast was cut off, although there is some evidence to support an inference that these acts were perpetrated.

Alleged acts of rape and murder of Immaculée Mukankuzi and others on 13 May 1994 (paragraph 4.9)

5848

1. Paragraph 4.9 of the Indictment states the following:

> "On 13 May 1994, within the area of Bisesero, in Gisovu and Gishyita communes, Kibuye Prefecture, Alfred Musema, in concert with others, raped and killed Immaculée Mukankuzi Mukankusi, a pregnant Tutsi, and thereafter ordered others accompanying him to rape and kill Tutsi women seeking refuge from attacks."

831. *Witness J*, a 49 year-old Tutsi woman, testified that she had five children, four girls and one boy. In 1994 the girls were 25, 23, 19 and 12 respectively, and the boy was 9 years old. The witness testified that she arrived in Bisesero in April 1994 seeking refuge on Muyira hill with two of her children. The other three children had been shot by Charles Sikubwabo, the *bourgmestre* of the Gishyita *Commune* on 7 April as she was fleeing.
832. Witness J testified that she first saw Musema on 13 May, leading the attackers, although she stated that she knew him previously as the managing Director of the Gisovu Tea Factory, where her husband worked. He was with about thirty young men, many *Interahamwe* wearing red shirts and white shorts and armed with clubs, sticks and machetes. Witness J testified that she was with five other Tutsi women and that when they saw Musema they ran and hid in a bush. He fired in the air, and they came out of the bush and tried to run away. Musema told his men to run after them, and they were caught. She said Musema told the men that he was going to take one of the women and rape her and that they should follow his example and do the same thing. The assailants followed the instructions. Witness J heard Musema tell them in Kinyarwanda "What I do, you will imitate after me." Musema also told the youths to take the Tutsi women and to check and note their constitution, which the witness understood to mean they were to be raped. The witness stated that Musema regrouped and instructed the assailants by using a megaphone and a whistle, and by speaking to them.
833. According to Witness J, Musema then raped one of the women, a Tutsi woman named Immaculée Mukankusi who was 25 years old and eight months pregnant. He hit her with the butt of his gun, she fell down, he dropped his trousers and underwear to the knees and jumped on her. The witness said Immaculee was struggling and she was crying because he was saying that he was going to kill her. Musema was on top of her for about four minutes. After raping her, he put on his clothes, got up and killed her, stabbing her with the knife attached to his gun between the neck and the shoulder.
834. Witness J testified that the killing of Immaculée Mukankuzi gave the men with Musema the courage to kill the other women. The other five women, including Witness J and her 18 year-old daughter, were then raped. After raping them, the men stuck sharpened sticks into their private parts. The witness said that she was raped last because the others were much younger than she was and she was considered as an old woman. She said the other women were still alive when the sticks were inserted into them and that they were screaming, and she clarified that they were killed with the sticks. Those who did not die were finished off with clubs or machetes. Witness J testified that she saw her daughter dying. The rapes, killings and other acts took place at less than two metres from her.
835. The witness said that while all this was happening Musema was further off but still in the area, shooting at the men who were fleeing. He told his men that when they had finished killing the women they should all leave. The witness testified that Musema was watching while she was raped and that her clothing was removed by her attackers. She said that the man who raped her was on top of her for four hours. On further questioning she said that because of the pain she was feeling she thought it went on for four hours and then she lost consciousness. On further questioning of the four hours, the witness said that maybe it was one year because the suffering was so much. Witness J said that nothing was inserted into her private parts because she was almost unconscious but that they cut her head with a machete and on her right shoulder and hand with a panga. She was also kicked in the stomach. When she recovered consciousness she noticed

5849

that she was bleeding and she saw the cadavers of the other victims, including that of her daughter. As a result of the attack, the witness said she has lost feeling in her arm and still has bleeding for which she cannot be treated. She said that while other widows were able to remarry she was not as she has become disabled.

836. On cross-examination, Witness J testified that her three older children - the 25 year-old, the 23 year-old and the 19 year-old were the ones shot by the *bourgmestre* when she was fleeing to Bisesero. She said the other two were killed in Bisesero. Defence counsel also questioned Witness J on the discrepancies between her testimony in court and a radio interview that she did in January 1998 for Radio Rwanda. In the interview, the witness gave an account of the killings that took place in Bisesero. Defence counsel noted that the witness did not mention certain killings, including the killing of her three children by Sikubwabo and also that she mentioned details in the interview that she had not mentioned in her testimony, such as that she went to the Mubunga church on the day she fled to Bisesero. The witness explained that she was asked questions and was not testifying against anybody, that she did not think it necessary to mention the church as she did not think there was anyone there against whom she was testifying. Defence counsel accused the witness of lying in her testimony because she felt that somebody should be responsible for her loss and injury. The witness emphatically insisted that her testimony was what she herself had witnessed and experienced. Defence counsel noted that the witness had not mentioned Musema, or the fact that she was raped or that others were raped, in the radio interview. She replied that she had not wanted to raise this matter and on re-direct examination she stated that before testifying she had not told anyone about the rape.
837. On cross-examination, Defence counsel noted that Witness J had said that her three oldest children had been shot by Sikubwabo, leaving her two children ages 12 and 9. He asked how then her 18 year-old daughter could have been raped by Musema's men subsequently. The witness responded that the child was her own baby that she had brought into this world and said that Defence counsel was trying to make her lose her mind with questions about the ages. She then said insistently that it was Musema who ordered the killing of her children, together with all those who were with her. At the request of the Chamber, the Prosecution introduced documentary evidence establishing that the witness had five children and giving their names.
838. Defence counsel questioned the witness extensively with regard to the physical location of the rape and killing showing her a number of photographs and asking her to identify Muyira hill. She was unable to do this from the photographs, which she attributed to the fact that the hills were all similar in nature and did not have distinguishing characteristics that could be identified, such as crop plantations.
839. According to the Defence, the allegations based on Witness J' testimony falls, since the witness lacks integrity and is unfaithfull.

Factual Findings:

840. The Chamber notes that witness J is the sole witness of the rape and killing of Immaculée Mukankuzi by Musema and the rape and killing of other women by the men with him at Muyira Hill on his instruction. The Chamber found her, generally speaking, to be a balanced witness. Her evidence on direct and cross-examination was notably consistent and additional details which emerged through extensive questioning provide a clear picture of the events she was describing.
841. Yet, the Chamber notes that the witness made several time estimates which appeared to be inaccurate. For example, she testified that the man who raped her was on top of her for four hours, saying subsequently that it felt like four hours or even a day. She testified that a distance which would take a young man five minutes to cover would take her two hours. The Chamber considers that these estimates reflect a general difficulty of the witness in measuring time which do not detract from the credibility or her testimony.
842. On cross-examination, Defence counsel challenged the witness on several grounds. The Chamber

5850

considers that with regard to the interview she did on Radio Rwanda, that it is inaccurate to characterize the interview as "different"from her testimony, as if it were therefore inconsistent with her testimony. Defence pointed out that she did not say everything in the interview that she said in her testimony and that she did not say everything in her testimony that she said in the interview. The witness had a reasonable explanation for these differences - the radio interview was of short duration with a specific purpose and controlled by the interviewer. The fact that she did not mention Musema is not, in the view of the Chamber, significant, particularly in light of the fact that she did not mention the killing of her children and other very significant events to which she testified. The chamber recognizes that it is especially difficult to testify about rape and sexual violence, moreover in a public forum. No inconsistencies between the radio interview and the testimony were identified.

843. The Chamber considers that the principal inconsistency in the testimony of Witness J relates to her account of the circumstances surrounding the killing of her 19 year-old daughter by Sikubwabo and the rape and killing of her 18 year-old daughter by the young men with Musema at Muyira hill. The witness clearly testified several times that she had five children, who were aged 25, 23, 19, 12, and 9. This has further been established by documentary evidence at the request of the Chamber. She clearly testified several times that her three eldest children were killed by Sikubwabo, leaving her with two children aged 12 and 9. Yet she also testified that one of the five young women raped with her at Muyira hill was her 18 year-old daughter. On cross-examination when the question was put to her to explain how this was possible, she did not provide any answer. On re-direct examination, in reply to a specific question on this point by the Prosecutor, she provided a very general answer to the effect that Musema had ordered her children to be killed. She did not explain the apparent inconsistency.

844. While the Chamber found the testimony of Witness J to be generally credible, it is deeply troubled by this unexplained inconsistency regarding the rape of her daughter. Without any reasonable explanation, the Chamber must question the accuracy of the account. The Chamber believes that there is likely to be a reasonable explanation, based on its evaluation of the witness.

845. However, recalling the high burden of proof on the Prosecutor and the lack of any other evidence produced to corroborate the account of Witness J, the Chamber cannot find beyond a reasonable doubt that the allegations have been established relating to the rape and killing of Immaculée Mukankuzi by Musema and the rape and killing of others with her by his men and on his order on 13 May 1994.

Alleged acts of rape and murder of a woman called Nyiramusugi on 13 May 1994 (paragraph 4.10).

846. Paragraph 4.10 of the Indictment reads as follows:

> "On 13 May 1994, within the area of Bisesero, in Gisovu and Gishyita communes, Kibuye prefecture, Alfred Musema, acting in concert with others, raped Nyiramusugi, a Tutsi woman, and encouraged others accompanying him to rape and kill her".

847. *Witness N* , a 39 year old Tutsi, testified that he sought refuge in the Bisesero area from 26 April to 13 May 1994. He stated that there were many attacks on Muyira hill on 13 May 1994 and that he stayed on Muyira hill until that date, after which he had to flee again. He testified that he knew Musema. He saw Musema arrive at Muyira hill aboard his red vehicle on 13 May 1994. He said that this was the first time that he had seen Musema during the attacks. He explained that he was able to hear Musema once the group moved to within a few metres of him.

848. The witness testified that Musema spoke to a policeman named Ruhindura, and asked him whether a young woman called Nyiramusugi was already dead, to which the policeman answered

5851

'no'. He stated that Musema then asked that before anything, this girl had to be brought to him.(14) He and the *bourgmestre* fired the first shots so the others would start shooting. Ruhindura while fighting and looking for the young woman caught her. The Witness stated that he knew Nyiramusugi. He used to see her when she walked to school and he used to take his cows to graze in front of her parents' house. He said that she was a young unmarried teacher.

849. Witness N testified that Nyiramusugi was caught around 15.30hrs. He said that he saw Ruhindura with four youths drag the young woman on the ground and take her to Musema. He said that Musema was carrying a rifle which he then handed to Ruhindura. The four people holding Nyiramusugi brought her to the ground. They pinned her down, two holding her arms and two holding her legs. The two holding her legs then spread them, and Musema placed himself between them. The witness saw Musema rip off Nyiramusugi's clothes and underclothes and then took off his own clothes. The witness stated that Musema said aloud "Today, the pride of the Tutsi shall end"(15) and then raped the young woman. Witness N said that Nyiramusugi was a very well known Tutsi girl who was very beautiful.
850. The witness explained that because of the echo at Muyira hill, it was possible to hear everything that was said and to recognize the voice of certain of the attackers. The Witness also explained that he was able to see the rape as he had fallen in a bush when fleeing to the top of the hill. Musema was at 40 metres, bird flight, on a little hill at Muyira, walking distance being further because to get to Musema from the Witness' position on the hill, one had to walk down and back up the other side.
851. The witness affirmed that the victim was Tutsi and explained that Musema took her by force. He stated that during the rape, Nyiramusugi struggled until Musema grabbed one of her arms and held it against her neck. The four assailants who initially held down the victim watched from nearby while the policeman, Ruhindura, stood further away. Witness N stated that after the rape, which he estimated lasted forty minutes, Musema walked over to Ruhindura, took his rifle back and left with him.
852. Witness N also testified that the four other men, who initially pinned down the victim, went back to the girl and took turns raping her. She was struggling and started rolling down toward the valley. He was able to see them rape Nyiramusugi until they were out of sight. During the rape, he heard the victim scream and say "the only thing that I can do for you is only to pray for you."(16)
853. Witness N added that he later saw the four attackers on the rise of the other side of the valley and saw that Nyiramusugi had been left for dead in the valley. That night, the witness and three other people went to the victim and found her badly injured. She was cut all over her body, covered with blood and nail scratches around her neck. He stated that they took her to her mother. The witness testified that the mother died the next day and that he learnt from Nyiramusugi's brother that she had been shot.
854. On cross-examination, Defence counsel extensively questioned the witness as to how he came to testify and the circumstances of his statement which was made on 13 January 1999 to the Prosecutor. The witness explained that he had previously made a statement about Musema to the local court in 1997. The witness further testified that he was able to hear Musema as the refugees were speaking amongst themselves softly and the attackers were getting organized. Moreover, the attackers spoke loudly so that everyone could hear them.
855. The witness was asked why Nyarimusugi was not killed after she was raped. He replied that he did not know. When asked again, he replied that what they did to her was worse than killing her. When pressed further as to whether it was not strange that she was not killed he replied that in a way they did kill her, and that sometimes they would leave people to die if they thought they had been sufficiently weakened. He added that if she had been left there without any help through the night, she would have died. The witness was asked whether he had been paid any money to come and testify, and he replied that he had not. Finally, it was put to him that he was lying, and he replied that he had not come to lie but rather to talk about what he himself had seen and that

Musema would know that he was telling the truth.

856. According to the Defence, Musema was not in Kibuye during the period covering 13 May 1994. Several letters were presented in support of the alibi.

Factual Findings:

857. The Chamber accepts the testimony of Witness N as credible.

858. It is clear and consistent, and nothing emerged from the cross-examination of the witness which cast any doubt on the evidence presented. In the view of the Chamber, the reasons given by witness N as to why he waited five years to come forward with this statement, namely that he reported Musema to his local court in 1997, is satisfactory.

859. The reasons given by the witness as to how he had been able to hear Musema's exclamations are also convincing. The witness indeed explained that, *firstly*, the attacks had not yet started when Musema asked for the girl to be brought to him, *secondly*, he was able to hear Musema since the refugees were speaking amongst themselves softly and the attackers were getting organized, and *thirdly*, the attackers spoke loudly. Moreover, the witness explained that because of the echo at Muyira hill, it was possible for him to hear everything that was said and to recognize the voice of certain attackers, taking into account that the bush in which he was hiding was approximately at 40 metres bird flight from Musema. In the light of exhibits D7-A, D7-B and P21, Witness N's observation and description of the area of Muyira hill is convincing.

860. Concerning the alibi, the Chamber recalls its finding in Section 5.2 above as regards mid-May attacks. The Chamber here confirms that this alibi does not stand.

861. Based on this evidence, the Chamber finds, beyond a reasonable doubt, that Musema, acting in concert with others raped Nyiramusugi, and by his example encouraged the others to rape her on 13 May 1994.

862. According to the Chamber, there is no evidence, however, that he encouraged them to kill her, as alleged in the Indictment.

5.4 Musema's Authority

863. Paragraph 5 of the Indictment states that Musema is individually criminally responsible pursuant to Articles 6(1) and 6(3) of the Statute for the crimes with which he is charged in the Indictment.

864. In Section 3.1 of the Judgement, the Chamber discussed the legal principles pertaining to individual criminal responsibility under Articles 6(1) and 6(3) of the Statute. As it determined there, the authority, whether *de facto* or *de jure*, or the effective control, exercised by Alfred Musema in the context of the events alleged, may provide the basis for such individual criminal responsibility.

865. In relation to Article 6(1), the nature of the authority wielded by an individual affects the assessment of that individual's role in planning, instigating, ordering, committing or otherwise aiding and abetting the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the Statute. In particular, the presence of an authority figure at an event could amount to acquiescence in the event or support thereof, and, in the perception of the perpetrators, legitimize the said event.

866. In relation to Article 6(3) of the Statute, the nature of the authority exercised by an individual is crucial to an assessment of whether that individual exercised a superior responsibility over perpetrators of acts detailed in Articles 2 to 4 of the Statute, and whether, as a result, that individual attracts individual criminal responsibility for those acts.

867. It is, therefore, necessary for the Chamber to assess the nature and extent of the authority, whether *de facto* or *de jure*, and the effective control exercised by Musema in the context of the events

5853

alleged in the Indictment. The Chamber will make that assessment of Musema's authority, firstly by examining the testimonies of witnesses before the Chamber and the documents tendered to it, and secondly by presenting its factual findings on the matter.

The Evidence

868. Many of the witnesses testified that Musema was perceived as a figure of authority and considerable influence in the Gisovu region. *Witness H* stated that Musema was "very well respected" in the locality. *Witness W* testified that Musema "occupied an important position in Rwanda", and that he occupied a place higher in the regime than others of equivalent or higher age or qualifications. *Witness E* stated that Musema was considered to have the same powers as a *Préfet*. *Witnesses R* and *D* both testified to seeing Musema sitting with officials or authorities at political meetings.
869. Witnesses offered two different, and overlapping, explanations for Musema's influence. According to some witnesses, his power stemmed from his control of socio-economic resources. According to other witnesses, his power was politically based.
870. *Witness BB* stated that Directors of Tea Factories became well respected in their respective *Préfectures* as a result of their provision to the local communities of social services (such as clinics and schools) ancillary to the factories. This respect extended their influence beyond their direct control over factory employees. *Witness G* stated that Musema was a "very important personality" because he employed many people at the factory.
871. *Witnesses W, E* and *AB* all testified in relation to Musema's political activities, and that he played an important political role within the Gisovu region.
872. The Expert Witness of the Prosecutor, *André Guichaoua*, provided testimony linking these two explanations of the source of Musema's authority. Guichaoua emphasized the political importance in the Second Republic of controlling key posts and positions which controlled the distribution of resources, including export earnings. These positions included management positions in parastatal organizations, such as *OCIR-thé*. *OCIR-thé* was a key parastatal because it controlled the "coming in of external resources" in the form of export earnings from tea. Guichaoua stated that according to the National Commission of Agriculture reports of 1991, it was one of the central export earners in Rwanda.
873. According to Guichaoua, the importance of the Tea Factory in Gisovu was magnified by the relative poverty of the region. Musema's influence as Tea Factory Director extended not only to the people, whom he could employ, but to the communal authorities, since by employing the people, and providing them with financial resources with which to pay communal taxes, he made it possible for the *commune* to pay its employees. As a result there was, according to Guichaoua, generally an extensive solidarity between the communal authorities and the parastatal enterprises. He stated that a Director of such an enterprise could "buy social peace".
874. Guichaoua also testified that Musema's appointment to the directorship of the Tea Factory was politically motivated, and to his links with the central government. He stated that Musema's influence and "prerogatives" would have expanded after the instalment of the new government on 8 or 9 April, 1994, because of the unprecedented presence of citizens of Kibuye in that government. Guichaoua outlined many personal affiliations between Musema and a range of governmental ministers. According to Guichaoua, during times of conflict, it was the role of a Tea Factory Director to maintain infrastructure and exports, but also to "ensure peace". The economic importance of Tea Factories meant Directors were closely surveyed by the central government. In Guichaoua's opinion it would not have been possible, being in a position such as that Musema occupied, not to have participated in the decision-making process at the time.
875. The Defence contested these allegations concerning Musema's authority. Their representations are contained in Section 4.3 of the Judgement. Generally, it was argued that no evidence had been presented of Musema's alleged civic authority; that the nature of Musema's appointment to the

5854

Directorship of the Gisovu Tea Factory was not conclusive evidence of any link between him and the regime; and that he was not in any way part of the interim government.

876. Musema's legal status as a Tea Factory Director was clarified by *Witness BB*. He stated that Tea Factory Directors, as heads of the factories in the independent legal entity, the parastatal *OCIR-thé*, were appointed by the President. They reported to the Managing Director of OCIR-thé, who in turn reported to the Ministry of Agriculture. Witness BB stated that the *Préfet* represented the Head of State in the *Préfecture*, and that the Factory Director was bound to respect him. However, the day-to-day administration of the factory, including the appointment of staff, was the prerogative of the Director, with no need of consultations with the *Préfet* nor the *bourgmestre*. In the Witness' opinion, the Director "exercised control" over his staff.
877. The Chamber notes that Musema testified that he could visit certain military camps, and that he was authorized to carry a firearm. Moreover, notes the Chamber, the fact that Musema was accompanied by military personnel also shows the importance of his general position.
878. In conclusion, the Chamber notes that the Defence also tendered numerous documents, including meeting reports and minutes and official correspondence, which all tend to demonstrate that at the time of the events alleged in the Indictment, Musema exercised *de jure* and *de facto* authority over tea factory employees in his official capacity as Director of the Tea Factory.

Factual findings

879. Having reviewed the evidence presented to it, and in light of its assessments of the credibility and reliability of witnesses in the Sections 5.2 and 5.3 of the Judgement, the Chamber will now make its factual findings regarding the nature and extent of authority and control, if any, exercised by Musema in the context of the events alleged in the Indictment.
880. The Chamber finds that it has been established beyond reasonable doubt that Musema exercised *de jure* authority over employees of the Gisovu Tea Factory while they were on Tea Factory premises and while they were engaged in their professional duties as employees of the Tea Factory, even if those duties were performed outside factory premises. The Chamber notes that Musema exercised legal and financial control over these employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory. The Chamber notes that Musema was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute. The Chamber also finds that, by virtue of these powers, Musema was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes. The Chamber finds that Musema exercised *de jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory.
881. In relation to other members of the population of Kibuye *Préfecture*, including *thé villageois* plantation workers, while the Chamber is satisfied that such individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region, it is not satisfied beyond reasonable doubt on the basis of the evidence presented to it that Musema did, in fact, exercise *de jure* power and *de facto* control over these individuals.
882. The Chamber finds, therefore, that it has been established beyond reasonable doubt that there existed at the time of the events alleged in the Indictment a *de jure* superior-subordinate relationship between Musema and the employees of the Gisovu Tea Factory.
883. In Section 6 of the Judgement in its legal findings, the Chamber will evaluate whether Musema's individual criminal responsibility is engaged under Article 6 of the Statute with respect to paragraphs 4.6 to 4.11 of the Indictment.

1. Section 4.1 of the Judgement.

58555

2. *See* Section 4.1 of the Judgement - "General Admissions"

3. In plural "*Imihurura*"

4. Kinyarwanda "badutsembatsembe".

5. Kinyarwanda "Imana y'Abatutsi barayishe. Nta Mana bakigira".

6. French Transcript 28 April 1999, "Ces véhicules qui venaient de la route d'en bas et les gens qui étaient à bord des véhicules sont descendus et tout le monde s'est regroupé près du panneau de signalement, près du panneau routier".

7. French original "Imaginez que tout le monde s'est retrouvé le 18/04 alors que chacun croyait tout les autres morts".

8. Exhibit P56A, English translation of P56, refers, incorrectly, to 17 April.

9. It should be noted that later in his testimony, Musema named the person as Faustin Nyavihima and spelt the name for the Court.

10. See Defence Closing Brief para. 263.

11. The French transcript reads "Pour ceux qui voulaient s'amuser, ils pouvaient violer leurs femmes et leurs filles, sans craindre aucune conséquence"(transcript of 30 April 1999, p.30).

12. French transcript reads " Tu as couché avec des Tutsi et maintenant tu viens de coucher avec des Twa".

13. The French states "Elle a été assasinée dans l'habitation du chef comptable. Les gens l'ont prise dans le thé, à proximité du guest house, puis ils sont montés vers les habitations, au-dessus du guest house, soit à plus de 300m. Moi-même, je me trouvais au guest house, à l'intèrieur. J'étais à ce moment avec Ndimbati, un enseignant, l'IPJ de la commune, deux militaires venus avec moi de Butare et Baragiwira". Musema made no mention of the bloodied sword carried by the teacher nor the coughs coming from the plantation behind him and said he was in the Guest. In Court he said he was outside.

14. [14] French transcript, 28 April 1999, page 75, lines 1 and 2, 'Musema a dit, qu'avant toute chose, on devait lui amener cette jeune fille.'

15. [15] French transcript, 28 April 1999, "il a dit 'Aujourd'hui, l'orgueil des Tutsis va finir.'"

16. [16] French transcript, 28 April 1999, "la seule chose que je peux faire pour vous, c'est de prier pour vous seulement."

5856

6. LEGAL FINDINGS

6.1 Count 1 - Genocide & Count 2 - Complicity in Genocide

6.2 Count 3 - Conspiracy to Commit Genocide

6.3 Count 5 - Crime against Humanity (extermination)

6.4 Count 4 - Crime against Humanity (murder)

6.5 Count 6 - Crime against Humanity (other inhumane acts)

6.6 Count 7 - Crime against Humanity (rape)

6.7 Counts 8 and 9 -Violation of Common Article 3 and Additional Protocol II 274

6.1 Count 1 - Genocide & Count 2 - Complicity in Genocide

884. *In Count 1*, relating to all the facts alleged in the Indictment, the Prosecutor charges Musema with criminal responsibility, under Article 6 (1) and (3) of the Statute, for the crime of *genocide*, a crime punishable under Article 2 (3) (a) of the Statute.
885. As an alternative, the Prosecutor also charges Musema with *Count 2,* in which Musema is held criminally responsible, under Article 6 (1) and (3) of the Statute, for having committed the crime of *complicity in genocide*, a crime punishable under Article 2 (3) (e) of the Statute. Count 2 also relates to all the acts alleged in the Indictment.
886. The Chamber recalls, as it indicated *supra* in its findings on the applicable law, that it holds that an accused is guilty of the crime of genocide if he committed one of the acts enumerated under Article 2 (2) of the Statute against a national, ethnical, racial or religious group, specifically targeted as such, with the intent to destroy, in whole or in part, said group.
887. Furthermore, the Chamber holds that an accused is liable for complicity in genocide if he knowingly and voluntarily aided or abetted or instigated a person or persons to commit genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, specifically targeted as such.
888. As Count 2 stands in the alternative to Count 1, the Chamber will now present its findings with respect to both counts by examining, firstly, on the basis of the factual findings set forth above in Chapter 5, which of the acts alleged in the Indictment to have been committed by Musema it considers to have been established beyond a reasonable doubt and for which he incurs responsibility. The Chamber will then determine whether those acts are constituent elements of the crime of genocide and, if not, whether they constitute elements of the crime of complicity in genocide.

With respect, firstly, to the facts alleged in the Indictment, the Chamber is satisfied beyond any reasonable doubt, on the basis of the factual findings, of the following:

889. *Firstly*, regarding the allegations presented under paragraph 4.8 of the Indictment, according to which Musema, in concert with others, ordered and abetted in the rape of Annunciata, a Tutsi, and thereafter ordered that she and her son be killed, the Chamber holds that even if it is proven that Musema ordered that Annunciata be raped, such order, by and of itself, does not suffice for him to incur individual criminal responsibility, given that no evidence has been adduced to show that the

5857

order was executed to produce such result, namely the rape of Annunciata. Nor has it been proved that Musema ordered that she and her son be killed.

890. *Secondly*, the Chamber is satisfied that it has been established beyond a reasonable doubt that on 26 April 1994, Musema led and participated in an attack on Gitwa Hill. Musema arrived at the site of the attack in a Daihatsu vehicle belonging to the Gisovu Tea Factory. He carried a firearm and was accompanied by employees of the Gisovu Tea Factory wearing blue uniforms. Musema and other persons, some of whom wore banana leaves and *Imihurura* belts, attacked Tutsi refugees. It has also been established beyond a reasonable doubt that Musema shot into the crowd of refugees. The attackers killed resolutely, and few refugees survived the large-scale attack.

891. The Chamber finds that Musema incurs individual criminal responsibility for the above-mentioned acts, on the basis of the provisions of Article 6 (1) of the Statute, for having ordered and, by his presence and participation, having aided and abetted in the murder of members of the Tutsi ethnic group, and for the causing of serious bodily and mental harm to members of the said group.

892. With respect to the Prosecutor's contention that Musema could additionally be held criminally responsible, under Article 6 (3) of the Statute, the Chamber finds that for an accused to be held criminally responsible under these statutory provisions, the Prosecutor must establish: (1) that one of the acts referred to under Articles 2 to 4 of the Statute was, indeed, committed by a subordinate of the Accused; (2) that the accused knew or had reason to know that the subordinate was about to commit such act or had done so; and (3) that the accused failed to take the necessary and reasonable measures to prevent the commission of said act by the subordinate or to punish him for the criminal conduct.

893. The Chamber notes that, in the instant case, it has been established that employees of the Gisovu Tea Factory were among the attackers. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

894. The Chamber finds that it has also been established that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power.(1) Considering that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

895. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 26 April 1994 on Gitwa Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.

896. *Thirdly*, the Chamber is satisfied beyond a reasonable doubt that between 27 April and 3 May 1994, Musema participated in the attack on Rwirambo Hill. Musema arrived in a red Pajero, followed by four Daihatsu pick-ups from the Gisovu Tea Factory which were carrying persons that Witness R described as *Interahamwe*. The witness recognized those persons from their blue uniforms which had the name "*Usine à thé Gisovu*" printed on the back. Musema was armed with a rifle. While trying to flee, Witness R's arm was injured from a bullet which came from Musema's direction.

897. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6 (1) of the Statute, for having committed and, by his presence and participation, having aided and abetted in the causing of, serious bodily and mental harm to members of the Tutsi group.

898. With respect to the Prosecutor's argument that Musema could also be held responsible under Article 6 (3) of the Statute, the Chamber finds, firstly, that among the attackers at Rwirambo were persons identified as employees of the Gisovu Tea Factory. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the

5858

Statute, including, in particular, causing serious bodily and mental harm to members of the Tutsi group.

899. The Chamber finds that it has also been established, as held *supra*, that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power. Noting that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in their commission, by his presence and by his personal participation.

900. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack on Rwirambo Hill, Musema incurs individual criminal responsibility, as their superior, on the basis of the basis of Article 6 (3) of the Statute.

901. *Fourthly*, on the basis of numerous corroborating testimonies, the Chamber is satisfied that it has been established beyond any reasonable doubt that on 13 May 1994 a large-scale attack was launched at Muyira Hill against 40,000 Tutsi refugees. The attack began in the morning. Some of the attackers arrived on Muyira Hill on foot while others came in vehicles, including Daihatsus belonging to the Gisovu Tea Factory. Employees of the Gisovu Tea Factory dressed in their uniforms, gendarmes, soldiers, civilians and members of the *Interahamwe* were among the attackers. The attackers were armed with firearms, grenades, rocket launchers and traditional weapons. They chanted anti-Tutsi slogans.

902. The Chamber is satisfied beyond a reasonable doubt that Musema was among the leaders of the attack. He arrived at the location in his red Pajero. He was armed with a rifle which he used during the attack. Thousands of unarmed Tutsi men, women and children were killed during the attack, while others were forced to flee for their lives.

903. The Chamber finds that, for the acts mentioned *supra*, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6 (1) of the Statute, for having ordered and, by his presence and participation, aided and abetted in the murder of members of the Tutsi group and the causing of serious bodily and mental harm to members of said group.

904. The Chamber notes, on the basis of the factual findings set forth *supra*, that it has been established beyond a reasonable doubt, that employees of the Gisovu Tea Factory were among the attackers. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the killing of members of the Tutsi group and causing serious bodily and mental harm to members of the said group.

905. The Chamber also finds that it has been established that Musema was the superior of the said employees and that he had not only *de jure* power over them, but also *de facto* power. Noting that Musema was himself present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.

906. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the attack of 13 May 1994, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6 (3) of the Statute.

907. *Fifthly*, the Chamber finds that it has been established beyond a reasonable doubt that on 13 May 1994, during the above-mentioned attack on Muyira Hill, Musema, having been told by a policeman called Ruhindara that a young Tutsi woman, a teacher by the name Nyiramusugi, was still alive, asked Ruhindara to catch her and to bring her to him. With the help of four young men, Ruhindara dragged the woman on the ground and brought her to Musema who had his rifle in his hand. The four young men, who were restraining Nyiramusugi, dropped her on the ground and pinned her down. Two of them held her arms, while the other two clamped her legs. The latter two opened the legs of the young woman and Musema tore her garments and undergarments, before

5859

undressing himself. In a loud voice, Musema said: "The pride of the Tutsi is going to end today". Musema raped Nyiramusugi. During the rape, as Nyiramusugi struggled, Musema immobilized her by taking her arm which he forcibly held to her neck. Standing nearby, the four men who initially held Nyiramusugi to the ground watched the scene. After Musema's departure, they came back to the woman and also raped her in turns. Thereafter, they left Nyiramusugi for dead.

908. The Chamber finds that Musema incurs individual criminal responsibility under Article 6 (1) of the Statute, for having raped, in concert with others, a young Tutsi woman and for thus having caused serious bodily and mental harm to a member of the Tutsi group. The Chamber also finds that Musema incurs individual criminal responsibility under Article 6(1) of the Statute, for having abetted others to rape the girl, by the said act of rape and the example he thus set.
909. With respect to the Prosecutor's argument that Musema could also be liable under Article 6(3) of the Statute, the Chamber notes that the Prosecutor has not established, nor even alleged, that among the assailants who attacked Nyiramusugi there were employees of the Gisovu Tea Factory or other persons who were Musema's subordinates. Therefore, the Chamber holds that Musema does not incur individual criminal responsibility under Article 6(3) of the Statute for Nyiramusugi's rape.
910. *Sixthly*, the Chamber is satisfied beyond a reasonable doubt that another large-scale attack took place on Muyira Hill on 14 May 1994 against Tutsi civilians. The attackers, who numbered about 15 000, were armed with traditional weapons, firearms and grenades. They chanted slogans. Musema, who was armed with a rifle, was one of the leaders of that attack.
911. Furthermore, the Chamber is satisfied beyond a reasonable doubt that Musema participated in an attack which took place in mid-May 1994 on Muyira Hill against Tutsi civilians and that Musema led the attackers, who included the *Interahamwe* and employees of the Gisovu Tea Factory. Musema's red Pajero and vehicles belonging to the Gisovu Tea Factory were seen at the site of the attack. Musema launched the attack by shooting his rifle, and he personally shot at the refugees, although it has not been established beyond a reasonable doubt that he killed anyone.
912. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, under Article 6(1) of the Statute, for having ordered, committed and, by his presence and participation, aided and abetted in the causing of serious bodily and mental harm to members of the Tutsi group.
913. The Chamber notes that, on the basis of the factual findings set forth *supra,* it has been established beyond a reasonable doubt that employees of the Gisovu Tea Factory were among the attackers. The Chamber holds that the participation of said employees resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the causing of serious bodily and mental harm to members of the Tutsi group.
914. The Chamber finds that it has also been established that Musema was the superior of said employees and that he not only held *de jure* power over them, but also *de facto* power. Considering that Musema was personally present at the attack sites, the Chamber is of the view that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.
915. Consequently, the Chamber finds that for the acts committed by the employees of the Gisovu Tea Factory on Muyira Hill, Musema incurs individual criminal responsibility as their superior, on the basis of the provisions of Article 6(3) of the Statute.
916. *Seventhly*, the Chamber is satisfied that it has been established beyond a reasonable doubt that Musema participated in an attack on Mumataba Hill in mid-May 1994. Among the attackers, who numbered between 120 and 150, were employees of the Gisovu Tea Factory armed with traditional weapons, and communal policemen. In the presence of Musema, vehicles of the tea factory transported the attackers to the sites. The attack, which was carried out against some 2000 to 3000 Tutsis who had sought refuge in the house of one Sakufe and in the vicinity of the said

5860

house, was sparked off by blowing whistles. The Chamber is satisfied beyond any reasonable doubt that Musema was present, that he stayed with the others near his vehicle during the attack, and that he left the site with the attackers.

917. The Chamber finds that, for these acts, Musema incurs individual criminal responsibility, on the basis of the provisions of Article 6(1) of the Statute, for having, by his presence and the fact that he witnessed the attack, aided and abetted in the murder of members of the Tutsi group and in the causing of serious bodily and mental harm to members of the said group.
918. The Chamber notes that it has been established beyond a reasonable doubt that employees of the Gisovu Tea Factory were among the attackers and that they were transported to the attack sites by vehicles of the factory, in the presence of Musema. The Chamber is of the view that their participation resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the killing of members of the Tutsi group and causing serious bodily and mental harm to members of the said group.
919. The Chamber finds that it has been established that Musema was the superior of the said employees and that he had not only *de jure* power over them, but also *de facto* power. Considering that Musema was himself present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that Musema, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said act by his subordinates, but rather abetted his subordinates in the commission of those acts, by his presence and by his personal participation.
920. Consequently, the Chamber finds that, for the acts committed by the employees of the Gisovu Tea Factory during the Mumataba attack, Musema incurs individual criminal responsibility, as their superior, on the basis of the provisions of Article 6(3) of the Statute.
921. *Eighthly*, the Chamber is convinced beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave. Musema was aboard his Pajero in a convoy, travelling towards the cave, which included tea factory Daihatsus aboard of which were tea factory workers. It has been proved beyond reasonable doubt that Musema was armed with a rifle, and that he was present at the attack during which assailants closed off the entrance to the cave with wood and leaves, and set fire thereto. The Chamber finds that it has been proven beyond reasonable doubt that over 300 Tutsi civilians who had sought refuge in the cave died as a result of the fire.
922. The Chamber finds that, for the above-mentioned acts, Musema incurs individual criminal responsibility, under Article 6(1) of the Statute, for having committed and, by his presence, aided and abetted in the commission of serious bodily and mental harm to members of the Tutsi group.
923. The Chamber notes that, on the basis of the factual findings set forth *supra,* it has been established beyond reasonable doubt that Gisovu Tea Factory workers were among the attackers. The Chamber holds that the participation of these employees resulted, inevitably, in the commission of acts referred to under Articles 2 to 4 of the Statute, including, in particular, the causing of serious bodily and mental harm to members of the Tutsi group.
924. The Chamber finds that it has also been established that Musema was the superior of said employees and that he not only held *de jure* power over them, but also *de facto* control. Considering that Musema was personally present at the attack sites, the Chamber is of the view that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused, nevertheless, failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation.
925. Consequently, the Chamber finds that for the acts committed by the employees of the Gisovu Tea Factory on Muyira Hill, Musema incurs individual criminal responsibility as their superior, on the basis of the provisions of Article 6(3) of the Statute.
926. It emerges from the foregoing findings that the Chamber is satisfied beyond any reasonable doubt that Musema is criminally responsible, under Article 6 (1) of the Statute, for having ordered, committed and, by his presence and his participation aided and abetted in the killing of members

5861

of the Tutsi group, to whom he caused serious bodily and mental harm. Moreover, the Chan... is satisfied beyond any reasonable doubt that Musema incurs further criminal responsibility under Article 6(3) of the Statute for the acts committed by the employees of the Gisovu Tea Factory.

Regarding ,secondly, whether the above-mentioned acts were committed against the Tutsi group as such, and whether Musema possessed genocidal intent at the time those acts were committed:

927. As held in the findings regarding the applicable law on the determination of genocidal intent, the Chamber is of the view that it is necessary to infer such intent by deduction from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by Musema.
928. The Chamber notes, firstly, that based on numerous submissions of evidence proffered at the trial, and, in particular, on acts referred to in paragraphs 4.4, 4.5, and 4.11 of the Indictment (2), it has been proven that, at the time of the facts alleged in the Indictment, numerous atrocities were committed against the Tutsis in Rwanda. Musema acknowledged that roadblocks manned by individuals, some of whom were armed with machetes and an assortment of weapons, were erected at the time all along the road from Kigali to Gitarama. Musema testified that he personally saw several bodies along the road and also witnessed incidents of looting. Musema conceded that those people had been killed at the roadblocks because they were accused of being *Inyenzi,* a term which at the time was equivalent to Tutsi.
929. In particular, Musema acknowledged that from April to June 1994, thousands of men, women and children, predominantly Tutsis, sought refuge in the Bisesero area. Musema admitted that those people were targets of regular attacks from approximately 9 April to 30 June 1994. The assailants used guns, grenades, machetes, spears, pangas, cudgels and other weapons to kill the Tutsis. In the Bisesero area, the attacks resulted in thousands of deaths and injuries among these men, women and children.
930. Musema also conceded that around 13 May 1994 a large-scale attack was launched against Tutsi civilians who had taken refuge on Muyira Hill in Gisovu *Commune* and that those Tutsis then became victims of acts of genocide. Musema admitted, in general, that during the months of April, May and June 1994, in the *communes* of Gisovu and Gishyita, in Kibuye *Préfecture*, acts of genocide were committed against the Tutsi ethnic group.
931. Consequently, the Chamber notes that the above acts, with which Musema and his subordinates are charged, were committed as part of a widespread and systematic perpetration of other criminal acts against members of the Tutsi group. Furthermore, the Chamber notes that Musema acknowledged that genocide directed against the Tutsis took place at the time of the events alleged in the Indictment and at the very sites where the acts with which he is charged were committed.
932. Next, and foremost, the Chamber notes that, on the basis of corroborating testimonies presented, the participation by Musema in the attacks against members of the Tutsi group has been proved beyond a reasonable doubt. The anti-Tutsi slogans chanted during the attacks, including the slogan "Let's exterminate them", directed at the Tutsis, clearly demonstrated that the objective of the attackers, including Musema, was to destroy the Tutsis. The Chamber is satisfied that Musema, who held *de facto* authority, by virtue *inter alia* of his position as Director of the Gisovu Tea Factory and as an educated man with political influence, ordered the commission of crimes against members of the Tutsi group and abetted in said crimes by participating personally in them. These attacks were pointedly aimed at causing harm to and destroying the Tutsis. The victims, namely men, women and children, were deliberately and systematically targeted on the basis of their membership in the Tutsi ethnic group. Certain degrading acts were purposely intended to humiliate them for being Tutsis.
933. Accordingly, the Chamber notes that on the basis of the evidence presented, it emerges that acts of serious bodily and mental harm, including rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each

5362

specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramusugi Musema declared: "The pride of the Tutsis will end today". In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such. Witness N testified before the Chamber that Nyiramusugi, who was left for dead by those who raped her, had indeed been killed in a way. Indeed, the Witness specified that "what they did to her is worse than death".

934. Therefore, the Chamber is satisfied beyond a reasonable doubt that at the time of commission of the above-mentioned acts, which the Chamber considers to have been established, Musema had the intent to destroy the Tutsi ethnic group as such.
935. On that basis, the Chamber recalls that, with regard to the issue of whether the Tutsis were, indeed, a protected group within the meaning of the Genocide Convention, at the time of the events alleged in the Indictment, the Defence did admit that acts of genocide were committed against the Tutsi ethnic group. Consequently, after having considered all the evidence submitted, and the political, social and cultural context prevailing in Rwanda, the Chamber holds that, at the time of the alleged events, the Tutsi group did constitute and still constitutes a protected group within the meaning of the Genocide Convention and , thereby, under Article 2 of the Statute.
936. In conclusion, from all the foregoing, the Chamber is satisfied beyond a reasonable doubt that: *firstly,* Musema incurs individual criminal responsibility for the above-mentioned acts, which are constituent elements of the crime of genocide; *secondly*, that said acts were committed by Musema with the specific intent to destroy the Tutsi group, as such; and *thirdly*, that the Tutsi group is one of the groups legally protected from the crime of genocide. Musema incurs individual criminal responsibility under Article 6(1) and (3) of the Statute for the crime of genocide, a crime punishable under Article 2(3)(a) of the Statute.

6.2 Count 3 - Conspiracy to commit genocide

937. Under Count 3, which relates to all acts alleged in the Indictment, the Prosecutor charges Musema with the crime of conspiracy to commit genocide, a crime punishable under Article 2 (3) (b) of the Statute.
938. The Chamber notes that the acts thus alleged by the Prosecutor under Count 3 are the same as the acts alleged under Count 1(genocide) and Count 2 (complicity in genocide).
939. Regarding the law applicable to the crime of conspiracy to commit genocide, the Chamber held *supra* that:

> "... conspiracy to commit genocide is to be defined as an agreement between two or more persons to commit the crime of genocide".(3)

940. The Chamber notes that the Prosecutor has neither clearly alleged, nor, above all, adduced evidence that Musema, indeed, conspired with other persons to commit genocide and that he and such persons reached an agreement to act to that end.
941. Therefore, the Chamber holds that Musema does not incur criminal responsibility for the crime of conspiracy to commit genocide, under Count 3, all the more so as, on the basis of the same acts, the Prosecutor presented evidence of Musema's participation in the commission of genocide, the substantive offence in relation to conspiracy.

6.3 Legal Findings - Count 5: Crime against Humanity (extermination)

5863

942. *Count 5* of the Indictment charges Musema with *crime against humanity (extermination)*, pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.
943. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were either a racial or ethnic group; that there were widespread or systematic attacks throughout Rwanda, between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds, ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (extermination).
944. The Chamber notes that Article 6(1) of the Statute, provides that a person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 4 of the present Statute, shall be individually responsible for the crime." It is also noted that Article 6(3) of the Statute provides that "acts [...] committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".
945. The Chamber has found, beyond a reasonable doubt that Musema:

- was armed with a rifle and that he ordered, aided and abetted and participated in the commission of attacks on Tutsi civilians who had sought refuge on Muyira hill on 13 and 14 May 1994, and in mid-May 1994. The Accused was one of the leaders of the attacks and some of the attackers were employees of the Gisovu Tea Factory who had traveled to Muyira hill in motor vehicles belonging to the Gisovu Tea Factory;(4)
- participated in an attack on Tutsi civilians, who had sought refuge on Mumataba hill in mid-May 1994. Some of the attackers were tea factory employees who were transported to Mumataba hill in motor vehicles belonging to Gisovu Tea Factory. The Accused was present through out the attack and left with the attackers;(5)
- participated in an attack on Tutsi civilians who had sought refuge in the Nyakavumu cave;(6)
- participated in an attack on Tutsi civilians who had sought refuge on Gitwa hill on 26 April 1994 (7); and;
- participated in an attack on Tutsi civilians between 27 April and 3 May 1994 in Rwirambo.

946. The Chamber finds that in 1994, the Accused had knowledge of a widespread or systematic attack that was directed against the civilian population in Rwanda. This finding is supported by the presence of Musema at attacks in different locations in Kibuye *Préfecture*, as found above, by the testimony of the Accused, and by Defence exhibits. The Chamber recalls, in particular, the following testimony of the Accused:

"[...] compte tenu d'abord d'une part les massacres qui se faisaient à l'intérieur [...] il y avait ce génocide qui venait de se commettre, qui était encore en train de se commettre [...]"(8);

"[...] des gens ont été massacrés à Kibuye, dans d'autres préfectures [...]"(9);

"[...] Ce bébé qui est mort, cette vieille femme, ce petit enfant qui est mort, qui a été massacré, par des bourreaux impitoyables, pour moi ce sont des martyrs."(10)

947. The Chamber further recalls statements made by Musema in letters written to Nicole Pletscher, which were tendered as Defence exhibits, specifically:

"Depuis le 06/04 le pays a vécu un bain de sang incroyable: troubles ethniques - massacres - vols - tout ce qu'on puisse ou plutôt qu'on ne peut pas s'imaginer sur le plan de l'horreur humaine ... Ruhengeri est plus ou moins touché. Mais Byumba est occupé à 100% ... Mais on indique que les morts dépassent des centaine de milliers de gens [...] Des milliers et des milliers de déplacés de guerre, quelle horreur qui s'ajoute à des milliers de cadavres!"(11)

"Au niveaux des droits humanitaires des massacres se sont arrêtés dans la Zône gouvernmentale mais se perpetrent toujours dans la Zône FPR. L'aide humanitaire est attendue mais n'arrive pas."(12)

948. The Chamber finds that, Musema's criminal conduct was consistent with the pattern of the then ongoing widespread or systematic attack on the civilian population and his conduct formed a part of this attack.
949. The Chamber finds, that Musema's conduct: in ordering and participating in the attacks on Tutsi civilians who had sought refuge on Muyira hill and on Mumataba hill; in aiding and abetting in the aforementioned attacks by providing motor vehicles belonging to Gisovu Tea Factory, for the transport of attackers to Muyira hill and Mumataba hill; and in his participation in attacks on Tutsi civilians who had sought refuge in Nyakavumu cave, Gitwa hill and Rwirambo, renders the Accused individually criminally responsible, pursuant to Article 6(1) of the Statute.
950. The Chamber has already found that there existed at the time of the events alleged in the indictment a *de jure* superior-subordinate relationship between Musema and the employees at the Gisovu Tea Factory.(13) The Chamber also found that the Accused had the authority to take reasonable measures to prevent the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of the attacks(14). The Chamber finds that the Accused, despite his knowledge of the participation of Gisovu Tea Factory employees in these attacks and their use of Tea Factory property in the commission of these attacks, failed to take any reasonable measures to prevent or punish such participation or such use of Tea Factory property.
951. The Chamber therefore finds beyond a reasonable doubt that Musema is individually criminally responsible for crime against humanity (extermination), pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, as charged in Count 5 of the Indictment.

6.4 Count 4: Crime against Humanity (murder)

952. *Count 4* of the Indictment charges Musema with *crime against humanity (murder)*, pursuant to Articles 3(a), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.
953. The Chamber notes that the Accused is also charged, under count 5 of the Indictment, for crime against humanity (extermination), pursuant to Articles 3(b), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment, which acts include the attacks on civilians at various locations in Bisesero. The allegations in the aforementioned paragraphs of the Indictment also form the basis for Count 4, crimes against humanity (murder).
954. The Chamber concurs with the reasoning in *Akayesu* that:

"[...] it is acceptable to convict the accused of two offences in relation to the same set of facts in the following circumstances: (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. However, the

5865

Chamber finds that it is not justifiable to convict an accused of two offences in relation to the same set of facts where (a) one offence is a lesser included offence of the other, for example, murder and grievous bodily harm, robbery and theft, or rape and indecent assault; or (b) where one offence charges accomplice liability and the other offence charges liability as a principal, e.g. genocide and complicity in genocide."(15)

955. The Chamber also concurs with the reasoning in the *Rutaganda* Judgement which states that:

"murder and extermination, as crimes against humanity, share the same constituent elements of the offence, that it is committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Both murder and extermination are constituted by unlawful, intentional killing. *However,* murder is the killing of one or more individuals, whereas extermination is a crime which is directed against a group of individuals....."(16) *(Emphasis added)*

956. The Chamber notes that in the *Akayesu* Judgement, a series of acts of murder, as alleged in individual paragraphs of the Indictment were held collectively to constitute an act of extermination. In the *Rutaganda* Judgement a single act of an attack on the "ETO", although charged *inter alia* both as murder and as extermination, was held to constitute extermination, and not murder, because it was found to be a killing of a collective group of individuals.
957. In this case, the killings at Gitwa hill, Muyira hill, Rwirambo hill, Mumataba hill and at the Nyakavumu cave are killings of collective groups of individuals, hence constituting extermination and not murder. Therefore, the Accused cannot be held culpable for crime against humanity (murder), in respect of these killings. The Chamber recalls its findings in Section 6.3 above.
958. The Chamber therefore finds that Musema is not individually criminally responsible, for crime against humanity (murder), pursuant to Article 3(a), 6(1) and 6(3) of the Statute, and as charged in Count 4 of the Indictment.

6.5 Count 6: Crime against Humanity (other inhumane acts)

959. *Count 6* of the Indictment charges Musema with *crime against humanity (other inhumane acts)*, pursuant to Articles 3(i), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.
960. The Chamber has already defined "Other inhumane Acts", as envisaged in Article 3 of the Statute. (17)
961. The Chamber finds that the Prosecutor has failed to prove beyond a reasonable doubt that Musema is individually criminally responsible for any act, falling within the ambit of crime against humanity (other inhumane acts), pursuant to Articles 3(i), 6(1) and 6(3) of the Statute, as charged in Count 6 of the Indictment.

6.6 Count 7: Crime Against Humanity (rape)

962. *Count 7* of the Indictment charges Musema with *crime against humanity (rape)*, pursuant to Articles 3(g), 6(1) and 6(3) of the Statute, for the acts alleged in paragraphs 4.1 to 4.11 of the Indictment.
963. In light of its factual findings with regard to the allegations in paragraph 4.10 of the Indictment (18), the Chamber considers the criminal responsibility of the Accused, pursuant to Articles 6(1) and 6(3) of the Statute.
964. The Chamber notes that the Defence has made certain admissions *inter alia*: that the Tutsi were a racial or ethnic group; that there were widespread or systematic attacks through out Rwanda,

5866

between the period 1 January and 31 December 1994 and these attacks were directed against civilians on the grounds of ethnic affiliation and racial origin. The Chamber finds that the Prosecutor is discharged of the burden of proving these elements in respect of crime against humanity (rape).

965. The Chamber has adopted the definition of rape set forth in the *Akayesu* Judgement, as "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive"(19) and the definition of sexual violence set forth in the *Akayesu* Judgement as "any act of a sexual nature which is committed on a person under circumstances which are coercive."(20)
966. The Chamber has made the factual finding that on 13 May 1994 the Accused raped a Tutsi woman called Nyiramusugi. The Chamber recalls its finding in Section 6.3 *supra*, that the Accused had knowledge of a widespread or systematic attack on the civilian population. The Chamber finds that the rape of Nyiramusugi by the Accused was consistent with the pattern of this attack and formed a part of this attack.
967. The Chamber therefore finds, that Musema is individually criminally responsible for crime against humanity (rape), pursuant to Articles 3(g) and (6)(1) of the Statute.
968. However, the Chamber finds, that the Prosecutor has failed to prove beyond a reasonable doubt any act of rape that had been committed by Musema's subordinates and that Musema knew or had reason to know of this act and he failed to take reasonable measures to prevent the said act or to punish the perpetrators thereof, following the commission of such act. The Prosecutor has therefore not proved beyond a reasonable the individual criminal responsibility of Musema, pursuant to Articles 3(g) and 6(3) of the Statute, as charged in Count 7 of the Indictment.

6.7 Counts 8 and 9 -Violation of Common Article 3 and Additional Protocol II

969. *Counts 8* and *9* of the Indictment charge Musema with *serious violations of Common Article 3 of the 1949 Geneva Conventions and the 1977 Additional Protocol II thereto*, as incorporated in Article 4 of the Statute of the Tribunal.
970. The Chamber notes that the Defence admitted that, at the time of the events alleged in the Indictment, there existed an internal armed conflict meeting the temporal and territorial requirements of both Common Article 3 and Additional Protocol II. Further, evidence presented during the trial, in particular the testimony of Musema, demonstrated the full extent of the conflict between the dissident armed forces, the FPR, and the Government forces, the FAR, in Rwanda throughout the period the offences were said to have been perpetrated.
971. On the basis of the above, the Chamber finds that it has been established beyond reasonable doubt that at the time of the events alleged in the Indictment there existed a non-international armed conflict meeting the requirements of Common Article 3 and Additional Protocol II.
972. The Chamber is also satisfied beyond reasonable doubt that the victims of the offences alleged, comprised of unarmed civilians, men, women and children, are protected persons under Common Article 3 and Additional Protocol II. Moreover, the Chamber notes that the Defence admitted that the victims of the alleged crimes were individuals protected under Common Article 3 and Additional Protocol II.
973. The Chamber recalls, as developed in Section 3.4 of the Judgement on the Applicable Law, that offences must be closely related to the hostilities or committed in conjunction with the armed conflict to constitute serious violations of Common Article 3 and Additional Protocol II. In other words, there must be a nexus between the offences and the armed conflict.
974. The burden rests on the Prosecutor to establish, on the basis of the evidence adduced during trial, that there exists a nexus, on the one hand, between the acts for which Musema is individually criminally responsible, including those for which he is individually criminally responsible as a superior, and, on the other, the armed conflict. In the opinion of the Chamber, the Prosecutor has failed to establish that there was such a nexus.

975. Consequently, the Chamber finds Musema not guilty of serious violations of Common Article 3 and Additional Protocol II as charged in Counts 8 and 9 of the Indictment.

---

1. See section 5.2 of the Judgement.

2. See Section 4.1.of the Judgement..

3. See Section 3.2.3 of this Judgement.

4. *See Supra* Section 5.2.

5. *See Supra* Section 5.2.

6. *See Supra* Section 5.2.

7. *See Supra* Section 5.2.

8. *See Testimony of the Accused, transcript of 24 May 1999*. English translation: "considering the killings that were taking place inside the country there was this genocide which had been committed, and which was being committed".

9. *See Testimony of the Accused, transcript of 24 May 1999*. English translation: "people were massacred in Kibuye and other Prefectures ...".

10. *See Testimony of the Accused, transcript of 24 May 1999*. English translation: "Babies, elderly women, children who died, who were massacred by butchers. They were butchered."

11. *See* Defence exhibit D36. English translation: " Since 06/04, the country has been living through an incredible blood bath: ethnic unrests - massacres - thefts - all that can or rather all that cannot be imagined at the level of human horror ... Runegeri is more or less affected. But Byumba is 100% affected ... It is estimated that about hundred of thousands of people [*sic*] have been killed ... Thousands and thousands of displaced people, how dreadful in addition to the thousands of corpses!"

12. *See* Defence exhibit D76. "At the level of human rights, the massacres have been halted in the Government zone but still to continue in the FPR zone. Humanitarian assistance is expected but has not arrived". [Unofficial translation]

13. *See Supra* Section 5.4.

14. *See Supra* Section 5.4.

15. *See Akayesu* Judgement, para. 468.

16. *See Rutaganda* Judgement, para.422.

17. *See Supra* Section 3.3.

18. *See Supra* Section 5.3.

19. *See Supra*, Section 3.3.

20. *See Supra*, Section 3.3.

5868

7. VERDICT

FOR THE FOREGOING REASONS, having considered all of the evidence and the arguments, THE CHAMBER finds Alfred Musema-Uwimana:

Count 1: Guilty of Genocide

Count 2: Not Guilty of Complicity in Genocide

Count 3: Not Guilty of Conspiracy to commit Genocide

Count 4: Not Guilty of Crime against Humanity (murder)

Count 5: Guilty of Crime against Humanity (extermination)

Count 6: Not Guilty of Crime against Humanity (other inhumane acts)

Count 7: Guilty of Crime against Humanity (rape)

Count 8: Not Guilty of Violation of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto (Article 4 (a) of the Statute)

Count 9: Not Guilty of Violation of Common Article 3 to the Geneva Conventions and Additional Protocol II thereto (4 (e) of the Statute)

5869

8. SENTENCING

976. The Chamber will now summarize the legal provisions relating to sentences and penalties and their enforcement, before discussing the scale of sentences and the general principles applicable in the determination of penalties.

8.1 Applicable texts

977. The Chamber will apply the following statutory and regulatory provisions: Article 22 of the Statute on judgement, Articles 23 and 26 of the Statute dealing respectively with penalties and enforcement of sentences, and Rules 101, 102, 103, and 104 of the Rules covering, respectively, sentencing procedure upon a conviction, status of the convicted person, and place and supervision of imprisonment.

8.2 Scale of sentences applicable to an accused convicted of one of the crimes listed in Articles 2, 3, or 4 of the Statute of the Tribunal

978. The Tribunal may sentence an accused who pleads guilty or is convicted to imprisonment for a fixed term or the remainder of his life. The Statute of the Tribunal does not allow for other forms of punishment, such as the death penalty, penal servitude or a fine.
979. In most national systems the scale of penalties is determined in accordance with the gravity of the offence. The Chamber notes that the Statute of the Tribunal does not rank the various crimes within the Tribunal's jurisdiction. The same scale of sentences applies to each of the crimes, with the maximum penalty being life imprisonment.
980. It should be noted, however, that in imposing a sentence, the Chamber should take into account, as one of the factors specified in Article 23(2) of the Statute, the gravity of the offence. In the opinion of the Chamber, it is difficult to rank the gravity of genocide and crime against humanity relative to each other. Both genocide and crime against humanity are crimes which are particularly shocking to the collective conscience.
981. Regarding the crime of genocide, the preamble of the Genocide Convention recognizes that at all periods of history, genocide has inflicted great losses on humanity and reiterates the need for international co-operation to liberate humanity from such an odious scourge. The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent "to destroy in whole or in part, a national, ethnic, racial or religious group as such", as stipulated in Article 2 of the Statute. The Chamber is thus of the opinion that genocide constitutes the "crime of crimes", and that this must be taken into account in deciding the sentence.
982. Crime against humanity must also be punished appropriately, duly recognizing their gravity. Article 27 of the Charter of the Nuremberg Tribunal empowered that Tribunal to sentence any accused found guilty of crimes against humanity, as defined in Article 6(c) of the said Charter, to death or other punishment deemed to be just.
983. Rwanda, like all the States that have incorporated crime against humanity or genocide in their domestic legislation, provides the most severe penalties for these crimes in its criminal legislation. The Rwandan Organic Law on the Organization of Prosecutions for Offences constituting Genocide or Crimes against Humanity, committed since 1 October 1990,(1) groups accused persons into four categories, according to their acts of criminal participation. Included in the first category are the masterminds of the crimes (planners, organizers), persons in positions of authority, persons who have exhibited excessive cruelty and perpetrators of sexual violence. All such persons may be punished by the death penalty. The second category covers perpetrators, conspirators or accomplices in criminal acts, for whom the prescribed penalty is life

5870.

imprisonment. Included in the third category are persons who, in addition to committing a substantive offence, are guilty of other serious assaults against the person. Such persons face a short-term imprisonment. The fourth category is that of persons who have committed offences against property.

984. Reference to the practice of sentencing in Rwanda and to the Organic Law is for purposes of guidance. While referring as much as practicable to such practice, the Chamber maintains its discretion to pass on persons found guilty of crimes within the Tribunal's jurisdiction any sentence authorized by the Statute, taking into account the circumstances of the case and the individual circumstances of the convicted person.

8.3 General principles regarding the determination of sentences

985. In determining the sentence, the Chamber shall be mindful of the fact that the Security Council, acting under Chapter VII of the United Nations Charter, established the Tribunal to prosecute and punish perpetrators of genocide and serious violations of international humanitarian law in Rwanda in 1994 with a view of ending impunity, promoting national reconciliation, and restoring peace.

986. The penalties imposed by this Tribunal must be directed at retribution, so that the convicted perpetrators see their crimes punished, and, over and above that, at deterrence, to dissuade for ever others who may be tempted to commit atrocities by showing them that the international community does not tolerate serious violations of international humanitarian law and human rights.

987. The Chamber also recalls that in the determination of sentences it is required, under Article 23(2) of the Statute and Rule 101(B) of the Rules, to take into account a number of factors including the gravity of the offence, the individual circumstances of the convicted person, and the existence of aggravating and mitigating circumstances. It is a matter, as it were, of individualizing the penalty.

988. In individualizing the penalty, the Chamber is not limited to consideration of the factors enumerated above. The Judges may consider any factor or fact that will enable the penalty to reflect the totality of the circumstances present in the given case and thus to ensure justice in sentencing.

989. Finally, the Chamber recalls that nothing in the Statute or the Rules requires a separate penalty for each proven count. In other words, the Chamber may impose one penalty for all the counts on which the accused has been found guilty.

8.4 Submissions of the Parties

Prosecutor's submissions

990. In her closing brief and in her closing argument made in open court on 24 June 1999, the Prosecutor submitted that the crimes committed by Musema, in particular genocide and crime against humanity, are crimes of extreme gravity. She submitted that the Chamber should take into account the status of Musema in society at the time of the commission of the crimes, including his resulting duty vis-à-vis the population; his individual role in the execution of the crimes; his motivation and his goals, as well as the extent of planning and premeditation; his disposition and will in regard to the criminal acts and the extent of behaving in a manner contrary to his duty; the way the crimes were executed; and his behaviour after the criminal acts.

991. The Prosecutor submitted that the following aggravating circumstances should be taken into account in this case:

1. Musema was known in society;

5871

2. His criminal participation extended to all levels;

3. He was committed to the genocidal program of the interim government. At the same time, he seized the occasion to promote his personal ambitions;

4. He abused his position as Director of a parastatal company by diverting workers and property to further unlawful acts;

5. The way the crimes were committed;

6. After the criminal acts, Musema did nothing to punish the perpetrators. Indeed, he was one of the main perpetrators;

7. He lied before the Chamber when dealing with the defence of alibi; and

8. He showed no remorse whatsoever with respect to the role he played in the commission of the unlawful acts.

992. Furthermore, the Prosecutor submitted that there are no mitigating circumstances. Musema did not co-operate with the Prosecutor. Nor has he shown that in committing the unlawful acts he was following orders.
993. With regard to the issue of multiple sentences which could be imposed on Musema as envisaged by Rule 101(c) of the Rules, the Prosecutor asked for a separate sentence for each of the counts on which Musema was found guilty while requesting that he serve the more severe sentence. The Prosecutor submitted that the Chamber should impose a sentence for each offence committed in order to fully recognise the severity of each crime and the particular role of the convicted person in its commission.
994. In conclusion, the Prosecutor recommended life imprisonment for each count on which Musema is convicted.

Defence's submissions

995. In its closing argument, the Defence submitted that the Prosecutor failed to prove Musema's guilt and that Musema should be set free.
996. The Defence further submitted that Musema deeply regrets that factory facilities may have been used by the perpetrators of atrocities and that he was unable to prevent this.
997. Moreover, it was submitted that Musema admitted publicly the genocide against the Tutsi people in Rwanda in 1994 and that he publicly expressed his distress about the deaths of so many innocent people and that he paid tribute to all victims of the tragic events which took place in Rwanda.
998. Finally, the Defence underlined that Musema co-operated with the Prosecutor by admitting facts to facilitate an expedient prosecution and trial.

8.5 Personal circumstances of Alfred Musema

999. Musema was born in 1949. At the age of 35, Musema was appointed Director of the Gisovu Tea Factory by a presidential decree and he continued to serve in that capacity during April, May, and June 1994. The Gisovu Tea Factory was one of the most successful tea factories in Rwanda and it was a major economic enterprise in Kibuye. As Director of the factory, Musema exercised legal and financial control over its employees.

5872

8.6 The Chamber

000. The Chamber has examined all the submissions presented by the parties in determination of the sentence, and finds as follows.

Aggravating circumstances

001. Amongst the aggravating circumstances, the Chamber finds, first of all, that the offences of which Musema is found guilty are extremely serious, as the Chamber already pointed out when it described genocide as the 'crime of crimes'.
002. As to Musema's role in the execution of the crimes, the Chamber notes that he led attackers who killed a large number of Tutsi refugees in the Bisesero region on 26 and between 27 April and 3 May 1994, in mid-May 1994, including on 13 and 14 May, and at the end of May 1994. Musema was armed with a rifle and used the weapon during the attacks. He took no steps to prevent tea factory employees or vehicles from taking part in the attacks.
003. The Chamber recalls that it found that individuals perceived Musema as a figure of authority and as someone who wielded considerable power in the region. The Chamber is of the opinion that, by virtue of this capacity, Musema was in a position to take reasonable measures to help in the prevention of crimes.
004. The Chamber however finds that Musema did nothing to prevent the commission of the crimes and that he took no steps to punish the perpetrators over whom he had control. As the Chamber found in Section 5, Musema had powers enabling him to remove, or threaten to remove, an individual from his or her position at the Gisovu Tea Factory if he or she were identified as a perpetrator of crimes punishable under the Statute.

Mitigating circumstances

005. The Chamber, amongst the mitigating circumstances, takes into consideration that Musema admitted the genocide against the Tutsi people in Rwanda in 1994, expressed his distress about the deaths of so many innocent people, and paid tribute to all victims of the tragic events in Rwanda.
006. Additionally, the Chamber notes that Musema expressed deep regret that the Gisovu Tea Factory facilities may have been used by the perpetrators of atrocities.
007. Furthermore, the Chamber notes that Musema's co-operation through his admission of facts pertaining to the case, not the least the fact that a genocide occurred in the Bisesero region in April, May, and June 1994, facilitated an expeditious trial. Finally, the Chamber notes that Musema's co-operation continued throughout the trial and similarly contributed to proceedings without undue delay.

Conclusion

008. Having reviewed all the circumstances of the case, the Chamber is of the opinion that the aggravating factors outweigh the mitigating factors, especially as on several occasions Musema personally led attackers to attack large numbers of Tutsi refugees and raped a young Tutsi woman. He knowingly and consciously participated in the commission of crimes and never showed remorse for his personal role in the atrocities.

TRIAL CHAMBER I

5873

FOR THE FOREGOING REASONS,

DELIVERING its decision in public, *inter partes* and in the first instance;

PURSUANT to Articles 22, 23, and 26 of the Statute and Rules 101, 102, 103, and 104 of the Rules;

NOTING the general practice regarding sentencing in Rwanda;

NOTING that Musema has been found guilty of:

Genocide - Count 1,

Crime against humanity (extermination) - Count 5, and

Crime against humanity (rape) - Count 7;

NOTING the closing briefs submitted by the Prosecutor and the Defence; and

HAVING HEARD the Prosecutor and the Defence;

IN PUNISHMENT OF THE ABOVE MENTIONED CRIMES,

SENTENCES Alfred Musema to:

A SINGLE SENTENCE OF LIFE IMPRISONMENT

FOR ALL THE COUNTS ON WHICH HE HAS BEEN FOUND GUILTY

RULES that the imprisonment shall be served in a State designated by the President of the Tribunal in consultation with the Trial Chamber; the Government of Rwanda and the designated State shall be notified of such designation by the Registrar;

RULES that this Judgement shall be enforced immediately, and that, however:

1. until his transfer to the designated place of imprisonment, Alfred Musema shall be kept in detention under the present conditions;

2. upon notice of appeal, if any, the enforcement of the sentence shall be stayed until a decision has been rendered on the appeal, with Musema nevertheless remaining in detention.

Judge Aspegren and Judge Pillay append their Separate Opinions to this Judgement.

Arusha, 27 January 2000.

Lennart Aspegren Laïty Kama Navanethem Pillay

Presiding Judge Judge Judge

(Seal of the Tribunal)

5874

1. Organic Law No. 8/96 of 30 August 1996, published in the Gazette of the Republic of Rwanda, 35th year. No. 17, 1 September 1996.

5875

SEPARATE OPINION OF JUDGE LENNART ASPEGREN

As to the factual findings:

1. I agree and share the factual findings by the Trial Chamber in its Judgement with the exception of certain findings which I am not able to support, namely:

   •those in Section 5.2 of the Judgement relating to events which are said to have occurred on 26 April 1994 at Gitwa hill, between 27 April and 3 May 1994 on Rwirambo hill, and at the end of May 1994 at Nyakavumu cave; and

   •those in Section 5.3 of the Judgement relating to events which are said to have occurred on 14 April 1994 (paragraph 4.8 of the Indictment).

2. For these dates and events, I remain unconvinced that it has been established beyond reasonable doubt that Musema participated in the events as alleged.
3. Below is the reasoning behind this partially dissenting position of mine.
4. Reference should of course be made to the relevant facts and presentation of the alibi as developed in said Sections 5.2 and 5.3 of the Judgement.

26 April 1994, Gitwa hill

5. As noted in the Judgement, the alibi of Musema is not specific to 26 April 1994, but is linked with the mission order (exhibit D10, Annex B to the Judgement) and the travel consequent thereto. I agree with the facts set forth below, as presented in the Judgement, but dissent on the rejection of the alibi for 26 April. Rather, it is my opinion that the alibi here stands.
6. I recall, as stated in the Judgement, that the Defence purports that on 18 April 1994, Musema, while searching for the heads of service of *OCIR-thé* in Gitarama, had run into the Minister of Industry, Trade & Handicraft, Justin Mugenzi. Having conveyed to Musema his concerns for the Gisovu Tea Factory, the Minister indicated that Musema would be sent on mission to contact the Director-General of *OCIR-thé* to start up the factories.
7. According to the alibi, Musema, who during this period was staying in Rubona, returned to Gitarama on 21 April 1994 where again he ran into Justin Mugenzi and also the Minister of Public Works, Water & Energy, this time at a FINA petrol station. Mugenzi told Musema of the security measures he had taken for the factory, and informed him that he had been unable to contact the Director-General of *OCIR-thé*, Baragaza. As such, Musema was to go to the North of the country to find him. Mugenzi said he himself would prepare the necessary paperwork which Musema should pick up from the residence of Faustin Nyagahima, a director within the Ministry of Industry, Trade & Handicraft. During the meeting at the FINA station, Mugenzi authorized the Public Works, Water & Energy Minister to sign the eventual mission order.
8. On 22 April, Musema said, he picked up the mission order (exhibit D10) from Faustin Nyagahima. This order was stamped by the Minister of Foreign Affairs, who, according to Musema, was the only minister at that time in Gitarama to possess an official stamp. For security reasons, Musema was given two gendarmes from the military camp in Gitarama to accompany him and then travelled up to the tea factory of Pfunda where he stayed until 25 April. With reference to the said exhibit D10, where Musema wrote "*arrivée à Pfunda le 21/04/1994*", he attributed this date to an error, and affirmed that he arrived at the factory in Pfunda on 22 April. Evidence in support of this include exhibit D28, a "*Déclaration de Créances*" for expenses

5876

incurred by *OCIR-thé* (Gisovu Tea Factory) for the use of two gendarmes from 22 April 1994 up to 2 May 1994, which is signed by the factory's Chief Accountant of the Gisovu Tea Factory.

9. Although he only visited the Pfunda Tea Factory during this part of his mission, Musema stated that he was able to include the tea factories of Nyabihu and Rubaya in his interim report (exhibit D29), having met the respective directors during the trip. I note, at this juncture, that the Defence uncovered this report in the Gisovu Tea Factory archives.
10. According to the alibi, on 25 April Musema returned to Gitarama after meeting at Mukamara the Director-General of *OCIR-thé*, who read the interim report and confirmed that Musema could continue his mission. Having stayed overnight in Gitarama, Musema travelled on to Rubona.
11. Defence Witness Claire Kayuku, Musema's spouse, confirmed that he left Rubona on 22 April for Gisenyi and on 26 April returned to Rubona where he stayed overnight.
12. I have also considered the contentions of the Prosecutor that the mission order was false and that the stamps of the ministries were fabrications. She contends that chance encounters with ministers, as described by Musema, were hardly convincing as the basis of the mission. In the Prosecutor's opinion, the mission order was designed simply to mislead the Tribunal and to conceal the extent of Musema's involvement in the massacres. The Prosecutor further contends that the interim report was strikingly thin considering the apparent nature of the mission. Moreover, Prosecution Witness BB stated that the mission order was unusual, and not one normally used by *OCIR-thé*.
13. I have specifically considered the issue of the alleged falsification by Musema of the mission order so as to camouflage his participation in the massacres.
14. In my view, it should be recalled, first and foremost, that this document, exhibit D10, was uncovered by the Swiss investigating magistrate while in Rwanda, and was thus afterwards brought to the attention of Musema while he was under arrest in Switzerland. As such, until it was appropriately disclosed, whether it be by the Swiss authorities or the Prosecutor, Musema did not have possession of it.
15. With this in mind, as regards the issue of alleged falsification, as addressed by the Prosecutor, I thus find it hard to see why, had Musema taken the time and care meticulously to create a false mission order in 1994 in Rwanda before fleeing abroad, he would have abandoned the document, a document which he must have deemed essential to his alibi in case of a possible investigation or trial concerning the events. Surely, were the mission order falsified to create such an alibi, Musema would most probably have seen to it that it was not left behind at the end of the conflict in Gisovu, especially in view of the advancing war front, and the uncertain fate of the Gisovu Tea Factory.
16. As pertains to the allegedly unconvincing nature of Musema's chance encounters with the ministers in Gitarama, I note that the prevailing circumstances during this period were far from normal. Indeed, evidence has shown that, around 18 April 1994 in Rwanda, an armed conflict was raging between the FAR and the FPR, widespread massacres of civilians were occurring, thousands of civilians were displaced, and the interim government was fleeing Kigali to seek temporary refuge in Gitarama. Consequently, it is my opinion that, in these circumstances, such chance encounters with ministers in Gitarama cannot be ruled out or deemed unconvincing *per se*.
17. As such, I find that the arguments advanced by the Prosecutor in support of the allegation that the mission order was a fake are insufficient to demonstrate that Musema purposefully falsified this order to conceal for the future his involvement in the 1994 massacres.
18. During Musema's testimony, he also dealt with the other issues pertaining in the main to the plausibility of such a mission. He explained that the prevailing circumstances, namely the insecurity caused by the armed conflict and the displacement of the interim government to Gitarama, would account for stamps of ministries other than that governing *OCIR-thé* appearing on the mission order.
19. I note that, although Musema included the Nyahibu and Rubaya tea factories in his interim report, yet did not visit them in person, he did meet and discuss these factories with the respective

5877

Director. It was on the basis of these discussions that Musema compiled this report. The contentions of the Prosecutor that the report is not derived from information gathered by Musema during his mission and is "strikingly thin" compared to the importance of the mission are, as I see it, unsubstantiated by evidence within the trial. It should be recalled that Musema had explained that this was just an interim report covering the initial stages of his mission, and that it did not even represent the "half-way" stage of his mission. Moreover, the argument of the Prosecutor that the report could have been written anywhere is similarly unsubstantiated during trial.

20. The Defence Witness Claire Kayuku, although married to Musema, appeared credible during her testimony, and testified that Musema returned to Rubona on 26 April.
21. This supports his alibi.
22. I agree with the majority as regards the testimony of *Witness M.* However, I do not share the majority position that the alibi should be rejected on this point. Rather, I am of the opinion that the alibi of Musema for these dates, which was heavily scrutinized during the trial and supported by documentary evidence and oral testimony, is such as to at least cast a reasonable doubt on the allegation of the Prosecutor as to the involvement of Musema in the attack of 26 April 1994 on Gitwa hill.

•27 April - 3 May, Rwirambo hill

23. Like the majority, I have considered the testimony of *Witness R* and the arguments of the Defence as to the discrepancies and the answers of the witness thereon between the witness' testimony in this case and his testimony in the *Kayishema* and *Ruzindana* case. However, unlike the majority, I find the evidence of Witness R must be considered to be unreliable and to cast doubt in the present matter.
24. There, of particular concern to me are the discrepancies which relate to Witness R's injuries and the treatment he received for them. I recall that R had indicated to the Chamber that as he had been unable to get hospital treatment, a benefactor put cow butter on his injury. However, this contrasts with his testimony as a witness in the *Kayishema* and *Ruzindana* case, where, in answer to a question from Judge Khan, he stated: "At that time the situation was not yet too serious and one could find one or two Hutus who were kind hearted and one could give them money for the purchase of penicillin". R had also testified that he had been treated in Rwirambo.
25. Yet, during the course of his testimony in this trial, Witness R denied having ever said anything about going to Rwirambo, it being impossible to reach Rwirambo hospital as there were barriers. He was able to recall before the Chamber that he did speak about penicillin as regards to serious injuries and that some individuals were able to find ways of getting this medicine. Following more questions from the Defence and the Chamber, he added that he did apply penicillin to his injury much later when his injury had scarred, but that he had never gone to a Hutu to ask for penicillin.
26. Although the divergent answers given by Witness R during his testimonies are not specific to the involvement of Musema in the attack, they touch upon serious matters and represent discrepant answers given under solemn declaration before this Tribunal. By their very nature therefore, their reliability should be equivalent, and discrepancies between such testimonies in my view must affect the credibility of the witness. Consequently, I am of the opinion that the contradictions raised by the Defence are serious and important enough to cast doubt on R's credibility in the present matter and that he is not, therefore, reliable enough.
27. I therefore find that it has not been established beyond reasonable doubt that Musema participated in an attack on Rwirambo hill around 27 April - 3 May 1994.

•End of May attack at Nyakavumu cave

28. Like the majority, I have considered the testimonies of Prosecution Witnesses H, S, D, AC and AB, and Musema's and Claire Kayuku's testimonies, as well as documentary evidence in support of the alibi. However, unlike the majority, I cannot find that it has been proven beyond reasonable doubt that Musema participated in the attack on Nyakavumu cave.

29. My reasons follow.
30. *Witness H* speaks of the attack occurring around the end of May or early June, *Witness S* testifies to it taking place near the end of May, while *Witnesses D* and *AC* make no specific mention of dates in their testimony. *Witness AB* stated that Musema came to the Kibuye military camp asking for firewood sometime in June.
31. The alibi places Musema in Gisovu on 27 and 28 May 1994, leaving for Shagasha on 29 May. According to the alibi, on 31 May he visited Zaïre as part of a technical mission. Copies of his passport were tendered in support thereof. His absence from the Gisovu tea factory lasted until 10 June 1994. It should be noted that all these dates are corroborated by exhibit P68, being Musema's handwritten calendar (Annex C to the Judgement).
32. The majority finding in the Judgement is based on the overwhelming consistent evidence of the Prosecution witnesses. The fact that the exact date of the attack is not clear from the said evidence, does not, in the opinion of the majority, deter from the reliability of the evidence. The alibi, in its opinion, does not refute this evidence.
33. I have to disagree. The witnesses, as I have indicated above, speak in turn of the 'end of May', 'early June' and 'sometime in June' as the possible time of the attack. One could, therefore, logically imply therefrom that the attack would have occurred on any date between the end of May and the end of June. Of course, I agree, in view of the prevailing situation in the Bisesero region during the events alleged, the likely trauma suffered by witnesses to the events, and the time lapse between the events and testimony thereon before this Tribunal, that it may be harder than usual for the witnesses to remember dates from five years ago with exactitude. Even though the evidence presented by these witnesses, is, I concede, consistent, there remains the fact that doubt prevails in the matter, inasmuch as it cannot be adduced with more precision when the attack occurred.
34. To state that the attack has taken place, and merely place it in a loose temporal setting, cannot be considered as removing doubt from the matter, and consequently, it my opinion, shall not be the basis of a finding of guilt, proved beyond reasonable doubt. Moreover, as in all cases, the burden being on the Prosecutor to prove the facts alleged, a lack of specificity in such a serious matter should not be of prejudice to the Defence. As the alibi stands from the end of May to early June, to find the events proved beyond reasonable doubt on the basis of consistent witness testimonies as to the events and yet, not as to time, is to place the burden of proof on the Defence. Moreover, an inability to be more precise as to the date of the attack in this instance does not allow Musema to adequately answer the relevant charges against him.
35. Therefore, I find that Musema's participation in the attack on Nyakavunu cave is not established beyond reasonable doubt.

•Annunciata Mujawayezu, 14 April 1994

36. I agree with the Chamber's majority that it has not been proven that on 14 April 1994, Annunciata Mujawayesu was raped or that Musema ordered that she be killed together with her son, Blaise.
37. However, the majority is convinced that the rape was ordered by Musema. In my view, this was not proven.
38. The main evidence on the raping comes from witness I, whose testimony was partially inconsistent, and to some extent contradicted by witnesses L and PP.
39. In my mind, these inconsistencies and contradictions cast doubt on witness I's testimony.
40. Therefore, I am not convinced, beyond reasonable doubt, by the evidence presented that on 14 April 1994, Musema, as alleged in paragraph 4.8 of the Indictment, ordered or encouraged the raping of Annunciata Mujawayezu.

As to the legal findings, verdict and sentencing:

5979

41. I concur with the legal findings in the Judgement (Section 6) to the extent they pertain to the acts other than those above.
42. Concerning the alleged rape of Annunciata Mujaweyezu on 14 April 1994, as just pointed out, the majority in its factual findings found it proved that Musema ordered the rape. On this point, as I have stated, I disagree, since I am not convinced that he did.
43. Being overruled in this matter, I join the majority in its legal findings on this point in Section 6.1 of the Judgement, to say, in short, that the order as such is not punishable.
44. I also agree with the majority's findings of guilt in the Judgement to the extent they pertain to the acts other than those above. Being partially overruled as to the factual and legal findings, I concur with the verdict (Section 7) and the sentence (Section 8).

Arusha, 27 January 2000,

Lennart Aspegren

Presiding Judge

(Seal of the Tribunal)

5880

SEPARATE OPINION OF JUDGE NAVANETHEM PILLAY

The judgement is unanimous with the exception of the partial dissents on factual findings that have been recorded.

1. I dissent with the factual finding of the majority in respect of the evidence presented in support of the allegations in paragraph 4.7 of the Indictment, in particular that the Accused encouraged the killing of Tutsis and the rape of Tutsi women at a meeting on 18 April 1994 and that following the meeting he participated in an attack of Tutsis, by securing weapons and ammunition for the attack.
2. My approach to the examination of the defence alibi presented by the Accused is at variance with the majority, even though the conclusions reached with regard to the other allegations in the Indictment are the same. For this reason, I am recording a separate opinion.
3. Evidence of an albi was tendered by the Accused and other Defence witnesses. I have

   assessed the evidence of alibi presented at trial as a whole, rather than on a piece meal, or a day by day basis. My assessment depends on the credibility findings I have made with regard to each witness, and the extent to which any documentary or other additional evidence presented supports or undermines their testimony.

4. In my view, once the credibility of a witness has been impaired, the testimony of that witness is inherently unreliable in all of its parts, unless it is independently corroborated. Similarly, once the Chamber has made a finding of credibility with respect to a witness, the testimony of that witness should be accepted, unless there is a compelling reason to find otherwise.
5. As set forth in the Judgement, the evidence given by the Prosecution witnesses has been evaluated and findings of credibility have been made with regard to each witness. The witnesses who testified specifically in relation to the allegations regarding events at Karongi Hill on 18 April are Witness M (for the Prosecution), and the Accused, and Claire Kayuku, the wife of the Accused (for the Defence).

   6. The Chamber has reviewed the evidence presented by Witness M and found Witness M to be a credible witness. Witness M testified that he heard the Accused make a statement at the meeting held on Karongi Hill on 18 April 1994 in which he encouraged those present to kill Tutsis and stated that "those who wanted to have fun could rape their women and their children." Subsequently, according to the testimony, the Accused ordered a guard to hand over rifles and ammunition for an attack on Tutsi refugees. Witness M also saw his cousin and niece being raped by five men, two of whom he recognized as having attended the meeting.

   7. The majority has in effect rejected this evidence on the grounds that they accept the alibi of the Accused with respect to 18 April 1994. The Accused testified that on 18 April he was in Gitarama, and the Defence argued that therefore he could not have been at the meeting on Karongi hill or the subsequent attack. Claire Kayuku, the Accused's wife, recalled in her testimony that the Accused went to Gitarama during this period but could not recall the exact date. Without specificity regarding dates, the testimony of Claire Kayuku, in my view, does not corroborate the alibi of the Accused.

   8. Having found that the Accused is not a credible witness for the reasons set forth below, I cannot accept his uncorroborated testimony, as the Majority does, when it directly conflicts with the testimony of Witness M, whom the Chamber has found to be credible. The Majority finds that with regard to the meeting at Karongi Hill, the sole testimony of Witness M is insufficient to

5881

prove beyond reasonable doubt that the Accused was present. The majority further states that with regard to the rapes about which Witness M testified, "there is no evidence that Musema ordered the rapes."

9. Witness M, who the Chamber unanimously declared to be credible, did provide compelling testimony consituting evidence that the Accused participated in the Karongi meeting and subsequent attack, that he instigated rape through the suggestion he made at the meeting that those who wanted to "have fun" could rape Tutsi women, and that two women were subsequently raped by two men who had attended the meeting.

10. I accept Witness M's testimony as a true account of events which took place on 18 April, and I reject the testimony of the Accused in presenting an alibi for this date on account of the following findings with regard to the alibi defence. The evidence of the Accused is so riddled with inconsistencies, as set forth below, that I do not consider his testimony, that he was in Gitarama on 18 April, which is not confirmed by any other witness or any other evidence, to raise reasonable doubt as to the credibility of the testimony of Witness M.

11. Witness M is the sole prosecution witness for both the 18 April and 26 April attacks. He was found to be credible by the Chamber. The Majority accepted Witness M's evidence and rejected the Accused's alibi and found that the Accused was present and participated in the 26 April attack. In respect of 18 April attack, the Majority accepted Witness M's evidence and also accepted the Accused's defence of alibi. In my view, without additional evidence with regard to either event, the testimony of Witness M cannot be rejected in one instance on the basis of testimony from the Accused and accepted in another instance despite testimony from the Accused.

12. For these reasons I disagree with the factual findings of the majority. I find that the Accused addressed a meeting on 18 April 1994, at which he encouraged the killing of Tutsi civilians and the raping of Tutsi women. I hold that these factual findings should be considered as cumulative evidence, when assessing the culpability of the Accused, in respect of the Counts which charge Genocide and Crimes against Humanity (extermination and rape).

The Alibi Defence

13. The Accused acknowledges his presence in Gisovu on 14 April but denies that he was present at Gisovu on 18 April, the date on which he is alleged to have addressed a meeting on Karonge hill FM Station and participated in the attack which ensued. He denies his presence in Gisovu on 13 and 14 May, the dates of the Muyira hill massacres, and he denies his presence at the entombment and asphyxiation of people in a cave at Nyakavumu at the end of May. He denies his presence in the region when there were attacks on 31 May and 5 June at Gishyita and on 22 June, the date of the attack on the Nyarutovu *cellule.*

14. There are a number of documents which are relevant to the alibi defence. Exhibit P54 is a record of an interview of the Accused by Swiss authorities on 11 Feb 1995. In this document, the Accused is recorded as having stated that he left Gisovu on the night of 15 to 16 April. Exhibit P56 is a record of an interview with Swiss authorities on 18 March 1995. In this document, the Accused is recorded as having said that he arrived at Gisovu on 14 April and left on 15 April at 0300. Exhibit P63 is a document written by the Accused, consisting of his notes for his asylum

5882

request to Swiss authorities. In these notes he says he left Gisovu on the night of 15 April 1994. Exhibit P68 is a hand written calendar drawn by the Accused, in which he indicates that he went to Butare from Gisovu on 15 April. The Accused testified, contrary to the documents cited above, that he left Gisovu on 17 April at 0300 and arrived in Butare at 0900 on the same day. His wife testified that he returned to their home in Butare on either 16 or 17 April.

15. The handwritten calendar (Exhibit P68), further indicates that the Accused was on mission from 18 to 26 April. Exhibit D10, an *ordre de mission,* records that the date on which the mission commenced was 22 April. A handwritten notation by the Accused next to the first stamp, on page 2 of this document, records that he started the mission on 21 April 1994. The Accused testified that his date of departure on mission was 22 April. He explained his handwritten entry of 21 April on the *ordre de mission* as an error.

16. The Accused does not maintain that he remained in Butare throughout the period 17 to 22 April. He testified that he went to Gitarama on 18 April in the hope of meeting authorities and searching for relatives. He testified that he went again to Gitarama to look for relatives on 21 April. The Accused's wife, Claire Kayuku, testified that between 16 and 22 April the Accused went twice to Gitarama to see his family but she did not specify exact dates. There is no testimony to corroborate the Accused's testimony that he was in Gitarama on 18 April. According to Exhibit P68, the hand written calendar written by the Accused, he should have been on mission to the tea factories on 18 April. There is no tea factory in Gitarama. The Accused testified, under cross-examination, that when he prepared the calendar he was not in possession of documents collected by the Swiss magistrates and by his defence lawyers and that it was only upon sight of these documents that he could say with certainty on which dates his mission was effected.

17. With regard to the whereabouts of the Accused on 13 and 14 May, the Accused testified that he remained in Rubona from 7 to 19 May 1994 and was not in Gisovu during this period. According to Exhibit P68, the handwritten calendar made by the Accused, he was in Gisovu from 4 to 14 May 1994. According to the record of an interview with Swiss authorities which took place on 16 March 1995, the Accused again said he was in Gisovu during the week of 4 to 13 May 1994. His wife, Claire Kayuku, testified that she remembered that the Accused returned to Gisovu sometime around the middle of May to pay the tea factory employees. She recalled that at the beginning of May the motor vehicle used by the Accused (the red Pajero), was under repair at a garage in Butare for one or two weeks. The Accused testified that the Pajero, registration number A7171, developed mechanical problems on 7 May 1994 and he submitted exhibit D45, a request for payment of expenses for the vehicle's repair. The date of the request was 19 May 1994. There is also a petrol receipt in exhibit D45, for fuel purchased on 14 May in Gitarama for a Pajero, registration number A7171. This document, the Defence contends, places the Accused away from the scene of the massacres in Bisesero on 14 May, but it is inconsistent with his testimony that the vehicle was out of order from 7 May to 19 May and that he was only able to travel to Gisovu on 19 May following its repair. The Chamber also notes that the other receipt submitted with exhibit D45, an invoice for a vehicle part, is dated 19 April 1994.

18. Other than his wife, who was not sure of the exact dates, the only witness to corroborate the statement of the Accused that he was in Rubona, Butare on 13 and 14 May was Defence Witness MH, who testified that he saw the Accused in Rubona on 13 May. Witness MH testified that when he was fleeing from Gitarama to Burundi he stopped in Rubona for twenty minutes in the early afternoon of 13 May 1994. He said he saw and spoke with the Accused there at the house of his mother-in-law and then proceeded to Burundi where he arrived on the same day. His passport was produced with an entry stamp for Burundi on 13 May 1994. Witness MH also testified that the Accused came to see him in Gitarama on 10 May 1994.

5883

19. When asked on cross-examination how he knew the Accused, Witness MH was very vague and evasive, repeating several times that it is very difficult to explain how one comes to know people. He said that he knew the Accused through his family-in-law but insisted that he had no relationship with the family-in-law of the Accused. Then subsequently Witness MH testified that one of his brothers-in-law was married to someone from the Accused's wife's family and that the two families knew one another through marriage. Witness MG, the wife of Witness MH, testified that the Accused came to their house one time in May but that she did not remember the exact date. She described him as a friend and did not mention any family relationship. Neither the Accused nor his wife Claire Kayuku testified to having met Witness MH.

20. On direct examination, Witness MH stated, in response to a question as to whether he had seen the Accused in Gitarama, that he only saw him once, on 10 May. I note that it was only at the prompting of Defence counsel that Witness MH recalled that he saw the Accused again on 13 May, the day he left the country. Initially he testified simply that he left Gitarama for Burundi, saying subsequently that he had forgotten to mention his stop in Rubona where he saw the Accused. The Chamber notes that the cross-examination of Witness MH elicited further memory lapses. The witness testified on cross-examination that he did not remember the make or the color of the vehicle driven by the Accused on May 10th, when he came to Gitarama. The witness testified that he had last used his passport in 1994, when in fact it was evident from the document that it had been used in 1995.

21. On cross-examination, Witness MH testified that before moving to Gitarama he had lived with his wife in Remera. When confronted with her testimony that they lived in Kicukiro, the witness claimed that the area was called Remera Kicukiro. He was unable or unwilling to describe a major landmark near his house in Remera. He was resistant to the questions put to him and did not provide any information on this matter.

22. The manner in which Witness MH testified casts doubt on the credibility of his testimony. He appeared to be very uncomfortable and hesitant to answer questions relating to his relationship with the Accused and to provide details relating to his testimony. In some instances, he virtually refused to answer questions put to him, even relatively straightforward questions. Some of these questions, while undermining his credibility as a witness, did not go directly to the relevant substance of his testimony. Some of these questions, however, are material to the alibi defence, such as his relationship with the Accused and the reason he went to Rubona in the midst of his flight from the country. He is the only witness presented at trial who testified that he saw the Accused somewhere other than in Bisesero on 13 May. There is no defence testimony that the Accused was in Rubona specifically on the date of 14 May, other than that of the Accused.

23. The evidence of Witness MH that he saw the Accused in Rubona on 13 May cannot be accepted, based on his demeanor, his reluctance to answer questions forthrightly, and the many inconsistencies in his testimony. There is no corroboration of his account, even from testimony of the Accused.

24. I put to the Accused at trial, that momentous events like the massacre at Muyira on 13 and 14 May are such that one would remember where one was when they occurred, without having to consult a calendar. The Accused prepared his own handwritten calendar, meticulously shading in the dates of his movement, less than a year after these massacres took place. The Accused testified that he knew these massacres had occurred because he had heard about them on the radio and because they were discussed at a meeting at the Gisovu Tea Factory on 19 May. The Accused further testified that when he prepared the handwritten calendar, he believed it to be accurate.

5884

25. Having carefully considered the evidence of alibi presented by the Defence, I note the numerous inconsistencies between the testimony of the Accused, the Defence exhibits and p statements made by the Accused, which was tendered as evidence at the trial. These inconsistencies are material and go to the heart of the alibi defence, particularly in respect to the dates of his travel to and from Gisovu. Witness MH was the only witness, other than the Accused's wife, who testified in support of his alibi, and the Chamber does not accept the testimony of this witness.

26. The Accused relies heavily on the document referred to as Exhibit D10, the *mission de ordre*. The authenticity of this document is in question for numerous reasons. The circumstances, as described by the Accused, of both its issuance and the extension affixed to it, seem highly unlikely and give rise to many questions which have not been satisfactorily explained. The document purports to have been issued by the Minister of Industry and Commerce but it is signed by the Minister of Justice and was extended by the Minister of Defence. The extension is not dated, and all the dates of arrival and departure noted next to the stamps on the second page of the document, are, by the Accused's own admission, in his own handwriting. Moreover, the Accused stated in his testimony that the first entry dated 21 April is not accurate. For these reasons, I do not accept the document as corroborating evidence of the alibi. Moreover, even if Exhibit D10 were to be accepted, it would not support the alibi defence in that it does not contain evidence of his whereabouts on the 18 April, 13 or 14 May, and other dates on which the crimes are alleged to have been committed.

27. The Defence has argued that certain documents, such as receipts and correspondence, and even the Accused's delay in replying to correspondence, should be interpreted as supporting his defence of alibi. In my view, this evidence while it may in some cases be consistent with the alibi, is not probative. For example, the failure of the Accused to reply to correspondence received in May 1994 until June 1994 could be explained by his absence from the tea factory in Gisovu, or it could be explained in many other ways. Moreover, some of the documents presented by the Defence raise more questions than they answer. For example, the receipt for petrol purchased on 14 May 1994 for a Pajero motor vehicle, registration A7171, suggests that the vehicle was in use at that time, although the Accused testified that it had developed mechanical problems on 7 May and was under repair until 19 May 1994. His submission of a request for reimbursement that is dated 19 May is not evidence that he returned to the factory on 19 May, rather than before 19 May, nor is it evidence that he was not there on other dates.

28. Having already found, the testimony of Witness MH to be unreliable, for the reasons set forth above, I note that the only other witness who testified on behalf of the Defence, in support of the alibi, is the testimony of the Accused's wife, Claire Kayuku. The Accused also testified on his behalf. Claire Kayuku's testimony, in large measure does not specifically corroborate the account by the Accused of his whereabouts. For example, she testified that the vehicle was under repair in the first week of May and that the Accused went to Gisovu sometime in the middle of May to pay the tea factory workers. This evidence could as easily be interpreted to support the allegation that the Accused was in Gisovu on 13 and 14 May, when the massacres took place, as to support his claim that he only went to Gisovu on 19 May. Moreover, I note that Claire Kayuku's testimony is consistent with the handwritten calendar of the Accused, in which he places himself at Gisovu through 14 May.

29. In light of the above, I reject the alibi defence, as it is not supported by sufficient evidence to make it even possible to cast reasonable doubt on the other evidence the Chamber finds to be credible. In coming to this conclusion, I note the evidence presented by the Prosecution placing the Accused at the scenes of the crimes he is alleged to have committed. For example, ten

5885

witnesses testified that they saw the Accused at Muyira hill in mid-May. Witnesses S and H testified that they saw him in mid-May. Witnesses R and F saw him on the 13 and 14 May. Witnesses N and T saw him on 13 May, Witness D saw him on 14 May and Witness P saw his vehicle on the 13 May. The Chamber found these witnesses to be credible and to have corroborated each other's evidence.

30. For these reasons, I reject the testimony of the Accused as inherently unreliable in its entirety.

31. With regard to the 31 May attack on Biyiniro hill, the Majority finds that the defence of alibi raised by the Accused casts a reasonable doubt on the evidence presented by the Prosecutor, although they find Witness E to be a "reliable witness", who was "consistent through out his testimony". Hence, the majority finds that the allegations in respect of the aforementioned attack have not been proved beyond a reasonable doubt. I concur with this finding of the Majority. I have reached this conclusion for reasons different to those of the Majority. I am of the view that the alibi defence does not diminish the evidence presented by the Prosecutor, in respect of this allegation. However, I find that the testimony of Witness E does not provide sufficient evidence, with regard to the participation of the Accused in the 31 May attack on Biyiniro hill, to satisfy the required standard of proof. It is solely for this reason that I find that the Prosecutor has failed to prove her case beyond a reasonable doubt, that the Accused participated in the 31 May attack on Biyiniro hill attack.

32. With regard to the 5 June attack, near Muyira hill, the Majority finds that the defence of alibi raised by the Accused casts a reasonable doubt on the evidence presented by the Prosecutor, although they find Witness E to have been "consistent through out his testimony". I concur with this finding of the Majority. I have reached this conclusion however, for reasons different to those of the Majority. I am of the view that the alibi defence does not diminish the evidence presented by the Prosecutor, in respect of this allegation. However, I find that the testimony of Witness E does not provide sufficient evidence, with regard to the participation of the Accused in the 5 June attack, near Muyira hill, to satisfy the required standard of proof. It is solely for this reason that I find that the Prosecutor has failed to prove her case beyond a reasonable doubt that the Accused participated in the 5 June attack near Muyira hill.

33. With regard to the 22 June attack in Nyarutovu *cellule,* the Majority finds that the defence of alibi, "documentary evidence and oral testimony" presented by the Defence, cast a reasonable doubt on the evidence presented by the Prosecutor, although they find Witness P to have given "consistent evidence". I concur with the finding of the Majority that allegations in respect of the aforementioned attack have not been proved beyond a reasonable doubt. I have reached this conclusion for reasons different to those of Majority. I am of the view that the alibi defence does not diminish the evidence presented by the Prosecutor, in respect of this allegation. However, I find that the testimony of Witness P does not provide sufficient evidence, with regard to the participation of the Accused in the 22 June attack, to satisfy the required standard of proof. I therefore find that the Prosecutor has failed to prove beyond a reasonable doubt that the Accused participated in the 28 June attack in Nyarutovu *cellule*.

Done in English and French, the English being authoritative.

Arusha, 27 January 2000

5886

Navanethem Pillay

Judge

(Seal of the Tribunal)

5887

ANNEX 12:

Polyukhovich v. Commonwealth (1991) 172 CLR 501.

5889

High Court of Australia

POLYUKHOVICH v. THE COMMONWEALTH OF AUSTRALIA AND ANOTHER (1991) 172 CLR 501 F.C. 91/026

Constitutional Law (Cth)

COURT
High Court of Australia
Mason C.J.(1), Brennan(2), Deane(3), Dawson(4), Toohey(5), Gaudron(6) and McHugh(7) JJ.
HRNG
Canberra, 1990, September 3-5; November 9;
1991, August 14. #DATE 14:8:1991
JUDGE1
MASON C.J. The plaintiff is an Australian citizen and a resident of South Australia. He brought an action in this Court seeking a declaration that the War Crimes Amendment Act 1988 (Cth) is invalid and, or in the alternative, a declaration that ss.6(1), 6(3), 7, 9 and 11 of the War Crimes Act 1945 (Cth) as amended ("the Act") are invalid. The plaintiff's interest in seeking declaratory relief of this kind arises from the circumstance that the second defendant laid an information against the plaintiff alleging that, between 1 September 1942 and 31 May 1943, the plaintiff committed war crimes in the Ukraine. Each of the crimes is alleged to have been a "war crime" within the meaning of s.9 of the Act, being a "serious crime" within the meaning of s.6 of the Act. In each instance the crime was alleged to have been committed at a time when the Ukraine was under German occupation during the Second World War. It is common ground that at the time of the commission of the alleged offences there was no Australian legislation in force which purported to make it a criminal offence on the part of an Australian citizen or resident to do such acts in the Ukraine as the plaintiff is alleged to have done.

2. In the course of the proceedings, at the request of the parties, I reserved for the consideration of the Full Court the question:

> "Is Section 9 of the War Crimes Act 1945 as amended, invalid in its application to the information laid by the second defendant against the plaintiff?"

The plaintiff submits that the question should be answered in the affirmative on two grounds. The first ground is that the section is beyond the legislative powers conferred upon the Parliament by s.51(vi) and (xxix) of the Constitution with respect to defence and external affairs, these being the only two powers which, according to the defendants' case, could sustain the validity of the law. The second is that the section, because it attempts to enact that past conduct shall constitute a criminal offence, is an invalid attempt to usurp the judicial power of the Commonwealth, that power being vested by the Constitution in Ch III courts.
The War Crimes Act 1945

3. According to its long title, the Act is "(a)n Act to provide for the Trial and Punishment of War Criminals". The original preamble to the Act recited:

> "WHEREAS it is expedient to make provision for the trial and punishment of violations of the laws and usages of war committed during any war in which His Majesty has been

S890

engaged since the second day of September, One thousand nine hundred and thirty-nine, against any persons who were at any time resident in Australia or against certain other persons".

4. By s.5(1) of the Act, as originally enacted, the Governor-General was authorized to "convene military courts for the trial of persons charged with the commission of war crimes". Section 7 conferred power on a military court so convened to "try persons charged with war crimes committed, at any place whatsoever, whether within or beyond Australia" and for that purpose "to sit at any place whatsoever, whether within or beyond Australia". "War crime" was defined by s.3 to mean: "(a) a violation of the laws and usages of war; or (b) any war crime within the meaning of the instrument of appointment" of a certain Board of Inquiry appointed under the National Security (Inquiries) Regulations (Cth) committed in any place whatsoever, whether within or beyond Australia, during any war.

5. By the War Crimes Amendment Act 1988 (No.3 of 1989) the original Act was almost entirely repealed and replaced. The amended preamble recites:

"WHEREAS:

(a) concern has arisen that a significant number of persons who committed serious war crimes in Europe during World War II may since have entered Australia and became Australian citizens or residents;

(b) it is appropriate that persons accused of such war crimes be brought to trial in the ordinary criminal courts in Australia; and

(c) it is also essential in the interests of justice that persons so accused be given a fair trial with all the safeguards for accused persons in trials in those courts, having particular regard to matters such as the gravity of the allegations and the lapse of time since the alleged crimes".

6. Section 9 of the Act provides:

"(1) A person who:

(a) on or after 1 September 1939 and on or before 8 May 1945; and

(b) whether as an individual or as a member of an organisation;

committed a war crime is guilty of an indictable offence against this Act.

(2) Sections 5 and 7, and paragraph 86(1)(a), of the Crimes Act 1914 do not apply in relation to an offence against this Act."

In order to ascertain whether an offence is a "war crime" within the meaning of the Act it is necessary to look to ss.6, 7 and 8. Section 7 defines a "war crime" by reference to a "serious crime". What constitutes a "serious crime" is to be ascertained from s.6.

7. Section 6(1) provides:

"An act is a serious crime if it was done in a part of Australia and was, under the law then in force in that part"

one of a number of offences mentioned in the sub-section. One such offence is: "(a) murder"; another is:

"(k) an offence of:

(i) attempting or conspiring to commit;

(ii) aiding, abetting, counselling or procuring the commission of; or

(iii) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of;

5891

an offence referred to in (paragraph (a))".

Section 6(2), (3) and (6) provide:

"(2) In determining for the purposes of subsection (1) whether or not an act was, under the law in force at a particular time in a part of Australia, an offence of a particular kind, regard shall be had to any defence under that law that could have been established in a proceeding for the offence.

(3) An act is a serious crime if:

(a) it was done at a particular time outside Australia; and

(b) the law in force at that time in some part of Australia was such that the act would, had it been done at that time in that part, be a serious crime by virtue of subsection (1)."

"(6) For the purposes of (subsection (3)), the fact that the doing of an act was required or permitted by the law in force when and where the act was done shall be disregarded."

8. Section 7 provides:

"(1) A serious crime is a war crime if it was committed:

(a) in the course of hostilities in a war;

(b) in the course of an occupation;

(c) in pursuing a policy associated with the conduct of a war or with an occupation; or

(d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.

(2) For the purposes of subsection (1), a serious crime was not committed:

(a) in the course of hostilities in a war; or

(b) in the course of an occupation;

merely because the serious crime had with the hostilities or occupation a connection (whether in time, in time and place, or otherwise) that was only incidental or remote.

(3) A serious crime is a war crime if it was:

(a) committed:

(i) in the course of political, racial or religious persecution; or

(ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and

(b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation.

(4) Two or more serious crimes together constitute a war crime if:

(a) they are of the same or a similar character;

(b) they form, or are part of, a single transaction or event; and

(c) each of them is also a war crime by virtue of either or both of subsections (1) and (3)."

Section 7 must be read in conjunction with the definition of "war" in s.5. That section defines "war" to mean a war "in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945". The section defines "occupation", inter alia, as meaning "(a) an occupation of territory arising out of a war".

9. The effect of these definitions is to confine war crimes to conduct which took place outside Australia (see s.7(1)(a) and (b)) except in so far as "serious crimes" under s.7(1)(c) and (d) and s.7(3) might conceivably be

5892

committed in Australia. However, the terms of the preamble and the provisions of s.7(1)(a) and (b) make it clear that the primary and substantial concern of the Act is with war crimes committed outside Australia, in other words, with conduct on the part of persons outside Australia. Further, the primary and substantial concern of the Act is with war crimes committed in Europe during the Second World War. So much appears from the preamble and the definitions of "war" and "occupation".

10. Only an Australian citizen or resident shall be charged with an offence under the Act (s.11), but that means that the person charged must be an Australian citizen or resident only at the time that he or she is charged. It follows that the Act makes criminal acts done by a person who, at the time of the commission of those acts, had no relevant connection with Australia.

11. The information laid against the plaintiff rests on an application of the provisions of ss.6(1), 6(3), 7, 9 and 11 of the Act. That is why he seeks a declaration that s.9 is invalid, for the application of that section depends not only on its own validity but also on the validity of related provisions.

12. Superior orders are not a defence in a proceeding for an offence under the Act: s.16. However, s.17(2) provides that, subject to s.16,

> "it is a defence if the doing by the defendant of the act alleged to be the offence:
>
> (a) was permitted by the laws, customs and usages of war; and
>
> (b) was not under international law a crime against humanity."

Section 17(3) to (5) go on to provide:

> "(3) To avoid doubt, the doing of the act by the defendant was permitted by the laws, customs and usages of war if it was reasonably justified by the exigencies and necessities of the conduct of war.
>
> (4) The defendant is not entitled to rely on a defence under subsection (2) unless there is evidence of the existence of the facts constituting the defence.
>
> (5) However, if there is such evidence, the onus of establishing, beyond a reasonable doubt, that those facts either do not exist or do not constitute the defence lies on the prosecution."

13. The provisions of s.68 of the Judiciary Act 1903 (Cth) apply in relation to an offence against the Act as if a reference in that section to a Territory did not include a reference to an external Territory: s.13(1). By virtue of s.68(2) and (5C) of the Judiciary Act, in relation to offences committed elsewhere than in a State or Territory, jurisdiction is conferred on the courts of a State or Territory notwithstanding any limits as to locality of the jurisdiction of that court under the law of that State or Territory. However, by s.14(4) of the Act, on an application by a defendant, the magistrate or judge is bound to order that all proceedings for the offence charged be held in a State or Territory other than that in which it is being held, unless he or she is satisfied on the balance of probabilities that the defendant, when charged with the offence:

> "(a) was a resident of the State or Territory referred to in subsection (1); or
>
> (b) was not a resident of that other State or Territory".

14. The powers of a court to take action to prevent an abuse of process are expressly preserved: s.13(4)(b). Moreover, s.13(5) provides:

> "Where, on the trial of a person for an offence against this Act, the person satisfies the judge, on the balance of probabilities, that:

5893

(a) the person is unable to obtain evidence that he or she would, but for the lapse of time or some other reason beyond his or her control, have been able to obtain;
(b) the person's inability to obtain that evidence has substantially prejudiced, or will substantially prejudice, the preparation or conduct of his or her defence; and
(c) the interests of justice require the making of an order under this subsection;

the judge may make such order as he or she thinks appropriate for a stay of proceedings for the offence."

The External Affairs Power (s.51(xxix))

15. Discussion of the scope of the external affairs power has naturally concentrated upon its operation in the context of Australia's relationships with other countries and the implementation of Australia's treaty obligations. However, it is clear that the scope of the power is not confined to these matters and that it extends to matters external to Australia. I have previously expressed the view that the grant of legislative power with respect to external affairs should be construed with all the generality that the words admit and that, so construed, the power extends to matters and things, as well as relationships, outside Australia: New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") (1975) 135 CLR 337, at pp 470-471; Robinson v. Western Australian Museum (1977) 138 CLR 283, at p 335; Koowarta v. Bjelke-Petersen (1982) 153 CLR 168, at p 223. That view has prevailed in this Court since 1975: see the Seas and Submerged Lands Case, per Barwick C.J. at p 360; Jacobs J. at p 497; Murphy J. at pp 503-504; Robinson, per Barwick C.J. at p 294; Viro v. The Queen (1978) 141 CLR 88, per Murphy J. at p 162; Koowarta, per Stephen J. at p 211; The Commonwealth v. Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1, per Gibbs C.J. at p 97; Murphy J. at p 170. In Koowarta, I said (at p 223) that the power extended to persons, as well as matters and things, outside Australia; in the Seas and Submerged Lands Case, Jacobs J. had expressed the same view: at p 497. Although not all of the judicial observations in the cases to which I have just referred mention explicitly the application of the power to persons, as distinct from matters, things or circumstances, external to Australia, there is no reason for drawing any distinction between the reach of the power in its application to persons on the one hand and matters, things and circumstances on the other hand. As Murphy J. stated in The Tasmanian Dam Case (at p 170), the power extends to conduct outside Australia.

16. The existence of a connection between the enacting State and the extraterritorial persons, things and events on which a State law operates has been held to be essential to the valid extraterritorial operation of that State law: Pearce v. Florenca (1976) 135 CLR 507, per Gibbs J. at pp 518-519; Union Steamship Co. of Australia Pty. Ltd. v. King (1988) 166 CLR 1, at p 14; Port MacDonnell Professional Fishermen's Assn Inc. v. South Australia (1989) 168 CLR 340, at pp 372-373; cf. Australia Act 1986 (Cth), s.2(1); Australia Act 1986 (UK), s.2(1). The requirement for a relevant connection between the circumstances on which the legislation operates and the State has been liberally applied and even a remote and general connection suffices: Union Steamship, at p 14. According to traditional doctrine, the requirement for such a connection or nexus stems from the circumstance that the legislative power of a State legislature is expressed to be for the peace, order and good government of the State. The opening words of the grant of legislative powers to the Parliament in s.51 of the Constitution might have provided a foundation for a similar interpretation of the external affairs power, making the existence of a relevant connection or nexus an essential prerequisite of the valid exercise of the power. However, I share the view expressed by Windeyer

5894

J. in Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd. (1959) 103 CLR 256, where he said (at p 308):

> "So far as the Commonwealth is concerned, it is now for Parliament alone to judge whether a measure in respect of any topic on which it has power to legislate is in fact for the peace order and good government of the Commonwealth".

This comment applies with particular force to an exercise of the external affairs power.

17. In the Seas and Submerged Lands Case, Jacobs J. was of the same opinion, observing (at p 498):

> "There is no gap in the constitutional framework. Every power right and authority of the British Crown is vested in and exercisable by the Crown in Australia subject only to the Constitution. The State legislatures do not have that sovereignty which the British legislature and now the Australian legislature possess. A State can only legislate in respect of persons acts matters and things which have a relevant territorial connexion with the State, a connexion not too remote to entitle the law to the description of a law for the peace welfare and good government of the State. ... The words of s.51 of the Constitution do not import any similar territorial limitation and there now is none in the case of the Australian legislature. The words 'external affairs' can now be given an operation unaffected by any concept of territorial limitation. The result is that the Commonwealth, outside the boundaries of the States and subject to any particular constitutional injunctions, may make laws on all subject matters in exercise of its sovereignty."

It follows that the legislative power of the Parliament with respect to matters external to Australia, using "matters" in a comprehensive sense, is not less in scope than the power of the Parliament of the United Kingdom with respect to such matters.

18. The very recent cases on the external affairs power - Koowarta, The Tasmanian Dam Case, Richardson v. Forestry Commission (1988) 164 CLR 261 and Queensland v. The Commonwealth (1989) 167 CLR 232 - concerned the impact on the States of Commonwealth legislation implementing Australia's obligations under international conventions designed to protect human rights and the domestic environment. These cases vindicated the regulation by the Parliament of conduct within Australia pursuant to the external affairs power when that regulation is undertaken by way of implementation of an international convention. The cases serve to illustrate the proposition that legislation enacted pursuant to the power, though necessarily concerned with some aspect of externality, will have a domestic or internal operation.

19. That, of course, is the situation here. The legislation makes conduct outside Australia unlawful, thereby visiting that conduct with legal consequences under Australian law. The conduct made unlawful constitutes a criminal offence triable and punishable in the ordinary criminal courts in this country. But, to the extent that s.9 operates upon conduct which took place outside Australia and makes that conduct a criminal offence, the section is properly characterized as a law with respect to external affairs and is a valid exercise of power, subject to a consideration of the argument based on usurpation of judicial power. In conformity with what I have already said, I arrive at this conclusion on the footing that it is not necessary that the Court should be satisfied that Australia has an interest or concern in the subject-matter of the legislation in order that its validity be sustained. It is enough that Parliament's judgment is that Australia has an interest or

concern. It is inconceivable that the Court could overrule Parliament's decision on that question. That Australia has such an interest or concern in the subject-matter of the legislation here, stemming from Australia's participation in the Second World War, goes virtually without saying.

20. If, to the extent that the law operates upon conduct which took place within Australia, s.9 cannot be supported as a valid exercise of legislative power, it is plainly severable so that, on any view, the section operates validly on conduct which took place outside Australia. In saying this, I do not mean to imply that s.9 is invalid to the extent to which it may operate on conduct within Australia. That question does not arise for decision and there is no point in discussing it further.

21. I should, however, indicate that I do not regard the circumstance that the law operates on the past conduct of persons who, at the time of the commission of that conduct, had no connection with Australia as detracting in any way from the character of s.9 as a law with respect to external affairs. The externality of the conduct which the law prescribes as the foundation of the criminal offence is enough without more to constitute it as a law with respect to external affairs. In this respect it makes no difference whether the law creates a criminal liability by reference to past or future conduct, so long as the conduct is external to Australia.

22. My conclusion that the external affairs power supports the validity of s.9 on the basis discussed above makes it unnecessary for me to examine the argument that the section may be supported on the ground that it is a law with respect to external affairs because it gives effect to an obligation arising under international law or because it implements a resolution of an international body. It is also unnecessary to deal with the alternative submission that the law is a valid exercise of the power because it facilitates the exercise of the universal jurisdiction under international law. Likewise, there is no need to consider the defence power.

Usurpation of Judicial Power

23. The plaintiff's argument on this aspect of the case is that the Act usurps the exercise of the judicial power of the Commonwealth in so far as it declares retrospectively certain past conduct to be a criminal offence and falls into the category of ex post facto laws. The submission is that one of the essential elements in the exercise of judicial power is the determination by a court of the issue whether the accused person infringed a rule of conduct prescribed in advance. According to the plaintiff's argument, the Act has determined that all persons who engaged in conduct of the kind declared unlawful are guilty of an offence, the only issue left for determination being whether the plaintiff is one of those persons.

24. The judicial power of the Commonwealth is vested by s.71 of the Constitution in Ch III courts comprising this Court, federal courts created by Parliament and State courts exercising federal jurisdiction. Judicial power is an elusive concept; "it has never been found possible to frame a definition that is at once exclusive and exhaustive", to repeat the comment of Dixon C.J. and McTiernan J. in Reg. v. Davison (1954) 90 CLR 353, at p 366. According to the widely-accepted statement of Griffith C.J. in Huddart, Parker and Co. Proprietary Ltd. v. Moorehead (1909) 8 CLR 330, at p 357, judicial power in s.71 means "the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property".

25. A more comprehensive statement of the content of judicial power is contained in the judgment of Kitto J. in Reg. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd. (1970) 123 CLR 361. His Honour observed

5896

(at pp 374-375):

> "Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified."

This statement contemplates as one element in the exercise of judicial power the application to the facts of a pre-existing or antecedent legal principle or standard, though it does not require that the rule or standard should have been ascertained or precisely defined before the determination is made in the exercise of judicial power. The need for an inquiry into what the law is presupposes that there may be uncertainty as to the nature, scope or content of the principle or standard to be applied. Indeed, it is widely recognized that courts, in exercising their judicial power, make and alter law in the sense of formulating new or altered legal principles.

26. There is nothing in the statements which I have quoted to suggest that an exercise of judicial power necessarily involves the application to the facts of a legal principle or standard formulated in advance of the events to which it is sought to be applied. Indeed, there is powerful authority in this Court which supports the proposition that the application to the facts of a retrospective law which operates on past conduct so as to create rights and liabilities is an instance of the exercise of judicial power. In Nelungaloo Pty. Ltd. v. The Commonwealth (1948) 75 CLR 495, the validity of the Wheat Industry Stabilization Act (No.2) 1946 (Cth) was upheld, even though it validated an order for the acquisition of wheat, the validity of which was in issue in proceedings pending when the statute was enacted. The statute affected rights in issue in the litigation. At first instance, Williams J., in holding that the statute was a valid exercise of the defence power, remarked (at p 503):

> "It was contended that this section infringes the judicial power because it does not amend the law prospectively but attempts to prescribe the construction to be placed upon an existing law by the court and the determination of the meaning of a statute is of the essence of the judicial power. The result of this contention, if sound, would be that the Commonwealth Parliament has no power to pass a declaratory statute which only has a retrospective operation. I cannot agree with this contention."

On appeal, his Honour's decision upon the point was upheld: see at pp 579-580, 584. Dixon J., with reference to the validating provision, said (at p 579):

> "It is simply a retrospective validation of an administrative act and should be treated in the same way as if it said that the rights and duties of the growers and of the Commonwealth should be the same as they would

> be, if the order was valid. If such an enactment is a law with respect to the subject of defence, I can see no objection to its validity".

Subsequently, in Reg. v. Humby; Ex parte Rooney (1973) 129 CLR 231, I applied Nelungaloo and, in so doing, observed (at p 250):

> "Chapter III contains no prohibition, express or implied, that rights in issue in legal proceedings shall not be the subject of legislative declaration or action."

27. More recently, in Australian Building Construction Employees' and Builders Labourers' Federation v. The Commonwealth (1986) 161 CLR 88, this Court rejected the contention that the Builders Labourers' Federation (Cancellation of Registration) Act 1986 (Cth) was invalid because it was an exercise of judicial power or because it involved an interference with judicial power. The contention was that the impugned statute, which cancelled the registration of the plaintiff union as a registered organization, abrogated the function of this Court in pending proceedings concerning the cancellation of that registration. The Court drew a distinction between legislation affecting substantive rights in issue in litigation and legislative interference with the judicial process itself: at p 96. Liyanage v. The Queen (1967) 1 AC 259, where the statutes were directed to the trial of particular persons charged with particular offences on a particular occasion, was a case which fell into the second of the two categories.

28. It is contended that the power of the Parliament to enact a retrospective or retroactive law dealing with substantive rights or liabilities does not extend to a law which makes past conduct a criminal offence. Such a law, it is said, stands in a very different position. It is suggested that support is to be found in Blackstone's Commentaries and in the decisions of the Supreme Court of the United States on Art.I, s.9, cl.3 and Art.I, s.10, cl.1 of the United States Constitution for the proposition that such a retrospective criminal law is beyond the power of the legislature on the ground that it is an interference with judicial power. The answer to this submission, as will appear, is that Blackstone does not assert that such a law is beyond the power of Parliament and that, to the extent to which the proposition is sustained by judicial decision, it rests upon the existence of a specific prohibition in the United States Constitution which has no counterpart in our Constitution.

29. Blackstone in his Commentaries, 17th ed. (1830), vol.I, pp 45-46, equated law to a "rule prescribed" and stated that, in the case of criminal conduct, such a rule must be prescribed as to future conduct. With reference to a law making past conduct a crime and inflicting punishment on the person who committed it, Blackstone said (at p 46):

> "Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement; which is implied in the term 'prescribed'."

But nowhere does Blackstone assert that it is beyond the power of Parliament to enact such a law, and still less that such a law would constitute an interference with the exercise of judicial power. He held strongly to the view that Parliament had power to enact that which was unreasonable and was vehemently opposed to the pretension that the courts had power to reject a statute on the ground that it was unreasonable "for that were to set the judicial power above that of the legislature, which would be subversive of all government": Commentaries, (1830), vol.I, p 91.

30. Art.I, s.9, cl.3 and Art.I, s.10, cl.1 of the United States Constitution prohibit any State as well as Congress from passing a bill of attainder or an ex post facto law. A bill of attainder is a legislative enactment which inflicts punishment without a judicial trial; initially a bill of attainder provided for punishment by death but in the context of the constitutional prohibition such a bill is now regarded as including what was formerly a bill of pains and penalties: Cummings v. The State of Missouri (1866) 71 US 277. An ex post facto law, of which a bill of attainder was, or might be, an instance, is a retrospective law which makes past conduct a criminal offence. An ex post facto law includes:

> "1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
> 2d. Every law that aggravates a crime, or makes it greater than it was, when committed": Calder v. Bull (1798) 3 US 385, per Chase J. at p 390.

The distinctive characteristic of a bill of attainder, marking it out from other ex post facto laws, is that it is a legislative enactment adjudging a specific person or specific persons guilty of an offence constituted by past conduct and imposing punishment in respect of that offence. Other ex post facto laws speak generally, leaving it to the courts to try and punish specific individuals.

31. The constitutional prohibition against bills of attainder and ex post facto laws was not an expression of the antecedent common law of England. So much was acknowledged by Chase J. in Calder v. Bull when he said (at p 388):

> "The prohibition against (State legislatures) making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments; and an exercise of judicial power."

32. The absence of any similar prohibition in our Constitution against bills of attainder and ex post facto laws is fatal to the plaintiff's argument except in so far as the separation of powers effected by our Constitution, in particular the vesting of judicial power in Ch III courts, imports a restraint on Parliament's power to enact such laws. In this respect the prohibition against bills of attainder has been seen "as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature": United States v. Brown (1965) 381 US 437, at p 442. This doctrine applies to bills of attainder but not to the generality of other ex post facto laws. That is because it is of the essence of the prohibition of a bill of attainder "that it proscribes legislative punishment of specified persons - not of whichever persons might be judicially determined to fit within properly general proscriptions duly enacted in advance": Tribe, American Constitutional Law, 2nd ed. (1988), p 643. The application of the doctrine depends upon the legislature adjudging the guilt of a specific individual or specific individuals or imposing punishment upon them. If, for some reason, an ex post facto law did not amount to a bill of attainder, yet adjudged persons guilty of a crime or imposed punishment upon them, it could amount to trial by legislature and a usurpation of judicial power. But if the law, though retrospective in operation, leaves it to the courts to determine whether the person charged has engaged in the conduct complained of and whether that conduct is an infringement of the rule prescribed, there is no interference with the exercise of judicial power.

5899

33. That the application of the doctrine of separation of powers depends upon the notion of "trial by legislature" is demonstrated by United States v. Brown. The statute made it an offence for anyone who was, or had been within five years, a member of the Communist Party to serve as an officer or manager of a labour union. The Court held that the statute was invalid as a bill of attainder, observing (at p 450):

> "The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates ... the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability - members of the Communist Party."

Later, the Court stated (at p 454) that the command of the bill of attainder prohibition is "that a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics ...".

34. The view that a statute which contains no declaration of guilt and does not impose punishment for guilt is not a usurpation of judicial power is supported by the reasoning of the Privy Council in its decision in Kariapper v. Wijesinha (1968) AC 717. The Privy Council upheld the validity of a statute enacted by the Parliament of Ceylon which imposed civil disabilities on persons to whom the statute applied, namely, persons, including the appellant, named in a schedule to the statute who were found guilty of bribery in a report by a commission of inquiry. The statute also provided for the vacation of the appellant's seat as a Member of Parliament. It was common ground that the Constitution of Ceylon insisted upon a separation of powers, at least to the extent that judicial power was vested exclusively in the courts to the exclusion of the legislature: see at p 732. The Privy Council had so held in its earlier decision in Liyanage v. The Queen, at pp 287-289. In Kariapper v. Wijesinha, the appellant argued (at p 721) that the statute was an exercise of judicial power because it imposed punishment for guilt without trial by a competent court and was a bill of attainder, ex post facto legislation having an element of punishment being on the same footing as a bill of attainder. The Privy Council rejected the argument on the grounds that the statute contained no declaration of guilt and the disabilities which it imposed did not have the character of punishment for guilt but were to keep public life clean for the public good.

35. Sir Douglas Menzies, speaking for the Judicial Committee, referred with evident approval to the concurring opinion of Frankfurter J. in United States v. Lovett (1946) 328 US 303. In that case, his Honour said (at pp 322-323):

> "All bills of attainder specify the offense for which the attainted person was deemed guilty and for which the punishment was imposed."

Frankfurter J. went on to say (at p 323):

> "No offense is specified and no declaration of guilt is made ... Not only does s304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder."

Sir Douglas Menzies concluded (at p 736) that, in conformity with the opinion of Frankfurter J., the Ceylon statute contained no declaration of guilt of bribery or of any other act. His Honour continued (at p 736):

> "It is the commission's finding that attracts the operation of the Act not any conduct of a person against whom the

5900

> finding was made. Parliament did not make any finding of its own against the appellant or any other of the seven persons named in the schedule. The question of the guilt or innocence of the persons named in the schedule does not arise for the purpose of the Act and the Act has no bearing upon the determination of such a question should it ever arise in any circumstances."

Accordingly, the statute did not interfere with the exercise of judicial power.

36. All that I have said so far in refutation of this aspect of the plaintiff's case is confirmed by the decision of this Court in R. v. Kidman (1915) 20 CLR 425. That case concerned the validity of the Crimes Act 1915 (Cth) so far as its provisions were retrospective. Section 2 of that Act added conspiracies to defraud the Commonwealth to the conspiracies which, by s.86 of the Crimes Act 1914 (Cth), were declared to be indictable offences. Section 3 of the 1915 Act provided that the Act was deemed to have been in force from the date of commencement of the 1914 Act. The accused were indicted for conspiracy to defraud the Commonwealth under the retrospective provisions of the 1915 Act. By a unanimous decision the validity of that Act was upheld. It was specifically contended that the Parliament had no power to enact retrospective criminal laws, reliance being placed on Calder v. Bull, the argument naturally being that the 1915 Act was an ex post facto law rather than a bill of attainder.

37. Griffith C.J. acknowledged (at p 432) that an ex post facto law was forbidden by the United States Constitution but pointed out that no question of the validity of such a law could arise in the case of a legislature of plenary power. However, being of the opinion, mistakenly, that Parliament's power to enact a criminal law stemmed only from s.51(xxxix), he concluded that this power did not extend to an ex post facto criminal law. He upheld the 1915 Act because in his opinion it did no more than re-enact the common law.

38. Isaacs J. observed (at pp 442-443):

> "There is no prohibition in the Australian Constitution against passing ex post facto laws, as there is in the American Constitution ... The prohibition to the United States apparently assumes that Congress would otherwise have had the power. Therefore, in my opinion, no distinction can be validly drawn between ex post facto laws - regarding them as criminal only - and any other kind of retroactive laws."

His Honour concluded by saying (at p 443):

> "But the Parliament's powers are not confined to creating fear of punishment by threatening as to future acts, but extend to dealing with the conduct, which in its opinion deserves it, and so conveying the same warning and fear as a plenary Legislature within the ambit assigned to it."

Higgins J. was of the same opinion: at pp 451-454. His Honour specifically referred (at p 451) to the fact that the Parliament of Great Britain had, by Acts of attainder and otherwise, made crimes of acts after they had been committed and held that, in the absence of a prohibition in the Constitution, the Commonwealth had like power to enact a retrospective criminal law. Likewise, Powers J. (at p 462) considered that the Parliament had the same power to pass retrospective criminal laws with respect to the subject-matters committed to it by s.51 of the Constitution as had the Imperial Parliament.

39. In the light of what I have said earlier about the plaintiff's argument, the decision in Kidman was plainly correct. It has frequently been cited in subsequent decisions of the Court without any hint of disapproval: see R. v. Snow (1917) 23 CLR 256, at p 265; Ex parte Walsh and Johnson; In re Yates

5901

(1925) 37 CLR 36, at pp 86, 124-125; Millner v. Raith (1942) 66 CLR 1, at p 9; Australian Communist Party v. The Commonwealth (1951) 83 CLR 1, at p 172; University of Wollongong v. Metwally (1984) 158 CLR 447, at pp 461, 484. The only qualification relevant to the plaintiff's argument that needs to be made is that the separation of powers effected by our Constitution would invalidate a bill of attainder on the ground that it involves a usurpation of judicial power. To the extent that Higgins J. seems to suggest that such a bill, if enacted by the Parliament, would be valid, I am unable to agree.

40. True it is that the judgments in Kidman to which I have referred do not make any mention of the separation of powers. That is readily understandable. The challenge to the validity of the 1915 Act was, and could only be, that it was an ex post facto law, for it was not a bill of attainder. Before the present case it had never occurred to anyone to suggest that an ex post facto law of the kind under consideration here, not being a bill of attainder, could amount to a usurpation of judicial power because such an ex post facto law simply does not amount to a trial by legislature. It leaves for determination by the court the issues which would arise for determination under a prospective law.

41. In the result, I would answer the question in the negative.
JUDGE2
BRENNAN J. The second defendant, with the claimed authority of the Commonwealth Director of Public Prosecutions, laid an information charging the plaintiff with the commission of a number of war crimes "within the meaning of section 9 of the War Crimes Act 1945". The War Crimes Act 1945 (Cth) was extensively amended by the War Crimes Amendment Act 1988 (Cth) which inserted a new preamble and new ss.3 to 22 in the place of the preamble and ss.3 to 14 of the original Act. The Act to which reference is made hereafter is the amended Act, except where the original Act (No.48 of 1945) is expressly mentioned. The plaintiff, by his further amended statement of claim in an action brought against the Commonwealth and the second defendant, seeks declarations that the sections of the Act relevant to his prosecution are invalid and an injunction to restrain the defendants from taking any step in furtherance of the prosecution of the plaintiff for offences under the Act. The defendants assert that the Act is valid, relying on the external affairs power and the defence power conferred on the Parliament respectively by s.51(xxix) and (vi) of the Constitution. The question reserved for consideration of the Full Court is as follows:

> "Is Section 9 of the War Crimes Act 1945 as amended, invalid in its application to the information laid by the second defendant against the plaintiff?"

That question is concisely drawn, but there is a more general question the answer to which may determine the answer to the question reserved and which is logically anterior to it. The more general question is this: is s.9 as amended invalid? Or, even more generally, is the Act as amended invalid? The last of these questions should be addressed first. To appreciate the respective arguments for and against the validity of the Act, it is necessary to construe its terms and to ascertain its operation.
1. The meaning and operation of the Act.

2. Section 9 of the Act purports to create a new offence. It reads as follows:

> " (1) A person who:
> (a) on or after 1 September 1939 and on or before 8 May 1945; and
> (b) whether as an individual or as a member of an organisation;
> committed a war crime is guilty of an indictable offence against this Act.
> (2) Sections 5 and 7, and paragraph 86 (1)(a), of the

S902

Crimes Act 1914 do not apply in relation to an offence against this Act."

The offence purportedly created by s.9 is a statutory offence, the elements of which are to be found in other sections of the Act that give a statutory meaning to the term "a war crime". But it is clear from the terms of s.9 itself that the acts which attract liability to conviction for the statutory offence are past acts. It is an offence that cannot now be committed, but it is an offence for which a person may be convicted by reason of past conduct. To be liable to conviction as for "an indictable offence against this Act" a person must have engaged in conduct of the prescribed kind - that is, conduct which answers the statutory definition of the term "a war crime" - during the period prescribed by par.(a) - that is, between 1 September 1939 and 8 May 1945 inclusive - and, when charged, be either:

"(a) an Australian citizen; or
(b) a resident of Australia or of an external Territory": s.11.

3. The term "a war crime" is defined by reference to another term: "a serious crime". Section 6 contains the definition of "a serious crime" and conduct which answers that definition is "a war crime" if it was committed in circumstances which are prescribed by s.7(1) or s.7(3). Section 6 reads as follows:

" (1) An act is a serious crime if it was done in a part of Australia and was, under the law then in force in that part, an offence, being:
(a) murder;
(b) manslaughter;
(c) causing grievous bodily harm;
(d) wounding;
(e) rape;
(f) indecent assault;
(g) abduction, or procuring, for immoral purposes;
(h) an offence (in this paragraph called the 'variant offence') that would be referred to in a preceding paragraph if that paragraph contained a reference to:
(i) a particular intention or state of mind on the offender's part; or
(ii) particular circumstances of aggravation;
necessary to constitute the variant offence;
(j) an offence whose elements are substantially the same as the elements of an offence referred to in any of paragraphs (a) to (h), inclusive; or
(k) an offence of:
(i) attempting or conspiring to commit;
(ii) aiding, abetting, counselling or procuring the commission of; or
(iii) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of;
an offence referred to in any of paragraphs (a) to (j), inclusive.
(2) In determining for the purposes of subsection (1) whether or not an act was, under the law in force at a particular time in a part of Australia, an offence of a particular kind, regard shall be had to any defence under that law that could have been established in a proceeding for the offence.
(3) An act is a serious crime if:
(a) it was done at a particular time outside Australia; and
(b) the law in force at that time in some part of Australia was such that the act would, had it been

5903

done at that time in that part, be a serious crime by virtue of subsection (1).

(4) The deportation of a person to, or the internment of a person in, a death camp, a slave labour camp, or a place where persons are subjected to treatment similar to that undergone in a death camp or slave labour camp, is a serious crime.

(5) Each of the following is a serious crime:

(a) attempting or conspiring to deport or intern a person as mentioned in subsection (4);

(b) aiding, abetting, counselling or procuring the deportation or internment of a person as so mentioned;

(c) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the deportation or internment of a person as so mentioned.

(6) For the purposes of subsections (3), (4) and (5), the fact that the doing of an act was required or permitted by the law in force when and where the act was done shall be disregarded."

The acts which, by force of s.6, are elements of the statutory offence may have been done during the prescribed period either in Australia (sub-s.(1)) or outside Australia (sub-s.(3)). If the relevant act was done inside Australia and if, under the law in force in that part of Australia at the time when the act was done, it amounted to any of the offences mentioned in sub-s.(1), the act answers the description of "a serious crime". If the act was done outside Australia but would have amounted to an offence of one of the kinds mentioned in sub-s.(1) had it been done at that time in some part of Australia by force of the law in that part, it is "a serious crime" for the purposes of sub-s.(3). The draftsman has not prescribed a particular Australian system of law to be the system to which reference must be made in determining, for the purposes of sub-s.(3), whether an act amounted to one of the offences mentioned. The consequence seems to be that, if an act, done within any part of Australia within the prescribed period, would have amounted to any of the offences mentioned under the law in force in that part of Australia at that time, the act is "a serious crime" for the purposes of s.6(3). Presumably, sub-s.(2) is material in determining whether an act done outside Australia would have amounted to one of the offences mentioned in sub-s.(1) had it been done in some part of Australia, though it is artificial to apply a municipal system of law designed for the preservation of the King's peace to acts done by or on behalf of belligerents in war.

4. An act which answers the description of "a serious crime" also answers the description of "a war crime" if it was done in circumstances defined by s.7. That section reads as follows:

" (1) A serious crime is a war crime if it was committed:

(a) in the course of hostilities in a war;

(b) in the course of an occupation;

(c) in pursuing a policy associated with the conduct of a war or with an occupation; or

(d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.

(2) For the purposes of subsection (1), a serious crime was not committed:

(a) in the course of hostilities in a war; or

(b) in the course of an occupation;

merely because the serious crime had with the hostilities or occupation a connection (whether in time, in time and place, or otherwise) that was only incidental or remote.

(3) A serious crime is a war crime if it was:

(a) committed:

(i) in the course of political, racial or

5904

religious persecution; or
(ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and
(b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation.
(4) Two or more serious crimes together constitute a war crime if:
(a) they are of the same or a similar character;
(b) they form, or are part of, a single transaction or event; and
(c) each of them is also a war crime by virtue of either or both of subsections (1) and (3)."

The term "war" in this section is not left at large; it is defined by s.5 to mean -

" (a) a war, whether declared or not;
(b) any other armed conflict between countries; or
(c) a civil war or similar armed conflict;
(whether or not involving Australia or a country allied or associated with Australia) in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945."

Section 7 thus has effect, so far as it relates to "war", to any armed conflict occurring in Europe during the same period as that prescribed by s.9(1)(a), whether the armed conflict involved Australia or not. The Commonwealth submitted that this section is to be read as importing by implication the requirement that the relevant conduct be a war crime or a crime against humanity by international law. This submission cannot be accepted. There is nothing in the framework of the Act which provides any foundation for implying an element which is not expressed. Although the suggested implied element would limit the exposure of persons to conviction, the Act expressly purports to deal with the requirements which, when added to the definition of "a serious crime", satisfy the element of "a war crime". As the preamble demonstrates, the Act was intended to provide for the bringing "to trial in the ordinary criminal courts in Australia" of "persons who committed serious war crimes in Europe during World War II", and ss.6 and 7 were the legislative expression of what were perceived to be war crimes of serious degree. There is no legislative indication that the words of s.7 should be read as importing into the definition of the term "a war crime" in s.9 the definition of a war crime at international law. A war crime in international law is a violation of the laws and customs of war. Those laws and customs limit the belligerents' choice of means of injuring enemy forces, controlling enemy prisoners of war and treating enemy civilians, but are silent as to acts which do not contravene those limitations. Sections 6 and 7 do not import those limitations. Indeed, the sections assume that any killing, not justified or excused under the general law applicable (ordinarily to civilians) in Australia during the prescribed period, would amount to culpable homicide.

5. To avoid so bizarre an operation of ss.6, 7 and 9, the draftsman introduced s.17(2) of the Act to confer immunity from conviction on persons whose acts, though falling within the category of "a war crime" as prescribed by ss.6 and 7, were, at the time when they were done, "permitted by the laws, customs and usages of war" and were then "not under international law a crime against humanity". Section 17 provides:

" (1) This section has effect for the purposes of a proceeding for an offence against this Act.
(2) Subject to section 16, it is a defence if the doing by the defendant of the act alleged to be the offence:

5905

(a) was permitted by the laws, customs and usages of war; and
(b) was not under international law a crime against humanity.
(3) To avoid doubt, the doing of the act by the defendant was permitted by the laws, customs and usages of war if it was reasonably justified by the exigencies and necessities of the conduct of war.
(4) The defendant is not entitled to rely on a defence under subsection (2) unless there is evidence of the existence of the facts constituting the defence.
(5) However, if there is such evidence, the onus of establishing, beyond a reasonable doubt, that those facts either do not exist or do not constitute the defence lies on the prosecution."

The practical operation of sub-ss.(4) and (5) of this section may be open to debate, but its substantive effect is clearly to introduce a modification to the relevant system of Australian municipal law. Section 17 has been inserted in an attempt to provide, under municipal law, some justification or excuse for some acts of belligerents in war - a justification or excuse not usually provided by municipal criminal law: see Brierly, The Basis of Obligation in International Law, (1958), pp 297-298. In due course it will be necessary to consider whether the provisions of the Act correspond with the provisions of international law but, in considering whether the Act incorporates international law into its definition of "a war crime", we must refer briefly at this stage to some of the rules of international law. Thus, in construing s.17, it is clear that the draftsman misunderstood the effect of the laws, customs and usages of war, for they give no permission for acts which would otherwise be forbidden; they simply forbid particular means of injuring enemy forces, controlling enemy prisoners of war or treating enemy civilians. Therefore, to give some effect to s.17(2)(a), "permitted by" must be read as meaning "not in contravention of". However, by reading s.17(2) in that way, any justification or excuse for "a serious crime" which was committed by a belligerent as a belligerent in time of war but which was not a violation of the law and customs of war must be found, if at all, in the relevant municipal law of a State or Territory. Yet the municipal law of the States and Territories contains no justification or excuse which might protect belligerents against liability to conviction for the deliberate killing of one who is not outside the protection of the municipal law. Alternatively, sub-s.2(a) might be read as having the precise meaning which sub-s.(3) attributes to it, so that a "defence" is available when the act charged was reasonably justified by the exigencies and necessities of the conduct of war and was not under international law a crime against humanity. In due course, it will be necessary to consider more precisely the meaning and effect of s.17(2) in order to ascertain whether it imports the elements of a war crime under international law. For the moment, it is sufficient to note that, once the reader is directed to the provisions of s.17, it is impossible to read ss.6 and 7 as though they impliedly imported international law to provide a definition of, or an element in the definition of, "a war crime" for the purposes of s.9.

6. The Act is drafted in language which not only bespeaks its turbulent legislative history but which rejects international law as the legal system by reference to which the elements of a war crime may be ascertained for the purposes of s.9. (In this respect, as we shall see, the Act reverses the operation of the original Act which provided for the application of international law to the trial of war criminals.) The Act invokes in the first place the several systems of municipal law in force in Australia at the time when the relevant act was done: s.6. Then, when a person is charged with the statutory offence, the reference in s.6 to the law in force "in a part of Australia" is supplemented by s.13(2) which reads as follows:

" Where a person is charged with an offence against this

Act, then, for the purposes of:
(a) determining whether a court of a State or internal Territory has jurisdiction in relation to the offence;
(b) an exercise of jurisdiction by such a court in relation to the offence;
(c) a proceeding connected with such an exercise of jurisdiction; and
(d) an appeal arising out of, or out of a proceeding connected with, such an exercise of jurisdiction;
this Act has effect, in relation to an act that is, or is alleged to be, the offence, as if:
(e) a reference in subsection 6(3) or section 18 to a part of Australia were a reference to that State or Territory; and
(f) without limiting subsection 6(2), all defences under the law in force in that State or Territory when the person is charged with the offence had been defences under the law in force in that State or Territory at the time of the act."

The supplementation of the legal system applicable by force of s.6 by the contemporary legal system of the place of trial is further modified by other provisions of the Act. Section 6(6) denies a defence of justification or excuse under the law of the place outside Australia where the relevant act was done. Not even the execution of judicial orders would, it seems, provide any justification or excuse for acts falling within s.6(3), (4) or (5). Then s.16 excludes the defence of superior orders. Section 16 reads:

" Subject to subsections 6(2) and 13(2), the fact that, in doing an act alleged to be an offence against this Act, a person acted under orders of his or her government or of a superior is not a defence in a proceeding for the offence, but may, if the person is convicted of the offence, be taken into account in determining the proper sentence."

Section 20 instructs the reader that ss.6(6) and 16 "are enacted to avoid doubt." Though s.20 indicates that ss.6(6) and 16 are not perceived by the Legislature to be statutory modifications of the applicable system of Australian municipal law, it is clear that s.17 is intended to have that effect.

7. From this review of the Act, it is clear that the elements of the statutory offence purportedly created by s.9 are to be found solely in the provisions of the Act itself and, except for the limited purposes of s.17, by reference to the municipal systems of law to which the Act refers. Indeed, s.8(2) and (3) are consistent only with that view. Section 8 reads:

" (1) Subject to subsection 7(2), nothing in section 6 or 7 limits the generality of anything else in that section.
(2) An act may be a serious crime by virtue of one or more of subsections 6(1), (3), (4) and (5), but not otherwise.
(3) A serious crime may be a war crime by virtue of either or both of subsections 7(1) and (3), but not otherwise.
(4) Two or more serious crimes may together constitute a war crime by virtue of subsection 7(4), but not otherwise."

8. The Act thus exposes to punishment by a court of a State or Territory exercising jurisdiction under municipal law any person who -

(a) being an Australian citizen or resident when charged with the offence;
(b) committed an act of the kind referred to in s.6;
(c) in Australia or outside Australia;
(d) between 1 September 1939 and 8 May 1945 (inclusive);
(e) in circumstances (defined in s.7) connected with any armed

5907

conflict in Europe between the dates mentioned, whether Australia was involved in that conflict or not;
(f) being an act that is not "permitted by" the laws, customs and usages of war or being under international law a crime against humanity.

It is immaterial that, when the relevant act was done, the person who did it was not then an Australian citizen or resident, that no Australian citizen or resident nor any person under or entitled to the protection of Australian law was the victim or likely victim, that the armed conflict in the course of which the act was committed did not involve Australia or that the act was lawful according to the laws of the place where the act was done at the time when it was done. Whether or not any relevant Australian interest was involved when the relevant act was done, it is sufficient for the purposes of the Act that the person who did the act has become an Australian citizen or an Australian resident. The Act is truly retrospective in its operation: that is to say, it attaches penalties under Australian municipal law to the doing of an act to which that penalty was not attached when the act was done. Under this Act, the plaintiff is charged with offences allegedly committed in 1942 and 1943 in the Ukraine during Germany's occupation of that territory. It is alleged that he wilfully killed a number of people in pursuit of German policies - either a policy of persecuting the Jewish people or those opposed to German policies or a policy of annihilating suspected partisans or communists. The plaintiff was not then an Australian citizen or resident.

9. If the allegations made in the charges be true, the plaintiff was guilty of heinous offences against the laws of the Ukraine and against the laws and customs of war but he is not charged with offences against the laws of the Ukraine nor, as we shall see, with offences against the laws and customs of war. He is charged with offences against the municipal law of Australia, created by s.9 of the Act. The validity of the Act depends upon the legislative power of the Parliament to create the offence defined by the Act and to vest jurisdiction in Australian courts to try persons charged with that offence. As the Act is retrospective in its operation, I assume the defendants would seek constitutional support for the Act not only in sub-ss.(vi) and (xxix) of s.51 but also in sub-s.(xxxix) of s.51 (the sub-section on which reliance was placed in R. v. Kidman (1915) 20 CLR 425 to support the retrospective criminal law that was there upheld). It will be convenient to consider first the various ways in which the external affairs power is said to support the Act.

2. The external affairs power.

10. The Constitution, by s.51(xxix), confers on the Parliament plenary legislative power with respect to external affairs, but the support given by the external affairs power to a particular law depends upon the identification of some relationship, set of circumstances or field of activity which falls within the description of "external affairs" and with which the law has a connection sufficient to satisfy the requirement imported by the words "with respect to" in s.51: Koowarta v. Bjelke-Petersen (1982) 153 CLR 168, at p 256.

11. The Commonwealth submits that the Act is supported by s.51(xxix) in a number of ways. First, the Act is said to be a law "with respect to things done outside Australia" and that a law "upon anything whatsoever done outside Australia" is supportable, "at least where there is a sufficient connection with Australia". Next, the Act is said to be a law enacted for purposes which attract the support of the power, the relevant purposes being identified as -

" (A) the discharge of an international obligation ...;
(B) the exercise of an international right ...;
(C) the meeting of an international concern; or
(D) the implementation of resolutions or recommendations

> of the United Nations General Assembly ('UNGA') or any other international body."

The first way in which the argument is put propounds the conduct in which individuals engage outside Australia as the relevant category of "external affairs" with which the Act is sufficiently connected. The next way in which the argument is put depends upon the international personality of Australia and propounds Australia's relationship with the community of nations as the relevant category of "external affairs". The two ways in which the argument is put call for separate consideration.

(i) External acts.

12. Put at its broadest, the Commonwealth's argument attributes to the external affairs power a scope which would empower the Commonwealth to pass a law affecting the doing of anything by anybody outside Australia: acts which are external to Australia are said to be external affairs and a law relating to any external acts is said to be a law with respect to external affairs. In New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") (1975) 135 CLR 337, Barwick C.J. said, at p 360:

> "The (external affairs) power extends, in my opinion, to any affair which in its nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole."

A wide view of the power was also taken by Mason, Jacobs and Murphy JJ. (at pp 470-471, 497, 503). In Koowarta, Mason J. said (at p 223) that "'external affairs' covers any matters or concerns external to Australia." In the contexts in which these observations were made, no question arose as to the connection between Australia and the extraterritorial person, thing or event to which the particular Commonwealth law applied. Australia's connection with its maritime boundaries in the one case and with its treaty obligations in the other was manifest. But it is argued that, although there must be some connection between the extraterritorial operation of a State law and the extraterritorial persons, things or events on which a State law operates (Port MacDonnell Professional Fishermen's Assn Inc. v. South Australia (1989) 168 CLR 340, at p 372), no such connection is required in the case of a Commonwealth law. If such a connection were required, so the argument runs, there would be a lacuna in the plenitude of legislative powers which the Australian legislatures, Commonwealth and State, together possess: see per Jacobs J. in the Seas and Submerged Lands Case, at p 497. But the powers conferred by the Constitution are not to be expanded beyond their true scope merely to supply what is thought, from the public viewpoint, to be a desirable or convenient power. Limits on power are the measure of private immunity from legislative action by the State. The legislative powers of the Parliament are limited by the terms of the Constitution, and the connotation of the phrase "external affairs" must be ascertained from its context and purpose. Accepting fully that s.51(xxix) is not to be narrowly construed (The Commonwealth v. Tasmania. The Tasmanian Dam Case (1983) 158 CLR 1, at pp 220-221), nevertheless the power thereby conferred is limited. Although the phrase "for the peace, order, and good government of the Commonwealth" itself contains no territorial limitation (Reg. v. Foster; Ex parte Eastern and Australian Steamship Co.Ltd. (1959) 103 CLR 256, at pp 300-301, 307-308), it does not expand the connotation of the phrase "External affairs" in s.51(xxix). Just as the power conferred by s.51(xxvii) "remains a power to make laws with respect to immigration into and emigration from Australian territory", as Menzies J. pointed out in Reg. v. Foster (at p 301), so the power conferred by s.51(xxix) remains a power to make laws with respect to Australia's external affairs. I do not understand the phrase "external affairs" to sweep into Commonwealth power every person who exists or every relationship, set of circumstances or field of activity which exists or occurs outside Australian territory. The "affairs" which are the subject matter of the power are, in my view, the external affairs of Australia; not affairs which have nothing to do with

Australia. Although affairs which exist or occur outside Australia may be described as "external" in a geographical sense, I would not hold that the Constitution confers power to enact laws affecting affairs which, though geographically external, have nothing to do with Australia. There must be some nexus, not necessarily substantial, between Australia and the "external affairs" which a law purports to affect before the law is supported by s.51(xxix).

13. It may be that this view of the scope of the external affairs power corresponds with the legislative competence of Australia as recognized by international law. The internationally recognized competence of a domestic legislature is illustrated by "Le Louis" (1817) 2 Dods.210 (165 E.R.1464), a case in which a question arose as to the limits of domestic legislative power under international law. In proceedings for the condemnation of a French ship for being employed in the slave trade, the seizors sought to rely upon a British statute which made the slave trade illegal. At that time, slavery was not illegal by the law of nations and it was held that "(t)he Legislature must be understood to have contemplated all that was within its power, and no more" (at p 254 (p 1479)). Although the power of the Legislature to enact extraterritorial legislation was not denied, it was acknowledged that, by the law of nations, the plenitude of legislative power claimed by the United Kingdom Parliament would not be recognized internationally where there was no occasion for its exercise. The general terms of the statute were construed in accordance with the limits recognized by international law. However, the correspondence between the scope of the power conferred by s.51(xxix) and that recognized by the law of nations is not a question which we have to decide in this case. The scope of the constitutional power is not determined by the law of nations, much less by international opinion as to Australia's connection with a particular subject matter. We are here concerned solely with the limits of a power conferred by the Constitution. The recent cases relating to s.51(xxix) show that the power thereby conferred enables the Commonwealth to legislate for the purpose of discharging the responsibilities and asserting to the full the interests of Australia as an independent member of the community of nations: the Seas and Submerged Lands Case; Koowarta; The Tasmanian Dam Case; Gerhardy v. Brown (1985) 159 CLR 70; Richardson v. Forestry Commission (1988) 164 CLR 261; Mabo v. Queensland (1988) 166 CLR 186. It is a plenary power exercisable as well in protection of Australia's international interests as in performance of its international obligations. But s.51(xxix) does not arm the Commonwealth with power to enact laws governing affairs outside Australia with which Australia has no connection. It is, of course, for the Parliament to determine in the first instance whether there is any connection between Australia and a relationship, set of circumstances or field of activity which exists or occurs outside Australia and which a proposed law would purportedly affect, but, if the legislative judgment cannot reasonably be supported, the law will be held to be outside the power conferred by s.51(xxix): see Richardson, at p 296; Gerhardy v. Brown, at p 139. It leaves no great lacuna in the plenitude of Australian legislative power to deny the character of a law with respect to external affairs to a law which does no more than affect something or somebody unconnected with Australia occurring or existing outside Australia. To take an extreme example: would a law be properly characterized as a law with respect to external affairs if it imposed a criminal penalty on a person who, being a citizen and resident of France, had dropped litter in a Parisian street forty years ago? The limits of the power conferred by s.51(xxix) are, in a real sense, a guarantee of the immunity from harassment by Australian law of persons who, having no connection with Australia, engage in conduct elsewhere which does not affect Australian interests or concerns.

14. The requirement of some connection between Australia and the relationship, set of circumstances or field of activity affected by a law is

5910

satisfied when the law purports to control extraterritorial conduct engaged in by Australian citizens or residents (whether natural or corporate) or by persons who are under or are entitled to the protection of Australian law. The extraterritorial conduct of such persons is an aspect of Australia's external affairs. Equally, the requirement of connection is satisfied when the law, in protection of the interests of any such persons, purports to prohibit conduct engaged in by others outside Australia. The external protection of the interests of those under the protection of Australian law, wherever those interests might be located, is another aspect of Australia's external affairs. A law governing conduct of the kinds referred to in this paragraph answers the description of a law with respect to Australia's external affairs.

15. However, the Act does not purport to affect the conduct of Australian citizens or residents outside Australia. It does not attach any penalty to conduct in which any such person might engage outside Australia. The conduct which is made a condition of present liability to conviction is past conduct of the kinds prescribed by the Act which occurred during the prescribed period, being conduct that was engaged in by any person. It is immaterial to liability whether the victims of any such conduct were under the protection of Australian law. If it be said that the Act bears the character of a law with respect to the "serious crimes" which fall within s.7(1) or s.7(3), the question is whether those crimes, at the time when they were committed, were then an aspect of Australia's external affairs. Nothing in the Act suggests that a serious crime falling within s.7(1) or 7(3) must be an aspect of Australia's external affairs. The Act does not prescribe as an element of conduct answering the description of "a war crime" anything which connects Australia with that conduct at the time it was engaged in. The element which at first sight may seem to provide some contemporaneous nexus between "a war crime" in s.9 and Australia is the definition of "war" in s.5, for Australia was involved in the European war between 3 September 1939 and 8 May 1945. But, apart from the difference in the commencing date of the prescribed period, the definition of "war" in s.5 rejects Australia's involvement in the Second World War as a necessary element in the definition, for the definition is satisfied by any armed conflict "(whether or not involving Australia or a country allied or associated with Australia)". If conduct of the prescribed kind which occurred during the prescribed period was not then an aspect of Australia's external affairs, a fortiori it could not have been an aspect of Australia's external affairs when the Act came into operation on 25 January 1989. Nearly forty-four years had passed between 8 May 1945 and the date when the Act came into operation. Unless Australia's external relations were affected by unpunished "serious crimes" committed more than forty-four years earlier (a question presently to be examined) I am unable to see how an act by an individual in the course of any European armed conflict occurring between 1 September 1939 and 8 May 1945 could be regarded, without more, as an aspect of Australia's external affairs in 1989.

16. If "a serious crime" committed by an individual forty-four or more years earlier answering the statutory description of "a war crime" was not itself an aspect of Australia's contemporary external affairs before 8 May 1945, does it make any difference to the character of the Act that the only persons who are liable to conviction must now be Australian residents or citizens? The Act, as we have seen, is a retrospective law which attaches penal consequences to conduct engaged in before the law was made. If the Parliament has power to enact a law which prohibits Australian residents and citizens from engaging in particular conduct outside Australia in future, does it have power to enact a law which exposes to conviction Australian residents and citizens who have engaged in particular conduct in the past? Were the Act restricted in its application to persons who were Australian residents or citizens at the time when "a war crime" was committed, it would be strongly arguable, on the

authority of Kidman, that the Act is supportable under s.51(xxxix) as a retrospective law with respect to the conduct of Australian residents and citizens overseas. In Kidman, a majority of this Court upheld the validity of a law deeming past conduct in defrauding the Commonwealth to be criminal and imposing penal consequences. By analogy, it could be argued that the extraterritorial commission of "a war crime" by Australian residents and citizens was, at that time, an aspect of Australia's external affairs and the retrospective imposition of a criminal penalty on them for engaging in that conduct is simply an exercise of the incidental power which empowers the Parliament to make retrospective laws to punish conduct that was at all material times a subject of legislative power. It is unnecessary in the present case to determine whether, if the Act had retrospectively created an offence which only persons who were Australian citizens or residents at the time could have committed, the Act might have been supported on the authority of Kidman. It is common ground that, at the times of the alleged occurrences of the acts charged against the plaintiff, the plaintiff had no connection with Australia and was not then either a citizen or a resident of Australia. He subsequently became and is now an Australian citizen and a resident of the State of South Australia. Does his becoming a citizen and resident of Australia transform his earlier conduct into an aspect of Australia's external affairs?

17. In answering this question, I again put to one side the argument that Australia's international relations constitute the aspect of Australia's external affairs that enlivens the legislative power in s.51(xxix) and supports the enactment of the Act. The argument which I now address is the argument that extraterritorial conduct, without more, has a sufficient connection with Australia to enliven the external affairs power if the person who engaged in that conduct subsequently becomes an Australian citizen or resident.

18. If it be right to say that the external affairs which may enliven legislative power under s.51(xxix) are affairs with which Australia has some connection, the scope of the power may alter from time to time as an Australian connection with particular relationships, sets of circumstances or fields of activity comes into existence or disappears. Like the defence power (see, for example, Hume v. Higgins (1949) 78 CLR 116, at pp 133-136), the scope of the external affairs power must be affected by the international conditions prevailing at the material time. It follows that, if there was no power to prohibit conduct outside Australia by a person who was not a citizen or resident at the time when the conduct was engaged in because that conduct was not an aspect of Australia's external affairs, the subsequent acquisition of Australian citizenship or residence cannot make that conduct an aspect of Australia's external affairs unless there be some international relationship which requires Australia to impose on a person who becomes a citizen or resident a penalty or liability for that conduct. There is no logical or legal reason why a power to forbid extraterritorial conduct engaged in by an Australian citizen or resident - which is an aspect of Australia's external affairs - should be expanded to a power to attach a penalty to persons for engaging in conduct which was not an aspect of Australia's external affairs unless, perhaps, the attaching of such a penalty (as distinct from the conduct) is itself required to satisfy Australia's international relations.

19. If the law would have been beyond power had it been in force when the relevant conduct was engaged in, the power cannot now be enlarged by retrospective legislation. Legislative power cannot be exercised retrospectively to transform a relationship, set of circumstances or field of activity which was not an aspect of Australia's external affairs when it existed or occurred into an aspect of Australia's present external affairs. A law cannot create the facts which condition the power needed for its own

support. A purported exercise of a legislative power cannot itself enliven the power to be exercised.

20. Australian citizenship or residence in Australia is not a solvent of responsibility for crimes committed elsewhere; Australia's extradition obligations are discharged and its deportation powers are exercised in order to ensure that this country does not become an Alsatia for criminals from overseas. But the mere acquisition of Australian citizenship or residence in Australia does not transform earlier extraterritorial conduct that was not a matter of Australia's external affairs when it was engaged in into a matter of Australia's external affairs. Something more is needed to make transgressions of other laws in other places in other times an aspect of Australia's external affairs. It follows that, in my opinion, the Act cannot be supported as a law with respect to external affairs if no more than conduct answering the description of "a war crime" as that term is used in s.9 is relied on as the relevant aspect of external affairs; nor can the Act be so supported if, in addition to that conduct, the subsequent acquisition of Australian citizenship and residence is relied on to constitute the relevant aspect of external affairs. The Commonwealth did not submit that the Act is supportable as a law with respect to immigration, citizenship or the influx of criminals.

21. I pass now to a consideration of a more substantial argument, namely, that the external affairs power supports the Act because Australia's international relationships require or permit it to attach liability to criminal conviction to any person who has committed an act which amounts to "a war crime" as that term is used in s.9.

(ii) International relations.

(a) International obligation or concern and the right to try.

22. The Commonwealth submits that the Act discharges an international obligation or meets an international concern that persons alleged to be guilty of war crimes and crimes against humanity be sought out, brought to trial and, upon conviction, punished, irrespective of the place where the crime was committed or where the alleged offender is found and irrespective of the citizenship or residence of the alleged offender or the victim. The propounded matter of international obligation or international concern is not stated merely in terms of seeking out and punishing persons guilty of war crimes and crimes against humanity. A process of trial is concededly an integral part of the postulated obligation or concern. Therefore, the postulated international obligation or matter of international concern is that the guilt of an alleged criminal be ascertained by a court of competent jurisdiction administering a system of law which creates or recognizes the crime with which the alleged criminal is charged. The international instruments relating to the punishment of war criminals have uniformly contemplated trials according to law. In 1942, the Declaration of St. James placed among the main goals of war the punishment, "through the channels of organized justice", of war criminals. In 1943, the Moscow Declaration declared that those responsible for or taking part in atrocities, massacres and mass executions would be "sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein." That Declaration was echoed by a unanimous recommendation of the United Nations General Assembly in Resolution 3(I) of 13 February 1946 which was reaffirmed by Resolution 170(II) of 31 October 1947. The latter resolution "(r)easserts that trials of war criminals and traitors, like all other trials, should be governed by the principles of justice, law and evidence." Then, following a series of further resolutions, the General Assembly declared on 3 December 1973 (Resolution 3074(XXVIII)) that, inter alia -

" 5. Persons against whom there is evidence that they have

committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes. In that connexion, States shall co-operate on questions of extraditing such persons."

The problem of statutory limitations on the prosecution of war crimes had been the subject of a United Nations Convention in 1968 but most members of the Council of Europe found that Convention unacceptable because of its broad definition of "crimes against humanity". A European Convention, drawn more narrowly, was signed in 1974 calling on each Contracting State to lift time limitations on the prosecution of certain war crimes and genocide punishable "under its domestic law" committed after the particular State ratified or acceded to the Convention or prior to that time if the limitation period had not then expired.

23. There can be no doubt but that, at least until 1974, there was a widespread desire expressed by the community of nations that the Axis perpetrators of war crimes during the Second World War should be apprehended, tried and, if found guilty, punished. Later evidence of this desire is meagre, though an agreement between the United States and the Union of Soviet Socialist Republics in 1989 relating to co-operation in investigating such war crimes suggests that some countries have continued the pursuit of war criminals. Although the instruments abovementioned gave jurisdictional priority to the courts of the States in whose territories the crimes were committed, there was also a general recognition that some crimes are international and are amenable to the jurisdiction either of international tribunals or of the courts of any State into whose hands the alleged criminal might fall.

24. The Charter of the International Military Tribunal for the Prosecution and Punishment of the Major War Criminals (the Nuremberg Tribunal) which was attached to an Agreement dated 8 August 1945 between the major Allied Powers for the Prosecution and Punishment of the Major War Criminals of the European Axis contained a list of recognized war crimes in Art.6(b). By its Resolution 95(I) of 11 December 1946, the General Assembly of the United Nations reaffirmed "the principles of international law recognized by the Charter of the Nurnberg Tribunal and the judgment of the Tribunal". Subsequent resolutions of the General Assembly or of the Economic and Social Council of the United Nations requested member States to ensure that "in accordance with international law and national laws, the criminals responsible for war crimes and crimes against humanity are traced, apprehended and equitably punished by the competent courts" (ECOSOC Resolution 1074D(XXXIX) of 28 July 1965). Moreover, each of the Geneva Conventions of 1949 prescribed a number of "grave breaches" which might be committed against persons or property protected by that Convention and contained a common provision in these terms:

" The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case."

(See Art.49, Geneva Convention I; Art.50, Geneva Convention II; Art.129,

5914

Geneva Convention III; Art.146, Geneva Convention IV.)

25. These instruments establish that the trial and punishment of war crimes was, at least for many years after the Second World War, a matter of serious international concern and has become, under the Geneva Conventions, a matter of treaty obligation. In its Resolution 2712(XXV) of 15 December 1970, the General Assembly of the United Nations recognized that war crimes and crimes against humanity were still being committed, and requested States to take appropriate action to bring war criminals and persons guilty of crimes against humanity to justice. Yet Australia, in common with most other nations, failed for many years to respond to that request.

26. The primary question on this branch of the case is whether the material relied on establishes that in 1989 there was either an obligation under customary international law or a matter of international concern that war criminals from the pre-1945 years be sought out and tried for their offences. As the sources of the postulated obligation and of the postulated concern are the same, there is no difference in content between the obligation and the concern. There are no relevant treaty obligations. The treaty obligations imposed by the Geneva Conventions of 1949 were not retrospective. The legislative obligations accepted by Australia under those Conventions were fulfilled by the Geneva Conventions Act 1957 (Cth) which substantially translated the Convention provisions into Australian municipal law. Although the material demonstrates that there was a widespread aspiration that the war criminals of the Axis powers should be brought to justice after the Second World War and although that aspiration was repeated in a series of resolutions in the UNGA and in the Economic and Social Council, the practice of States in the community of nations does not reveal a widespread exercise of jurisdiction to try alleged war criminals for extraterritorial war crimes. European States have exercised jurisdiction in respect of war crimes committed in their respective territories, but Israel and Canada are the only States which have asserted jurisdiction to try alleged war criminals in respect of extraterritorial war crimes.

27. To determine whether, in these circumstances, there exists a customary law obligation to try alleged war criminals in respect of extraterritorial war crimes, it is necessary to refer to the sources of international law. Article 38(1) of the Statute of the International Court of Justice is generally regarded as a complete statement of the sources of international law: Brownlie, Principles of Public International Law, 4th ed. (1990), p 3. It provides:

> " The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilized nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

28. In the absence of international conventions, the custom required to evidence "a general practice accepted as law" must be "extensive and virtually uniform" (North Sea Continental Shelf Cases (1969) I.C.J.R.1, at p 43) and "followed on the basis of a claim of right and, in turn, submitted to as a

5915

matter of obligation" (MacGibbon, "Customary International Law and Acquiescence", (1957) XXXIII The British Year Book of International Law 115, at p 117). In Nicaragua v. United States of America (1986) I.C.J.R.14, the International Court of Justice accepted (at p 98) that it is "sufficient that the conduct of States should, in general, be consistent with" a postulated rule of international law, but that was a view expressed in conjunction with an inquiry whether there was an opinio juris as to the binding character of the postulated rule (see pp 99-101). An opinio juris supportive of a postulated rule of customary international law must explain and inform the practice of States in order to show that that practice is "accepted as law". The principle is conveniently stated by Dr Akehurst's summary of his article "Custom as a Source of International Law", (1974-1975) XLVII The British Year Book of International Law 1, at p 53:

> " Opinio juris is necessary for the creation of customary rules; State practice, in order to create a customary rule, must be accompanied by (or consist of) statements that certain conduct is permitted, required or forbidden by international law (a claim that conduct is permitted can be inferred from the mere existence of such conduct, but claims that conduct is required or forbidden need to be stated expressly). It is not necessary that the State making such statements believes them to be true; what is necessary is that the statements are not challenged by other States."

In the present case, there is no evidence of widespread State practice which suggests that States are under a legal obligation to seek out Axis war criminals and to bring them to trial. There is no opinio juris supportive of such a rule.

29. Although there be no obligation in international law to which reference might be made in support of the validity of the Act, the external affairs power is not restricted to the support of laws passed to fulfil international treaty obligations (Richardson, at p 289) or to fulfil other obligations under customary international law. It has been recognized that the power may be enlivened by circumstances which do not give rise to an obligation under international law: The Tasmanian Dam Case, at pp 129-132, 171-172, 222, 258-259. Those circumstances have been said to be sufficient if they reveal that the subject matter of the law is a matter of "international concern". The reason why matters of international concern enliven the power was explained by Stephen J. in Koowarta, at p 217:

> "A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'."

30. It is clear that the term "international concern" possesses no very precise meaning, for it may cover a diverse multitude of topics. However, its meaning cannot carry the external affairs power beyond the fulfilment of the purpose for which it was conferred. The Constitution summoned into existence a new Commonwealth that was to take its place among the nations of the world and, in the fulness of time, to act and to be seen to be acting independently of the Imperial Government. The Commonwealth was equipped not only with executive power, so that its voice might be heard and its actions might be seen by the international community, but with legislative power, so that the Commonwealth might ensure that our municipal laws were conducive to the discharge of our international duties and the effective assertion of our international rights. As treaty obligations and other obligations in international law possess the capacity to affect Australia's relations with other countries, those obligations are a matter of international concern, but not every subject of international dialogue or even of widespread international aspiration has the capacity to affect Australia's relations.

One purpose of the external affairs power is to furnish the Commonwealth with legislative authority to ensure that Australia acts in accordance with standards expected of and by the community of nations, even though those standards are not, or have not yet achieved the status of, obligations in international law. The observation of those standards may rightly be regarded as a matter of international concern. However, unless standards are broadly adhered to or are likely to be broadly adhered to in international practice and unless those standards are expressed in terms which clearly state the expectation of the community of nations, the subject of those standards cannot be described as a true matter of international concern. It may be that there are few occasions when the external affairs power is enlivened by the existence of a matter of international concern without a corresponding obligation in international law, but whether the enlivening factor be an obligation or a concern it is necessary to define it with some precision in order to ascertain the scope of the power. Understanding the notion of international concern in this way, the relationship between obligation and concern can be perceived - a relationship which requires elucidation in order to answer the question asked by Dawson J. in Richardson, at pp 322-323:

> "... if international concern is the touchstone, why is a treaty necessary at all? Why is international concern over a matter not sufficient of itself to bring it within the external affairs power?"

It would be erroneous to attribute a scope to the external affairs power which depended on the broadest meaning which could be given to the imprecise phrase "international concern": that phrase is not a constitutional text and it is used to indicate that the power relates to matters affecting Australia's external relations even if those matters are not obligations under international law.

31. In the present case, the postulated matter of international obligation or concern is not simply the punishment of war criminals but the seeking out, bringing to trial and punishment of war criminals. In my view, the material relied on to establish that Australia is or was obliged to take steps now to bring to trial in Australia suspected war criminals from the Second World War fails to do so, but the material does establish that the apprehension and prosecution of war criminals from the Second World War before international tribunals or before courts of the country in which the crimes were committed were matters of international concern for many years after 1945. Whether those matters were still of international concern in 1989 may be doubted. There is insufficient material to show that the apprehension and trial of such war criminals before courts of countries other than those in which the crimes were committed were ever matters of international concern.

32. However, I need not and I do not rest my judgment on this view for there is a further argument which depends simply on the existence of a universal jurisdiction to try international crimes. In the way in which this argument was first put by the Commonwealth, the Act was said to be a law adapted and appropriate to the exercise of a right which international law specially confers on each nation to try those charged with the commission of international crimes, especially war crimes. At first, the submission made by the Commonwealth identified the right to try as a right to try allegations of guilt of crimes defined by international law, albeit that definition was adopted by municipal law and applied as such.

33. Although the terminology which equates universal jurisdiction with a right might be open to question, I would hold that a law which vested in an Australian court a jurisdiction recognized by international law as a universal jurisdiction is a law with respect to Australia's external affairs. Australia's international personality would be incomplete if it were unable to exercise a jurisdiction to try and to punish offenders against the law of

nations whose crimes are such that their subjection to universal jurisdiction is conducive to international peace and order. As the material drawn from international agreements and UNGA resolutions acknowledges, international law recognizes a State to have universal jurisdiction to try suspected war criminals whether or not that State is under an obligation to do so and whether or not there is any international concern that the State should do so.

34. Even if there were an international obligation or concern as postulated by the Commonwealth, its content must be this: that States should try war criminals in exercise of their universal jurisdiction to do so, for there is nothing to suggest that the postulated obligation or concern was to be satisfied or met by a trial in exercise of a jurisdiction which is not conferred by international law.

35. A municipal law which provides for the exercise of a universal jurisdiction recognized by international law must prescribe an appropriate system of law by which to try an alleged criminal and an appropriate court to exercise jurisdiction in the case. The present argument thus raises for consideration two questions: 1. what system of law does the community of nations recognize as applicable to the creation and definition of war crimes and crimes against humanity? and 2. what courts are recognized to possess universal jurisdiction to apply the relevant system of law?

36. International law recognizes certain international crimes in respect of which any country may exercise criminal jurisdiction regardless of the citizenship or residence of the alleged offender or of the place where the offence was committed: Halsbury's Laws of England, 4th ed., vol.18, par.1529; Professor Green, "International Crimes and the Legal Process", (1980) 29 International and Comparative Law Quarterly 567, at p 568. Brownlie, op cit, p 305, states the principle in this way:

> "It is now generally accepted that breaches of the laws of war, and especially of the Hague Convention of 1907 and the Geneva Convention of 1949, may be punished by any state which obtains custody of persons suspected of responsibility. This is often expressed as an acceptance of the principle of universality, but this is not strictly correct, since what is punished is the breach of international law; and the case is thus different from the punishment, under national law, of acts in respect of which international law gives a liberty to all states to punish, but does not itself declare criminal."

Piracy is an older example of a crime under international law as war crimes now are. Indeed, one author has described war crimes as "international crimes par excellence" (Van den Wijngaert, "War Crimes, Crimes Against Humanity, and Statutory Limitations" in Bassiouni (ed.), International Criminal Law, vol.3, (1987), p 91). In In re List (Hostages Trial) (1948) 15 Annual Digest 632, at p 636, the United States Military Tribunal sitting at Nuremberg said:

> " An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances. The inherent nature of a war crime is ordinarily itself sufficient justification for jurisdiction to attach in the courts of the belligerent into whose hands the alleged criminal has fallen."

37. A war crime in international law consists in a violation of those laws and customs of war - "breaches of the laws of war" as Brownlie calls them - which oblige belligerents to abstain from prescribed anti-humanitarian acts in

5918

the waging of armed conflicts. The laws and customs of war are prohibitory in nature; they do not authorize the use of force. M.W. Mouton, the Netherlands Representative on the United Nations War Crimes Commission, writing on "War Crimes and International Law" in Grotius International Yearbook (1940-1946), said (at p 59):

> " The laws and customs of war never justify any killing, on the contrary they limit the right as to the choice of means of injuring the enemy (Hague regulations art. 22); forbid unnecessary cruelty and acts of barbarity against the enemy, limit the evils of war and unnecessary suffering and protect the civil population of an occupied country (see the preamble of the Hague regulations) and try to make lasting peaceful relations after the hostilities possible.
> Killing is not punishable in the course of combat. But killing is the form of execution between parties who have taken the 'law' into their own hands for want of a court or a judge. The laws and customs of war are the procedural rules about this execution, laying down e.g. that torture is not allowed, that killing should be limited to armed combatants in action."

The prohibitory nature of the laws and customs of war is illustrated by Art.22 of the Hague Regulations of 1907 which provides:

> " The right of belligerents to adopt means of injuring the enemy is not unlimited."

War crimes, being violations of the laws and customs of war, thus consist in acts which transgress the limitations imposed by those laws and customs. Such transgressions are universally condemned and are internationally recognized as crimes which can be tried according to international law by the courts of any nation into whose hands the offender falls. The same national competence was recognized in relation to the offence of piracy, as the Privy Council observed in In re Piracy Jure Gentium (1934) AC 586, at p 589:

> " With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of the criminals, are left to the municipal law of each country. But whereas according to international law the criminal jurisdiction of municipal law is ordinarily restricted to crimes committed on its terra firma or territorial waters or its own ships, and to crimes by its own nationals wherever committed, it is also recognized as extending to piracy committed on the high seas by any national on any ship, because a person guilty of such piracy has placed himself beyond the protection of any State. He is no longer a national, but 'hostis humani generis' and as such he is justiciable by any State anywhere".

Their Lordships' statement that recognition of crimes as defined by international law is "left to the municipal law of each country" should not be understood to mean that international law accepts whatever definition of an international crime the municipal law may contain. Rather, what is left to municipal law is the adoption of international law as the governing law of what is an international crime. So much appears from the judgment of Judge Moore (dissenting, but not on this point) in The S.S. Lotus (1927) 2 W.C.R.20, at p 69:

> "in the case of what is known as piracy by law of nations, there has been conceded a universal jurisdiction, under which the person charged with the offence may be tried and punished by any nation into whose jurisdiction he may come. I say 'piracy by law of nations', because the municipal laws of many States denominate and punish as 'piracy' numerous acts which do not constitute piracy by law of nations, and

5919

> which therefore are not of universal cognizance, so as to be punishable by all nations.
>
> Piracy by law of nations, in its jurisdictional aspects, is sui generis. Though statutes may provide for its punishment, it is an offence against the law of nations; and as the scene of the pirate's operations is the high seas, which it is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as the enemy of all mankind - hostis humani generis - whom any nation may in the interest of all capture and punish."

The universal jurisdiction to try war criminals is a jurisdiction to try those alleged to have committed war crimes as defined by international law: see Simons, "The Jurisdictional Bases of the International Military Tribunal at Nuremberg" in Ginsburgs and Kudriavtsev (eds), The Nuremberg Trial and International Law, (1990), pp 48-49. But jurisdiction under municipal law to try a municipal law offence which is similar to but not identical with an international crime is not recognized as a jurisdiction conferred or recognized by the law of nations. Professor Green, op cit, p 571, comments:

> "If a country introduces legislation describing some offence under its own criminal law as constituting, for example, piracy, and includes within that term offences which do not strictly fall within the international law definition, then that law can only be invoked to establish jurisdiction against nationals or residents of the country in question, a principle that was made crystal clear by Lord Stowell in his decision in the Le Louis in 1817, and the situation is the same, even if the offence so described were to constitute an international crime under some other name or concept. Equally, if a country uses in its national criminal law a definition that only partly meets the conditions of international law, especially if the offence in question has been defined in a treaty, the courts of that country would only be entitled to try those whose actions fall within its own definition, although it might well be that the country concerned might have breached its international obligations by adopting so narrow a definition."

38. However, when municipal law adopts the international law definition of a crime as the municipal law definition of the crime, the jurisdiction exercised in applying the municipal law is recognized as an appropriate means of exercising universal jurisdiction under international law. Brownlie, op cit, p 561, states the position thus:

> " Since the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals. These tribunals exercise an international jurisdiction by reason of the law applied and the constitution of the tribunal, or, in the case of national courts, by reason of the law applied and the nature of jurisdiction (the exercise of which is justified by international law)."

The jurisdiction of the courts of the United States to try cases of international crime was founded on the application by municipal courts of international law. Thus, in an early American case (United States v. Smith (1820) 5 Wheat.153, noted in the report of The Magellan Pirates (1853) 1 Sp Ecc and Ad 81, at pp 90-91 (164 ER 47, at pp 52-53)), the Supreme Court of the United States held that American common law "recognises and punishes piracy as

an offence, not against its own municipal code, but as an offence against the Law of Nations (which is part of the Common Law), as an offence against the universal law of society; a pirate being deemed an enemy of the human race." In that case and in Ex parte Quirin (1942) 317 US 1, the Court spoke in terms which suggested that the courts of the United States applied international law directly as part of the municipal law of the United States. Thus in Ex parte Quirin, at pp 27-28, the Court said:

> " From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals."

In In re Yamashita (1946) 327 US 1, the Court, speaking in more guarded language, observed (at p 16) that -

> " We do not make the laws of war but we respect them so far as they do not conflict with the commands of Congress or the Constitution."

(Cf. Art.I, s.8, cl.10 of the United States Constitution which confers on the Congress power "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations".)

39. International law distinguishes between crimes as defined by it and crimes as defined by municipal law and it makes a corresponding distinction between jurisdiction to try crimes as defined by international law and jurisdiction to try crimes as defined by municipal law. Professor Lauterpacht ("The Law of Nations and the Punishment of War Crimes", (1944) XXI The British Year Book of International Law 58, at pp 65-67) held the opinion that the law which must be applied in connection with the prosecution and punishment of war criminals is primarily the law of nations and that, by applying the law of nations, municipal legislation providing for the trial of war criminals avoids the reproach of retroactivity and breach of the principle nullum crimen sine lege. He wrote:

> "Once it is realized that the offenders are being prosecuted, in substance, for breaches of international law, then any doubts due to inadequacy of the municipal law of any given State determined to punish war crimes recede into the background. There is in this matter no question of any vindictive retroactivity arising out of the creation of crimes of which the accused could not possibly be cognizant. There is even no question of procedural retroactivity by subjecting him to a foreign jurisdiction in defiance of established law and principles. The law of Great Britain, of the United States, and of many other States, does not, as a rule, recognize the competence of national courts in respect of criminal acts committed by aliens abroad. But there would be no question of any retroactivity, contrary to justice and to established principles of law, if Great Britain were to alter her law so as to enable her tribunals, civil or military, whether functioning in Great Britain or abroad, to assume jurisdiction over German nationals who committed in Germany criminal offences against British prisoners of war or British civilians in circumstances not authorized by international law.
>
> It would thus appear that there is no novelty about the principle that a belligerent is entitled to punish such perpetrators of war crimes as fall into his hands; that that principle, far from being a mere assertion of power, grudgingly assented to by international law, on the part of the fortunate belligerent is, in turn, grounded in the fact of recognition by international law of the jurisdiction of

5921

States based on the territorial and cognate principles as well as in the fact that in punishing war criminals the belligerent applies and enforces, in essence, the rules of the law of nations which are binding upon the individual members of the armed forces of all belligerents; and that there is no question of any retroactive application of the law from any material point of view."

40. In the Netherlands, war crimes committed by the occupying forces of Germany during the Second World War were, for a time after the War, prosecuted under municipal laws. This procedure, like the procedure contemplated by the Act, required some consideration of the relationship between international law and municipal law. A Special Court of Cassation refused to apply the municipal law of manslaughter to the trial of Ahlbrecht (1946-1947) - see Mouton, op cit, p 54 - an alleged war criminal who had been convicted and sentenced to death by the Special Court at Arnhem. The Special Court of Cassation was of the view that an army in occupation of foreign territory brings its own penal code, courts martial and penal procedure with it, but the members of the occupying forces may be brought to trial at the cessation of hostilities for violations of the laws and customs of war. The Court's judgment continued:

"however this conclusion in no way implies that as the Netherlands law now stands the Netherlands judge already possesses legal competence over enemy war criminals; ... for this, more is necessary, namely that the Netherlands judge can either directly apply an international agreement brought about to this effect with the co-operation of the Netherlands, or can base himself on a Netherlands law in which the legislator has set out in a concrete legal form his (the judge's) internationally recognised competence over enemy war criminals in the national sphere etc.".

The Court found no statement of international law in the municipal statutory provisions, as they then stood, observing that the view that the municipal statutory provisions applied to the case -

"proceeds from the mistaken train of thought that international law would give the Netherlands jurisdiction over all members of the enemy forces and officials who committed ... acts in this country which could be construed as coming under any act described and made punishable in the Netherlands Penal Code, unless they could put forward in their defence that a positive rule of international law nevertheless allowed them full liberty to commit those acts; ... however this version inverts the correct relationship of things and gives far too wide a scope to that jurisdiction which international law has granted to States over members of a hostile occupying force; ... on the contrary this jurisdiction is limited in principle to those among them who while in this country violated the laws or customs of war and who on those grounds alone can be tried by Netherlands courts; ... in other words, international law does not here function as a general ground of excuse for a foreign power whose actions in this country should in principle come fully under the provisions of the penal law, in force here, but on the contrary it does by way of exception give jurisdiction to that State where the hostile army operated with respect to the members of that army and its followers who violated there the laws or customs of war, and does so only for that purpose; ... it would be unreasonable to try foreign soldiers and officials according to Netherlands rules which were not

5922

written for them instead of trying them by those rules, written for them, which govern warfare and also taking into account the provision regarding superior orders which was accepted in article 8 of the Charter belonging to the London Agreement; ... indeed all those international documents quoted above take the line that alone the violation of the rules of war forms a basis for foreign jurisdiction": Mouton, op cit, pp 54-56 (emphasis added).

Subsequently, the municipal law was amended by making punishable war crimes and crimes against humanity as defined by the Charter of the Nuremberg Tribunal (Baxter, "The Municipal and International Law Basis of Jurisdiction over War Crimes", (1951) XXVIII The British Year Book of International Law 382, at p 384). Whether or not it be right to say that contraventions of the laws and customs of war are the only crimes for which the members of the military forces of an enemy power in occupation of the territory of a State may be prosecuted in the courts of that State after the occupation ceases, it seems that municipal law can govern the acts done in the course and for the purposes of the occupation only if those acts fail to comply with the law of nations governing armed conflict and hostile occupation. This is the principle on which France and Norway acted in the trial of war criminals after the Second World War (Baxter, op cit, at pp 384-385) and there is authority to support that view in United States cases after the Civil War: Coleman v. Tennessee (1878) 97 US 509; Dow v. Johnson (1879) 100 US 158. Whether contraventions of the laws and customs of war constitute the only crimes justiciable by the courts of the State whose territory has been occupied or whether such contraventions remove the immunity from municipal law to which occupying forces are entitled in respect of acts done in the course and for the purposes of hostile occupation, the prosecution must establish such a contravention in order to obtain a conviction.

41. Historically, war crimes allegedly committed by the forces of a belligerent power were tried according to international law by military courts or commissions created for the purpose by the other belligerent: Mouton, op cit, p 39. In pursuance of the policy adopted by the Allied Powers in the Second World War to bring war criminals to justice, international military tribunals were constituted by the Allied Powers and military courts or commissions were appointed by particular nations for the purpose. The respective jurisdictions of these tribunals to try persons accused of war crimes were prescribed by the instruments which constituted them. Article 6 of the Nuremberg Charter prescribed the crimes within the jurisdiction of the Nuremberg Tribunal; similar provisions were inserted in the proclamation by the Supreme Commander for the Allied Forces in the Pacific War setting up the International Military Tribunal for the Far East: Mouton, op cit, p 53. Article 6(b) defined "war crimes" as follows:

"War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity".

The Nuremberg Tribunal observed, (1947) 41 The American Journal of International Law 172, at p 248:

" The Tribunal is of course bound by the Charter, in the definition which it gives both of War Crimes and Crimes against Humanity. With respect to War Crimes, however, as has already been pointed out, the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by

> Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument."

42. Apart from the coercive jurisdiction of international tribunals, enforcement of international law governing war crimes is a matter for the particular State into whose hands the alleged criminal falls. In In re Altstotter (The Justice Trial) (1947) 14 Annual Digest 278, at pp 282-283, the United States Military Tribunal at Nuremberg, dealing with the universality of punishment of war crimes, said:

> "This universality and superiority of international law does not necessarily imply universality of its enforcement. As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognised that tribunals may be established and punishment imposed by the State into whose hands the perpetrators fall. Those rules of international law were recognised as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned. (Ex parte Quirin, supra; In re Yamashita, 90 L Ed 343.)"

43. In Australia, the original War Crimes Act (No.48 of 1945) provided for the convening of military courts with "power to try persons charged with war crimes committed, at any place whatsoever, ... against any person who was at any time resident in Australia ..." (see s.7), "war crimes" being so defined as to import the law of nations: see s.3 and the instrument of appointment therein mentioned. Act No.48 of 1945 did not exhaust the jurisdiction over war crimes which international law recognized Australia to possess, for the jurisdiction created by s.7 was limited to war crimes against Australian residents. Although the jurisdiction vested in military courts by that Act was jurisdiction to administer international law, upon amendment of the War Crimes Act the jurisdiction vested in the competent courts of the several States and Territories (s.13(1)) was jurisdiction to administer not international law but, as we have seen, a purely municipal law having a retrospective operation.

44. There is no reason why jurisdiction to try persons alleged to be guilty of war crimes should be conferred only on military courts or commissions. I would respectfully agree with what Lord Simon L.C. said in the House of Lords on 7 October 1942 (quoted in War Crimes: Report of the War Crimes Inquiry (UK) - the Hetherington Report - Cm.744, (1989), pars 6.41, 6.42):

> "I take it to be perfectly well-established International Law that the laws of war permit a belligerent commander to punish by means of his Military Courts any hostile offender against the laws and customs of war who may fall into his hands wherever be the place where the crime was committed. ... National courts, in my view, are equally entitled to exercise whatever criminal jurisdiction would be conceded to them by International law ... The real question ... is not so much whether the domestic law of a particular nation has already conferred upon the particular national Courts concerned a particular jurisdiction. It may not have gone to the full length which International Law would recognise and permit. The important question is this: what is the ambit of the jurisdiction which might by International Law be conferred upon them, as for example, in the present case,

> by Parliament here actually legislating to enlarge, within permissible limits, the jurisdiction of our Courts to deal with crimes committed abroad?" (Official Report (Hansard): cols 578-579.)

The Hetherington Report observes (par.6.42):

> "Legal opinion at the time seems to have been that jurisdiction over violations of the laws and customs of war existed, and that there was a need to legislate only to empower the domestic courts to utilise the jurisdiction which was already available under international law."

It follows that it is no objection to the validity of the Act that it selects the ordinary courts of the States and Territories as the tribunals for the trial of persons charged with "a war crime".

45. It is one thing to vest in a municipal court jurisdiction to administer the law of nations, albeit that that law is adopted by the municipal law. It is another thing to vest jurisdiction to administer municipal law that does not correspond with international law. The real objection to the validity of the Act is that the Act rejects international law as the governing law for the trial of persons allegedly guilty of war crimes and adopts a municipal law definition which operates retrospectively. That retrospectivity denies to the Act the capacity to satisfy an international obligation or to meet an international concern or to confer a universal jurisdiction recognized by international law.

46. International law does not create an international crime retrospectively. The judgment of the International Military Tribunal at Nuremberg was concerned to repel the suggestion that its jurisdiction extended to the imposition of criminal penalties for acts that were not forbidden by international law when they were done. Subsequently, the question of retrospectivity arose in respect of Control Council Law No.10 by which the Allied Control Council conferred jurisdiction upon Military Tribunals sitting in the respective occupation zones of Germany after the Second World War to try persons accused of crimes "recognized" by Law No.10. An objection that the crimes so recognized (stated more broadly in the case of crimes against humanity than in the Nuremberg Charter) were retrospective was rejected by the United States Military Tribunal at Nuremberg (In re List (Hostages Trial)). The correspondence between the offences defined by Law No.10 and crimes under international law may be doubted but the Military Tribunal asserted that there was correspondence in order to answer the argument that Law No.10 was retrospective. The judgment contained the following passage (at pp 634-636):

> " (2) Control Council Law No.10 and the Principle of 'Nullum Crimen Sine Lege'. - It is urged that Control Council Law No.10 is an ex post facto act and retroactive in nature as to the crime charged in the indictment. The act was adopted on 20th December, 1945, a date subsequent to the dates of the acts charged to be crimes. It is a fundamental principle of criminal jurisprudence that one may not be charged with crime for the doing of an act which was not a crime at the time of its commission. We think it could be said with justification that Article 23 (h) of the Hague Regulations of 1907 operates as a bar to retroactive action in criminal matters. In any event, we are of the opinion that a victorious nation may not lawfully enact legislation defining a new crime and make it effective as to acts previously occurring which were not at the time unlawful. It therefore becomes the duty of a Tribunal trying a case charging a crime under the provisions of Control Council Law No.10, to determine if the acts charged were crimes at the time of their commission and that Control Council Law No.10

5925

> is in fact declaratory of then existing International Law. This very question was passed upon by the International Military Tribunal in the case of the United States v. Hermann Wilhelm Goering in its judgment entered on 1st October, 1946 (13 Annual Digest 203). Similar provisions appearing in the Charter creating the International Military Tribunal and defining the crimes over which it had jurisdiction were held to be devoid of retroactive features in the following language: 'The Charter is not an arbitrary exercise of power on the part of the victorious nations, but in (the) view of the Tribunal, as will be shown, it is the expression of International Law existing at the time of its creation; and to that extent is itself a contribution to International Law'. ... The crimes defined in Control Council Law No.10 which we have quoted herein, were crimes under pre-existing rules of International Law - some by conventional law and some by customary law. ... If the acts charged were in fact crimes under International Law when committed, they cannot be said to be ex post facto acts or retroactive pronouncements. ...
>
> It is true, of course, that customary International Law is not static. It must be elastic enough to meet the new conditions that natural progress brings to the world. It might be argued that this requires a certain amount of retroactive application of new rules and that, by conceding the existence of a customary International Law, one thereby concedes the legality of retroactive pronouncements. To a limited extent the argument is sound, but when it comes in conflict with a rule of fundamental right and justice, the latter must prevail. The rule that one may not be charged with crime for committing an act which was not a crime at the time of its commission is such a right. The fact that it might be found in a constitution or bill of rights does not detract from its status as a fundamental principle of justice. It cannot properly be changed by retroactive action to the prejudice of one charged with a violation of the laws of war."

47. Whether or not all the offences recognized by Law No.10 were at all material times offences against the law of nations, the principle against retrospectivity is rightly stated. Some texts have suggested that, in international law, there is no rule forbidding the enactment or adoption of criminal laws with retrospective force: see the discussion by the Supreme Court of Israel in Attorney-General of Israel v. Eichmann (1962) 36 ILR 277, at pp 281-283, the Report of the Canadian Commission of Inquiry on War Criminals (Deschenes Commission), (1986), pp 137-138, and the writings therein mentioned. The better view now, if not in earlier times, is that the rule of customary international law is as expressed in Art.15 of the International Covenant on Civil and Political Rights, (1966):

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. ...
>
> 2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."

Article 99 of the 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War contains a similar provision:

5926

" No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by International Law, in force at the time the said act was committed."

Oppenheim, International Law, 7th ed. (1952), vol.II, p 390, comments:

"The reference to International Law, which did not appear in the Convention of 1929, is intended to remove any doubts as to the right of the detaining belligerent to try prisoners of war for war crimes."

48. Thus international law not only refuses to countenance retrospective provisions in international criminal law; it condemns as offensive to human rights retrospective municipal criminal law imposing a punishment for crime unless the crime was a crime under international law at the time when the relevant act was done. It follows that there can be no international obligation to enact a municipal law to attach a penalty to past conduct unless that conduct, at the time when it was engaged in, was a crime under international law. International concerns must be qualified in like manner. For present purposes, the relevant time is between 1 September 1939 and 8 May 1945: s.9(1)(a) of the Act. The jurisdiction of a national court to try a person for a war crime will be recognized as a universal jurisdiction in international law if the crime as defined by a post-war municipal law was an international crime at the time of its commission, but not otherwise.

49. In ascertaining whether the jurisdiction of a national court to try alleged war criminals from the Second World War is a universal jurisdiction recognized by international law, the correct approach is that taken by the Hetherington Report in pars 6.36 and 6.37:

"6.36. The principles nullem crimen sine lege and nulla poena sine lege are basic tenets of law, and are themselves included in the laws and constitutions of many countries. No state may enact legislation to deem an act a crime or render it punishable when it was not considered to be a criminal offence under the law at the time of its commission, and thus give its courts jurisdiction in respect of those acts. These principles are also enshrined in international conventions and declarations including the International Covenant on Civil and Political Rights 1966 (Article 15); the European Convention on Human Rights 1950 (Article 7); and the Universal Declaration of Human Rights 1948 (Article 11).

6.37. To apply these principles to war crimes as defined by this Inquiry's terms of reference it is necessary to consider whether the acts or omissions were crimes at the time of their commission, and, if so, whether there was jurisdiction over them at the time of their commission and whether the British criminal courts could now have jurisdiction over them."

Therefore, the question is whether the statutory offence created by s.9 of the Act corresponds with the international law definition of international crimes existing at the relevant time. If it does, the Act vests jurisdiction to try alleged war criminals for crimes which were crimes under the applicable (international) law when they were committed; its apparent retrospectivity in municipal law is no bar to the exercise of a universal jurisdiction recognized by international law and that is sufficient to enliven the external affairs power to support the Act which vests that jurisdiction. Even if there be no international obligation or concern calling for the exercise of the universal jurisdiction, a statutory vesting of the jurisdiction would be essential to its exercise by an Australian court and that would suffice to give the support of s.51(xxix) to the law. But if the statutory offence created by s.9 does not correspond with the international law definition of international crimes

5927

existing before 8 May 1945, the retrospective creation by Australian municipal law of the crime defined by the Act is offensive to international law. In that event, the Act cannot be seen to satisfy an international obligation, to meet an international concern or (subject to a further submission yet to be considered) to be appropriate and adapted to the vesting of a universal jurisdiction.

50. This view is consistent with the view of Professor Baxter who, after the Supreme Court of Israel had affirmed Israel's jurisdiction to try and to condemn Eichmann for war crimes and other violations of international law committed before Israel came into existence, added a postscript to his article on "The Municipal and International Law Basis of Jurisdiction over War Crimes", op cit. The postscript appears in Bassiouni and Nanda (eds), A Treatise on International Criminal Law, (1973), vol.2, p 65. The author wrote (at p 83):

> " There could be no objection under international law to Israeli law's reaching out to 'a person' of whatsoever nationality to the extent that the municipal law of that country merely incorporated in its law crimes under international law subject to universal jurisdiction. It is thus necessary to examine the consistency of the crimes defined by the law of Israel with those crimes recognized by international law."

Baxter's conclusion was that Israeli municipal law defined war crimes restrictively and not more broadly than the international law definition, but he stopped short of affirming that Israel's definition of crimes other than war crimes conformed to international law.

51. At this stage, the differing operation of s.7(1) and s.7(3) should be noted. Section 7(1) relates to "serious crimes" which, having been committed in connection with a war or armed conflict, might have amounted to a war crime in international law; s.7(3), on the other hand, relates to "serious crimes" committed in a country while it was at war or under hostile occupation, but it is immaterial whether the victims were of the same nationality as the offender or not. Serious crimes falling within s.7(3) might have amounted to what has become known as crimes against humanity. Before considering crimes against humanity, we should enquire whether s.9 of the Act, by the operation of ss.6, 7(1) and 17, creates an offence which corresponds with a war crime as defined by the law of nations.
"A war crime" in s.9 and a war crime in the law of nations.

52. Section 6(3) of the Act requires a court, in determining whether an act committed outside Australia is "a serious crime" to "imagine another act committed (in a part of Australia) which is similar in all relevant respects" (per Lord Reid in Cox v. Army Council (1963) AC 48, at p 70). Although Lord Reid went on to say that murder and theft "are the same all the world over", there are conceptual difficulties in translating a killing in the course and for the purposes of military activity in Europe (including hostile military occupation of a European State) into a part of Australia. Presumably, in the notional translation directed by s.6(3)(b), the victim must be treated as having been within "the King's peace" (cf. Reg. v. Page (1954) 1 QB 170) so that that element of culpable homicide can be established. But what is the position of an accused who, as a member of military forces, killed "in the course of hostilities in a war" or in any of the other circumstances referred to in s.7(1)? If it be right to say that the members of an enemy force in occupation of a State are immune from the municipal law of the State provided they do not act in violation of the law and customs of war, an accused looking at ss.6, 7(1) and 9 of the Act might have argued that his act would not have amounted to one of the offences under municipal law mentioned in s.6(1) unless it were proved to be an act done in violation of the laws and customs of war.

Had that been the effect of the Act, the law of nations would have governed his liability to conviction as for an offence under s.9. Sections 6 and 7 would have operated as restrictions on liability to conviction for war crimes as defined in international law. But s.17 precludes that construction. It is enacted as a critical part of a code which determines the liability to conviction of a person who is proved to have committed an act falling within ss.6 and 7. One cannot postulate, for the purposes of s.6, that the members of an enemy force are immune from punishment for the municipal law offences mentioned in s.6(1) except where the act charged violated the laws and customs of war, for that would make s.17(2) otiose. Section 6 must bring deliberate and wilful killing by a member of an enemy force into the category of "serious crime" unless the usual defences - self-defence, mistake, etc. - are open on the facts of the particular case, leaving s.17(2) to take out of "a war crime" any killing which falls within its terms. The Act thus displaces the essential character of a war crime under the law of nations as a violation of the laws and customs of war and seeks to make the laws, customs and usages of war a source of excuse. Section 17(2) is misconceived, as Baxter (op cit, p 388) explains:

> " If, in those states in which war crimes are tried under municipal law, the function of international law is to furnish a justification for acts of warfare which are thereby recognized to be lawful, the law of war loses its reasonableness. The international law of war is 'prohibitive law' and its purpose is to place curbs upon the otherwise unrestrained violence of war. Belligerent acts in war are facts, not legal rights, and to set the law to justifying them, instead of keeping them within limits which comport with the dictates of humanity, leads to a law which places its emphasis on the rightness of war to the detriment of what is wrong in war. Any theory which relies on the law of nations as a defence for belligerent acts thus fails to accord with the true raison d'etre of the law of war and with the many expressions of the intentions of those who have contributed to its development in recent years."

Sub-section (2) does not stand alone as a defence. Sub-section (3) provides a dictionary for sub-s.(2) and calls for a factual evaluation of what was "reasonably justified by the exigencies and necessities of the conduct of war." It may be that the exigencies and necessities of the conduct of war could be construed to embrace any military objective which is not unlawful by the laws and customs of war (see Bindschedler-Robert, "Problems of the Law of Armed Conflicts" in Bassiouni and Nanda (eds), op cit, vol.1, p 295, at pp 304-306), a construction that would be repetitive of the concepts in sub-s.(2)(a). However that may be, the requirement that the act charged be "reasonably justified" leaves the way open for a jury to make an evaluation of the facts adverse to an accused although the legal restrictions on military action prescribed by the laws and customs of war have not been violated. By the combined operation of sub-ss.(2) and (3) of s.17, the laws and customs of war are excluded as the legal criterion of criminal liability capable of application by direction of the trial judge and are replaced by the factual criterion of reasonable justification which a jury, probably inexperienced in the exigencies and necessities of the conduct of war, must apply as best it can.

53. The disconformity between the statutory offence purportedly created by s.9 of the Act and a war crime in international law can be illustrated by taking, as an example, the facts of the case in Osman Bin Haji Mohamed Ali v. Public Prosecutor (1969) 1 AC 430 where Indonesian military personnel penetrated into enemy territory (Singapore) and, in doing sabotage, caused death. Had they been acting under legitimate orders and had they been wearing uniform, they may have been able to plead that their act was immune from

5929.

municipal law as an act of State of a belligerent Power (Wright, "War Criminals", (1945) 39 The American Journal of International Law 257, at pp 272-273) but, as they wore no uniform and concealed their identity in order to sabotage their objective, they were held to have forfeited the protection of a prisoner of war under the Geneva Convention (whether of 1929 or 1949) and were liable to conviction for murder under municipal law. As the laws and customs of war do not "permit" such an act, such an act would amount to "a war crime" under s.9. Yet such an act is no contravention of the laws and customs of war, at least where the objective of the sabotage is legitimate. Oppenheim, International Law, 7th ed., vol.II, par.255, deals with cases of this kind which are sometimes designated as "war treason". That designation includes cases of "(w)recking of military trains, destruction of the lines of communication or of telegraphs or telephones in the interest of the enemy, and destruction of any war material for the same purpose". The author writes, at pp 574-576:

> " Espionage and so-called war treason ... bear a twofold character. International Law gives a right to belligerents to use them. On the other hand, it gives a right to belligerents to consider them, when committed by enemy soldiers or enemy private individuals within their lines, as acts of illegitimate warfare, and consequently liable to punishment - though it seems improper to characterise such acts as war crimes. ...
>
> So-called 'war treason' consists of all such acts ... committed within the lines of a belligerent as are harmful to him and are intended to favour the enemy. It may be committed, not only in occupied enemy country, or in the zone of military operations, but anywhere within the lines of a belligerent.
>
> Enemy soldiers - in contradistinction to private enemy individuals - may only be punished for such acts when they have committed them during their stay within a belligerent's lines under disguise. If, for instance, two soldiers in uniform are sent to the rear of the enemy to destroy a bridge, they may not, when caught, be punished for 'war treason,' because their act was one of legitimate warfare. But if they exchange their uniforms for plain clothes, and thereby appear to be members of the peaceful private population, they are liable to punishment." (Emphasis added.)

By applying Australian municipal law, s.9 would hold the out-of-uniform saboteur of a legitimate objective behind enemy lines in Europe guilty of a war crime consisting in the "serious crime" of murder if the sabotage was likely to cause death and did cause death - unless the accused can point to or adduce evidence to show that his act "was reasonably justified by the exigencies and necessities of the conduct of war."

54. Even if "permitted by" in s.17(2)(a) were construed as meaning "not in violation of" the laws, customs and usages of war, s.17 would not bring the offence created by s.9 into correspondence with international law. Section 17 provides a defence to what has been proved under ss.6 and 7. The issue of violation of the laws and customs of war would not arise unless the accused could point to or adduce "evidence of the existence of the facts constituting the defence" - and to do so in a trial more than forty years after the event. Instead of adopting the international law definition of a war crime, the Act has created an offence which holds members of an enemy force to be subject to municipal law in respect of acts done "in the course of hostilities in a war" and, instead of restricting criminal liability to acts done in violation of the laws and customs of war, holds an accused liable to conviction unless he can point to or adduce evidence which might lead a jury to acquit on the ground that the act "was reasonably justified by the exigencies and

5930

necessities of the conduct of war." Thus the offence which ss.6, 7(1), 9 and 17 create is in disconformity with the offence of a war crime as defined by the law of nations.

55. It is arguable that s.16 (to which s.17(2) is subject) creates a further disconformity between the municipal law and the international law of war crimes or, at least, the international law of war crimes as it existed during the period 1 September 1939 to 8 May 1945. Subject to s.6(2), s.16 excludes a defence of superior orders. It prescribes a rule which is the converse of Art.443 of the Australian Manual of Military Law, as it stood at 1 September 1939. After setting out the more important violations of the laws of war, Art.443 read:

> "It is important, however, to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy. He may punish the officials or commanders responsible for such orders if they fall into his hands, but otherwise he may only resort to the other means of obtaining redress which are dealt with in this chapter."

This proposition, which had been copied from the British Manual of Military Law, 7th ed. (1929), was in substantial accord with the Rules of Land Warfare (1940) approved by the General Staff of the United States Army and then in force. Art.347 of those Rules read as follows:

> "... Individuals of the armed forces will not be punished for these offences in case they are committed under the orders or sanction of their government or commanders. The commanders ordering the commission of such acts, or under whose authority they are committed by their troops, may be punished by the belligerent into whose hands they may fall."

The concurrent views of the Australian, British and United States military forces as at 1 September 1939 embraced the doctrine of respondeat superior advanced by Professor Oppenheim in his work International Law (5th ed., vol.II, pp 453-454):

> " Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent Government concerned. If members of the armed forces commit violations by order of their Government, they are not war criminals, and may not be punished by the enemy; the latter may, however, resort to reprisals. In case members of forces commit violations ordered by their commanders, the members may not be punished, for the commanders are alone responsible, and the latter may, therefore, be punished as war criminals on their capture by the enemy."

56. The doctrine of respondeat superior had been applied in the case of Commander Karl Neumann (The "Dover Castle") (1921) 16 The American Journal of International Law 704 by the Second Criminal Senate of the Imperial Court of Justice of Germany (the Reichsgericht), but that Court's view of the doctrine appears more clearly from its decision in the case of Lieutenants Dithmar and Boldt (The "Llandovery Castle") (1921) 16 The American Journal of International Law 708. There it was held (at p 722) that a defence of superior orders was not available "if (the) order is universally known to everybody, including also the accused, to be without any doubt whatever against the law". The correctness of an unqualified doctrine of respondeat superior was questioned by Lord Cave in an address to the Grotius Society in 1922: (1922) 8 Grotius Transactions, p xix. Lord Cave thought that the true scope of the doctrine "limits the impunity of the soldier to cases where the orders are not so manifestly illegal that he must or ought to have known they were unlawful": at p xxiii. In 1942, Professor Lauterpacht rejected the

unqualified defence of superior orders in a memorandum to a committee of the International Commission for Penal Reconstruction and Development, which was approved by the Commission and by the participating governments: see Dinstein, The Defence of 'Obedience to Superior Orders' in International Law, (1965), p 104. Professor Lauterpacht said:

> " There ought to be no doubt that should courts entrusted with the trial of war crimes disregard altogether the plea of superior orders, they would be adopting a course which could not be regarded as defensible. On the other hand, while the fact of superior orders sets a limit to the punishment of acts which might otherwise constitute war crimes, it need not warp the effectiveness of the law in a manner which may rightly be regarded as a perversion of justice. It will not cover crimes committed by superior authorities and officers acting under their own responsibility and initiative; it will not protect criminal acts committed by subordinates for purposes of private gain and lust; it will not shield acts committed in pursuance of orders so glaringly offending against fundamental conceptions of law and humanity as to remove them from the orbit of any possible justification, including that of immediate danger to the person charged with the execution of the orders; it will not excuse crimes committed in obedience to unlawful orders in circumstances in which the person executing the crime was not acting under the immediate impact of fear of drastic consequences of summary martial justice following upon a refusal to act (the latter being crimes perpetrated by the vast army of officials in the occupied territories). If these limits of the doctrine of superior orders are taken into consideration, then its judicious application, far from defeating the ends of justice, may testify in a significant manner to the determination of the victorious belligerent to abide by the limitations of international law": (1944) XXI The British Year Book of International Law, pp 73-74.

57. Professor Lauterpacht edited the 6th edition of Oppenheim's International Law and rejected the earlier views of Professor Oppenheim: see vol.II, s253. Following that edition, Art.443 of the Australian Manual of Military Law was amended on 30 September 1944 to read:

> " The fact that a rule of warfare has been violated in pursuance of an order of the belligerent Government or of an individual belligerent commander does not deprive the act in question of its character as a war crime; neither does it, in principle, confer upon the perpetrator immunity from punishment by the injured belligerent. Undoubtedly, a court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weight scrupulously the legal merits of the order received. The question, however, is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity."

58. By 8 August 1945, when the Nuremberg Charter was agreed, the Oppenheim

5932

position had been abandoned. In its place, a doctrine of absolute liability was erected (see Dinstein, p 117). Article 8 of the Charter provided that:

> " The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires."

Article 6 of the Charter of the International Military Tribunal for the Far East (the Tokyo Tribunal), however, provided that a superior order should not "of itself" be a defence: see Whiteman, Digest of International Law, vol.11, p 972. Dinstein (op cit, p 157) comments that -

> "the fact of obedience to orders was not prevented from contributing, in conjunction with other facts, to discharge from responsibility and was rejected only as a defence per se."

59. If that was the state of international law during the prescribed period, there may be little disconformity between the provisions of the Act (ss.16, 6(2) and 6(6)) and the relevant international law, despite the contrary provisions in Art.443 of the Australian Manual of Military Law. The United States Military Tribunal at Nuremberg in the Hostages Trial adopted the formulation of the Nuremberg Charter, observing with reference to the Oppenheim doctrine (at p 650):

> "The fact that the British and American armies may have adopted it for the regulation of their own armies as a matter of policy, does not have the effect of enthroning it as a rule of International Law."

However that may be, the significance in international law of obedience to superior orders remains a matter of "some incertitude" (Dinstein, p 253) if not of "universal uncertainty" (Vogler, "The Defense of 'Superior Orders' in International Criminal Law" in Bassiouni and Nanda (eds), op cit, vol.1, p 619, at p 634). Both of these jurists would reject the doctrine of absolute liability. Dinstein prefers a defence of lack of mens rea to which the fact of obedience to orders would be relevant. Vogler perceives international law to be moving to the position that the subordinate is criminally responsible "only if he had in reality recognized the criminal nature of the order, or if the fact of its criminality was obvious." In my respectful opinion, there is much to commend these views. Having regard to the uncertain state of international law during the prescribed period, one cannot be confident of the coincidence of the law prescribed by s.16 and international law. However, there remains a disconformity between international law and the municipal law contained in ss.6, 7(1), 9 and 17 of the Act.

"A war crime" in s.9 and a crime against humanity.

60. Section 7(3) brings within the statutory definition of "a war crime" conduct which, though heinous, is not necessarily in violation of the laws and customs of war. It is said that the crimes falling within s.7(3) are crimes against humanity and that such crimes are, like war crimes, international. In the plaintiff's case, it is said that he was guilty of a particular species of crimes against humanity, namely, crimes of genocide. In the Nuremberg Charter, Art.6(c) prescribed the crimes which were to be treated as crimes against humanity:

> "Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."
> (Emphasis added.)

The words italicized limited the scope of the crimes falling within Art.6(c) and, in effect, restricted them to crimes against humanity which were also war

5933

crimes or, pursuant to Art.6(a), crimes against peace: see Schwelb, "Crimes Against Humanity", (1946) XXIII The British Year Book of International Law 178, at pp 188, 194-195, 206. If war crimes and crimes against peace were, at all material times, crimes against the law of nations, it was unnecessary to consider whether crimes against humanity which were not connected with war crimes or with crimes against peace were crimes against the law of nations. Construing its Charter, the Nuremberg Tribunal said, at p 249:

> " With regard to Crimes against Humanity there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. The policy of terror was certainly carried out on a vast scale, and in many cases was organized and systematic. The policy of persecution, repression, and murder of civilians in Germany before the war of 1939, who were likely to be hostile to the Government, was most ruthlessly carried out. The persecution of Jews during the same period is established beyond all doubt. To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity."

61. In Reg. v. Finta (1989) 61 DLR (4th) 85, the Ontario High Court rejected an argument that crimes against humanity were not recognized as international crimes before 1945. In doing so, Callaghan A.C.J.H.C. said (at p 101):

> "I accept the reasoning of the Nuremberg Tribunal who indicated, when faced with the same sorts of arguments as above, that 'by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war'. In other words, in light of the historical documents I have referred to and the words of the Nuremberg Tribunal, I am of the opinion that war crimes and crimes against humanity were, by 1939, offences at international law or criminal according to the general principles of law recognized by the community of nations."

With great respect, the Nuremberg Tribunal used the words cited by his Lordship in reference only to "the laws and customs of war which are referred to in Article 6(b) of the Charter" (see vol.41 The American Journal of International Law, at pp 248-249), not in reference to crimes against humanity. The words cited by his Lordship did not relate to crimes against humanity referred to in Art.6(c) of the Charter; those crimes were dealt with by a subsequent passage in the judgment (at p 249) which is the passage cited above. Schwelb points out (op cit, p 205) that, in the case of Streicher, the Tribunal found him guilty of crimes against humanity committed before 1 September 1939 in Germany against German nationals but the Tribunal pointed to a nexus between these activities and crimes committed on occupied Allied

5934

territory and against non-German nationals. Schwelb notes that this is "the most that can be said" and that -

> "It cannot be said in the case of any of the defendants that he was convicted only of crimes committed in Germany against Germans before 1 September 1939."

62. Control Council Law No.10, enacted by the military powers in occupation of Germany after the Second World War, provided for trial within the respective Zones of Occupation of persons charged with crimes "recognized" in Art.II. Among those crimes were "Crimes against Humanity" expressed more expansively than in the Nuremberg Charter. The breadth of that definition and the uncertainty of its content are manifest from the consideration given to it by the United States Military Tribunal in In re Altstotter (The Justice Trial), at pp 284-285:

> " We hold that crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocities or persecutions whether committed by private individuals or by a governmental authority. As we construe it, that section provides for the punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic governmentally organised or approved procedures, amounting to atrocities and offences of that kind specified in the act and committed against populations or amounting to persecutions on political, racial, or religious grounds.
>
> Thus the statute is limited by the construction of the type of criminal activity which prior to 1939 was, and still is, a matter of international concern. Whether or not such atrocities constituted technical violations of laws and customs of war, they were acts of such scope and malevolence, and they so clearly imperilled the peace of the world, that they must be deemed to have become violations of international law. ... As the prime illustration of a crime against humanity under C.C. Law 10, which by reason of its magnitude and its international repercussions has been recognised as a violation of common international law, we cite 'genocide'." (Emphasis added.)

The opinion of this Tribunal has not been accepted as an authoritative statement of customary international law. Law No.10 and the tribunals which administered it were not international in the sense that the Nuremberg Charter and the International Military Tribunal were international. As Dr Schwelb observes (op cit, p 218):

> "the difference between the Charter and Law No.10 probably reflects the difference both in the constitutional nature of the two documents and in the standing of the tribunals called upon to administer the law. As we have attempted to show, the International Military Tribunal is, in addition to being an occupation court for Germany, also - to a certain extent - an international judicial organ administering international law, and therefore its jurisdiction in domestic matters of Germany is cautiously circumscribed. The Allied and German courts, applying Law No.10, are local courts, administering primarily local (municipal) law, which, of course, includes provisions emanating from the occupation authorities." (Emphasis added.)

63. The crime of genocide, which the Tribunal described as the "prime illustration" of a crime against humanity attracting punishment, did not acquire the status of an international crime until after the Second World War: see Kunz, Editorial Comment: "The United Nations Convention on Genocide",

(1949) 43 The American Journal of International Law 738, at p 742; Green, "Canadian Law, War Crimes and Crimes Against Humanity", (1988) LIX The British Year Book of International Law 217, at pp 225-226; Shaw, "Genocide and International Law" in Dinstein (ed.), International Law at a Time of Perplexity, (1989), p 797. Genocide was not listed as a crime in Art.6(b) of the Nuremberg Charter but, on 11 December 1946, the General Assembly of the United Nations by Resolution 96(I) affirmed that genocide is a crime under international law and initiated studies leading to the adoption of the Genocide Convention of 1948. There is some disagreement as to whether, by the time when the Genocide Convention was approved by the General Assembly, genocide had become a crime under customary international law. Shaw (op cit, at p 799) expresses the view that, after the General Assembly adopted Resolution 96(I) -

> "Hand in hand with the speedy enshrinement of genocide as a crime under conventional law, has gone a process of parallel acceptance under customary international law."

Kunz (at p 742) and Green (at p 225), on the other hand, take the view that the Convention created and defined the crime of genocide for the law of nations. The weight of opinion and international practice as evidenced by the drafting of Art.6(c) of the Nuremberg Charter show that genocide was not a crime under international law until after the Second World War, and the history of the drafting of Art.6(c) shows that crimes against humanity were not clearly established as crimes in international law independent of war crimes when the Nuremberg Charter was drafted: see Clark, "Crimes Against Humanity" in The Nuremberg Trial and International Law, pp 177-199; but cf. Simons, at p 49. Thus I come to the same conclusion as that expressed in the Hetherington Report whose summary I would adopt (par.6.44) mutatis mutandis as applicable to Australia:

> " To summarise, by 1939, before the offences which this Inquiry is required to investigate were allegedly committed, violations of the customs and uses of war, or war crimes as they were later called, were internationally recognised as crimes, both Britain and Germany being among the signatories of the Hague Conventions which confirmed them as such. The Nuremberg judgement also held that such acts were also recognised as crimes under customary international law, which bound even those nations which had not become party to the Conventions. Genocide was not so recognised until 1948 and we find the position of what were subsequently called crimes against humanity to be unclear. Under customary law belligerents had the right to try before military courts war criminals who fell into their hands, and also to provide for the surrender of others in the terms of the armistice or the peace treaty. Legal opinion then held that jurisdiction existed over such crimes and that a state had the right to legislate to incorporate that jurisdiction into its national domestic law. Therefore it can be argued that enactment of legislation in this country to allow the prosecution of 'war crimes' in British courts would not be retrospective: it would merely empower British courts to utilise a jurisdiction already available to them under international law since before 1939, over crimes which had been internationally recognised as such since before 1939 by nations including both the United Kingdom and Germany. We are less certain that a similar stance can be adopted with regard to crimes against humanity. To legislate now for offences of genocide committed during the Second World War would, in our view, constitute retrospective legislation." (Emphasis added.)

64. The crime created by s.9 of the Act would thus expose to conviction persons whose act, if it fell only within sub-s.(3) of s.7, would not (genocide) or might not (some other crime against humanity) have amounted to a crime under international law at the time when the act was done and did not then amount to a crime under municipal law. In the light of the objection of international law to retrospective criminal legislation unless the crime was, at the time of its commission, a crime under international law, there could be no international obligation which would have been satisfied nor any international concern which would have been met by creating retrospectively a crime one of the elements of which is furnished by s.7(3). So far as s.7(3) furnishes an element of the statutory offence created by s.9, it is not consonant with pre-1945 international law. A jurisdiction to try a person for such an offence is not a universal jurisdiction to try a person for an international crime.

65. The disconformity between the provisions of the Act defining a war crime falling within sub-s.(1) of s.7 and international law equally denies that that provision, so far as it furnishes an element of the s.9 offence, satisfies an international obligation or meets an international concern. The international obligation or concern, if any, can relate only to the seeking out and prosecution of persons alleged to be guilty of war crimes as recognized by international law. The prosecution of crimes which are the creation of a retrospective municipal law and which differ from international crimes cannot be the subject of a universal jurisdiction to try. As s.8(3) provides that a "serious crime may be a war crime by virtue of either or both of subsections 7(1) and (3), but not otherwise", s.9 cannot be supported as a provision which satisfies an international obligation or meets an international concern. Nor can it be supported as a law investing a universal jurisdiction to try a person for an international crime. If s.9 be invalid, the Act must fall.

66. To meet an argument that the statutory offence does not conform to the international law definition of international crimes (as international law stood during the prescribed period), the proposition that the Act invested a jurisdiction to try offences defined in international law was broadened in the course of the Commonwealth's submissions. It was submitted that there is a universal jurisdiction under international law to try allegations of guilt of crimes defined by municipal law if those definitions approximated the definitions of crimes in international law. The authority cited in support of the broadened submission was Brierly, op cit, which must be set out in extenso. Asserting that jurisdiction over war crimes "in the strict sense" is "a special jurisdiction created by the international law of war" (at p 297), the author says (at pp 300-301):

> " It is of course to be regretted that the laws of war do not define more precisely either the acts that it is permissible to treat as war crimes, or the procedure by which they ought to be dealt with. But lack of precision, and consequently scope for differing interpretations of the rule of law, are inevitable in any system of customary law, and it is notorious that they occur throughout the whole body of international law. Municipal courts are frequently called on to apply international law, yet they rarely have any absolutely authoritative guide to the right rule; they have to do their best, with the result that different national courts do not always arrive at uniform decisions on the same point of international law. ... Yet to allow this lack of uniform interpretation to persuade us that the law that a national court applies in such cases is simply its own municipal law is to come near to denying the existence of international law altogether; what the court does is to apply its own national view of what the rule of

> international law is, but that is a different matter, and in the present stage of international legal development is is unfortunately inevitable.
>
> It will be the same with national courts when they come to the trial of war crimes. They will not all arrive at exactly the same view as to the constituent elements of each particular offence; they will not all follow the same procedure of trial. But so long as the trial accords with natural justice, with 'the general principles of law recognised by civilised nations' as principles proper to be applied on the trial of a criminal charge, they will not exceed the discretion that the laws of war have left to them. Nor is it at all likely that the absence of exact uniformity will be serious in practice. Even in the most favourable circumstances it will never be possible to bring to justice more than a small fraction of the crimes that Germans have committed in this war, and the possibility that in the cases that do come to trial any real difficulty, still less any real injustice, will be caused by the uncertainty of the laws of war is almost negligible. Murder, rape, robbery, no doubt it is desirable that crimes like these should be meticulously defined for the purposes of penal law, and in a developed municipal system that is done. But it is idle to expect such refinements in the laws of war. In practice courts will probably follow more or less closely the definitions and the procedures of their own municipal law, and in so doing they will be well within the latitude that the laws of war allow. But again that will not mean that they follow their own municipal law because that is the law which they are bound to apply; it will mean that in the absence of exact definition contained in the laws of war the municipal definition is likely to be the best available guide to the rule that natural justice requires them to apply."

67. An analysis of the Act demonstrates that the last proposition is, if not inaccurate, at least subject to exceptions. The latitude which national courts must have in applying the law of nations cannot relieve them, when the question is in issue, from determining whether a municipal law does create or define an offence in respect of which international law recognizes a universal jurisdiction to try. The latitude available to national courts might allow them to accept that an absolute statutory exclusion of the defence of superior orders (ss.6(6) and 16) is consistent with international law when the status of that defence is uncertain in international law, but the latitude cannot warrant the disregarding of divergences between the substantive offences defined in municipal law and the offences defined in international law. Nor are the two systems of substantive law brought into unison merely by according "natural justice" which has to do with the procedure of the court, not with the issues to be tried. Some violations of the laws and customs of war may be imprecisely defined, according to the particular law or custom that has been violated, but the Act is no more precise. The Act seems to stretch out to embrace international law in s.17(2)(a) only to reject the laws, customs and usages of war as a legal touchstone of criminal responsibility in favour of a factual element in s.17(3). To accept the Act as an approximate reflection of international law would not be to interpret international law but to abdicate the Court's duty of interpretation in favour of the provisions which commended themselves to the Legislature.

68. Whatever right Australia may now possess under international law to bring alleged war criminals from the Second World War to trial before Australian

courts, the Act does not exercise it.
(b) Resolutions and recommendations of international bodies.

69. The resolutions and recommendations of the United Nations General Assembly and of the Economic and Social Council do not suggest that States should bring suspects to trial under a municipal law that is in disconformity with international law. Nor do they suggest that a municipal law which acts retrospectively is an appropriate means of bringing to justice a person whose act did not amount to a crime under international law at the time when the act was done. Indeed, in each of the Geneva Conventions of 1949, the obligation stated is to enact legislation to punish "persons committing, or ordering to be committed" any of the "grave breaches" defined therein: see, for example, Arts 146 and 147 of Geneva Convention IV. The obligation is to translate into municipal law the international law definition of those crimes to be effective in the case of future breaches.

70. In the Genocide Convention of 1948, a similar obligation was imposed (Art.V) followed by a jurisdictional provision (Art.VI) which, as I read it, requires a person charged with a Convention offence to be tried ("shall be tried") either by "a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." The Supreme Court of Israel read this provision as not excluding the jurisdiction of national courts but, with respect, I am unable to read it in that way (cf. Baxter's questioning of this jurisdictional decision in Bassiouni and Nanda (eds), op cit, at p 85).

71. The material relied on gives no support for the notion that the jurisdiction of a national court to try a person suspected of committing a war crime or a crime against humanity should be exercised pursuant to a law which is in disconformity with international law.

72. It follows that on none of the bases advanced is the Act to be characterized as a law with respect to Australia's external affairs. It thus derives no support from s.51(xxix). The second power on which reliance is placed to support the Act is the defence power (s.51(vi)).
3. The defence power.

73. The purpose of a law for which support is claimed under s.51(vi) is "collected from the instrument in question, the facts to which it applies and the circumstances which called it forth": per Dixon J. in Stenhouse v. Coleman (1944) 69 CLR 457, at p 471. In determining whether a purpose of the Act is to advance the defence of the Commonwealth, it is legitimate to take into account the fact that, by punishing violations of the laws and customs of war, the conduct of future armed conflicts will be less likely to be attended by the barbarities those laws and customs proscribe. The deterrent effect of punishing such violations was noted by resolutions of the United Nations General Assembly passed between 1965 and 1973, but the deterrent effect of trials and punishments under the Act must now be doubtful. The passage of time since 8 May 1945, the occurrence of other armed conflicts in which Australia has been engaged during and after the Second World War (conflicts frequently attended by notorious violations of the laws and customs of war) and the selective operation of the Act upon acts done during armed conflicts in Europe between 1 September 1939 and 8 May 1945 not only diminish, if not destroy, the deterrent effect of the Act but throw doubt on the proposition that defence considerations are "the circumstances which called it forth".

74. Although the Act is capable of having a relevant deterrent effect and may, on that account, be said to be "appropriate and adapted" to serve defence purposes (as the original War Crimes Act was thought to do), the validity

under s.51(vi) of a law enacted in a time of peace depends upon whether the Parliament might have reasonably considered the means which the law embodies for achieving or procuring the relevant defence purpose to be appropriate and adapted to that end, a question of reasonable proportionality: see per Deane J. in The Tasmanian Dam Case, at p 260; Richardson, at pp 291, 311-312, 336, 345-346. In times of war, laws abridging the freedoms which the law assures to the Australian people are supported in order to ensure the survival of those freedoms in times of peace. In times of peace, an abridging of those freedoms - in this case, freedom from a retrospective criminal law - cannot be supported unless the Court can perceive that the abridging of the freedom in question is proportionate to the defence interest to be served. What is necessary and appropriate for the defence of the Commonwealth in times of war is different from what is necessary or appropriate in times of peace: Richardson, per Dawson J. at p 326. "That is because the question of appropriateness and adaptation falls for determination by reference to the circumstances which engage the power": per Gaudron J. in Re Tracey; Ex parte Ryan (1989) 166 CLR 518, at p 597. The formation of the critical judgment as to whether the means adopted by a law are appropriate and adapted to serve defence purposes is entrusted to the Court: Stenhouse v. Coleman, at p 470.

75. The means which the Act adopts to secure future adherence to the laws and customs of war not only trample upon a principle which is of the highest importance in a free society, namely, that criminal laws should not operate retrospectively, but also select a specific group of persons from a time long past out of all those who have committed, or are suspected of having committed, war crimes in other armed conflicts. Respect for the laws and customs of war cannot be secured by a law having such an oppressive and discriminatory operation.

76. I would hold the Act invalid. It follows that I would answer the question reserved for consideration thus: Section 9 of the War Crimes Act 1945 as amended is invalid in its application to the information laid by the second defendant against the plaintiff.

JUDGE3

DEANE J. The question reserved for the consideration of the Court in this case is whether s.9 of the War Crimes Act 1945 (Cth) ("the Act") is invalid in its application to the information laid against the plaintiff. That question raises problems of fundamental importance about the extent of the Commonwealth's legislative power with respect to "External affairs" and the implications, in so far as the trial and punishment of criminal offences are concerned, of the Constitution's exclusive vesting of the judicial power of the Commonwealth in the courts contemplated by Ch III. It is convenient to turn at once to a consideration of the meaning and operation of the central provisions of the Act. Except to the extent necessary for discussion, I shall avoid repetition of either the background facts or the detailed text of the relevant statutory provisions. It suffices to note that the acts which are said to constitute offences under the Act were all allegedly done by the plaintiff in the Ukraine between 1942 and 1943. It is common ground that, at the time those acts were allegedly committed in the Ukraine, the plaintiff had no relevant connection with this country and that, at that time, none of the alleged offences was a crime under any domestic law in force in this country. If any of the alleged offences is a crime under the domestic law of this country, it is only because it was made such a crime by the War Crimes Amendment Act 1988 (Cth) ("the 1988 Amendment Act") which, while retaining the old title, substituted a completely new piece of legislation for the then provisions of the Act.

Offences against the Act

2. Section 7 of the Act identifies what constitutes a "war crime" for the purposes of the Act. It does this by building upon a "serious crime" as

defined by s.6. The effect of s.7, when read in the context of the definitions of "war" and "occupation" in s.5, is that any of the multitude of acts which might constitute a "serious crime" under s.6(1), (4) and (5) (if done in a part of Australia) or s.6(3),(4) and (5) (if done outside Australia) is a "war crime" for the purposes of the Act if it bears one or more of a number of specified relationships with the war or armed conflict which "occurred in Europe in the period" between 1 September 1939 and 8 May 1945 or with an occupation of territory arising out of that war or armed conflict (including the occupation of territory in Latvia, Lithuania or Estonia pursuant to the 1939 agreement between Germany and the U.S.S.R.).

3. Section 9(1) of the Act provides that a person who committed a "war crime" during the period from 1 September 1939 to 8 May 1945 is guilty of an indictable offence against the Act. Section 10 prescribes the maximum penalties for an offence against the Act: imprisonment for life for an offence involving wilful killing; imprisonment for twenty-five years for any other offence. Section 11 restricts the persons who may be charged with an offence against this Act to "an Australian citizen" or "a resident of Australia or of an external Territory". Section 13 applies s.68 of the Judiciary Act 1903 (Cth) to vest jurisdiction in relation to alleged offences against the Act in courts of the Australian States and internal Territories.

The defence under s.17

4. Section 17(2) constitutes a key to an understanding of the scope and operation of the Act. It provides that, subject to s.16 (which excludes a defence of superior orders), "it is a defence if the doing by the defendant of the act alleged to be the offence:

(a) was permitted by the laws, customs and usages of war; and

(b) was not under international law a crime against humanity".

The past tense "was" in each limb of s.17(2) makes plain that the temporal reference point for the operation of the sub-section is the time when the offence was allegedly committed.

5. The law permits what it does not proscribe or penalize and the ordinary meaning of "permitted" when used with reference to a law or system of law is "not prohibited" or "not in contravention of". The word "permitted" is used in that sense in par.(a). It follows that, as a matter of ordinary language, the effect of the sub-section is that "it is a defence" if, at the time of its commission, "the act alleged to be the offence" was neither a contravention of the laws, customs and usages of war nor a crime against humanity under international law.

6. The phrase "the laws, customs and usages of war" in par.(a) of s.17(2) would seem to be the equivalent of the phrase "the laws and customs of war" which has long been used in international treaties and literature. The inclusion of the word "usages" presumably reflects a tendency in some places, including this country, to use that word instead of the more traditional "customs" (see, e.g., United Nations General Assembly Resolution 3(I), "Extradition and Punishment of War Criminals", 13 February 1946; Manual of Military Law 1941, Australian ed., Ch XIV). The phrase "the laws, customs and usages of war" in par.(a) should be understood as referring to laws and customs which have reached the status of binding rules in the sense explained by Finch in "The Nuremberg Trial and International Law", The American Journal of International Law, vol.41 (1947), at pp 20-21:

> "The laws and customs of war, including those of military occupation, are well established in international law. They are enacted in national legislation, codified in military manuals, incorporated in binding international conventions, and affirmed by the immemorial practice of states thus becoming a part of the common law of war."

5941

In their particular context as a "defence" to conduct which would otherwise be punishable as a "war crime" under the statutory definition contained in the main operative provisions of the Act, it appears to me to be clear enough that the words "was permitted by the laws, customs and usages of war" should be understood as meaning conduct which did not constitute a violation of the then rules of international law prohibiting certain types of conduct towards combatants, prisoners and civilians in or in relation to the waging of war. Such conduct is commonly described as a war crime under international law. That description should not, however, be allowed to conceal the fact that the rules of international law, as distinct from particular treaties, did not, at the time of the alleged offences in the present case (i.e. between September 1942 and May 1943), directly establish or make punishable the criminality of individuals for breaches of the law of war (see, generally, Stone, Legal Controls of International Conflict, (1954), at p 357; United Nations War Crimes Commission, History of the United Nations War Crimes Commission and the Development of the Laws of War, (1948), at pp 262ff.). International law had long recognized the right of a belligerent State to punish for war crimes not only members of its own forces and those who contravened the laws and customs of war upon its territory but also members of the armed forces of an opposing State who fell into its hands. The development of international law to the stage where it made individuals directly and universally punishable by the International Community or by a State or States acting on its behalf for conduct constituting a war crime was, however, something which occurred after the establishment of the United Nations War Crimes Commission in October 1943. It was closely associated with the development of the principle of international law that conduct of an individual could be a crime under international law notwithstanding that it was done in obedience to government or superior orders (see below).

7. The phrase "crime against humanity" has, in the last half-century, also become a commonly used one in international treaties and the writing of publicists. There is little real difficulty about its meaning. It is a convenient general phrase for referring to heinous conduct in the course of a persecution of civilian groups of a kind which is now outlawed by international law but which may not involve a war crime in the strict sense by reason of lack of connection with actual hostilities. Inevitably, there may be difficulties in determining whether a particular course of conduct (e.g. genocide) was made criminal and punishable as a "crime against humanity" under international law at any particular point of time. It is, however, unnecessary to pursue those difficulties for the purposes of the present judgment. As will be seen, the Act is not concerned with offences against international law in their character as such and does not confine the past acts which it makes punishable for the first time as offences against Commonwealth law to acts which were in contravention of international law.

8. Sub-sections (3),(4) and (5) of s.17 all bear upon the operation and effect of s.17(2). They were introduced in the Bill for the 1988 Amendment Act by amendment made in the Senate. Sub-section (3) reads:

> "To avoid doubt, the doing of the act by the defendant was permitted by the laws, customs and usages of war if it was reasonably justified by the exigencies and necessities of the conduct of war."

That provision is ambiguous. It is open to be construed as an exhaustive definition of the scope of par.(a) of s.17(2), that is to say, as confining what is "permitted by the laws, customs and usages of war" for the purposes of par.(a) to what can be reasonably justified by considerations of military necessity. The more obvious construction of sub-s.(3) is, however, not as an exhaustive definition of what falls within par.(a) but as no more than an express identification (to "avoid doubt") of but one of the possible sets of circumstances in which a defence under that paragraph is available. This more

5947

obvious construction is, in my view, the preferable one. So construed, the sub-section does not affect the scope of s.17(2) otherwise than in relation to the special case of military necessity with which it deals. In so far as that special case is concerned, sub-s.(3) arguably extends the scope of sub-s.(2) in that it is arguable that it gives a more general application to a more lenient test than does international law. It would, however, presumably be a less generous test than the extended notion of necessity asserted under the German doctrine of Kriegsraison in the two World Wars (see Stone, op cit, at pp 351-352).

9. Section 17(4) provides that a defendant "is not entitled to rely on a defence" under s.17(2) "unless there is evidence of the existence of the facts constituting the defence". Section 17(5) provides that, "if there is such evidence, the onus of establishing, beyond a reasonable doubt, that those facts either do not exist or do not constitute the defence lies on the prosecution". On first impression, sub-ss.(4) and (5) appear to have been framed on the assumption that the question whether the doing of any act falling within the very wide range of s.7 was permitted by the laws, customs and usages of war and was not under international law a crime against humanity will always involve a defence allegation of additional fact by way of confession and avoidance. Such an assumption would be ill-founded in any case where, regardless of excuse or justification, "the act alleged to be the offence" was not, as a matter of international law, a contravention of the laws, customs and usages of war or a crime against humanity at the time when it was allegedly committed (e.g. some possible examples of the "serious crime" of "manslaughter" (see s.6(1)(b)) "committed ... in the course of an occupation" (see s.7(1)(b)). Be that as it may, s.17(4) confirms what s.17(2) itself clearly indicates, namely, that s.17 does not add an element to what constitutes a "war crime" for the purposes of the Act. The elements of a "war crime" are to be found in the earlier sections to which reference has been made: in particular, s.6 which defines a "serious crime"; s.7 which builds upon a "serious crime" to define a "war crime"; and s.9 which identifies a past period within which the commission of a "war crime" constitutes an indictable offence. Conduct which constitutes a "war crime" for the purposes of the Act is not punishable as such if a s.17(2) defence is applicable. Where such a defence involves allegations of additional fact, there must be some evidence of the existence of those facts before the defence can be relied upon. Subject to that qualification, the onus of negativing the defence to the ordinary criminal standard of proof rests on the prosecution.

10. It should be mentioned that it was submitted on behalf of the defendants that there should be implied in s.7 of the Act a provision to the effect that it is an element of a "war crime" for the purposes of that section that the conduct in question constituted a war crime or crime against humanity under international law. There is, however, nothing in the Act which supports the importation of such a clause. To the contrary, the express provisions of s.17 preclude the implication of any such general overriding provision in s.7. The primary legislative purpose to be discerned in the Act

11. The preamble to the Act, like all of the Act's operative provisions, was introduced by the 1988 Amendment Act. It expresses a legislative decision that it is "appropriate" that there should be "brought to trial in the ordinary criminal courts in Australia" any "persons who committed serious war crimes in Europe during World War II" and who have "since ... entered Australia and became Australian citizens or residents" (emphasis added). While the Act in terms applies to "war crimes" committed in Australia, its requirement of one or other of the various specified relationships with the 1939-1945 war or armed conflict which "occurred in Europe" supports the conclusion that, as the preamble indicates, the ordinary operation of the Act was intended by the Parliament to be in relation to the trial and, in case of

5943

a conviction, the punishment of Australian citizens or residents accused of past conduct in Europe of the kind described by the Act. The present case falls within the area of that intended ordinary operation in that the plaintiff, an Australian citizen and resident, is charged with acts allegedly committed almost half a century ago in the Ukraine at a time when he had no disclosed connection with Australia. The defendants' primary contention is that that ordinary operation of the Act (i.e. in relation to a case such as the present where the alleged offence is an act committed outside Australia by a person who was not at the time an Australian citizen or resident) can be justified by reference to the grant of legislative power contained in s.51(xxix) of the Constitution. For reasons which will appear, it is unnecessary for me to consider a subsidiary submission of the defendants that the Act can also be justified as a law with respect to the naval and military defence of the Commonwealth and the States (Constitution, s.51(vi)).

Section 51(xxix): "External affairs"

12. The first thing to be stressed about s.51(xxix) of the Constitution for the purposes of the present case is that its reference to "External affairs" is unqualified. The paragraph does not refer to "Australia's external affairs". Nor does it limit the subject matter of the grant of power to external affairs which have some special connection with Australia. The word "external" means "outside". As a matter of language, it carries no implication beyond that of location. The word "affairs" has a wide and indefinite meaning. It is appropriate to refer to relations, matters or things. Used without qualification or limitation, the phrase "external affairs" is appropriate, in a constitutional grant of legislative power, to encompass both relationships and things: relationships with or between foreign States and foreign or international organizations or other entities; matters and things which are territorially external to Australia regardless of whether they have some identified connection with Australia or whether they be the subject matter of international treaties, dealings, rights or obligations. Such a construction of the phrase "External affairs" in s.51(xxix) is supported by the settled principle of constitutional construction which requires that, subject to any express or implied general constitutional limitations and any overriding restrictions flowing from express or implied constitutional guarantees, the grants of legislative power contained in s.51 be construed with all the generality which the words used admit and be given their full force and effect.

13. The view that a law with respect to matters or things which are territorially outside Australia is a law with respect to "External affairs" for the purposes of s.51(xxix) is supported by numerous statements in recent cases in this Court. Thus, Barwick C.J., in New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") (1975) 135 CLR 337, at p 360, expressed the view that the legislative power with respect to external affairs "extends ... to any affair which in its nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole". To the same effect were the comments of Mason J. (at p 470):

> "The plaintiffs' argument proceeds on the footing that the power is no more than a power to make laws with respect to Australia's relationships with foreign countries. Why the power should be so confined is not readily apparent. The power is expressed in the widest terms; it relates to 'affairs' which are external to Australia. 'Affairs' include 'matters' and 'things' as well as 'relationships' and a constitutional grant of plenary legislative power 'should be construed with all the generality which the words used admit'".

Jacobs J. (at p 497) was no less emphatic:

> "In my opinion the Commonwealth has the power to make

5944

> laws in respect of any person or place outside and any matter or thing done or to be done or prohibited to be done outside the boundaries of the Commonwealth."

14. In the Seas and Submerged Lands Case (at p 503), Murphy J. said that "external affairs" in s.51(xxix) are not confined to subjects "of international concern" and are "not limited to the subject matters of treaties and conventions to which Australia is a party, and to the affairs of international bodies ... of which Australia is a member". His Honour concluded (at pp 503-504) that it mattered not whether the Seas and Submerged Lands Act 1973 (Cth) departed from the international conventions upon which the Commonwealth relied. It sufficed that the Act dealt directly with "aspects of external affairs". In the context of a challenge to the validity of legislation which dealt with (amongst other things) the continental shelf outside the limits of the territorial sea, it is arguable that Murphy J.'s comments should be read as reflecting an underlying view corresponding to that expressed by Barwick C.J., Mason J. and Jacobs J. in the above-quoted extracts from their judgments. If that be so, the view that the external affairs power extends to authorize the making of laws in respect of any place situate, and any matter or thing done or to be done, outside the boundaries of the Commonwealth was a basis of the decision in the Seas and Submerged Lands Case upholding the validity of the provisions relating to the continental shelf outside territorial Australia. That that view was subsequently held by Murphy J. is made clear by his judgment in Robinson v. Western Australian Museum (1977) 138 CLR 283, at p 343, where his Honour wrote that the Parliament "has plenary power under the external affairs power to legislate for shipping (whether intra-state, interstate or overseas) in and beyond the territorial sea and may make any provision it thinks fit for wrecks in or under the sea or on the coast", and added that "the practical limitation" upon the exercise of the power was international acceptance. In The Commonwealth v. Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1, at pp 171-172, his Honour said:

> "To be a law with respect to external affairs it is sufficient that it ... deals with circumstances or things outside Australia".

(See also Viro v. The Queen (1978) 141 CLR 88, at p 162.)

15. One searches in vain in recent judgments in this Court in cases involving s.51(xxix) for any denial of the view that the legislative power with respect to external affairs extends to any matter or thing done or situate outside Australia. The closest one comes to finding any express questioning of that view is in the judgment of Gibbs C.J. in Koowarta v. Bjelke-Petersen (1982) 153 CLR 168, where his Honour (who had dissented in the Seas and Submerged Lands Case in relation to the territorial sea but not in relation to the continental shelf beyond territorial waters) saw the question as remaining an open one. Referring to the Seas and Submerged Lands Case, he said (at p 190):

> "... three members of the Court, Barwick C.J., Mason and Jacobs JJ., relied on the further ground that the power given by s.51(xxix) was not limited to authorizing laws with respect to Australia's relationships with foreign countries, but extended to any matter or thing situated or done outside Australia. It is unnecessary to consider whether the words of par.(xxix) can have this dual operation, i.e. whether the phrase 'external affairs' can be used to mean matters outside the Commonwealth as well as matters involving a relationship between Australia and other countries."

In contrast, Mason J. in Koowarta (at p 223) expressed the view that the question had been determined by the decision in the Seas and Submerged Lands Case which "decided that the power extends to matters and things, and I would say, persons, outside Australia". His Honour added:

> "That decision established, quite apart from the provisions

5945

> of the Statute of Westminster, that the so-called principle denying an extra-territorial operation to the legislation of a colony had no application to laws enacted by the Commonwealth Parliament. There was, accordingly, no reason why the power should not apply to any matter or concern external to Australia."

In Koowarta, Stephen J. (who, like Gibbs C.J., had dissented in the Seas and Submerged Lands Case in relation to the territorial sea) appears to me to have accepted that s.51(xxix) conferred a general legislative power with respect to matters outside Australia. The word "External", his Honour wrote (at p 211), qualified "affairs" so as to restrict the meaning of the composite phrase "External affairs" in s.51(xxix) "to such of the public business of the national government as relates to other nations or other things or circumstances outside Australia" (emphasis added). In The Tasmanian Dam Case (at p 97), Gibbs C.J. adopted as accurate that suggested "paraphrase" of the legislative power with respect to external affairs.

16. Whatever may have been the position before the emergence of Australia as a fully independent sovereign State, it should now be accepted that any law which can properly be characterized as a law with respect to any matter, thing or person occurring or situate outside Australia is a law with respect to "External affairs" for the purposes of s.51(xxix). In referring to "a law with respect to any matter ... occurring ... outside Australia", I intend to include, among other things, what Jacobs J. described (see above) as "any matter or thing done or to be done or prohibited to be done outside the boundaries of the Commonwealth". As has been mentioned, that broad view of the scope of the power conforms with settled principles of constitutional construction. It is, as has been seen, arguably part of the ratio decidendi of the Seas and Submerged Lands Case. It is certainly strongly supported by statements in the judgments in that and other recent cases (see, in addition to the above references, Robinson v. Western Australian Museum, at pp 294, 335; The Tasmanian Dam Case, at p 255). It is also supported by the consideration that Commonwealth laws with respect to matters, things or persons outside Australia are likely to operate in areas where there will commonly be no competing State interests with the result that, in the absence of Commonwealth legislative power, there would be a lacuna in the plenitude of combined legislative powers of the various Parliaments of the Australian federation. It has long been recognized in this Court that, subject to express and implied constitutional limitations and guarantees, no such lacuna exists in legislative authority in relation to internal matters (see, e.g., Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth (1912) 15 CLR 182, at pp 214-215; Smith v. Oldham (1912) 15 CLR 355, at pp 360-361, 365; Reg. v. Duncan; Ex parte Australian Iron and Steel Pty. Ltd. (1983) 158 CLR 535, at pp 590-591). With the emergence of Australia as a fully sovereign and independent nation, there remains no acceptable basis for maintaining any such lacuna in the combined powers of the Parliaments of the federation to legislate for this country with respect to extraterritorial matters beyond that resulting from the limitations which the Constitution itself expressly or impliedly imposes. In that regard, it is important to bear in mind that the question whether s.51(xxix) confers a general plenary legislative power with respect to matters, things and persons occurring or situate outside of Australia does not ordinarily involve what Stephen J. called the "conceptual duality" which applies in a case where the subject matter of a law with respect to external affairs is some matter, thing or person occurring or situate within Australia (see the Seas and Submerged Lands Case, at p 458). As Stephen J. commented (ibid.), "the absence of any State interests means that for that area the Commonwealth may act as if it were a unitary state, without need to draw any distinction, if distinction there be, between internal and external aspects of 'sovereign rights'" (and see, generally, the discussion in the judgment of Jacobs J. in the Seas and

5946

Submerged Lands Case, at pp 497-498, with which I respectfully agree).

17. To the extent that they provide for the trial and punishment of Australian citizens and residents for acts committed outside Australia and having a specified relationship with the 1939-1945 war or armed conflict which occurred in Europe, the provisions of the Act are clearly a law or laws with respect to matters or things which occurred or were done outside Australia. It follows from what has been said above that, at least to that extent, the Act is a law with respect to "External affairs" within the meaning of that phrase as used in s.51(xxix). It is unnecessary for the purpose of deciding the present case to determine whether the provisions of the Act can also be characterized as a law with respect to "External affairs" to the extent that they provide for the trial and punishment of Australian citizens and residents in respect of acts committed within Australia which have one or other of the specified relationships with the 1939-1945 war or armed conflict which occurred in Europe. The offences involved in the present case are all alleged to have been committed by the plaintiff outside Australia and the operation of the Act in relation to alleged offences committed outside Australia could be severed from the provisions of s.6(1) and (2) which have the effect of including acts committed within Australia in conduct punishable under the Act as a "war crime". Indeed, as I followed the argument, it was not submitted that the provisions of the Act dealing with overseas conduct are invalid on the ground that, even if they be valid to the extent of their own operation, they are inseverable from invalid provisions dealing with conduct within Australia.

18. It should, however, be acknowledged that the question whether the Act can properly be characterized as a law with respect to external affairs for the purposes of s.51(xxix) to the extent that its provisions are made applicable (by s.6(1) and (2)) to acts committed within Australia is a more complicated one than the question whether it can be so characterized to the extent that its provisions apply to acts committed outside Australia. In its purported application to local conduct, the Act operates in an area in which it interacts with State laws. Indeed, s.6(1) makes criminality under the law of the locus State an element of a "war crime". That interaction with State law raises difficult questions about whether the Act, if wholly within constitutional power, should be read down to avoid double jeopardy or double punishment in cases where there has been a trial or conviction under State law for that past criminal conduct and whether State laws are rendered invalid, under s.109 of the Constitution, to the extent that they would provide for future punishment of a "serious crime" that is liable to be punished, under the Act, as a "war crime". In a context where I am unpersuaded that there is any obligation at all upon Australia under customary international law or under any treaty to enact legislation providing for the further punishment of an individual's pre-1945 conduct within Australia (i.e. punishment additional to the penalty already provided under "the law then in force" in the relevant "part of Australia": see s.6(1) and (2)), the answer to the question whether the provisions of the Act are, to the extent that they deal with conduct within Australia, properly to be characterized as a law with respect to external affairs for the purposes of s.51(xxix) ultimately turns upon whether, being a law with respect to acts committed within Australia, they can, in all the circumstances, also be properly characterized as a law with respect to the 1939-1945 war or armed conflict in Europe or whether, if they cannot properly be so characterized, their operation is capable of being reasonably considered to be "appropriate and adapted" to deal with some matter of international concern or to achieve an identified purpose or object which is itself a legitimate subject of external affairs in the sense explained in The Tasmanian Dam Case (at pp 259-261; see, also, Richardson v. Forestry Commission (1988) 164 CLR 261, at pp 291, 309-312, 324, 336, 344-346).

594

19. There remains to be considered the question whether, notwithstanding that the Act (at least to the extent that the provisions apply to acts committed outside Australia) is properly to be characterized as a law with respect to external affairs, it is nonetheless beyond the competence of the Parliament of the Commonwealth by reason of some express or implied limitation upon power to be found in the Constitution. Two possible sources of such a restriction upon the Parliament's legislative power with respect to "External affairs" were raised in the course of argument of the present case. The first suggested source of such a restriction is the phrase "for the peace, order, and good government of the Commonwealth" in the introductory words of s.51. The second is Ch III of the Constitution.
"for the peace, order, and good government of the Commonwealth"

20. Each of the legislative powers conferred by s.51 is expressly stated, by the introductory words of the section, to be a "power to make laws for the peace, order, and good government of the Commonwealth" with respect to the specified subject matter. It was argued that the words "for the peace, order, and good government of the Commonwealth" introduce a requirement of some identified connection with Australia and that no such connection exists in relation to acts committed between 1939 and 1945 in Europe by a person who was not, at the relevant time, a citizen or resident of this country. There is a short answer to that argument.

21. The words "for the peace, order, and good government of the Commonwealth" in s.51 do not impose an objective qualification upon the subject matters of legislative power. They refer to the intended beneficial operation of laws made with respect to those subject matters and simply express the fact that in "a general and remote sense the purpose and design of every law is to promote the welfare of the community" for which the law is made (see Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd. (1959) 103 CLR 256, at p 308; Union Steamship Co. of Australia Pty. Ltd. v. King (1988) 166 CLR 1, at pp 12-13). It is for the Parliament, not for the Court, to decide whether a law will be or is "for the peace, order, and good government of the Commonwealth". Where the Parliament decides, by enactment, that a law is "for the peace, order, and good government of the Commonwealth", that, of itself, provides sufficient connection between this country and the subject matter of that law for the purposes of s.51 (see, generally, King, at pp 9-13).

22. Moreover, even if, contrary to my own view and to authority, the words "for the peace, order, and good government of the Commonwealth" introduced a requirement that the particular law have some special connection with this country over and beyond the fact that it is made for Australia by the Australian Parliament, that requirement would be satisfied by the Act. The operation of a law which provides for the trial and, in the event of conviction, punishment of Australian citizens or residents in Australian courts for past conduct in connection with a war in which this country was a belligerent obviously has a close and special connection with Australia regardless of whether the alleged offence was committed overseas or whether, at the time of its commission, the alleged offender had any connection with this country.
Chapter III of the Constitution

23. The Constitution is structured upon the doctrine of the separation of judicial from legislative and executive powers. Chapter III gives effect to that doctrine in so far as the vesting and exercise of judicial power are concerned. Its provisions constitute "an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested" (see, e.g., Reg. v. Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254, at p 270). The specific grants of legislative powers contained in s.51 are expressly made subject to the Constitution and it is settled law that those

S9748

grants of legislative power are subject to the provisions of Ch III identifying the permissible repositories, and controlling the manner of exercise, of Commonwealth judicial power.

24. The main objective of the sometimes inconvenient separation of judicial from executive and legislative powers had long been recognized at the time of the federation. It is to ensure that "the life, liberty, and property of the subject (is not) in the hands of arbitrary judges, whose decisions (are) then regulated only by their own opinions, and not by any fundamental principles of law" (Blackstone, Commentaries, 17th ed. (1830), vol.I, p 269; and see, to like effect, Story, Commentaries on the Constitution of the United States, (1833), s1568). That objective will, of course, be achieved only by the Constitution's requirement that judicial power be vested exclusively in the courts which it designates if the judicial power so vested is exercised by those courts in accordance with the essential attributes of the curial process (cf. Re Tracey; Ex parte Ryan (1989) 166 CLR 518, at p 580). Indeed, to construe ChIII of the Constitution as being concerned only with labels and as requiring no more than that the repository of judicial power be called a court would be to convert it into a mockery, rather than a reflection, of the doctrine of separation of powers. Common sense and the provisions of Ch III, based as they are on the assumption of traditional judicial procedures, remedies and methodology (see below), compel the conclusion that, in insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch III, the Constitution's intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that that notion essentially requires. Accordingly, the Parliament cannot, consistently with Ch III of the Constitution, usurp the judicial power of the Commonwealth by itself purporting to exercise judicial power in the form of legislation. Nor can it infringe the vesting of that judicial power in the judicature by requiring that it be exercised in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power. It would, for example, be beyond legislative competence to vest jurisdiction to deal with a particular class of matter in a Ch III court and to provide that, in the exercise of that jurisdiction, the judge or judges constituting the court should disregard both the law and the essential function of a court of law and do whatever they considered to be desirable in the public interest.

25. The ordinary object of the exercise of judicial power is the ascertainment of rights and liabilities or of guilt or innocence under the law. The point was made by the United States Supreme Court in Prentis v. Atlantic Coast Line Co. (1908) 211 US 210, at p 226, in a passage which has been quoted with approval on a number of occasions in this Court (see, e.g., Rola Co. (Australia) Pty. Ltd. v. The Commonwealth (1944) 69 CLR 185, at p 211; Reg. v. Davison (1954) 90 CLR 353, at p 370):

> "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter ..."

Prima facie, the relevant substantive law for determining rights and liabilities is the law which operated at the time of the circumstances from which those rights and liabilities are alleged to arise. Thus, it is a rule of construction that it is to be presumed that it was not the legislative intent that a statutory provision which affects rights or liabilities should operate retrospectively. Nonetheless, the focus of civil litigation is upon the determination of rights and liabilities under the law as it exists at the time of the proceedings. Civil legislation which operates retrospectively in the sense that it extinguishes or alters pre-existing rights or liabilities or

5949

deems rights and liabilities which it creates to have existed at an earlier time may, depending on the circumstances, be susceptible of legitimate criticism as unfair or unjustified. Such legislation will not, however, contravene the doctrine of separation of powers merely because it retrospectively creates, extinguishes or alters civil rights and liabilities or because it requires the courts to recognize and enforce, in subsequent civil litigation, the retrospective operation of its provisions (cf., e.g., Reg. v. Kirby; Ex parte Boilermakers' Society of Australia, at p 281). Putting to one side cases of impermissible interference with the proper discharge of judicial power by the courts, it will do so only if it is properly to be seen as involving a purported legislative exercise of the judicial function. Except in quite extreme cases (e.g. a statute providing that there be a verdict for the plaintiff in the amount of $500,000 in pending defamation proceedings in a court), the boundary between what is permissible as falling within the limits of legislative power and what is forbidden as a usurpation of judicial power is likely to be blurred in civil matters. The reason is that both the legislature and the judicature may, within the limits of their respective functions under the doctrine of separation of powers, each settle questions of rights and liabilities under the civil law. The position is different, however, in the case of a law which operates to make criminal an act which was not a crime when done. I turn to explain why that is so. For convenience of discussion, I shall refer to such a law as an "ex post facto criminal law".

26. There are some functions which, by reason of their nature or because of historical considerations, have become established as incontrovertibly and exclusively judicial in their character. One - and the most important - of such functions is the adjudgment of guilt of a person accused of a criminal offence. As such, that function is a matter "appertaining exclusively to (judicial) power" (per Griffith C.J., Waterside Workers' Federation of Australia v. J.W. Alexander Ltd. (1918) 25 CLR 434, at p 444) which "could not be excluded from the judicial power" (see, e.g., Reg. v. Davison, at pp 368-369, 383). It follows that, subject only to limited qualifications (see below), the Parliament is incapable of vesting jurisdiction to try a person accused of an offence against a law of the Commonwealth otherwise than in one of the "courts" contemplated by Ch III or of directing that part of such jurisdiction be exercised in a manner inconsistent with the requirements of that Chapter. More important for present purposes, the Parliament is incapable of substituting a legislative enactment of criminal guilt of an offence against a law of the Commonwealth for a trial by a Ch III court. To appreciate the implications of that fundamental constitutional truth, it is necessary to understand the central function of a criminal trial under our system of government.

27. The basic tenet of our penal jurisprudence is that every citizen is "ruled by the law, and by the law alone". The citizen "may with us be punished for a breach of law, but he can be punished for nothing else" (Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (1959), p 202). Thus, more than two hundred years ago, Blackstone taught (see Commentaries, (1830), vol.I, pp 45-46) that it is of the nature of law that it be "a rule prescribed" and that, in the criminal area, an enactment which proscribes otherwise lawful conduct as criminal will not be such a rule unless it applies only to future conduct. Consequently, it would be contrary to the nature of the legislative function under our system of government, if:

> "... after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent

5950

> law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence in futuro, and be notified before their commencement; which is implied in the term 'prescribed'."

Put differently, it is basic to our penal jurisprudence that a person who has disobeyed no relevant law is not guilty of a crime. Of its nature, a crime "is an act committed, or omitted, in violation of a public law, either forbidding or commanding it" (Blackstone, Commentaries, (1830), vol.IV, p 5). It necessarily involves a contravention of a prohibition contained in an existing applicable valid law. As Lord Atkin wrote, for the Judicial Committee of the Privy Council, in Proprietary Articles Trade Association v. Attorney-General for Canada (1931) AC 310, at p 324:

> "Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? Morality and criminality are far from co-extensive; nor is the sphere of criminality necessarily part of a more extensive field covered by morality - unless the moral code necessarily disapproves all acts prohibited by the State, in which case the argument moves in a circle. It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of 'criminal jurisprudence'; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State ..."

Accordingly, the whole focus of a criminal trial is the ascertainment of whether it is established that the accused in fact committed a past act which constituted a criminal contravention of the requirements of a valid law which was applicable to the act at the time the act was done. It is the determination of that question which lies at the heart of the exclusively judicial function of the adjudgment of criminal guilt.

28. That basic tenet of our penal jurisprudence has at times been blurred in the area of so-called "judge-made" criminal law (see, generally, Spencer, Nulla Poena sine Lege in English Criminal Law, The Cambridge-Tilburg Law Lectures 1980; Kelsen, General Theory of Law and State, (1945), p 146). In so far as legislation is concerned, history records some departures from it particularly in times of civil disturbance. At least since the time of Bentham and Mill, however, ex post facto criminal legislation has been generally seen in common law countries as inconsistent with fundamental principle under our system of government. The point was well made by a very strong Court of Exchequer Chamber (Kelly C.B., Martin, Channell, Pigott and Cleasby BB., Willes and Brett JJ.) in a judgment delivered by Willes J. in Phillips v. Eyre (1870) LR 6 QB 1. Having recognized that some retrospective legislation was "beneficial and just", their Lordships wrote (at p 25):

> "The retrospective Attainder Acts of earlier times, when the principles of law were not so well understood or so closely regarded as in the present day, and which are now looked upon as barbarous and loosely spoken of as ex post facto laws, were of a substantially different character. They did not confirm irregular acts, but voided and punished what had been lawful when done. Mr. Justice Blackstone (1 Bla. Com. 46) describes laws ex post facto of this objectionable class as those by which 'after an action

5951

> indifferent in itself is committed, the legislature (Blackstone wrote "legislator") then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it'" (emphasis added).

Obviously, their Lordships were not - any more than was Blackstone - suggesting that ex post facto criminal legislation was beyond the legislative competence of the Imperial Parliament whose powers have never been confined by an entrenched doctrine of the separation of judicial from legislative and executive powers. Nonetheless, their Lordships' comments - like those of Blackstone - are directly relevant to the determination of what lies beyond the limits of the legislative function under a constitution which, like ours, entrenches the doctrine and subjects legislative power to it. In that regard, it is important to note that their Lordships identified the central vice of a Bill of Attainder not as lying in its specific naming of an individual but as lying in its ex post facto operation as a legislative decree that an act which was not criminal when done was "voided and punished" as a crime. A statute which decreed that "any person" who had supported the unsuccessful party in some past period of civil disturbance was, notwithstanding that he had contravened no then existing law, guilty of treason and subject to a death penalty would not be a Bill of Attainder in the strict sense in that a trial would be necessary to determine whether a particular accused had in fact supported the unsuccessful party and the actual sentencing would be by a court. It would, nonetheless, fall squarely within the category of laws which their Lordships condemned as inconsistent with a proper understanding of "the principles of law". So also does any statute which, like s.9(1) of the Act, declares that a person is guilty of a crime against the law of the Commonwealth if he has committed a past act which did not, when committed, contravene any then existing and applicable law of the Commonwealth and was therefore not such a crime.

29. The perception that ex post facto criminal legislation lies outside the proper limits of the legislative function is not confined to countries whose legal traditions can be traced to the British system of government. It is shared by all the nations of the European Economic Community (see Case 63/83 Reg. v. Kirk (1984) EC.R. 2689, at p 2718). It is reinforced by the provisions of international conventions concerned with the recognition and protection of fundamental human rights (see, e.g., Universal Declaration of Human Rights, (1948), Art.11(2); European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950), Art.7; American Convention on Human Rights, (1969), Art.9). In some international conventions and national declarations of fundamental rights, a disavowal of retrospective criminal legislation is made subject to a qualification in respect of an act which was, at the time it was committed, a crime against international law. Such a qualification is not in point in the present case where the conduct made criminal by the Act is not made punishable as, and need not necessarily have been, a crime against international law at the time it occurred.

30. A statutory provision, such as s.9 of the Act, that a "person who" in the past "committed" a specified act "is guilty of" a punishable crime prescribes no rule of conduct. It prohibits nothing. It trespasses upon the exclusively judicial field of determining whether past conduct was a crime, that is to say, whether it was in fact an act or omission which the law "prohibited with penal consequences". Within that field, it negates the ordinary curial process by enacting, and requiring a finding of, criminal guilt regardless of whether there was in fact any contravention of any relevant law. If the specified act was not prohibited by such a law when done, such a statutory provision is a retroactive legislative declaration of past criminal guilt when in fact there was none. If it nominates, either individually or by reference to an identifiable group, the person or persons who have committed the specified act, it constitutes a Bill of Attainder or a Bill of Pains and

Penalties, depending upon the punishment. In such a case, the statutory provision constitutes a legislative declaration of guilt without any trial at all. Plainly, it involves a usurpation of judicial power. As Murphy J. wrote in Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25, at p 107:

> "For centuries the finding that a person has broken the criminal law has been regarded as within the judicial sphere, and outside the sphere of the Parliament and the executive. Bills of attainder by which Parliament entered the sphere of criminal justice are inconsistent with this basic constitutional scheme" (emphasis added).

31. The position is less obvious where such a statutory provision does not nominate a particular person or group of persons but identifies the persons whom it makes punishable for past "crime" by reference only to their having committed some past act which was not criminal when done. In such a case, there will be a need for a trial to determine whether a particular accused falls within the class of those whose past conduct is retroactively made criminal. Nonetheless, such a statutory provision declaring past conduct to have been a criminal offence constitutes a usurpation of judicial power in that, once it is established that the accused has committed the past act, the question whether that act constituted a criminal contravention of the law is made simply irrelevant. To that extent, curial determination of criminal guilt is ousted by legislative decree. The point can be illustrated by dividing the legislation in such a case into its essential components. One component of such legislation is the requirement that there be a "trial" in the courts, in which judicial process must be observed, to determine whether it is established beyond reasonable doubt that a particular person knowingly engaged in the designated conduct. The second component is the enactment that, if it be established that the particular person did in fact engage in that past conduct which was not criminal when done, he is guilty of a punishable crime. That second component of the legislation invades the heart of the exclusively judicial function of determining criminal guilt, that is to say, of determining whether past conduct constituted a criminal contravention of the law. It pre-empts and negates what would otherwise be an inevitable judicial determination that, since the act of the particular person did not constitute a criminal contravention of any Commonwealth law which was applicable at the time when it was done, that person committed no crime under our law. In the place of that inevitable judicial determination, it imposes a legislative enactment of past guilt which it requires the courts, in violation of the basic tenet of our criminal jurisprudence and the doctrine of separation of judicial from legislative and executive powers, to apply and enforce. It is simply not to the point that the first component of the legislation camouflages the usurpation of judicial power involved in the second by requiring a display of the full panoply of judicial process for the purpose of determining whether it is established beyond reasonable doubt that the accused person knowingly did a specified act which was not criminal when done.

32. It follows from what has been written above that Ch III's exclusive vesting of the judicial power of the Commonwealth in courts acting as such does not, at least prima facie, permit the conviction of a person by a court under a statute which declares that a person is guilty of a punishable crime if he has done a past act which was not criminal when done. There are two closely related reasons why the process leading up to such a conviction would prima facie contravene the doctrine of separation of powers embodied in Ch III. It is convenient to restate them in summary form. First, the legislature's interference in that process would go beyond the limits of the legislative function under a constitution structured upon the separation of judicial and legislative powers in that it would involve a usurpation and

partial exercise of what lies at the heart of the exclusively judicial function in criminal matters, namely, the determination of whether the accused person has in fact done an act which constituted a criminal contravention of the then applicable law. Second, a court's participation in that process would also be inconsistent with the doctrine of the separation of powers in that it would represent an abdication of the judicial function of determining in a criminal trial whether past conduct had contravened the law in favour of the legislature's decree that a past non-criminal act is to be punished as a crime. It becomes necessary to consider whether anything within the Constitution itself or considerations of context or authority require that the provisions of Ch III be given some more limited effect than that which the doctrine of separation of judicial from legislative and executive powers would prima facie support. I shall consider that question under three headings: "Constitutional provisions and structure", "The United States precedent" and "The effect of decided cases".

Constitutional provisions and structure

33. It can be said at once that there is nothing in the Constitution which militates against construing Ch III as precluding the enactment (by the Parliament) or the application and enforcement (by the courts) of an ex post facto criminal law. To the contrary, some of the specific provisions and the general structure of the Constitution support such a construction.

34. The provisions of Ch III are based on an assumption of traditional judicial procedures, remedies and methodology. They confer "jurisdiction", that is, the curial power of declaration (dictio) of the law (jus): "the power and authority of a court to hear and determine a judicial proceeding" (In re Estate of De Camillis (1971) 322 NYS 2d 551, at p 556). The jurisdiction so conferred is upon "courts" rather than upon the judge or judges who constitute a particular court. Most important, it is with respect to "matters". In a context such as Ch III, the word "matters" denotes controversies of a kind appropriate to come before a court of justice (see, e.g., per Griffith C.J., The State of South Australia v. The State of Victoria ("the Boundaries Case") (1911) 12 CLR 667, at p 675). A matter "must be such that it can be determined upon principles of law" (ibid.; and see, to the same effect, per O'Connor J. at p 708). The "expression" (i.e. "matter" in Ch III) "includes and is confined to claims resting upon an alleged violation of some positive law ..." (per Isaacs J. at p 715). In their joint judgment in In re Judiciary and Navigation Acts (1921) 29 CLR 257, at p 266, Knox C.J., Gavan Duffy, Powers, Rich and Starke JJ. cited the judgments in the Boundaries Case as authority for the proposition, that "a matter under the judicature provisions of the Constitution must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law" (emphasis added).

35. Section 80 of the Constitution provides clear confirmation of Ch III's assumption of traditional curial standards, procedures and methodology in so far as the criminal law is concerned. It assumes that the determination of criminal guilt will be by "trial" and provides that, when the "trial" is "on indictment", it "shall be by jury". Traditionally, the ultimate question in a criminal trial by jury has been whether the accused did something which was, at the time he did it, contrary to the then law. In that regard, it is quite contrary to all traditional notions of a criminal trial by jury to require the jury to convict a person of a crime by reason of an act which was not criminal when done. In requiring that the trial by jury "shall be held in the State where the offence was committed" (emphasis added), s.80 assumes, what would in any event be implicit in the requirement of trial by jury, that the question of guilt or innocence will be determined by reference to criminality or otherwise as at the time of the alleged offence.

5954

36. Moreover, the structure of the federation and the paramountcy of the Commonwealth's legislative powers with respect to designated subject matters could give rise to extraordinary injustice, difficulty and uncertainty if it lay within the Commonwealth's legislative competence to enact an ex post facto criminal law. If the proscribed act under such a Commonwealth law had been mandatory under an operative and applicable State law at the time when the act was done, the accused would be made retroactively guilty of a crime for doing what the law actually required him to do at the time he did it. If the Commonwealth's ex post facto criminal law covered the field and purported to exclude the operation of any State law, the question would arise whether the exclusion and consequent pro tanto invalidity of the State law could be made fully retroactive (cf. University of Wollongong v. Metwally (1984) 158 CLR 447, at pp 478-479). If it could, State criminal law would assume a provisional character in any area within the reach of Commonwealth legislative power. If, in such a case, the accused had been convicted and punished for an offence against the inconsistent State law, he would have been accused and punished under what retroactively had been made invalid. If the Commonwealth law did not apply retroactively to invalidate the State law but had full cumulative operation, double jeopardy and double punishment would be the result. If it be objected that these problems are hypothetical and far-fetched, one need do not more than refer to the provisions of ss.6(1), 7(1) and 9(1) of the Act. Under those provisions, a person who had been convicted of the offence of "wounding" in 1942 in New South Wales would be retroactively made guilty of a "war crime" under the Act if his offence was committed in any of the circumstances referred to in s.7(1)(c) and (d). In such a case, the elements of the offence of "wounding" under New South Wales law would be elements of the "war crime" under the Act. Unless one can read down the provisions of the Act so that they do not apply to the case where a person has been convicted of the underlying "serious crime" under s.6(1), those provisions would inevitably give rise, in such a case, to serious difficulties and uncertainties about, among other things, the past validity of the State law and the effect of the past trial and conviction in respect of the State offence.

The United States precedent

37. The doctrine of the separation of powers which is incorporated in the Constitution differs from that embodied in the United States Constitution in so far as the relationship between the legislative and executive arms of government is concerned. Chapter III's separation of judicial from executive and legislative power was framed on the United States model. Even in that area, however, there is a relevant and important difference between the two in that the United States Constitution contains express prohibitions of any "Bill of Attainder or ex post facto Law" (Art.I, s9, cl.3 (Federal) and Art.I, s10, cl.1 (State): "the Bill of Attainder Clause") which does not appear in our Constitution. It can be argued that the failure of the Constitution to follow the United States precedent in that regard provides grounds for rejecting a construction of Ch III which would preclude the enactment by the Parliament of an ex post facto criminal law. Such an argument is, of course, equally applicable to a Bill of Attainder in the strict sense. A general answer to it is that, in circumstances where the framers of our Constitution took a quite different approach to the need to incorporate express and detailed statements of underlying individual rights and guarantees, it is impermissible to treat the absence of one or other of the express statements of individual rights or guarantees contained in the United States Constitution as, of itself, constituting a reason for rejecting the possibility that the provisions of our Constitution may give rise to the implication of a corresponding individual right or guarantee (cf. Street v. Queensland Bar Association (1989) 168 CLR 461, at pp 521-522). There is, however, a more particular answer which turns the argument on its head.

38. At the time when the Constitution was adopted by the Australian people, it had long been recognized in the United States that the Bill of Attainder Clause did no more than make express what was, in any event, implicit in the doctrine of the separation of judicial from legislative and executive powers. Thus, in Calder v. Bull (1798) 3 US 386, at p 388, Chase J., in the course of what has subsequently been accepted as the classic exposition of the effect of that Clause, wrote:

> "The prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment. These acts were legislative judgments; and an exercise of judicial power" (emphasis added).

In a context where the express prohibition of "ex post facto laws" was seen as merely declaratory of an aspect of the doctrine of separation of powers, it was a natural step to confine the scope of that phrase to its traditional meaning of ex post facto laws dealing with criminal offences. That step was taken in Calder v. Bull where it was laid down that the reference to ex post facto laws in Art.I should be construed in a technical sense and confined to criminal laws which "create or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction" (see per Chase J. at pp 390-391; Watson v. Mercer (1834) 33 US 88, at pp 109-110). As I have indicated, I am, in this judgment, using the phrase "ex post facto criminal law" in the even narrower sense explained by Blackstone, that is to say, as referring only to a law which retroactively makes criminal an act which was not criminal when done.

39. Chase J.'s view that the Bill of Attainder Clause, construed as confined to criminal laws, merely states what is implicit in the doctrine of separation of powers remains the accepted view in the United States. Thus, one finds the United States Supreme Court in United States v. Brown (1965) 381 US 437, at p 442, acknowledging that:

> "The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature" (emphasis added).

(And see also, e.g., Ogden v. Blackledge (1804) 2 Cranch (6 US) 272, at p 277; Weaver v. Graham (1981) 450 US 24, at p 29; Tribe, American Constitutional Law, 2nd ed. (1988), pp 656ff.; Lehmann, "The Bill of Attainder Doctrine: A Survey of the Decisional Law", Hastings Constitutional Law Quarterly, vol.5 (1978), pp 777-780; "The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause", The Yale Law Journal, vol.72 (1962), pp 330ff.; but cf. Berger, "Bills of Attainder: A Study of Amendment by the Court", Cornell Law Review, vol.63 (1978), pp 379ff.)

40. It follows that the fact that the provisions of the Constitution incorporating the doctrine of the separation of judicial from legislative and executive powers were obviously influenced by corresponding provisions of the United States Constitution provides no reason for denying that it is implicit in those provisions that the Parliament lacks competence to enact an ex post facto criminal law. To the contrary, the recognition, long before 1900, that a prohibition of ex post facto criminal laws was implicit in the doctrine of separation of judicial power which those United States provisions embodied supports the conclusion that Ch III precludes the enactment of such a law. In that regard, it is relevant to note that at least one of the principal framers

5956

of our Constitution saw its adoption of the doctrine of the separation of judicial from legislative and executive powers as involving significant limitation on the powers of the Parliament corresponding to those which had been recognized by the United States decisions as flowing from that doctrine. In his Studies in Australian Constitutional Law, (1901), Mr. Justice Inglis Clark defined a "law" of the Commonwealth as "a rule of conduct prescribed by the Parliament in regard to any matter in respect of which the Parliament is authorised by the Constitution to make laws" (emphasis added). In the course of the following paragraph - opposite the marginal note "The distribution of governmental powers implies a limitation on the power of Parliament" - he wrote (at pp 39-41, emphasis again added):

> "The Constitution does not prohibit the Parliament of the Commonwealth from making retroactive laws; and none of the Constitutions of the States imposes any such prohibition upon the Parliament of the State. But by limiting the governmental authority of the Federal Parliament to the exercise of legislative functions the Constitution of the Commonwealth has indirectly but effectually prohibited to the Parliament any legislation similar in character to some of the legislation which has been enacted in some, if not all, of the colonies which have become States of the Commonwealth. The legislation to which this statement refers has been usually enacted to remedy defects in previous legislation which have been discovered in the course of litigation and have defeated the expectations of the promoters of the previous law. ... Such amending laws have been repeatedly declared by the American courts to be invalid because they were encroachments upon the exclusive province of the Judiciary under a constitution which conferred separately upon different departments of the government the legislative, the executive and the judicial powers exercisable under it (See People v. Board of Supervisors, 16 N.Y., 424; Governor v. Porter, 5 Humph., 165; Mayor andc. v. Horn, 26 Md., 294). The underlying principle of the decisions of the American courts upon this subject was concisely stated by Thompson, J., in the case of Dash v. Van Kleek (7 Johns., 477) in which he said - 'To declare what the law is or has been is a judicial power; to declare what the law shall be is legislative.'"

Clearly enough, the first sentence in the above passage must be read, in context, as referring to a direct constitutional prohibition of retroactive laws. Equally clearly, Inglis Clark's apparent acceptance of the "underlying principle" referred to in the last sentence as applicable to our Constitution would preclude the enactment of an ex post facto criminal law.

The effect of decided cases

41. The only case in this Court in which reasoned consideration has been given to the question of the legislative competence of the Parliament of the Commonwealth to enact an ex post facto criminal law is R. v. Kidman (1915) 20 CLR 425. In that case, the Court upheld the validity of s.3 of the Crimes Act 1915 (Cth) which had been assented to on 7 May 1915. That Act (by s.2) added conspiracy to defraud the Commonwealth to the conspiracies which had been declared by s.86 of the Crimes Act 1914 (Cth) to be indictable offences. Section 3 provided that the amendment was to be deemed to have been in force from the date of the commencement of the 1914 Act (29 October 1914). The Court held, unanimously, that it had been within the legislative competence of the Parliament to make the legislation retrospective.

42. The first thing to be noted about Kidman for the purposes of the present case is that all members of the Court saw the question of the validity of the

5957

retrospective provisions as depending "entirely on the meaning of sub-sec.xxxix (i.e. the "incidental" power) of sec.51 of the Constitution" (per Isaacs J. at p 440; and see also at pp 434-435 (Griffith C.J.), 450-451 (Higgins J.), 455 (Gavan Duffy and Rich JJ.), 460-461 (Powers J., who also relied upon the "defence power" conferred by s.51(vi))). Notwithstanding that reference was made to Calder v. Bull, it apparently was not suggested in argument in Kidman that there was any relevant limitation of the plenary legislative powers conferred upon the Parliament by s.51 to be derived from other provisions of the Constitution (see per Higgins J. at p 451). The result was that none of the judgments adverted to the question whether a retroactive criminal law was consistent with s.71's exclusive vesting of judicial power in Ch III courts. With the benefit of hindsight, that may seem to be surprising. It must, however, be remembered that Kidman was decided some three years before the Court was first called upon to "make a critical examination" of the effect of s.71's vesting of judicial power in Ch III courts (see Alexander, at p 441).

43. Kidman is clear authority for the proposition that the fact that a criminal law operates retrospectively does not necessarily preclude it from being properly characterized as a law for the peace, order and good government of the Commonwealth with respect to one or other of the heads of legislative power set out in s.51. In that regard, the case provides support for the conclusion reached earlier in this judgment that the operative provisions of the Act are properly to be characterized as a law with respect to "External affairs" notwithstanding that they relate only to past acts. Thus, Gavan Duffy and Rich JJ. said (at pp 456-457):

> "... in any case Parliament may think and rightly think that punishment of offences committed before the passing of the Act would be likely to deter persons from obstructing the execution of powers in the future. If we take the collection of Customs duties by way of a concrete example of the execution of a power, might not Parliament reasonably think that the most effective means to prevent the perpetration of frauds in the course of such collection, and so protect and facilitate the execution of the power, would be not merely to provide for the punishment of those who offended in the future but to actually punish offenders in the past? If so, Parliament would be at liberty to adopt those means."

There are statements to like effect in the judgments of Isaacs J. (at p 443), Higgins J. (at p 450) and Powers J. (at pp 460-461). By analogy, the Parliament might "reasonably think" that the punishment of present Australian citizens and residents for past acts of barbarism in other countries would act as a deterrent to other Australian citizens and residents from engaging in such conduct in the future. That of course says nothing on the question whether such a law is consistent with Ch III of the Constitution.

44. Even though the possible effect of Ch III was neither raised nor considered in Kidman, Griffith C.J. was troubled by the notion that the Parliament possessed legislative competence to enact an ex post facto criminal law, that is, a law which retroactively makes criminal an act which was indifferent when done. His Honour saw the making and enforcement of such a law as standing quite outside the ordinary enactment and administration of criminal laws with respect to, or for the purposes of, the subject matters of legislative power contained in s.51 (see at pp 432-434). He expressed the view that, if it were necessary to assign an ex post facto criminal law to some definite category, "the true category would be 'Control over the liberty of the subject' ... or 'Reward and punishment of citizens who have deserved well or ill of the State'" and concluded (ibid.) that a law which operates merely as an ex post facto criminal law was not within the legislative power conferred by s.51(xxxix). The Chief Justice's difficulty with the notion that

5958

the Parliament could, as a matter of characterization under s.51, have legislative competence to enact an ex post facto criminal law was not shared by the other members of the Court. The discussion of that difficulty in his judgment tends, however, to underline the importance of the fact that no consideration at all was given in Kidman to the possible relevance of Ch III of the Constitution.

45. The basis of Griffith C.J.'s conclusion, in Kidman, that the retrospective provision of the 1915 Act was valid was that the law was not really an ex post facto criminal law at all. In his Honour's view, conduct which constituted conspiracy to defraud the Commonwealth had already been a crime at common law before the enactment of the 1915 Act. On that view, all that the 1915 Act did was to enact "in the form of a Statute the unwritten law of the Commonwealth" (at pp 436-437). Griffith C.J.'s view that the legislation in Kidman was not an ex post facto criminal law in the narrow sense in which I have been using that phrase, was apparently shared by Isaacs J. (see at p 442). The judgments of a majority of the Court proceeded, however, on the assumption that the 1915 Act was a truly ex post facto criminal law. That being so, Kidman is properly to be seen as providing technical authority for a denial of the proposition that Ch III of the Constitution precludes the enactment by the Parliament of such a law. However, in circumstances where the effect of Ch III and the question of the validity of that proposition were neither raised in argument nor considered in any of the judgments and where the case was decided before the implications of the adoption by Ch III (and by the Constitution as a whole) of the doctrine of the separation of judicial from administrative and legislative power had been critically examined in this Court, the authority of Kidman in that regard is weak indeed. This Court is the creation and the servant of the Constitution. It would be quite wrong for it to treat an implicit decision of its own in an earlier case on a point which was neither raised in argument nor considered in the judgments as of itself providing a justification for refusing to acknowledge the implications of Ch III's fundamental guarantee of judicial process.

46. Kidman has been mentioned in a number of subsequent cases in the Court. In Moss v. Donohoe (1915) 20 CLR 615, at pp 620-621, Griffith C.J. referred, without discussion, to the dissenting opinion he had expressed in Kidman about the invalidity of a truly retroactive criminal law. The case was referred to, again without discussion, in R. v. Snow (1917) 23 CLR 256, at p 265, and Millner v. Raith (1942) 66 CLR 1 (see at p 9) as authority for the proposition that the Parliament has authority to enact an ex post facto criminal law. Otherwise, subsequent references to the case in the Court have been merely passing and obiter or they have been in civil proceedings or deportation cases without reference to ex post facto criminal legislation. In none of those subsequent cases has there been any advertence to the possible relevance of Ch III of the Constitution. In these circumstances, the subsequent cases in the Court add little to the weight of Kidman as authority on the effect of Ch III.

47. Kidman and the cases referred to in the preceding paragraph aside, there is no real authority on the question whether Ch III precludes the enactment by the Parliament of an ex post facto criminal law. Cases concerning the constitutional law of the United Kingdom, Canada, New Zealand and other countries without comparable constitutional provisions vesting national judicial power can offer but limited assistance in this particular area. Such cases do, however, disclose a general perception of the inconsistency of ex post facto criminal legislation with accepted minimum standards of fairness in the administration of criminal justice (see, e.g., Waddington v. Miah (1974) 1 WLR 683, at p 694; (1974) 2 All ER 377, at p 379; Federal Republic of Germany v. Rauca (1982) 38 O.R. (2d) 705, at p 717; Reg. v. Kirk, at p 2718). In view of the influence of the United States precedent upon the framing of our

S959

Constitution's vesting of judicial power exclusively in designated courts, th most helpful persuasive decisions from other jurisdictions are the cases in the United States Supreme Court, particularly Calder v. Bull, decided before the adoption of the Australian Constitution. Specific reference has already been made to them (see above). They support the proposition that ex post facto criminal legislation is inconsistent with the exclusive vesting of judicial power in courts under a constitution structured upon the separation of judicial from legislative and executive powers. Specific reference should also be made to the decision of the Judicial Committee of the Privy Council (Lord MacDermott, Lord Morris of Borth-y-Gest, Lord Guest, Lord Pearce and Lord Pearson) on appeal from the Supreme Court of Ceylon in Liyanage v. The Queen (1967) 1 AC 259.

48. The impugned legislation in Liyanage had been purportedly enacted by the Parliament of Ceylon to deal with a past abortive coup d'etat. It retrospectively widened the existing statutory offence of conspiring to wage war against the Queen. In that regard, however, it would seem not to have been an ex post facto criminal law in the sense explained above since the conduct which was retrospectively included in the offence would clearly have constituted some other criminal offence at the time when it occurred. The substantive retrospective operation of the legislation was plainly directed to the trial and punishment of the persons involved in the coup. Its "pith and substance" was summarized as follows (at p 290): "It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered ex post facto the punishment to be imposed on them." The last sentence is a reference to the fact that the challenged legislation retrospectively prescribed a minimum penalty (ten years' imprisonment) and decreed compulsory forfeiture of property in the case of a conviction of conspiracy "to wage war against the Queen".

49. As their Lordships recognized (at p 286), the Constitution of Ceylon differed from that of Australia and the United States of America in that it did not expressly vest national judicial power in designated courts. However, their Lordships considered (at p 287) that other provisions of the Constitution of Ceylon manifested a similar intention that "judicial power shall be vested only in the judicature". In circumstances where the challenged legislation applied to acts which were, in any event, criminal when done, their Lordships' consideration was confined to the question whether legislation which retrospectively increased the penalty for past criminal conduct and which operated retrospectively to alter the course of particular proceedings was consistent with the exclusive vesting of judicial power in the judicature. In their Lordships' view, the answer to that question depended upon whether the effect of the legislation was that judicial power had been "usurped or infringed by the executive or the legislature". They went on to explain (at p 289):

> "Section 29 (1) of the Constitution says: 'Subject to the provisions of this Order Parliament shall have power to make laws for the peace order and good government of the Island.' These words have habitually been construed in their fullest scope. Section 29 (4) provides that Parliament may amend the Constitution on a two-thirds majority with a certificate of the Speaker. Their Lordships however cannot read the words of section 29 (1) as entitling Parliament to pass legislation which usurps the judicial power of the judicature - e.g., by passing an Act of attainder against some person or instructing a judge to bring in a verdict of guilty against someone who is being tried - if in law such usurpation would otherwise be

5960

> contrary to the Constitution. There was speculation during the argument as to what the position would be if Parliament sought to procure such a result by first amending the Constitution by a two-thirds majority. But such a situation does not arise here. In so far as any Act passed without recourse to section 29 (4) of the Constitution purports to usurp or infringe the judicial power it is ultra vires."

50. The importance of the Judicial Committee's decision in Liyanage for present purposes lies in its clear recognition that the exclusive vesting of judicial power in the judicature under the written Constitution of a British Dominion has important and far-reaching implications in so far as the integrity of the judicial process and the exercise of judicial power are concerned. In that regard, the decision that the impugned legislation was invalid for the reason that it represented a legislative usurpation and infringement of judicial power underlined the difference between the situation under such a written Constitution defining the scope of legislative power and the situation in the United Kingdom where the Constitution is unwritten and legislative power is unconfined (see at p 288). Their Lordships stated (at p 289) that they were "not prepared to hold that every enactment in this field which can be described as ad hominem and ex post facto must inevitably usurp or infringe the judicial power". In the case before them, however, they had "no doubt" that the challenged legislation constituted "such interference" (at p 290). The decisive invalidating features of the legislation were the fact that it was directed against those involved in the abortive coup and the fact that it retrospectively prescribed a minimum term of imprisonment and automatic forfeiture of property. Their Lordships said (at pp 290-291):

> "The true nature and purpose of these enactments are revealed by their conjoint impact on the specific proceedings in respect of which they were designed, and they take their colour, in particular, from the alterations they purported to make as to their ultimate objective, the punishment of those convicted. These alterations constituted a grave and deliberate incursion into the judicial sphere. Quite bluntly, their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as respects appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment, and compelled to order confiscation of his possessions, even though his part in the conspiracy might have been trivial."

The position would obviously have been a fortiori if the conduct which the legislation retrospectively subjected to the minimum punishment of ten years' imprisonment had not even been an offence under the law of Ceylon at the time when it occurred.

51. It becomes necessary to weigh the considerations favouring acceptance of the general proposition that the effect of s.71's exclusive vesting of the judicial power of the Commonwealth in Ch III courts precludes the enactment by the Parliament of an ex post facto criminal law against any considerations militating against acceptance of that general proposition. On the one hand, considerations of fundamental principle and the implications of the Constitution's doctrine of the separation of judicial from legislative and executive powers dictate acceptance of the proposition. In that, they are reinforced by the general structure of the Constitution, by a number of specific constitutional provisions dealing with other matters and by judgments in United States cases in relation to the effect of the exclusive vesting of the judicial power of the United States in designated courts under the doctrine of separation of powers embodied in that country's Constitution. On

the other hand, the bare decision in Kidman, unsupported by relevant express statement or reasoning, stands in opposition supported only by the fact that it was uncritically and unquestioningly accepted in some later cases in which, as in Kidman, no reference at all was made to Ch III. In these circumstances, the validity of the general proposition must be accepted and, to the extent that it denies it, Kidman must be overruled.

Some exclusions from the scope of Ch III

52. The cases establish that s.71's vesting of the judicial power of the Commonwealth exclusively in Ch III courts is subject to at least two exceptions in the area of the trial and punishment of unlawful conduct. The first exception relates to the power of each of the Houses of Parliament to punish for contempt or breach of privilege (see Reg. v. Richards; Ex parte Fitzpatrick and Browne (1955) 92 CLR 157). The second relates to the powers of military tribunals to enforce military discipline by dealing, at least in some circumstances, with offences against military law committed by those who fall under military authority (see R. v. Bevan; Ex parte Elias and Gordon (1942) 66 CLR 452). The first of those exceptions flows from the provisions of s.49 of the Constitution which, unlike s.51, were not expressly made subject to Ch III (see Re Tracey; Ex parte Ryan, at p 581). The second is a largely pragmatic exception based on historical and practical considerations (ibid., at pp 581-583).

53. The Court has not had occasion in the past to examine the extent to which Ch III of the Constitution is applicable in relation to the trial and punishment of persons accused of crimes against international law. In so far as Australia's participation in the establishment and functioning of an international tribunal for the trial and punishment of such alleged crimes is concerned, the provisions of Ch III would be inapplicable for the reason that the judicial power of the Commonwealth would not be involved. Australia's participation would be as a member State of the International Community and the judicial power involved would be the judicial power of that Community. The position is not so clear in a case where a local tribunal is purportedly vested with jurisdiction in relation to an alleged crime against international law. It may be arguable that, in such a case, the judicial power of the Commonwealth is not involved for so long as the alleged crime against international law is made punishable as such in the local court (see, e.g., Brierly, The Basis of Obligation in International Law, (1958), p 304). Alternatively, at least where violations of the laws and customs of war are alone involved, analogy with the disciplinary powers of military tribunals and largely pragmatic considerations might combine to dictate recognition of a special jurisdiction standing outside Ch III. Those are, however, questions which it is unnecessary to answer for the purposes of the present case.

54. The purported conferral of jurisdiction in the present case is upon Ch III courts. Conduct which the Act makes punishable as a "war crime" is not punishable under the Act as an offence against international law. It is punishable as a distinct and independently defined indictable offence under the municipal law of the Commonwealth. Nor is that conduct confined to violations of international law. The conduct which the Act retroactively makes punishable as a crime under municipal law need not have been a crime against international law at the time it was committed. The elements of the indictable offence of a "war crime" are identified by ss.6, 7, 9 and 10 of the Act without reference to international law. International law becomes relevant only if a defence is raised, under s.17(2), that the conduct which constitutes a "war crime" under ss.6 and 7 was "permitted by the laws, customs and usages of war" and "was not under international law a crime against humanity". That defence can be relied on only if "there is evidence of the existence of the facts" which constitute it (s.17(4)). More important, even where there is such evidence, the validity of a defence under s.17(2) is not to be determined

by reference only to international law. Section 17(2) is expressly made subject to s.16 which, subject to presently irrelevant qualifications, excludes (except as a plea of mitigation) the defence of government or superior orders. At the time of the alleged offences in the present case (i.e. prior to June 1943), it is clear beyond real argument that the stage had not been reached where customary international law unqualifiedly regarded a subordinate (as distinct from his State) as being individually guilty of a breach of the law and customs of war in circumstances where he had merely acted in obedience to superior orders which he was bound to obey under his national law (see, e.g., Wheaton's Elements of International Law, 6th ed. (1929), vol.II, pp 1159-1160; Oppenheim, International Law, 5th ed. (1935), vol.II, pp 453-454; the United States Rules of Land Warfare, (1940), Art.347; British Manual of Military Law, 7th ed. (1929), Art.443; Lauterpacht, "The Law of Nations and the Punishment of War Crimes", (1944) XXI The British Year Book of International Law 58, at pp 69-74; Pal, Crimes in International Relations, (1955), pp 382-384; Roling, "The Law of War and the National Jurisdiction since 1945", Recueil des Cours, (1960-II), vol.100, pp 372-377; History of the War Crimes Commission, at pp 274-288; Stone, op cit, at p 362; Detter De Lupis, The Law of War, (1987), pp 357-358; and, as regards Australia, the Manual of Military Law 1941 which recognized the defence (Ch XIV, par.443) but which was amended on 30 September 1944 to deny it). The importance of the express exclusion of a defence of superior orders is not so much that such a defence was available at international law at least in some circumstances at the time of an alleged offence under the Act. It is that the legislative exclusion of the defence - like the legislative indifference to the question whether, at the time of an alleged offence, customary international law directly established or made punishable the criminality of individuals for breaches of the law of war (see above) - underlines the fact that what the Act is concerned to make punishable is a new crime against the law of the Commonwealth which the Act itself retrospectively creates. If the elements of an indictable offence as defined by ss.6, 7, 9 and 10 are present and the qualified defence under s.17(2) is not raised or, if raised, does not prevail, it matters not for the purposes of the Act whether the accused was or was not personally guilty of a crime under international law.

55. In these circumstances, the jurisdiction purportedly conferred by the Act is in relation to crimes under Commonwealth law. The consideration that the alleged conduct was not criminal under international law when it occurred may, but will not necessarily, constitute a defence. When conduct is punishable under the Act, it is punishable, in the ordinary municipal courts, solely by reason of the fact that it is an indictable offence under the municipal law of this country. The trial and punishment within Australia of an Australian citizen or resident accused of such an indictable offence under municipal law is part of the ordinary judicial power of the Commonwealth. That being so, the Act is necessarily beyond the competence of the Parliament to the extent that it is properly to be seen as an ex post facto criminal law in the sense that I have explained.

Is the Act an ex post facto criminal law?

56. As a general rule, the question whether an enactment of a particular legislature declaring that a past act is punishable as a crime is an ex post facto criminal law will fall to be determined by reference to the system of law which is subject to the legislative powers of that legislature. The fact that the particular act was a crime under some other system of law at the time when it was done will ordinarily be irrelevant. In a federation such as Australia where the national law encompasses the enactments of a number of different legislatures with authority in designated areas, the question whether a law of a particular legislature is an ex post facto criminal law will ordinarily fall to be determined by reference to the particular area of the national law in relation to which that particular legislature has

5963

authority. Thus, it will ordinarily be irrelevant that an act retrospectively made criminal under an enactment of the Parliament of the Commonwealth was already a crime under an enactment of one or more of the State Parliaments. It is, however, possible to envisage circumstances in which the interaction between Commonwealth and State laws could give rise to difficulty in determining whether a law of the Parliament which retrospectively declared a past act to be punishable as a crime was properly to be seen as an ex post facto criminal law. If, for example, the Commonwealth Parliament were, pursuant to a reference (under s.51(xxxvii) of the Constitution) or a request (under s.51(xxxviii)) by the Parliaments of all the States, to enact a national code in relation to a certain type of crime which retrospectively replaced earlier Commonwealth and State laws, it would be arguable that the code was not an ex post facto criminal law to the extent that it retrospectively made criminal under Commonwealth law an act which had been, at the time when it was done, a corresponding crime punishable by a corresponding or greater penalty under the law of the State where it was done. It is, however, unnecessary to pursue such questions for the purposes of the present case. It is not suggested that the acts committed outside Australia to which the Act applies were crimes under any law of this country - Commonwealth, State or Territory - at the time when they were done. In so far as the Act applies to past conduct within Australia, the fact that elements of that conduct (i.e. the s.6(1) elements) were punishable as different, and in many cases much less heinous, crimes under the law of the State or Territory in which the conduct occurred is clearly insufficient to prevent the Act's retroactive declaration that the past conduct (i.e. the s.6(1) elements aggravated by the s.7 elements) is punishable under Commonwealth law as "war crimes" from being an ex post facto criminal law in the relevant sense. Indeed, no submission to the contrary was advanced on behalf of those who argued in support of the validity of the Act.

57. Nor is it necessary to consider whether a law of the Parliament which confers retrospective jurisdiction upon a municipal court to punish a past crime under international law (as such) is an ex post facto criminal law in the relevant sense. As has been seen, the Act does not confine the conduct which it retrospectively makes punishable to acts which were, when they occurred, crimes under international law. Nor does it make that conduct punishable as a crime under international law. What the Act does is to declare past conduct, which may or may not have been a crime under international law, to have been a crime under Commonwealth law which is punishable in its capacity as such. In those regards, the Act differs from the War Crimes Act (Cth) as enacted in 1945 and from legislation enacted in some other countries for the punishment of past acts as war crimes (see, e.g., the Canadian Criminal Code, s.7(3.71)-(3.76); the Netherlands Penal Code, Art.27a; and cf. the War Crimes Act 1991 (UK), s.1). It also makes inapplicable statements in other cases or in learned writings to the effect that an offence is being punished in its capacity as a contravention of international law (see, e.g., Baxter, "The Municipal and International Law Basis of Jurisdiction over War Crimes", (1951) XXVIII The British Year Book of International Law 382, at pp 382-387) and that, for that reason, the retrospective conferral of jurisdiction is not a retroactive or ex post facto criminal law (see, e.g., Reg. v. Finta (1989) 61 DLR (4th) 85, at pp 94-95; and, as to the recent United Kingdom legislation, Steiner, "Prosecuting War Criminals in England and in France", (1991) Criminal Law Review 180, at p 186).

58. It follows that the operative provisions of the Act constitute an ex post facto criminal law and are inconsistent with s.71's exclusive vesting of the judicial power of the Commonwealth in Ch III courts. Accordingly, s.9 of the Act is invalid in its application to the information laid by the second defendant against the plaintiff and the question reserved for consideration

should be answered in the affirmative.

59. There is one further matter which I would briefly mention. It is that the enormity of the acts of barbarism perpetrated before and in the course of the 1939-1945 war in Europe should not be allowed to disguise the nature of the critical question addressed in this judgment. The charges against the plaintiff relate to acts allegedly done in the Ukraine. It is common ground that those acts, when and if done, did not contravene any applicable law of the Commonwealth. Yet the charges against the plaintiff are not of breaches of international law or of breaches of the system of law which applied in the Ukraine during the wartime occupation of that country. They are of crimes against the law of the Commonwealth. The only arguable basis of those charges is a statutory provision (the Act, s.9(1)) which purported to declare in 1988 that a "person ... is guilty of an indictable offence" against the law of the Commonwealth if, between 1939 and 1945, he had done an act which was not, when done, an offence against the law of the Commonwealth at all. The critical question upon the answer to which this judgment turns is ultimately one of abstract constitutional law. It is whether the Commonwealth Parliament possesses power to legislate that a "person ... is guilty" of a crime against Commonwealth law if, in the past, he has done some specified thing which was not, when done, such a crime. That question must, in my view, be answered in the negative for the reason that a law which declares that a person "is guilty" of a crime against a law of the Commonwealth if he has done an act which did not, when done, in fact contravene any such law is inconsistent with Ch III of the Constitution. Both in substance and in form, the central operation of the Act is as such a legislative declaration of criminal guilt. It prohibits nothing, prescribes no rule of conduct and is incapable of being contravened since, by its terms, it is inapplicable to acts committed after its enactment. As I have endeavoured to explain, it is not to the point that the Act identifies a "person" whom it declares to be "guilty" of past crimes against the law of the Commonwealth not by name but, in the case of the plaintiff, by reference to whether, within a long past period and in another country, he did an alleged act which was not such a crime when done and which has never, if done where it was allegedly done, been prohibited by any applicable law of the Commonwealth, including the Act. Nor is it to the point that the operation of the Act to declare that such a person "is guilty" of such a past crime is obscured by the requirement of a trial to determine whether a particular accused is in fact such a person. What is to the point for the purposes of the present case is the combined effect of two propositions which are basic to the criminal jurisprudence of this country. The first of those propositions is almost a truism. It is that criminal guilt, under our system of law, means being guilty of a contravention of the requirements of a then existing and applicable penal law: a crime is, as Blackstone wrote (see above), "an act committed, or omitted, in violation of a public law, either forbidding or commanding it". That proposition lies at the heart of Lord Atkin's comments in the Proprietary Articles Case (see above) when he wrote (emphasis added) that criminal law "connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions" and that the "criminal quality of an act" cannot "be discovered by reference to any standard but one: Is the act prohibited with penal consequences?" The second of those two propositions is that the function of determining whether a person is in fact guilty of a crime against a law of the Commonwealth is a function which appertains exclusively to, and which cannot be excluded from, the judicial power which our Constitution vests solely in the courts which it designates. That being so, it is beyond the competence of the Parliament to declare, as s.9(1) of the Act purports to do, that a "person ... is guilty" of a crime against a law of the Commonwealth by reason of having committed a past act which did not, when done, contravene any applicable Commonwealth law and was therefore not in fact such a crime.

JUDGE4

5965

DAWSON J. Whilst I have never been able to accept the view that the external affairs power (Constitution, s.51(xxix)) extends to matters of a purely domestic character merely because they form the subject of an international treaty or may otherwise be shown to be of international concern, I have never doubted that the power extends to places, persons, matters or things physically external to Australia. The word "affairs" is imprecise, but is wide enough to cover places, persons, matters or things. The word "external" is precise and is unqualified. If a place, person, matter or thing lies outside the geographical limits of the country, then it is external to it and falls within the meaning of the phrase "external affairs".

2. Whether the external affairs power was always construed in this way is something which need not trouble me. Section 3 of the Statute of Westminster 1931 (Imp) declares and enacts that the Parliament of a Dominion has full power to make laws having extraterritorial operation. That section, amongst others, was adopted by the Statute of Westminster Adoption Act 1942 (Cth), the adoption being given effect from 3 September 1939. As Menzies J. pointed out in Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd. (1959) 103 CLR 256, at p 300:

> "(Section 3) is not an amending section; it is an amplifying section directed to negativing a conception which in the course of time had perhaps come to be regarded as a misconception as to the nature of a power to legislate granted by the Imperial Parliament to a Dominion Parliament without any affirmation that the power granted extended to the making of laws with extra-territorial operation."

The conception or misconception, which was never anything but obscure, was, in any event, largely disposed of in 1932 by the Privy Council, without any reliance upon the Statute of Westminster, in Croft v. Dunphy (1933) AC 156 when it said, at p 163, of the Canadian Parliament:

> "Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in s.91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State."

So far as the Australian States were concerned the power contained in each of their Constitutions to legislate for the peace, order and good government of the State (or the equivalent power) continued to be construed as requiring that State legislation with an extraterritorial operation be connected, not too remotely, with the enacting State. That test, however, was never narrowly applied and its operation must now be governed by s.2(1) of the Australia Act 1986 (Cth) and s.2(1) of the Australia Act 1986 (UK), each of which declares and enacts that each State has full power to make laws for the peace, order and good government of the State with extraterritorial operation: see Union Steamship Co. of Australia Pty. Ltd. v. King (1988) 166 CLR 1, at p 14.

3. Whatever the position may have been or may be with the States, since the Statute of Westminster extended to Australia there is no doubt at all that the Constitution bestows upon the Commonwealth Parliament full and complete power to legislate extraterritorially with respect to those matters enumerated in s.51 which, of their nature, can be the subject of extraterritorial legislation. This was the view of Windeyer J., with which I respectfully agree, in Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd., at pp 306-307:

> "If the Commonwealth Parliament were to legislate gratuitously in respect of foreign persons in foreign territory, in one of the ways fancifully suggested in

5966

> argument, an Australian court could not hold the legislation was invalid - provided, always, that it was in respect of one of the matters in s.51. Vis-a-vis the States, the competence of the Commonwealth Parliament remains limited and the Statute of Westminster does not affect this. But in respect of the matters set out in s.51 the Parliament is now in reality fully sovereign, except perhaps in a theoretical unrealistic sense satisfying to convinced Austinians who see the Statute of Westminster as a repealable enactment of the Imperial Parliament. Whatever limitations international comity may impose are the consequences of considerations of political propriety and of the limitations of political power, not of legal capacity."

4. While the old conception or misconception persisted, it may have suggested a restrictive interpretation of the external affairs power in its application to circumstances external to Australia. This was recognized by Jacobs J. when he said in New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") (1975) 135 CLR 337, at p 497:

> "It is true that the operation of the (external affairs) power may have been limited in 1900 by the concept that Australia, lacking sovereignty, could legislate only for its territory; but that limitation, if it existed, did not alter the meaning of the words."

That limitation, while it was thought to exist, may have required legislation extending to matters external to Australia to exhibit, even under the external affairs power, some relationship between those matters and Australia in order to provide the necessary territorial connection. But now that the extraterritorial legislative power of the Commonwealth has been put beyond doubt, there is no justification for reading down the words "external affairs" so as to require any such relationship. Externality alone is sufficient.

5. That means that, subject to any express or implied constitutional prohibitions or limitations, the external affairs power is capable by itself of providing the authority for Commonwealth legislation extending to circumstances which are geographically external to Australia, without reference to the other legislative powers conferred by s.51 of the Constitution. That must be the case, for it is beyond question that s.51(xxix) stands as an independent legislative power. A contrary suggestion was shortly disposed of by Latham C.J. in R. v. Burgess; Ex parte Henry (1936) 55 CLR 608, at p 639:

> "It has been argued that sec.51(xxix.) should be construed as giving power to make laws only with respect to some external aspect of the other subjects mentioned in sec.51. Prima facie it would be as reasonable to argue that any other single power conferred by sec.51 is limited by reference to all the other powers conferred by that section - which is really an unintelligible proposition. There is no reason whatever why placitum xxix. should not be given its natural and proper meaning, whatever that may be, as an independent express legislative power."

It is true that in 1936 Latham C.J. viewed s.51(xxix) as being incapable of providing general extraterritorial legislative power because of covering cl.5 of the Constitution. Covering cl.5 relevantly provides that the laws of the Commonwealth shall be in force on all British ships whose first port of clearance and whose port of destination are in the Commonwealth. But if in so providing covering cl.5 reflected a limited conception of Commonwealth extraterritorial legislative power, it has been overtaken by s.3 of the Statute of Westminster. In any event, covering cl.5 appears to have been intended to extend Commonwealth domestic laws to the ships designated, upon

the customary basis that they were to be treated as part of Australia, rather than to authorize a limited exercise of extraterritorial legislative power: see Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd., at p 309.

6. I must confess that I have never entirely understood why the words "peace, order, and good government" should have been thought to impose a territorial limitation upon State legislative power, when they otherwise have no practical limiting effect. Indeed, Windeyer J. in Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd., at p 308, thought that the origin of the limitation was otherwise. Nevertheless, it must now be accepted that the limits upon the extraterritorial operation of a State law - now subject to the Australia Act - inhere in the grant of power to the legislature: Port MacDonnell Professional Fishermen's Assn Inc. v. South Australia (1989) 168 CLR 340, at p 370. Be that as it may, in the absence of any territorial limitation upon the Commonwealth's legislative powers, it is clear that the words "peace, order, and good government of the Commonwealth" in s.51 of the Constitution impose no practical limits upon those powers: see Reg. v. Burah (1878) 3 App Cas 889; Hodge v. The Queen (1883) 9 App Cas 117; Powell v. Apollo Candle Company (1885) 10 App Cas 282; Riel v. The Queen (1885) 10 App Cas 675. These cases were examined by this Court recently in Union Steamship Co. of Australia Pty. Ltd. v. King, a case which raised questions concerning the extent of the power of the Parliament of New South Wales to legislate for the peace, welfare and good government of the State. At p 10, this Court said:

> "These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words 'for the peace, order and good government' are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see Drivers v. Road Carriers ((1982) 1 NZLR 374, at p 390); Fraser v. State Services Commission ((1984) 1 NZLR 116, at p 121); Taylor v. New Zealand Poultry Board ((1984) 1 NZLR 394, at p 398)), a view which Lord Reid firmly rejected in Pickin v. British Railways Board ((1974) AC 765, at p 782), is another question which we need not explore."

The effect of the authorities is that, save possibly for quite extraordinary circumstances, it is for the Commonwealth Parliament alone to judge whether legislation which otherwise falls within power is for the peace, order and good government of the Commonwealth: Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd., at p 308; Pearce v. Florenca (1976) 135 CLR 507, at pp 515-516.

7. The conclusion that the reach of the external affairs power extends to all places, persons, matters or things geographically external to Australia is, I

think, supported by recent authority. In the Seas and Submerged Lands Case, Barwick C.J., at p 360, expressed the view that the "power extends ... to any affair which in its nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole". A similar view was expressed by Mason J., at p 470, and by Jacobs J., at p 497. It would seem that Murphy J. placed at least as wide a construction upon the reach of the external affairs power outside Australia as Barwick C.J., Mason and Jacobs JJ. Subsequently, in The Commonwealth v. Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1, at p 170, Murphy J. expressed the view that the external affairs power authorizes the Parliament to make laws which govern conduct outside Australia. See also Viro v. The Queen (1978) 141 CLR 88, at p 162.

8. In Koowarta v. Bjelke-Petersen (1982) 153 CLR 168, at p 190, Gibbs C.J. said, referring to the Seas and Submerged Lands Case:

> "three members of the Court, Barwick C.J., Mason and Jacobs JJ., relied on the ... ground that the power given by s.51(xxix) was not limited to authorizing laws with respect to Australia's relationships with foreign countries, but extended to any matter or thing situated or done outside Australia (at pp 360, 470-471, 497). It is unnecessary to consider whether the words of par. (xxix) can have this dual operation, i.e. whether the phrase "external affairs" can be used to mean matters outside the Commonwealth as well as matters involving a relationship between Australia and other countries."

In the same case, at p 223, Mason J. reiterated his view, which he said had been accepted in the Seas and Submerged Lands Case, that "the power extends to matters and things, and I would say, persons, outside Australia". In Robinson v. Western Australian Museum (1977) 138 CLR 283, at p 294, Barwick C.J. repeated his opinion that "the Commonwealth may take as the subject matter of its law some fact or circumstance which is actually outside the territorial limits of the Commonwealth". Mason J. also repeated his view at p 335. And in The Tasmanian Dam Case, at p 97, Gibbs J. adopted as accurate the paraphrase of par.(xxix) suggested by Stephen J. in Koowarta v. Bjelke-Petersen, at p 211, namely "... such of the public business of the national government as relates to other nations or other things or circumstances outside Australia".

9. In perceiving that the Constitution requires the exclusion of domestic matters from the ambit of the external affairs power, I have elsewhere pointed to the division of legislative power between the Commonwealth and the States and have observed that, if international concern over entirely domestic matters were sufficient to bring those matters within the external affairs power, par.(xxix) would have the potential to obliterate the division which s.51 was intended to effect. To construe par.(xxxix) in that way would be to disregard entirely its constitutional setting.

10. But if, as I think to be the case, it is necessary to have regard to the scheme of the Constitution in construing the external affairs power, the result is different with regard to circumstances external to Australia. For although the sovereignty of the Australian nation is divided internally between the Commonwealth and the States, there is no division with respect to matters which lie outside Australia. There the sovereignty of the nation is the sovereignty of the Commonwealth which may act as if it were a unitary state without regard to the "conceptual duality" within Australia to which Stephen J. referred to in the Seas and Submerged Lands Case, at p 458. There is no corresponding capacity on the part of the States, either singly or together. Indeed, any limitation upon the power of the Commonwealth to legislate with respect to matters outside the country would leave a gap in the totality of legislative power which the Constitution bestows upon the

S969

Commonwealth and the States. An interpretation of the Constitution which denies the completeness of Australian legislative power is unacceptable in terms of constitutional theory and practice. Apart from express or implied constitutional prohibitions or limitations, it is not to be contemplated that there are laws which no Parliament has the power to pass: Attorney-General for Ontario v. Attorney-General for Canada (1912) AC 571, at pp 583-584; Colonial Sugar Refining Co. Ltd. v. Attorney-General for the Commonwealth (1912) 15 CLR 182, at pp 214-215; Smith v. Oldham (1912) 15 CLR 355, at pp 360-361, 365; Reg. v. Duncan; Ex parte Australian Iron and Steel Pty. Ltd. (1983) 158 CLR 535, at pp 590-591.

11. The War Crimes Act 1945 (Cth) as amended by the War Crimes Amendment Act 1988 (Cth) ("the Act") extends to serious crimes committed in the course of hostilities in a war or in the course of an occupation of territory arising out of a war. That appears from s.7. "War" is restricted by s.5 to a war in the period beginning on 1 September 1939 and ending on 8 May 1945 in so far as it occurred in Europe. Under s.7 war crimes also extend to serious crimes committed in pursuing a policy associated with the conduct of war or with an occupation or on behalf of, or in the interests of, a power conducting a war or engaged in an occupation. The Act does, therefore, contemplate war crimes committed within Australia. Difficult questions could arise in relation to those provisions which deal with war crimes committed within Australia, particularly as war crimes are defined so as to include acts which are criminal acts under the laws of the States, but those questions do not arise in this case.

12. The war crimes alleged against the plaintiff, who is now an Australian citizen and a resident of South Australia, were said to have been committed in the Ukraine between 1 September 1942 and 31 May 1943. It was not argued that the invalidity of any provisions relating to the commission of war crimes within Australia would, by reason of inseverability or otherwise, affect the validity of the provisions relating to war crimes committed outside Australia if those provisions are otherwise valid. The question reserved for the consideration of the Court is whether s.9 of the Act is invalid in its application to the information laid against the plaintiff. That information relates entirely to events which took place in Europe almost fifty years ago.

13. Section 9 of the Act relevantly provides:

> "(1) A person who:
> (a) on or after 1 September 1939 and on or before 8 May 1945; and
> (b) whether as an individual or as a member of an organisation;
> committed a war crime is guilty of an indictable offence against this Act."

Section 11 provides that a person shall not be charged with an offence against the Act unless he is an Australian citizen or a resident of Australia or of an external Territory, although s.5 defines "person" as meaning a natural person whether or not the person is or has ever been an Australian citizen or a resident of Australia. A serious crime is, under s.7, a war crime if it was committed in the circumstances to which I have already referred. Section 6 provides:

> "(1) An act is a serious crime if it was done in a part of Australia and was, under the law then in force in that part, an offence, being:
> (a) murder;
> (b) manslaughter;
> (c) causing grievous bodily harm;
> (d) wounding;
> (e) rape;
> (f) indecent assault;
> (g) abduction, or procuring, for immoral purposes;

5970

(h) an offence (in this paragraph called the 'variant offence') that would be referred to in a preceding paragraph if that paragraph contained a reference to:
(i) a particular intention or state of mind on the offender's part; or
(ii) particular circumstances of aggravation;
necessary to constitute the variant offence;
(j) an offence whose elements are substantially the same as the elements of an offence referred to in any of paragraphs (a) to (h), inclusive; or
(k) an offence of:
(i) attempting or conspiring to commit;
(ii) aiding, abetting, counselling or procuring the commission of; or
(iii) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of;
an offence referred to in any of paragraphs (a) to (j), inclusive.

(2) In determining for the purposes of subsection (1) whether or not an act was, under the law in force at a particular time in a part of Australia, an offence of a particular kind, regard shall be had to any defence under that law that could have been established in a proceeding for the offence.

(3) An act is a serious crime if:
(a) it was done at a particular time outside Australia; and
(b) the law in force at that time in some part of Australia was such that the act would, had it been done at that time in that part, be a serious crime by virtue of subsection (1).

(4) The deportation of a person to, or the internment of a person in, a death camp, a slave labour camp, or a place where persons are subjected to treatment similar to that undergone in a death camp or slave labour camp, is a serious crime.

(5) Each of the following is a serious crime:
(a) attempting or conspiring to deport or intern a person as mentioned in subsection (4);
(b) aiding, abetting, counselling or procuring the deportation or internment of a person as so mentioned;
(c) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the deportation or internment of a person as so mentioned.

(6) For the purposes of subsections (3), (4) and (5), the fact that the doing of an act was required or permitted by the law in force when and where the act was done shall be disregarded."

In addition to setting out in sub-s.(1) the circumstances in which a war crime may be committed, s.7 in sub-ss.(2) and (3) provides:

"(2) For the purposes of subsection (1), a serious crime was not committed:
(a) in the course of hostilities in a war; or
(b) in the course of an occupation;
merely because the serious crime had with the hostilities or occupation a connection (whether in time, in time and place, or otherwise) that was only incidental or remote.

(3) A serious crime is a war crime if it was:
(a) committed:
(i) in the course of political, racial or religious persecution; or
(ii) with intent to destroy in whole or in part a national,

5971

ethnic, racial or religious group, as such; and

(b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation."

14. Under s.16 it is no defence for a person charged under the Act that he or she acted upon superior orders, although that may be taken into account in determining the proper sentence, but under s.17(2) it is a defence that the act alleged against a person charged with an offence was permitted by the laws, customs and usages of war and was not under international law a crime against humanity. It was submitted that s.17 operates so as to confine a war crime under ss.6 and 7 to a crime which was not permitted by the laws, customs and usages of war or which was under international law a crime against humanity. However, it is clear that s.17 does not operate in this way. It provides a defence only. Indeed, under s.17(4) a defendant is not entitled to rely on a defence under s.17(2) unless there is evidence of the existence of the facts constituting the defence. If there is evidence, under s.17(5) the onus of displacing the defence lies upon the prosecution in accordance with the criminal standard of proof.

15. The provisions of the Act which I have set out show that there are not inconsiderable problems of interpretation arising from the way in which it was framed, but it is unnecessary for me to tackle those problems for it is quite apparent that, in its application to the plaintiff, the Act deals entirely with places, persons, matters or things which were physically external to Australia. For the reasons which I have given, I consider that the external affairs power extends the legislative reach of the Commonwealth Parliament to those places, persons, matters or things because of their externality and nothing further is required to bring them within the description of "external affairs".

16. Nor do I think that the externality of the circumstances with which the Act relevantly deals is affected by its retrospectivity. Those circumstances, as exemplified by the allegations against the plaintiff, remain physically external to Australia, notwithstanding that they occurred in the past. For that reason they fall within the ambit of the external affairs power. The submission that the retrospectivity of the Act otherwise places it beyond the competence of the Commonwealth Parliament must, in my view, fail.

17. The Act is truly retrospective - that is to say, retroactive - in its application to past events. Actions in the past which were, as a matter of domestic law, not criminal, are made criminal. The Act is, therefore, an ex post facto law. Ex post facto laws may be either civil or criminal, but the description is frequently used to refer only to criminal laws, perhaps because the creation of crimes ex post facto is, for good reason, generally considered a great deal more objectionable than retrospective civil legislation. Blackstone in his Commentaries, 17th ed. (1830), vol.I, pp 45-46, after referring to Caligula's method of prescribing laws by writing them in very small characters and hanging them up on high pillars in order to ensnare the people, said:

"There is still a more unreasonable method than this, which is called making of laws ex post facto: when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law: he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust. All

5972

> laws should be therefore made to commence in futuro, and be notified before their commencement; which is implied in the term 'prescribed'."

But Blackstone was not denying the capacity of Parliament to pass ex post facto laws, however undesirable they may be: see Commentaries, 16th ed. (1825), vol.I, p 90. The resistance of the law to retrospectivity in legislation is to be found in the rule that, save where the legislature makes its intention clear, a statute ought not be given a retrospective operation where to do so would be to attach new legal consequences to facts or events which occurred before its commencement: Fisher v. Hebburn Ltd. (1960) 105 CLR 188, per Fullagar J. at p 194; see also Maxwell v. Murphy (1957) 96 CLR 261, at p 267; Geraldton Building Co. Pty. Ltd. v. May (1977) 136 CLR 379; Rodway v. The Queen (1990) 169 CLR 515, at p 518. However, the injustice which might be inflicted by construing an enactment so as to give it a retrospective operation may vary according to its subject matter. Indeed, justice may lay almost wholly upon the side of giving remedial legislation a retrospective operation where that is possible: see George Hudson Ltd. v. Australian Timber Workers' Union (1923) 32 CLR 413, at p 434. With legislation of that character, if the ordinary rule be couched in terms of a presumption against retrospectivity, it must, at best, be a weak presumption: see Doro v. Victorian Railways Commissioners (1960) VR 84, at pp 85-86. With a criminal law, where the injustice of giving it an ex post facto operation will ordinarily be readily apparent, the presumption must be at its strongest.

18. However, the ex post facto creation of war crimes may be seen to be justifiable in a way that is not possible with other ex post facto criminal laws, particularly where the conduct proscribed would have been criminal conduct had it occurred within Australia. The wrongful nature of the conduct ought to have been apparent to those who engaged in it even if, because of the circumstances in which the conduct took place, there was no offence against domestic law. And, of course, if the conduct amounted to genocide or a crime against humanity, that comment would be the stronger. This justification for a different approach with respect to war crimes is reflected in the International Covenant on Civil and Political Rights to which Australia became a signatory on 18 December 1972. Article 15(1) of that Covenant forbids the ex post facto creation of criminal offences, but Art.15(2) provides: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." Because of the view which I take of the external affairs power, I have no need to enter upon the question whether before 1945 genocide or crimes against humanity constituted offences under customary international law; it is sufficient to observe that, even if they did not, the wrongful nature of the conduct would nevertheless have been plainly evident. War crimes of the kind created by the Act simply could not, in any civilized community, have been described as innocent or blameless conduct merely because of the absence of proscription by law.

19. In any event, the intention of the legislature that the Act should have a retrospective operation could not have been more clearly expressed. There is no room for the application of the rule or presumption against giving the legislation a retrospective construction.

20. There is ample authority for the proposition that the Commonwealth Parliament may in the exercise of its legislative powers create retrospective laws, including criminal laws with an ex post facto operation. I have earlier referred to the authorities which establish that the power of the Parliament to make laws for the peace, order and good government of the Commonwealth is, in constitutional terms, a sovereign legislative power with respect to the matters enumerated in s.51: see also Ibralebbe v. The Queen (1964) AC 900, at

p 923. And sovereignty necessarily involves the power to legislate retrospectively. Whatever the objections which might be raised to ex post facto laws - and as the passage cited from Blackstone shows, they are considerable - there can be no doubt about the capacity of Parliament to pass them.

21. The power of the Parliament to create criminal offences is incidental to the power to legislate with respect to the specific matters enumerated in pars (i) to (xxxviii) of s.51. And s.51(xxxix) gives to the Parliament express power to legislate with respect to matters incidental to the execution of any power vested by the Constitution in Parliament. In R. v. Kidman (1915) 20 CLR 425, at p 434, Griffith C.J. thought that, for a matter to be incidental to the execution of a power, it must relate to its present execution. An ex post facto law could not, in his view, be incidental to the execution of a power because it operated upon a past event and not with reference to its present execution. This view (which, with respect, is difficult to understand since past events may have a direct bearing upon a present exercise of legislative power as this case demonstrates) was rejected by the rest of the Court. They were of the view that it is incidental to the power of Parliament to make laws with respect to the matters confided to it, to express its condemnation of past actions falling within those matters by attaching criminal penalties to them. As Higgins J. said, at p 451:

> "We have not been referred to any words in the Constitution which point to any limitation of the plenary powers of the Federal Parliament so long as the Parliament keeps within the ambit of the subjects of legislation specifically assigned to it. The British Parliament, admittedly, has power to make its laws retroactive; and I know of no instance in which a Legislature created by the British Parliament has been held to have overstepped its powers by making legislation retroactive. There are plenty of passages that can be cited showing the inexpediency, and the injustice, in most cases, of legislating for the past, of interfering with vested rights, and of making acts unlawful which were lawful when done; but these passages do not raise any doubt as to the power of the Legislature to pass retroactive legislation, if it see fit. The maxim runs: Nova constitutio futuris formam imponere debet, non proeteritis. The word used is 'debet,' not 'potest.'"

22. In R. v. Kidman, legislation creating the indictable offence of conspiring to defraud the Commonwealth was held to be valid, notwithstanding that the legislation was given an ex post facto operation by its application to conspiracies committed before the legislation came into force. The correctness of the decision has never, so far as I am aware, been subsequently doubted: see R. v. Snow (1917) 23 CLR 256, at p 265; Ex parte Walsh and Johnson; In re Yates (1925) 37 CLR 36, at pp 81, 127; Millner v. Raith (1942) 66 CLR 1; Nelungaloo Pty. Ltd. v. The Commonwealth (1948) 75 CLR 495, at pp 503-504; Australian Communist Party v. The Commonwealth (1951) 83 CLR 1, at p 172; University of Wollongong v. Metwally (1984) 158 CLR 447, at pp 456, 461, 480, 484.

23. In the United States both Congress and the State legislatures are prohibited by the Constitution from passing any bill of attainder or ex post facto law: Art.I, ss.9 and 10. The case law in the United States has grown up around bills of attainder rather than ex post facto laws generally. This would seem to be due in part to the restrictive interpretation given to ex post facto laws within the meaning of the prohibition, whereby they are confined to criminal laws: Calder v. Bull (1798) 3 US 385, at p 390. Moreover, bills of attainder have been held to extend beyond anything which

5974

could be so described historically. They have been held to embrace not only what would be described, as a matter of history, as bills of pains and penalties but also as extending to any kind of punishment legislatively inflicted. A bill of attainder in England imposed the penalty of death, forfeiture of land and possessions and "corruption of blood" whereby the heirs of the person attainted were prevented from inheriting his property. A bill of pains and penalties inflicted lesser punishment, involving forfeiture of property and, on occasions, corporal punishment less than death. The wide interpretation of the bill of attainder clause in the United States led the Supreme Court to observe in United States v. Brown (1965) 381 US 437, at p 447:

> "In 1810, Chief Justice Marshall, speaking for the Court in Fletcher v. Peck, 6 Cranch 87, 138, stated that '(a) bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.' This means, of course, that what were known at common law as bills of pains and penalties are outlawed by the Bill of Attainder Clause. The Court's pronouncement therefore served notice that the Bill of Attainder Clause was not to be given a narrow historical reading (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups."

24. Historically, bills (or, more correctly, acts) of attainder constituted a particular form of law, generally of an ex post facto character, whereby punishment was inflicted upon a designated person or group of persons adjudged by the legislature to have been guilty of crimes, usually of a capital nature, such as treason or murder. The particular objection to bills of attainder was not so much that they may have had an ex post facto operation, but that they substituted the judgment of the legislature for that of a court. In England, the practice evolved of giving the person with whom a bill dealt some sort of a hearing, but the result was still secured by legislation and not by judicial action: see Australian Communist Party v. The Commonwealth, at p 172. In the United States, where, as I have said, an expanded version of bills of attainder was adopted, it was this aspect which was seen as the vice, not only because it was oppressive, but also because it was thought (at least by 1965) to offend against the separation of powers doctrine. In United States v. Brown the Supreme Court said, at p 442:

> "While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply - trial by legislature."

25. The perception that the bill of attainder clause in the United States Constitution was intended to implement the separation of powers came somewhat late in the history of that clause. It is not without its difficulties, the chief of which is, as was pointed out by White J. in dissent in United States v. Brown, at p 473, in quoting from Dreyer v. Illinois (1902) 187 US 71, at p 84, that State legislatures, as well as Congress, are prohibited from passing

bills of attainder and "(w)hether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate ... is for the determination of the State". Nevertheless, it is perfectly clear that it is only the prohibition against bills of attainder and not the prohibition against ex post facto laws generally which might be traced to the doctrine of the separation of powers. That is because it is not the ex post facto nature of bills of attainder which offends against the doctrine, but the substitution of the judgment of the legislature for that of the courts. That is not a necessary feature of an ex post facto law. Where an ex post facto law penalizes a past activity by means of a generally applicable rule rather than by specifying the persons to be subjected to the penalty, it is not a bill of attainder whatever other objections might be raised to its ex post facto operation. In that situation a court is still left to determine whether an individual is guilty of having engaged in the prohibited activity, albeit an activity which took place before the law created the offence, and the legislature has done no more than lay down a rule of general application which is part of its true function. Even a law which penalizes persons who possess specified characteristics may not be a bill of attainder, provided the characteristics are specified in sufficiently general terms. Legislation will amount to a bill of attainder only where it is apparent that the legislature intended the conviction of specific persons for conduct engaged in in the past. The law may do that by penalizing specific persons by name or by means of specific characteristics which, in the circumstances, identify particular persons. A court in applying such a law is in effect confined in its inquiry to the issue of whether or not an accused is one of the persons identified by the law. If he is, his guilt follows. The proper judicial inquiry as to whether an accused has been guilty of prohibited conduct has thus been usurped by the legislature. Alternatively, a bill of attainder may designate the persons it seeks to penalize by means of some characteristic (such as membership of an organization) that is independent of and not equivalent to the criminal activity which it is the purpose of the law to prohibit or prevent. In United States v. Brown, the Supreme Court struck down as amounting to a bill of attainder an Act which made it a crime for a member of the communist party to serve as an officer or (except in clerical or custodial positions) as an employee of a labour organization. At p 450, the Court said:

> "The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability - members of the Communist Party."

The Court went on to observe, at p 455:

> "The designation of Communists as those persons likely to cause political strikes is not the substitution of a semantically equivalent phrase ... In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics."

26. The Commonwealth Constitution contains no provision which corresponds to the bill of attainder clause in the United States Constitution. Nor does it adopt in its entirety the United States theory of the separation of powers.

59.76

That is readily apparent from the fact that responsible government is a central feature of our constitutional scheme. But in Reg. v. Kirby; Ex parte Boilermakers' Society of Australia (1956) 94 CLR 254, this Court pointed out that the federal structure required the provision of a judicature with paramount powers to determine the demarcation of governmental functions between independent governments. That provision is to be found in Ch III of the Constitution, which establishes that no resort can be had to judicial power except in conformity with that Chapter. For that reason, it is beyond the competence of the Parliament to invest with any part of Commonwealth judicial power any body or person except a court created or invested with jurisdiction pursuant to Ch III. To that extent there is clearly a separation of the judicial power of the Commonwealth from its legislative and executive functions.

27. But even accepting for present purposes the expanded notion of a bill of attainder which has prevailed in the United States and accepting that a measure which would fall within that notion would offend against the separation of Commonwealth judicial power, it cannot be said that the War Crimes Act amounts to a bill of attainder. True it is that it operates ex post facto, but that does not, as I have endeavoured to explain, convert it into a bill of attainder nor does it import that quality of a bill of attainder which has been said to constitute an intrusion upon the exercise of judicial power, namely, the substitution of legislative judgment for the judgment of the courts.

28. Those activities which are said by the Act to constitute war crimes are defined in general terms without any attempt to designate any person or group of persons as having engaged in any of those activities. Nor does the Act pick out the persons it seeks to penalize by means of a characteristic which is independent of the prohibited criminal activity; it may have done so had it specified that any person who had been a member of a particular enemy organization was thereby to be held guilty of a war crime, but that is not the approach adopted. The Act confines the period during which, and the field of war in relation to which, those activities will have constituted war crimes, but that in no way usurps the judicial function of determining whether a particular person charged with an offence engaged in conduct which the Act describes as a war crime. The fact that the period specified by the Act occurred before the Act in its amended form came into operation is what gives it an ex post facto operation. But otherwise its provisions are in such a form as to be capable of operating prospectively and, were they to do so, the function of a court applying those provisions would be the same, namely, ascertaining whether a person alleged to have engaged in conduct which the Act proscribes had in fact done so. The Act does not, merely because it penalizes conduct which occurred before it came into operation, supplant the court in the exercise of its ordinary, traditional function. That function is, in the application of the criminal law, the ascertainment in accordance with the law of the guilt or innocence of a person charged with an offence under the law. In designating conduct - whether in the future or in the past - as criminal, a law does not intrude upon the judicial function. It is when the legislature itself, expressly or impliedly, determines the guilt or innocence of an individual that there is an interference with the process of the court. The Act requires no finding of guilt on the part of a person charged with an offence under its provisions, save where that person is found to have contravened the rules of conduct which it lays down. That finding requires the determination of a court after a trial. The fact that the Act lays down rules of conduct in relation to events which occurred before it came into effect does not invest it with the attributes of a bill of attainder, however widely such an instrument is defined.

29. Of course, the real question is not whether the Act amounts to a bill of

5977

attainder, but whether it exhibits that characteristic of a bill of attainder which is said to represent a legislative intrusion upon judicial power. In Liyanage v. The Queen (1967) 1 AC 259 there was no bill of attainder (although bills of attainder were referred to by analogy), but the Privy Council held that legislation passed by the Parliament of Ceylon constituted the usurpation of the judicial function in contravention of the separation of judicial power which is embodied in the Constitution of Ceylon. The legislation followed an abortive coup d'etat in January 1962, in respect of which a number of persons identified in a White Paper were charged with a variety of conspiracies. The accused were all (save for one) in custody at the time the two Acts constituting the legislation in question were passed. The Acts were attacked in argument in a manner which the Privy Council said, at p 290, fairly described their effect:

> "The first Act was wholly bad in that it was a special direction to the judiciary as to the trial of particular prisoners who were identifiable (in view of the White Paper) and charged with particular offences on a particular occasion. The pith and substance of both Acts was a legislative plan ex post facto to secure the conviction and enhance the punishment of those particular individuals. It legalised their imprisonment while they were awaiting trial. It made admissible their statements inadmissibly obtained during that period. It altered the fundamental law of evidence so as to facilitate their conviction. And finally it altered ex post facto the punishment to be imposed on them."

The legislation was held to be invalid, not because of its ex post facto operation (although that was a necessary feature of it), but because, far from laying down any general rule of conduct, it was designed to secure the conviction of identifiable individuals. It was, therefore, a legislative attempt to exercise judicial power which, under the Constitution of Ceylon, was confided to the courts. Indeed, the Privy Council said of the Acts, at p 291, that one might fairly apply the words of Chase J. in Calder v. Bull that they were "legislative judgments; and an exercise of judicial power". Earlier, at p 289, the observation was made that:

> "It goes without saying that the legislature may legislate, for the generality of its subjects, by the creation of crimes and penalties or by enacting rules relating to evidence. But the Acts of 1962 had no such general intention. They were clearly aimed at particular known individuals who had been named in a White Paper and were in prison awaiting their fate. The fact that the learned judges declined to convict some of the prisoners is not to the point. That the alterations in the law were not intended for the generality of the citizens or designed as any improvement of the general law is shown by the fact that the effect of those alterations was to be limited to the participants in the January coup and that, after these had been dealt with by the judges, the law should revert to its normal state."

30. The legislation in this case was, by way of contrast, enacted by the legislature "for the generality of its subjects". It is not aimed at "particular known individuals" but at any Australian citizen or resident who, within the specified period, engaged in conduct amounting to the commission of a war crime as defined by the Act. It does not, therefore, represent a legislative usurpation of judicial power.

31. For these reasons, I would answer the question asked in the negative.

JUDGE5

TOOHEY J. The relevant facts and statutory provisions appear in the

5978

judgments of other members of the Court. I shall avoid undue repetition.

2. The plaintiff, who is an Australian citizen and a resident of South Australia, is charged with having committed "war crimes" contrary to s.9 of the War Crimes Act 1945 (Cth). All references in this judgment to "the Act" are to the War Crimes Act 1945 (Cth) as amended by the War Crimes Amendment Act 1988 (Cth), unless otherwise stated.

3. It is unnecessary to set out the information in detail. It contains thirteen paragraphs. Some allege that the plaintiff murdered one or more persons in the Ukraine, the persons being identified by name or description. Others allege that the plaintiff was knowingly concerned in or party to the murder of about 850 Jews from the village of Serniki in the Ukraine. All offences are said to have taken place between 1942 and 1943, during and in the course of the German occupation of the Ukraine in World War II. They are said to have been committed "in pursuing a policy of Germany associated with the conduct of the said war and occupation or on behalf of or in the interests of that power being a policy of persecution of the Jewish people of Europe on political, racial or religious grounds" or "with intent to destroy the Jewish people" in the places concerned and, in five cases, in pursuing a policy of annihilating those suspected to be partisans or communists.

4. The question reserved for the consideration of the Court is whether s.9 of the Act is invalid in its application to the information laid against the plaintiff. Nevertheless, the arguments went to the validity of the Act generally. The issues canvassed may be summed up in this way:

1. Is the Act valid as an exercise of the power of the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to external affairs (s.51(xxix) of the Constitution)?
2. Is the Act valid as an exercise of the power of the Parliament to make laws for the peace, order and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth (s.51(vi) of the Constitution)?
3. If the Act is otherwise valid, does it involve an improper use of the judicial power of the Commonwealth? If it does, what consequences follow for the charges against the plaintiff?

But, in the end, the question to be answered by the Court is the question reserved for its consideration.

External affairs - externality

5. The Commonwealth argued that the external affairs power supports the validity of the Act by reference to what might be termed geographical externality and, in the alternative, on the basis that the Act implements an obligation or a concern to be found in international law or a resolution of an international body or that it is an exercise of a universal jurisdiction in international law. (The Director of Public Prosecutions supported the Commonwealth in its arguments. Nevertheless, it is convenient to speak only of "the Commonwealth" except where some additional argument was advanced by the Director.)

6. I shall deal first with the argument based on geographical externality. It is true that there are passages in earlier judgments of members of the Court suggesting that a law of the Commonwealth may operate with respect to persons or events by reason only of their externality. In New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") (1975) 135 CLR 337 Barwick C.J., at p 360, spoke of "any affair which in its nature is external to the continent of Australia and the island of Tasmania subject always to the Constitution as a whole". Mason J., at p 471, said that the power conferred by s.51(xxix) "extends to matters or things geographically situated outside

Australia". Jacobs J., at p 497, spoke of the power "to make laws with respect to places outside, or matters or things done outside the boundaries of the Commonwealth". Murphy J. did not speak in these terms. But in the light of what his Honour said in Viro v. The Queen (1978) 141 CLR 88, at p 162, and in The Commonwealth v. Tasmania. The Tasmanian Dam Case (1983) 158 CLR 1, at pp 171-172, he must be taken to have endorsed this general view of s.51(xxix).

7. However, these statements must be taken in context and, when so taken, they do not establish a proposition that there need be no connection whatsoever between Australia and the subject matter of a law which the external affairs power is said to support. In the Seas and Submerged Lands Case the statements were made in answer to an argument that the external affairs power was limited to a power to make laws with respect to Australia's relationships with foreign countries: see, for instance, Mason J., at pp 470-471. The legislation under attack in the Seas and Submerged Lands Case did not directly involve another country but it went to the sovereignty of the Commonwealth over the territorial sea, that is, to the very boundaries of Australia. In Koowarta v. Bjelke-Petersen (1982) 153 CLR 168 Mason J., at p 223, described "external affairs" as covering "any matters or concerns external to Australia". But the context in which the statement was made cannot be ignored; it was the implementation of a treaty obligation.

8. Certainly the word "external" means situated outside and of itself requires no connection with that which it is outside. But in pl.(xxix) "External" is an adjective qualifying "affairs" and it is necessary to have regard to the composite expression. Dictionaries commonly define "affair" by reference to "concern". An external affair is a matter which is external in the sense that it lies outside Australia but it is a matter which is of concern to Australia. This does not mean that it must be a matter touching Australia's relations with another country though that will ordinarily be the case. But it does mean that it is a matter in which Australia has an interest. Whether a matter so qualifies is, in this respect, for the Parliament to determine. But the power assumes the existence of a national interest in some person, thing or matter that enables one to say that the subject of legislation concerns Australia. I am content to accept the explanation given by Stephen J. in Koowarta, at p 211, where his Honour says:

> "The word 'External' must in this constitutional context qualify 'affairs' so as to restrict its meaning to such of the public business of the national government as relates to other nations or other things or circumstances outside Australia. It is legislation for the peace, order and good government of the Commonwealth with respect to such a subject-matter that the words of par.(xxix) appear to envisage."

9. Quick and Garran, The Annotated Constitution of the Australian Commonwealth, (1901), pp 631-632, give pl.(xxix) a restricted operation. But they do so in the context of the relationship between Australia and the Imperial Parliament at the time of federation. It was through the Imperial Parliament that Australia's external affairs were conducted. With the emergence of Australia as a nation, that restrictive view could no longer stand. However, the issue is one of constitutionality, that is, the power of the Parliament to legislate with respect to a particular matter. A matter does not qualify as an external affair simply because it exists outside Australia. It must be a matter which the Parliament recognises as touching or concerning Australia in some way. Indeed it might be thought more than passing strange that the Constitution solemnly conferred power on the Parliament to legislate with respect to a matter in which it had no interest.
Externality - War Crimes Act

10. The Commonwealth urged that the Act deals with matters geographically external to Australia, hence that it is justified by reference to the external affairs power. The Solicitor-General for the Commonwealth put the matter this way:

> "The Commonwealth is not relying upon the external affairs power to intrude in any way into a field which would otherwise be within State power. The Act is confined to dealing with something done, or the consequence of something done, overseas where the national Parliament thinks that that legislation is desirable."

11. But the Act is not confined in the way suggested by the Solicitor-General. The Commonwealth argued that s.6(1), which refers to conduct "done in a part of Australia", is definitional only; that it provides "the foundation for the structure of a municipal offence", going no further than is warranted by international law; that s.6(3), which picks up the "serious crimes" listed in s.6(1) where the conduct occurred outside Australia, effectively comprises the range of acts which can constitute a war crime; and that the expression "serious crime" in s.6(1) has no operation other than as a step towards an understanding of what is meant by a "war crime" for the purposes of ss.7 and 9. And, it was said, s.7(1) must be read in light of the definition of "war" in s.5. But none of this assists the Commonwealth's broad argument on externality. It is true that the definition in s.5 confines "war" to a "war ... (whether or not involving Australia or a country allied or associated with Australia) in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945" (emphasis added). But a serious crime, which is a "war crime" if committed, inter alia, in pursuing a policy associated with the conduct of such a war or with an occupation (s.7(1)(c)) or on behalf of, or in the interests of, a power conducting such a war or engaged in an occupation (s.7(1)(d)), may be committed anywhere in the world including Australia. To say that is not to overlook s.7(2) which provides that a serious crime was not committed in the course of hostilities in a war (see s.7(1)(a)) or in the course of an occupation (see s.7(1)(b)) merely because the connection between the serious crime on the one hand and the hostilities or occupation on the other was only incidental or remote. The connection may be very real indeed, wherever the serious crime was committed.

12. A person may not be charged with an offence against the Act unless he or she is an Australian citizen or a resident of Australia or of an external Territory: s.11 of the Act. But that is a status required at the date of charging. The person charged need not have been an Australian citizen or resident at the time of the alleged offence. Indeed, it is clear that the Act is aimed at situations in which neither an Australian offender nor victim is likely to have been involved: see, for instance, the preamble. Furthermore, the definition of "war" in s.5 does not require Australia's involvement. Unquestionably, the Act encompasses conduct which may have occurred within or without Australia. That is borne out not only by the sections to which I have already referred, but in addition by s.18. That section deals with alternative verdicts and speaks of conduct done in Australia and elsewhere.

13. Nevertheless, there is no difficulty in concluding that, in the context of a war in which Australia was directly involved, in which many Australian service personnel and civilians were killed, wounded, imprisoned or ill-treated and which had such significant social, economic and political consequences for this country, an Act purporting to render those who are Australian citizens or residents liable for conduct associated with that war legislates with respect to a matter which is of concern to Australia and to which the public business of the national government relates. It is true, of course, that the definition of "war" in s.5 does not require Australia's

involvement. But it would be to turn a blind eye to history to see no connection between the dates and area identified in s.5 and World War II, or to conclude that "war" as defined could relate to a conflict in which Australia had no interest at the time, even if not directly involved. For these reasons the law is one with respect to "External affairs" within s.51(xxix). The fact that the Act creates a liability for past conduct does not of itself remove the legislation from the capacity to deal with an external affair though that matter has other implications to which it will be necessary to refer later in these reasons. Whether the Act can be said to be a law with respect to external affairs, in so far as it encompasses conduct which occurred within Australia, is another matter, with which it is unnecessary to deal. If, in that respect, the Act is beyond power, the relevant provisions are severable. Their severance would not affect the operation of the balance of the Act.

External affairs - international law

14. In its terms, s.9 does not involve an inquiry into international law and, on the view I have taken that the Act is a law with respect to external affairs, it might be thought unnecessary to enter upon a discussion of international law. However, acknowledging the breadth of the argument before the Court, I propose to consider some aspects of that law in arriving at a conclusion as to the validity of the Act. The general scope of the Act has been explained. Reference to international law in terms appears only in s.17(2) which, subject to the exclusion in s.16 of the defence of superior orders, makes it a defence to a charge under the Act, if the doing of the act:

> "(a) was permitted by the laws, customs and usages of war; and
> (b) was not under international law a crime against humanity".

15. The Commonwealth supported the validity of the Act as an exercise of the external affairs power, not only by reference to geographical externality, but also by contending that the Act gives effect to an obligation or concern in international law or that it implements a resolution of an international body. The Commonwealth further argued that the Act facilitates the exercise of a right existing in international law, namely, the universal jurisdiction.

External affairs - international obligation

16. The obligation upon which the Commonwealth relied to support s.9 as a valid exercise of the external affairs power was expressed as an obligation "to search out, bring to trial and, if found guilty, to punish war criminals". In satisfying that obligation, it was said, Australia may itself prosecute and punish or it may extradite the offender to the country where the offence is alleged to have been committed. The plaintiff's response was that no such obligation exists in international law. He said further that, if there is any comparable obligation, it does not go beyond a duty to extradite the offender to the place of the offence.

17. To establish the existence of the wider obligation for which the Commonwealth contended, it is necessary to point to general practice by States and opinio juris. In the Commonwealth's submission, each limb has a bearing on the other in the sense that if State practice is widespread it is less crucial to demonstrate opinio juris. And, it was contended, the obverse is true.

18. I have read what Brennan J. has written in regard to the existence of an international obligation to prosecute and punish as opposed to extraditing. I agree with his Honour's analysis and with his conclusion: "there is no evidence of widespread State practice which suggests that States are under a legal obligation to seek out Axis war criminals and to bring them to trial. There is no opinio juris supportive of such a rule." I have nothing to add to

5982

Brennan J.'s analysis and conclusion in this regard. It follows that the Act cannot be supported as an exercise of the external affairs power on the groun that it gives effect to an international obligation.

External affairs - international concern

19. It is convenient to approach this aspect of the case against the background of what was said by Stephen J. in Koowarta, at p 217:

> "A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of a nation's 'external affairs'."

It was appropriate for Stephen J., in the context of his judgment, to speak of "a country's relations with other nations". But I do not understand his Honour to exclude any other consideration as constituting a subject matter of international concern. In the light of what he said in Koowarta, at p 211 (the passage quoted earlier in these reasons), his Honour would accept a matter touching the public business of Australia in relation to an event outside Australia as capable of giving rise to a concern that would answer the description - an external affair. See also Mason J. in Koowarta, at p 234.

20. Much of the learning that is relevant to the question whether there is an international obligation on countries to prosecute and punish war criminals whose offences were committed elsewhere is naturally relevant to the question whether it is a matter of international concern to do so. Again, I agree with Brennan J.'s conclusion: "There is insufficient material to show that the apprehension and trial of such (i.e. World War II) war criminals before courts of countries other than those in which the crimes were committed were ever matters of international concern." But this aspect of the case tends to be subsumed in what was referred to in argument as the universal jurisdiction. This jurisdiction, it was said by the Commonwealth, supported the Act as a law with respect to external affairs.

External affairs - universal jurisdiction

21. The Commonwealth contended that, in the event that the Court found no relevant international obligation or concern to exist, the Act is nevertheless a valid exercise of the external affairs power because Australia has jurisdiction in international law to prosecute war crimes and crimes against humanity which occurred outside Australia against non-nationals. The focus of this analysis shifts from inquiry into a substantive obligation or concern, requiring or justifying action on the part of the Australian Government, to the concept of crimes existing in international law and principles of jurisdiction which provide Australia with authority to prosecute those crimes.

22. The term "jurisdiction" has different meanings in international and municipal law. In international law it is used in various ways but it may be taken to refer to "a state's general legal competence and is an aspect of state sovereignty": Triggs, "Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?", (1987) 16 Melbourne University Law Review 382 (hereafter "Triggs"), at p 387. Relevantly, it "refers to a state's legitimate assertion of authority to affect legal interests": Randall, "Universal Jurisdiction Under International Law", (1988) 66 Texas Law Review 785 (hereafter "Randall"), at p 786. The term has legislative, adjudicatory and enforcement dimensions: Randall, at p 786; Triggs, at p 387; Wagner, "U.S. Prosecution of Past and Future War Criminals and Criminals Against Humanity: Proposals for Reform Based on the Canadian and Australian Experience", (1989) 29 Virginia Journal of International Law 887 (hereafter "Wagner"), at p 899. We are here concerned with Australia's authority to make criminal laws applicable to certain persons, events or things with the aim of dealing with an international law crime. We are concerned, therefore, not only with Australia's legislative power in constitutional law, but also with Australia's

enforcement and adjudicatory authority in international law because the Commonwealth relies on that authority to support its legislative power.

23. The subjects of international law are primarily, though not exclusively, states: Brownlie, Principles of Public International Law, 4th ed. (1990) (hereafter "Brownlie"), Ch III and see Ch XXIV. Individuals are recognized by international law in so far as they are protected by, or, more importantly here, are subject to, international law. There is no exhaustive list of bases upon which a state may exert authority over an individual in international law nor is there precise agreement between commentators as to categorisation. But a common and convenient analysis is that five principles emerge by which the legitimacy of an asserted jurisdiction in criminal matters may be assessed: Kobrick, "The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes", (1987) 87 Columbia Law Review 1515 (hereafter "Kobrick"), at p 1519; Randall, at pp 787-788; Wagner, at pp 899-900. Cf. Brownlie, at pp 300-307; Triggs, at pp 387-389. They are: 1. the territoriality principle, which applies when an offence occurs within the territory of the prosecuting state; 2. the nationality principle, which applies when the offender is a national of the prosecuting state; 3. the protective principle, which is excited where an extraterritorial act threatens the integrity of the prosecuting state; 4. the passive personality principle, which applies where the victim of the offence is a national of the prosecuting state; and 5. the universality principle.

24. The last of these principles permits jurisdiction to be exercised over a limited category of offences on the basis that the offender is in the custody of the prosecuting state. The jurisdiction is based on the notion that certain acts are so universally condemned that, regardless of the situs of the offence and the nationality of the offender or the victim, each state has jurisdiction to deal with perpetrators of those acts. Since the Act focuses primarily (and, in practice, possibly entirely) on acts committed by non-nationals against non-nationals outside Australia, its likely basis for jurisdiction over war criminals from World War II is the principle of universal jurisdiction: see Wagner, at p 901. There appears to be no consensus that the "nationality of offender" basis for jurisdiction will include the situation where an offender later becomes a national. Cf. Triggs, at p 393, where it is suggested that "territorial jurisdiction over Australian citizens and residents" may be applicable.

25. Before examining material which is relevant in deciding whether war crimes and crimes against humanity in international law are subject to universal jurisdiction, it is useful to look at the doctrine itself because views differ as to its nature. The principle of universality is, at times, used to refer to the authority of states to exercise jurisdiction over certain conduct, regardless of whether it constitutes a crime under customary international law. On this view of the principle it is the universality of the condemnation of, for example, the common crime of murder which allows every state to exert authority over an offender in the absence of other jurisdictional links: Brownlie, at pp 304-305; Triggs, at p 389. In other words, a state may assume jurisdiction over an alleged murder offence where it would otherwise fall within the jurisdiction of another state under its own municipal law. No question of an international law offence arises.

26. However, the principle is most often formulated so that it applies only to crimes which are already constituted as such under international law. In this respect, the principle rests on the existence of an offence in international law; the municipal law under which an individual is prosecuted must be in conformity with that international law. On this view, authority to prosecute the relevant conduct extends to every state under its own laws, even in the absence of one or more of the other jurisdictional links such as

5984

territoriality or nationality. But it is the existence of the crime in international law, and not simply the universality of condemnation in states' own municipal laws (though this may be evidence supporting the existence of the crime), which justifies the exception to the requirements of the other jurisdictional bases: Randall, at pp 795-798; American Law Institute, Restatement of the Law, Third: The Foreign Relations Law of the United States (hereafter "Restatement"), s404; Williams and Castel, Canadian Criminal Law: International and Transnational Aspects, (1981) (hereafter "Williams and Castel"), at p 137. In the context of war crimes and crimes against humanity, it is this formulation of the universality principle, relying as it does on the existence of an offence in international law, which is relevant: Brownlie, p 305; Williams and Castel, Ch 5. And it is this formulation on which the Commonwealth relies.

27. The Commonwealth's use of the concept of a "right" existing in international law by reason of the universality principle is misleading, especially if it is (as it was in argument) associated with a right vested in Australia by treaties and other international agreements. We are concerned here with authority to proceed legally; in that sense Australia may have a right but it is not in the nature of a substantive right created by treaty or, by analogy, contract. The Commonwealth's concern was to emphasise the potency of the principle for the purposes of relying on it for constitutional validity. Thus a distinction was drawn between a "special and limited right" and mere permission. Again terminology may be misleading because universality of jurisdiction is in fact a permissive doctrine. But the proposition that universal jurisdiction is positively conferred by international law and is not merely the absence of prohibition is well founded. Specifically conferred authority to exercise that jurisdiction is a sufficient foundation on which to base a law of the Parliament with respect to external affairs because the universality of the condemnation necessarily touches and concerns Australia. If jurisdiction conferred by principles of international law is a component of sovereignty, then, in the absence of constitutional prohibition or conflict between the scope of federal and State powers, that jurisdiction is a necessary aspect of the Commonwealth's capacity to function effectively in the international community. Therefore the exercise of that jurisdiction where it exists - or rather the perceived commission of an international crime subject to that jurisdiction - is, or may give rise to, an external affair for the purposes of the legislative power of the Commonwealth. That Australia has a choice whether or not to exercise the jurisdiction does not alter that characterisation as an external affair.

Universal jurisdiction: war crimes and crimes against humanity

28. Whether the rationale for the universality principle lies in the proposition that those committing certain offences lose their national character and are therefore subject to any state's jurisdiction, or whether it lies in the fundamental nature of the crime - its particular gravity and heinousness (see Randall, at pp 792-795; In re List (Hostages Trial) (1948) 15 Annual Digest 632, at p 636; Attorney-General of Israel v. Eichmann (1962) 36 ILR 5, 277 (Supreme Court), at pp 282-283; (1961) 36 ILR 18 (District Court), at p 50), there appears to be general agreement that war crimes and crimes against humanity are now within the category subject to universal jurisdiction: see Brownlie, at pp 305, 562; Kobrick, at pp 1522-1523, 1529; Randall, at p 800; Wagner, at p 905 (with respect to war crimes).

29. In numerous cases of prosecution of war criminals after World War II, for both violations of the international laws of war and crimes against humanity, reliance was placed, inter alia, on the universality principle. For example, in In re Eisentrager (Shanghai, 1947) 14 Law Reports of Trials of War Criminals 8 (hereafter "L Rep Trials War Crims"), the United States Military Commission rejected the argument of the defendants that, because they were

5985

German citizens residing in China, they were subject only to Chinese law and jurisdiction. The Commission said, at p 15:

> "A war crime ... is not a crime against the law or criminal code of any individual nation, but a crime against the ius gentium. The laws and usages of war are of universal application, and do not depend for their existence upon national laws and frontiers. Arguments to the effect that only a sovereign of the locus criminis has jurisdiction and that only the lex loci can be applied, are therefore without any foundation."

See also The Hadamar Trial (In re Klein) (Wiesbaden, 1945) 1 L Rep Trials War Crims 46; In re Tesch (Zyklon B Case) (1946) 13 Annual Digest 250; In re List; Attorney-General of Israel v. Eichmann; Demjanjuk v. Petrovsky (1985) 776 F 2d 571, at p 582.

30. In In re List the United States Military Tribunal ("USMT") said, at p 636:

> " An international crime is such an act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances."

31. And the District Court of Jerusalem, in Attorney-General of Israel v. Eichmann, based its jurisdiction "on a dual foundation: the universal character of the crimes in question and their specific character as intended to exterminate the Jewish people": at p 26. The Court further explained, at p 50:

> "The State of Israel's 'right to punish' the accused derives, in our view, from two cumulative sources: a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and a specific or national source, which gives the victim nation the right to try any who assault its existence."

Both the District Court and Supreme Court judgments described the precedent of universal jurisdiction over piracy, drew an analogy between piratical acts and Nazi atrocities, and found support for the universality principle in the earlier war crimes cases: see at p 26 and pp 290-295.

32. However, to say that war crimes and crimes against humanity were, sometime after World War II, subject to universal jurisdiction does not answer the question whether the conduct of which the plaintiff is accused was a war crime or a crime against humanity before the end of the War nor whether, if they existed, those crimes could then be prosecuted by any state.

33. It may be said that, if a crime is found to have existed at some point in the past but was not the subject of universal jurisdiction, the subsequent expansion of jurisdiction is a procedural matter only and that a state with no other jurisdictional link can prosecute legitimately after the status of universal jurisdiction has been achieved. A better approach in this instance, however, is to examine the relationship between the concepts of "international crime" and "universal jurisdiction". The question whether a crime is constituted as such in international law is, conceptually, distinct from the question whether that crime is the subject of universal jurisdiction: Kobrick, at pp 1522, 1528. A crime created by treaty will not be the subject of universal jurisdiction merely by reason of its conventional existence: see Restatement, s404. It is less clear, however, that crimes having their source in custom can be said not to be the subject of universal jurisdiction unless limitations on the right to prosecute are contained in the definition of the

crime itself.

34. Certainly, the two questions - whether a crime exists and the scope of jurisdiction to prosecute - are inextricably linked. An international crime is constituted, precisely, where conduct is identified which offends all humanity, not only those in a particular locality; the nature of the conduct creates the need for international accountability. Where conduct, because of its magnitude, affects the moral interests of humanity and thus assumes the status of a crime in international law, the principle of universality must, almost inevitably, prevail: see Zoller, "Territorial Effect of the Norm on Responsibility" in Ginsburgs and Kudriavtsev (eds), The Nuremberg Trial and International Law, (1990), p 106. This is particularly true of crimes against humanity since they comprise, by definition, conduct abhorrent to all the world.

35. Therefore, while the question whether war crimes and crimes against humanity were subject to universal jurisdiction during World War II remains theoretically distinct, the question whether the crimes existed as such at that time is basic. If such conduct amounted, then, to customary international crimes, their very nature leads to the conclusion that they were the subject of universal jurisdiction.

36. It is convenient to look, first, at the concepts of "war crime" and "crime against humanity" to determine whether they existed in international law between 1942 and 1943 (the period in respect of which the plaintiff is charged) and, if so, to examine the Act in some detail to determine whether its provisions accurately reflect those concepts and are an effective exercise of universal jurisdiction.

International crimes - war crimes and crimes against humanity

37. The term "war crime" in s.9 of the Act looks to two distinct, though overlapping, concepts in international law: "war crimes" and "crimes against humanity". War crimes in international law are contraventions of the laws and customs of war recorded in such documents as the Hague Conventions of 1907 and in military manuals. "Crimes against humanity" in international law is a generic term which refers to crimes of persecution, that is, persecution on political, racial or religious grounds, and to crimes of extermination. It is important to note that the difference between war crimes and crimes against humanity lies in the context in which they are committed. Traditionally, the laws and customs of war governed only conduct between belligerents or between a belligerent and the inhabitants of an occupied country. This is a reflection of the fundamental doctrines of sovereignty and non-intervention between states. Crimes against humanity, on the other hand, are not so confined. They may be carried out by a national against another national of the same country, and in peacetime. Conduct may therefore constitute both a war crime and a crime against humanity.

38. The Commonwealth submitted that s.7 of the Act embraces both kinds of crime at international law. The submission continued in this way. War crimes, including crimes against humanity which also amount to a war crime, are reflected in s.7(1) and (2). And if the terms of sub-s.(3) are satisfied, the conduct may be prosecuted under that sub-section also. Those crimes against humanity which would not also have amounted to a war crime are particularly reflected in s.7(3).

War crimes

39. There is no doubt that war crimes were crimes in international law during World War II. The fourth Hague Convention of 1907, the international Convention concerning the Laws and Customs of War on Land ("the Hague Convention"), was ratified by Germany and Russia as well as the major Allied

5987

powers. The first Article of the Convention required the contracting states to issue instructions to their land forces in conformity with the Regulations respecting the Laws and Customs of War on Land annexed to the Convention ("the Hague Rules"). See Manual of Military Law, 7th ed. (1929) (Great Britain); Manual of Military Law 1941, Australian ed. (hereafter "Australian Military Manual"); the "Kriegsbrauch in Landkriege", instructions issued to the German armed forces following the Hague Conventions.

40. The matters dealt with by the Hague Rules included: the status of belligerents, the humane treatment of prisoners of war, and Arts 42-56 dealt with rules of conduct of a hostile state in occupied territory. Article 46 provided that, where a territory is occupied, "(f)amily honour and rights, individual life, and private property, as well as religious convictions and worship, must be respected." Article 50 read:

> " No collective penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which it cannot be regarded as collectively responsible."

The Hague Convention and its annexed Rules provided an undisputed reference in peace negotiations between Germany and the Allies after World War I.

41. With respect to war crimes, the International Military Tribunal ("IMT") exercised jurisdiction over major war criminals after World War II on the basis of Art.6(b) of its Charter ("the Nuremberg Charter"). That Article defines war crimes as:

> "violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." (emphasis added)

Article 6(b) does not extend beyond the treatment of civilian populations in occupied territory: see In re Altstotter (The Justice Trial) (1947) 14 Annual Digest 278, at p 282. The IMT claimed that the law contained in Art.6(b) represented existing international law:

> "With respect to War Crimes, ... the crimes defined by Article 6, Section (b), of the Charter were already recognized as War Crimes under international law. They were covered by Articles 46, 50, 52, and 56 of the Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929": judgment of the International Military Tribunal (Nuremberg), reproduced in (1947) 41 American Journal of International Law 172, at p 248.

42. It was argued before the IMT that this law did not apply generally because Art.2 of the Hague Convention expressly stated that its provisions bind only contracting parties and do not apply if all parties to an international conflict are not parties to the Convention. Several countries involved in World War II were not parties to the Hague Convention. However, in its judgment the IMT said, at pp 248-249:

> "The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. ... but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter."

The United Nations General Assembly subsequently adopted, in December 1946, by

5988

a unanimous vote, Resolution 95(I) which affirmed the principles of international law "recognized by" the Nuremberg Charter and the IMT's judgment.

43. So, by 1939 the Hague Convention had been in existence for 32 years. By 1941, 41 states had signed the Convention; 25 had deposited ratifications, including Germany (with the reservation of Art.44 of the Rules) though not Australia: Australian Military Manual, p 340. The Convention provided a reference after the major world conflict which occurred during that time and its provisions have been widely reflected and disseminated in various states' military manuals. In light of the precision of these rules and the length of time they had been in existence, together with states' reliance on them, there is sufficient evidence that a contravention of these conventional laws of war amounted to an offence in customary international law at the commencement of World War II.

44. The relevant questions to be asked with respect to a war crime in this narrow sense, then, concern the scope of that crime and whether the Act, on its proper construction, properly implements its prosecution. Those questions will be considered later.

Crimes against humanity

45. As already noted, "crime against humanity" is a generic term in international law encompassing different kinds of maltreatment of civilian populations, including those of the same nationality as the perpetrator. The Commonwealth submitted that there are, in international law, three classes of crimes against humanity: crimes of persecution, which are reflected in s.7(3)(a)(i); crimes of extermination, reflected in s.7(3)(a)(ii); and other serious crimes against members of any civilian population. The Commonwealth said that it was "probably" the case that crimes of persecution and other serious crimes against civilian populations must be committed in the execution of or in connection with war or occupation to be a crime at international law. In the case of crimes of extermination, on the other hand, it was said that no such connection is - and presumably the Commonwealth meant, also, was - required. Although the submission referred to conduct in execution of or in connection with "war or occupation", the thrust of the argument seemed to be in conformity with the limitation imposed on crimes against humanity by Art.6(c) of the Nuremberg Charter, to be discussed later. That is to say, crimes against humanity, apart from crimes of extermination, must have been committed in execution of or in connection with war crimes or the crime of waging aggressive war.

46. There is little doubt that crimes against humanity, in each of these classes, now exist in international law either as treaty law or, probably, as a matter of customary international law: cf. Meron, "The Geneva Conventions as Customary Law", (1987) 81 American Journal of International Law 348. But the question is whether crimes against humanity were crimes in international law before 1945.

47. There was no international agreement creating a crime against humanity. If the crime existed, it was a matter of customary law. A customary law comprises two elements: (i) general practice by states; and (ii) opinio juris, in other words, expressed opinion that such a crime exists. Material sources produced before 1945 are evidence of both of these elements; those produced after 1945 are evidence of opinio juris only, as they are statements of opinion as to the state of international law in the past. A survey of the material is useful.

48. Although the Hague Convention and the Hague Rules did not themselves deal with the conduct of belligerents towards their own citizens, there is some

suggestion in the Convention that its provisions (and therefore those of military manuals produced in consequence) were not intended to cover the field of legal protection accorded to civilian populations. The preamble to the Convention includes the so-called Martens clause:

> " Until a more complete code of the laws of war can be drawn up, the High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and the belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience." (emphasis added)

As can be seen, there is an acceptance that binding humanitarian norms existed apart from the rules dealt with by the Convention itself.

49. After World War I the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties presented a report to the Preliminary Peace Conference at Versailles in March 1919 (reproduced in (1920) 14 American Journal of International Law 95). The Commission made findings as to the progress of the War and made recommendations for prosecutions and for the establishment of an international tribunal. Several times in its report the Commission used the term "laws of humanity" or "dictates of humanity" or similar phrases. For example, one conclusion drawn by the Commission, at p 117, was:

> " All persons belonging to enemy countries ... who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution."

In relation to the tribunal to be set up to try the crimes the Commission said, at p 118:

> " Two classes of culpable acts present themselves:
> (a) Acts which provoked the world war and accompanied its inception.
> (b) Violations of the laws and customs of war and the laws of humanity."

50. In In re Altstotter, as reported in 2 L Rep Trials War Crims 1, the USMT said, at p 46:

> "Since the World War of 1914-1918, there has developed in many quarters evidence of ... an international interest and concern in relation to what was previously regarded as belonging exclusively to the domestic affairs of the individual State; and with that interest there has been ... an increasing readiness to seek and find a connection between domestic abuses and the maintenance of the general peace."

Reference was also made to instances in which states had intervened to prevent abuse by another state of its own subjects, including French intervention to check religious atrocities in Lebanon in 1861 and national protests directed towards Roumania and Russia with respect to aggression against Jews and towards Turkey on behalf of persecuted Christian minorities.

51. Oppenheim, International Law, 3rd ed. (1920), vol.I, expressed doubt that there was, then, "really a rule of the Law of Nations" which permitted intervention on humanitarian grounds. However, he said, at p 229:

> " Many jurists maintain that intervention is ... admissible, or even has a basis of right, when exercised in the interest of humanity for the purpose of stopping religious persecution and endless cruelties in time of peace and war. That the Powers have in the past exercised intervention on these grounds, there is no doubt. Thus

S990

> Great Britain, France, and Russia intervened in 1827 in the struggle between revolutionary Greece and Turkey."

And Bluntschel, Das Moderne Volkerrecht der Civilisierten Staaten, 3rd ed. (1878), (quoted in In re Altstotter (L Rep Trials War Crims), at p 47) said, at p 270:

> "States are allowed to interfere in the name of international law if 'humanity rights' are violated to the detriment of any single race."

52. Next, the conduct which forms the substance of a "war crime" for the purposes of the Act, namely, murder, manslaughter, wounding, kidnapping and various sexual offences under Australian municipal law, attracted criminal sanctions before 1945 in most, if not all, of the states which were parties to World War II. This does not constitute that conduct an international crime but it is evidence of state practice concerning conduct between nationals of the same country. In determining whether a rule of justice may be declared an international law, it is relevant that each individual state condemns the conduct the subject of the rule: cf. In re List, at p 633.

53. At the end of World War II, crimes against humanity were dealt with in the following way. Article 6(c) of the Nuremberg Charter of 1945 defined "crimes against humanity" as:

> "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" (emphasis added).

The paragraph contains two important limitations. First, a crime against humanity must comprise conduct directed at a civilian population. Isolated acts against individuals, unconnected with a larger design to persecute or exterminate a population, are not within the definition of the crime, whether committed by an individual or by a state authority: see, for instance, In re Altstotter, (Annual Digest) at p 284. The second limitation is that crimes against humanity must have been committed "in execution of or in connection with any crime within the jurisdiction of the Tribunal", that is, war crimes (Art.6(b)) or crimes against peace or waging aggressive war: Art.6(a). The second limitation applies both to acts of persecution and to acts of extermination. As to the grammatical change made to Art.6(c), which makes the intention of the contracting parties to this effect unequivocal, see Schwelb, "Crimes Against Humanity", (1946) XXIII The British Year Book of International Law 178 (hereafter "Schwelb"), at pp 193-195. Only crimes against humanity committed during the period of the war were held to be capable of founding a conviction because only those acts could be seen to satisfy the limitation. In its judgment, the IMT concluded, at p 249:

> "To constitute Crimes against Humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War

5991

> Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity."

54. The IMT judgment does not throw much light on what "in execution of, or in connection with" means. The Tribunal found that conduct amounting to a crime against humanity either was a war crime or was done in execution of or in connection with a crime against peace. And, if done during the War, that connection seems to have been assumed. Be that as it may, Art.6(c) of the Charter evidences a conceptually distinct crime where the conduct constituting the crime is, in a practical sense, associated with other conduct which amounts to a war crime or a crime against peace.

55. On 20 December 1945 the Control Council for Germany, comprising representatives of Britain, the United States, France and USSR, enacted a law for the punishment of persons guilty of, inter alia, "crimes against humanity". This law, generally known as Control Council Law No.10 ("CC Law No.10"), was passed to effect the prosecution of war criminals other than the major actors dealt with by the IMT. Article II 1(c) of CC Law No.10 defined crimes against humanity in substantially the same terms as did the Nuremberg Charter but, significantly, did not contain the words "in execution of or in connection with any crime within the jurisdiction of the Tribunal".

56. The USMT, whose jurisdiction emanated from CC Law No.10, said, in In re Altstotter, (Annual Digest) at p 282:

> "The (Nuremberg) Charter, the I.M.T. Judgment, and C.C. Law 10 ... constitute authoritative recognition of principles of individual penal responsibility in international affairs which ... had been developing for many years. Surely C.C. Law 10, which was enacted by the authorised representatives of the four greatest powers on earth, is entitled to judicial respect when it states, 'Each of the following acts is recognised as a crime'."

Although the USMT drew a general conclusion concerning CC Law No.10, the context of the statement is a discussion about Art.6(b) of the Nuremberg Charter and its equivalent, Art.II 1(b) of CC Law No.10, not about crimes against humanity. However, later, at p 285, the Tribunal said:

> "Whether the crime against humanity is the product of statute or of common international law, or, as we believe, of both, we find no injustice to persons tried for such crimes. They are chargeable with knowledge that such acts were wrong and were punishable when committed."

57. In In re List the defendants were charged with crimes which all came within the scope of war crimes in international law. But the USMT discussed CC Law No.10 generally, saying, at p 634:

> "The crimes defined in Control Council Law No. 10 ... were crimes under pre-existing rules of International Law - some by conventional law and some by customary law."

58. There were, therefore, significantly different claims by the USMT, operating under the authority of CC Law No.10, and by the IMT, operating under the authority of the Nuremberg Charter, as to the state of international law before 1945. The former tribunal claimed that a crime against humanity was an independent crime under customary international law; the latter tribunal required its connection with a war crime or a crime against peace. The differences may, as Dr Egon Schwelb points out, reflect the difference in the legal nature of the two instruments and in the status of the two tribunals created to exercise jurisdiction: Schwelb, pp 218-219. The IMT was, in addition to being an occupation court for Germany, also, to some extent, an

5992

international judicial body administering international law. Being an international judicial organ, the IMT's jurisdiction in domestic matters of Germany was circumscribed. The zonal tribunals applying CC Law No.10, on the other hand, were arguably in the nature of local courts administering primarily municipal law and therefore not limited by the settled boundaries of international law: cf. In re Altstotter, (Annual Digest) at pp 278-279, 287, where the USMT itself concluded that it exercised international jurisdiction.

59. One more kind of evidence relating to crimes against humanity should be considered: enabling legislation of countries which do not have territorial jurisdiction in international law with respect to war criminals from World War II, and the resulting prosecutions of those persons in municipal courts some time after 1945. These sources are evidence of opinio juris of states though their law-making capacity, as practice, is not relevant when considering the state of international law in the past.

60. In 1950, the Israeli Parliament enacted legislation for the prosecution of, inter alia, crimes against humanity, defined substantially in accordance with CC Law No.10: the Nazi and Nazi Collaborators (Punishment) Law 1950 (Israel). Attorney-General of Israel v. Eichmann was prosecuted under this legislation. The Court concluded, at p 283, that the crimes for which the appellant was convicted, including crimes against humanity, "must be regarded as having been prohibited by the law of nations since 'time immemorial'".

61. In 1987 the Canadian Parliament amended the Canadian Criminal Code to provide for the prosecution of war crimes and crimes against humanity. The conduct in the definition of crimes against humanity is similar in scope to that in Art.6(c) of the Nuremberg Charter; but no connection with other crimes is required. The Canadian definition, however, does require conduct amounting to a crime against humanity to constitute a "contravention of customary international law or conventional international law" or to be "criminal according to the general principles of law recognized by the community of nations": s.7(3.76). This latter formulation corresponds to the terms of the relevant Canadian constitutional provision.

62. The Queen v. Finta (1989) 61 DLR(4th) 85, in the Ontario High Court of Justice, held the Canadian legislation to be constitutionally valid, in that it was not retroactive and because crimes against humanity, as defined in the legislation, existed in international law before 1945. This conclusion was based on a survey of conventions and agreements and other relevant material: see at pp 97-103. However, the Court's opinion as to the limits of a crime against humanity is not clear. In part, the decision was based on the judgment of the IMT. Callaghan A.C.J.H.C. said, at p 101, that he accepted the reasoning of the IMT:

> "who indicated ... that 'by 1939 these rules laid down in the (Hague) Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war'".

But, as Brennan J. points out in his judgment in the present case, the words quoted referred only to war crimes as defined in Art.6(b) and not to crimes against humanity defined in par.(c). Also, as noted earlier, "crimes against humanity" are defined very broadly in the Canadian legislation. Callaghan A.C.J.H.C. concluded, at p 101:

> "I am of the opinion that war crimes and crimes against humanity were, by 1939, offences at international law or criminal according to the general principles of law recognized by the community of nations" (emphasis added).

The distinction between "general principles" of law and international law, although corresponding to the distinction made in the relevant Canadian constitutional provision (and in equivalent international law, for example, in

5993

Art.15 of the International Covenant on Civil and Political Rights), was not spelt out.

63. The United Kingdom War Crimes Act 1991 provides for prosecutions for murder, manslaughter or culpable homicide committed between 1 September 1939 and 5 June 1945 in a place which was then part of Germany or under German occupation and which "constituted a violation of the laws and customs of war": s.1(1). Thus no question directly arises as to crimes against humanity. The conclusions contained in War Crimes: Report of the War Crimes Inquiry, Cm.744, (1989) ("the Hetherington Report") informed the preparation of the United Kingdom legislation. The report concluded, at par.5.43:

> " In 1939 there was no internationally accepted definition of crimes against humanity, as there was of violations of the laws and customs of war. The Nuremberg definition of 1945 appears partly to be based on the principle that some crimes are so patently against the laws of all civilised nations as to be regarded as crimes in international law, prosecutable by any nation. ... (However) while the moral justification for trying crimes against humanity at Nuremberg is understandable, the legal justification is less clear."

64. So, there is support in Israel's legislation for the existence at the relevant time of crimes against humanity defined according to CC Law No.10. Also, Canadian legislation, defining crimes against humanity broadly, has been held to be an accurate reflection of the law at the time. But the United Kingdom legislation, by omission, carries the implication that crimes against humanity were not formulated sufficiently before 1945 to be binding rules of law.

Crimes against humanity - conclusion

65. It is impossible, perhaps, to say definitively what were the limits of crimes at international law between 1939 and 1945. This is not merely because of the state of historical record, but because of the nature of international law. The sources of international law and their relative status are not, and were not then, finally fixed. Documents such as those emanating from the United Nations and states' legislation are strong authority, but there is no heirarchy of judicial and legislative organs creating a system of binding precedent as in municipal law. For example, practice contrary to express intention does not necessarily attract legal sanction; and its status - the status of contravening practice - is unsettled also. Since no permanent international court of criminal justice exists to determine authoritatively the scope of international criminal law or to enforce sanctions for its breach, agreements and other documents evidencing international crimes do not function in the same way as statutes in municipal law. This is the case especially where crimes develop from customary practice of nations, but even where treaties exist between states.

66. The absence of consistent enforcement and sanction means that documents evidencing international criminal laws cannot be scrutinised with the same intensity for the exact limits of the provisions they contain. It is not only unrealistic but incorrect to take an excessively technical approach. In In re Piracy Jure Gentium (1934) AC 586, Lord Sankey said, at pp 588-589:

> "Speaking generally, in embarking upon international law, their Lordships are to a great extent in the realm of opinion, and in estimating the value of opinion it is permissible not only to seek a consensus of views, but to select what appear to be the better views upon the question."

5994

67. There is a certain unease and evident moral, and legal, tension surrounding the question of crimes against humanity. This shows itself in various ways, as in the sometimes peremptory dealing with the question by the tribunals. See, for example, the statement of the USMT in In re Altstotter, at p 282 (already quoted), after a discussion of war crimes in the narrow sense:

> "Surely C.C. Law 10, which was enacted by the authorised representatives of the four greatest powers on earth, is entitled to judicial respect when it states, 'Each of the following acts is recognised as a crime'."

And also the readiness of the IMT to make the connection between the conduct in question and other crimes within its jurisdiction. The tension is further illustrated in the divergence of views represented in the current war crimes legislation in Israel, Canada and the United Kingdom.

68. Upon analysis, the moral tension is seen to be between a desire to ensure that fundamental justice is not avoided by an overly technical scrutiny and a fundamental objection to individuals being called to account by victors in a war according to laws which did not exist at the time; a fear, also, of justice being undermined. When analysed legally, and from the perspective of the time, the tension is seen to be between two fundamental notions: on the one hand, the doctrine of sovereignty with its concomitant principle of non-intervention between nations; and, on the other, fundamental principles of human rights, including the right of a people to be protected by the world community if abused by a sovereign power. Certainly, with the development of principles of human rights and the joint responsibility for their protection since, and largely as a result of, World War II, the limitations of a strictly defined doctrine of sovereignty, and exclusive rights with respect to the welfare of a group of people, have become increasingly evident: see, for example, Brilmayer, Justifying International Acts, (1989), Ch 5 and Ch 7. However, humanitarian norms cannot be said to have been absent before 1945. Fundamental values and the laws of war themselves, being rules limiting the means of aggression not rules permitting violence, arise from a desire to preserve humanity and humaneness in relations between all people. They are themselves, in this sense, humanitarian norms.

69. With this analysis in mind, I have reached the following conclusions. There is, on a survey of relevant material, evidence of the existence before 1939 of a consciousness of acts which offend fundamental human rights; these may be called crimes against humanity. This is to be found in diplomatic instances and legal commentary in the nineteenth century; in the report to the Preliminary Peace Conference of 1919; in the Martens clause in the Hague Convention (by implication); and in the consistency of sanction of similar crimes in municipal laws of individual states. Crimes which extended, conceptually, beyond war crimes were contemplated. But before 1939 there was no real indication of the boundaries of these crimes. Reference is made to the "laws of humanity" or the "dictates of conscience" but the scope of the offence does not emerge. Two statements of the scope of crimes against humanity appeared in the Nuremberg Charter and CC Law No.10 in 1945, containing an important difference between them. Given that the IMT was most clearly exercising international jurisdiction and that no precise definition of the crime had emerged prior to that time, the narrower view of the crime contained in the Nuremberg Charter must be preferred.

70. It follows that, at the relevant time, conduct which amounted to persecution on the relevant grounds, or extermination of a civilian population, including a civilian population of the same nationality as the offender, constituted a crime in international law only if it was proved that the conduct was itself a war crime or was done in execution of or in connection with a war crime.

5995

71. The conduct in respect of which the plaintiff is charged is the murder of a number of persons, either Jews or those suspected of being partisans or communists. The paragraphs of the information relating to those suspected of being partisans or communists allege expressly that the conduct was in pursuance of a policy of annihilation "contrary to the laws of war", in other words that the conduct was a war crime. The paragraphs relating to Jewish people allege that the murders were committed during and in the course of the German occupation of the Ukraine, and either in pursuing Germany's policy of persecution of Jewish people or with intent to destroy Jewish people. In so far as the information alleges a murder in pursuance of Germany's policy of persecution, the conduct is done in execution of or in connection with a war crime in international law, the war crime being Germany's planned persecution in occupied Europe of people by reason of their race, or their political or religious beliefs. In so far as the information alleges a murder with intent to destroy the Jewish people, the conduct is alleged to have been committed "during and in the course of" the German occupation. "In the course of", which reflects the terminology of s.7(1) of the Act, implies, in this context, more than a temporal connection between the murder and the occupation. If it meant otherwise, it would add nothing to "during" the occupation. The allegation is sufficient, therefore, to amount itself to a war crime, as well as a crime against humanity. If, for any reason, the allegation of murder with intent to destroy the Jewish people is insufficient, in context, to amount to a war crime, the information would fail to describe conduct which amounted to a crime against humanity as defined in international law at the relevant time and would fail to be within the universal jurisdiction to prosecute that crime. On its face, however, the conduct alleged against the plaintiff constituted a war crime or a crime against humanity at the relevant time.

The Act and crimes in international law

72. The next matter for consideration is whether the definition of "war crime" in s.7 of the Act represents a valid exercise of Commonwealth legislative power as an appropriate exercise of universal jurisdiction conferred in international law with respect to war crimes, in the narrow sense, or crimes against humanity. "Appropriate" in this context means, of course, "effective"; it does not imply a power in this Court to review the desirability of the exercise of the jurisdiction.

73. The question for the Court here is: does the Act permit a person to be convicted of an offence under s.9 in circumstances where the conduct alleged against the person would not have amounted to a war crime or a crime against humanity under international law? Section 17 of the Act plays a decisive role in this determination. Sub-section (2) of that section is the central provision. It reads:

> " Subject to section 16, it is a defence if the doing by the defendant of the act alleged to be the offence:
>
> (a) was permitted by the laws, customs and usages of war; and
>
> (b) was not under international law a crime against humanity."

It follows from the earlier discussion as to crimes against humanity that par.(b) of s.17(2) can have only an operation consistent with the restricted understanding of that crime in international law. As to par.(a), since, as Baxter says, the international law of war is "'prohibitive law' ... Belligerent acts in war are facts, not legal rights" ("The Municipal and International Law Basis of Jurisdiction over War Crimes", (1951) XXVIII The British Year Book of International Law 382 (hereafter "Baxter"), at p 388), it is not accurate to speak of acts which are "permitted" by the laws, customs and usages of war. However, although inaccurate, the meaning of s.17(2)(a) is not unclear. Questions of onus of proof aside, there is no difficulty in construing the positive language of the paragraph as invoking the prohibitive

5996

provisions of the laws of war. The words "was permitted by the laws, customs and usages of war" must be taken to refer to conduct which "did not contravene the laws, customs and usages of war".

74. The Commonwealth submitted that s.17 is properly to be considered integral to the formation of the offence contained in s.9, with the result that the offence created by that section is confined by the limits of the relevant crimes at international law. This conclusion was said to result from two possible constructions of the relevant sections. The first is that the provisions of s.17 have the effect of creating an implied element in the offence created by the Act. In other words, it was submitted, words should be read into both s.7(1) and s.7(3), after "A serious crime is a war crime", to the effect: "which is a war crime or a crime against humanity at international law". This would involve the prosecution proving, in every case, beyond reasonable doubt, the facts which constitute the elements of the international crime alleged to have been committed. The analogy, on this construction, is the Crown's onus in a prosecution for murder to prove an intention on the part of the accused to kill or do grievous bodily harm.

75. If an "element of an offence" is to be understood in this strict sense, the suggested construction of ss.7 and 17 is not supported by the words and structure of the Act. Section 9 contains the elements of the offence created by the Act. A person is guilty of an indictable offence if he or she has (1) committed a "war crime", (2) between 1 September 1939 and May 1945. With no express reference to war crimes or crimes against humanity in international law in s.9, or in ss.6 or 7, and without more compelling reason than a general evocation of international law in, for example, the terms of s.7(3)(a)(i) and (ii), there is no justification for implying those crimes as an element (in the strict sense referred to) of the offence in s.9.

76. This does not mean, however, that the offence created by the Act may not be limited by the scope of crimes at international law referred to in s.17. As an alternative construction, the Commonwealth submitted that s.17 and the provisions of the Act as a whole have this effect because s.17 makes contravention of an international criminal law a "prerequisite of guilt", rather than an element of the offence. There are two ways, it was said, in which the "defence" in s.17(2), may be so raised. The accused may, in effect, demur to the indictment by claiming that the allegations in the charge do not, as a matter of law, constitute an offence against the laws, customs and usages of war or a crime against humanity. This would be a matter for the judge to decide and, if satisfied of the accused's submission, the prosecution would not proceed. If no facts needed to be determined, the jury would not be involved. An analogy here is a question as to the jurisdiction of a court. The prosecution, or a plaintiff in a civil case, need not prove that the claim made falls within the jurisdiction of a court; but if the issue is raised it must be resolved in favour of the prosecution, or plaintiff, before the proceedings may continue. Mason C.J. and Dawson J. observed in Thompson v. The Queen (1989) 169 CLR 1, at p 12:

> "Proof of jurisdiction is a prerequisite of guilt but otherwise it is not an element in proof of the commission of the offence except in those cases in which the offence is so defined that commission of it in a place or locality is made an element of the offence charged."

77. The second way in which it was said that an accused may raise the "defence" and claim that liability under the Act does not attach is to introduce additional facts which take the conduct alleged out of the category of a crime in international law. The facts alleged by the prosecution may, if proved, constitute a war crime in international law and for the purposes of the Act. For example, the facts alleged may amount to the manslaughter of

5997

civilians in occupied territory. But additional facts may raise a sufficient doubt as to the military necessity of the conduct. Section 17(3) expressly provides that conduct arising from military necessity is permitted by the laws, customs and usages of war. If this is the way liability is denied - by the assertion of additional facts - s.17(4) requires that there be evidence of the existence of those facts.

78. The language of s.17(4) does suggest that this second way is the only way to deny liability under s.17(2) but this literal reading cannot be taken to preclude the right to demur. Sub-section (4) is concerned to preclude reliance on sub-s.(2) where the defendant relies on additional facts but there is no evidence of them, merely assertion. As to that situation, see s.13(5).

79. In so far as a denial of liability does require evidence of additional facts, a defendant has an evidentiary onus in that regard. The word "defence" is used inaptly in s.17 because of the onus cast upon the prosecution if there is evidence of the existence of the facts constituting the defence: see s.17(5). However, there is nothing unusual in a defendant having an evidentiary onus nor, for that matter, in an inapt use of the word "defence" in a statute. An analogy for this view of the operation of s.17(2) is self-defence in the criminal law. The absence of circumstances which may amount to self-defence is not, in the strict sense, an element of murder. An evidentiary onus lies on an accused to adduce facts which are capable of raising a doubt as to whether the conduct in relation to which he or she is charged was done by way of self-defence. But, despite the name, self-defence is not a defence in the sense that an accused must prove the facts on which he or she relies.

80. I have dealt in some detail with this view of s.17, involving the proposition that the section has the effect of limiting the operation of ss.7 and 9 without creating an implied element in s.7, because it seems to me the correct construction. Prosecutions under s.9 must be in accordance with the whole Act. Apart from the particular provisions of s.17, there are indications in the Act - in specific provisions and general structure - which point strongly to the offence created in s.9 being predicated on the international law crimes of war crimes and crimes against humanity as formulated at the relevant time. The indications are as follows:

Specific provisions

(i) The terms of s.7(3) correspond to phrases and concepts in both Art.6(c) of the Nuremberg Charter and Art.II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention"). Article 6(c) speaks of "persecutions on political, racial or religious grounds"; s.7(3)(a)(i) speaks of a serious crime committed "in the course of political, racial or religious persecution". The difference between sub-pars (i) and (ii) of s.7(3)(a) also corresponds to the distinction between acts of persecution and acts of extermination, central to Art.6(c). With respect to acts of extermination, the reference in s.7(3)(a)(ii) to serious crimes committed "with intent to destroy in whole or in part a national, ethnic, racial or religious group" corresponds precisely to the language of Art.II of the Genocide Convention.

(ii) Section 7(1) provides that a serious crime may be a "war crime" in either of two contexts: during hostilities or in the course of an occupation. These are the two contexts dealt with by the laws and customs of war and which distinguish violations of those laws and customs from crimes against humanity per se. And nothing in s.7(1) requires there to be conduct, for the purposes of s.9, which is inconsistent with conduct which amounts to a war crime in the narrow sense.

The plaintiff relied on s.7(2), which makes a merely incidental or remote connection, whether in time, in time and place, or otherwise, insufficient to constitute conduct "in the course of" hostilities or an occupation, in order to support the proposition that a mere temporal or spatial connection would, in some circumstances, be sufficient to found a prosecution so long as it was not "incidental or remote". This, on its face, would exceed international law. The Commonwealth, on the other hand, argued that s.7(1), read in the light of sub-s.(2), requires a strong, substantial connection and that mere temporal or spatial connection is insufficient. This latter construction is the better view. The use of brackets, instead of commas, in s.7(2) has the effect of emphasising the main text of the sub-section, which simply makes incidental or remote connection insufficient. The subject matter of the provision is the degree, not the kind of connection. Although not conclusive, this construction lends support to the proposition that s.7(1) remains within the limits of international law. Such a construction is supported by the ordinary meaning of the phrase "in the course of" which carries with it the idea of a relationship between the substance of the two things connected. Conduct need not be calculated by sober military minds to achieve a military end; neither need war crimes in international law. The sexual assault of women inhabitants by occupying soldiers during an occupation would be "in the course of" the occupation and would be a war crime in international law but need not be (though it may be) calculated to further the ultimate military object of occupation.

(iii) The language of ss.16, 6(6) and, by implication, s.20 of the Act also refers to concepts familiar in international law. See the discussion of ss.16 and 20 later in these reasons.

Structure

(iv) The structure of s.7 itself, divided into two substantive parts - sub-ss.(1) and (3), reflects the two categories of crimes under discussion and contemplated in virtually all literature in this area of international law: war crimes and crimes against humanity.

(v) The structure of the "definition" of a "war crime" for the purposes of the Act indicates that the Act should properly be construed to stay within the limits of international law referred to in s.17. A "serious crime" in s.6 is defined by reference to municipal law; s.7 defines the circumstances within which those notional municipal offences can be prosecuted under the Act. Section 7 itself would be unnecessary if no invocation of international law were intended. The dual structure of the s.9 offence, therefore, supports the proposition that two systems of law are contemplated in the application of the Act.

(vi) Section 9 is the first section in Pt III of the Act, entitled "War Crimes". Many of the sections in that Part which follow s.9 have the effect of limiting the scope of the prosecutions possible under s.9. Some limit the prosecutions procedurally only: see, for example, s.14. Some sections, on the other hand, have a substantive operation, creating, in effect, a condition precedent for prosecution. For instance, s.11 limits prosecutions to those against Australian citizens or residents. This is not an element of the offence but, if the question is raised, the prosecution must be able to establish the citizenship or residency of the accused. Thus it is consistent with the scheme of the Act that s.9 be read in accordance with the limitations contained in Pt III of the Act.

5999

The Act and international law

81. Subject to a qualification to be discussed shortly, the Act evidences a sufficient intention that it does not seek to trespass beyond the boundaries of international law as they have been discussed in this judgment. Although a "war crime" is defined in terms which do not of themselves attract notions of international law, the scope of s.17 and the Act as a whole warrant a conclusion that the Act is in accord with what international law understands as war crimes and crimes against humanity at the relevant time.

82. The qualification in question exists by reason of s.16 which reads:

> " Subject to subsections 6(2) and 13(2), the fact that, in doing an act alleged to be an offence against this Act, a person acted under orders of his or her government or of a superior is not a defence in a proceeding for the offence, but may, if the person is convicted of the offence, be taken into account in determining the proper sentence."

The language of s.16 is very close to that of Art.8 of the Nuremberg Charter agreed to on 8 August 1945 and, no doubt, was taken from that instrument. Section 20 of the Act reads: "Subsection 6(6) and section 16 are enacted to avoid doubt." The "doubt" was not clearly identified in the submissions of counsel; indeed virtually nothing was said of s.16 in the course of argument.

83. If s.16 reflects international law at the times specified in the information, the correspondence between the Act and that law may, broadly speaking, be said to be complete. But what if it does not? Referring to the various trials by Allied courts after World War II, Professor Starke has commented:

> " It appears clearly established also by the above-mentioned post-war trials (see, for example, the judgment of the Nuremberg Court) that orders by superiors, or obedience to national laws or regulations, do not constitute a defence, but may be urged in mitigation of punishment": Introduction to International Law, 9th ed. (1984), p 529.

84. Of course the question in the present case is the state of international law between 1942 and 1943 when the offences alleged against the plaintiff are said to have been committed. The view that the doctrine of superior orders was available to service personnel charged with war crimes was asserted by Professor Oppenheim in his International Law as late as the fifth edition, published in 1935: see 5th ed., vol.II, pp 453-454. That view was reflected in the Australian Military Manual which, at the outbreak of World War II, said, in Ch XIV, Art.443:

> "It is important, however, to note that members of the armed forces who commit such violations of the recognized rules of warfare as are ordered by their Government, or by their commander, are not war criminals and cannot therefore be punished by the enemy."

85. But when Professor Lauterpacht edited the sixth edition of Oppenheim in 1940, he rejected the earlier view and expressed his opinion in terms corresponding to s.16 of the Act: see 6th ed., vol.II, pp 453-454. The Australian Military Manual was amended to give effect to the changed opinion on 30 September 1944.

86. In In Re List, at p 650, the USMT said of the defence of superior orders:

> " The defence relies heavily upon the writings of Prof. L. Oppenheim to sustain their position. It is true

6000

> that he advocated this principle throughout his writings. As a co-author of the British Manual of Military Law, he incorporated the principle there. It seems also to have found its way into the United States Rules of Land Warfare (1940). We think Professor Oppenheim espoused a decidedly minority view. ... The fact that the British and American armies may have adopted it for the regulation of their own armies as a matter of policy, does not have the effect of enthroning it as a rule of International Law."

87. It is significant that as early as 1921, in the case of The Llandovery Castle (1921) 2 Annual Digest 436, a German court held the defence of superior orders to be unavailable if the order were "universally known ... to be ... against the law".

88. Now it is true that the author of a major study - Dinstein, The Defence of 'Obedience to Superior Orders' in International Law, (1965) (hereafter "Dinstein") - ends, at p 253, with these words: "I cannot help but conclude my study of the subject of obedience to superior orders in international law with some incertitude." But, as noted, there is a body of authority and opinion that between 1942 and 1943 the defence of superior orders was not available in the case of a prosecution for a war crime. The point does not seem to have been debated in relation to crimes against humanity as opposed to war crimes in the narrower sense. But, given that crimes against humanity need not be defined by reference to military relationships, this may not be surprising.

89. Section 16 of the Act says no more than that "the fact that ... a person acted under orders ... is not a defence". It says nothing of duress, other defences made available by ss.6(2) and 13(2)(f) of the Act, or the implications of an order for the mens rea of the defendant: in this respect, see the discussion in Dinstein, at pp 251-252. The section is in truth very limited in its operation.

90. To the extent that there may be "doubt" (s.20) as to the availability of the defence of superior orders in the "war" to which the Act applies, I do not think that the doubt is sufficient to destroy the general correspondence between the Act and international law. It follows then that the Act is supportable as an exercise of the universal jurisdiction and, in that regard, as an exercise of the external affairs power.

Return to externality

91. I return now to where this judgment began, namely, that the Act is a law with respect to external affairs because it relates to conduct that took place during a war which touched and concerned Australia, whether or not Australia was directly involved in the particular conflict from which the conduct arose.

92. On this approach, the Act is viewed simply as municipal law which penalizes certain conduct answering the statutory definition of a "war crime" between 1 September 1939 and 8 May 1945. And, subject to what follows concerning Ch III of the Constitution, the Act is a valid exercise of the external affairs power.

Defence power

93. The Commonwealth contended that the Act is supportable as an exercise of the defence power in s.51(vi). But, for the reasons given by Brennan J., to which I do not wish to add, the Act is not so supportable. It is therefore unnecessary to say more about this aspect of the case.

Constitutional limitations - Chapter III

94. Placitum (xxix) of s.51 of the Constitution, as with the other placita of

6001

that section, is expressed to be "subject to this Constitution". It is necessary therefore that the Act does not offend any part of the Constitution, relevantly, that it does not offend Ch III - The Judicature.

95. The provisions of Ch III of the Constitution function to achieve the independence of the judiciary for two related ends. First, they ensure the institutional separation of the site of judicial power from those of executive and legislative powers so that the courts may operate as a check, through review, on the other arms of government. Secondly, the independence of the judiciary is protected so as to ensure that cases are decided free from domination by other branches of government and in accordance with judicial process. See Harris v. Caladine (1991) 65 ALJR 280, at p 300; 99 ALR 193, at pp 227-228.

96. The limits of judicial power are difficult to ascertain precisely; the line between an essentially legislative or executive function and a judicial function is not always obvious. However, it is clear that the determination of criminal liability is, historically and by its nature, the exercise of a purely judicial power: Waterside Workers' Federation of Australia v. J.W. Alexander Ltd. (1918) 25 CLR 434, at pp 443-444.

97. The essence of judicial power was stated by Kitto J. in The Queen v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd. (1970) 123 CLR 361, at p 374, when his Honour said:

> "Thus a judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist."

Legislation enacted by the Parliament pursuant to s.51 of the Constitution, which purported to require a court to which Ch.III applies to act otherwise than in accordance with these principles, would offend Ch III.

Bills of Attainder

98. Bills of attainder (which impose the death penalty) and bills of pains and penalties (which impose a lesser penalty) may be defined as legislative acts imposing punishment on a specified person or persons or a class of persons without the safeguards of a judicial trial: see Lehmann, "The Bill of Attainder Doctrine: A Survey of the Decisional Law", (1978) 5 Hastings Constitutional Law Quarterly 767, at pp 790-791.

99. Legislative acts of this character contravene Ch III of the Constitution because they amount to an exercise of judicial power by the legislature. In such a case, membership of a group would be a legislative assessment as to the certainty, or at least likelihood to the criminal standard of proof, of an accused doing certain acts or having certain intentions. Those acts or intentions would not themselves be open to scrutiny by the court. The vice lies in the intrusion of the legislature into the judicial sphere: Murphy J. in Victoria v. Australian Building Construction Employees' and Builders Labourers' Federation (1982) 152 CLR 25, at p 107.

6902

100. The Act, however, does not answer the description of a bill of attainder. It specifies no particular persons and it requires a trial. As to the kind of bill of attainder which confers guilt according to membership of a group, the Act confines the class of persons in relation to which it operates in the following ways. It deals only with conduct occurring between 1939 and 1945; war crimes outside of that time are not within its operation. More importantly perhaps, the Act's operation is confined to the European field of war, indicating that, at least in practice, it is the agents of European Axis countries who are the focus of the Act. But this falls short of the Act impliedly operating with respect to a specific class of persons. Guilt of a war crime for the purposes of s.9 is to be determined, in substance, not just form, by an assessment of conduct and intent on the part of the accused. Proof of conduct and of the necessary state of mind which constitutes murder, manslaughter, wounding or the various sexual offences is too particular in its nature to amount, in these circumstances, to a disguised description of group membership. Even though it may be that members of a group are likely to be the ones prosecuted, no assumption is made that members of that group, by virtue of that membership, have, or are likely to have, acted in one or more of these ways.

Retroactivity

101. The Commonwealth submitted that there is no consitutional prohibition against the Parliament enacting retroactive legislation. It is of some importance to see how the submission was couched. Mr Rose, of counsel for the Commonwealth, said in relation to the external affairs power:

> "of course the power is, like all the other powers in< section 51, subject to Chapter III, but, ... once the law is characterised as one with respect to external affairs, then like any of the legislation enacted under the other powers, Chapter III does not enable a court to say, for example, that this is an unjust law".

102. Whether a court may declare a statute to be invalid because it is unjust is a question that goes to the very heart of the relationship between the courts and Parliament: see, among the writings on the subject, Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty: A Recent Fray with Freedom of Religion", (1985) 59 Australian Law Journal 276. But that question does not arise here. The question is rather whether a law, which requires a court to which Ch III applies to act contrary to accepted notions of judicial power, contravenes Ch III and is therefore invalid to that extent. The question is not answered by the characterization of the law with respect to the placita of s.51. If the law is not in truth a law with respect to a particular head of power, it is not a valid law. It is only if the law meets that test that Ch III need arise for consideration. When it does so arise, it operates to invalidate a law that does not comply with what it requires.

103. I do not accept the submission of the Commonwealth in the absolute terms in which it was proffered. In legislation, judicial decisions and statements of principles, both of municipal and international law, there has emerged a general abhorrence of retroactive criminal law. The notion that there should be no crime or punishment, except in accordance with law, was recognized as early as 1651, when Hobbes wrote:

> "No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law": Leviathan, (1651), Chs.27-28, quoted in Glanville Williams, Criminal Law: The General Part, 2nd ed. (1961) (hereafter "Williams"), p 580.

104. The principle was formulated in Art.8 of the French Declaration of the

6003

Rights of Man of 1789, it re-appeared in the French Constitution of 1791 and remains in the French Code Penal. It headed the German Penal Code of 1871 and was guaranteed by the Weimar Constitution. Art.I, s.9, cl.3 of the United States Constitution expressly prohibits ex post facto laws. See generally Williams, at pp 575-581; Hall, "Nulla Poena Sine Lege", (1937) 47 The Yale Law Journal 165.

105. In international law the principle of non-retroactivity is enshrined in Art.15(1) of the International Covenant on Civil and Political Rights, (1966), which reads, inter alia:

> " No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed."

(See also Art.7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, (1950); Art.11(2) of the Universal Declaration of Human Rights, (1948); Art.9 of the American Convention on Human Rights, (1969); Art.7 of the African Charter on Human and Peoples' Rights, (1981).) There has been considerable debate surrounding Art.15, tending to focus on a concern that it should not function to undermine the validity of agreements and legislation and resulting prosecutions of war criminals after World War II: see Bossuyt, Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights, (1987), p 330; also the comments of The European Commission of Human Rights in X v. Belgium (1961) 4 Yearbook of the European Convention on Human Rights 324. It is generally agreed, however, that non-retroactivity is a fundamental principle in international law: Reshetov, "The Temporal Operation of Norms on Criminal Responsibility" in Ginsburgs and Kudriavtsev (eds), The Nuremberg Trial and International Law, (1990), p 111, at pp 111-113.

106. All these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future. Thus, in Calder v. Bull (1798) 3 US 385, Chase J. said, at p 388:

> "no man should be compelled to do what the laws do not require; nor to refrain from acts which the laws permit".

Laws should function to give reasonable warning of their operation and permit individuals to rely on that scope and meaning until expressly altered. Another nineteenth-century rationale for the principle was expressed in terms of specific deterrence:

> "The reason why these laws are so universally condemned is, that they overlook the great object of all criminal law, which is, to hold up the fear and certainty of punishment as a counteracting motive, to the minds of persons tempted to crime, to prevent them from committing it. But a punishment prescribed after an act is done, cannot, of course, (prevent) any such motive": Jacquins v. Commonwealth (1852) 63 Mass. 279, at p 281.

107. Prohibition against retroactive laws protects a particular accused against potentially capricious state action. But the principle also represents a protection of a public interest. This is so, first, in the sense that every individual is, by the principle, assured that no future retribution by society can occur except by reference to rules presently known; and secondly, it serves to promote a just society by encouraging a climate of security and humanity.

6004

108. In so far as the principle of non-retroactivity protects an individual accused, it is arguably a mutable principle, the right to protection dependent, to some extent, on circumstances. Where, for example, the alleged moral transgression is extremely grave, where evidence of that transgression is particularly cogent or where the moral transgression is closely analogous to, but does not for some technical reason amount to, legal transgression, there is a strong argument that the public interest in seeing the transgressors called to account outweighs the need of society to protect an individual from prosecution on the basis that a law did not exist at the time of the conduct. But it is not only the issue of protection of an individual accused at the point of prosecution which is raised in the enactment of a retroactive criminal law. It is both aspects of the principle - individual and public interests - which require fundamental protection.

109. In Calder v. Bull, Chase J. delineated the scope of the provision in the United States Constitution which prohibits ex post facto laws. He concluded, at p 390, that it proscribed four types of laws. They were: (i) laws that make an action done before the passing of the law, and which was innocent when done, criminal; and punish such action; (ii) laws that aggravate a crime, or make it greater than it was, when committed; (iii) laws that change the punishment, and inflict a greater punishment, than the law annexed to the crime, when committed; and (iv) laws that alter the legal rules of evidence, and receive less, or different, testimony than the law required at the time of the commission of the offence, in order to convict the offender.

110. It is not the case that a law (even a criminal law) that operates retroactively thereby offends Ch III of the Constitution. It is only if a law purports to operate in such a way as to require a court to act contrary to accepted notions of judicial power that a contravention of Ch III may be involved. It is conceivable that a law, which purports to make criminal conduct which attracted no criminal sanction at the time it was done, may offend Ch III, especially if the law excludes the ordinary indicia of judicial process. Such a law may strike at the heart of judicial power: see Liyanage v. The Queen (1967) 1 AC 259, at pp 289-290. But it is unnecessary to pursue this topic further because, as will appear, I do not consider that the Act, in its application to the information laid against the plaintiff, is retroactive in any offensive way. Likewise, I find it unnecessary to consider whether the decision in The King v. Kidman (1915) 20 CLR 425 is consistent with the operation of ChIII as described in this judgment, though it is apparent that I do not share dicta which may be thought to suggest that an ex post facto law can never offend Ch III: see, for instance, Isaacs J., at pp 442-443; Higgins J., at p 451; Powers J., at p 462. The Court was not invited to overrule Kidman and, in the absence of full argument on the point, it is preferable to say no more on this aspect.

Retroactivity: The Act

111. The Act is not offensively retroactive in relation to the information laid against the plaintiff. The information, except for par.2 and the relevant part of par.12, alleges that the plaintiff murdered one or more persons. Paragraphs 2 and 12 contain allegations that the plaintiff was "knowingly concerned in or party to the murders" of about 850 Jewish people in the village of Serniki.

112. Section 9 of the Act refers only to conduct done in the past. Those who "committed a war crime" are guilty of an offence. The offence under s.9 (strictly, unnamed, since "war crime" simply identifies certain conduct which amounts to the s.9 offence) did not exist in Australian law at the time of the conduct, so the section is, in some sense at least, retrospective. But the Act causes no detriment to an accused where the offence charged rests on the notional crime of murder referred to in s.6(1) and, by implication, s.6(3).

6005

Under the laws of the Australian States, the intentional killing of a person in the absence of authorisation, justification or excuse was at the relevant time an offence punishable by, at least, a maximum penalty no less than that imposed by s.10 of the Act for an offence involving the wilful killing of a person: imprisonment for life. And there was no suggestion in argument that the law prevailing in the Ukraine at the relevant time was any more beneficial to an accused. Further, the universality of the condemnation of murder in municipal laws generally is reflected in the existence in international law of war crimes and crimes against humanity, both of which (so far as it is relevant here) are predicated on conduct which all Australian States and Territories would have identified as murder. Where the conduct alleged is murder, the circumstances described in s.7, which must be satisfied to establish the offence in s.9, do not alter the nature of the conduct which is punishable so as to take it outside the scope of the municipal crime of murder. They describe the circumstances in which a crime of murder will be a "war crime". Conduct constituting such an offence under the Act was conduct which attracted the sanction of criminal laws generally, not just the censure of moral codes. In those circumstances, it cannot be said that an individual is caused detriment to which he or she would not have been subject at the time of the conduct, or that he or she had "no cause to abstain" from that conduct.

113. In its application to the information in pars 2 and 12, alleging that the plaintiff was "knowingly concerned in" the murder of several hundred Jewish people, the scope of the Act is less clear. The phrase reflects that in s.6(1)(k)(iii) of the Act which is part of the sub-section increasing the range of parties to a crime who may be caught by the scope of s.6. Those who attempt, conspire to commit, aid, abet, counsel or procure, or who are knowingly concerned in one of the crimes mentioned in pars (a) to (j) of the sub-section are also subject to its provisions. To be "knowingly concerned" is not generally an element of criminal conduct or a component of being a party to an offence in State criminal law involving offences to the person. The breadth of this phrase is made even larger by the language preceding it. Those who are "in any way, directly or indirectly, knowingly concerned in" a relevant offence may be prosecuted. Nevertheless, par.(k)(iii) is part of s.6(1) and is therefore qualified by the words "and was, under the law then in force ..., an offence". The plaintiff did not argue that the words "knowingly concerned" should be struck out and I am not persuaded that their inclusion in s.6 affects the validity of s.9.

114. Section 6 of the Act invokes State law offences whereas s.9 creates a Commonwealth offence. The notional offences on which the "war crime" is based did not exist in Commonwealth law. But it does not follow from this that the Act is retroactive in any relevant sense. If it is insufficient that the crime of murder existed as a crime within Australian law as a whole, then, at least in the case of murder, it is sufficient that the principles on which the doctrine of non-retroactivity is based are not contravened. Questions may perhaps arise with respect to other criminal offences as to whether there was cause to abstain, but not in the case of murder. Likewise, questions may arise in relation to par.(j) of s.6(1) which speaks of "an offence whose elements are substantially the same as the elements of an offence referred to" in the preceding paragraphs. But it too is qualified by the opening words of sub-s.(1). It is unnecessary to explore these matters.

115. In its application to the information against the plaintiff the Act is not retroactive in a way offensive to Ch III of the Constitution.

Summary of conclusions

116. There is an element of risk in attempting to summarise the contents of any judgment. But, having regard to the length of this judgment and the range of issues it canvasses, there is some justification for making the attempt.

6006

What follows is a summary of the judgment; it need hardly be said that the summary cannot be divorced from the context in which it appears.

1. The power of the Parliament to make laws with respect to "External affairs" (s.51(xxix) of the Constitution) includes a power to make laws with respect to matters external to Australia which touch or concern Australia in some way.
2. The Act is a law with respect to a matter external to Australia, touching or concerning the national interest of Australia, in so far as it relates to conduct occurring outside Australia arising from "war" as defined.
3. There is insufficient evidence of any international obligation to seek out war criminals and bring them to trial to support the Act as an exercise of the external affairs power.
4. Likewise, there is insufficient evidence of any international concern that war criminals be tried in countries other than those in which their crimes were committed to support the Act as an exercise of the external affairs power.
5. The power of the Parliament to make laws with respect to "External affairs" includes a power to make laws with respect to international crimes which are subject to the universal jurisdiction.
6. The Act is a law with respect to external affairs in so far as it is an exercise of the universal jurisdiction to prosecute war crimes and crimes against humanity as formulated in international law at the relevant time.
7. The Act cannot be supported by reference to the defence power in s.51(vi) of the Constitution.
8. The validity of the Act may be tested against the requirements of Ch III of the Constitution, that is, the Act must not call for an exercise, by a court to which the Chapter applies, of what is not truly judicial power.
9. In its application to the information against the plaintiff, the Act does not offend Ch III of the Constitution.

117. It follows then that I answer the question reserved for the consideration of the Court as follows: Section 9 of the Act is not invalid in its application to the information laid against the plaintiff.

JUDGE6

GAUDRON J. The relevant facts, statutory provisions and legislative history are set out in the judgments of Brennan J. and of Deane J. They reveal, amongst other things, that the War Crimes Act 1945 (Cth) ("the Act") was amended with effect from 25 January 1989 to create an indictable offence, called a "war crime", to be prosecuted in the courts of the States and internal Territories of Australia. See ss.9 and 13 of the Act.

2. The acts which constitute the offence created by s.9 of the Act are confined to acts which occurred between 1 September 1939 and 8 May 1945 and which were connected in one or other of the ways specified in s.7 of the Act with the Second World War in Europe or with an occupation arising out of that war. See the definitions of "occupation" and "war" in s.5 of the Act. See also s.7 and s.9(1)(a). As a matter of construction, the offence may be constituted by acts committed in Australia or acts committed outside Australia. See ss.6 and 7. Also as a matter of construction, the acts may have been committed by persons who were then citizens or residents of Australia or by persons then having no connection with this country. See, again, ss.6 and 7. However, s.11 of the Act provides that only an Australian citizen or resident may be charged with a "war crime". It seems from the preamble to the Act, inserted by the 1988 amendments, that the expectation of the Parliament may have been that the Act would, in the main, operate with respect to "persons who committed serious war crimes in Europe during World

6007

War II (and who) since have entered Australia and (become) Australian citizens or residents".

3. An information has been laid against the plaintiff charging him with a number of "war crimes". The crimes were allegedly committed on various dates between 1 September 1942 and 31 May 1943 in the Ukraine during or in the course of German occupation of that territory, in pursuit of German policy associated with that occupation or with the war, or on behalf of or in the interests of Germany, or, in some cases, with intent to destroy a racial group. See s.7(1)(b), (c) and (d) and s.7(3)(a)(ii) and (b). At no time during the period 1 September 1942 to 31 May 1943 was the plaintiff a citizen or a resident of Australia. He is now an Australian citizen, resident in South Australia.

4. The question asked in the present case pursuant to s.18 of the Judiciary Act 1903 (Cth) is this:

> "Is Section 9 of the War Crimes Act 1945 as amended, invalid in its application to the information laid ... against the plaintiff?"

The assumption implicit in that question is that the operation of s.9 with respect to the acts alleged in the information may be severed from the wider operation effected by ss.6 and 7 of the Act. The arguments of the plaintiff and of the defendants were based on the further assumption that severability may be effected on the basis that the acts alleged occurred wholly outside Australia. For reasons which will later appear, it is unnecessary to decide the issue of severability, but, in my view, the assumptions to which I have referred are correct. See Bank of N.S.W. v. The Commonwealth (1948) 76 CLR 1, per Dixon J. at pp 369-371; R. v. Commonwealth Court of Conciliation and Arbitration; Ex parte Whybrow and Co. (1910) 11 CLR 1, per Isaacs J. at p 54.

5. The question referred pursuant to s.18 of the Judiciary Act may be approached from various perspectives. By reason of the assumptions implicit in the question and in the arguments, I shall first consider whether, to the extent and by reason of its application to events which occurred wholly outside Australia, s.9 is a law with respect to external affairs.

6. In Koowarta v. Bjelke-Petersen (1982) 153 CLR 168 Mason J. said (at p 223) that New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") (1975) 135 CLR 337, "decided that the (external affairs) power extends to matters and things ... outside Australia". And Stephen J. (at p 211) was of the same view. However, I do not think that the decision in the Seas and Submerged Lands Case was to that effect.

7. In the Seas and Submerged Lands Case the sufficiency of the externality of the matter or thing to which the law in question applied was expressly accepted by Mason J. (at p 471) and by Jacobs J. (at p 497). It may be that, as was accepted by Gibbs C.J. in Koowarta (at p 190), Barwick C.J. expressed his acceptance of its sufficiency when, having indicated that various matters did not limit the power, his Honour stated (at p 360) that "(t)he power extends ... to any affair which in its nature is external to the continent of Australia and the island of Tasmania". However, that depends on what his Honour meant by the word "affair". Nothing else in the judgments in that case tends in favour of the view that externality is, of itself, sufficient to attract the power. Although that view was later expressly adopted by Murphy J. in The Commonwealth v. Tasmania (The Tasmanian Dam Case) (1983) 158 CLR 1, at pp 171-172, his Honour's decision in the Seas and Submerged Lands Case was based on the view (at p 503) that "(t)he Constitution, particularly s.51(xxix), is intended to enable Australia to carry out its functions as an international person, fulfilling its international obligations and acting effectively as a member of the community of nations."

6008

8. Had the Seas and Submerged Lands Case decided that the external affairs power extends to matters or things outside Australia it would dictate the conclusion that, in its application to the matters alleged in the information - being, as already indicated, matters which occurred wholly outside Australia, s.9 of the Act is a law with respect to external affairs. Equally, were there a decision to the opposite effect, that would dictate the opposite result. But there is no decision one way or the other. Thus, it is necessary to ascertain whether the power with respect to external affairs extends to acts, matters or things which are outside Australia by reference to the meaning of the words conferring the power.

9. The legislative power conferred by s.51(xxix) of the Constitution is a power "to make laws for the peace, order, and good government of the Commonwealth with respect to ... (e)xternal affairs". The extent of that power depends on the meaning of the words "external affairs", ascertained in accordance with the ordinary rule of constitutional interpretation that they "be construed with all the generality which the words ... admit": Reg. v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd. (1964) 113 CLR 207, at p 225. In particular, their meaning is not cut down by the words "for the peace, order, and good government of the Commonwealth". Those words neither identify nor limit the subject matter of legislative power, and they do not now (and it is very much to be doubted that they ever did) import a limitation upon the ability to legislate extraterritorially. Moreover, they indicate that, so long as the proposed measure is one with respect to some subject matter entrusted to the Parliament, it is for the Parliament to decide the nature and extent of the measure, if any, to be enacted on that topic. See Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd. (1959) 103 CLR 256, at pp 306-308. See also Pearce v. Florenca (1976) 135 CLR 507, at pp 515-516, and Union Steamship Co. of Australia Pty. Ltd. v. King (1988) 166 CLR 1, at pp 12-13.

10. The word "affairs" in the expression "external affairs" is a word of considerable generality. In its ordinary usage, "affair" may import a connection or relationship, but not necessarily of any precise or formal kind. Rather, "affair" signifies a relationship of a vague and general kind involving some interest or concern transcending mere curiosity. If that notion of connection or relationship is imported into the phrase "(e)xternal affairs" in s.51(xxix), the phrase extends to acts, matters or things external to Australia which attract the interest or concern of the Australian body politic. And that interest or concern is necessarily established if an external act, matter or thing has been selected by the Parliament of the Commonwealth as the act, matter or thing to which its legislation should apply. Thus, when the validity of legislation is in question, it will necessarily be a law with respect to external affairs if it applies to "matters or things geographically situated outside Australia": the Seas and Submerged Lands Case, per Mason J. at p 471.

11. The view that a law enacted by the Parliament of the Commonwealth is necessarily a law with respect to external affairs to the extent that it operates upon acts, matters or things external to Australia, although not dictated by the decision in the Seas and Submerged Lands Case, is one which received considerable support in that case. It also receives support from statements in the judgments in Robinson v. Western Australian Museum (1977) 138 CLR 283 (per Barwick C.J. at p 294, per Mason J. at p 335, and per Murphy J. at p 343), Viro v. The Queen (1978) 141 CLR 88 (per Murphy J. at p 162), Koowarta (per Stephen J. at p 211, and per Mason J. at p 223) and The Tasmanian Dam Case (per Murphy J. at pp 171-172). However, and more fundamentally, it is a view which proceeds from the ordinary meaning of the words "(e)xternal affairs" in s.51(xxix). Accordingly, in my view, s.9 of the

6009

Act is properly to be characterized as a law with respect to external affairs to the extent and by reason that it operates upon acts, matters or things outside Australia. More particularly, it is a law on that topic to the extent of its claimed application to the information laid against the plaintiff, that information being based on acts which are said to have taken place in the Ukraine, a place geographically external to Australia.

12. The conclusion that s.9 of the Act is a law with respect to external affairs to the extent and by reason that it operates upon acts, matters or things outside Australia makes it unnecessary to consider whether some other feature also renders it, either to some greater or lesser extent, a law on that topic. Nor is it necessary to consider whether, as argued on behalf of the defendants, it is a law with respect to defence. However, as s.9 operates only with respect to events which occurred during the period of and in connection with the Second World War in Europe or an occupation arising out of that war and as that conflict came to an end almost forty-five years before s.9 came into effect, it is very difficult to see any connection at all between it and "the ... defence of the Commonwealth (or) of the several States" (s.51(vi) of the Constitution).

13. The defence power has been described as a "purposive power", meaning that it will support a law which is reasonably capable of being seen as appropriate and adapted to the purpose of defence. See Stenhouse v. Coleman (1944) 69 CLR 457, at p 471. Even so, save for those considerations embodied in the phrase "pour encourager les autres", there is no basis on which s.9 can be said to be in the slightest degree relevant to defence. And those considerations, of doubtful validity in circumstances which are proximate in time, become even more questionable as events recede into history. But cf. R. v. Kidman (1915) 20 CLR 425, per Powers J. at p 460. In my view, those considerations will not stamp a law applying to events which occurred during a war which came to an end some forty-five years earlier as a law with respect to defence.

14. The legislative powers conferred by s.51 are conferred "subject to this Constitution". Thus, laws passed on a subject entrusted to the Parliament under s.51 are invalid if they offend a constitutional prohibition. On behalf of the plaintiff it was argued that s.9, in its application to the information laid against him, offends a prohibition deriving from Ch III of the Constitution or, more particularly, from s.71 which provides that "(t)he judicial power of the Commonwealth shall be vested in ... the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction." The latter courts are identified in s.77(ii) as "the courts of the States".

15. It is not in doubt that Ch III is the source of important prohibitions which, amongst other things, operate to guarantee the independence of the federal judiciary. See, for example, Waterside Workers' Federation of Australia v. J.W. Alexander Ltd. (1918) 25 CLR 434; Reg. v. Kirby; Ex parte Boilermakers' Society of Australia ("the Boilermakers' Case") (1956) 94 CLR 254; and Attorney-General of the Commonwealth of Australia v. The Queen (1957) 95 CLR 529. The prohibition which was asserted on behalf of the plaintiff was not identified in precise terms. Rather, Mr Charles Q.C., senior counsel for the plaintiff, pointed to the features of the offence created by s.9 and the features of the proceedings contemplated by the Act and argued that one or more of those features offend Ch III.

16. The offence created by s.9 of the Act is constituted by a "serious crime" (a concept which is elaborated in s.6) committed during the period specified in s.9(1)(a) and in one or other of the circumstances specified in s.7. As earlier indicated and in broad terms, s.7 and s.9(1)(a) require the offence to have been committed during the period of and to have been connected with the

6010

Second World War in Europe or with an occupation arising out of that war.

17. The information in this case is based on s.6(3) of the Act which provides:-

> "An act is a serious crime if:
> (a) it was done at a particular time outside Australia; and
> (b) the law in force at that time in some part of Australia was such that the act would, had it been done at that time in that part, be a serious crime by virtue of subsection (1)."

The information relies on "serious crimes" (murder, and being knowingly involved in murder) as specified in s.6(1)(a) and (k)(iii) of the Act. Sub-section (1) of s.6 operates by reference to several legal categories and provides as follows:

> "An act is a serious crime if it was done in a part of Australia and was, under the law then in force in that part, an offence, being:
> (a) murder;
> (b) manslaughter;
> (c) causing grievous bodily harm;
> (d) wounding;
> (e) rape;
> (f) indecent assault;
> (g) abduction, or procuring, for immoral purposes;
> (h) an offence (in this paragraph called the 'variant offence') that would be referred to in a preceding paragraph if that paragraph contained a reference to:
> (i) a particular intention or state of mind on the offender's part; or
> (ii) particular circumstances of aggravation;
> necessary to constitute the variant offence;
> (j) an offence whose elements are substantially the same as the elements of an offence referred to in any of paragraphs (a) to (h), inclusive; or
> (k) an offence of:
> (i) attempting or conspiring to commit;
> (ii) aiding, abetting, counselling or procuring the commission of; or
> (iii) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of;
> an offence referred to in any of paragraphs (a) to (j), inclusive."

Mention should also be made of s.6(2) which provides:-

> "In determining for the purposes of subsection (1) whether or not an act was, under the law in force at a particular time in a part of Australia, an offence of a particular kind, regard shall be had to any defence under that law that could have been established in a proceeding for the offence."

18. Assuming it was committed during the period and in the circumstances required by s.9(1)(a) and s.7 of the Act, the conduct which, by virtue of s.6(1) and (3), constitutes a "war crime" is any conduct which is capable of being assigned to a legal category designated in s.6(1) by the hypothetical application of a law of the Commonwealth or of some State or Territory as that law stood at the time of the conduct involved.

19. Section 17(2) allows a defence to a charge of war crime as follows:

> "Subject to section 16, it is a defence if the doing by

6011

the defendant of the act alleged to be the offence:
(a) was permitted by the laws, customs and usages of war; and
(b) was not under international law a crime against humanity."

That defence is further elaborated by s.17(3), (4) and (5). And s.16 provides that, subject to any defence available pursuant to s.6(2) or s.13(2), it is not a defence that the person concerned "acted under orders of his or her government or of a superior".

20. A number of matters should be noted by reference to s.17. First, it is sufficient to state, without going to the terms of s.17(3), (4) and (5), that I agree with Deane J., for the reasons that his Honour gives, that s.17(2)(a) must be construed to mean that the acts in question did not infringe the rules of international law prohibiting certain conduct in the course of and in connection with the waging of war.

21. Secondly, and subject to s.16(2) and any wider area of defence that may be permitted by s.17(3), I also agree with Deane J. that s.17(2) permits a defence, as a matter of law, that the conduct in question was neither a war crime nor a crime against humanity under the rules of international law as those rules stood at the time of the commission of the acts alleged, as well as a defence that, as a matter of fact, that conduct did not offend those rules. It is with respect to a defence of the latter kind that s.17(4) operates so that the defence cannot be relied upon unless there is evidence of facts which raise the defence.

22. Thirdly, I agree with Brennan J. and with Deane J. that it is not an element of the offence created by s.9 that the conduct should amount to a war crime or a crime against humanity under the rules of international law. There is no need for an implication to that effect, and the presence of s.17(2) makes that implication impossible. See John v. Federal Commissioner of Taxation (1989) 166 CLR 417, at pp 434-435.

23. Fourthly, the availability of a defence under s.17(2) does not effect the consequence that only that conduct which, at the time of its commission, involved an infringement of the rules of international law creating war crimes or crimes against humanity is made punishable by the Act. I agree with Deane J., for the reasons that his Honour gives, that, at least for a large part of the period of 1 September 1939 to 8 May 1945, international law did not exclude the defence of superior orders which is excluded by s.16 of the Act. There is thus a substantial and significant disconformity between the area in which the Act operates and the area occupied by the rules of international law by reference to which s.17(2) is formulated. And, as Deane J. points out, that disconformity extends to the period covered by the information. Moreover, as Brennan J. points out, to the extent that a defendant might wish to rely on a factual defence as permitted by s.17(2), he or she must be able to point to or call evidence before the defence can be raised.

24. The first and most unusual feature of the offence created by s.9 of the Act is that it is confined to past conduct and, it is common ground, to conduct which, at the time of its commission, was not subject to any law of this country. In particular, it was not then governed by the criminal law of this country and, thus, could not then form the basis of a criminal prosecution in this country.

25. Another unusual feature of the offence created by s.9 is that, at least to the extent involved in the information laid against the plaintiff, it is constituted by acts which are described in terms of particular legal categories rather than in terms assigning particular acts or omissions to some legal category.

6012

26. The proceedings contemplated by the Act for an offence against s.9 also have an unusual feature in that, to the extent that they are based on s.6(3), the assignment of conduct to a legal category involves the application of a body of law contrived for the proceedings. The first step in that process is dictated by s.6(1) which, as earlier indicated, requires that the law should have been in force when the act was done. The next step is directed by s.13(2) which relevantly provides that:

> "Where a person is charged with an offence against this Act, then, for the purposes of:
>
> ...
>
> (b) an exercise of jurisdiction by ... a court (of a State or internal Territory) in relation to the offence;
>
> ...
>
> this Act has effect, in relation to an act that is, or is alleged to be, the offence, as if:
>
> (e) a reference in subsection 6(3) or section 18 to a part of Australia were a reference to that State or Territory; and
>
> (f) without limiting subsection 6(2), all defences under the law in force in that State or Territory when the person is charged with the offence had been defences under the law in force in that State or Territory at the time of the act."

Section 18 provides for alternative verdicts. It need not be further considered.

27. In a prosecution based on s.6(3), the combined effect of s.6(1) and s.13(2) is to contrive a body of law to determine, not whether the offence of "war crime" was committed, but whether the acts constitute a "serious crime". That body of law is comprised of the law of the State or Territory in whose court the prosecution is brought as that law stood at the time of the acts alleged, but notionally amended to incorporate defences available when the charge was laid. Because it must be contrived for each prosecution, that body of law is necessarily variable. There is some rational basis for variation according to the time of the acts alleged. However, the contrived body of law may also vary according to the time when the charges are laid and according to the State or Territory in which the proceedings are brought.

28. The initial selection of the State or Territory in which proceedings are to be brought is for the prosecutor. However, s.14 of the Act allows for an application to be made for an order transferring the proceedings to another State or Territory. It is provided by s.14(3) that such an application must be made "as soon as reasonably practicable" after a charge is laid or "at such later time as the magistrate or judge allows". By s.14(4), the application must be granted unless the person charged is a resident of the State or Territory in which the proceedings were brought or is not a resident of the State or Territory to which the transfer is sought. Although s.14 makes residence the dominant factor in determining the State or Territory in which the matter is to be prosecuted, it stops short of an absolute requirement that a prosecution be brought in the State or Territory in which the defendant resides.

29. Apart from the convenience of the judge and, possibly, the lawyers involved, there is no obvious reason for the selection of the law of the State or Territory in whose court the proceedings are brought as the reference point for contriving a body of law to determine whether the acts charged constitute a "serious crime". And, at least where the conduct involved occurred outside Australia and, hence, outside that State or Territory, no reason is provided because, at least ordinarily, it will be where the defendant resides. The State or Territory in which he or she resides may be the result of chance or

of the merest circumstance, and one might expect that its laws will have been framed without regard to the events in wartime Europe. To the extent that a body of law is contrived by reference to the law of some State or Territory other than that in which the defendant resides, that will often be the consequence of the initiative of the prosecutor, the inertia of the defendant, the discretion of the judge or a combination of one or more of those matters. Thus, to a significant extent, the body of law contrived to determine whether the acts involved in any particular case constitute a "serious crime" is not only variable, but results from circumstances which are either remote from or irrelevant to conduct which, as here and as contemplated by s.6(3), occurred outside Australia and is made the subject of s.9 of the Act.

30. One other feature of the proceedings contemplated by the Act should be mentioned. Section 13(4)(b) relevantly provides that "(n)othing in Part II or subsection 9(1) shall be taken to ... limit ... the powers of a court to take action to prevent an abuse of process." However, s.13 further provides:

> "(5) Where, on the trial of a person for an offence against this Act, the person satisfies the judge, on the balance of probabilities, that:
>
> (a) the person is unable to obtain evidence that he or she would, but for the lapse of time or some other reason beyond his or her control, have been able to obtain;
>
> (b) the person's inability to obtain that evidence has substantially prejudiced, or will substantially prejudice, the preparation or conduct of his or her defence; and
>
> (c) the interests of justice require the making of an order under this subsection;
>
> the judge may make such order as he or she thinks appropriate for a stay of proceedings for the offence.
>
> (6) Nothing in subsections (4) and (5) limits the generality of anything else in those subsections."

31. It was argued that s.13(5), not being within Pt II of the Act, must be taken as an exhaustive statement of the circumstances which will justify a stay of proceedings under the Act and, hence, a limitation upon the inherent power of a Court to control its own process.

32. The inherent power of a court to stay proceedings is a power which is closely confined: see Jago v. District Court (N.S.W.) (1989) 168 CLR 23. However, the power is an essential attribute of a superior court and exists for the purpose of ensuring that proceedings serve the ends of justice and are not themselves productive of or an instrument of injustice. See Cocker v. Tempest (1841) 7 M and W 502, at pp 503-504 (151 ER 864, at p 865). In my view, an intention to interfere with such an important and essential power must be revealed by unmistakable language before a provision of a statute will be construed as having that effect. See Cameron v. Cole (1944) 68 CLR 571, per Rich J. at p 589. And, in that event, a question might arise, at least in circumstances which would call for the exercise of that power, whether its curtailment or abrogation transformed the power purportedly vested in the court into something other than judicial power and, thus, brought the provision into conflict with Ch III. Notwithstanding that s.13(4), (5) and (6) are curious both in form and in substance, they do not, in my view, reveal an unmistakable intention to curtail or abrogate the inherent power of a court to stay its proceedings.

33. It was said in the Boilermakers' Case (at pp 270-271, 289) that s.71, being a complete and exhaustive statement with respect to the judicial power of the Commonwealth, requires that only judicial power and powers ancillary or incidental thereto be conferred on a court as named or indicated in s.71. The correctness of the principal conclusion of the Boilermakers' Case was doubted

6014

by Barwick C.J. and by Mason J. in Reg. v. Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation (1974) 130 CLR 87, at pp 90 and 102 respectively. However, it is not in doubt that s.71 imposes limits as to the powers which the Parliament may confer on a court. See Hilton v. Wells (1985) 157 CLR 57, at p 68 and at pp 81-82. See also Reg. v. Spicer; Ex parte Australian Builders' Labourers' Federation (1957) 100 CLR 277, at pp 290-291; Reg. v. Commonwealth Industrial Court; Ex parte The Amalgamated Engineering Union, Australian Section (1960) 103 CLR 368; and Mikasa (N.S.W.) Pty. Ltd. v. Festival Stores (1972) 127 CLR 617.

34. An essential feature of judicial power is that it be exercised in accordance with the judicial process. I attempted to identify the features of that process in Harris v. Caladine (1991) 65 ALJR 280, at 307; (1991) 99 ALR 193, at p 239, and in Re Nolan; Ex parte Young (1991) 65 ALJR 486; 100 ALR 645. To adopt the words of Kitto J. in Reg. v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty. Ltd. (1970) 123 CLR 361, at 374, the essential features of that process include the determination of legal rights, obligations or consequences by the ascertainment of the facts as they are and as they bear on the matter for determination, and the identification of the applicable law, followed by an application of that law to those facts. Those features may be more or less obvious, depending on the issues involved and the nature of the law to be applied. At one extreme, the law to be applied may require the assigning of future rights and obligations attaching to or in consequence of a legal relationship in the exercise of a judicial discretion in which no particular matter is decisive. At the other extreme, the law may assign distinct legal consequences by reason that a person has committed a particular proscribed act. Criminal laws are laws of the latter kind. But whatever the issues and whatever the nature of the law being applied, the power vested in a court can be exercised only on the basis of the discovered facts and by application of the law which determines the legal consequences attaching to those facts.

35. A power to be exercised by the application of law to facts invented by Parliament or invented according to some statutory formula or prescription would not be a power to be exercised in accordance with the judicial process and would not be judicial power. That is not to say that statutory fictions may not be employed in the course of and for the purpose of formulating the legal rights, obligations or consequences attaching to a relationship or to conduct. And, of course, they may be applied by the courts when those rights, obligations or consequences are in issue. However, the relationship or the conduct which is the basis of those rights, obligations or consequences must be real and not fictitious. A law assigning legal consequences on the basis of fictitious or invented facts may sometimes, on that account, be characterized as other than a law on a subject matter within legislative power. See Actors and Announcers Equity Association v. Fontana Films Pty. Ltd. (1982) 150 CLR 169. Quite apart from that consideration, a law conferring power on a court to determine legal consequences on the basis that a person is who he is not or on the basis that he did what he did not would be invalid for offending Ch III. It would be invalid because the power in question would involve a travesty of the judicial process and would, thus, be a power which, by virtue of s.71, could not validly be conferred on a court.

36. Equally, it would be a travesty of the judicial process if, in proceedings to determine whether a person had committed an act proscribed by and punishable by law, the law proscribing and providing for punishment of that act were a law invented to fit the facts after they had become known. In that situation, the proceedings would not be directed to ascertaining guilt or innocence (which is the function of criminal proceedings and the exclusive function of the courts), but to ascertaining whether the Parliament had perfected its intention of declaring the act in question an act against the

6015

criminal law. That is what is involved if a criminal law is allowed to take effect from some time prior to its enactment. Of course, the position is different if the law re-enacts an earlier law which applied when the acts were committed. At least that is so to the extent that that earlier law has not been brought to bear on conduct falling or alleged to fall within it. In this regard, it is sufficient to state that, in my view, a law would not be a law re-enacting an earlier law if it purported to apply cumulatively upon it. And the position is different again in the case of a law which acts retrospectively upon civil rights, obligations or liabilities. The function of a court in civil proceedings is the determination of present rights, obligations or liabilities. In that context, a retrospective civil law is very much like a statutory fiction in that it is a convenient way of formulating laws which, by their application to the facts in issue, determine the nature and extent of those present rights, obligations or liabilities.

37. It was argued on behalf of the defendants that it was decided in Kidman that it is within the power of the Parliament to pass a criminal law taking effect from some time prior to its enactment. Kidman concerned a provision creating the statutory offence of conspiracy to defraud the Commonwealth.

38. It is now obvious, if it was not when Kidman was decided, that conspiracy to defraud the Commonwealth constituted on offence at common law. Thus, the provision considered in Kidman merely re-enacted a law which applied at the earlier time. It was that feature which, in the judgment of Griffith C.J. (at p 436), served to signal that the provision was within legislative power. And Isaacs J., at p 442, expressed a similar consideration, namely, that the provision was not "ex post facto converting a lawful act into an unlawful act". However, the other Justices in that case proceeded on the basis or assumed without deciding (see Higgins J., at p 448) that the provision created a new offence constituted, so far as it operated during a period prior to its enactment, by acts which were not then proscribed by law.

39. As Deane J. points out in this case, the significance of Ch III was neither raised nor considered in Kidman. Accordingly, in my view, Kidman is authority only for what it actually decided, namely, that it is within the legislative power of the Parliament to create a statutory offence taking effect prior to its enactment if it merely gives statutory form to an earlier common law offence. However, if Kidman is authority for some wider proposition, then in my view, for the reasons given by Deane J., it should be re-examined. In particular, it does not rest upon a principle that has been carefully worked out in a succession of cases and, it is not a decision which, outside the present case, appears to have been acted upon. See The Commonwealth v. Hospital Contribution Fund (1982) 150 CLR 49, at pp 56-57.

40. The true nature of what is commonly called an "ex post facto law" or a "retroactive law" is revealed in the judgment of Powers J. in Kidman (at p 457) where his Honour described a law of that kind as "a law by which, after an act has been committed which was not punishable ... at the time it was committed, the person who committed it is declared to have been guilty of a crime and to be held liable to punishment". As is there made clear, it is the statute or the Act of the Parliament, and not the determination of a court, by which a person is declared to have been guilty. That is the usurpation (see Liyanage v. The Queen (1967) 1 AC 259, at p 289) of power which is exclusively judicial. See Huddart, Parker and Co. Proprietary Ltd. v. Moorehead (1909) 8 CLR 330, per Griffith C.J. at p 357, and per Isaacs J. at p 383; Alexander, per Griffith C.J. at p 442, and per Isaacs and Rich JJ. at pp 463, 465; Trade Practices Tribunal, per Kitto J. at p 374; and Re Tracey; Ex parte Ryan (1989) 166 CLR 518, per Deane J. at p 580.

41. The usurpation of judicial power by a law which declares a person guilty

6016

of an offence produces the consequence that the application of that law by a court would involve it in an exercise repugnant to the judicial process. It is repugnant to the judicial process because the determination of guilt or innocence is foreclosed by the law. The only issue is whether the person concerned was a person declared guilty by the law. And all that involves is the determination, as a matter of fact, whether some person is the person, or answers the description (whatever form it takes) of the persons, declared guilty by the Act. It does not involve, and indeed negates, that which is the essence of judicial power in a criminal proceeding, namely, the determination of guilt or innocence by the application of the law to the facts as found. Accordingly, such a law is invalid as infringing s.71 because it involves the exercise by Parliament of a power which can be exercised only by the courts named or indicated in s.71 and because its application by a court would involve it in exercising a power repugnant to the judicial process. If Kidman holds otherwise, it should no longer be followed.

42. It remains to be considered whether, in its application to the information laid against the plaintiff, s.9 is invalid by reason that it offends Ch III. I have already indicated that, in my view, a law which merely re-enacts a law which applied to acts at the time of their commission, provided that that earlier law has not already been brought to bear on those acts, would not come into conflict with Ch III. And I see no reason why, assuming it to be a law with respect to a subject matter entrusted to the Parliament of the Commonwealth, the Parliament might not re-enact the common law, the law of a State or of a Territory or reproduce the law of some foreign country or a rule of international law. However, validity would depend on the faithful re-enactment or reproduction of that law and, should an issue arise, it would be for the Commonwealth to establish - by evidence if necessary - that its law faithfully re-enacted or reproduced the earlier law. See Australian Communist Party v. The Commonwealth (1951) 83 CLR 1, per Dixon J. at pp 200-202, per Williams J. at pp 222-223, per Webb J. at p 244, and per Fullagar J. at pp 261-262.

43. It was not suggested that the Act is a re-enactment or a reproduction of an earlier law, save to the extent that the defendants pointed to the rules of international law with respect to war crimes and crimes against humanity. As already indicated, the Act is not confined to the area of operation of those rules as they stood from time to time in the period 1 September 1939 to 8 May 1945 and by reference to which the defence allowed by s.17(2) is formulated. Accordingly, it is not a faithful reproduction of those rules.

44. Moreover, despite the complexity of ss.6(3) and 13 and the way in which they are formulated, the proceedings contemplated by the Act do not involve the application of law to facts as found to determine their legal consequence. Rather, the complexity and the contrived nature of those provisions indicate that what is involved is the application of a formula which, in essence, directs an enquiry whether the person charged did acts outside Australia which, if done within Australia, would have amounted to an offence in Australia if the law had then been the same as that contrived for the proceedings. That task is not altered by reason that the Act allows a "defence" which, as already indicated, differs from the rules of international law by reference to which it is formulated. The "defence" is merely part of the formula providing a description of the persons whom the Act declares to be guilty. And, thus, the task involved in the proceedings contemplated by the Act is no more than that of ascertaining, as a matter of fact, whether a person charged under the Act fits that description. Were that task to be divorced from the consequence which ss.9 and 10 seek to attach, it might properly be conferred on a Royal Commission of Inquiry or some similar body possessed of investigative powers. However, whether divorced from or attached to that consequence, it cannot be conferred on a court named or indicated in

6017

s.71 of the Constitution for the simple reason that the process involved is one that denies an essential feature of the judicial process, namely, the application of law to facts to determine their legal consequence.

45. It makes no difference to the validity of s.9, in its application to the information laid against the plaintiff, that jurisdiction is also conferred on the courts of the internal Territories. Although the courts of the Territories are in a somewhat different position from the courts named and indicated in s.71 (see Capital T.V. and Appliances Pty. Ltd. v. Falconer (1971) 125 CLR 591 and Hilton v. Wells, at pp 67-68), s.9 is, in any event, invalid by reason that it involves the usurpation of a power which can be exercised only by a court in accordance with the judicial process.

46. The question referred pursuant to s.18 of the Judiciary Act should be answered "Yes".

JUDGE7

McHUGH J. The question reserved for consideration of the Full Court in this case is whether s.9 of the War Crimes Act 1945 (Cth) as amended ("the Act") is invalid in its application to the information laid by the second defendant against the plaintiff. In my opinion that question should be answered in the negative.

2. The facts and contentions of the parties are set out in other judgments. Except for the purpose of explaining my reasons, I shall not repeat them.

3. Upon its proper construction, the Act applies to conduct which constitutes a war crime (within the meaning of the Act) whether that conduct occurred inside or outside Australia. The terms of s.6(1) of the Act when read with s.7(1)(c) or (d) or s.7(3) and the terms of s.6(3) when read with s.7 make it clear that s.9(1) applies to a person who committed an act constituting a war crime whether that act occurred inside or outside Australia. The most relevant provisions of the Act are as follows:

> "6.(1) An act is a serious crime if it was done in a part of Australia and was, under the law then in force in that part, an offence, being:
>
> (a) murder;
> (b) manslaughter;
> (c) causing grievous bodily harm;
> (d) wounding;
> (e) rape;
> (f) indecent assault;
> (g) abduction, or procuring, for immoral purposes;
> (h) an offence (in this paragraph called the 'variant offence') that would be referred to in a preceding paragraph if that paragraph contained a reference to:
> (i) a particular intention or state of mind on the offender's part; or
> (ii) particular circumstances of aggravation;
> necessary to constitute the variant offence;
> (j) an offence whose elements are substantially the same as the elements of an offence referred to in any of paragraphs (a) to (h), inclusive; or
> (k) an offence of:
> (i) attempting or conspiring to commit;
> (ii) aiding, abetting, counselling or procuring the commission of; or
> (iii) being, by act or omission, in any way, directly or indirectly, knowingly concerned in, or party to, the commission of;
> an offence referred to in any of paragraphs (a) to

6018

(j), inclusive.

(2) In determining for the purposes of subsection (1) whether or not an act was, under the law in force at a particular time in a part of Australia, an offence of a particular kind, regard shall be had to any defence under that law that could have been established in a proceeding for the offence.

(3) An act is a serious crime if:

(a) it was done at a particular time outside Australia; and

(b) the law in force at that time in some part of Australia was such that the act would, had it been done at that time in that part, be a serious crime by virtue of subsection (1)."

Section 7 provides:

"(1) A serious crime is a war crime if it was committed:

(a) in the course of hostilities in a war;

(b) in the course of an occupation;

(c) in pursuing a policy associated with the conduct of a war or with an occupation; or

(d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.

(2) For the purposes of subsection (1), a serious crime was not committed:

(a) in the course of hostilities in a war; or

(b) in the course of an occupation;

merely because the serious crime had with the hostilities or occupation a connection (whether in time, in time and place, or otherwise) that was only incidental or remote.

(3) A serious crime is a war crime if it was:

(a) committed:

(i) in the course of political, racial or religious persecution; or

(ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and

(b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation.

(4) Two or more serious crimes together constitute a war crime if:

(a) they are of the same or a similar character;

(b) they form, or are part of, a single transaction or event; and

(c) each of them is also a war crime by virtue of either or both of subsections (1) and (3)."

Section 9(1) provides:

"A person who:

(a) on or after 1 September 1939 and on or before 8 May 1945; and

(b) whether as an individual or as a member of an organisation;

committed a war crime is guilty of an indictable offence against this Act."

Section 16 provides:

"Subject to subsections 6(2) and 13(2), the fact that, in doing an act alleged to be an offence against this Act, a person acted under orders of his or her government or of a superior is not a defence in a proceeding for the offence, but may, if the person is convicted of the offence, be taken into account in determining the proper sentence."

Section 17 provides:

"(1) This section has effect for the purposes of a

> proceeding for an offence against this Act.
> (2) Subject to section 16, it is a defence if the doing by the defendant of the act alleged to be the offence:
> (a) was permitted by the laws, customs and usages of war; and
> (b) was not under international law a crime against humanity.
> (3) To avoid doubt, the doing of the act by the defendant was permitted by the laws, customs and usages of war if it was reasonably justified by the exigencies and necessities of the conduct of war.
> (4) The defendant is not entitled to rely on a defence under subsection (2) unless there is evidence of the existence of the facts constituting the defence.
> (5) However, if there is such evidence, the onus of establishing, beyond a reasonable doubt, that those facts either do not exist or do not constitute the defence lies on the prosecution."

4. The Commonwealth contended that s.6(1) was definitional and that the Act operated only in respect of conduct which occurred in Europe during the period 1 September 1939 and 8 May 1945. It is true that the first paragraph of the preamble, the definitions of "war" and "occupation", and the terms of ss.16 and 17 of the Act suggest that the Act was aimed only at those persons who committed war crimes in Europe during that period. But the terms of s.6(1) are too emphatic to be read down by these considerations. The words "(a)n act ... if it was done in a part of Australia" in that sub-section cannot be read as if they meant "an act done outside Australia". Moreover, the contrast between s.6(1), which makes an act of a certain kind a serious crime "if it was done in a part of Australia", and s.6(3), which makes an act of a certain kind a serious crime "if it was done at a particular time outside Australia", is explicable only on the ground that the Parliament of the Commonwealth intended that an act committed in Australia can constitute a war crime for the purposes of the Act. By s.11, however, only a person who is at the present time an Australian citizen or resident of Australia or an external Territory can be charged with an offence against the Act.

5. The Commonwealth also submitted that s.7 contained an implication that the conduct in question had to constitute a war crime or a crime against humanity under international law before it amounted to a war crime for the purposes of s.7. But nothing in the Act gives any support for that proposition. Indeed, the inference to be drawn from s.17 is to the contrary. That section makes it a defence "if the doing by the defendant of the act alleged to be the offence ... was permitted by the laws, customs and usages of war; and ... was not under international law a crime against humanity". The word "permitted" in this context is erroneous. As Baxter has pointed out, in "The Municipal and International Law Basis of Jurisdiction over War Crimes", (1951) XXVIII The British Year Book of International Law 382, at p 388:

> "The international law of war is 'prohibitive law' and its purpose is to place curbs upon the otherwise unrestrained violence of war. Belligerent acts in war are facts, not legal rights ..."

To make sense of the section, therefore, the words "permitted by" should be read as meaning "not in breach of". When the section is so read, it provides an answer to a charge under s.9(1) where the act of the defendant was not in breach of the laws, customs and usages of war and was not under international law a crime against humanity. Nevertheless, s.17(4) provides that the "defence" is not open "unless there is evidence of the existence of the facts constituting the defence". Unless there is such evidence, the prosecution is not required to prove that those facts do not exist or do not constitute such a "defence". It follows that a conviction under s.9(1) may ensue without proof that the act of the defendant was in breach of the laws, customs and

6020

usages of war (that is to say, was a "war crime" for the purposes of international law) or was under international law a crime against humanity. That being so, it is not a necessary element of a charge under s.9(1) that the act of the defendant was in breach of the laws, customs and usages of war or was under international law a crime against humanity. Neither s.7 nor any other provision of the Act can be read as containing any implication to the contrary.

6. The constitutional validity of the Act, therefore, depends upon two questions:

(a) Did the Parliament have power in 1988 to punish an Australian resident or citizen for conduct falling within ss.6(3) and 7 of the Act when that conduct occurred outside Australia more than forty years previously?

(b) Did the Parliament have power in 1988 to punish an Australian resident or citizen for conduct falling within ss.6(1) and 7 of the Act when that conduct occurred in Australia more than forty years previously?

The external affairs power

7. In my opinion, in so far as the Act penalises conduct constituting a war crime which occurred outside Australia, the Act is validly enacted pursuant to the external affairs power. According to a substantial body of dicta, but no express decision, in this Court, s.51(xxix) of the Constitution authorises a law for the peace, order and good government of the Commonwealth with respect to any matter, thing or conduct occurring outside Australia: New South Wales v. The Commonwealth ("the Seas and Submerged Lands Case") (1975) 135 CLR 337, at pp 360, 471, 497, and cf. pp 503-504; Robinson v. Western Australian Museum (1977) 138 CLR 283, at p 294, and cf. pp 335, 343; Viro v. The Queen (1978) 141 CLR 88, at p 162; Koowarta v. Bjelke-Petersen (1982) 153 CLR 168, at pp 222-223. In the Seas and Submerged Lands Case, Jacobs J. said (at p 497) that, under the external affairs power, "the Commonwealth has the power to make laws in respect of any person or place outside and any matter or thing done or to be done or prohibited to be done outside the boundaries of the Commonwealth".

8. I can see no reason for giving the power conferred by s.51(xxix) any narrower interpretation than that expounded by Jacobs J. Subject to any express or implied limitations in the Constitution, a grant of power conferred by s.51 is to "be construed with all the generality which the words used admit": Reg. v. Public Vehicles Licensing Appeal Tribunal (Tas.); Ex parte Australian National Airways Pty. Ltd. (1964) 113 CLR 207, at p 225. The ordinary meaning of the word "external" is "outside". The meaning of the word "affairs" varies considerably according to its context. But it is a word which is capable of a very wide meaning. The Macquarie Dictionary, 2nd rev.ed. (1987), includes among the meanings of "affair":

> "1. anything done or to be done; that which requires action or effort; business; concern: ... 2. (pl.) matters of interest or concern; particular doings or interests: ... 3. an event or a performance; a particular action, operation, or proceeding: ... 4. thing; matter (applied to anything made or existing, with a descriptive or qualifying term): ... 5. a private or personal concern; a special function, business or duty".

9. Moreover, since the adoption of s.3 of the Statute of Westminster Act 1931 (Imp.) by the Statute of Westminster Adoption Act 1942 (Cth), no question can arise as to the extraterritorial operation of Commonwealth legislation. But, independently of the effect of that legislation, once a subject matter is found to be within the terms of s.51, the Commonwealth has, and always has

6021

had, power to give extraterritorial operation to a law on that subject matter: see Croft v. Dunphy (1933) AC 156, at p 163. The contrary view was based on a misconception: Reg. v. Foster; Ex parte Eastern and Australian Steamship Co. Ltd. (1959) 103 CLR 256, at p 300. In so far as the nature of any subject matter specified in s.51 is capable of being given an extraterritorial operation, therefore, the Commonwealth has the constitutional power to give it that operation. If the Parliament of the Commonwealth in exercising its powers under s.51 "were to legislate gratuitously in respect of foreign persons in foreign territory, ... an Australian court could not hold the legislation ... invalid": Reg. v. Foster, at p 306.

10. Furthermore, the words "peace, order, and good government of the Commonwealth" do not require that a law with respect to "external affairs" should be a law whose subject matter has some recognisable connection with Australia. Those words do not impose any limitation on the power conferred on the Parliament of the Commonwealth by s.51 of the Constitution. They do not require legislation to be held invalid because, in the opinion of the Court, the legislation does not promote or is not in fact for the peace, order and good government of the Commonwealth: Union Steamship Co. of Australia Pty. Ltd. v. King (1988) 166 CLR 1, at p 10. The words "peace, order, and good government" are a recognition of the fact that, for the purposes of constitutional theory, "the purpose and design of every law is to promote the welfare of the community": Harrison Moore, The Constitution of the Commonwealth of Australia, 2nd ed. (1910), pp 274-275, cited in Reg. v. Foster, per Windeyer J. at p 308.

11. Accordingly, the term "external affairs" should be interpreted to include any matter, thing, event or relationship existing or arising or which might exist or arise outside Australia. Section 51(xxix) is not confined, therefore, to the making of laws authorising arrangements with other nations or implementing arrangements properly entered with other nations: see the Seas and Submerged Lands Case, at p 360. Nor is it confined to affairs which concern Australia's relations with other countries or affect Australia's standing in the community of nations or which have some recognisable connection with Australia. A law which punishes an Australian resident or citizen in respect of conduct occurring outside Australia is a law for the peace, order and good government of the Commonwealth with respect to "external affairs". Thus, in so far as the Act operates in respect of "war crimes" committed by Australian residents or citizens outside Australia, it would have been validly enacted under the external affairs power if it had been enacted on 1 September 1939. On that hypothesis, the Act would have operated prospectively to punish Australian citizens and residents in respect of conduct occurring outside Australia with respect to a war occurring in Europe. The critical question, however, is whether the retrospective operation of the Act means that it is not a law with respect to external affairs even though the Act punishes conduct which has occurred outside Australia.

12. In R. v. Kidman (1915) 20 CLR 425, this Court unanimously held that the Parliament of the Commonwealth had the power to deem a law, which made conspiracy to defraud the Commonwealth an offence, to have been in force from a date prior to the enactment of that law. A majority of the Court were of the opinion that the retrospective operation of the law was authorised by s.51(xxxix) of the Constitution, which provides that the Parliament has power to make laws with respect to:

> "Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth".

In Kidman, Higgins J. said (at p 453):

> "It is clear that pl.xxxix. of sec.51 was not meant to

6022

> limit, it was meant to increase, the powers of Parliament to make laws; and there is not one word, from first to last, to indicate an intention to withhold from the Federal Parliament the same absolute discretion as the British Parliament itself has, with regard to past events as well as present and future - provided that the Federal Parliament confine itself to the specified subjects and matters incidental to the execution of the legislative executive and judicial powers."

13. The present Act punishes conduct which occurred outside Australia more than forty years before the enactment of the Act. For the reasons which I have given, however, s.51(xxix) of the Constitution vests in the Parliament the power to make a law with respect to such conduct. Upon the assumption that Kidman was correctly decided - a question with which I have to deal in determining whether the Act offends the provisions of Ch III of the Constitution - the retrospective operation of the Act was authorised by s.51(xxxix) of the Constitution since that operation was a matter "incidental to the execution of (a) power vested by this Constitution in the Parliament".

14. Accordingly, in my opinion, in so far as the Act punishes conduct occurring outside Australia at a time prior to the commencement of the Act, the Act is authorised by s.51(xxix) and (xxxix) of the Constitution.

15. In my opinion, the Act is also valid in so far as it punishes an Australian resident or citizen for an act "done in a part of Australia" which is a "serious crime" within the meaning of s.6(1) of the Act. Before a person can be punished under s.9(1) for such an act, the "serious crime" must be a "war crime" within the meaning of s.7 of the Act: see s.8(2), (3) and (4) and s.9(1). The terms of s.7 have already been set out.

16. Section 5 of the Act defines "occupation" to mean:

> "(a) an occupation of territory arising out of a war; or
> (b) without limiting the generality of paragraph (a), an occupation of territory in Latvia, Lithuania or Estonia as a direct or indirect result of:
> (i) the agreement of 23 August 1939 between Germany and the Union of Soviet Socialist Republics; or
> (ii) any protocol to that agreement".

That section also defines "war" to mean:

> "(a) a war, whether declared or not;
> (b) any other armed conflict between countries; or
> (c) a civil war or similar armed conflict;
> (whether or not involving Australia or a country allied or associated with Australia) in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945."

Because of the definitions of "war" and "occupation", it is not possible for a person who has committed an act which is a serious crime within the meaning of s.6(1) to have committed a war crime within the meaning of s.7(1)(a) or (b). But a person who has committed an act which is a serious crime within the meaning of s.6(1) will have committed a "war crime" within the meaning of s.7(1)(c) or (d) if his or her act was done in pursuing a policy associated with the conduct of a war or occupation (as defined) or on behalf of or in the interests of a power conducting such a war or engaged in such an occupation. Moreover, since Australia was involved "in a war", it is theoretically possible for a person who committed an act in Australia to have done so in circumstances which make it a "war crime" by reason of s.7(3).

6023

17. It would be surprising if there is any person who has committed a war crime within the meaning of the Act by reason of an act done in Australia. However, the constitutional validity of s.9(1), in so far as it depends upon the combined operation of ss.6(1) and 7, has to be determined by reference to the terms of those provisions and not by reference to the likelihood of their operation in respect of acts committed in Australia.

18. The question, therefore, is whether a law which punishes an act committed in Australia in circumstances which make it a "war crime" by reason of s.7 is a valid enactment under the external affairs power.

19. In my opinion, the external affairs power extends to conduct engaged in in Australia for the purpose of carrying out some object external to Australia. Thus, a law which prohibits persons from doing any act or thing in Australia with intent to overthrow by force or violence a foreign government is a law with respect to external affairs: cf. s.24AA of the Crimes Act 1914 (Cth). Similarly, the external affairs power would support a law which prohibits persons from preparing in Australia for an incursion into a foreign State for the purpose of engaging in hostile activities: cf. s.7 of the Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth). Although the acts which ss.6(1), 7 and 9(1) of the Act penalise were acts occurring within Australia, they were acts which were committed in the course of or for the purpose of events occurring outside Australia. Consequently, ss.6(1), 7 and 9(1), which punish such acts, were validly enacted under the external affairs power. For the reasons I have already given, the retrospective operation of these sub-sections does not take them outside the scope of the external affairs power.

Chapter III

20. Counsel for the plaintiff contended that, by reason of Ch III of the Constitution, the Parliament of the Commonwealth cannot "pass legislation requiring Federal Courts to act in a manner which is inconsistent with basic requirements of justice". In support of his contention that the Act infringed Ch III, he relied on its retroactive operation, the burden of proof of an accused under s.17(4), the nature of the proof required from an accused under s.17(2) and the effect of s.13(5) and (6) of the Act on the common law doctrine of abuse of process. Only the retroactive nature of the Act, however, raises any arguable question that the Act is invalid because of the provisions of Ch III of the Constitution.

21. Unless Kidman is overruled - and counsel for the plaintiff did not suggest that it should be - the decision in that case seems to me to be a complete answer to the suggestion that the retrospective operation of a law of the Parliament constitutes an infringement of Ch III of the Constitution. Kidman upheld the constitutional validity of a statute which retrospectively made it a criminal offence to conspire to defraud the Commonwealth. It is a direct authority on the point in issue in this case. It is true that the legislation in Kidman made it an offence to do what was already a common law offence. But, so far as the present case is concerned, that distinction is one without a difference. Like the present case, Kidman was concerned with the retrospective operation of a law of the Parliament which created a criminal offence.

22. The correctness of the decision in Kidman has not hitherto been doubted in any judgment of this Court. To the contrary, it has frequently been cited as an authority: see, for example, R. v. Snow (1917) 23 CLR 256, at p 265; Ex parte Walsh and Johnson; In re Yates (1925) 37 CLR 36, at pp 86, 124-125; Australian Communist Party v. The Commonwealth (1951) 83 CLR 1, at p 172; University of Wollongong v. Metwally (1984) 158 CLR 447, at p 484. In Ex parte Walsh and Johnson, Isaacs J. said (at p 81):

6024

> "Whatever the Parliament enacts with respect to any of the named subject matters for any period or point of time subsequent to the establishment of the Commonwealth is, subject to any prohibition or qualification in the Constitution itself or in any controlling Imperial law, binding throughout the Commonwealth and on certain British ships beyond the Commonwealth (secs.51 and 52 and covering sec.V). Such laws may be made prospectively or retrospectively, the Commonwealth Parliament having in this respect the power of the Imperial Parliament".

In Nelungaloo Pty. Ltd. v. The Commonwealth (1948) 75 CLR 495, Williams J. pointed out (at pp 503-504):

> "It is trite law that the powers conferred upon the Commonwealth Parliament by s.51 of the Constitution are plenary powers of legislation as large and of the same nature as those of the Imperial Parliament itself".

No one doubts the power of the Parliament of the United Kingdom to enact retrospective criminal laws. English law has rejected Hobbes' statement that:

> "No law, made after a fact done, can make it a crime ... For before the law, there is no transgression of the law."

(Leviathan, (1651), Chs 27-28, cited by Williams in Criminal Law: The General Part, 2nd ed. (1961), at p 580.) Even Blackstone, who was strongly critical of ex post facto laws, did not deny the power of Parliament to pass such laws: see Commentaries on the Laws of England, (1765), at p 46. Throughout the centuries, the Imperial Parliament has passed numerous laws, civil and criminal, having a retrospective operation.

23. Moreover, numerous Commonwealth statutes, most of them civil statutes, have been enacted on the assumption that the Parliament of the Commonwealth has power to pass laws having a retrospective operation. Since Kidman, the validity of their retrospective operation has not been challenged. And I can see no distinction between the retrospective operation of a civil enactment and a criminal enactment: see Kidman, per Isaacs J. at pp 442-443.

24. Notwithstanding this course of authority and practice, however, two members of the Court are of the opinion that the Parliament of the Commonwealth has no power to pass criminal laws which have a retrospective operation. They hold that such laws are an invalid exercise of judicial power. They point out that the effect of Ch III was not the issue in Kidman. In those circumstances, it seems proper to re-examine the question of the validity of retrospective criminal laws notwithstanding the course of authority in this Court, the accepted constitutional doctrine and the practice of successive Parliaments during the last seventy-five years in enacting such laws.

25. In my opinion, the enactment of laws having a retrospective operation does not infringe the constitutional guarantee that the judicial power of the Commonwealth can be exercised only by courts established and judges appointed in accordance with Ch III of the Constitution, and by such other courts as are invested with federal jurisdiction.

26. The Constitution of the United States of America expressly prohibits the passing of Bills of Attainder and ex post facto laws: Art.I, s.9, cl.3 and Art.I, s.10, cl.1. At common law, Bills of Attainder were special Acts under which the legislature inflicted capital punishments upon persons alleged to be guilty of treason and other felonies "without any conviction in the ordinary course of judicial proceedings": Story, Commentaries on the Constitution of the United States, 5th ed. (1891), vol.II, at p 216. The sentence of death also meant that the person concerned was "attainted" which had the

6025

consequence, inter alia, that his or her goods and chattels and land and tenements held in fee or in tail for term of life were forfeited to the Crown: Lord Coke's First Institute, (1818), vol.3, at pp 567-568. Other special Acts inflicting lesser punishment than death were technically known as Bills of Pains and Penalties. In the sixteenth and seventeenth centuries Bills of Attainder and Bills of Pains and Penalties were passed on numerous occasions by the English Parliament, particularly "in times of rebellion, or of gross subserviency to the crown, or of violent political excitements": Story, at p 217. During the American Revolution, a number of such Bills were passed by the thirteen colonies: see United States v. Brown (1965) 381 US 437, at p 442.

27. The Supreme Court of the United States has given the term "Bill of Attainder" in the U.S. Constitution a wide meaning. It extends to all "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial": United States v. Lovett (1946) 328 US 303, at p 315. On the other hand, the Supreme Court has construed the term "ex post facto Law" in the US Constitution narrowly so that it applies only to criminal and penal laws. In Calder v. Bull (1798) 3 US 386, Chase J. said (at p 391):

> "Every ex post facto law must necessarily be retrospective; but every retrospective law is not an ex post facto law: the former only are prohibited. Every law that takes away or impairs rights vested, agreeable to existing laws, is retrospective, and is generally unjust, and may be oppressive; and it is a good general rule, that a law should have no retrospect: but there are cases in which laws may justly, and for the benefit of the community, and also of individuals, relate to a time antecedent to their commencement; as statutes of oblivion or of pardon. They are certainly retrospective, and literally both concerning and after the facts committed. But I do not consider any law ex post facto, within the prohibition, that mollifies the rigor of the criminal law: but only those that create or aggravate the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction".

In Fletcher v. Peck (1810) 10 US 87, Marshall C.J. said (at p 138):

> "An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury."

In Johannessen v. United States (1912) 225 US 227, the Supreme Court said (at p 242):

> "It is, however, settled that this prohibition is confined to laws respecting criminal punishments, and has no relation to retrospective legislation of any other description."

28. The framers of our Constitution were much influenced by the model of the U.S. Constitution. They "felt the full fascination of its plan": Dixon, Jesting Pilate, (1965), at p 113. Yet, although Chs I, II and III reflect Arts I, II and III of the United States model, our Constitution does not prohibit Bills of Attainder or ex post facto laws. The omission must have been deliberate. It is a powerful indication that the Parliament was intended to have the power to enact ex post facto laws. Furthermore, I have not seen anything in the historical materials which would indicate that the framers of the Commonwealth Constitution believed or assumed that giving a criminal statute a retrospective operation was an exercise of, or an interference with the exercise of, judicial power. Inglis Clark later wrote that "any

6026

exposition of the purport of the language of an existing law, or any declaration of the existence of any rights or liabilities as the result of it enactment, is not an exercise of legislative power ... it is an attempted encroachment on the province of the Judiciary and is therefore invalid" (my emphasis): Studies in Australian Constitutional Law, (1901), at p 39. But he accepted that "(t)he Constitution does not prohibit the Parliament of the Commonwealth from making retroactive laws": ibid., at pp 39-40.

29. A law which creates a criminal offence but operates retrospectively is not the same as a Bill of Attainder or a Bill of Pains and Penalties. Such Bills are an interference with the exercise of judicial power. Bills of Attainder and Bills of Pains and Penalties constitute a legislative punishment "of specifically designated persons or groups": United States v. Brown, at p 447. Such Bills are "legislative judgments; and an exercise of judicial power": Calder v. Bull, at p 388. I think that the enactment of a Bill of Attainder or a Bill of Pains and Penalties would infringe the provisions of ChIII of the Constitution. But the fact that the Constitution impliedly forbids the enactment of Bills of Attainder and Bills of Pains and Penalties does not mean that the Constitution prohibits the making of criminal laws having a retrospective operation. Retrospectivity is not itself sufficient to offend Ch III of the Constitution. I cannot accept the argument that the determination of guilt or innocence is foreclosed by a criminal law which has a retrospective operation. Under such a law, it is still the jury, and not the legislature, which determines what the facts of the case are and which applies the law, as determined by the judge, to those facts for the purpose of determining whether the accused is guilty or innocent of the charge against him or her. Such a law is not an exercise of, or an interference with the exercise of, judicial power.

30. Kidman was correctly decided.

31. The Act in question in this case is not a Bill of Attainder or a Bill of Pains and Penalties. It differs from an ordinary criminal statute only in the fact that it operates retrospectively and not prospectively. It does not select a specifically designated person or group and impose a punishment on that person or group. It does not make any determination of fact. It does not adjudge any person or group to be guilty of any offence. There is not a scintilla of difference between the roles of the judge and jury in a trial under this Act and the roles of the judge and jury in a trial under a hypothetical law, in substantially identical terms to this Act, passed on 1 September 1939 and operating prospectively. The only difference between the present Act and that hypothetical law would be that the present Act makes it a legislative offence to do what was not a legislative offence at the time when it was done. That is to say, the difference is that the present Act retrospectively, and not prospectively, imposes penal sanctions on prescribed conduct. The imposition of penal sanctions on prescribed conduct, however, is an exercise of legislative, not judicial, power. Accordingly, the present Act does not interfere in any way with the judicial process or with the judicial power of the Commonwealth.

Conclusion

32. The Act is a valid enactment under s.51(xxix) and (xxxix) of the Constitution. It does not infringe the provisions of Ch III.

33. I would answer the question asked in the negative.

ORDER

Answer the question reserved as follows:

Is section 9 of the War Crimes Act 1945 (Cth), as amended, invalid in its application to the information laid by the second defendant against the plaintiff?

6027

Answer: No.

No order as to costs.

ANNEX 13:

R v. Finta [1994] 1 SCR 701.

6029.

Her Majesty The Queen *Appellant*

v.

Imre Finta *Respondent*

and

**Canadian Holocaust Remembrance Association,
League for Human Rights of B'Nai Brith Canada,
Canadian Jewish Congress and InterAmicus** *Interveners*

Indexed as: R. *v.* Finta

File Nos.: 23023, 23097.

1993: June 2, 3; 1994: March 24.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Gonthier, Cory, McLachlin and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Criminal law -- War crimes and crimes against humanity -- Nature and proof of offences -- Allegations arising from detention, robbery and deportation to concentration camps of Jewish persons in Nazi-controlled World War II Europe -- Defence of police officer following lawful orders -- Trial judge calling own evidence -- Whether war crimes and crimes against humanity separate crimes from included Criminal Code offences or whether Code provisions jurisdictional allowing Canadian courts to exercise jurisdiction in situations of war crimes or crimes against humanity over criminal activity occurring abroad -- Whether necessary for the jury to decide, beyond a reasonable doubt not only guilt under applicable Criminal Code charges but also whether acts war crimes and/or crimes against humanity -- Whether requisite mens rea for each offence requiring the Crown to prove intent to commit criminal offence and knowledge of factual characteristics of war crimes and/or crimes against humanity -- Whether "peace officer defence" available and nature of that defence -- Whether trial judge's instructions to the jury adequately overcoming prejudice caused by defence counsel's inflammatory and improper jury address --

6030

Whether police statement and deposition of deceased person admissible even though within recognized exception to the hearsay rule -- Whether trial judge properly calling own evidence -- Whether trial judge's

page 702

instructions to the jury relating to the Crown's identification evidence appropriate -- Criminal Code, R.S.C., 1985, c. C-46, ss. 6(2), 7(3.71)(a)(i), (ii), (iii), (b), (3.72), (3.74), (3.76), 15, 25(1), (2), (3), (4), 736.

Constitutional law -- Charter of Rights -- War crimes and crimes against humanity -- Nature and proof of offences -- Allegations arising from detention, robbery and deportation to concentration camps of Jewish persons in Nazi-controlled World War II Europe -- Defence of police officer following lawful orders -- Whether infringement of principles of fundamental justice (s. 7), the right to be informed without unreasonable delay of the specific offence (s. 11(a)), the right to trial within a reasonable time (s. 11(b)), the right to be presumed innocent (s. 11(d)), the requirement that an act or omission constitute an offence (s. 11(g)), the prohibition against cruel and unusual punishment (s. 12) or the equality guarantees (s. 15) -- If so, whether infringement justified under s. 1 -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(a), (b), (d), (g), 12, 15.

Respondent, a legally trained captain in the Royal Hungarian Gendarmerie, was commander of an investigative unit at Szeged when 8,617 Jewish persons were detained in a brickyard, forcibly stripped of their valuables and deported under dreadful conditions to concentration camps as part of the Nazi regime's "final solution". The only authority for implementing this barbarous policy in Hungary was the Baky Order, a decree of the Hungarian Ministry of the Interior directed to a number of officials including the commanding officers of the gendarme (investigative) subdivisions. This order placed responsibility for executing the plan on the Gendarmerie and certain local police forces.

Respondent was charged under the *Criminal Code*, R.S.C. 1927, with unlawful confinement, robbery, kidnapping and manslaughter of the victims of Szeged. There were in effect four pairs of alternate counts -- one series as crimes against humanity and the other as war crimes. After the war a Hungarian court tried respondent *in absentia* and convicted him of "crimes

page 703

against the people". His punishment in that country became statute-barred and he later benefitted from a general amnesty. The Hungarian trial and conviction were found to be nullities under Canadian law and the amnesty was found not to be a pardon. The pleas of *autrefois convict* or pardon were therefore not available. Expert opinion at trial was that the Baky Order was manifestly illegal and that a person trained in Hungarian law would have known so.
The Crown's case depended in large measure on the testimony of 19 witnesses who had been interned at Szeged and deported to the concentration camps. The evidence of these survivors fell into four general groups. Six witnesses who knew respondent before the events in issue testified as to things said and done by him at the brickyard and at the train station. A second group consisting of three witnesses who did not know respondent beforehand identified him as having said or done certain things at the brickyard and at the station. A third group consisting of three witnesses who did not know respondent beforehand also testified as to things said and done at the brickyard and at the station. However, this last group based their identification of respondent on statements made

603 1

to them by others. The fourth group, consisting of eight witnesses who did not know respondent beforehand and did not identify him, gave evidence as to events at the brickyard and the train station. In addition to the evidence of the survivors, the Crown relied on photographs, handwriting and fingerprint evidence to identify respondent as a captain in the Gendarmerie at Szeged at the relevant time. Expert and documentary evidence was tendered to establish the historical context of the evidence, the relevant command structure in place in Hungary in 1944 and the state of international law in 1944.

During the trial, the trial judge, on behalf of the defence, called the evidence of two eye-witnesses, Ballo and Kemeny. The statement and minutes of a third witness, Dallos, whose testimony was given at respondent's Hungarian trial, was also admitted. Dallos, a survivor of the brickyard who died in 1963, gave evidence of the existence of a lieutenant who might have been in charge of the confinement and deportation of the Jews at the brickyard. The trial judge ruled that, although the evidence was of a hearsay nature, it was admissible. He also stated that, together with other evidence, it could

page 704

leave the jury with a reasonable doubt about the responsibility of respondent for confinement and brickyard conditions. The trial judge warned the jury in his charge about the hearsay nature of the evidence.

Respondent was acquitted at trial and a majority of the Court of Appeal dismissed the Crown's appeal from that acquittal. This judgment was appealed and cross-appealed.

Several issues were raised on appeal. Firstly, was s. 7(3.71) of the *Criminal Code* merely jurisdictional in nature or did it create two new offences, a crime against humanity and a war crime, and define the essential elements of the offences charged such that it was necessary for the jury to decide, beyond a reasonable doubt, not only whether the respondent was guilty of the 1927 *Criminal Code* offences charged, but also whether his acts constituted crimes against humanity and/or war crimes as defined in ss. 7(3.71) and 7(3.76)? Secondly, did the trial judge misdirect the jury as to the requisite *mens rea* for each offence by requiring the Crown to prove not only that the respondent intended to commit the 1927 *Criminal Code* offences charged, but also that he knew that his acts constituted war crimes and/or crimes against humanity as defined in s. 7(3.76)? Thirdly, did the trial judge err in putting the "peace officer defence" (s. 25 of the *Code*), the "military orders defence" and the issue of mistake of fact to the jury and did he misdirect the jury in the manner in which he defined those defences? Fourthly, did the trial judge's instructions to the jury adequately correct defence counsel's inflammatory and improper jury address so as to overcome the prejudice to the Crown and not deprive it of a fair trial? Fifth, was the Dallos "evidence" (police statement and deposition) admissible and, in particular, in finding it admissible even though it did not fall within any of the recognized exceptions to the hearsay rule? Sixth, did the trial judge err calling the Dallos evidence and the videotaped commission evidence as his own evidence, thereby making it unnecessary for the defence to do so and as a result depriving the Crown of its statutory right to address the jury last, and if so, did it result in a substantial wrong or miscarriage of justice? Seventh, were the trial judge's instructions to the jury

page 705

relating to the Crown's identification evidence appropriate.

6032

The constitutional questions stated on the cross-appeal queried whether s. 7(3.74) and s. 7(3 of the *Code* violate ss. 7 (the principles of fundamental justice), 11(*a*) (the right to be informed without unreasonable delay of the specific offence), 11(*b*) (the right to trial within a reasonable time), 11(*d*) (the right to be presumed innocent), 11(*g*) (the requirement that an act or omission constitute an offence), 12 (the prohibition against cruel and unusual punishment) or 15 (the equality guarantees) of the *Canadian Charter of Rights and Freedoms*, and if so, whether they were justifiable under s. 1.

Held (La Forest, L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

Held: The cross-appeal should be dismissed. Sections 7(3.74) and 7(3.76) of the *Criminal Code* do not violate ss. 7, 11(*a*), (*b*), (*d*), (*g*), 12 or 15 of the *Charter*.

Per Gonthier, Cory and Major JJ.:

The Appeal

Jurisdiction

Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil only when the conditions specified in s. 7(3.71) are satisfied. The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity. It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction. Canadian courts may not prosecute an ordinary offence that has occurred in a foreign jurisdiction. The only reason Canadian courts can prosecute these individuals is because the acts alleged to have been committed are viewed as being war crimes or crimes against humanity. A war crime or a crime against humanity is not the same as a domestic offence. There are fundamentally important additional elements involved in a war crime or a crime against humanity.

The Requisite Elements of the Crime Described by Section 7(3.71)

Canadian courts normally do not judge ordinary offences that have occurred on foreign soil but have jurisdiction to try individuals living in Canada for

page 706

crimes which they allegedly committed abroad when the conditions specified in s. 7(3.71) are satisfied. Here, the most important of those requirements is that the alleged crime must constitute a war crime or a crime against humanity which, compared to a domestic offence, has fundamentally important additional elements. It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction.

In order to constitute a crime against humanity or a war crime, there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity. The mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity. It is not necessary, however, to establish that the accused knew that his or her actions were inhumane. Similarly, for war crimes, the Crown would have to establish that the

6033

accused knew or was aware of the facts or circumstances that brought his or her actions within definition of a war crime. The accused would have to have known that a state of war existed and that his or her actions even in a state of war, would shock the conscience of all right thinking people. Alternatively, the *mens rea* requirement of both crimes against humanity and war crimes would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.

The wording of the section, the stigma and consequences that would flow from a conviction all indicate that the Crown must establish that the accused committed a war crime or a crime against humanity. This is an integral and essential aspect of the offence. It is not sufficient simply to prove that the offence committed in Canada would constitute robbery, forcible confinement or manslaughter. An added element of inhumanity must be demonstrated to warrant a conviction under this section. The mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity. However it would not be necessary to establish that the accused knew that his or her actions were inhumane. It is sufficient if the Crown

page 707

establishes that the actions viewed by a reasonable person in the position of the accused were inhumane.

Similarly for war crimes the Crown would have to establish that the accused knew or was aware of facts that brought his or her action within the definition of war crimes, or was wilfully blind to those facts. It would not be necessary to prove that the accused actually knew that his or her acts constituted war crimes. It is sufficient if the Crown establishes that the acts, viewed objectively, constituted war crimes.

The Defences

The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test: the defences are not available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. There can be no moral choice where there was such an air of compulsion and threat to the accused that he or she had no alternative but to obey the orders.

Trial Judge's Calling Evidence

The trial judge, in order to take the unusual and serious step of the court's calling witnesses, must believe it essential to exercise his or her discretion to do so in order to do justice in the case. Here, where the trial judge had decided that certain evidence was essential to the narrative, it was a reasonable and proper exercise of this discretion to call the evidence if the Crown refused to do so. It is essential in a case where the events took place 45 years ago that all material evidence be put before the jury. With the passage of time it becomes increasingly difficult to get at the truth of events: witnesses die or cannot be located, memories fade, and evidence can be so easily forever lost. It is then essential that in such a case all available accounts are placed before the court. The

6034

argument that all cases pose difficulties in presenting a defence fails to recognize that this case, because of the time elapsed, presents very real

page 708

difficulties for the defence in getting at the truth which is not comparable to other cases.

The trial judge properly took into account the fact that if he did not call the evidence the defence would be required to do so and as a result lose its right to address the jury last. Where the trial judge has found that the evidence in question should have been called by the Crown, the issue of who addresses the jury last is indeed relevant. If this were not so it would be open to the Crown not to call certain evidence in order to force the defence to give up its right to address the jury last. (The Crown here did not act for improper reasons.) The opportunity for such abuse should not be left open. Further, the trial judge's concern for the order of addresses to the jury was secondary to his finding that the evidence was essential to the narrative.

Finally, the trial judge did not need to wait until after the defence had decided whether or not to call evidence before he called the evidence in question. The trial judge could not wait until the defence had finished its case without risking offending the rule that a trial judge should not call evidence him- or herself after the close of the defence case unless the matter was unforeseeable. If the trial judge had waited, and the defence had elected not to call evidence, the trial judge would have been prevented from calling the evidence at that time, as the matter was readily foreseeable, and calling it at that point would have been prejudicial to the defence.

The Cross-Appeal

Does Section 7(3.74) and (3.76) of the Criminal Code Violate Section 7 of the Charter Because these Purport to Remove the Protection of Section 15 of the Criminal Code?

Respondent, even though he acted in obedience to the law (the Baky Order), could not argue that he had an honest but mistaken belief that that decree was lawful so as to absolve him of fault. He still had the guilty mind required to found a conviction. Section 7(3.74) does not, by permitting the removal of this defence, result in a breach of fundamental justice in violation of s. 7 of the *Charter*. When the *Criminal Code* provides that a defence is to be expressly excluded it is because Parliament has determined that the criminal act is of such a nature that not only is the disapprobation of society warranted, but also the act cannot be justified by the

page 709

excluded defence. Such a legislative provision will not generally violate s. 7 when a defence is inconsistent with the offence proscribed in that it would excuse the very evil which the offence seeks to prohibit or punish.

Do the Impugned Sections of the Code Violate the Charter by Reason of Vagueness?

International law prior to 1944 provided fair notice to the accused of the consequences of breaching the still evolving international law offences. The legislation is not made uncertain merely because the entire body of international law is not codified and that reference must be made to opinions of experts and legal writing in interpreting it. Differences of opinion of international law experts as to these provisions and the questions of fact and law that arise in

6035

interpreting and applying them do not render them vague or uncertain. It is the court that must ultimately interpret them.

Do the Impugned Sections of the Code Violate Section 7 and Section 11(g) of the Charter?

Although the average citizen is not expected to know in detail the law with respect to a war crime or a crime against humanity, it cannot be argued that he or she had not substantive fair notice of it or that it is vague. Everyone has an inherent knowledge that such actions are wrong and cannot be tolerated whether this perception arises from a moral, religious or sociological stance. These crimes, which violate fundamental human values, are vehemently condemned by the citizens of all civilized nations and are so repulsive, reprehensible and well understood that the argument that their definition is vague or uncertain does not arise. Similarly, the definitions of "war crimes" and "crimes against humanity" do not constitute a standardless sweep authorizing imprisonment. The standards which guide the determination and definition of crimes against humanity are the values that are known to all people and shared by all.

The impugned sections do not violate ss. 7 and 11(*g*) of the *Charter* because of any allegedly retrospective character. The rules created by the *Charter of the International Military Tribunal* and applied by the Nuremberg Trial represented "a new law". The rule against retroactive legislation is a principle of justice. A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they

page 710

were committed, however, is an exception to the rule against *ex post facto* laws. Individual criminal responsibility represents certainly a higher degree of justice than collective responsibility. Since the internationally illegal acts for which individual criminal responsibility has been established were also morally the most objectionable and the persons who committed them were certainly aware of their immoral character, the retroactivity of the law applied to them cannot be considered as incompatible with justice. Justice required the punishment of those committing such acts in spite of the fact that under positive law they were not punishable at the time they were performed. It follows that it was appropriate that the acts were made punishable with retroactive force.

Did the Pre- and Post-Charge Delay Violate Sections 7, 11(b) and 11(d) of the Charter?

The pre- and post-charge delay does not violate the *Charter* principles of fundamental justice (s. 7), the right to trial without unreasonable delay (s. 11(*b*)) and the right to be presumed innocent (s. 11(*d*)). The principles set out in *R. v. Askov* accordingly need not be extended to the situation here. Indeed, the delay was far more likely to be prejudicial to the Crown's case than it was to that of the defence. The documentary and physical evidence not available to the defence was probably destroyed during the war and therefore would not have been available for trial even if held a few years after the war. With regard to post-charge delay, the indictment was preferred less than a year after the legislation was proclaimed. This was a minimal and very reasonable period of delay.

Do the Impugned Sections of the Code Violate Sections 7 and 15 of the Charter?

The impugned sections do not infringe the equality provisions of s. 15 of the *Charter*. The fact that the legislation relates only to acts or omissions performed by individuals outside Canada is not based on a personal characteristic but on the location of the crime. The group of persons who

6036

commit a war crime or a crime against humanity outside of Canada cannot be considered to be discrete and insular minority which has suffered stereotyping, historical disadvantage or vulnerability to political and social prejudice. Similarly, these sections, notwithstanding the allegation that they allegedly subject the individual to prosecution based on an

page 711

extension of jurisdiction for crimes for which the people of Canada are not criminally liable, are not contrary to the principles of fundamental justice.

Do the Impugned Provisions Violate Section 12 of the Charter?

No argument was made with respect to s. 12 (cruel and unusual punishment) of the *Charter*. It was not necessary to consider the application of s. 1.

Per Lamer C.J.: The appeal should be dismissed for the reasons given by Cory J. The cross-appeal should be dismissed as being moot.

Per La Forest, L'Heureux-Dubé and McLachlin JJ. (dissenting [1]): Section 7(3.71) of the *Criminal Code* confers jurisdiction on Canadian courts to prosecute foreign acts amounting to war crimes or crimes against humanity domestically, according to Canadian criminal law in force at the time of their commission. The provision does not create any new offences. The person who commits the relevant act is not declared guilty of an offence as in all other criminal offences. On the contrary, the nucleus of the provision is its predicate, "shall be deemed to commit that act or omission in Canada at that time". Moreover, no penalty is stipulated. A finding of war crime or crime against humanity does not result in punishment but rather merely opens the door to the next procedural step -- the placing before the jury of the charges against the accused for offences defined in the *Code* in respect of acts done outside the country, so long as those acts constitute crimes against humanity or war crimes.
The war crimes and crimes against humanity provision stands as an exception to the general rule regarding the territorial ambit of criminal law. Parliament intended to extend the arm of Canada's criminal law in order to be in a position to prosecute these extraterritorial acts if the alleged perpetrators were discovered here. Although exceptions to s. 6 (which limits the *Code*'s application to Canada) can also take the form of offence-creating provisions that expressly embrace extraterritorial acts, the wording of s. 7(3.71) closely resembles that of other purely jurisdiction-endowing provisions and can be contrasted with these offence-creating provisions. Had Parliament wished specifically to make war crimes and

page 712

crimes against humanity domestic offences, it would have been much easier to do so directly.

No distinction should be made between territorial jurisdiction of the court (going to the determination of the proper Canadian court to hear a case) and territorial reach of the criminal law (affecting the definition of the offences themselves). Section 6(2) of the *Code* does not render Canadian territoriality a defining element of its offences. Rather, it merely precludes a person's conviction or discharge for an offence when committed outside Canada in response to the structure of international order which entrusts prosecution of a criminal act to the state in which that act was committed. The fact that an act or an omission may have taken place outside Canada's borders does not negate its quality as culpable conduct.

6037

Questions of jurisdiction are matters of law entrusted to the trial judge. The terms of s. 6 are absolute; they specifically envision exceptions, whether in the *Code* itself or in other Acts of Parliament. Deciding questions of jurisdiction has been found to be properly entrusted to the trial judge in other circumstances in *R. v. Balcombe* and no reason exists for a different rule to apply to the s. 6 inquiry. Whether the criteria in s. 7(3.71), (whether the act amounts to a war crime or crime against humanity, whether it constituted an offence pursuant to Canadian law at the time of commission, and whether identifiable individuals were involved) creating the exception to s. 6 have been met is a question of law entrusted to the trial judge and not to the jury. If these requirements are not satisfied, the exception to the rule of no extraterritorial application is not met, and the court must decline jurisdiction and acquit the accused even if all the elements of the offences of manslaughter, robbery, confinement or assault may be satisfied.

The jury's role will be similar to that exercised in an ordinary prosecution under our domestic law. Its function, and the charge made to it, will be like those that would be made to a jury determining the underlying offence only. The sole difference will be in relation to justifications, excuses and defences. Section 7(3.73) provides the accused with the benefit of pleading all available international justifications, excuses and

page 713

defences in addition to those existing under domestic law. The one domestic defence made unavailable, by the operation of s. 7(3.74), is the defence of obedience to *de facto* law.

The requirements for jurisdiction need not be proved beyond a reasonable doubt. The trial judge, however, must consider the evidence to satisfy the jurisdiction requirements and not simply base his or her assessment of these requirements on the charges as alleged. Because some of the facts necessary to establish jurisdiction are not the same as those necessary for the jury's determination of the underlying offence, all the findings of fact cannot be left to the jury. Here, since the jury will have to hear much of the same evidence related to the offences as the trial judge would have to hear in relation to the jurisdiction issue, it will usually be more efficient to have the trial judge consider the jurisdiction issue at the same time as the jury hears the evidence related to the offence. If desired, and to keep a jury's mind clear, the parts of the evidence or expert testimony that are completely irrelevant to the jury's concerns can be heard in the jury's absence. At the close of the evidence, the judge will decide whether the conditions for the exercise of jurisdiction have been met. If so, then the court can proceed to hear the jury's verdict.

War crimes and crimes against humanity do not require an excessively high *mens rea* going beyond that required for the underlying offence. In determining the *mens rea* of a war crime or a crime against humanity, the accused must have intended the factual quality of the offence. In almost if not every case, the domestic definition of the underlying offence will capture the requisite *mens rea* for the war crime or crime against humanity as well. Thus, the accused need not have known that his or her act, if it constitutes manslaughter or forcible confinement, amounted to an "inhumane act" either in the legal or moral sense. One who intentionally or knowingly commits manslaughter or kidnapping would have demonstrated the mental culpability required for an inhumane act. The normal *mens rea* for confinement, robbery, manslaughter, or kidnapping, whether it be intention, knowledge, recklessness or wilful blindness, is adequate.

The additional conditions of the *actus reus* requirement under international law are intended to be used to

6038

page 714

ascertain whether the factual conditions are such that the international relations concerns of extraterritorial limits do not arise. Since in almost if not every case the *mens rea* for the war crime or crime against humanity will be captured by the *mens rea* required for the underlying offence that will have to be proved to the jury beyond a reasonable doubt, the trial judge will rarely, if ever, have to make any additional findings in relation to the *mens rea* to satisfy the jurisdiction requirements.

If a justification, excuse or defence that would have been available had the accused been charged with the crime under international law rather than the underlying crime is available, it should be referred to the jury with appropriate instructions whether the issue arises on the evidence presented by the Crown or the accused. Under s. 7(3.73) of the *Code*, an accused may rely on any "justification, excuse or defence available . . . under international law" as well as under the laws of Canada. The jury would then have to decide the issue with any reasonable doubt decided in favour of the accused.

The scheme in s. 7(3.71)-(3.77) does not deprive the accused of his or her rights in a manner inconsistent with the principles of fundamental justice. The accused cannot be found guilty of the offence charged (the underlying domestic offence) unless the jury finds the relevant mental element on proof beyond a reasonable doubt. This mental element coincides with that of the war crime or crime against humanity. And if any excuse, justification or defence for the act arises under international law, the accused is entitled to the benefit of any doubt about the matter, including any relevant *mens rea* attached to such excuse, justification or defence. *Charter* jurisprudence relating to fundamental justice does not require, merely because a special stigma might attach to certain offences, that only the jury be entrusted with finding *mens rea* and only on a standard of proof beyond a reasonable doubt. Any stigma attached to being convicted under war crimes legislation does not come from the nature of the offence, but more from the surrounding circumstances of most war crimes and often is a question of the scale of the acts in terms of numbers.

Under the jurisdictional portion of s. 7(3.71), the inquiry goes to assessing whether Canadian courts are able to convict or discharge the perpetrator of the relevant conduct. The preliminary question, whether the

page 715

relevant conduct constitutes a situation evaluated by the international community to constitute one warranting treatment exceptional to the general precepts of international law, involves an assessment of Canada's international obligations and other questions concerning the interrelationship of nations. The culpability of the acts targeted by this provision, from Canada's perspective, arises from, and will be assessed according to Canadian standards of offensive behaviour as embodied in the *Code*. The preliminary question of war crimes or crimes against humanity is more of a political inquiry than one of culpability and accordingly does not traditionally fall within the province of the jury. The international community actively encourages the prosecution of those whose criminal conduct also constitutes war crimes or crimes against humanity.

It is not unfair or contrary to our philosophy of trial by jury to entrust determination of jurisdiction to the trial judge rather than the jury. The assignment of this task is just and well-

6039

designed given the technical nature of the actual factual findings that must be made by the trial judge on the preliminary jurisdictional question, as well as the complicated nature of the international law with which he or she must grapple. The technical nature of these inquiries, unrelated as they are to matters of culpability, do not form part of the special capacity of the jury.

The jury's role in the prosecution remains extensive. As in any other domestic prosecution, the jury is the sole arbitrator of whether both the *actus reus* and the *mens rea* for the offence charged are present and whether any domestic defences are available. Moreover, in addition to its normal functions, the jury also decides whether any international justification, excuse or defence is available. These determinations are not merely technical findings to supplement the extensive role of the trial judge; on the contrary, they go to the essence of the accused's culpability. The jury alone decides whether the accused is physically and mentally guilty of the offence charged, on proof beyond a reasonable doubt. The only element removed from the jury's usual scope of considerations in regular domestic prosecutions is the *de facto* law defence (s. 7(3.74)).

Section 7(3.74) does not violate the s. 7 of the *Charter* by removing available defences. Subsections 7(3.73) and (3.74) qualify each other and together indicate that the accused has the benefit of all available international

page 716

and domestic justifications, excuses or defences. The operation of s. 7(3.73) only rules out resort to the simple argument that, because a domestic law existed, the conduct was authorized and so excused. The whole rationale for limits on individual responsibility for war crimes and crimes against humanity is that there are higher responsibilities than simple observance of national law. That a law of a country authorizes some sort of clearly inhumane conduct cannot be allowed to be a defence.

The peace officer and the military orders defences put to the jury here exist under Canadian domestic law and relate to arguments based on authorization or obedience to national law. The rationale for these defences is that a realistic assessment of police or military organizations requires an element of simple obedience; there must be some degree of accommodation to those who are members of such bodies. At the same time, totally unthinking loyalty cannot be a shield for any human being, even a soldier. The defence is not simply based on the idea of obedience or authority of *de facto* national law, but rather on a consideration of the individual's responsibilities as part of a military or peace officer unit. Essentially obedience to a superior order provides a valid defence unless the act is so outrageous as to be manifestly unlawful. Further, an accused will not be convicted of an act committed pursuant to an order wherein he or she had no moral choice but to obey.

The war crime provisions do not violate ss. 7 and 11(*g*) of the *Charter* because they are retroactive. The accused is not being charged or punished for an international offence, but a Canadian criminal offence that was in the *Code* when it occurred.

International law in this area was neither retroactive nor vague. Even on the basis of international convention and customary law, there are many individual documents that signalled the broadening prohibitions against war crimes and crimes against humanity. Numerous conventions indicated that there were international rules on the conduct of war and individual responsibility for them. International law, as expressed by international and national tribunals, continues to maintain that crimes against humanity and war crimes were well established. The

6040

strongest source in international law for crimes against humanity, however, are the common domestic

page 717

prohibitions of civilized nations. The conduct listed under crimes against humanity was of the sort that no modern civilized nation was able to sanction.

The *Code* provisions do not violate s. 11(*g*) as being retroactive. Section 11(*g*) of the *Charter* specifically refers to the permissibility of conviction on the basis of international law or the general principles of law recognized by the community of nations. One of the factors motivating the terms of the provision was to remove concerns about otherwise preventing prosecution of war criminals or those charged with crimes against humanity.

Section 7(3.71) (relating to the generality of the definitions of war crimes and crimes against humanity) read with s. 7(3.76) does not violate s. 7 of the *Charter* by reason of vagueness. The offence with which the accused is charged and for which he will be punished is the domestic offence in the 1927 *Code*, and it is readily apparent that the cross appeal is not concerned with arguing that these standard *Code* provisions are unconstitutionally vague. The standard of vagueness necessary for a law to be found unconstitutional is that the law must so lack in precision as not to give sufficient guidance for legal debate. The contents of the customary, conventional and comparative sources provide enough specificity to meet this standard for vagueness.

The pre-trial delay of 45-odd years between the alleged commission of the offence and the laying of charges did not violate ss. 7, 11(*b*) and 11(*d*) of the *Charter*. Pre-charge delay, at most, may in certain circumstances have an influence on the assessment of whether post-charge delay is unreasonable but of itself is not counted in determining the delay. The *Charter* does not insulate accused persons from prosecution solely on the basis of the time that elapsed between the commission of the offence and the laying of the charge. No complaint was made as to post-charge delay.

Section 7(3.71) does not violate ss. 7 and 15 of the *Charter* by applying only to acts committed outside Canada. This provision is jurisdictional and creates no new offences. Whether impugned conduct is committed abroad or in Canada, the accused would be charged with the same offence and subject to the same penalty, if

page 718

convicted. Indeed, any difference in treatment favours the extraterritorial perpetrator.

Cases Cited

By Cory J.

Considered: *Dover Castle*, 16 A.J.I.L. 704 (1921); *Llandovery Castle*, 16 A.J.I.L. 708 (1921); *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; **referred to**: *R. v.* ***Finta*** (1989), 69 O.R. (2d) 557; *The Case of the S.S. "Lotus"* (1927), P.C.I.J., Ser. A, No. 10; *Balcombe v. The Queen*, [1954] S.C.R. 303; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Sault Ste.*

6041

Marie, [1978] 2 S.C.R. 1299; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154; *R. v. Martineau*, [1990] 2 S.C.R. 633; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Hess*, [1990] 2 S.C.R. 906; *R. v. Prue*, [1979] 2 S.C.R. 547; *Beaver v. The Queen*, [1957] S.C.R. 531; *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120; *United States v. Bevans*, 24 Fed. Cas. 1138 (1816), rev'd on jurisdictional grounds, 3 Wheat. 336 (1818); *R. v. Smith* (1900), 17 S.C. 561; *Ofer v. Chief Military Prosecutor* (the *Kafr Qassem* case), [Appeal 279-283/58, *Psakim* (Judgments of the District Courts of Israel), vol. 44, at p. 362], in *Pal. Y.B. of Int'l L.* (1985), vol. 2, p. 69; *The Einsatzgruppen Case*, 4 Trials of War Criminals 470 (1948); *Trial of the Major War Criminals before the International Military Tribunal*, vol. 22, (1946) (Official Text in the English Language); *Kelsey v. The Queen*, [1953] 1 S.C.R. 220; *Parnerkar v. The Queen*, [1974] S.C.R. 449; *Dunlop v. The Queen*, [1979] 2 S.C.R. 881; *R. v. Faid*, [1983] 1 S.C.R. 265; *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Williams* (1985), 18 C.C.C. (3d) 356; *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *Campbell v. The Queen* (1982), 31 C.R. (3d) 166; *R. v. S. (P.R.)* (1987), 38 C.C.C. (3d) 109; *R. v. Harris* (1927), 20 Cr. App. R. 86; *R. v. Holden* (1838), 8 Car. & P. 606, 173 E.R. 638; *R. v. Brown*, [1967] 3 C.C.C. 210; *R. v. Bouchard* (1973), 24 C.R.N.S. 31; *R. v. Black* (1990), 55 C.C.C. (3d) 421; *R. v. Tregear*, [1967] 2 Q.B. 574; *United States v. Lutwak*, 195 F.2d 748 (1952), aff'd 344 U.S. 604 (1952), rehearing denied 345 U.S. 919 (1953); *United States v. Marzano*, 149 F.2d 923 (1945); *United States v. Liddy*, 509 F.2d 428 (1974), *certiorari* denied 420 U.S. 911 (1975); *Young v. United States*, 107 F.2d 490 (1939); *Estrella-Ortega v. United States*, 423 F.2d 509 (1970); *United States v. Pape*, 144 F.2d 778

page 719

(1944); *Steinberg v. United States*, 162 F.2d 120 (1947); *United States v. Browne*, 313 F.2d 197 (1963); *United States v. Ostrer*, 422 F. Supp. 93 (1976); *R. v. Holmes*, [1988] 1 S.C.R. 914; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Penno*, [1990] 2 S.C.R. 865; *Reference re ss. 193 and 195.1 (1)(c) of the Criminal Code (Man.) (Prostitution Reference)*, [1990] 1 S.C.R. 1123; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Askov*, [1990] 2 S.C.R. 1199; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *R. v. Turpin*, [1989] 1 S.C.R. 1296.

By La Forest J. (dissenting [2])

R. v. Symes, [1993] 4 S.C.R. 695; *Trial of the Major War Criminals before the International Military Tribunal*, vol. 22, (1946) (Official Text in the English Language); *Attorney-General of the Government of Israel v. Eichmann* (1961), 36 I.L.R. 5, aff'd (1962), 36 I.L.R. 277; *The Almelo Trial*, 1 Law Reports of Trials of War Criminals 35 (1945); *Trial of Lothar Eisentrager*, 14 Law Reports of Trials of War Criminals 8 (1949); *Demjanjuk v. Petrovsky*, 776 F.2d 571 (1985), *certiorari* denied, 475 U.S. 1016 (1986); *Josef Altstötter Trial* (*The Justice Trial*), 6 Law Reports of Trials of War Criminals 1 (1947); *The Case of the S.S. "Lotus"* (1927), P.C.I.J., Ser. A, No. 10;

McVey (Re); McVey v. United States of America, [1992] 3 S.C.R. 475; *R. v.* ***Finta*** (1989), 69 O.R. (2d) 557; *Polyukhovich v. Commonwealth of Australia* (1991), 101 A.L.R. 545; *Balcombe v. The Queen*, [1954] S.C.R. 303; *Bolduc v. Attorney General of Quebec*, [1982] 1 S.C.R. 573; *R. v. DeSousa*, [1992] 2 S.C.R. 944; *R. v. Théroux*, [1993] 2 S.C.R. 5; *West Rand Central Gold Mining Co. v. The King*, [1905] 2 K.B. 391; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Libman v. The Queen*, [1985] 2 S.C.R. 178; *Ofer v. Chief Military Prosecutor* (the *Kafr Qassem* case), [Appeal 279-283/58, *Psakim* (Judgments of the District Courts of Israel), vol. 44, at p. 362], in *Pal. Y.B. Int'l L.* (1985), vol. 2, p. 69; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Penno*, [1990] 2 S.C.R. 865; *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *United Nurses of Alberta v. Alberta (Attorney General)*, [1992] 1 S.C.R. 901; *R. v. Morin*, [1992] 1

6042

S.C.R. 771; *R. v. Kalanj*, [1989] 1 S.C.R. 1594; *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(*a*), (*b*), (*d*), (*f*), (*g*), 12, 15, 24(1).

Charter of the International Military Tribunal, Art. 6(*c*), 8.

page 720

Convention Respecting the Laws and Customs of War on Land (Hague Convention IV, 1907).

Criminal Code, R.S.C. 1927, c. 36.

Criminal Code, R.S.C. 1970, c. C-34, s. 213(*a*).

Criminal Code, R.S.C., 1985, c. C-46, ss. 6(2) [rep. & sub. R.S.C., 1985, c. 27 (1st Supp.), s. 4; am. French version, R.S.C., 1985, c. 1 (4th Supp.), s. 18, Schedule 1, item 1], 7(3) [rep. & sub. R.S.C., 1985, c. 27 (1st Supp.), s. 5(1)], (3.1) [ad. *ibid.*, s. 5(3)], (3.71) [ad. R.S.C., 1985, c. 30 (3rd Supp.), s. 1], (3.72) [ad. *idem*], (3.73) [ad. *idem*], (3.74) [ad. *idem*], (3.76) [ad. *idem*], (3.77) [ad. R.S.C., 1985, c. 10 (3rd Supp.), s. 1], (4), 14, 15, 19, 25, 74(2), 465(1)(*a*) [rep. & sub. R.S.C., 1985, c. 27 (1st Supp.), s. 61(1)], (3) [rep. & sub. *ibid.*, s. 61(4)], 477.1 [ad. S.C. 1990, c. 44, s. 15], 607(6) [ad. R.S.C., 1985, c. 30 (3rd Supp.), s. 1].

Federal Rules of Evidence, Rule 614(a).

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, 75 U.N.T.S. 31.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 27 July 1929, 118 L.N.T.S. 303.

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, 75 U.N.T.S. 85.

Geneva Convention relative to the Protection of Civilian Persons in time of War of August 12, 1949, 75 U.N.T.S. 287.

Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, 75 U.N.T.S. 135.

Order in Council, P.C. 1985-348.

Statute of the International Court of Justice, Art. 38(1).

War Crimes Act 1991, 1991 (U.K.), c. 13.

War Crimes Amendment Act 1988, 1989 (Aust.), No. 3.

6043

Authors Cited

American Law Institute. *Restatement (Third) of the Law, the Foreign Relations Law of the United States*, vol. 1. St. Paul, Minn.: American Law Institute Publishers, 1987.

Annot., 53 A.L.R. Fed. 498.

Annot., 67 A.L.R.2d 538.

Archbold, John Frederick. *Pleading, Evidence and Practice in Criminal Cases*, 45th ed. General editor, P. J. Richardson. London: Sweet & Maxwell, 1993.

Bakker, Jeanne L. "The Defense of Obedience to Superior Orders: The Mens Rea Requirement" (1989), 17 *Am. J. Crim. L.* 55.

page 721

Bassiouni, M. Cherif. *Crimes Against Humanity in International Criminal Law*. Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1992.

Brownlie, Ian. *Principles of Public International Law*, 4th ed. Oxford: Clarendon Press, 1990.

Canada. Commission of Inquiry on War Criminals. *Commission of Inquiry on War Criminals Report, Part I: Public.* Jules Deschênes, Commissioner. Ottawa: The Commission, 1986.

Canada. Law Reform Commission. *Our Criminal Law*. Ottawa: Information Canada, 1976.

Canada. Parliament. Special Joint Committee on the Constitution of Canada. *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*, Issue no. 41 (January 20, 1981) and Issue no. 47 (January 28, 1981). First Session of the Thirty-second Parliament, 1980-81. Ottawa: Queen's Printer, 1981.

Cross, Rupert, Sir. *Cross on Evidence*, 7th ed. By the late Sir Rupert Cross and Colin Tapper. London: Butterworths, 1990.

Dinstein, Yoram. *The Defence of 'Obedience to Superior Orders' in International Law*. Leyden, The Netherlands: A. W. Sijthoff, 1965.

Fenrick, W. J. "The Prosecution of War Criminals in Canada" (1989), 12 *Dalhousie. L. J.* 256.

Green, Leslie Claude. Note. "Canadian Law, War Crimes and Crimes Against Humanity" (1988), 59 *Brit. Y.B. Int'l L.* 217.

Green, Leslie Claude. *International Law: A Canadian Perspective*, 2nd ed. Toronto: Carswell, 1988.

Green, Leslie Claude. "Superior Orders and Command Responsibility" (1989), 27 *Can. Y.B. Int'l L.* 167.

6044

Green, Leslie Claude. "Superior Orders and the Reasonable Man". In *Essays on the Modern Law of War*. Dobbs Ferry, N.Y.: Transnational Publishers, 1985.

Green, Leslie Claude. *Superior Orders in National and International Law*. Leyden, The Netherlands: A. W. Sijthoff, 1976.

Green, Leslie Claude. "The Defence of Superior Orders in the Modern Law of Armed Conflict" (1993), 31 *Alta. L. Rev.* 320.

Greenspan, Morris. *The Modern Law of Land Warfare*. Berkeley: University of California Press, 1959.

Kelsen, Hans. "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals" (1945), 2:3 *Judge Advocate J.* 8.

Kelsen, Hans. "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" (1947), 1 *Int'l L.Q.* 153.

Lachs, Manfred. *War Crimes: An Attempt to Define the Issues.* London: Stevens & Sons, 1945.

page 722

Lauterpacht, Hersch. "The Law of Nations and the Punishment of War Crimes" (1944), 21 *Brit. Y.B. Int'l L.* 58.

Matas, David. *Justice Delayed: Nazi War Criminals in Canada*. By David Matas with Susan Charendoff. Toronto: Summerhill Press, 1987.
Maxwell-Fyfe, David, Sir. Foreword. In R. W. Cooper, *The Nuremberg Trial.* London: Penguin Books, 1947.

McCormick, Charles Tilford. *McCormick on Evidence*, vol. 1, 4th ed. By John William Strong, General Editor. St. Paul, Minn.: West Publishing Co., 1992.

McWilliams, Peter K. *Canadian Criminal Evidence*, 3rd ed. Aurora, Ont.: Canada Law Book, 1988 (loose-leaf).

Newark, Michael and Alec Samuels. "Let the Judge Call the Witness", [1969] *Crim. L. Rev.* 399.

Oppenheim, L. *International Law: A Treatise*, 6th ed., vol. 2. Edited by H. Lauterpacht. London: Longmans, Green and Co., 1944.

Phipson, Sidney Lovell. *Phipson on Evidence*, 14th ed. By Michael Newman Howard, Peter Crane and Daniel A. Hochberg. London: Sweet & Maxwell, 1990.

Schwarzenberger, Georg. *International Law as Applied by Intentional Courts and Tribunals*, vol. 2, *The Law of Armed Conflict*. London: Stevens & Sons, 1968.

Schwelb, Egon. "Crimes Against Humanity" (1946), 23 *Brit. Y.B. Int'l L.* 178.

6045

Smith, J. C. and Brian Hogan. *Criminal Law*, 7th ed. London: Butterworths, 1992.

Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada*. Toronto: Butterworths, 1992.

Stenning, Philip C. "One Blind Man To See Fair Play: The Judge's Right To Call Witnesses" (1974), 24 C.R.N.S. 49.

Stone, Julius. *Legal Controls of International Conflict*. Holmes Beach, Florida: Wm. W. Gaunt & Sons, Inc., 1974.

Szegedi uj Nemzedék, April 9, 1944.

Triggs, Gillian. "Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?" (1987), 16 *M.U.L.R.* 382.

United Nations. General Assembly. United Nations Resolution on *Principles of international cooperation in the detection, arrest, extradition, and punishment of persons guilty of war crimes and crimes against humanity*. G.A. Res. 3074, 28 U.N. GAOR, Supp. (No. 30) 78, U.N. Doc. A/9030 (1973).

page 723

United Nations. International Law Commission. *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*. U.N. GAOR, 5th Sess., Supp. No. 12 (A/1316).

Wigmore, John Henry. *Evidence in Trials at Common Law*, vol. IA. Revised by Peter Tillers. Boston: Little, Brown & Co., 1983.

Williams, S. A. and A. L. C. de Mestral. *An Introduction to International Law*, 2nd ed. Toronto: Butterworths, 1987.

APPEAL AND CROSS-APPEAL from a judgment of the Ontario Court of Appeal (1992), 92 D.L.R. (4th) 1, 73 C.C.C. (3d) 65, 14 C.R. (4th) 1, 53 O.A.C. 1, 9 C.R.R. (2d) 91, dismissing an appeal from acquittal by Campbell J. sitting with jury. Appeal dismissed, La Forest, L'Heureux-Dubé and McLachlin JJ. dissenting. Cross-appeal dismissed. Sections 7(3.74) and 7(3.76) of the *Criminal Code* do not violate ss. 7, 11(*a*), (*b*), (*d*), (*g*), 12 or 15 of the *Charter*.

C. A. Amerasinghe, Q.C., and *Thomas C. Lemon*, for the appellant.

Douglas H. Christie and *Barbara Kulaszka*, for the respondent.

David Matas, for the intervener League for Human Rights of B'Nai Brith Canada.

Edward M. Morgan, for the intervener Canadian Jewish Congress.

Joseph R. Nuss, Q.C., and *Lieba Shell*, for the intervener InterAmicus.

The following are the reasons delivered by

LAMER C.J. -- I have read the reasons of my colleagues, Justice La Forest and Justice Cory. For

6046

the reasons given by Cory J. I would dismiss the appeal. This being so, I would dismiss the cross-appeal as being moot.

page 724

The reasons of La Forest, L'Heureux-Dubé and McLachlin JJ. were delivered by

LA FOREST J. (dissenting) -- This case concerns the proper understanding of s. 7(3.71)-(3.73) of the *Criminal Code*, R.S.C., 1985, c. C-46, which constitutes the scheme designed by Parliament to bring war criminals and perpetrators of crimes against humanity to justice in Canada. It also raises a number of issues concerning the constitutional validity of this legislation under several provisions of the *Canadian Charter of Rights and Freedoms*.

The legislation was enacted pursuant to the Report of the Deschênes Commission on War Criminals, *Commission of Inquiry on War Criminals Report*, Jules Deschênes, Commissioner (1986). The Commission was established by Order-in-Council No. 1985-348, which stated, in part, that the "Government of Canada wishes to adopt all appropriate measures necessary to ensure that any . . . war criminals currently resident in Canada . . . are brought to justice". Although the report, released December 30, 1986, named 774 alleged war criminals resident in Canada, to date there have been no convictions obtained using s. 7(3.71)-(3.73). This appeal concerns the first prosecution ever attempted under this legislation.

Facts

The accused, Imre **Finta**, was born in Kolozsvar, Hungary (now a part of Romania) in 1912. During the 1930s, he lived and studied law in Szeged, Hungary. In 1935, Mr. **Finta** enrolled in the Royal Hungarian Military Academy and in January 1939 he was commissioned as an officer in the Royal Hungarian Gendarmerie. The Gendarmerie is most accurately described as an armed paramilitary police force which served the Hungarian government by wielding political muscle in the country's more rural areas. By 1942, Mr. **Finta** had achieved the rank of captain in this notorious organization.

page 725

In March 1944, Mr. **Finta** was posted to Szeged as commander of the investigative subdivision of the Gendarmerie. That same month Hungary had been occupied by the forces of the Third Reich. Despite the fact that Hungary had joined the Axis powers in 1940, Germany proceeded to install an even more pro-German puppet government in the Hungarian capital of Budapest. Thus, throughout the relevant period, Hungary was a *de facto* occupied state. The Hungarian police and the Gendarmerie came under the direct command of the German SS, and these two organizations were instrumental in administering the anti-Jewish laws adopted by the Nazi government of Germany and the Hungarian government under its control.

The charges against Mr. **Finta** stem from his time in Szeged. Mr. **Finta** is alleged to have been in charge of the "de-jewification" of Szeged during the spring of 1944. This activity was authorized by the so-called "Baky Order", the Hungarian Ministry of the Interior Order passed on April 7, 1944. In its essentials, the "Baky Order" called for the isolation, complete

6047

expropriation, ghettoization, concentration, entrainment, and eventual deportation (primarily to Auschwitz and Birkenau) of all Hungarian Jews. Once there, these Jews faced either immediate extermination or forced labour followed by eventual extermination. The events at Szeged were duplicated in villages and towns across Hungary throughout that unfortunate spring. There can be no doubt that this process, which my colleague, Justice Cory, has described in all its horrific detail, was an integral part of what the Nazis themselves dubbed the "final solution" to the "Jewish problem", namely the systematic slaughter of every last European Jew.

In 1947-48, Mr. **Finta** was tried and convicted, *in absentia*, by a Szeged court for "crimes against the people" relating to his role as a Gendarmerie captain during the spring of 1944 purge of Szeged's Jewish population. In 1951, **Finta** immigrated to Canada. In 1956 he became a Canadian citizen, and has lived in this country ever since.

page 726

Mr. **Finta** was charged with unlawful confinement, robbery, kidnapping and manslaughter of 8,617 Jews between May 16 and June 30, 1944 at or about Szeged, Hungary, thereby committing an offence under the definitions of these crimes in the *Criminal Code* existing at the time the offences were committed. The indictment added that such offences constituted crimes against humanity and war crimes under what is now s. 7(3.71) of the *Criminal Code*. The latter reference was added because prosecution for crimes committed abroad cannot ordinarily take place in Canada since criminal offences are generally confined to conduct that takes place in Canada (s. 6 of the *Code*), and the conduct alleged here took place in Hungary. Section 7(3.71), however, permits prosecution for conduct outside Canada if such conduct constitutes a crime against humanity or a war crime and would have been a crime in Canada at the time it took place had it been committed here. As Cory J. states, the principal issue in this case concerns a proper understanding of this and related provisions permitting persons to be prosecuted in Canada for crimes against Canadian law if these crimes also constitute crimes against humanity or war crimes under international law.

My colleague has set forth the judicial history of the case and I need not repeat it except as may be necessary in setting forth my views. For the moment, it suffices to set forth the basic procedural steps in the proceedings. Following a pre-trial motion before the late Callaghan A.C.J. of the Ontario Court, General Division, to consider a number of constitutional issues regarding the validity of the legislation under the *Charter*, a trial was held before Campbell J. sitting with a jury. The accused was acquitted and the acquittal was affirmed by a majority of the Ontario Court of Appeal, Dubin C.J. and the late Tarnopolsky J.A.

page 727

dissenting. From that decision, the Crown appealed to this Court, raising seven grounds of appeal.

The Issues

It is only necessary for me to deal with the first two grounds of appeal. These relate to (1) the proper understanding of the jurisdictional nature of the war crimes provisions, and (2) the requirements of international law in relation to the mental element in such crimes. That is because, in my view, serious errors were made in respect of these issues that require the ordering of a new

6048

trial. That being so, it is unnecessary for me to address the other issues, which for the most part to the particular manner in which the trial was conducted. It is right to say, however, that had the provisions been interpreted in the manner I propose, some of the problems, notably in relation to the inflammatory address by defence counsel, could have been avoided or at least mitigated.

In dealing with the two issues I have outlined, I propose to confine myself to attempting to discern the intention of Parliament in enacting the war crimes provision by reference to the ordinary rules of statutory interpretation. The trial judge and the majority of the Court of Appeal attempted to interpret it in light of certain concerns they had about the implications of the *Charter*. While I agree that where a possible interpretation of a provision is consistent with the *Charter*, and another is not, the former is to be preferred, that approach cannot go so far as to permit the courts to rewrite the section; see *R. v. Symes*, [1993] 4 S.C.R. 695. At all events, I do not think the provision as interpreted in accordance with the ordinary canons of statutory construction in any way breaches *Charter* values. I shall discuss the *Charter* issues that constitute the *leitmotif* of the respondent's interpretative approach later, and conclude with the other *Charter* challenges raised in the cross-appeal.

Before entering into a detailed examination of the issues I have just outlined, it is important first to set forth the general economy of s. 7(3.71)-

page 728

(3.77) and the interrelationship of these provisions with international law for, in my view, this constitutes a necessary first step to a consideration of the specific issues. For a failure to grasp these general issues seems to me to lie at the root of much of the confusion that has arisen in this case.

Interrelationship of International Law and Section 7(3.71)-(3.76)

War crimes and crimes against humanity are crimes under international law. They are designed to enforce the prescriptions of international law for the protection of the lives and the basic human rights of the individual, particularly, as befits an international prescription, against the actions of states. They are acts universally recognized as criminal according to general principles of law recognized by the community of nations. While some of these crimes have been given a considerable measure of definition in international documents, as a whole they have not been reduced to the precision one finds in a national system of law. Crimes against humanity, in particular, are expressed in broad compendious terms relying broadly on principles of criminality generally recognized by the international community. Consequently, s. 7(3.76) defines crimes against humanity and war crimes as follows:

7. . . .

(3.76) For the purposes of this section,

. . .

"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional

6049

international law or is criminal according to the general principles of law recognized by the community of nations;

page 729

"war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.

Since war crimes and crimes against humanity are prescriptions governing the international legal order, it follows that they must apply against states, which have indeed been brought to account in various international fora. But a state must obviously act through individuals and it would frustrate the prosecution and punishment of war crimes and crimes against humanity if individuals could be absolved of culpability for such crimes by reason only that it was not illegal under the law of the state on behalf of which they acted. Consequently, it is clear that the mere existence of such law cannot be a defence to an individual charged with a war crime. This was well stated in *Trial of the Major War Criminals before the International Military Tribunal*, vol. 22, (1946) (Official Text in the English Language), in the following passage, at pp. 465-66:

It was submitted that international law is concerned with the actions of sovereign states and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the state. In the opinion of the Tribunal, both these submissions must be rejected.

. . .

...individuals can be punished for violations of international law. Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.

This principle was adopted in the Canadian legislation. Section 7(3.74) of the *Criminal Code*, reads as follows:

page 730

7. . . .
(3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

The existence of such *de facto* laws is not, however, totally irrelevant in considering situations where a person had no moral choice in doing what he or she did. This can be seen from the formulation by the International Law Commission in 1950 of the Principles of the Nuremberg Charter and Judgment; see U.N. General Assembly Official Records, 5th Sess., Supp. No. 12 (A/1316). Principle IV reads:
PRINCIPLE IV

6050

The fact that a person acted pursuant to orders of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Having said this, I note in passing that there is ordinarily nothing all that subtle about war crimes. The moral aspect leaps immediately to the consciousness of anyone with any moral sensitivity. The shooting of civilians in the absence of a mistake of fact or a superior order is an example. In the latter case, the accused may raise this as a defence only if he has no moral choice, in which case there are defences available both under international and domestic law. Apart from this, such acts obviously involve moral culpability on the part of the perpetrator. That is surely so of the facts here where the rounding up of 8,617 defenceless people, men, women and children, and confining and transporting them under unspeakable conditions outside the country to meet their fate strikes one as morally vile and inexcusable if it appears that an accused has done this without a valid justification, excuse or defence.

Since war crimes and crimes against humanity reflect the views of the members of the family of nations as they may be found not only in international conventions but also in customary

page 731

international law in respect of such crimes, it follows that they would be subject to similar justifications, excuses and defences as apply in respect of such crimes in domestic law. For one of the sources of international law is "the general principles of law recognized by civilized nations" (see Art. 38(*c*) of the *Statute of the International Court of Justice*, Acts and Documents Concerning the Organization of the Courts, No. 4, *Charter of the United Nations, Statute and Rules of Court and Other Documents* (1978)), a matter specifically referred to in the definition of "crimes against humanity". Consequently, then, provision for these justifications, excuses and defences are provided in s. 7(3.73) of the *Code*. Of particular relevance to war crimes would be issues going to the mental intent, necessity, duress and mistake of fact, as well as defences specifically available to peace officers and military forces. There are, as well, additional defences available for these international crimes, such as military necessity, superior orders and reprisals. By virtue of s. 7(3.73), any justification, excuse or defence available under international law as well as under the law of Canada at the time of the commission of the alleged offence are made available to an accused charged by virtue of the Canadian legislation. Section 7(3.73) reads as follows:

7. . . .

(3.73) In any proceedings under this Act with respect to an act or omission referred to in subsection (3.71), notwithstanding that the act or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 607(6), rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings.

It follows from the ordinary principles of criminal law followed in Canadian courts that any reasonable doubt on these matters is to be determined in favour of the accused.

Since war crimes and crimes against humanity are crimes against international prescriptions and,

605 1

page 732

indeed, go to the very structure of the international legal order, they are not under international law subject to the general legal prescription (reflected in s. 6(2) of our *Code*) that crimes must ordinarily be prosecuted and punished in the state where they are committed; see *Attorney-General of the Government of Israel v. Eichmann* (1961), 36 I.L.R. 5. Indeed the international community has encouraged member states to prosecute war crimes and crimes against humanity wherever they have been committed. See the four Geneva Conventions of 1949 (*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12 1949*, 75 U.N.T.S. 31, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949*, 75 U.N.T.S. 85, *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, 75 U.N.T.S. 135, and *Geneva Convention relative to the Protection of Civilian Persons in time of War of August 12, 1949*, 75 U.N.T.S. 287); United Nations Resolution on *Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, G.A. Res. 3074, 28 U.N. GAOR, Supp. (No. 30) 78, U.N. Doc. A/9030 (1973); *War Crimes Amendment Act 1988*, 1989 Aust., No. 3; *War Crimes Act 1991*, 1991 (U.K.), c. 13; *Restatement (Third) of the Law, the Foreign Relations Law of the United States*, vol. 1, [sect] 404 (1987); *Trial of the Major War Criminals before the International Military Tribunal*, *supra*, at p. 461; *The Almelo Trial*, 1 Law Reports of Trials of War Criminals 35 (1945) (U.S.M.T. Almelo); *Trial of Lothar Eisentrager*, 14 Law Reports of Trials of War Criminals 8 (1949) (U.S.M.T. Shanghai), at p. 15; *The Eichmann Case*, *supra*, at p. 50, aff'd (1962), 36 I.L.R. 277, at p. 299 (Isr. S.C.); *Demjanjuk v. Petrovsky*, 776 F.2d 571 (6th Cir. 1985), at pp. 582-83, *certiorari* denied, 475 U.S. 1016 (1986); I. Brownlie, *Principles of Public International Law* (4th ed. 1990), at p. 305; S. A. Williams and A. L. C. de Mestral, *An Introduction to International Law* (2nd ed. 1987), at pp. 130-31. It would be pointless to rely solely on the state where such a crime has been committed, since that state will often be

page 733

implicated in the crime, particularly crimes against humanity. This concept was forcefully and unequivocally expressed by the U.S. Military Tribunal in the justice trials (*Josef Altstötter Trial* (*The Justice Trial*)), 6 Law Reports of Trials of War Criminals 1 (1947) (U.S.M.T. Nuremberg), at p. 49, where it was stated:

> The very essence of the prosecution case is that the laws, the Hitler decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions.
>
> The central concern in the case of crimes against humanity is with such things as state-sponsored or sanctioned persecution, not the private individual who has a particular hatred against a particular group or the public generally. Extraterritorial prosecution is thus a practical necessity in the case of war crimes and crimes against humanity. Not only is the state where the crime took place unlikely to prosecute; following the cessation of hostilities or other conditions that fostered their commission, there also is a tendency for the individuals who perpetrated them to scatter to the four corners of the earth. Thus, war criminals would be able to elude punishment simply by fleeing the jurisdiction where the crime was committed. The international community has rightly rejected

6052

this prospect.

Turning again to the interrelationship between war crimes and crimes against humanity and Canadian criminal law, it is notable that the Deschênes Commission was of the view that a prosecution could be launched against a war criminal before a Canadian superior court of criminal jurisdiction on the basis of a violation of "the general principles of

page 734

law recognized by the community of nations". This finding was based on two factors: (1) s. 11(*g*) of the *Charter*, which, in the Commission's view, adopted "customary" international law *lato sensu* into Canadian law, and (2) the principle of universal jurisdiction; see Deschênes Commission, *supra*, at p. 132. However, the Commission dismissed this option on the grounds that "[a] prosecution under international law appears too esoteric"; *ibid.*, at p. 133. The Commission took the view that a preferable vehicle for the prosecution of war criminals would be for Parliament to pass enabling legislation whereby prosecution of war criminals could be pursued in Canada based on crimes known to Canadian criminal law. The international aspect of these crimes would, pursuant to the principle of universality inherent in these grievous acts, continue to provide the jurisdictional link to Canada, so long as the international crimes were known to international law at the time and place of their commission.

Despite the Deschênes Commission's assumption that s. 11(*g*) of the *Charter*, coupled with the universality jurisdiction associated with these war crimes and crimes against humanity, could ground a prosecution in Canada, it is not self-evident that these crimes could be prosecuted in Canada in the absence of legislation. On the analogy of other international authority in the area, it is certainly arguable that the international norm regarding universality of jurisdiction is permissive only (see *The Case of the S.S. "Lotus"* (1927), P.C.I.J., Ser. A, No. 10), and the language of s. 11 (*g*) of the *Charter* also appears to be framed in permissive terms. Thus it is by no means clear that prosecution could automatically be pursued for these crimes before the courts of the various states, especially Canada where, barring express exception, crimes must comply with the requirement that they were committed within Canada's territory (s. 6 of the *Code*). Under these circumstances, it is not surprising that Parliament saw fit by s. 7(3.71) of the *Code*, to confer jurisdiction on Canadian courts by providing expressly that, notwithstanding any provision in the *Code* or any other Act, a war crime or

page 735

crime against humanity shall be deemed to have been an act committed in Canada.

But Parliament, like the Commission, quite rightly in my view, accepted the position that war crimes and crimes against humanity would be crimes in Canada. For although they may not, in those terms, be crimes under Canadian law, they are in essence reflections of general principles of law recognized by the community of nations, and so would, if committed in Canada, be subject to prosecution here under various provisions. It is evident that compendious expressions like "murder, extermination, enslavement, deportation, persecution, or any other inhumane act or omission" include acts and omissions that comprise such specific underlying crimes as confinement, kidnapping, robbery and manslaughter under our domestic system of law. A somewhat similar relationship between compendiously described unlawful acts in international treaties and specific crimes under domestic law exists in the law of extradition; see *McVey (Re); McVey v. United States of America*, [1992] 3 S.C.R. 475, at pp. 514-15.

6053

I should note, however, that war crimes and crimes against humanity often include additional circumstances relating them to the international law norms they subserve. Thus crimes against humanity are aimed at giving protection to the basic human rights of all individuals throughout the world, and notably against transgression by states against these rights. That is why such crimes are aimed at an "act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission"; see s. 7(3.76). The law referred to in that expression is, of course, the local domestic law, not international law, as counsel for respondent argued. For these crimes were at the relevant period violative of the law of nations. As Callaghan A.C.J. ruled in his pre-trial ruling in

page 736

the present case (*R. v.* ***Finta*** (1989), 69 O.R. (2d) 557 (Ont. H.C.), at p. 569):

A brief review of international conventions, agreements and treaties, clearly demonstrate [*sic*] that, by World War II, war crimes or crimes against humanity were recognized as an offence at international law, or criminal according to the general principles of law recognized by the community of nations.

This proposition is well supported by the international sources cited by Callaghan A.C.J. and I shall have occasion to return to this later. For the moment, I would simply note that many of the defendants tried in Nuremberg also raised this plea, in the form of *nullum crimen sine lege*, and this defence was rejected; *Trial of the Major War Criminals before the International Military Tribunal*, *supra*, at pp. 461-65; *Josef Altstötter*, *supra*, at pp. 41-49. The following words of Sir David Maxwell-Fyfe (Foreword to R. W. Cooper, *The Nuremberg Trial* (1947)), are apt (at p. 11):

With regard to "crimes against humanity", this at any rate is clear: the Nazis, when they persecuted and murdered countless Jews and political opponents in Germany, knew that what they were doing was wrong and that their actions were crimes which had been condemned by the criminal law of every civilized State. When these crimes were mixed with the preparation for aggressive war and later with the commission of war crimes in occupied territories, it cannot be a matter of complaint that a procedure is established for their punishment.

I again, however, underline the fact -- which finds expression in the statement just quoted -- that the acts comprised in war crimes and crimes against humanity are in this country in essence crimes that fall under the familiar rubrics of our law such as confinement, kidnapping, and the like. They would be equally blameworthy if done by private individuals or criminal groups for other similar vile motives. The additional circumstances are added to crimes against humanity to tie them to

page 737

the international norm and permit extraterritorial prosecution by all states.

The same approach applies to war crimes. There must, of course, be an "international armed conflict". In other cases, other conditions may be imposed. Shooting at enemy forces is generally not a war crime, but shooting at civilians is subject to more stringent requirements. Other conditions under which one acts may also determine the difference between whether such acts are

6054

war crimes or not. As in the case of the existence of a state of war, these conditions are what ties them to international norms and empowers extraterritorial prosecution.

In enacting enabling legislation respecting war crimes and crimes against humanity, Parliament could have proceeded in one of two ways. These crimes could have been simply made offences in their own terms in Canada even though committed abroad. This, I understand, is what has been done, for instance, in Australia; see *Polyukhovich v. Commonwealth of Australia* (1991), 101 A.L.R. 545 (Aust. H.C.). Another technique is to enable prosecution under domestic law by the device of deeming the acts constituting a war crime or crime against humanity to have been committed in Canada. Since these acts are then deemed to have been committed in Canada, the person accused of having committed them may be charged with any of the relevant underlying offences that encompass these acts under the law of Canada. That is the course that was taken by Parliament, an approach somewhat similar to that followed in Great Britain; see *War Crimes Act 1991*, 1991 (U.K.), c. 13. By section 7(3.71), a provision cited and discussed at length later, Parliament provided that a person who has committed an act or omission outside Canada that constitutes a war crime or crime against humanity shall be deemed to have committed that act in Canada. The provision adds a second requirement for the operation of this clause. To

page 738

avoid punishing someone for an act that would not at the time have been a crime under Canadian law, it further requires that the act must constitute a crime in Canada according to the law at the time, a provision reinforced by s. 7(3.72) which requires that any prosecution in respect of such act be conducted according to the then existing laws of evidence and procedure.

There are obvious advantages to the second approach. The judge and especially the jury are able to function largely pursuant to a system of law which, being our own, is more familiar to us and more precise. As much as possible, the intricacies of what constitutes international law and how it functions (with which even the judge is often unfamiliar) are avoided. The judge is able to instruct the jury secure in his or her knowledge of Canadian law. With the exception of international defences, which are available to the accused, the jury can then perform its function pursuant to Canadian law which demands proof beyond a reasonable doubt that the accused committed the offence -- a Canadian offence -- with which he or she is charged.

Interpretation of Section 7(3.71)

General

I turn now to the first ground of appeal concerning the correct interpretation of s. 7(3.71). Ignoring for the moment the *Charter* issues at stake, a clear understanding of the intention of the legislature can, in my view, be ascertained through the normal rules for the interpretation of legislative provisions.

To clarify the issue, it is useful to examine how it was dealt with in the courts below. It first arose before Callaghan A.C.J. in the course of dealing with the constitutionality of s. 7(3.71) and (3.74) in a pre-trial ruling. In his view, s. 7(3.71) is of a procedural nature and does not create new offences, but merely confers retrospective and extraterritorial jurisdiction to Canadian courts over acts that would have been offences under Canadian law at the time of their occurrence if they had taken place

6055

page 739

in Canada, so long as those acts constitute war crimes or crimes against humanity.

Though the trial judge agreed with Callaghan A.C.J.'s ruling that s. 7(3.71) is exclusively jurisdictional in nature, he determined that the question of jurisdiction, though ordinarily a matter determined by the trial judge as a matter of law, should in this case be left with the jury. Under this ruling, the trial judge, it is true, would determine abstract legal questions such as whether crimes against humanity constituted a contravention of customary or conventional law or was criminal according to the law of nations, but it was for the jury to decide whether the respondent's acts or omissions constituted a war crime or crime against humanity.

The majority of the Court of Appeal (1992), 92 D.L.R. (4th) 1, upheld the conclusion of the trial judge but on another basis. They did not agree that s. 7(3.71) was procedural and relevant only to the jurisdiction of the court to try the respondent for the domestic offences such as confinement, robbery, kidnapping and manslaughter. As they put it, at p. 108:

. . . we arrive at the same conclusion reached by the trial judge, although we interpret s. 7(3.71) differently. We do not regard the allegations that **Finta**'s acts or omissions constituted war crimes or crimes against humanity as going to the jurisdiction of the trial court so as to bring them within the purview of the judgment in *Balcombe* [*Balcombe v. The Queen*, [1954] S.C.R. 303]. Instead, we view these issues as integral to the fundamental question of whether **Finta** committed the offences which were alleged against him in the indictment.

As Dubin C.J. put it, at p. 20, ". . . the upshot of the majority view is that s. 7(3.71) of the *Criminal Code* creates two new offences, namely, a crime against humanity and a war crime. . . ." Like

page 740

Dubin C.J. and Tarnopolsky J.A., and for that matter Callaghan A.C.J., I respectfully disagree with the position taken by the trial judge and the Court of Appeal. I do so for the following reasons.

On a literal reading of s. 7(3.71), an appreciation of its legislative context along with analogous provisions in the *Code* and an understanding of its legislative history, I conclude that s. 7(3.71) is unquestionably intended to confer jurisdiction on Canadian courts to prosecute domestically, according to Canadian criminal law in force at the time of their commission, foreign acts amounting to war crimes or crimes against humanity. The provision does not create any new offences. Section 7(3.71) reads:

7. . . .

(3.71) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if,

6056

(*a*) at the time of the act or omission,

(i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,

(ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or

(iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or

(*b*) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada. [Emphasis added.]

I am quite unable to see anything in s. 7(3.71) that creates new offences of war crimes and crimes

page 741

against humanity. Nowhere is it declared, as it is in the case of all other *Code* offences, that a person who commits the relevant act is guilty of an offence. On the contrary, the nucleus of the provision is its predicate, "shall be deemed to commit that act or omission in Canada at that time". All the rest gravitates towards this focus. Moreover, no penalty is stipulated. The subjection to domestic prosecution that results from a finding of war crime or crime against humanity is not punishment; it is, rather, merely the next procedural step. What the provision does is empower the prosecution to lay charges against the accused for offences defined in the *Code* in respect of acts done outside the country, so long as those acts constitute crimes against humanity or war crimes.

This reading of s. 7(3.71) also makes sense when viewed in its legislative context. Found in Part I, the "General" section of the *Criminal Code*, the provision stands as an exception to the general rule regarding the territorial ambit of criminal law, which appears in the immediately preceding section. Section 6(2) of the *Code* reads:

6. . . .

(2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 736 of an offence committed outside Canada.

The perpetration of acts constituting war crimes and crimes against humanity, of course, transcends national borders, yet the perpetrators are often not identified until later, after they have displaced themselves to a new country. Parliament's intention was to extend the arm of Canada's criminal law in order to be in a position to prosecute these extraterritorial acts if the alleged perpetrators were discovered in our midst. The enactment of s. 7(3.71) was necessary because Parliament's plan derogated from the general principle of s. 6(2). As I noted earlier, by specifically deeming the extraterritorial act to have taken place in Canada,

page 742

Parliament has expressed its view that the normal concerns about extraterritoriality are not present.

6057

Similarly structured deeming provisions that also embrace extraterritorial acts are found among the other subsections of s. 7; see s. 7(3) in relation to offences committed against internationally protected persons or their property, s. 7(3.1) in relation to hostage-taking and s. 7(4) in relation to public service employee offenders. Similarly worded provisions are found in other parts of the *Code*, as well. Section 477.1 deems to be committed in Canada acts occurring in, above or beyond the continental shelf. A close parallel can be drawn with the conspiracy provision set forth in s. 465(3) of the *Code*, which reads:

465. . . .

(3) Every one who, while in Canada, conspires with any one to do anything referred to in subsection (1) in a place outside Canada that is an offence under the laws of that place shall be deemed to have conspired to do that thing in Canada.

The nature of this provision was considered by this Court in *Bolduc v. Attorney General of Quebec*, [1982] 1 S.C.R. 573, where, at pp. 577 and 581, it is stated:

It is apparent on its face that this subsection does not create an offence. It creates a presumption of territoriality so as to make the conspiracy an offence punishable in Canada. Where, as in the case at bar, persons conspire in Canada to effect an unlawful purpose in the United States, which would not in itself be an offence punishable in Canada, they "shall be deemed to have conspired to do in Canada that thing". The result is to introduce the essential aspect which would otherwise be absent, and to make the offence punishable in Canada.

. . .

The offence charged is common law conspiracy committed in Canada, to effect an unlawful purpose. Causing persons to enter the United States unlawfully constitutes an offence under American law, just as causing

page 743

persons to come into Canada unlawfully constitutes an offence under Canadian law. As a consequence of the presumption of s. 423(3) [currently s. 465(3)], the conspirators are deemed to have conspired to commit the offence in Canada. It is as if they had conspired to cause persons to come into Canada unlawfully. [Emphasis added.]

As in the case of s. 7(3.71), s. 465(3) deems Canadian territoriality where a criterion is met. While the criterion for s. 465(3) is the unlawfulness of the act conspired according to the law of the place of the conspired act, the criteria for s. 7(3.71) are threefold: that the act constitutes a war crime or crime against humanity; that the act was unlawful in Canada at the time of its commission; and that specifically defined individuals are involved. Just as the offence charged in the former case is conspiracy committed in Canada, the charge in the latter is that of the underlying domestic offence, be it murder, robbery or the like. The similarity of the structure of these two provisions supports a consistent interpretation.

Admittedly, exceptions to s. 6 can also take the form of offence-creating provisions that expressly embrace extraterritorial acts. However, the wording of s. 7(3.71) closely resembles that of other purely jurisdiction-endowing provisions and can be contrasted with these offence-creating provisions. For example, another conspiracy provision reads:

6058

465. (1) . . .

(*a*) every one who conspires with any one to commit murder or to cause another person to be murdered, whether in Canada or not, is guilty of an indictable offence and liable to a maximum term of imprisonment for life;

This section deals, *inter alia*, with conspiracy to murder abroad. The provision itself makes this extraterritorial act an offence and attaches a sanction to it. A similar approach is taken with respect to the criminalization of piracy, in s. 74(2):

page 744

74. . . .

(2) Every one who commits piracy while in or out of Canada is guilty of an indictable offence and liable to imprisonment for life.

The distinction between this *Code* treatment of extraterritorial acts and that embodied by s. 7 (3.71) and its kin is obvious. The former reflects Parliament's intention to approach the relevant acts as domestic offences unto themselves, in contrast to the latter's effect of deeming the acts to come within the scope of offences already created elsewhere in the *Code*.

Parliament's intention to confine itself to a rule governing the application of offences is also evident from the position of s. 7(3.71) in the *Code*. It appears, I repeat, in Part I of the *Code*, which is appropriately titled "General". No offence is created in that Part. It deals, as its name implies, with interpretive matters, application, enforcement, defences and other general provisions. Offences are dealt with in other parts of the *Code*, and are usually entitled as such, among others "Part II. Offences Against Public Order", "Part VIII. Offences Against the Person and Reputation", "Part IX. Offences Against Rights of Property", and so on. One should assume some minimal level of ordering in an Act of Parliament. Had Parliament wished specifically to make war crimes and crimes against humanity domestic offences, it would have been much easier to do so directly, and I cannot imagine why it would have done so in the General Part of the *Code*.

This reading of s. 7(3.71) is bolstered by its legislative history. Sections 7(3.71)-(3.77) represent the consummation of the recommendations of the Commission of Inquiry on War Criminals (the "Deschênes Commission"). The crux of the Commission's recommendations, we saw, was not the domestic creation of these international offences, but rather, the removal of the obstacle of extraterritoriality and the enablement of Canada to serve as a forum for the domestic prosecution of these

page 745

offenders. This thrust of the Report is reflected, at p. 158, as follows:

Need it be stressed again: we are not aiming to make acts, which were deemed innocent when committed, criminal now; such would be unacceptable retroactivity. But extermination of a civilian population, for instance, was already as much criminal in 1940 as it would be today, under the laws of all so-called civilized nations. We are only trying to establish now in Canada a forum where those suspected of having committed such offences may be tried, if found in Canada.

6059

In formulating its recommendations, the Commission specifically commented, at p. 165, that "[t]he Code must contain an express grant of jurisdiction to the courts in Canada". Tarnopolsky J.A. made this observation as well, at p. 60, in the Court of Appeal:

Rather than creating a substantive offence of war crime or crime against humanity, Parliament chose, on the recommendation of the Deschênes Commission, to extend the applicability of existing *Criminal Code* provisions extant at the time of the acts.

The Commission's view, as I read it, is that new offences did not have to be created; censure of the actual relevant acts was already provided for in the Canadian *Criminal Code*, as it was in the law of most civilized nations. So any such acts could have been prosecuted under the ordinary Canadian criminal provisions if committed here. What Canadian courts had to be equipped with was the capacity to hear and decide the prosecutions. Consistent with the requirements of international law, the link to international law concepts of war crimes and crimes against humanity was the mechanism selected to ensure that only the cases envisioned by the Report would endow a Canadian court with the capacity to serve as a forum for the prosecution of extraterritorial acts. The question of the presence of war crimes or crimes against humanity is thus one of jurisdiction. The offence with which the accused is charged, on the other hand, is the underlying domestic offence, drawn from the already

page 746

existing Canadian criminal law at the time of commission.

Questions of jurisdiction are matters of law entrusted to the trial judge. In *Balcombe v. The Queen*, *supra*, Fauteux J., speaking for this Court, had this to say, at pp. 305-6:

The question of jurisdiction is a question of law -- consequently, for the presiding Judge -- even if, to its determination, consideration of the evidence is needed. It is a question strictly beyond the field of these matters which under the law and particularly under the terms of their oath, the jury have to consider. They are concerned only with the guilt or innocence of the prisoner at the bar. Indeed the lawful fulfilment of their duties rests on the assumed existence of the jurisdiction of the Court to try, at the place where it is held, the accused for the crime charged. They are concerned with facts as they may be related to guilt or innocence but not to jurisdiction. [Emphasis added.]

Being a question of law, the trial judge would make his or her determination of whether the act or omission in question amounted to a war crime or a crime against humanity on a balance of probabilities. The jury's duty is to determine the guilt of the accused of the offence with which he or she was charged.

The majority of the Court of Appeal would distinguish *Balcombe* on the grounds that all of the essential elements of the offence must be put to the jury, and that this includes the offence of a war crime or crime against humanity. As will become clear, I do not view the existence or non-existence of a war crime or crime against humanity as an essential element of the offence but rather as the jurisdictional link grounding prosecution for the underlying Canadian domestic offence. At the same time, however, the jury would of course have to consider whether as a fact the acts that constitute the war crime or crime against humanity occurred in determining whether the offence under Canadian law was committed. The jury is not acting in a vacuum.

page 747

6060

I respectfully reject the distinction drawn by the majority of the Court of Appeal between territorial jurisdiction of the court and territorial reach of the criminal law. The majority seems to have attempted to differentiate between the former, which it characterizes as going to the determination of the proper Canadian court to hear a case, and the latter, which it identifies as affecting the definition of the offences themselves.

With respect, s. 6(2) of the *Code* does not render Canadian territoriality a defining element of its offences. Rather, it merely precludes a person's conviction or discharge for an offence when committed outside Canada. This general principle of our criminal law system reflects, in addition perhaps to the need for accommodation in the interest of efficiency, Canada's acceptance of the general premise of the sovereignty of nations that underlies international relations. The fact that an act or an omission may have taken place outside Canada's borders does not negate its quality as culpable conduct in the eyes of Canadians and the underlying values of Canadian criminal law. This is reflected, as well, in the law of immigration, deportation and extradition. The principle of territoriality simply responds to the structure of the international order; the prosecution of the perpetrator of a criminal act is normally entrusted to the state in which the act was committed.

Questions of territoriality in all cases deal with the same matter: where did the event take place? Of course, the result of this determination may differ depending on whether the inquiry involves distinguishing between two provinces, on the one hand, or between Canada and another country, on the other. In the former case, the proper provincial court is determined, while in the latter, the capacity to try at all pursuant to the *Code* is at stake. In either case, however, the skill called upon to make the determination is the same: the technical ability to demarcate the location of the relevant act. In *Balcombe*, *supra*, this Court held that this function was properly entrusted to the trial judge. I see no

page 748

reason why a different rule should apply to the s. 6 inquiry.

The terms of s. 6 are not absolute; they specifically envision exceptions, whether in the *Code* itself or in other Acts of Parliament. In making the territorial determination dictated by s. 6, the trial judge must consider whether these exceptional provisions apply. These exceptional provisions typically deem territoriality where relevant specified criteria are met. Although perhaps not enacted neatly in one *Code* provision, s. 6 and its exceptions constitute a united inquiry, destined to establish whether the court in question can hear the prosecution of the accused. In order to decide on the application of the general rule, the application of the exceptions would have to be assessed. To entrust the latter decision to the jury, while leaving the general question to the judge, would be an illogical division of labour and could only result in unnecessary confusion. The entire question of jurisdiction should therefore be assigned to the trial judge as a matter of law.

Section 7(3.71) of the *Code* is one of these exceptional provisions. Its criteria, whether the act amounts to a war crime or crime against humanity, whether it constituted an offence pursuant to Canadian law at the time of commission, and whether identifiable individuals were involved, are thus questions of law entrusted to the trial judge and not to the jury.

The Role of Judge and Jury

On this interpretation of the jurisdiction sections, a clear role for both judge and jury emerges.

6061

The role of the jury will be similar to its role in an ordinary prosecution under our domestic law. Its function, and the charge made to it, will be like those that would be made to a jury determining the underlying offence only. The sole difference will be in relation to justifications, excuses and

page 749

defences. Section 7(3.73) provides the accused with the benefit of pleading all available international justifications, excuses and defences in addition to those existing under domestic law. The one domestic defence made unavailable, by the operation of s. 7(3.74), is the defence of obedience to *de facto* law. I shall have more to say about this in discussing the constitutionality of the scheme. It is enough to say here that it is clear to me that this is the scheme contemplated by Parliament.

For his or her part, the trial judge must determine whether all the conditions for the exercise of jurisdiction are met. If the requirements set by Parliament are not satisfied, then the exception to the rule of no extraterritorial application is not met, and the court must decline jurisdiction and the accused acquitted even if all the elements of the offences of manslaughter, robbery, confinement or assault may be satisfied.

It is evident from my earlier comments that I do not agree with the trial judge and the majority of the Court of Appeal that the requirements for jurisdiction be proved beyond a reasonable doubt. Unlike the dissenting judges in the Court of Appeal, however, I believe that the trial judge will have to consider the evidence to satisfy the jurisdiction requirements. The judge cannot simply base his or her assessment of these requirements on the charges as alleged, and leave all the findings of fact to the jury, because some of the facts necessary to establish jurisdiction are not the same as those necessary for the jury's determination of the underlying offence. Thus, for example, a jurisdiction requirement of a war crime requires that the action be done during an international military conflict, a fact that need not be found by a jury determining whether there was manslaughter or kidnapping, (though inevitably these facts will be before them and may, in some cases, be relevant to

page 750

their task in relation to some justification, excuse or defence under international law).

I see no procedural quagmire in the different functions of judge and jury, although it may at times call for some procedural ingenuity. Certainly, if the charges even as alleged do not meet the jurisdiction requirements, then on motion the judge can decline jurisdiction. Beyond that, however, the judge will have to examine the evidence to determine that the jurisdictional facts are established. In ordinary cases, the judge hears the evidence in relation to the jurisdictional point in a *voir dire*, since most of it is irrelevant for the jury's issues. However, since in this case the jury will have to hear much of the same evidence related to the offences as the trial judge would have to hear in relation to the jurisdiction issue, it will usually be more efficient to have the trial judge consider the jurisdiction issue at the same time as the jury hears the evidence related to the offence. If desired, and to keep a jury's mind clear, the parts of the evidence or expert testimony that are completely irrelevant to the jury's concerns can be heard in the absence of the jury. At the close of the evidence, the judge will decide whether the conditions for the exercise of jurisdiction have been met. If so, then the court can proceed to hear the verdict of the jury.

6062

The Mental Element Required for War Crimes or Crimes Against Humanity

While my finding on the first ground of appeal is sufficient to allow this appeal, I shall also deal with the second ground of appeal which relates to the requirements of international law regarding the mental element in war crimes and crimes against humanity. The appellant argues that the trial judge seriously erred in his understanding of the requirements of these crimes, and in particular, that the judge set far too high a requirement for the mental element required for there to be a war crime or crime against humanity. For reasons that will appear I agree that the trial judge and the majority

page 751

of the Court of Appeal erred on the second ground of appeal as well.

In making his determination on the issue of jurisdiction, the judge must determine that there was a war crime or crime against humanity. What these entail is partly set out by the *Code* (s. 7 (3.76)), but will also require reference to international law. This creates some complexity, but the requirements can be deciphered by reference to theoretical constructs of criminal law already familiar to us. The structure of most of the international law in relation to war crimes and crimes against humanity can be conveniently examined under the familiar analysis of the elements of the act (the *actus reus*), the mental elements and defences. The judge must examine the evidence and compare it to the international law to determine whether the requirements of the crime are satisfied, as well as what defences may be available.

Actus Reus Requirement

The issue raised is confined to the *mens rea* relating to a war crime or crime against humanity, but to understand that issue, it is necessary to examine briefly the requirements of the *actus reus* necessary to constitute a war crime or crime against humanity. Both the *Code* and international law contain requirements of particular types of acts or omissions. Thus, for example, the war crime of mistreatment of civilians requires that the accused have done actions that amount to mistreatment. As Manfred Lachs, *War Crimes: An Attempt to Define the Issues* (1945), chapter 7, observed, these acts are usually characterized by violence. In addition, particular circumstances are frequently required. This is clearly exemplified by the requirement that war crimes involve actions that occurred during a state of war. At times, the actions may also have to be directed at certain objects. For example, some actions, though permissible against enemy soldiers in the field, are war crimes if committed against civilians or prisoners. The trial judge must be satisfied that these particular requirements required by international law and by the *Code* are met for there

page 752

to have been a crime against humanity or a war crime. While this may at times raise difficult and complex issues, the general idea of an act or omission, and possibly consequences and circumstances, is well understood; see Lachs, *supra*, at pp. 16-24; L. C. Green, *International Law: A Canadian Perspective* (2nd ed. 1988), Part VI, at [sect][sect] 359-64.

A good example is the requirement that to constitute a crime against humanity the impugned act have been directed at "any civilian population or any identifiable group" (see s. 7(3.76)). Again one must return to the international system perspective to understand this requirement. As mentioned earlier, this is the specific factor that gives the crime the requisite international

6063

dimension and that permits extraterritorial prosecution, thus distinguishing it from an "ordinary crime" that the state is expected to prosecute. Unlike ordinary crimes, it is of direct concern to the international community and may be prosecuted wherever the alleged offender may be found. As earlier mentioned, this exception to the ordinary principle that criminal law is territorially limited is made necessary by a number of considerations. As mentioned, where the crime is especially widespread in that it is directed against an entire population (whether of a town, or region, or even nationally) or an identifiable group within the population, foreign enforcement is especially important because there is often the possibility that the government in the state where the crime occurs may not be willing to prosecute; indeed it may be the source of the crimes. For this reason, international law permits other states to exercise jurisdiction to try such crimes. Given that this is the condition to assuming jurisdiction, the trial judge would have to find that the criminal conduct was directed at a civilian population or identifiable group.

page 753

Apart from his error in putting this question to the jury, the trial judge seems to have had a good sense of the *actus reus* requirements under international law. Thus he specifically noted such requirements as that for war crimes there must be international conflict, and that the accused had to be an agent of an occupying force. To cover other elements of a war crime, he also referred to the acts having to be of the "factual quality" of war crimes or crimes against humanity. This appears to be too ambiguous and should have more specifically been considered against specific types of war crimes or crimes against humanity. This concept illustrates some of the problems of putting this entire question to the jury: this determination clearly involves an assessment of the legal quality of the acts as well as their factual components. This aspect of the judge's understanding of war crimes or crimes against humanity would, however, appear to be adequate if the question were decided, as I have indicated it should be, by the judge as a question of law.

More serious was that the trial judge at several points referred to the accused's actions having "risen up" to the quality of a war crime or crime against humanity. This is not strictly accurate; there may be different considerations for the offences under international law, and they may have some additional requirements to those for domestic offences, but these are not always higher and may not be related to individual culpability. To use language that suggests that somehow there is a higher degree of culpability required in relation to the international crimes is misleading.

Mens Rea Requirement

The trial judge was quite rightly concerned that the acts or omissions should be of a type that is prohibited as war crimes or crimes against humanity as defined in the *Code* and under international law. But from this the judge drew some seriously

page 754

erroneous implications about the mental element required to find that there was a war crime or crime against humanity. With all respect, the trial judge, in my view, made two types of errors, which are related in their effect: first, in requiring that there be a mental element for each and every component of a war crime or crime against humanity, and secondly, partly as a result of the first error, in suggesting that the accused needed to have known that his actions were illegal. The simple fact, as I see it, is that there is no need for the jury to be concerned with the mental element in relation to the war crimes and crimes against humanity beyond those comprised in the underlying domestic offence with which the accused is charged. In other words, as I will attempt

6064

to demonstrate, the mental blameworthiness required for such crimes is already captured by the *mens rea* required for the underlying offence. The additional circumstances of the *actus reus* required in terms of the international system to justify extraterritorial jurisdiction do not require that the accused individually have knowledge of these matters. These components of the *actus reus* really have nothing to do with individual culpability. As I see it, the law does not require that the accused individually have had knowledge of these factors. Such a requirement cannot be found in either Canadian or international law.

In neither the jurisdiction nor the definition section of the *Code* (s. 7(3.71) and s.7 (3.76) respectively) is any mental element specifically alluded to; all that is stated is that there be behaviour that constitutes an act or omission that is contrary to international law. In turn, the requirements for the mental element under international law are often not as clearly established as under our national law. I suspect that this lack of express discussion of the requirement is largely because nobody ever really thought that there was a need for an individual *mens rea* that went beyond that required for the basic nature of the conduct, whether that be murder, assault, robbery or kidnapping. In international law, the mental element frequently seems to be ignored, and focus is instead placed on the special factual circumstances in which the culpable

page 755

conduct occurred. However, if a detailed refutation is required, it seems justified to use our established common law rules of *mens rea* where the international law does not have specific standards.

Most criminal offences require that there be a *mens rea* in relation to the basic act or omission. At times, but by no means invariably, some form of *mens rea*, sometimes knowledge, sometimes recklessness or even inadvertence, is required in relation to consequences and circumstances as well. In the present case, however, the trial judge insisted that there be a subjective mental element in relation to all the elements of the act that constitute the war crime or crime against humanity. For example, in relation to the first count of unlawful confinement, the trial judge considered the necessary mental element to be:

Essential Elements of Count 1: Confinement: Crime Against Humanity

(3)The accused knew that the confinement had the factual quality of a crime against humanity in the sense that it was

(1)enslavement or

(2)inhumane or persecutorial deportation or

(3)racial or religious persecution or

(4)an inhumane act and

(4)The accused knew that the people confined were a civilianpopulation or any identifiable group of persons and

(5)The accused knew the confinement was in execution of or inconnection with the conduct... of war or any war crime. [Emphasis added.]

6065

Moreover, he emphasized that this was a subjective condition which the particular accused must satisfy; any such knowledge could not be simply inferred from the conduct or intent or knowledge to do the simple act. The judge instructed the jury on the second count in exactly the same way

page 756

except that he substituted "crime against humanity" with "war crime", and he followed a similar pattern in respect of robbery, kidnapping and manslaughter.

In my view, this is far too high a standard; a *mens rea* need only be found in relation to the individually blameworthy elements of a war crime or crime against humanity, not every single circumstance surrounding it. This approach receives support in Canadian domestic law. In *R. v. DeSousa*, [1992] 2 S.C.R. 944, at pp. 964-65, this Court held that reading in such a requirement for every element of an offence misconstrues and overgeneralizes earlier decisions of this Court. Rather, the proper approach, it noted, was that "there must be an element of personal fault in regard to a culpable aspect of the *actus reus*, but not necessarily in regard to each and every element of the *actus reus*" (p. 965). [Emphasis added.]
This reasoning is especially appropriate in dealing with circumstances related to international offences that do not involve culpability but are of a more technical nature. For example, the trial judge, in my view, erred in requiring for a finding of war crime that the accused knew that he was an agent of an occupying force or that there was actually war. Had the accused acted not as an agent but on his own, his individual culpability would be no less -- he might, indeed, be more culpable. The same would be true if he had committed the acts charged in peace time. As I have already indicated, all that matters is that these factual conditions be present. In the scheme as set out by the legislature, these conditions constitute a justification in the international system for extraterritorial prosecution rather than matters going to individual culpability. They go to jurisdiction.

The same is true of the trial judge's instruction that it was necessary that the accused know that the actions were directed against a civilian

page 757

population or an identifiable group. I would argue that such knowledge on the part of the accused is strictly irrelevant to his individual culpability. To forcibly confine or kidnap 8,617 people is equally blameworthy whether he knew or did not know that they were Jews. On a practical level, the lack of real relevance of knowledge about such matters is evident from the circumstances. Can anyone doubt that an adequate knowledge would be that difficult to find? When one is aware that the actions are directed at a large number of people with the same characteristic, such knowledge would be easily inferred. In this case, for example, since Jews had expressly been the only subject of all these actions to the knowledge of those involved, then it seems readily apparent that the requisite knowledge in relation to this circumstance is met. Similar considerations apply to other issues of this kind, such as whether a state of war existed.

I should at this stage, however, underline that there may be a requirement of a mental element for certain justifications, excuses and defences under international law, but, as previously noted, these are made available to the accused in defending himself or herself of the domestic offence, e.g., kidnapping, with which he is charged. If any such justification, excuse or defence arises on the evidence, it must be put to the jury and if the jury has any reasonable doubt respecting that

6066

mental element it must, of course, resolve that doubt in favour of the accused, as is the case of ar defence available to the accused under Canadian law.

As earlier noted, the trial judge's overemphasis on knowledge on the part of the accused led him to a different, if intertwined, type of error. It led him to confuse the difference between the mental element in relation to the factual nature of the impugned act and its legal or moral quality. As Dubin C.J. noted this confusion is best exemplified in the instruction in relation to the term "inhumane act" contained in the definition of "crime against humanity" in s. 7(3.76). This general category should not be taken to import a knowledge of the

page 758

inhumanity of the behaviour. If an accused knowingly confines elderly people in close quarters within boxcars with little provision for a long train ride, then the fact that the accused subjectively did not consider this inhumane should be irrelevant.

This confusion between appreciation of the factual as opposed to the moral or legal quality of the accused's actions was exacerbated by further comments in the trial judge's charge that indicated his view of the *mens rea* requirement. While the judge did refer on a number of occasions to the accused's knowledge of the factual quality of a crime against humanity, as Dubin C.J. points out, he returned again and again to his view that the jury had to be satisfied beyond a reasonable doubt that the accused knew that the act he did was inhumane (i.e., a crime against humanity). Dubin C.J. refers to a number of these instances (at pp. 32-33). I cite a few here:

Remember always that before the accused can be convicted, it has to be proved beyond a reasonable doubt, *whatever he did to his knowledge rose up to the level of a war crime or rose up to the level of a crime against humanity.*

Even if the Crown proved beyond a reasonable doubt the accused committed confinement, robbery, kidnapping or manslaughter; you must acquit unless the Crown also proves beyond a reasonable doubt that to the knowledge of the accused what he did rose up to the level of a war crime or rose up to the level of a crime against humanity.

. . .

One of the ways for the Crown to prove Count 1 is to prove beyond a reasonable doubt that the accused personally knew that the confinement had the factual quality of a crime against humanity in the sense that it was an inhumane act. Now, this is just one element. Of course, there are six or seven other things the Crown has to prove, but this is one example of one element the Crown has to prove. So *it is an essential element on that count that the Crown has to prove*

page 759

beyond a reasonable doubt the accused knew that the confinement was an inhumane act. [Emphasis added by Dubin C.J.]

In my view, these instructions introduced elements of knowledge of both the legal and moral status of the conduct, in a way that is not required by either domestic or international law. It is well established in our domestic criminal law jurisprudence that knowledge of illegality is not required for an accused. Section 19 of the *Code* echoes a requirement found in earlier codes

6067

(including the one in effect at the time the actions in this case were alleged to have been committed): ignorance of the law by one who commits an offence is not an excuse for committing the offence. At common law the principle is well established. As Smith and Hogan, *Criminal Law* (7th ed. 1992), put it, at p. 81:

It must usually be proved that D intended to cause, or was reckless whether he caused, the event or state of affairs which, as a matter of fact, is forbidden by law; but it is quite immaterial to his conviction (though it might affect his punishment) whether he *knew* that the event or state of affairs was forbidden by law. [Emphasis in original.]

Nor should it be forgotten that awareness that the act is morally wrong is also immaterial. Smith and Hogan, *supra*, note, at p. 53:

A man may have *mens rea*, as it is generally understood today, without any feeling of guilt on his part. He may, indeed, be acting with a perfectly clear conscience, believing his act to be morally, and even legally, right, and yet be held to have *mens rea*.

In *R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 18, McLachlin J. emphasized that regardless of the nature of the circumstances or consequences required:

First, as Williams underlines, this inquiry has nothing to do with the accused's system of values. A person is not saved from conviction because he or she believes there

page 760

is nothing wrong with what he or she is doing. The question is whether the accused subjectively appreciated that certain consequences would follow from his or her acts, not whether the accused believed the acts or their consequences to be moral.

The underlying rationale behind the *mens rea* requirement is that there is a lack of sense of personal blame if the person did not in some way even intend to do the action or omission. In finding a war crime or crime against humanity, the trial judge must, of course, look for the normal intent or recklessness requirement in relation to the act or omission that is impugned. However, there is rarely any requirement that the accused know the legal status or description of his or her behaviour. This is not part of the rules of our criminal law and, in my view, is not required under international law. It would be strange if it were. For as counsel for the intervener B'Nai Brith observed, in the case of crimes against humanity, for example, the issue of humaneness would have to be judged in terms of the moral values of the perpetrator of the prohibited act, rather than the moral views of the international community that established the norm.

The Crown's international law expert, Professor Bassiouni, it is true, did at some point in his testimony suggest that an accused must have had knowledge of international law in order to find that he or she has committed a war crime or crime against humanity. While he readily agreed with the Crown that an accused need not know that his or her actions comprised some particular offence under international law, he suggested that the accused would have to have a "general sense" that his or her conduct was illegal under international law. Representative of his somewhat confusing viewpoint is the following exchange with crown counsel:

Q. Does he have to know that his conduct amounts to a war crime or crime against humanity at international law?

6668

A. He doesn't have to know that with the specificity that you're claiming it, and I suppose by my analogy is,

page 761

does a person who commits murder know that the act of murder constitutes murder in the first degree in that time of a statute. So it is the general knowledge that there is a prohibition by law that you're supposed to have, as opposed to a specific knowledge of the specific type of crime that you might be committing.

Q. And so would the victim or the -- ignorance of the law is no excuse in the application of international law?

A. Yes, indeed, because it is a general principle of law because it exists in every legal system of the world.

Q. So what is it that a perpetrator must know in order to attract culpability or liability at international law for war crimes or crimes against humanity?

A. Well, the individual must obviously have knowledge of the nature of the acts he is engaging in. He must know that these acts are a violation of the law. He does not have to know the specific label of the violation that he has committed. And he must act with knowledge or intent.

M. Cherif Bassiouni in his later book, *Crimes Against Humanity in International Criminal Law* (1992), suggests that there should be a "rebuttable presumption" of knowledge of international criminal law. He states, at p. 364:

This rebuttable presumption includes knowledge of the illegality of the act performed, based on the standard of reasonableness. Notwithstanding this standard of reasonableness, an individual may present the defense of ignorance of the law. Thus, this legal standard is not ultimately objective, but subjective.

Given this basic viewpoint, the trial judge was not surprisingly confused as to the *mens rea* requirement.

It is instructive at this point to say something about the utility of the views of learned writers such as Professor Bassiouni in determining the applicable international law. They are extremely useful, of course, in bringing before the Court the various relevant sources of law, and as Lord Alverstone observed in *West Rand Central Gold Mining Co. v. The King*, [1905] 2 K.B. 391, at p. 402, they also render "valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged". But, as he went on

page 762

to add (at p. 402), "in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be... the conduct of nations *inter se*, than the enunciation of a rule or practice as universally approved or assented to [by nation states] as to be fairly termed . . . `law'". In a word, international conventions and the practices adopted and approved as law by authoritative decision makers in the world community, along with the general principles of law recognized by civilized countries are what constitute the principal sources of

6069

international law. The pronouncements of learned writers on international law are extremely useful in setting forth what these practices and principles are, but the personal views of learned writers in the field, though useful in developing consensus, are of a subsidiary character in determining what constitutes international law. This approach, which is universally accepted by the international community, is authoritatively set down in Art. 38(1) of the *Statute of the International Court of Justice* which reads:

Article 38

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(*a*) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(*b*) international custom, as evidence of a general practice accepted as law;

(*c*) the general principles of law recognized by civilized nations;

(*d*) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. [Emphasis added.]

On an examination of these sources of international law, I am in complete agreement with the dissenting judges in the Court of Appeal that international law does not require such a high mental

page 763

element as the majority in that court and the trial judge thought necessary. In fact, Bassiouni does not represent the consensus of legal writers. He himself made it clear that the majority view among international law scholars was that there was no requirement of knowledge of the international legal quality of the actions. Clearly, this is not the international law emerging out of the *Charter of the International Military Tribunal*, for which no such knowledge requirement is included. Nor was it considered to be a requirement in the war crimes and crimes against humanity decisions at Nuremberg. And if we turn to the general principles of law recognized by civilized nations, Bassiouni in the passage in the testimony produced above accepted the principle that ignorance of the law is no excuse in that application of international law "because it exists in every legal system of the world".

Indeed, as one goes back through the history of international law, knowledge of international law has never been a requirement for culpability. Traditionally, the western and Christian conception of international law especially in this area can be seen to coincide with the dictates of natural law; under the Roman Law, for example the *jus gentium* which was applied to non-Romans was presumed because it coincided with the *jus naturalis*. In Grotius' theory of international law, which applied to all individuals as well, the dictates of international law followed as dictates of natural reason. Piracy or slavery would be contrary to international law as long as the accused had preyed on ships or traded in slaves, regardless of whether the pirates or slavedealers were aware of how their conduct was classified under international law. In the international realm as much as the domestic, blameworthiness in criminal law does not consist of

6070

knowingly snubbing the law, but rather in deliberately engaging in certain types of conduct that international law prohibits.

It is evident from his book that Bassiouni required a knowledge of the legal quality of the

page 764

actions because of his concerns about the state of international law prior to World War II. I will more fully address the issue of the alleged retroactivity of the international law below. It suffices at this point to say that this view appears to be based on an impoverished view of the nature and sources of international law. As Bassiouni himself noted in testimony, his view is a minority one. In relation to war crimes, the content of the prohibited actions was incontestably well established. And in relation to crimes against humanity (with which Bassiouni was concerned in his comments above), the more representative view is that these crimes were well established by the customs of international law as evidenced in practice and in a variety of earlier conventions, and their existence was justified, in particular, on the basis of the widespread practice of many national laws, including those of Germany, which criminally sanctioned such conduct. For example, Schwarzenberger, *International Law*, vol. 2, *The Law of Armed Conflict* (1968), at pp. 23-27, emphasizes that the foundation of the Nuremberg decisions on crimes against humanity was the existing prohibitions in civilized nations. For still greater certainty, this alternative (but well established) source for international law is, as noted earlier, specifically referred to in the definition of "crime against humanity" set forth in s. 7(3.76), which alludes to the three alternative sources of international law, conventional international law, customary international law and "the general principles of law recognized by the community of nations".

To summarize, then, the correct approach, in my view, is that the accused have intended the factual quality of the offence, e.g. that he was shooting a civilian, or that he knew that the conditions in the train were such that harm could occur to occupants. It is not possible to give an exhaustive treatment of which circumstances must have an equivalent knowledge component. Whether there is an equivalent mental element for circumstances will depend on the particular war crime or crime

page 765

against humanity involved. However, in almost all if not every case, I think that our domestic definition of the underlying offence will capture the requisite *mens rea* for the war crime or crime against humanity as well. Thus, the accused need not have known that his act, if it constitutes manslaughter or forcible confinement, amounted to an "inhumane act" either in the legal or moral sense. One who intentionally or knowingly commits manslaughter or kidnapping would have demonstrated the mental culpability required for an inhumane act. The normal *mens rea* for confinement, robbery, manslaughter, or kidnapping, whether it be intention, knowledge, recklessness or wilful blindness, would be adequate. As Egon Schwelb notes in "Crimes Against Humanity" (1946), 23 *Brit. Y.B. Int'l L.* 178, at pp. 196-97, almost all the serious crimes of the municipal law of civilized nations are also in some basic sense culpable offences in the minds of humanity; for a similar view, see Law Reform Commission of Canada, *Our Criminal Law* (1976), at pp. 3, 5 and 7. The additional conditions of the *actus reus* requirement under international law are intended to be used to ascertain whether the factual conditions are such that the international relations concerns of extraterritorial limits do not arise. Since in almost all if not every case the *mens rea* for the war crime or crime against humanity will be captured by the *mens rea* required for the underlying offence that will have to be proved to the jury beyond a reasonable doubt, the

6071

trial judge will rarely, if ever, have to make any additional findings in relation to the *mens rea* to satisfy the jurisdiction requirements.

From what I have been able to determine, the issue does not arise in this case, but assuming there may in certain cases be circumstances relating to crimes against humanity and war crimes that involve the individual culpability of an accused that is not captured by the mental element in the underlying offence, I do not think this could lead to any unfairness. It must be remembered that

page 766

under s. 7(3.73) of the *Code*, an accused may rely on any "justification, excuse or defence available . . . under international law" as well as under the laws of Canada. If a justification, excuse or defence that would have been available had the accused been charged with the crime under international law rather than the underlying crime, it should be referred to the jury with appropriate instructions whether the issue arises on the evidence presented by the Crown or the accused. The jury would then have to decide the issue, with any reasonable doubt decided in favour of the accused.

For these reasons, I conclude that the trial judge and majority of the Court of Appeal erred in requiring an excessively high *mens rea*, one going beyond the *mens rea* for the underlying offence.

Charter Issues

Up to this point, I have focused on distilling the proper interpretation of s. 7(3.71)-(3.77) of the *Criminal Code*, which I have found to be a jurisdiction-endowing provision, and on defining the precise limits of the trial judge's role in ruling on the preliminary jurisdictional question. I now turn to the constitutional issues raised by the respondent and by the courts below. As I earlier noted, the trial judge and the majority of the Court of Appeal intermixed the interpretative exercise with accommodation of *Charter* concerns. I prefer first to extract the true intention of Parliament in accordance with the ordinary canons of statutory interpretation, and only then to measure that interpretation by constitutional standards. This approach is especially appropriate in the present case since, as I see it, that interpretation does not pose *Charter* difficulties. I shall now set forth the questions raised and my response to them.

Does the Interpretation of Section 7(3.71) of the Criminal Code as a Jurisdictional Section Violate Sections 7 and 11(f) of the Charter, by Taking

page 767

From the Jury the Determination of War Crime/Crime Against Humanity?

This challenge was not raised by the respondent as a ground of cross-appeal *per se*; rather, it underlies his argument and the majority reasons in the Court of Appeal regarding the proper interpretation of s. 7(3.71)-(3.77). For the respondent, the concern lies more with s. 7 of the *Charter*. He argues that those on trial as a result of s. 7(3.71)-(3.77) are highly stigmatized. Consequently, he argues, unless the accused's guilt of war crimes or of crimes against humanity is found by a jury beyond a reasonable doubt and knowledge and subjective *mens rea* attach to such crimes, the exigencies of fundamental justice would not be met.

6072

This argument reflects a misunderstanding of this Court's jurisprudence on the dictates of fundamental justice respecting *mens rea* for an offence that involves special stigma. In *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 653, this connection between stigma and necessary *mens rea* was expressed by Lamer J. (as he then was):

. . . there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime.

I observed, at p. 665, that:

. . . because of the stigma attached to a conviction for murder, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime, namely one referable to causing death. . . . It is sufficient to say that the mental element required by s. 213(*d*) of the *Criminal Code* is so remote from the intention specific to murder (which intention is what gives rise to the stigma attached to a conviction for that crime) that a conviction under that paragraph violates fundamental justice.

page 768

I do not take our reasons in *Vaillancourt*, *supra*, to have dictated a necessary standard of proof or to have required that the jury decide certain matters, in cases of special stigma, in order to accord with the principles of fundamental justice. As I read it, the Court viewed certain offences, which import a high degree of stigma, as demanding a higher degree of *mens rea*, on a substantive level, reflecting the nature of the relevant offence. The debate arises on a substantive, not a procedural plane. The issue is one of finding where, on the objective-to-subjective scale of intent, a particular offence falls. Our assessment of fundamental justice in *Vaillancourt*, *supra*, and in all subsequent cases, did not lead us to conclude that because a special stigma might attach to certain offences, only the jury is to be entrusted with finding *mens rea* and only on a standard of proof beyond a reasonable doubt. I note that in *R. v. Lyons*, [1987] 2 S.C.R. 309, this Court has held that a hearing for the "labelling" of a convicted person as a dangerous criminal does not require the determination of dangerousness by a jury, though such a determination clearly carries a serious stigma.

The scheme set up by Parliament in s. 7(3.71)-(3.77) of the *Code* does not deprive the accused of his or her rights in a manner inconsistent with the principles of fundamental justice. The accused cannot be found guilty of the offence with which he or she was charged, i.e., the underlying domestic offence, unless the jury finds the relevant mental element on proof beyond a reasonable doubt, a mental element which, we saw, coincides with that of the war crime or crime against humanity. And if any excuse, justification or defence for the act arises under international law, the accused is entitled to the benefit of any doubt about the matter, including any relevant *mens rea* attached to such excuse, justification or defence.

I would add that any stigma attached to being convicted under war crimes legislation does not

page 769

come from the nature of the offence, but more from the surrounding circumstances of most war crimes. Often it is a question of the scale of the acts in terms of numbers, but that is reflected in the domestic offence; for example, a charge of the kidnapping or manslaughter of a hundred

6073

people in the domestic context itself raises a stigma because of the scale, but one that s. 7 is not concerned about. Similarly, the jurisprudence does not allow for stigma that may also result from being convicted of an offence in which the surrounding circumstances are legally irrelevant but public disapproval strong. Thus one convicted of a planned and deliberate murder can face additional stigma because his or her actions were particularly repulsive or violent, but our system does not make any additional allowance for that.

A separate but related concern is that reflected in the Court of Appeal majority's interpretation of s. 7(3.71). The majority looked to the *Charter* right of trial by jury, found in s. 11(*f*), to reinforce its other justifications for reading s. 7(3.71) as creating the offences of war crime and crime against humanity. The majority observed that the function of the jury is strongly rooted in determining the guilt or innocence of the accused. In its view, the determination of whether the accused's conduct amounts to a war crime or crime against humanity involves a question of culpability and thus must be entrusted to the jury. At page 111 of its reasons, the majority explained:

There can be no doubt that the allegations that **Finta** committed war crimes and crimes against humanity go to his culpability. Without these allegations Canada has no interest in and no justification for bringing **Finta** before a Canadian criminal court to answer for his conduct. The moral claim that Canada has against those who have committed the offences referred to in s. 7(3.71) outside Canada comes not from the mere alleged violation of Canadian domestic criminal law but from the additional allegation that the violation reached the dimension and status of a war crime or a crime against

page 770

humanity. Canada's international obligation to prosecute such offences rests on the same foundation.

The question, in the eyes of the Court of Appeal, thus was properly left to the jury.

In my view, Canada always has an interest, or a moral claim, in bringing those who commit acts that it regards as offensive behaviour to justice. Conduct is not viewed as any less culpable merely because it is committed abroad; murder of anybody anywhere is something we find abhorrent. This is reflected, as I earlier noted, in our laws of immigration and extradition. However, because of Canada's respect for the underlying premises of international relations, i.e., comity and respect for the sovereignty of independent states, a self-imposed limit is placed on its ability to prosecute these culpable acts when committed outside its territory. As part of our respect for sovereignty and part of our confidence in the standards of other nations, we would normally expect that other nations would punish the culpable conduct. Such a limit is also justified on the basis of efficacy of prosecution; it is usually more efficient and effective to prosecute in the place where the criminal act actually occurred. Nevertheless, we should never forget that, throughout, in our view, this conduct constitutes culpable conduct in violation of our legal standards. This perspective is reflected in s. 6 of the *Code*, explored above. The general principle embodied therein does not strip extraterritorially committed offences of their culpability in Canadian eyes; rather, the ability to convict or to discharge is removed.

The concern towards which the jurisdictional portion of s. 7(3.71) is directed is, rather, the

6074

determination of the appropriate court to hear the case. Put another way, the inquiry goes to assessing whether Canadian courts are able to convict or discharge the perpetrator of the relevant conduct. The international community agreed, presumably because of the general revulsion for these types of

page 771

conduct and their recognition of the need for cooperation because of the difficulty in bringing offenders to justice in the place where they were committed, that war crimes and crimes against humanity presented cases worthy of exception to the general concerns of international law. The preliminary question in s. 7(3.71), whether the relevant conduct constitutes a situation evaluated by the international community to constitute one warranting treatment exceptional to the general precepts of international law, involves an assessment of Canada's international obligations and other questions concerning the interrelationship of nations. The culpability of the acts targeted by this provision, from Canada's perspective, arises from, and will be assessed according to our standards of offensive behaviour as embodied in the *Code*. In the absence of international accord, we would still have found the conduct criminal and culpable, but for other policy reasons, would not have prosecuted in our courts. It is this domestic evaluation of culpability that served as the instigator for Canada's agreement to be bound by international conventions in this area. The decision to give Canadian courts jurisdiction in the case of war crimes and crimes against humanity, as is the case in the other situations of extraterritorial jurisdiction granted in s. 7 of the *Code*, is based not on culpability, but on other often totally unrelated policy considerations. The preliminary question of war crime or crime against humanity is more of a political inquiry than one of culpability. As such, the issue is not one that is viewed as traditionally falling within the province of the jury. Admittedly, the standard used to determine whether these exceptional cases are present is one of international "crimes". However, this does not take away from the fact that the considerations underlying this determination will involve questions of international obligations, with which the trial judge is better equipped to deal.

In my view, this situation is similar to that on which I commented on in *Libman v. The Queen*,

page 772

[1985] 2 S.C.R. 178, a case concerning Canadian criminal jurisdiction. I there noted that the concerns of international comity normally called for restraint in the extraterritorial application of Canadian criminal law. But I added that, in the context there, the dictates of international comity were not offended because there was a substantial Canadian element in the criminal activities involved. Moreover, I noted that our respect for the interest of other states was in fact served by assisting in the prosecution of offences having a transnational impact on other states. In an increasingly interdependent world, I observed (at p. 214), "we are all our brother's keepers" -- we are all responsible for the welfare of those in other societies. Nowhere can our international responsibility be more at stake than in the situation of war crimes and crimes against humanity. The international community has not only stated that it does not object to our exercising jurisdiction in this field; it actively encourages the prosecution of those whose criminal conduct also constitutes war crimes or crimes against humanity. From the sheer viewpoint of our moral responsibility, I fail to see any injustice in prosecuting these crimes in accordance with our normal criminal procedures.

When one considers the technical nature of the actual factual findings that must be made by the trial judge on the preliminary jurisdictional question, as well as the complicated nature of the

6075

international law with which he or she must grapple, it is apparent that the assignment of this determination to the trial judge is just and well-designed. As noted earlier, the factual issues involve matters specific to war, state policy and the classification of groups or individuals. In the case of a specific war crime, the trial judge would be confronted with questions of circumstances, such as whether the actions occurred during a state of war, as well as of definition of the objects of the relevant conduct, such as whether the victims were enemy soldiers, surrendered prisoners or civilians. Where a crime against humanity is alleged, the trial

page 773

judge's findings would have to include such issues as whether the impugned conduct was the practical execution of state policy and whether the conduct targeted a civilian population or other identifiable group of persons. The technical nature of these inquiries, unrelated as they are to matters of culpability, do not form part of the special capacity of the jury. This leads me to conclude that it is not unfair or contrary to our philosophy of trial by jury to entrust these issues to the trial judge rather than the jury.

Moreover, even among the authorities, much confusion exists as to the distillation of the contents of international law. No clear articulation of the physical and mental elements of the international offences of war crimes and crimes against humanity and their defences is found among scholars in this area. This confusion is understandable and unavoidable in our system of international law among sovereign nations. Although some aspects of these offences are delineated in conventions, this is not the case for all; another important source of international law is custom. To establish custom, an extensive survey of the practices of nations is required. Moreover, in the case of crimes against humanity, the *Criminal Code* definition is informed by the general principles of law recognized by the community of nations. As L. C. Green remarks, "Canadian Law, War Crimes and Crimes Against Humanity" (1988), 59 *Brit. Y.B. Int'l L.* 217, at p. 226:

> . . . a major problem would arise in seeking to ascertain just what is meant by the `general principles of law recognized by the community of nations'. . . . The difficulty lies in determining what are `general principles of law' and what percentage of the world's States constitutes a sufficient proportion to be considered `the community of nations'. Does this collection have to include every major power or be representative of all the leading legal systems of the world?

It is, of course, not an answer to this complicated task to say that the contents of international offences are too difficult to distill and, therefore,

page 774

that the accused cannot be found guilty; the confusion is the reality of the international law which Canada has obliged itself to observe and apply. This abandonment of international obligation, however, is likely to occur where the jury is called upon to determine the contents of the international offences. The necessary confusion could mislead the jury into believing that international norms are not really law and opens the door to manipulative lawyering. The questions of pinpointing international law, therefore, are best left in the hands of the trial judge whose training better equips him or her for the task. Not only is the judge better trained than the jury in evaluating international law, but, in fact, his or her interpretation of international law bears some force internationally (see Art. 38 of the *Statute of the International Court of Justice*). Again, the inquiries required are not of a kind immediately related to the accused's culpability for the

6076

domestic offence; rather, they are more legal and technical. There can, in my view, be no doubt that justice is better served by leaving the question of international law to the trial judge. I can perhaps make the point that the process bears some similarity to that of determining the content and application of common law, except that the latter, fluid and moveable as it may be, is far more precise.

The approach taken in the courts below leads to the following incongruous result. War crimes and crimes against humanity were viewed as so heinous as to require a procedure so unmanageable as to make successful prosecution unlikely. This is certainly not called for by the *Charter*. From *R. v. Lyons*, *supra*, onwards, this Court has repeatedly reiterated that s. 7 requires a fair procedure, not the procedure most favourable to the accused that can be imagined, and that fairness requires a proper consideration of the public interest (at p. 362). And here the public interest is no less than Canada's obligation as a responsible member of the world community to bring to justice those in our midst who have committed acts constituting war crimes

page 775

and crimes against humanity -- an obligation clearly contemplated by the *Charter* (s. 11(*g*)). This procedure, devised by Parliament, is essential to underline the fundamental values shared by Canadians with the world community. It must be workable not only to render justice in relation to the horrors of the past. It must also respond to the ongoing atrocities that daily assault our eyes whenever we turn on the television and that, we all have reason to fear, will continue into the future. And, of course, the procedure, as devised by Parliament, is fair. With appropriate modifications to ensure that Canada is respectful of the jurisdictional limits under the law of nations and the additional defences it provides, it is the same procedure we use to prosecute Canadians for crimes committed in Canada. With one exception required by international law, those accused of war crimes and crimes against humanity are accorded no less. They deserve no more.

As we have seen, many cogent reasons justify Parliament's choice to entrust to the trial judge the preliminary jurisdictional question of the presence of a war crime or a crime against humanity to be determined on a balance of probabilities. It must be realized, however, that the jury's role in the prosecution remains extensive. As in any other domestic prosecution, the jury is the sole arbitrator of whether both the *actus reus* and the *mens rea* for the offence with which the accused is charged are present and whether any domestic defences are available to the accused. Moreover, in addition to its normal functions, the jury also decides whether any international justification, excuse or defence is available. These determinations are not merely technical findings to supplement the extensive role of the trial judge; on the contrary, they go to the essence of the accused's culpability. The jury alone decides whether the accused is physically

page 776

and mentally guilty of the offence charged, on proof beyond a reasonable doubt.

The only element removed from the jury's usual scope of considerations in regular domestic prosecutions is the *de facto* law defence (s. 7(3.74)). This constitutes the respondent's second ground of cross-appeal, to which I now turn.

Does Section 7(3.74) of the Criminal Code Violate Section 7 of the Charter by Removing Available Defences?

6077

Section 7(3.74) must be read in conjunction with s. 7(3.73) in understanding the overall sch of defences permitted by the *Code*. For convenience, I will repeat them:

7. . . .

(3.73) In any proceedings under this Act with respect to an act or omission referred to in subsection (3.71), notwithstanding that the act or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 607(6), rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings.

(3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

The correct interpretation of these two sections is that they qualify each other. Section 7(3.73) does not in my view contradict s. 7(3.74). Together they indicate that the accused has the benefit of all available international and domestic justifications, excuses or defences. All that is ruled out by the operation of s. 7(3.74) is the simple argument that because a domestic law existed that authorized the conduct, that in itself acts as an excuse. I have indicated earlier that this rule is taken from the international law on the subject, and is founded on the very rationale for the existence of that law; see

page 777

Principles of the Nuremberg Charter and Judgment, Principle IV, *supra*.

The inclusion of the international justifications, excuses and defences will allow any recognized doctrines peculiar to the international context to be included. An example of a peculiar form of international defence is that of reprisals or the more general doctrine of military necessity; see, for example, W. J. Fenrick, "The Prosecution of War Criminals in Canada" (1989), 12 *Dalhousie L.J.* 256, at pp. 273-74. However, no such international justifications, excuses or defences are claimed here, and none applies.

The two defences put to the jury in this case are ones that exist under our domestic law. They are the peace officer and military orders defences, which are both related to arguments based on authorization or obedience to national law. These defences are not simply based on a claim that there existed a national law under which the accused acted. The rationale for these defences is that a realistic assessment of police or military organizations requires an element of simple obedience; there must be some degree of accommodation to those who are members of such bodies.

At the same time, it is generally recognized that totally unthinking loyalty cannot be a shield for any human being, even a soldier. The Canadian domestic provisions are probably more generous than required under international law. For example, a number of international lawyers have observed that the superior orders defence lacks official recognition under international law; see for example, Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (1965). The *Charter of the International Military Tribunal* and the trials pursued under it did not accept such a defence, except in mitigation of punishment. The defence, however, is part of the military law of many nations. The American military trial of soldiers for the horrendous My Lai

massacre during the Vietnam War is a widely known military case where the defence was raised 6078
In my

page 778

view, the defence is part of our national law, as explained notably in the work of L. C. Green; see, for example, *Superior Orders in National and International Law* (1976). The defence is not simply based on the idea of obedience or authority of *de facto* national law, but rather on a consideration of the individual's responsibilities as part of a military or peace officer unit. For these reasons, such a defence can be considered by the jury, and is not excluded under s. 7(3.74).

Essentially obedience to a superior order would appear to provide a valid defence unless the act is so outrageous as to be manifestly unlawful. Further, in any case, an accused will not be convicted of an act committed pursuant to an order wherein he or she had no moral choice but to obey. The flavour of the defence and the circumstances under which it may apply can perhaps be caught by excerpts from relevant authorities on the matter, many of which are reproduced in L. C. Green,"The Defence of Superior Orders in the Modern Law of Armed Conflict" (1993), 31 *Alta. L. Rev.* 320. I set forth a few of these. Lauterpacht, having referred to British and American manuals of military law, has this to say about it in his revised edition of Oppenheim's *International Law* (6th ed. 1944), vol. 2, at pp. 452-53:

. . . a Court confronted with the plea of superior orders adduced in justification of a war crime is bound to take into consideration the fact that obedience to military orders, not obviously unlawful, is the duty of every member of the armed forces and that the latter cannot, in conditions of war discipline, be expected to weigh scrupulously the legal merits of the order received. . . . However, . . . the question is governed by the major principle that members of the armed forces are bound to obey lawful orders only and that they cannot therefore escape liability if, in obedience to a command, they commit acts which both violate unchallenged rules of warfare and outrage the general sentiment of humanity.

page 779

That there is nothing unfair in not permitting superior orders as a defence where the act is "manifestly unlawful" is evident when one considers the nature of a manifestly unlawful order as it appears in *Ofer v. Chief Military Prosecutor* (the *Kafr Qassem* case) [Appeal 279-283/58, *Psakim* (Judgments of the District Courts of Israel), vol. 44, at p. 362], cited in appeal before the Military Court of Appeal, *Pal. Y.B. Int'l L.* (1985), vol. 2, p. 69, at p. 108, where the Military Court of Appeal of Israel approved the following judgment:

The identifying mark of a `manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: `forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of `manifest' illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.

In this area, the trial judge did a balanced job in setting out the requirements of the defence. For the peace officer defence he instructed the jury that the Crown must prove beyond a reasonable

6079

doubt that: (1) no reasonable person in the position of the accused would honestly (even if mistakenly) believe that he or she had lawful authority; or, (2) any reasonable person in the position of the accused would know that the offence (e.g., confinement) had the factual quality of a crime against humanity or a war crime; or, (3) the accused used unnecessary or excessive force. For the military orders defence, the judge instructed the jury that the Crown had to prove beyond a reasonable doubt that: (1) no reasonable person in the position of the accused would honestly (even if mistakenly) believe that the order was lawful, or, (2) any reasonable person in the position of the accused would know that the confinement had the factual quality of a crime against humanity or a war crime; and, (3) the accused had a moral choice to

page 780

disobey because no reasonable person in the position of the accused would honestly (even if mistakenly) believe on reasonable grounds that he or she would suffer harm equal to or greater than the harm he or she caused. In my view, such limits on these defences give effect to the intent of the s. 7(3.74) exclusion of the claim *simpliciter* of obedience to *de facto* national law.

It must be remembered that "the requirements of fundamental justice are not immutable; rather, they vary according to the context in which they are invoked"; see *Lyons*, *supra*, at p. 361. I would agree with Callaghan A.C.J. at p. 586 that "[t]here is no statutory or common law rule that supports the proposition that all defences are applicable to all offences". In *R. v. Bernard*, [1988] 2 S.C.R. 833, a majority of this Court agreed that the removal of a particular defence does not violate the principles of fundamental justice in s. 7 of the *Charter* even when that defence, drunkenness, arguably concerns the existence of *mens rea*. This is particularly the case where the exculpatory defence would undermine the entire purpose of an offence; for example, the defence of drunkenness cannot be used as a defence to impaired driving because it constitutes the very nature of the offence; see *R. v. Penno*, [1990] 2 S.C.R. 865. Less controversially, justifications and excuses are commonly restricted in their application, and there is no suggestion that this violates the principles of fundamental justice. For example, s. 14 of the *Code* prevents the operation of the defence of consent in relation to offences of causing death.

The whole rationale for limits on individual responsibility for war crimes and crimes against humanity is that there are higher responsibilities than simple observance of national law. That a law

page 781

of a country authorizes some sort of clearly inhumane conduct cannot be allowed to be a defence. Indeed, one main concern of both war crimes and especially crimes against humanity relates to state-sponsored or authorized cruelty. To allow the state to authorize and immunize its agents from any responsibility simply by enacting a law authorizing behaviour that is contrary to the principles of international law and the general principles of law observed by all civilized nations is in my view untenable. The basic viewpoint of a country such as Canada that recognizes that the standards of international law are part of our domestic law cannot allow for other states simply to deny or violate observation of the standards of international law by the enactment of contrary domestic laws.

Before turning to the remaining *Charter* issues raised in the cross-appeal, I should say that I largely accept the reasoning of both Callaghan A.C.J. and the Court of Appeal judges as more than adequate to dispose of these remaining issues, but I would make some additional observations.

6080

The reasons I have just given in no way detract from the findings of Callaghan A.C.J., accepted b the unanimous Court of Appeal, regarding the four remaining *Charter* issues on the cross-appeal.

Do the War Crime Provisions Violate Sections 7 and 11(g) of the Charter Because They Are Retroactive?

On its face, the jurisdiction provision, s. 7(3.71), specifically requires that the impugned conduct be illegal under both the Canadian law and the international law at the time. The simplest answer to this *Charter* argument is again that the accused is not being charged or punished for an international offence, but a Canadian criminal offence that was in the *Criminal Code* when it occurred. Nevertheless, the accused argues that the international law in this area was both retroactive and vague. This argument is in my view based on a shallow

page 782

understanding of the nature and contents of international law.

The definitions of "war crime" and "crime against humanity" in s. 7(3.76) requires that the act "at that time and . . . place, constitutes a contravention of customary international law or conventional international law". The definition of "crime against humanity" expressly allows for a third alternative, that the act be "criminal according to the general principles of law recognized by the community of nations".

The nature of a decentralized international system is such that international law cannot be conveniently codified in some sort of transnational code. Its differing sources may alarm some strict legal positivists, but almost all international lawyers now recognize that such a crude analogy to the requirements of a domestic law system is simplistic; see, for example, Williams and de Mestral, *supra*. The most common sources for international law are in the custom of international state practice and in international conventions. But other sources are also well established. For example, Art. 38(1)(*c*) of the *Statute of the International Court of Justice* provides as a third source, "the general principles of law recognized by civilized nations".

Even on the basis of international convention and customary law, there are many individual documents that signalled the broadening prohibitions against war crimes and crimes against humanity. Particularly with regard to war crimes there were numerous conventions that indicated that there were international rules on the conduct of war and individual responsibility for them. These limits were found in Christian codes of conduct, in rules of chivalry and in the writing of the great international law writers such as Grotius. All of this customary European law was confirmed and developed in a number of treaties and conventions through the 19th and 20th Centuries, for example, in the *Hague Conventions* of 1899 and 1907. This

page 783

impressive list of prohibited forms of conduct in war extended to treatment of non-combatants, innocent civilians and the imprisoned, the sick and the wounded.

As well, one should note that international law continues to maintain that crimes against humanity and war crimes were well established. This remains the official view of both international and national tribunals. As Bassiouni, *supra*, notes, at pp. 534-35:

6081

. . . arguments challenging the legality of the Charter's enunciation of "crimes against humanity" were consistently raised at the Nuremberg and Tokyo trials, the post-Nuremberg prosecutions under CCL [Allied Control Council Law] 10, before the proceedings conducted by the Allies in their occupation zones, and in the special military tribunals set up by the United States in the Far East. Similar claims were also raised in national tribunals, such as in the Eichmann and Barbie trials held, respectively, in Israel and France. They have always been rejected.

Bassiouni himself continued to have concerns about the somewhat uncertain status of crimes against humanity. It is part of his view that an entirely separate international court and a separate and elaborate international code is required. While these are admirable objectives, the absence of such ideal conditions should not be allowed to confuse the issue of whether crimes against humanity were retroactive in 1944 or not. The actions impugned as crimes against humanity had their own solid foundation.

As regards crimes against humanity, I prefer the reasoning of writers such as Schwarzenberger, *supra*, who have emphasized that the strongest source in international law for crimes against humanity was the common domestic prohibitions of civilized nations. The conduct listed under crimes against humanity was of the sort that no modern civilized nation was able to sanction: enslavement, extermination, and other inhumane acts directed at civilian populations or identifiable

page 784

groups. These types of actions have been so widely banned in societies that they can truly be said to fall to the level of acts that are *mala in se*. Even Bassiouni, *supra*, at p. 168, observes that the "historical evolution demonstrates that what became known as `crimes against humanity' existed as part of `general principles of law recognized by civilized nations' long before the Charter's formulation in 1945".

The drafters of our *Charter* realized that those with impoverished views of international law might argue that enforcing the contents of international law could be retroactive. Thus, s. 11(*g*) specifically refers to the permissibility of conviction on the basis of international law or the general principles of law recognized by the community of nations. A review of the drafting history of this provision reveals that one of the factors motivating the terms of the provision was the concern about preventing prosecution of war criminals or those charged with crimes against humanity; see the Deschênes Commission Report, *supra*, at pp. 137-48, especially at pp. 144-46; *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada* Issue no. 47, (January 28, 1981), at pp. 47:57-47:59, and Issue no. 41, (January 20, 1981), at p. 41:99.

For these reasons, I think it clear that the *Code* provisions do not violate s. 11(*g*) as being retroactive.

Does Section 7(3.71) Read with Section 7(3.76) Violate Section 7 of the Charter by Reason of Vagueness?

The respondent argues that the legislation in respect of the charges he faces is unconstitutional because it is too vague. This, of course, relates to the generality of the definitions of war crimes and crimes against humanity. Again the simple answer is that the offence with which the accused

6082

is charged and for which he will be punished is the

page 785

domestic offence in the 1927 *Criminal Code*, and it is readily apparent that the cross-appeal is not concerned with arguing that these standard *Code* provisions are unconstitutionally vague.

To the extent that arguments of vagueness apply to the jurisdiction section, as I have outlined earlier, I consider this to be based first of all on a limited view of the nature and content of international law. As Williams and de Mestral, *supra*, at p. 12, note, even though there is no comprehensive codification, international law can nevertheless be determined. Given our common law tradition, we should be used to finding the law in a number of disparate sources. The definition section (s. 7(3.76)) instructs us that a war crime is partly defined under customary or conventional international law, and a crime against humanity, under customary or conventional international law, or under the general principles observed by civilized nations.

As noted earlier, the requirements of international law in 1944 in relation to war crimes are seen to be quite elaborate and detailed. And in relation to crimes against humanity, while somewhat more difficult, the reference to the national laws of most civilized nations at the time would indicate that such conduct would be excluded under the national laws. Finally, as already explained, much of this conduct is illegal under international law because it is considered so obviously morally culpable that it verges on being *malum in se*.

The standard for unconstitutional vagueness has been discussed by this Court in several cases. In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, Gonthier J., at p. 643, thus summed up the standard of vagueness: "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate". In *United Nurses of Alberta v. Alberta (Attorney*

page 786

General), [1992] 1 S.C.R. 901, McLachlin J. for the majority wrote, at p. 930:

The union cites the principle that there must be no crime or punishment except in accordance with fixed, pre-determined law. But the absence of codification does not mean that a law violates this principle. For many centuries, most of our crimes were uncodified and were not viewed as violating this fundamental rule. Nor, conversely, is codification a guarantee that all is made manifest in the *Code*. Definition of elements of codified crimes not infrequently requires recourse to common law concepts: see *R. v. Jobidon*, [1991] 2 S.C.R. 714, where the majority of this Court, *per* Gonthier J., noted the important role the common law continues to play in the criminal law. In my view, the contents of the customary, conventional and comparative sources provide enough specificity to meet these standards for vagueness.

Did the Pre-Trial Delay Violate Sections 7, 11(b) and 11(d) of the Charter?

The respondent also attempts to argue that the 45-odd years that have elapsed between the alleged commission of the offences and the charging of Mr. **Finta** constitutes a violation of his *Charter* guarantees. This contention has no merit. This Court has already held that pre-charge delay, at most, may in certain circumstances have an influence on the assessment of

6083

whether post-charge delay is unreasonable but of itself is not counted in determining the delay, *R. v. Morin*, [1992] 1 S.C.R. 771, at p. 789. More commonly, pre-charge delay is not given any weight in this assessment; see *R. v. Kalanj*, [1989] 1 S.C.R. 1594. The *Charter* does not insulate accused persons from prosecution solely on the basis of the time that has elapsed between the commission of the offence and the laying of the charge; see *R. v. L. (W.K.)*, [1991] 1 S.C.R. 1091, at p. 1100. As the respondent does not seem to complain about any post-charge delay, this ground of cross-appeal must be dismissed.

page 787

Does Section 7(3.71) Violate Sections 7 and 15 of the Charter by Applying Only to Acts Committed Outside Canada?

This ground assumes that s. 7(3.71) of the *Code* creates the new offences of war crimes and crimes against humanity. As has been discussed above, this provision is a jurisdictional one and creates no new offences. Whether impugned conduct is committed abroad or in Canada, the accused would be charged with the same offence, be it murder, robbery, kidnapping or forcible confinement, as in this case, and subject to the same penalty, if convicted. In fact, any difference in treatment favours the extraterritorial perpetrator of the relevant act or omission. Whereas the local perpetrator can only be convicted upon the jury's finding of both *actus reus* and *mens rea* and that no domestic defence avails, the conviction of the extraterritorial perpetrator requires, in addition to the surmounting of those same hurdles, the jury's rejection of any applicable international justification, excuse or defence and the trial judge's finding that the requirements of war crime or crime against humanity have been met. In this way, the extraterritorial offender actually benefits from double protection as a result of s. 7(3.71).

Conclusion and Disposition

Before concluding I should refer to a further technical question. The indictment alleged two counts each of unlawful confinement, robbery, kidnapping and manslaughter; each of these offences alleged, in separate counts, a war crime or a crime against humanity. From what I have stated earlier, it will be obvious that I agree with Tarnopolsky J.A. that it was unnecessary to charge each of the underlying offences twice, once as constituting a crime against humanity and once as a war crime. To give jurisdiction to Canadian courts, it is sufficient that the act charged constituted a crime

page 788

against humanity or a war crime, so there were in essence four counts and not eight as framed.

I would allow the appeal on the basis of the first and second grounds of appeal, set aside the judgment of the trial judge and the Court of Appeal and order a new trial on four counts, one each of unlawful confinement, robbery, kidnapping and manslaughter, each count alternatively constituting a war crime or crime against humanity. I would dismiss the cross-appeal on the *Charter* issues.

The judgment of Gonthier, Cory and Major JJ. was delivered by

CORY J. -- How should the section of the *Criminal Code* dealing with war crimes and crimes against humanity be interpreted? That is the fundamental issue to be resolved in this appeal.

6084

I. Historical and Factual Background

Some facts, well known to all must be set out. In September 1939, the Second World War began in Europe. It ended on that continent with the surrender of Germany on May 8, 1945. Canada, as one of the allied powers, was at war with the axis countries (Germany and Italy) during the war. Hungary joined the axis powers in 1940, and was officially in armed conflict with Canada between December 7, 1941 and January 20, 1945.

Throughout the war Germany was led by Adolf Hitler and the National Socialist German Workers' Party (the Nazi Party). The German government pursued a cruel and vicious policy directed against Jewish people. When the war broke out, this same cruel policy was extended to all the areas under German influence and occupation, including Hungary. The implementation of the "final solution" by the German government meant that Jews were deprived of all means of earning an income, of their property, and eventually were deported to camps in eastern Europe, where they provided

page 789

forced labour for the German war effort. In these dreadful camps many were put to death.

In Hungary, between 1941 and 1944 a series of anti-Jewish laws were passed. They culminated in the promulgation of a law containing a formula for the identification of Jews and requiring them to wear the yellow star. The Jews were therefore an identifiable group for the purposes of Hungarian law.

In March 1944, German troops invaded Hungary. The existing government was removed and an even more servile pro-German puppet government was installed. After the invasion, although Hungary appeared to exist as a sovereign state, it was in fact an occupied country. In order to obtain complete control over Hungary's economic and military resources, the German government established a command structure which flowed directly from Heinrich Himmler, the Reichsführer SS and chief of German police, through the German-appointed Higher SS and police leader for Hungary in Budapest, and thence to the various German police and SS units that were stationed throughout the country, and from there to the Royal Hungarian Gendarmerie and the Hungarian police force.

The Royal Hungarian Gendarmerie was an armed paramilitary public security organization. It provided police services in rural areas and acted as a political police force. The German forces occupying Hungary were instructed not to disarm the Gendarmerie as it was in the process of being restructured so that it would be available to the Hungarian Higher SS and the Police Leader. Following the German occupation the new puppet government quickly passed a series of anti-Jewish laws and decrees. A plan for the purging of Jews from Hungary was incorporated in Ministry of Interior Order 6163/44, dated April 7, 1944. This was the infamous Baky Order. It was the only "authority" for the confinement of all Hungarian Jews, the confiscation of their property and their deportation.

page 790

It was the Baky Order which provided the master plan for the implementation of the final solution, which was to take place in six phases, namely: Isolation, Expropriation, Ghettoization, Concentration, Entrainment and Deportation. To carry out this plan, Hungary was divided into six

6085

zones under the command of the Royal Hungarian Gendarmerie. The City of Szeged was designated as one of seven concentration centres in Zone 4. The Baky Order was addressed to a number of officials, including all Gendarme District Commands, all Commanding Officers of the Gendarme (Detective) Subdivisions and the Central Detective Headquarters of the Royal Hungarian Gendarmerie. It placed responsibility for carrying out the plan on the Royal Hungarian Gendarmerie and certain local police forces.

Shortly after the issuance of the Baky Order the six phases of the final solution were put into effect in Szeged. The Jewish people of the city were rounded up and forced into a fenced-in ghetto. Usually the Jews remained in the ghetto for a couple of weeks. They were then either transferred directly to a brickyard, or first to a sports field and then a few days later to the brickyard. By June 20, 1944, 8,617 Jews had been collected in the brickyard.

The brickyard was filthy, with grossly inadequate sanitary facilities. It consisted of a large open area containing an enormous kiln, a chimney and several buildings used for drying bricks. Jewish men, women and children were crowded together. They slept on the ground in the drying sheds, which had roofs but no walls. The compound was surrounded by a fence and guarded by gendarmes.

Announcements were repeatedly made over the loudspeaker ordering the Jews to surrender their remaining valuables, gold or jewellery. When the Jews were gathered for these announcements, a basket or hamper was presented for the collection of the valuables and the people were told that anyone who failed to comply with the orders would be executed.

page 791

In the days between June 24 and 30, 1944, the Jews in the brickyard were marched by the gendarmes to the Rokus train station. There they were forced into box cars on three trains which took them from their homes in Hungary to the stark horror of the concentration camps.

Some 70 to 90 Jews together with their luggage were forced into each boxcar. These cars measured roughly eight metres by two metres. There was no artificial lighting in them. The crowding was so intense that most were forced to remain standing throughout the dreadful journey. The doors on the boxcars were padlocked shut. The only openings for air were small windows with grilles located in each of the four upper corners of the boxcar.

Usually the boxcars contained two buckets, one for water and the other for toilet facilities. However, during the journey the toilet buckets quickly overflowed with human excrement. The crowding was so bad that the buckets were inaccessible to many of the prisoners who were forced to relieve themselves where they stood or sat.

As a result of the intolerable conditions in the boxcars, some of the Jews, particularly the elderly, died during the journey. Neither the gendarmes nor the German guards permitted the bodies to be removed prior to the train's reaching its destination. The stench of decaying flesh was added to that of human excrement. Truly, these were nightmare journeys into hell.

Imre **Finta** was born on September 2, 1912 in the town of Kolozsvar. He studied law at the university in Szeged in the 1930s. In 1935 he enrolled at the Royal Hungarian Military Academy, and on January 1, 1939 was commissioned as a second lieutenant in the Royal

6086

Hungarian Gendarmerie. On April 5, 1942, he was promoted to the rank of captain. He was transferred to Szeged as the commander of an investigative unit of the Gendarmerie.

In the post-war confusion **Finta** left Hungary. In 1947-48, he was tried *in absentia* in the People's

page 792

Tribunal of Szeged and convicted of "crimes against the people". He was sentenced to five years of forced labour (later commuted to five years' imprisonment), confiscation of property, loss of employment and loss of the right to political participation for ten years. In 1951, **Finta** emigrated to Canada, and in 1956 became a Canadian citizen.

On January 27, 1958, as a result of a statutory limitation that existed under Hungarian law, the punishment of **Finta** in that country became statute-barred. In 1970, the Presidential Council of the Hungarian People's Council issued a general amnesty which, by its terms, applied to **Finta**. In Canada, the trial judge found that the general amnesty did not, either in its own terms or by operation of Hungarian law, constitute a pardon. Further, he found that the Hungarian trial and conviction were nullities under Canadian law. As a result, he concluded that **Finta** was not entitled to plead *autrefois convict* or pardon.

II. The Evidence

Expert Evidence as to the Validity of the Baky Order

Dr. Revesz testified that the Baky Order was manifestly illegal. He also stated that members of the Gendarmerie were involved in the conduct of criminal investigations. They were thus required to have a thorough training in Hungarian law and procedure. Dr. Revesz concluded that, given a gendarme's knowledge of the law and the decrees published prior to the Baky Order, such an officer would have known that the Baky Order was beyond the prerogative of the Under Secretary of State and contained at least 14 violations of Hungarian law.

The trial judge directed the jury that the Baky Order was unlawful as violating Hungarian law, including a number of principles of the Hungarian Constitution.

page 793

*Evidence Pertaining to **Finta**'s Involvement in Events at Szeged*

Finta was charged with unlawful confinement, robbery, kidnapping and manslaughter under the *Criminal Code*, R.S.C. 1927, c. 36, as amended. There are in effect four pairs of alternate counts. For example, count one describes the forcible confinement of 8,617 Jews as a crime against humanity, whereas count two characterizes that same forceable confinement as a

6087

war crime. The indictment alleges that in May and June of 1944 **Finta** forcibly confined 8,617 Jews in the brickyard at Szeged where he robbed them of their personal effects and valuables. It further alleges that in June 1944 at the Rokus railway station he kidnapped 8,617 Jews and caused the deaths of some of those persons.

The Crown's case depended in large measure on the testimony of 19 witnesses who had been interned in the brickyard and deported on one of the three trains. Some gave *viva voce* evidence before the jury. Others were examined by way of commission evidence taken in Israel and Hungary and their evidence was then presented at trial on videotape. Additionally, the trial judge at the request of the defence, directed that the videotape of commission evidence of two other survivors be placed before the jury.

The evidence of the survivors fell into four general groups. Six witnesses who knew **Finta** before the events in issue testified as to things said and done by him at the brickyard and at the train station. A second group consisting of three witnesses who did not know **Finta** beforehand identified him as having said or done certain things at the brickyard and at the station. A third group consisting of three witnesses who did not know **Finta** beforehand also testified as to things said and done at the brickyard and at the station. However, this last group based their identification of **Finta** on statements made to them by others. The fourth group, consisting of eight witnesses who did not know **Finta** beforehand and did

page 794

not identify him, gave evidence as to events at the brickyard and the train station.

Of the six witnesses who testified that they knew **Finta** before their imprisonment in the brickyard, four testified that **Finta** was in charge of the brickyard and one testified that everyone referred to **Finta** as the commander of the brickyard. Two of these six witnesses testified that **Finta** made the daily announcements in the brickyard demanding that the prisoners relinquish all their valuables on pain of death. Three of them testified that he supervised the confiscation of the detainees' valuables. Two of them testified that **Finta** was at the train station supervising the loading of the prisoners into the boxcars.

Among the second group of witnesses, one witness testified that, as **Finta** was in charge of the brickyard, all the announcements made or commands given in the brickyard were issued by him or on his behalf and that he supervised the confiscations. This witness testified further that **Finta** commanded the gendarmes when the Jews were escorted from the ghetto to the brickyard and that he supervised their loading by the gendarmes at the train station.

6088

Another witness in this group testified that **Finta** broke the silver handle off her mother's cane and confiscated it.

Several witnesses who identified **Finta** on the basis of what had been said by others gave testimony to the effect that **Finta** was in charge of the brickyard and supervised the confiscations. One of these witnesses testified that she saw a person identified to her as **Finta** give the announcements for the surrender of valuables and that, from her observations, that person was in charge at the railway station. Three other witnesses in this group testified that they were told by others that the person making the announcements, and in one case, the person in charge at the railway station, was **Finta**. The trial judge instructed the jury that they could not rely on the identification of **Finta** by these witnesses in so far as it depended on what others had told them as to the identity of the person they believed to be **Finta**.

page 795

The eight witnesses who did not identify **Finta** described the conditions in the brickyard, the deportation from Szeged and the conditions in the boxcars.

In addition to the evidence of the survivors, the Crown relied on photographs, handwriting and fingerprint evidence to identify **Finta** as a captain in the Gendarmerie at Szeged at the relevant time.

Expert and documentary evidence was tendered to establish the historical context of the evidence, the relevant command structure in place in Hungary in 1944 and the state of international law in 1944.

III. Decisions Below

Pre-Trial Motions (Callaghan A.C.J.H.C.)

Including pre-trial motions, the trial lasted eight months. On one of these pre-trial motions, Callaghan A.C.J.H.C., as he then was, upheld the constitutional validity of the war crimes provisions in the *Criminal Code*. This decision has now been reported (*R. v.* ***Finta*** (1989), 69 O.R. (2d) 557).

Trial (Campbell J. Sitting With a Jury)

At trial, the Crown contended that **Finta** was the senior officer of the Gendarmerie at the Szeged concentration centre and had effective control over the operation and guarding of the

6089

centre, thus committing the acts in question. Alternatively it was said that through his supervisory role, he procured, aided or abetted others who actually performed the acts alleged. Though acknowledging his presence at the time and place of the alleged offences, **Finta** denied that he was in a position of authority at the brickyard and stated that he was subject at the time to the command of the German SS. He denied responsibility for the alleged offences.

page 796

During the trial, the Crown called 43 witnesses, including 19 eyewitnesses. The trial judge, on behalf of the defence, called the evidence of two eyewitnesses, Ballo and Kemeny. The statement and minutes of a third witness, Dallos, whose testimony was given at **Finta**'s Hungarian trial, were also admitted. Mr. Dallos, a survivor of the brickyard who died in 1963, gave evidence of the existence of a Lieutenant Bodolay, who might have been in charge of the confinement and deportation of the Jews at the brickyard. Campbell J. ruled that, although the evidence was of a hearsay nature, it was admissible. He also stated that, together with other evidence, it "could leave the jury with a reasonable doubt about the responsibility of **Finta** for confinement and brickyard conditions." The trial judge warned the jury in his charge about the hearsay nature of the evidence.

The jury acquitted **Finta** on all counts.

Ontario Court of Appeal (1992), 92 D.L.R. (4th) 1, 73 C.C.C. (3d) 65, 14 C.R. (4th) 1, 53 O.A.C. 1, 9 C.R.R. (2d) 91, (Arbour, Osborne and Doherty JJ.A.; Dubin C.J. and Tarnopolsky J.A. dissenting)

A summary of the Court of Appeal's position on the principal issues and their final disposition is set out below.

(i) The Evidentiary Issue

The majority of the Court of Appeal (Arbour, Osborne and Doherty JJ.A.) found the evidence of Dallos called by the trial judge to be admissible, despite its hearsay, and in one instance, double-hearsay nature. The majority affirmed the reasons given by the trial judge, both with respect to the unique features of the trial, and the principles underlying the exceptions to the hearsay rule relating to reliability, necessity and fairness.

However, the majority concluded that the trial judge erred in introducing this evidence himself

page 797

before the defence had elected whether or not to call evidence. Though the majority observed that parts of the defence's final address were improper, they concluded that the trial judge's directions pertaining to the address negated any prejudice that might have resulted.

The substance of the judge's error, in their view, was to deprive the Crown of its statutory right to address the jury last. However, the majority could not conclude that, had the trial judge not

6090

called the evidence in question, the verdict of the jury might well have been different. The majority therefore ruled that this error did not occasion a substantial wrong or miscarriage of justice which would require that the jury's acquittal of **Finta** be reversed.

Like the majority, Dubin C.J. found that the trial judge erred in the manner in which he admitted the evidence on behalf of the defence. He noted that the entire defence theory rested on the impugned evidence. As a result of the trial judge's calling the evidence rather than the defence, the defence retained the right to address the jury last. In his view, at p. 37, this "inflammatory address tainted the trial" and served to aggravate the error. Dubin C.J. concluded that it could not be said that no substantial wrong or miscarriage of justice resulted from the cumulative effect of the trial judge's error.

Tarnopolsky J.A. concurred with the reasons and disposition of Dubin C.J. with respect to the evidentiary question.

(ii) The Interpretation of Section 7(3.71) and the *Mens Rea* Issue

The following passage, at pp. 104-5, summarizes the majority's approach with respect to the legislation in question:

In our opinion, s. 7(3.71) speaks not to the jurisdiction of the court but to the territorial scope of the offences referred to in that section. It does so by expanding the territorial reach of the criminal law beyond Canada to the rest of the world whenever the

page 798

acts or omissions in question meet the dual criminality requirement of the section.

For example, to establish the commission of a "normal" charge of robbery the Crown must prove that the robbery occurred in Canada. Where the Crown alleges robbery contrary to s. 7 (3.71), instead of proving that the robbery occurred in Canada, the Crown must prove that:

--had the act occurred in Canada, it would have amounted to robbery under the then operative *Criminal Code*, and

--the act amounted to a war crime or a crime against humanity.

As for the standard of *mens rea* to be applied by the jury, the majority approved of the charge given by the trial judge, which directed the jury to convict the accused of a war crime or a crime against humanity only if "the accused knew that his acts had the factual quality that made them war crimes", or if he knew his acts had a factual quality that "raised them up from the level of an ordinary crime to the international level of a crime against humanity".

In Dubin C.J.'s view, both the trial judge and the majority of the Court of Appeal misconstrued the purpose of s. 7(3.71) when they determined that the effect of this legislation was to create two new offences under the *Criminal Code*. He stated at p. 20:

In my opinion, that subsection does not create two new offences, namely, a crime against humanity and a war crime, nor does it define the essential elements of the offences with which the respondent was charged.... Section 7(3.71) provides a mechanism for persons to be convicted for

6091

violating the *Criminal Code* of Canada for acts or omissions committed abroad if those acts or omissions are deemed to have been committed in Canada and thus subject to the *Criminal Code* of Canada. Forcible confinement, robbery, kidnapping and manslaughter, contrary to the provisions of the 1927 *Criminal Code*, were the only offences for which the respondent stood trial.

He also rejected the proposition that the legislation alters the jurisdiction over a person or the

page 799

territorial jurisdiction of a court; rather, he viewed the section simply as concerning the culpability in Canada for conduct outside Canada.

Therefore, he held that it was within the power of the trial judge to determine whether the acts alleged, if committed in Canada, would have violated the *Criminal Code*, and to determine, as a matter of law, whether such acts constituted a war crime or a crime against humanity. It then remained for the jury to assess whether the acts were in fact committed. With respect to the *mens rea* requirement of this section, Dubin C.J. at p. 29 concurred with Tarnopolsky J.A. that the test was an objective one: "... it is quite irrelevant whether the respondent knew that those acts fell within the legal definition of a crime against humanity or whether he believed such acts to be inhumane".

Tarnopolsky J.A. was of the view that the Crown does not have to prove that the accused knew he was committing a war crime or a crime against humanity in order to convict him under s. 7 (3.71).

Like Dubin C.J., Tarnopolsky J.A. contended that s. 7(3.71) does not create new substantive *Criminal Code* offences; rather, he stated at p. 53 that the section is:
... merely *procedural* in nature, in that it confers jurisdiction on Canadian courts with respect to acts committed outside Canada, which would have been offences against Canadian law in force at the time of their occurrence, by deeming such acts to have occurred in Canada. [Emphasis in original.]

(iii) Jurisdiction and the Role of Judge and Jury

The majority determined that s. 7(3.71) sets out the elements of the offence. Those elements require that the act committed be a war crime or a crime against humanity. It follows that it is for the jury to decide whether the acts in question are war crimes or crimes against humanity.

page 800

Dubin C.J. found that pursuant to s. 7(3.71) of the *Code*, it is for the trial judge to determine first, whether the alleged acts would constitute, as a matter of law, a war crime or a crime against humanity, if the accused committed such acts outside Canada. The trial judge also must decide whether, as a matter of law, the alleged acts constitute an offence under the provisions of the *Code* then in force. It remains for the jury to decide if the accused did in fact commit the alleged acts. After reviewing the facts of this case, Dubin C.J. concluded at p. 29:

In my view, the trial judge in this case would have no difficulty in concluding, as a matter of law, that, if the respondent had confined the victims in the manner alleged in the evidence, such conduct would constitute a crime against humanity.

6092

In this case, I do not think that a trial judge should have had any doubt that such acts, if committed, would constitute the offence of forcible confinement.

Tarnopolsky J.A. found that the determination of whether an accused's acts constituted a war crime or a crime against humanity (characterized as a "jurisdictional fact" by the trial judge, in that it had to be proven before the court could assume jurisdiction to try the accused) should properly rest with the trial judge as it is a question of law. It was, therefore, a misdirection for the trial judge to instruct the jury that the Crown had to prove beyond a reasonable doubt that the accused must have knowledge of the mental element in relation to "jurisdictional facts".

(iv) Constitutionality of s. 7(3.71)

The majority judgment of the Court of Appeal affirmed the reasons of Callaghan A.C.J.H.C. in ruling that the war crimes provisions in the *Code* do not violate the *Canadian Charter of Rights and Freedoms*. However, the majority took issue with the characterization of the section as not giving rise to new offences under the *Code*. This departure from the findings of Callaghan A.C.J.H.C.,

page 801

however, did not affect the ruling with respect to the constitutionality of s. 7(3.71).

Dubin C.J. also agreed with the reasons of Callaghan A.C.J.H.C. in upholding the constitutionality of the war crimes provisions.

Finally, Tarnopolsky agreed with the rest of the Court of Appeal in affirming Callaghan A.C.J.H.C.'s pre-trial judgment that the war crimes provisions in the *Code* did not violate the *Charter*.

(v) Disposition

In the result, the majority of the Court of Appeal dismissed the Crown's appeal from the acquittal of **Finta**.

Dubin C.J. concluded that the jury was misdirected with respect to the *mens rea* requirement, and that the trial judge erred in determining what "jurisdictional facts" had to be proven to the jury. On these grounds, and for the other reasons set out, he would order a new trial.

On the basis of the trial judge's rulings concerning jurisdictional facts and the proof required of the essential elements of the war crimes offences, Tarnopolsky J.A. would also order a new trial.

IV. Relevant Legislation

Criminal Code, R.S.C., 1985, c. C-46, as amended by R.S.C., 1985, c. 30 (3rd Supp.), s. 1:

7. ...

(3.71) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that

6093

constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall

page 802

be deemed to commit that act or omission in Canada at that time if,

(*a*) at the time of the act or omission,

(i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,

(ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or

(iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or

(*b*) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada.

(3.72) Any proceedings with respect to an act or omission referred to in subsection (3.71) shall be conducted in accordance with the laws of evidence and procedure in force at the time of the proceedings.

...

(3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

...

(3.76) ...

"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

"war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention

page 803

6094

of the customary international law or conventional international law applicable in international armed conflicts.

15. No person shall be convicted of an offence in respect of an act or omission in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs.
25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(*a*) as a private person,

(*b*) as a peace officer or public officer,

(*c*) in aid of a peace officer or public officer, or

(*d*) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner. [Emphasis added.]

page 804

Canadian Charter of Rights and Freedoms

11. Any person charged with an offence has the right

...

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

V. Points in Issue

6095

The Appeal

Did the Court of Appeal err in law in holding that:

(1) s. 7(3.71) of the *Criminal Code*, is not merely jurisdictional in nature, but rather creates two new offences, a crime against humanity and a war crime, and defines the essential elements of the offences charged, such that it is necessary for the jury to decide beyond a reasonable doubt, not only whether the respondent is guilty of the *1927 Criminal Code* offences charged, but also whether his acts constituted crimes against humanity and/or war crimes as defined by ss. 7(3.71) and 7(3.76);

(2) the trial judge did not misdirect the jury as to the requisite *mens rea* for each offence by requiring the Crown prove not only that the respondent intended to commit the *1927 Criminal Code* offences charged, but also that he knew that his acts constituted war crimes and/or crimes against humanity as defined in s. 7(3.76);

[3](a)the trial judge did not err in putting the "peace officer defence" embodied in s. 25 of the *Criminal Code*, the "military orders defence" and the issue of mistake of fact to the jury; and

(b)the trial judge did not misdirect the jury in the manner in which he defined those defences;

[4]the trial judge's instructions to the jury adequately corrected defence counsel's inflammatory and improper jury address so as to overcome the

page 805

prejudice to the Crown and not deprive it of a fair trial;

[5] the DALLOS "evidence" (police statement and deposition) was admissible and, in particular, in finding that even though it did not fall within any of the recognized exceptions to the hearsay rule:

(i)it was admissible on the basis that it had circumstantial indicia of reliability;

(ii)there was a necessity to introduce it;

(iii)its admission was necessary to ensure a fair trial and to prevent a miscarriage of justice; and

(iv)it was admissible for the defence even though it would not be admissible for the Crown.
[6] the trial judge's error in calling the DALLOS evidence and the videotaped commission evidence of the witnesses KEMENY and BALLO as his own evidence, thereby denying the Crown of its statutory right to address the jury last, did not result in a substantial wrong or miscarriage of justice; and

[7] the trial judge's instructions to the jury relating to the Crown's identification evidence were appropriate and in not finding that he misdirected the jury on the issue of identification ...

The Cross Appeal

[8]Does s. 7(3.74) [and s. 7(3.76)] of the *Criminal Code* violate ss. 7, 11(*a*), 11(*b*), 11(*d*), 11

6096

(*g*), 12 or 15 of the *Canadian Charter of Rights and Freedoms*?

[9]If the answer to the question is in the affirmative, [are] ss. 7(3.74) [and 7(3.76)] of the *Criminal Code* ... reasonable limit[s] in a free and democratic society [justifiable] under s. 1 of the *Canadian Charter of Rights and Freedoms*?

VI. Analysis

(1) *Jurisdiction*

The jurisdiction of Canadian courts is, in part, limited by the principle of territoriality. That is, Canadian courts, as a rule, may only prosecute those crimes which have been committed within

page 806

Canadian territory. Section 6(2) of the *Criminal Code* provides that:

6. ...

(2) Subject to this Act or any other Act of Parliament, no person shall be convicted or discharged under section 736 of an offence committed outside Canada.

This rule reflects the principle of sovereign integrity, which dictates that a state has exclusive sovereignty over all persons, citizens or aliens, and all property, real or personal, within its own territory. Indeed, the Permanent Court of International Justice has confirmed that:

... the first and foremost restriction imposed by international law upon a State is that ... it may not exercise its power[s] in any form in the territory of another State.

(*The Case of the S.S. "Lotus"* (1927), P.C.I.J., Ser. A, No. 10, at p. 18.)

However, there are exceptions to the principle of territoriality. Professor Ian Brownlie has identified several other bases of jurisdiction in his work *Principles of Public International Law* (4th ed. 1990). According to Gillian Triggs, in "Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?" (1987), 16 *M.U.L.R.* 382, at p. 389:

[the] principle [of universality] permits the exercise of jurisdiction by a state in respect of criminal acts committed by non-nationals against non-nationals wherever they take place. Jurisdiction is based upon the accused's attack upon the international order as a whole and is of common concern to all mankind as a sort of international public policy. Historically, the universality principle has been employed to prosecute piracy and, more recently, hijacking. Under the principle of universality the criminal act is a violation of national law. International law merely gives states a liberty to punish but it does not itself declare the act illegal.

By contrast, some acts are crimes under international law. They may be punished by any state which has custody of the accused. Examples of this ... basis of jurisdiction include breaches of the laws of war included in

page 807

6097

the Hague Convention of 1907 and the four Geneva 'Red Cross' Conventions of 1949, torture, apartheid, attacks on diplomatic agents, drug trafficking and terrorism.

Section 11(*g*) of the *Charter* allows customary international law to form a basis for the prosecution of war criminals who have violated general principles of law recognized by the community of nations regardless of when or where the criminal act or omission took place. The use of international legal principles to ground jurisdiction for criminal activity committed outside of Canada has thus been constitutionally permissible since 1982. On February 7, 1985, Order in Council P.C. 1985-348 established the Commission of Inquiry on War Criminals (the Deschênes Commission). In its report, the Commission, headed by the Honourable Jules Deschênes, recommended that the *Criminal Code* be used as the vehicle for the prosecution of "war criminals in Canada". (See *Commission of Inquiry on War Criminals Report.*) In response to these recommendations, the *Code* was amended to include ss. 7(3.71) to (3.77). These provisions constitute an exception to the principle of territoriality found in s. 6(2) of the *Code*.

However, the jurisdiction of Canadian courts to try offences under ss. 7(3.71) - (3.77) is carefully circumscribed. It is only when the following conditions are fulfilled that offences under s. 7(3.71) may be prosecuted in Canada: (1) the act or omission was committed outside the territorial boundaries of Canada; (2) the act or omission constitutes a crime against humanity or a war crime; (3) the act or omission, had it been committed in Canada, would have constituted an offence against the laws of Canada in force at the time; and (4) in the words of the section at the time of the act or omission,

7. . . .

(3.71) . . .

(i) [the accused] is a Canadian citizen or is employed by Canada in a civilian or military capacity,

page 808

(ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or

(iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or ... [Emphasis added.]

(5) at the time of the act or omission, Canada, in conformity with international law, could have exercised jurisdiction over the person with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada.

Thus, there are a number of jurisdictional hurdles which must be cleared before Canadian courts may prosecute offences under s. 7(3.71). How then are these jurisdictional issues to be determined?

This Court considered the issue of jurisdiction and the respective roles of the judge and the jury in determining jurisdictional questions in the case of *Balcombe v. The Queen*, [1954] S.C.R. 303. In that case, at p. 304, the indictment alleged that the accused committed murder "... at the County

6098

of Dundas in the province of Ontario". He was tried and convicted in Ontario by a court composed of a judge and jury. At trial, he sought a directed verdict, arguing that the homicide had occurred in Quebec. The trial judge dismissed the motion and the Court of Appeal affirmed his ruling. In their application for leave to appeal to this Court, defence counsel argued that the question of the situs of the offence was one for the jury to decide, and that the trial judge should have directed them that they had to be satisfied beyond a reasonable doubt that the offence was committed within the province of Ontario. This Court dismissed the application for leave to appeal. Fauteux J. stated at p. 305:

The question of jurisdiction is a question of law -- consequently, for the presiding Judge -- even if, to its determination, consideration of the evidence is needed. It is a question strictly beyond the field of these matters which under the law and particularly under the terms of

page 809

their oath, the jury have to consider. They are concerned only with the guilt or innocence of the prisoner at the bar. Indeed the lawful fulfilment of their duties rests on the assumed existence of the jurisdiction of the Court to try, at the place where it is held, the accused for the crime charged.

The trial judge in the present case distinguished *Balcombe* on the basis that the questions of fact raised by some of the jurisdictional requirements in s. 7(3.71) go to the very heart of the moral culpability of **Finta**'s alleged actions. The trial judge put it in this way:

Although *Balcombe* decided that jurisdictional facts such as situs are decided by the judge and not the jury, the court noted in *Balcombe* that the facts in issue there did not go to the guilt or innocence of the accused. This is therefore not a case like *Balcombe*. In this case situs is not in issue. In this case the jurisdictional facts such as enslavement, deportation, persecution or the commission of any other inhumane act by the accused are facts that go to his very guilt or innocence. Such questions are for the jury. They go in this case to the very root of the principle of trial by jury.

This is particularly so when an adverse determination of those jurisdictional facts deprives the accused of important legal rights including *Charter* rights, special pleas, and the very significant defence of obedience to de facto law.

To take these crucial issues of jurisdictional fact away from the jury would deprive both him and the community of the right to have a jury decide all the facts that go to the guilt or innocence of the accused. Those facts will therefore be decided by the jury.

I agree with this position. There is an important distinction to be made between the jurisdictional issue of situs, which a judge is entitled to determine on consideration of the facts, and the jurisdictional issue as to whether the essential elements of an offence have been proven. The latter must be left to the jury. As Lamer J. (as he then was) stated in *R. v. Vaillancourt*, [1987] 2 S.C.R. 636, the presumption of innocence demands that the prosecution prove beyond a reasonable doubt the existence

page 810

of all of the essential elements of the offence -- whether specified in the legislation enacting the

6099

offence or constitutionally mandated by s. 7 of the *Charter*. In subsequent decisions of this Cou the requirement of proof beyond a reasonable doubt was extended to cover collateral factors, excuses and defences. (See *R. v. Whyte*, [1988] 2 S.C.R. 3; *R. v. Chaulk*, [1990] 3 S.C.R. 1303; *R. v. Keegstra*, [1990] 3 S.C.R. 697.) Thus, it matters not whether the additional international elements involved in the offences of crimes against humanity and war crimes constitute jurisdictional factors or excuses. The essential question is not how the elements are characterized, but rather, whether the jury would be forced to convict in spite of having a reasonable doubt as to whether the offences constituted a war crime or a crime against humanity.

It is the appellant's position that the trial judge would be called upon to make determinations on the balance of probabilities on issues such as whether the accused was responsible for the confinement of 8,716 Jews, whether he was responsible for loading these people into the boxcars and whether the actions were inhumane in the sense that they constituted acts of persecution or discrimination against an identifiable group. The trial judge would also be required to make a decision with respect to the mental element of these offences. It would remain for a jury only to decide whether the accused committed the *actus reus* and had the requisite mental element required for the acts committed to constitute offences under the Canadian *Criminal Code*.

This cannot be correct. It is readily apparent that the jury could find that the accused was guilty of manslaughter and yet have reasonable doubts as to whether his actions and state of mind were such that his actions amounted to crimes against humanity or war crimes. If the appellant's submission were accepted, the jury would nonetheless be forced to convict. This would result in a denial both of the accused's right to have the essential

page 811

element of the charges against him proven beyond a reasonable doubt and of his right to have his guilt or innocence determined by a jury.

(i) Summary of Jurisdiction

Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil only when the conditions specified in s. 7(3.71) are satisfied. The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity. It is thus the nature of the act committed that is of crucial importance in the determination of jurisdiction. Canadian courts may not prosecute an ordinary offence that has occurred in a foreign jurisdiction. The only reason Canadian courts can prosecute individuals such as Imre **Finta** is because the acts he is alleged to have committed are viewed as being war crimes or crimes against humanity. As Cherif Bassiouni has very properly observed, a war crime or a crime against humanity is not the same as a domestic offence. (See M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (1992).) There are fundamentally important additional elements involved in a war crime or a crime against humanity.

(2) *The Requisite Elements of the Crime Described by Section 7(3.71)*

(i) The Physical Elements or *Actus Reus*

The operative part of s. 7(3.71) is as follows:

6160

7. ...

(3.71) Notwithstanding anything in this Act or any other Act, every person who, either before or after the coming into force of this subsection, commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at that time if

page 812

It can be seen that the accused, in order to be convicted, must have committed an act that constituted a war crime or a crime against humanity and that the same act would constitute an offence against the laws of Canada in force at the time the act was committed. An integral part of the crime and an essential element of the offence is that it constitutes a crime against humanity. In the mind of the public those persons indicted for having committed crimes against humanity or war crimes stand charged with committing offences so grave that they shock the conscience of all right-thinking people. The stigma that must attach to a conviction for such a crime is overwhelming. Society simply cannot tolerate the commission of such crimes. As well, the nature of the penalty for committing a crime against humanity must be more severe than would be the punishment for an act of robbery, confinement or manslaughter committed in Canada.

What are the additional elements of a crime against humanity or a war crime that distinguish these crimes from other domestic offences such as manslaughter or robbery? Part of the answer to this question is found in the definition of the two terms in s. 7(3.76) of the *Criminal Code*. They are as follows:

7. ...

(3.76) . . .

"crime against humanity" means murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that is committed against any civilian population or any identifiable group of persons, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of customary international law or conventional international law or is criminal according to the general principles of law recognized by the community of nations;

"war crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention

page 813

of the customary international law or conventional international law applicable in international armed conflicts. [Emphasis added.]

Thus, with respect to crimes against humanity the additional element is that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people. With respect to war crimes, the additional element is that the actions constitute a violation of the laws of armed conflict. These elements must be established both in order for a Canadian court to have the

6/01

jurisdiction to try the accused and in order to convict the accused of the offence.

(ii) The Mental Element or *Mens Rea*

The "international element" of the s. 7(3.71) offences is not comprised solely of the *actus reus* or of the physical quality of the actions. Canada acquires jurisdiction over actions performed in foreign territory only when those actions reach the level of an international crime or when they are "criminal" according to the general principles of international law. A crime is comprised of both a physical and a mental element. As was noted by the majority of the Court of Appeal in the present case, the definitions of war crimes and crimes against humanity found in s. 7(3.76) do not expressly define the mental state which must accompany the facts or circumstances that bring an act within the definition of a war crime or a crime against humanity. Thus, a mental element must be read into those definitions. Indeed, it is now trite law that *mens rea* has been elevated from a presumed element in offences (*R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299), to a constitutionally required element (*R. v. Vaillancourt, supra*). Proof of this mental element is an integral part of determining whether the offences committed amount to a war crime or a crime against humanity and thus, whether the court has jurisdiction to try the case.

The appellant contends that the deeming mechanism in the *Code* provision presently under consideration is such that an accused charged under s. 7(3.71) may be found guilty not of "war crimes" or

page 814

"crimes against humanity" but of "ordinary" *Code* offences such as manslaughter, confinement or robbery. It is further argued that proof of the *mens rea* with respect to the domestic offences provides the element of personal fault required for offences under s. 7(3.71). Thus, it is submitted, proof of further moral culpability is not required, since once the necessary *mens rea* to confine forcibly, rob or commit manslaughter has been proved, it becomes impossible to maintain that the accused was morally innocent.

I cannot accept that argument. What distinguishes a crime against humanity from any other criminal offence under the Canadian *Criminal Code* is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group or race. With respect to war crimes, the distinguishing feature is that the terrible actions constituted a violation of the laws of war. Although the term laws of war may appear to be an oxymoron, such laws do exist. War crimes, like crimes against humanity, shock the conscience of all right-thinking people. The offences described in s. 7(3.71) are thus very different from and far more grievous than any of the underlying offences.

For example, it cannot be denied that the crimes against humanity alleged in this case, which resulted in the cruel killing of thousands of people, are far more grievous than occasioning the death of a single person by an act which constitutes manslaughter in Canada. To be involved in the confinement, robbing and killing of thousands of people belonging to an identifiable group must, in any view of morality or criminality, be more serious than even the commission of an act which would constitute murder in Canada.

Therefore, while the underlying offences may constitute a base level of moral culpability, Parliament has added a further measure of blameworthiness by requiring that the act or omission

6102

page 815

constitute a crime against humanity or a war crime. If the jury is not satisfied that this additional element of culpability has been established beyond a reasonable doubt, then the accused cannot be found guilty of a war crime or a crime against humanity.

In *R. v. Vaillancourt*, *supra*, this Court held that there are certain crimes where, because of the special nature of the available penalties or of the stigma attached to a conviction, the principles of fundamental justice require a mental blameworthiness or a *mens rea* reflecting the particular nature of that crime. It follows that the question which must be answered is not simply whether the accused is morally innocent, but rather, whether the conduct is sufficiently blameworthy to merit the punishment and stigma that will ensue upon conviction for that particular offence. In the present case there must be taken into account not only the stigma and punishment that will result upon a conviction for the domestic offence, but also the additional stigma and opprobrium that will be suffered by an individual whose conduct has been held to constitute crimes against humanity or war crimes. In reality, upon conviction, the accused will be labelled a war criminal and will suffer the particularly heavy public opprobrium that is reserved for these offences. Further the sentence which will follow upon conviction will reflect the high degree of moral outrage that society very properly feels toward those convicted of these crimes.

In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, I suggested the contextual approach for the determination of the appropriate level of fault required for a given offence. The offence must be viewed in the context of the objectives which Parliament attempted to achieve in enacting the provision as well as the competing interests of the individual accused. I think that the context in which the offence or offences are committed must also be taken into account in assigning the appropriate *mens rea* or mental element to the offence.

page 816

What was the aim of Parliament in passing the section? It was passed following the receipt of the Deschênes Commission Report. In the Parliamentary debates following the tabling of the report, the Minister of Justice observed that Canadians would never be satisfied with the notion that individuals guilty of war crimes during World War II should find a safe haven in Canada.

There can be no doubt that Canadians were revolted by the suffering inflicted upon millions of innocent people. It seems that the section was passed to bring to trial those who inflicted death and cruel suffering in a knowing, pre-meditated, calculated way. The essential quality of a war crime or a crime against humanity is that the accused must be aware of or wilfully blind to the fact that he or she is inflicting untold misery on his victims.

The requisite mental element of a war crime or a crime against humanity should be based on a subjective test. I reach this conclusion for a number of reasons. First, the crime itself must be considered in context. Such crimes are usually committed during a time of war. Wars are concerned with death and destruction. Sweet reason is often among the first victims. The manipulation of emotions, often by the dissemination of false information and propaganda, is part and parcel of the terrible tapestry of war. False information and slanted reporting is so predominant that it cannot be automatically assumed that persons in units such as the Gendarmerie would really know that they were part of a plot to exterminate an entire race of people.

It cannot be forgotten that the Hungarian people were loyal to the axis cause. There was strong

'6/03

pro-German sentiment throughout the country. This was a time of great stress and anxiety as the Russian advance pushed back the German armies towards the borders of Hungary. A newspaper report of the time presented at the trial may give some indication of the feelings of the Hungarian people:

page 817

With the war, the front line nearing our borders, the Jewish problem is becoming more and more acute.... this country, girding itself for self-defence, possibly with German help, the internal situation of eight to nine hundred thousand Jews of basically hostile attitude to our military objectives demands new and effective measures....

In his policy-making speech, the Prime Minister expressively stated that the only way open to us in solving the Jewish problem is the deportation.

(*Szegedi uj Nemzedék*, April 9, 1944.)

Section 7(3.71) cannot be aimed at those who killed in the heat of battle or in the defence of their country. It is aimed at those who inflicted immense suffering with foresight and calculated malevolence.

What then is the nature of a war crime or inhumane act? In addition to the definition provided by the *Code* itself, the trial judge in this case gave the following definition of an inhumane act to the jury:

Inhumane. Inhuman, uncivilized. Not humane; destitute of compassion for suffering.

Inhumanity. The quality of being inhuman or inhumane; want of human feeling; brutality; barbarous cruelty.

Inhuman. Not having the qualities proper or natural to a human being; especially destitute of natural kindness or pity; brutal, unfeeling.

Brutal; barbarous; cruel.

The trial judge added to his comments that "Inhumanity in this context means some kind of treatment that is unnecessarily harsh in the circumstances". He explained to the jury that one of the ways that the domestic offences of kidnapping, confinement, and robbery could achieve the level of a crime against humanity was if the acts could be considered to be inhumane.

In my view, this is an appropriate characterization which emphasizes that for example robbery,

page 818

without the additional component of barbarous cruelty is not a crime against humanity. It cannot be inferred that someone who robs civilians of their valuables during a war has thereby committed a crime against humanity. To convict someone of an offence when it has not been established beyond a reasonable doubt that he or she was aware of conditions that would bring to his or her actions that requisite added dimension of cruelty and barbarism violates the principles of fundamental justice. The degree of moral turpitude that attaches to crimes against humanity and

6104

war crimes must exceed that of the domestic offences of manslaughter or robbery. It follows that the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence.

I find support for this position in decisions of this Court relating to the constitutional requirements for *mens rea*. In *R. v. Martineau*, [1990] 2 S.C.R. 633, the Court struck down s. 213 (*a*) of the *Criminal Code*, R.S.C. 1970, c. C-34. This section provided that the offence of murder would be committed in circumstances where a person caused the death of another while committing or attempting to commit certain named offences, and meant to cause bodily harm for the purpose of committing the underlying offence or to facilitate flight after committing the offence. Murder was deemed to have been committed regardless of whether the person meant to cause death and regardless of whether that person knew that death was likely to result from his or her actions. The majority of the Court (*per* Lamer C.J.) affirmed that in order to secure a conviction for murder, the principles of fundamental justice required subjective foresight of the consequences of death. As was noted in *R. v. DeSousa*, [1992] 2 S.C.R. 944, while it is not a principle of fundamental justice that fault or *mens rea* must be proved as to each separate element of the offence, there must be a meaningful mental element demonstrated relating to a culpable aspect of the *actus reus*. See also: *R. v. Hess*, [1990] 2 S.C.R. 906.

page 819

These cases make it clear that in order to constitute a crime against humanity or a war crime, there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity.

Thus, for all of the reasons set out earlier, I am in agreement with the majority of the Court of Appeal's assessment that the mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity. However, I emphasize it is not necessary to establish that the accused knew that his or her actions were inhumane. As the majority stated at p. 116:

... if the jury accepted the evidence of the various witnesses who described the conditions in the boxcars which transported the Jews away from Szeged, the jury would have no difficulty concluding that the treatment was "inhumane" within the definition of that word supplied by the trial judge. The jury would then have to determine whether **Finta** was aware of those conditions. If the jury decided that he was aware of the relevant conditions, the knowledge requirement was established regardless of whether **Finta** believed those conditions to be inhumane.

Similarly, for war crimes, the Crown would have to establish that the accused knew or was aware of the facts or circumstances that brought his or her actions within the definition of a war crime. That is to say the accused would have to be aware that the facts or circumstances of his or her actions were such that, viewed objectively, they would shock the conscience of all right-thinking people.

Alternatively, the *mens rea* requirement of both crimes against humanity and war crimes would be met if it were established that the accused was wilfully blind to the facts or circumstances that would bring his or her actions within the provisions of these offences.

6/05

page 820

(iii) Summary of the Elements of the Offence Described in s. 7(3.71): The Integral Aspects of the Section

The wording of the section, the stigma and consequences that would flow from a conviction all indicate that the Crown must establish that the accused committed a war crime or a crime against humanity. This is an integral and essential aspect of the offence. It is not sufficient simply to prove that the offence committed in Canada would constitute robbery, forcible confinement or manslaughter. An added element of inhumanity must be demonstrated to warrant a conviction under this section. The mental element required to be proven to constitute a crime against humanity is that the accused was aware of or wilfully blind to facts or circumstances which would bring his or her acts within the definition of a crime against humanity. However it would not be necessary to establish that the accused knew that his or her actions were inhumane. For example, if the jury was satisfied that **Finta** was aware of the conditions within the boxcars, that would be sufficient to convict him of crimes against humanity even though he did not know that his actions in loading the people into those boxcars were inhumane.

Similarly for war crimes the Crown would have to establish that the accused knew or was aware of facts that brought his or her action within the definition of war crimes, or was wilfully blind to those facts. It would not be necessary to prove that the accused actually knew that his or her acts constituted war crimes. Those then are the requisite elements of the offence and the mental element required to establish it.

(iv)Did the Trial Judge Err in his Charge Regarding the Requisite Mental Element?

The appellant concedes that the trial judge correctly instructed the jury on the mental element of the offences at various points in his charge.

page 821

However it is contended that these instructions were negated by the frequent occasions in the course of his charge when his words could have conveyed the notion that the Crown must prove that the respondent actually knew his conduct constituted a crime against humanity or a war crime or amounted to an act which came within the definition of a crime against humanity or a war crime.

It is apparent that the trial judge made comments during the course of his very lengthy and complex charge which could have been construed as requiring the Crown to prove that the accused knew that his conduct was inhumane. However the charge included several clear directions as to the correct approach. When the charge is looked at as a whole, it is clear that the trial judge did not misdirect the jury on the issue of *mens rea*. For example, he stated:

The next item is heading No. 9, the mental element for crimes against humanity and simply the Crown has the duty to beyond a reasonable doubt [*sic*] that the particular offences; robbery, kidnapping, confinement, manslaughter, to the knowledge of the accused had those factual qualities that raise them up to a crime against humanity.

6106

The Crown doesn't have to prove the accused is an international scholar, that he knows the pigeon holes or nooks and crannies of international law. It is sufficient to prove the accused knew his acts had the factual quality of enslavement or persecutorial deportation or racial or religious persecution or inhumanity that raised them up from the level of an ordinary crime to the international level of a crime against humanity.

With respect to proof of the mental element for crimes against humanity, the trial judge instructed the jury that:

The Crown also has to prove the physical and mental element of war crimes and crimes against humanity beyond a reasonable doubt and that knowledge has to be brought home personally to the accused as a factual quality that what he does is a war crime or crime against humanity, that it has those factual qualities.

page 822

Again, he doesn't have to know the nooks and crannies of international law, just has to know what he is doing has the nature and quality factually that makes it a war crime or crime against humanity. Does he know it is deportation for racial persecution? Does he know it is an inhumane act? Does he know it is ill treatment of the civilian population? In the manner I described.

Here again the trial judge made it clear to the jury that the accused simply needed to be aware of the surrounding factual circumstances and the actions which came within the definition of war crimes. The trial judge correctly instructed the jury that the accused need not know that his actions constituted a crime at international law.

The trial judge on several occasion stressed that the test to be applied was an objective one. For example with regard to deportation he stated:

As to the necessary mental element; the accused must intend to deport within the meaning I gave you for a crime against humanity. Apply to this count the issues as I reviewed them. Is the deportation a reasonable temporary measure for public safety, with the bedding and furniture and so forth stored safely for their return; might the accused honestly think so on reasonable grounds. Or would it be clear to any reasonable person that they were being deported because they were Jews or they were being persecuted under inhumane conditions.

With regard to the taking of property he said this:

The second part of that branch is as I have read it before, has the Crown proved beyond a reasonable doubt any reasonable person in the position of the accused would know that the taking had the factual quality of a crime against humanity (see 5) below and the accused personally as a principal or aider or abettor used violence or threats of violence.

The charge made it very clear that the jury had to decide whether **Finta** was aware of the

page 823

circumstances that rendered his actions either a crime against humanity or a war crime, and

6107

whether he had the requisite mental element for the domestic offences. The jury must have know

that, in order to convict, they had to find that **Finta** knowingly participated in conduct that reached the level of a war crime or a crime against humanity, and that his level of awareness was such that he could be held personally responsible for the crimes that were committed in Hungary at that time. The trial judge stressed that it was not sufficient that the jurors thought that what had happened constituted a violation of the laws of war or were crimes against humanity. **Finta** himself had to be aware of those conditions and factual circumstances that raised the crimes to the level of crimes against humanity or war crimes.

It should also be noted that the trial judge instructed the jury that they must find that **Finta** knew or was aware that he was assisting in a policy of persecution. This is part of the factual circumstances that **Finta** would be required to have known in order for his actions to fall within the definition of crimes against humanity. Although the *Code* does not stipulate that crimes against humanity must contain an element of state action or policy of persecution/discrimination, the expert witness, M. Cherif Bassiouni, testified that at the time the offences were alleged to have been committed, "state action or policy" was a pre-requisite legal element of crimes against humanity. Thus, in my view, the trial judge properly instructed the jury that they had to be satisfied that **Finta** knew or was aware of the particular factual circumstance which rendered the acts he was alleged to have committed crimes against humanity. The trial judge properly distinguished this factor from motive which, he clearly indicated to the jury, the Crown did not have to establish.

The trial judge made every effort to give clear, well-organized instructions to the jury in this long, complex and difficult trial.

page 824

(3) *The Defences*

Since the integral aspect of the offence is that the crime be against humanity or a war crime, some special defences may be raised with regard to it.

The questions raised with regard to the defences available to the respondent at trial are essentially the following: (1) should the defence of obedience to military orders and the peace officer defence be available to persons accused of offences pursuant to s. 7(3.71); (2) was the trial judge justified in putting the defences of mistake of fact and obedience to superior orders to the jury?

It might be helpful to first consider the defences which may be employed by a person accused of an offence pursuant to s. 7(3.71).

Section 7(3.73) of the *Criminal Code* provides that those accused of crimes pursuant to s. 7 (3.71) may avail themselves of all of the defences and excuses under domestic and international law. It reads as follows:

7. ...

6108

(3.73) In any proceedings under this Act with respect to an act or omission referred to in subsection (3.71), notwithstanding that the act or omission is an offence under the laws of Canada in force at the time of the act or omission, the accused may, subject to subsection 607(6), rely on any justification, excuse or defence available under the laws of Canada or under international law at that time or at the time of the proceedings.

Section 607(6) provides that a person who is alleged to have committed an act or omission outside Canada that is an offence in Canada and in respect of which that person has been tried and convicted outside Canada, may not plead *autrefois convict* under certain specified conditions.

Section 7(3.74) states that a person may be convicted of an offence referred to in s. 7(3.71) even if the act was committed in obedience to or

page 825

conformity with the law in force at the time and in the place of its commission.

Section 25 of the *Code* provides the accused with a justification for the use of as much force as is necessary to do anything in the administration or enforcement of a law, notwithstanding that the law is defective. It reads as follows:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(*a*) as a private person,

(*b*) as a peace officer or public officer,

(*c*) in aid of a peace officer or public officer, or

(*d*) by virtue of his office,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(2) Where a person is required or authorized by law to execute a process or to carry out a sentence, that person or any person who assists him is, if that person acts in good faith, justified in executing the process or in carrying out the sentence notwithstanding that the process or sentence is defective or that it was issued or imposed without jurisdiction or in excess of jurisdiction.

(3) Subject to subsection (4), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.

(4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner. [Emphasis added.]

6/09

page 826

The peace officer defence, set out above, is similar to the defence of obedience to military orders. The latter defence is recognized by most systems of criminal law. (See, e.g., L. C. Green, "Superior Orders and Command Responsibility" (1989), 27 *Can. Y.B. Int'l L.* 167.) It is based on the well-recognized principle that in both the armed forces and police forces commands from superior officers must be obeyed. It follows that it is not fair to punish members of the military or police officers for obeying and carrying out orders unless the orders were manifestly unlawful. In this case, at the time the offences were allegedly committed this defence would have been available to the respondent and therefore, pursuant to s. 7(3.73) of the *Code*, it was available to him at trial.

The common law defence of mistake of fact is based on the concept that to have a guilty state of mind, the accused must have knowledge of the factual elements of the crime he is committing. In other words, although an accused may commit a prohibited act, he is generally not guilty of a criminal offence where he is ignorant of or mistaken as to a factual element of the offence. (See for example *R. v. Prue*, [1979] 2 S.C.R. 547.) An accused is deemed to have acted under the state of facts he or she honestly believed to exist when he or she did the act alleged to be a criminal offence. (See *Beaver v. The Queen*, [1957] S.C.R. 531, and *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120.) The trial judge also instructed the jury that this defence was available to the respondent.

(A)Should the Defence of Obedience to Military Orders and the Peace Officer Defence be Available to an Accused Under Section 7(3.71)?

The appellant argues that neither the international law defence of obedience to superior orders nor the peace officer defence found in s. 25 of the Canadian *Criminal Code* should be available to persons charged with offences under s. 7(3.71). It

page 827

is submitted that, by putting the peace officer and military orders defences to the jury based on Hungarian decrees and orders, the trial judge gave effect to the defence of obedience to the law in force at that time and place. This, it is said, is contrary to Parliament's intention in enacting s. 7 (3.74), and contrary to the principle that an accused cannot plead the laws of the state to justify crimes against humanity and war crimes, when those crimes, by their very nature, must be state sponsored. With respect to s. 25 of the *Code* the appellant argues that the trial judge having directed the jury, as a matter of law, that the Baky Order, the anti-Jewish decrees and the train schedule document were unlawful, should have found that the s. 25 defence was inapplicable since the respondent's acts could not be said to be "required or authorized by law" as stipulated in s. 25.

Secondly, the appellant argues, the defence of mistake of fact should not have been put to the jury in conjunction with the defence of obedience to superior orders and the peace officer defence since the question of what the respondent believed is a separate issue going to *mens rea* and is irrelevant to a "positive" defence. Additionally, the appellant contends that by putting the defence of mistake of fact to the jury, the trial judge was actually putting the defence of mistake of law to the jury. This, it is said, violates the presumption of knowledge of the law and requires the Crown to prove that the accused knew that his acts fell within the legal definition of the offence charged.

6110

Finally, the appellant argues that the trial judge misdirected the jury in the manner in which h defined those defences. The trial judge incorporated the component elements of crimes against humanity and war crimes into the definition of the defences. This, the appellant argues, was incorrect.

page 828

At this stage it may be appropriate to consider the history of the defence of obedience to superior orders. Whether obedience to superior orders can shield an offender has been a concern of legal writers for centuries. (See for example: L. C. Green, "Superior Orders and the Reasonable Man", in *Essays on the Modern Law of War* (1985), at pp. 43 and 49.)

(i) *Historical Analysis of the Defence of Obedience to Superior Orders*

Our principles of criminal law often cannot readily be applied to the military. Our ideas of criminal law have evolved slowly. They involve a concept of equality before and under the law. Everyone is entitled to respect, dignity and the integrity of his or her body. Gradually it became accepted that an accused charged with assault was to be held personally responsible for violating the integrity of another human being. It is difficult if not impossible to apply that concept to the military.

The whole concept of military organization is dependent upon instant, unquestioning obedience to the orders of those in authority. Let us accept that the military is designed to protect the physical integrity of a nation, its borders and its people. The orders of the commander in chief must be carried out through the chain of command. The division commanders must carry out the orders of the army commanders. The regimental commanders must carry out the orders of the divisional commanders, the company commanders those of the battalion commanders, and the men in the platoons those of the lieutenant in charge. This requirement of instant obedience to superior order applies right down to the smallest military unit. Military tradition and a prime object of military training is to inculcate in every recruit the necessity to obey orders instantly and unhesitatingly. This is in reality the only way in which a military unit can effectively operate. To enforce the instant carrying out of orders, military discipline is directed at

page 829

punishing those who fail to comply with the orders they have received. In action, the lives of every member of a unit may depend upon the instantaneous compliance with orders even though those orders may later, on quiet reflection, appear to have been unnecessarily harsh.

The absolute necessity for the military to rely upon subordinates carrying out orders has, through the centuries, led to the concept that acts done in obedience to military orders will exonerate those who carry them out. The same recognition of the need for soldiers to obey the orders of their commanders has led to the principle that it is the commander who gives the orders who must accept responsibility for the consequences that flow from the carrying out of his or her orders.

Cherif Bassiouni, *supra*, has written on the subject of obedience of the military to orders that they receive in this vein at p. 399:

... throughout the history of military law, obedience to superior orders has been one of the

6111

highest duties for the subordinate. This obedience exonerates the subordinate from responsibility because of the command responsibility of the superior who issued the order.

This criminal responsibility attaches to the decision-maker and not to the executor of the order who is exonerated. As a counterpart, the subordinate is expected to obey the orders of a superior. This approach to responsibility is predicated on the assumption that the superior can be deterred from wrongful conduct by the imposition of criminal responsibility for unlawful commands. But when this assumption fails, obviously, the overall approach must be reconsidered.

As the author correctly points out, the military leader's defence of obedience to superior orders has been brushed aside at various times throughout history. This has been done where the crimes committed in obedience to superior orders during hostilities were so atrocious that they exceeded the limits of acceptable military conduct, and shocked the conscience of society.

page 830

Both Green (in "Superior Orders and Command Responsibility", *supra*, at p. 173) and Bassiouni (*supra*, at p. 416) report that one of the first people to assert the defence of superior orders before a tribunal, Peter von Hagenbach, was denied the protection of command responsibility.

Bassiouni, *supra*, writes at p. 416:

Perhaps the first person to assert the defense of superior orders before a tribunal was Peter von Hagenbach in the year 1474. Charles, the Duke of Burgundy, appointed Hagenbach the Governor (*Landvogt*) of the Upper Rhine, including the fortified town of Breisach. At the behest of Charles, Hagenbach, with the aid of his henchmen, sought to reduce the populace of Breisach to a state of submission by committing such atrocities as murder, rape and illegal confiscation of property. Hagenbach was finally captured and accused of having "trampled under foot the laws of God and man". Hagenbach relied primarily on the defense of "obedience to superior orders". His counsel claimed that Hagenbach "had no right to question the order which he was charged to carry out, and it was his duty to obey. Is it not known that soldiers owe absolute obedience to their superiors?" The Tribunal refused to accept Hagenbach's defense, found him guilty, and sentenced him to death.

See also Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. 2, (1968), at p. 465, and L. C. Green, "Superior Orders and Command Responsibility", *supra*, at p. 173.

In the United States, a significant case was tried during the War of 1812. There was then a divergence of opinion as to necessity of the war. In New England, the United States Navy was not very popular. One day while the ship *Independence* was docked in Boston Harbour, a passerby made some abusive remarks to a marine by the name of Bevans, who was standing guard on the ship. Bevans responded rather violently by driving his bayonet through the man. Bevans was charged with murder and pleaded the defence of obedience to superior orders, claiming that the marines on *Independence* had been ordered to bayonet whomever showed

page 831

them disrespect. At trial Story J. instructed the jury that such an order was illegal and void, and if

given and carried out, both the superior and subordinate would be guilty of murder. Bevans was convicted (*United States v. Bevans*, 24 Fed. Cas. 1138 (C.C.D. Mass. 1816) (No. 14,589), although his conviction was later reversed by the U.S. Supreme Court on jurisdictional grounds in *United States v. Bevans*, 3 Wheat. 336 (1818)).

Green (in "Superior Orders and Command Responsibility", *supra*, at pp. 174-75) states that the decision of Solomon J. in *R. v. Smith* (1900), 17 S.C. 561 (Cape of Good Hope), established the English position. In that case a soldier acting on the orders of his superior during the Boer War, killed a native for not performing a menial task. Although the court acquitted the soldier, it introduced the "manifest illegality" test, stating at pp. 567-68:

... it is monstrous to suppose that a soldier would be protected where the order is grossly illegal. [That he] is responsible if he obeys an order [that is] not strictly legal ... is an extreme proposition which the Court cannot accept.... [E]specially in time of war immediate obedience ... is required.... I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer.

Bassiouni, *supra*, at pp. 419-21, recounts:
The issue of "obedience to superior orders" first gained contemporary international significance during the war crimes trials that followed World War I. By virtue of Article 228 of the Treaty of Versailles, Germany submitted to the Allied Powers' right to try alleged war criminals. Although the Treaty originally provided that the trials would be administered by the state against whose nationals the alleged crimes were committed, it was subsequently agreed that the German *Reichsgericht*

page 832

(Supreme Court) sitting at Leipzig would be the court to preside over these cases. The two most notable cases involving the issue of "obedience to superior orders" during the Leipzig Trials were the *Dover Castle* and the *Llandovery Castle*.

In *Dover Castle*, the defendant, Lieutenant Captain Karl Neuman [*sic*], the commander of a German submarine, was charged with torpedoing the *Dover Castle*, a British hospital ship. The defendant claimed that he was acting pursuant to "superior orders", which were issued by his naval superiors who claimed that they believed that Allied hospital ships were being used for military purposes in violation of the laws of war. The Leipzig Court, acquitted the commander holding:

It is a military principle that the subordinate is bound to obey the orders of his superiors ... (w)hen the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible. This is in accordance with the terms of the German law, [sect] 47, para. 1 of the Military Penal Code ....

According to [sect] 47 of the Military Penal Code No. 2, a subordinate who acts in conformity with orders is ... liable to punishment as an accomplice, when he knows that his superiors have ordered him to do acts which involve a civil or military crime or misdemeanour. There has been no case of this here. The memoranda of the German Government about the misuse of enemy hospital ships were known to the accused .... He was therefore of the opinion that the measures taken by the German Admiralty against enemy hospital ships were not contrary to international

613

law, but were legitimate reprisals .... The accused ... cannot, therefore, be punished for his conc

In the subsequent *Llandovery Castle* case, the same court did not so readily grant the accused a defense of "obedience to superior orders". In that case, also involving a German submarine attack upon a British hospital ship, the submarine commander ordered his subordinates to open fire on the survivors of the torpedoed *Llandovery Castle* who had managed to get into lifeboats. The officers who carried out the order, First Lieutenants Ludwig Dithmar and John Boldt, were charged with the killings and pleaded that they followed the orders of their commander, Helmut Patzik (whom the

page 833

German authorities failed to apprehend after the war). The court, however, rejected this defense and stated:

The firing on the boats was an offence against the law of nations .... The rule of international law, which is here involved, is simple and is universally known. No possible applicability .... (The commander's) order does not free the accused from guilt. It is true that according to para. 47 of the Military Penal Code, if the execution of an order in the ordinary course of duty involves such a violation the superior giving the order is alone responsible. However, the subordinate obeying such an order is liable to punishment if it was known to him that the order of the superior involved the infringement of civil or military law. This applies in the case of the accused. It is certainly to be urged in favor of the military subordinates, that they are under no obligation to question the order of their superior officer, and they can count upon its legality. But no such confidence can be held to exist, if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law.

Nonetheless, the court acknowledged that the defence of obedience to superior orders was a mitigating factor to be taken into account in determining the appropriate penalty, and sentenced the accused to only four years' imprisonment.

Professor Yoram Dinstein, in *The Defence of 'Obedience to Superior Orders' in International Law* (1965), analyzed the use of the defence of "obedience to superior orders" at the Leipzig trials and correctly concluded, at p. 19, that:

(I) As a general rule, a subordinate committing a criminal act pursuant to an order should not incur responsibility for it.

(2) This rule is inapplicable if the subordinate knew that the order entailed the commission of a crime, and obeyed it nonetheless.

(3) To determine whether the subordinate was aware of the fact that he had been ordered to perform a criminal act, the Court may use the auxiliary test of manifest illegality.

page 834

The later cases, particularly those involving the hospital ships, reflect the increasing difficulties in determining when the defence of carrying out the order of a superior may be properly considered. In *Dover Castle*, 16 A.J.I.L. 704 (1921), it would at first blush have been unthinkable that the defence could be utilized in the sinking of a hospital ship. Yet when the evidence

6114

established that the German High Command and members of the German Forces believed that hospital ships were being used for purely military purposes, perhaps as troop ships, the defence became one that not only was considered but also properly proved successful at trial. On the other hand the machine gunning and shelling of the survivors in the lifeboats in *Llandovery Castle*, 16 A.J.I.L. 708 (1921), was such an atrocious act and so adverse to all traditions and law of the sea that it was on its face manifestly unreasonable. As a result, the defence was unacceptable and the conviction correctly resulted. These cases also are an example of the necessity to consider the context in which the acts were committed. They cannot be viewed in any other way. The actions are the product of their times.

The manifest illegality test has received a wide measure of international acceptance. Military orders can and must be obeyed unless they are manifestly unlawful. When is an order from a superior manifestly unlawful? It must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong. For example the order of King Herod to kill babies under two years of age would offend and shock the conscience of the most hardened soldier. A very helpful discussion as to when an order is manifestly unlawful can be found in the decision of the Israel District Military Court in the case of *Ofer v. Chief Military Prosecutor* (the *Kafr Qassem* case) [Appeal 279-283/58, *Psakim* (Judgments of the

page 835

District Courts of Israel), vol. 44, at p. 362], cited in appeal before the Military Court of Appeal, *Pal. Y.B. Int'l L.* (1985), vol. 2, p. 69, at p. 108, and also cited in Green "Superior Orders and Command Responsibility", *supra*, at p. 169, note 8:

The identifying mark of a `manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: `forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of `manifest' illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.

The most significant decisions which dealt with the superior order defence were rendered by the International Military Tribunal at Nuremberg. There, for the first time a rule was set down which addressed the superior orders defence. Article 8 of the *Charter of the International Military Tribunal*, provides:

Article 8. The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that Justice so requires.

In interpreting and justifying this provision, the Tribunal stated that:

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though, as the Charter here provides, the order may be urged in

6115

mitigation of the punishment. The true test, which is found in varying degrees in the criminal l[illegible] of most nations, is not the existence of the order, but whether moral choice was in fact possible. [Emphasis added.]

page 836

(*Trial of the Major War Criminals before the International Military Tribunal*, vol. 22, (1946) (Official Text in the English Language), at p. 466.)

(ii) *The "Moral Choice" Test, Coercion and Necessity*

The "moral choice" test used by the International Military Tribunal has been criticized as undermining Art. 8, which effectively requires a subordinate to ignore a manifestly illegal order regardless of the consequences. (See for example: Morris Greenspan, *The Modern Law of Land Warfare* (1959), at p. 493.) However, other international legal scholars such as Professors Bassiouni (*supra*, at p. 427) and Dinstein (in *The Defence of `Obedience to Superior Orders' in International Law*, *supra*, at p. 152) assert that the moral choice test as enunciated by the International Military Tribunal "was meant to complement the provision of Article 8 and not to undermine its foundations". According to this interpretation, Bassiouni, *supra*, notes at p. 437 that

`obedience to superior orders' is not a defense ... to an international crime when the order is patently illegal and when the subordinate has a moral choice with respect to obeying or refusing to obey the order. But, if the subordinate is coerced or compelled to carry out the order, the norms for the defense of coercion (compulsion) should apply. In such cases, the issue is not justification, but excuse or mitigation of punishment.
A person may be compelled to obey superior orders either because of natural causes which place the individual in a condition of danger (necessity) or because of pressure which is brought to bear on him or her by another person (coercion). Bassiouni, *supra*, at p. 439, explains:

The two sources of compulsion though different may lead a person to harm another in order to avoid a greater or equal personal harm. Both are a concession to the instinct of human survival, but both are limited for policy and moral-ethical reasons, by positive and natural law.

page 837

The defence of obedience to superior orders based on compulsion is limited to "imminent, real, and inevitable" threats to the subordinate's life (*The Einsatzgruppen Case*, 4 Trials of War Criminals 470 (1948)). As Jeanne L. Bakker has pointed out in "The Defense of Obedience to Superior Orders: The Mens Rea Requirement" (1989), 17 *Am. J. Crim. L.* 55, the problem is to determine when threats become so imminent, real, and inevitable that they rise to the level of compulsion that disables a subordinate from forming a culpable state of mind.

I agree with Bakker, when she states, at pp. 72 and 73:

... a moral choice is available where subordinates have the freedom to choose between right and wrong courses of conduct without suffering detrimental consequences. Subordinates who choose to obey an illegal order when they could have disobeyed without suffering adverse consequences are guilty of criminal action.

...

6/16

Otto Ohlendorf, commanding officer of one of the notorious *Einsatzgruppen* (death wagon [*sic*], executed more than 90,000 "undesirable elements composed of Russians, gypsies, Jews and others" on the basis of an order that he recognized as "wrong", although he refused to consider "whether it was moral or immoral"(.) In view of his acknowledged unwillingness to exercise moral judgment, the tribunal refused him a plea of obedience to superior orders.

Bakker suggests that it is only when the soldier faces an imminent, real and inevitable threat to his or her life that the defence of compulsion may be used as a defence to the killing of innocent people. "Stern punishment" or demotion would not be sufficient. She states at p. 74:

Whether a subordinate's belief in the existence of an imminent, real and inevitable threat to his life is justified should be a function of circumstances surrounding the subordinate faced with an illegal order. A number of circumstances may be considered including age, education, intelligence, general conditions in which

page 838

subordinates find themselves, length of time spent in action, nature of the hostilities, the type of enemy confronted, and opposing methods of warfare.

Circumstances that go directly to the state of mind of the offender confronted with a moral choice include the announced penalty for disobeying orders, the probable penalty for disobedience, the typical subordinate's reasonable beliefs about the penalty, the subordinate's belief as to what the penalty is, and any alternatives available to the subordinate to escape execution of the penalty.

The element of moral choice was, I believe, added to the superior orders defence for those cases where, although it can readily be established that the orders were manifestly illegal and that the subordinate was aware of their illegality, nonetheless, due to circumstances such as compulsion, there was no choice for the accused but to comply with the orders. In those circumstances the accused would not have the requisite culpable intent.

I would add this to the comments of the text writers. The lower the rank of the recipient of an order the greater will be the sense of compulsion that will exist and the less will be the likelihood that the individual will experience any real moral choice. It cannot be forgotten that the whole concept of the military is to a certain extent coercive. Orders must be obeyed. The question of moral choice will arise far less in the case of a private accused of a war crime or a crime against humanity than in the case of a general or other high ranking officer.

(iii)*Obedience to Superior Orders Constituting Just Another Factual Element to be Taken into Account in Determining Mens Rea*

Some writers have concluded that the requirement to obey superior orders should not be characterized as a defence. Rather it is simply one of the many factual circumstances which must be

page 839

examined in determining whether the accused had the guilty mind required for a conviction.

6117

Professor Dinstein, at p. 88, states that:

... obedience to orders constitutes not a defence *per se* but only a factual element that may be taken into account in conjunction with the other circumstances of the given case within the compass of a defence based on lack of *mens rea*, that is, mistake of law or fact or compulsion.

Professor, later Sir, Hersch Lauterpacht expressed the same view in "The Law of Nations and the Punishment of War Crimes" (1944), 21 *Brit. Y.B. Int'l L.* 58, stating at p. 73:

... it is necessary to approach the subject of superior orders on the basis of general principles of criminal law, namely, as an element in ascertaining the existence of *mens rea* as a condition of accountability.
Bakker, *supra*, at p. 79, also argued, that "obedience to superior orders should be just another *factual* finding in the search for evidence indicative of the actor's state of mind when carrying out orders." (Emphasis in original.)

(iv) *The Canadian Context*

Section 7(3.74) of the Canadian *Criminal Code* provides that:

7. ...

(3.74) Notwithstanding subsection (3.73) and section 15, a person may be convicted of an offence in respect of an act or omission referred to in subsection (3.71) even if the act or omission is committed in obedience to or in conformity with the law in force at the time and in the place of its commission.

Section 15 of the *Criminal Code* provides a defence against conviction when the accused acted "in obedience to the laws for the time being made and enforced by persons in *de facto* possession of the sovereign power in and over the place where the act or omission occurs".

page 840

It is apparent that s. 7(3.74) was enacted to provide judicial discretion to deny a defence of reliance on laws such as the Baky Order. The section reflects the internationally recognized exception to the rule of international law which provides that states have a duty to refrain from intervention in the international or external affairs of other states. (See Brownlie, *supra*, at p. 291.) Without this exception, countries such as World War II Germany, whose state policy of persecution was enshrined in national legislation, could effectively claim that the matter was one of domestic concern and that the principle of sovereign integrity prevented other states from interfering with their citizens who carried out their laws which constituted crimes against humanity.

In the absence of this exception, even Hitler could have defended charges against him by claiming that he was merely obeying the law of the country. As a German citizen he too was subject to the laws of the state, and was required to comply with the legislation mandating the "Final Solution". If obedience to *de facto* law were permitted to be used as an automatic defence then not even the most despotic tyrant, the author and enforcer of the most insidious laws against humanity, could be convicted for the crimes committed under his regime. This would be an unacceptable result. Hence, Canadian courts have the discretion to convict a person of a war crime

6/18

or a crime against humanity notwithstanding the existence of laws in the country where the offence was committed which justified or even required such conduct.

The defence of obedience to *de facto* law is not the same as obedience to superior orders. Although at times, the superior orders which a soldier receives may become part of the domestic legal system, this would not change the nature of the order as far as the soldier was concerned. He or she would still be obliged to follow the order unless it were manifestly unlawful. Thus, the removal of the automatic right to claim obedience

page 841

to *de facto* law does not affect the defence of obedience to superior orders.

It follows that the trial judge was correct in putting the defence of obedience to military orders to the jury. In so doing he was not permitting the respondent to plead obedience to the laws of Hungary in effect at the time of the alleged actions. He reminded the jury of the expert testimony to the effect that the respondent, as a Captain of the Gendarmerie, would have been subject to the orders of General Baky. Then he instructed the jury that the Baky Order was unconstitutional according to Hungarian law, but that their task was to determine whether a reasonable person in the respondent's position would have found that the order was manifestly illegal and whether the respondent would have had a choice to obey the order or not. The trial judge did not characterize the defence as being obedience to laws of Hungary in existence at the time of the alleged offences. Rather, it was properly characterized as obedience to military orders.

I can find no fault in these instructions. Once again the situation must be considered in its context. This was a time of war. The Russian armies were approaching the borders of Hungary. Hungary was in effect an occupied state. German forces were in command and in control of the country. No matter how unlawful the Baky Order was, it was open to the jury to find that it would be difficult to expect a Captain of the Gendarmerie to disobey that order and that to the accused the Baky Order was a military order. It was in that light that his defence of obeying an order from a superior had to be considered.

The appellant argues that the effect of s. 7(3.74), which limits the accused's right to plead obedience to *de facto* law, is to preclude the use of the peace officer defence under s. 25 of the *Criminal Code*. The thrust of this argument is that s. 25(2), which permits the accused to rely on the law notwithstanding the fact that the law may be defective, is contrary to the purpose of s. 7 (3.74). However, I

page 842

am of the view that the trial judge correctly interpreted the application of the peace officer defence in the context of a war crime and a crime against humanity. The purpose of s. 25(2) is to provide legal protection to a police officer, who, acting in good faith and on a reasonable belief that his or her actions are justified by law, later finds out that those actions were not authorized because the law was found to be defective.

Section 25 is akin to the defence of mistake of fact. Unless, the law is manifestly illegal, the police officer must obey and implement that law. Police officers cannot be expected to undertake a comprehensive legal analysis of every order or law that they are charged with enforcing before taking action. Therefore, if it turns out that they have followed an illegal order they may plead the

6119

peace officer defence just as the military officer may properly put forward the defence of obedience to superior orders under certain limited conditions. The qualification is that the military officer must act in good faith and must have reasonable grounds for believing that the actions taken were justified. An officer acting pursuant to a manifestly unlawful order or law would not be able to defend his or her actions on the grounds they were justified under s. 25 of the *Criminal Code*.

In the case at bar, the trial judge clearly instructed the jury that if the law was manifestly illegal, in the sense that its provisions were such that it had the factual qualities of a crime against humanity or a war crime, then the accused could not rely on the peace officer defence under s. 25 of the *Code*. The written instructions provided to the jury make it clear that the peace officer defence would not be available if a reasonable person in the accused's position would know that his or her actions had the factual quality of a crime against humanity or a war crime. The peace officer defence would be available only if the law or orders were not manifestly illegal and if the accused honestly, and on reasonable grounds, believed his actions to be justified. For example,

page 843

the following instructions given to the jury were, in my view, entirely appropriate.

So it is very important to judge a policeman or soldier, anyone subject to military discipline with the test of whether they acted honestly and reasonably in all the circumstances at that time and in that place.

These defences are limited. They depend on honesty, they depend on reasonable conduct, they depend on not using excessive force. They aren't a licence to commit a crime. They aren't a licence if some government or some deputy minister or some under secretary of state goes off the rails and tells the policeman or soldier to do something that is clearly illegal. These defences are no licence to commit obvious crimes in the name of the government.

These instructions did not permit the accused to plead obedience to the laws of his country.

It is worth noting that s. 7(3.74) is permissive. It provides that a person may be convicted of an offence under s. 7(3.71) even if the actions were taken in conformity with *de facto* law. Thus, the existence of a law which is not manifestly unlawful and which appears to justify the conduct of the accused may, under certain conditions, be a factor to be considered in determining whether in acting under those laws the officer had the requisite guilty mind. More will be said on this issue when the constitutionality of the provisions is considered.

(B)Whether Mistake of Fact Should Have Been Put to the Jury in Conjunction With the Other Defences and With the Other Elements of the Offences

(i)*Whether Mistake of Fact Can be Combined With the Military Orders and Peace Officer Defences*

The appellant argues here that the trial judge improperly combined the military orders and peace officer defences with an issue going to *mens rea*, that is, mistake of fact. The appellant argues that,

page 844

6120

in effect, the trial judge put mistake of law to the jury. The appellant further argues that the trial judge erred in incorporating into the definition of the defences, the component elements of crimes against humanity and war crimes.

I cannot accept these arguments. The trial judge correctly instructed the jury that the accused charged with an offence under s. 7(3.71) cannot claim that, although a reasonable person would in the circumstances have known that the actions allegedly performed had the factual quality of crimes against humanity or war crimes, he mistakenly thought that they were lawful and that therefore he was justified in following orders and performing the actions. If this were so then an accused could always claim the defence of obedience to military orders by stating that the illegality of the order simply did not occur to him or her at the time. This would be stretching the defence beyond all reasonable limits. If it were permitted it would require the Crown to establish that the accused knew the orders and his or her actions were manifestly unlawful.

Rather, it is sufficient if it is established that the accused was aware of the factual qualities of his or her actions, provided that the jury finds that those actions come within the definition of crimes against humanity or war crimes and that a reasonable person in his or her position would know that orders to perform such actions would be manifestly unlawful. Further, if it is established that the accused had a valid moral choice as to whether to obey the orders, the accused will not be able to avail him- or herself of the defence of obedience to superior orders regardless of what his or her personal thoughts were concerning the lawfulness of the actions. It is not a requirement that the accused knew or believed, according to his or her own moral code or knowledge of the law, that the orders and his or her actions were unlawful.

These same principles apply with respect to the peace officer defence. As the trial judge correctly stated:

page 845

When the order is clearly unlawful in the sense I have described it [it clearly has the factual quality of a war crime or crime against humanity], there's no defence. No peace officer is required or authorized by law to do anything that is clearly a war crime or a crime against humanity.

He was also correct in instructing the jury that when the order or law is not manifestly unlawful and the peace officer or soldier acts on reasonable grounds, he is justified in using as much force as is required for the purpose even if it is later discovered that the law was defective. He properly told the jury that "[i]f the peace officer or soldier honestly believes the law or order is lawful domestically, he acts on reasonable grounds at the time, he has a right to be wrong even if it turns out later he was, in fact, wrong". In my view, this is a correct instruction on the defence of mistake of fact in combination with the peace officer and military orders defences. Mistake of fact is applicable only in circumstances where the order (in the case of the superior orders defence) or law (in the case of the peace officer defence) is not manifestly unlawful.

In my opinion the trial judge did an admirable job of combining these defences with the elements of the crimes in such a way that the jury was able to follow a logical and legally correct process of reasoning when considering their verdict.

(ii) *Summary With Respect to Availability of Defences*

6121

The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test. That is to say, the defences will not be available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior

page 846

orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. That is to say, there was such an air of compulsion and threat to the accused that the accused had no alternative but to obey the orders. As an example, the accused could be found to have been compelled to carry out the manifestly unlawful orders in circumstances where the accused would be shot if he or she failed to carry out the orders.

(iii) *Whether the Defences of Mistake of Fact and Obedience to Superior Orders Should Have Been Put to the Jury*

The appellant argues that the trial judge erred in putting the defences of mistake of fact and obedience to superior orders to the jury since there was no air of reality to these defences. It is said that because the accused did not testify, nor call any evidence, there was no evidence to support an inference that he mistakenly believed that the Hungarian decrees and orders, particularly the "Baky Order" and the "train schedule", authorized the actions he allegedly took. The appellant further argues that since the respondent's position was that he did not commit the offences, (with the exception of the acts of robbery which he admitted doing but claimed he believed he was authorized to perform) he could not then claim that if it was found that he had committed the offences in question, he was excused because he honestly believed his actions were lawful since he was obeying orders.

It is trite law that a trial judge must instruct the jury only upon those defences for which there is a real factual basis. A defence for which there is no evidentiary foundation should not be put to the jury (*Kelsey v. The Queen*, [1953] 1 S.C.R. 220). A defence should not be put to the jury if a reasonable jury, properly instructed, would have been unable to acquit on the evidence presented in support of that defence. However, if a reasonable jury properly instructed could acquit on the basis of the evidence giving rise to the defence, then the defence must be put to the jury. It is for the trial judge to decide whether the evidence is sufficient

page 847

to give rise to the defence as this is a question of law (*Parnerkar v. The Queen*, [1974] S.C.R. 449; *Dunlop v. The Queen*, [1979] 2 S.C.R. 881). There is thus a two-stage process to be followed. The trial judge must look at all the evidence to consider its sufficiency. Then, if the evidence meets the threshold, it should be put before the jury which will weigh it and decide whether it raises a reasonable doubt. See: *Wigmore on Evidence* (1983), vol. IA, at pp. 968-69; *R. v. Faid*, [1983] 1 S.C.R. 265, at p. 276. This is all that is meant by the requirement of sufficient evidence.

I cannot accept the appellant's contention that merely because the respondent chose not to testify at trial that the defences of mistake of fact and obedience to superior orders became unavailable to him. It matters not who put forward the evidence which supports the "air of reality" test; the crucial question is whether the evidence is sufficient to support an acquittal. In my view,

6/22

the respondent has correctly noted that evidence of the following circumstances was entered at trial which gave the defences of mistake of fact and obedience to superior orders an air of reality.

(1) **Finta**'s position in a para-military police organization;

(2) the existence of a war;

(3) an imminent invasion by Soviet forces;

(4) the Jewish sentiment in favour of the Allied forces;

(5) the general, publicly stated belief in newspapers in Hungary that the Jews were subversive and disloyal to the war efforts of Hungary;

(6) the universal public expression in the newspapers cited by one of the witnesses of approval of the deportation of Hungarian Jews;

page 848

(7) the organizational activity involving the whole Hungarian state together with their ally, Germany, in the internment and deportation;

(8) the open and public manner of the confiscations under an official, hierarchical sanction;

(9) the deposit of seized property with the National Treasury or in the Szeged synagogue.

The evidence of the state of the war, that the country was occupied by German forces, the existence of state-sanctioned conduct by police officers in a state of emergency, and the imminent invasion by the Soviet army which was but 100 km from Szeged was sufficient in my view to give an air of reality to the defence of obedience to superior orders. The evidence from the newspapers of public approval for the deportation, and the open manner in which the confiscations took place could have supported the defence of mistaken belief that the orders to undertake the actions which gave rise to the charges against the respondent were lawful.

Although the respondent only admitted to having taken the property of those people confined in the brickyard, the jury could have found that the respondent aided and abetted the deportation and internment. The fact that the respondent only admitted to confiscating the property did not mean that the jury would believe that that was all he did. Thus, the defenses were properly put to the jury on this basis. Additionally, a war crime and a crime against humanity may be committed by omission as well as by acts. If the jury found that the respondent had committed a war crime or a crime against humanity by having knowledge of the unlawful confinement and kidnapping and doing nothing to stop it, the respondent would be entitled to have the defences put before the jury. Thus, the defences may have been applicable to all counts depending on how the jury viewed the facts. Since there was an air of reality to the defences the trial judge acted properly in putting them to the jury.

page 849

(4) *Inflammatory Address*

6123

The trial of this matter was long and complex. It raised issues of a highly emotional and dec troubling nature. In this context it is perhaps understandable that both defence and Crown counsel made inappropriate remarks to the jury. Among these were suggestions by defence counsel that the jury should stop what was described as the application of "diabolical" legislation. However, in my view, the errors made by both lawyers were satisfactorily corrected by the trial judge in his charge to the jury. For example, in order to correct the suggestion made by defence counsel that the jury could choose to ignore the law the trial judge stated:

If I make a mistake, it can and will be corrected. If you make a mistake it probably can't be corrected. That is why your task is so important.

The defence counsel in his address predicted accurately I would say something like that. Defence counsel said something that needs to be corrected. He said that that position I just expressed to you is one that most people in hierarchies of command rely on. He said that position is similar to the military where a captain follows the order from a lieutenant-colonel, relying on his superiors, in public acts like the entrainment, and each of us relies on the government's judgment of authority, which might later on turn out to be wrong.

Now, that wasn't a very helpful comparison. You make up your own mind whether a reasonable person in the position of the accused can honestly believe the Baky order or the train schedule order were lawful and did not involve racial or religious persecution or inhumane acts. Don't get the idea you are following orders or I am following orders. There is all the difference in the world between someone following government orders and someone like you and me who has a duty to apply the law in all due process and all the principles of fundamental justice and all the rights of the accused.

You are not following orders in this case from anyone and neither am I. You are independent and so am I. You are judges. We do not follow any orders. We go wherever the path of the law takes us. No matter whether we

page 850

think it will please someone in authority or displease someone in authority. Your sense of responsibility and [mine] come from our oaths, our knowledge that what we do is the right thing. None of us, you or I, are following government orders. We are going down the path of the law as interpreted by the independent courts of this country. It isn't helpful to draw a parallel between someone following government orders and independent judges like you and me.

With regard to defence counsel's descriptions of the *Code* provisions as "diabolical", the trial judge stated:

Defence counsel called diabolical the law which you have a sworn duty to apply. He is entitled to his opinion but I am not sure how helpful his opinion is in the difficult duty you have to perform. It really isn't relevant to your judicial task what you think of the wisdom of the law. As to its fundamental fairness under our constitution, this court, in this case, has given this law a clean bill of health and has said it does comply with the principles of fundamental justice.

You are here to judge the accused; you are not here to judge the law. Judges do judge the law in this country in a system with a lot of safeguards. In Canada courts do not leave it to the government or parliament to decide whether the law conforms with the principles of fundamental

6/24

justice. I am not here to defend the law and I am not here to criticise the law. Because you near criticized as a diabolical law, I think you are entitled to know this court has ruled the law, which you took the oath to apply, the defence counsel calls diabolical, is constitutionally valid. This court in this case has ruled this law complies with the principles of fundamental justice and our higher courts provide a further safeguard to the accused on that issue.

The trial judge went on to correct the statements made by defence counsel that the jurors might at some point find themselves on trial for persecution of the accused. He spoke at some length, and in clear and unequivocal terms instructed the jury that they were not to take into consideration any other concerns. They were simply to determine whether the evidence established the accused's guilt beyond a reasonable doubt.

page 851

In further response to the inappropriate comments on the part of defence counsel he stated: "Your oath requires you to deliver a just and fair verdict on the law and the evidence and not to send a message to one side or the other in some dispute in this country or some other country about what policy should be followed in respect of the suspected war crimes or crimes against humanity". The trial judge's instructions to the jury were clear and unambiguous. They would have greatly assisted the jurors to focus on the task before them and to reach a verdict based solely on the evidence. He discounted any suggestions on the part of defence counsel that the jury ought to take any other improper considerations into account in making their decision.

He also commented on Crown counsel's treatment of some of the evidence in these terms:

While I am on the subject of counsels' addresses, let me also say it didn't seem to me helpful for Crown counsel to refer to the degrading body searches carried out upon the women in the ghetto or other places, or to the cruel comments by that gendarme captain Dr. Uray at a meeting in Munkacs, that the accused did not attend, about putting 100 people in the boxcar packed like sardines and those who couldn't take it, would perish. There isn't a scrap of evidence here, the accused had anything to do with any body searches or he attended that meeting that Dr. Uray made that comment at or that he knew about the comment or heard about it or agreed with it or was even aware of it.

It is most important in this case to separate in your minds the things the accused knew and the things he didn't know and not to attribute to him personally those things about which he personally knew nothing.

Unfortunate statements were indeed made by counsel for the respondent. They were unprofessional and prejudicial. Yet at the conclusion of the jury addresses the trial judge very carefully instructed the jury with regard to all the significant prejudicial statements made by counsel for the respondent. At the conclusion of a long, difficult,

page 852

and emotional trial it is only natural that a jury would turn to a trial judge as the impartial arbiter for instructions and directions with regard to the case. In this case their trust was well placed. The jury received from the unbiased arbiter, clear, unequivocal directions pertaining to all the improper statements of counsel for the accused. It is those instructions that they would hear last and take with them to the jury room and rely upon during the course of their deliberations. The final

6/25

instructions of the trial judge are rightly assumed to be of great significance to the jury. That is why these directions are carefully reviewed by appellate courts. Here those instructions were sufficient to rectify any prejudicial effect that may have been caused by the unfortunate statements of counsels in their addresses.

Neither counsel was a model of perfection in his address to the jury, although I hasten to add that the remarks of the counsel for the respondent were far more prejudicial. Nonetheless the directions given by the trial judge pertaining to the counsels' addresses remedied any prejudice that might have arisen.

(5) *Admissibility of the Evidence of Dallos*

The evidence of Dallos came in two forms. The first was a deposition given by him to the Hungarian state police in Szeged on January 16, 1947. On that occasion, Dallos was told of his obligation to tell the truth and advised that he might have to confirm his testimony by oath. Dallos testified that the Commandant of the Gendarmerie guarding the Jews confined in the brickyard was a man by the name of Bodolay. Captain **Finta**, he said, was in charge of those detained and the taking of their possessions.

The second was a statement made before the People's Tribunal of Szeged in the form of a deposition, in which he stated again that Bodolay was in charge of the brick factory along with another man by the name of Narai. Neither form of evidence was subject to cross-examination. Both contained hearsay. The majority of the Court of Appeal observed that there is an element of

page 853

fairness arising from the right of confrontation implicit in the adversarial system. However, the majority held that the trial judge did not err in admitting the evidence in light of this Court's judgment in *R. v. Khan*, [1990] 2 S.C.R. 531. The majority determined that the requirement of necessity was clearly met in this case as the declarant was dead. It also determined that Dallos' statement had the requisite *indicia* of reliability. It noted, at p. 136:

The statements were made on a solemn occasion, somewhat akin to a court proceeding, by a person adverse to the party seeking to tender the statement. They appear to have been made by a person having peculiar means of knowledge of the events described in the statement, and the statements themselves distinguish between events within Dallos' personal knowledge and events about which he had merely received information from others.

The majority also determined that the fact that the statements were officially recorded and preserved favoured their admissibility. It held that cross-examination could shed little light on the truth of what Dallos said since only he could testify to that. On this issue they observed, at p. 136:

The cross-examination of which the Crown says it was deprived could only clarify what was said by Dallos. As in the case of a business record, there is little reason here to doubt the accuracy, as opposed to the truth, of what Dallos is reported to have said.

Finally, the majority held that the exception to the hearsay rule in the form of statements made against penal interest by a person who is unavailable could only be invoked by the defence. It concluded that it would be unfair to allow the Crown to prosecute an accused today with the

6126

assistance of evidence which had been in existence for some 46 years and which the accused not given the opportunity to challenge.

page 854

In *R. v. Williams* (1985), 18 C.C.C. (3d) 356, Martin J.A. stated that there is a need for a flexible application of some rules of evidence in order to prevent a miscarriage of justice. He said at p. 378: "It seems to me that a court has a residual discretion to relax in favour of the accused a strict rule of evidence where it is necessary to prevent a miscarriage of justice and where the danger against which an exclusionary rule aims to safeguard does not exist." His words are particularly apposite to this case.

In *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, at p. 57, the Ontario Court of Appeal held that the rules of evidence were properly relaxed in order to permit a question to be asked of a witness the answer to which constituted inadmissible hearsay. This was permitted because to do otherwise would have denied the accused the right to make full answer and defence, a right encompassed in the term "fundamental justice" now enshrined in s. 7 of the *Charter*.

In *R. v. Khan*, *supra*, this Court observed that in recent years courts have adopted a more flexible approach to the hearsay rule, rooted in the principles and the policies underlying the hearsay rule, rather than in the narrow strictures of the traditional exceptions. The requirements for the admission of hearsay evidence are that it be necessary and reliable. Necessity may be present where no other evidence is available. The testimony may be found to be reliable when the person making the statement is disinterested, and the statement is made before any litigation is undertaken. It is also helpful if the declarant is possessed of a peculiar or special means of knowledge of the event. See also *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740. The evidence of Dallos meets all these criteria and was therefore admissible.

I agree with the majority of the Court of Appeal that there was a firm foundation supporting the trial judge's ruling that the evidence of Dallos was admissible. The importance of putting all relevant and reliable evidence that is available before the

page 855

trier of fact in order to provide the clearest possible picture of what happened at the time of the offences is indisputable. It would have been unfair to have deprived the respondent of the benefit of having all relevant, probative and reliable evidence before the jury. This is particularly true of evidence that could be considered to be helpful to his position.

(6) *Trial Judge's Calling Evidence of Dallos, Kemeny and Ballo Himself*

The trial judge found that the evidence of Dallos was essential to the narrative as he was in a unique position to observe directly the command structure in the brickyard.

With respect to the evidence of Ballo and Kemeny, the trial judge ruled that their evidence was essential to the unfolding of the narrative on which the prosecution was based. In his decision to call the evidence himself he also considered their evidence to be significant in relation to the confinement, to the question as to who was in command of the brickyard, and to the quality of evidence of the other survivors who testified that **Finta** was the commander.

6127

Additionally, he considered the fact that the evidence of Kemeny and Ballo could potentially support an inference quite different from that left by all the other survivors. Kemeny was the only living witness who, as one of the Jewish leaders, was involved in the administrative centre of the brickyard, including the preparation of the list of names of those who were to be deported from the brickyard. The transcript of her testimony at **Finta**'s trial in Hungary revealed that she could not identify **Finta** as the commander of the brickyard. Indeed, she went further and said that she never heard his name. Ballo was the only witness who testified regarding the house in the area of the brickyard, guarded by a Gendarme, in which a German officer had his seat. This could have been viewed by a jury as strong evidence that the commander of the brickyard was a German officer.

page 856

The majority of the Court of Appeal held that the evidence of Dallos, Kemeny and Ballo should not have been called by the trial judge, as he was moved to proceed in this way in order to preserve the right of the defence to address the jury last. With respect, I disagree. In a case such as this where the evidence of witnesses is based on events that occurred over 45 years ago, it is essential that all evidence which is relevant, probative and relatively reliable be admitted. The jury must have the benefit of all the testimony pertaining to events which occurred at the time of the alleged offences. Furthermore, it would have been manifestly unfair if the jury had returned a verdict of guilty without having considered the available evidence which suggested that **Finta** was not the commander of the brickyard. Since such a possibility existed, the trial judge correctly decided to call the evidence on his own behalf since both sides refused to call the evidence themselves. In my view, this was entirely appropriate. What happened to the Jewish people in Hungary was despicably cruel and inhumane. Yet those who are charged with those fearful crimes are entitled to a fair trial. It is the fundamental right of all who come before the courts in Canada. In order to ensure a fair trial for **Finta**, the evidence of these witnesses had to be presented to the jury.

The evidence was admissible. It was important in determining the outcome of this case. It was known to be available to the court. If a miscarriage of justice was to be avoided then the trial judge was bound to call this evidence. I can see no alternative to that decision. This is one of those rare cases where the residual discretion resting with a trial judge to call witnesses was properly exercised.

(i) Canadian and English Law

It has long been recognized in Canada and in England that in criminal cases a trial judge has a limited discretion to call witnesses without the consent of the parties. This step may be taken if, in the opinion of the trial judge it is necessary for the discovery of truth or in the interests of justice. This

page 857

discretion is justified in criminal cases because "the liberty of the accused is at stake and the object of the proceedings is to see that justice be done as between the accused and the state" (Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1992), at p. 826).

6128

The discretion should only be exercised rarely and then with extreme care, so as not to inte with the adversarial nature of the trial procedure or prejudice the accused. It should not be exercised after the close of the defence case, unless the matter was one which could not have been foreseen. (See Sopinka, Lederman and Bryant, *supra*, at p. 826; Peter K. McWilliams, *Canadian Criminal Evidence* (3rd ed. 1988), at para. 27:10830 "Right of judge to call witnesses", at pp. 27-15 and 27-16; *Cross on Evidence* (7th ed. 1990), at pp. 266-68); *Phipson on Evidence* (14th ed. 1990), at pp. 219-20; Archbold, *Pleading, Evidence and Practice in Criminal Cases* (45th ed. 1993), at p. 1/555; see also annotation by Philip C. Stenning, "'One Blind Man To See Fair Play': The Judge's Right To Call Witnesses" (1974), 24 C.R.N.S. 49, and Michael Newark and Alec Samuels, "Let the Judge Call the Witness", [1969] *Crim. L. Rev.* 399.)

There is very little case law on how the discretion should be exercised. In his annotation, *supra*, Stenning enumerates seven propositions derived from English case law. These propositions were cited with approval as correctly stating the Canadian law in *Campbell v. The Queen* (1982), 31 C.R. (3d) 166 (P.E.I.S.C.), at pp. 172-75, *per* Campbell J., and in *R. v. S. (P.R.)* (1987), 38 C.C.C. (3d) 109 (Ont H.C.), *per* McKinlay J. (as she then was), affirming decision of Kurisko Dist. Ct. J. A summary of these propositions is as follows:

1.The trial judge may call a witness not called by either the prosecution or the defence, and without the consent of either the prosecution or the defence, if in his opinion this course is necessary in the interest of justice: *R. v. Harris* (1927), 20 Cr. App. R. 86 at p. 89

page 858

(K.B.); *R. v. Holden* (1838), 8 Car. & P. 606, 173 E.R. 638; *R. v. Brown*, [1967] 3 C.C.C. 210, at p. 215, *per* Hyde J. (dissenting in part on another issue), at pp. 219-20 *per* Taschereau J. (for the majority); *R. v. Bouchard* (1973), 24 C.R.N.S. 31, (N.S. Co. Ct.), at p. 46; *Campbell v. The Queen*, *supra*, at pp. 172-75; *R. v. S. (P.R.)*, *supra*, at pp. 111, 119-24; *R. v. Black* (1990), 55 C.C.C. (3d) 421 (N.S.S.C.A.D.), at p. 425.

2.The right to call a witness after the close of the case of the defence should normally be limited to a case where a matter was one which could not have been foreseen.

3.A witness may be called after the close of the defence not in order to supplement the evidence of the prosecution but to ascertain the truth and put all the evidence before the jury.

4.The trial judge may not exercise his right to call a witness after the jury has retired, even at the request of the jury.

5.In a non-jury case, in the absence of special circumstances, it is wrong to allow new evidence to be called once a trial judge has retired, and probably after the defence has closed its case.

6.A judge ought not to exercise his discretion to call a witness if the defence would in no way be prejudiced by calling the witness. The defence should not be permitted in this way to use the judge to call their witness to give him a greater appearance of objectivity.

7.The calling of the witness after the defence has closed its case is a factor which may be taken into account on appeal.

None of these propositions is really helpful in deciding how the trial judge should have

6129

exercised his discretion in this case. In a number of reported decisions, trial judges have called witnesses themselves and either been upheld on appeal, or not

page 859

appealed. For example in a murder trial, where three doctors examined the body of the deceased and had a difference of opinion, and only two of those doctors were called by the prosecution, the trial judge called the third doctor (*R. v. Holden*, *supra*). In a trial for "riot" and wounding with intent to cause grievous bodily harm, the trial judge called two eye witnesses (*R. v. Tregear*, [1967] 2 Q.B. 574 (C.A.)). In a trial for impaired driving the trial judge called a doctor who could provide the factual basis for earlier expert testimony given on the defence of automatism (*R. v. Bouchard*, *supra*). In a trial for indecent assault and sexual assault the accused sought to adduce polygraph evidence and the crown called an expert to testify to the unreliability of such evidence. The accused could not afford an expert to support the opposing position. The trial judge called an expert on the reliability of polygraphs, so the court would have the benefit of hearing evidence on both sides of the issue (*R. v. S. (P.R.)*, *supra*).

(ii) American Law

The American law is essentially the same as the Canadian and British law. A trial judge has the discretion to call witnesses whom the parties do not choose to present: *McCormick on Evidence* (4th ed. 1992), vol. 1, at pp. 23, 26; Annot., 67 A.L.R.2d 538; Annot., 53 A.L.R. Fed. 498. *United States v. Lutwak*, 195 F.2d 748 (7th Cir. 1952), at pp. 754-55, aff'd 344 U.S. 604 (1952), rehearing denied 345 U.S. 919 (1953), refers to the discretion in these words, at pp. 754-55:

Indeed, it is generally recognized that where there is a witness to a crime for whose veracity and integrity the prosecuting attorney is not willing to vouch, he is not compelled to call the witness, but that the court, in its discretion, may do so and allow cross examination by both sides within proper bounds.

page 860

Another statement of the discretion is found in *United States v. Marzano*, 149 F.2d 923 (2nd Cir. 1945), at p. 925:

It is permissible, though it is seldom very desirable, for a judge to call and examine a witness whom the parties do not wish to call.... A judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert.

A similar statement was made, *obiter*, in *United States v. Liddy*, 509 F.2d 428 (D.C. 1974), at p. 438, *certiorari* denied 420 U.S. 911 (1975):

The precepts of fair trial and judicial objectivity do not require a judge to be inert. The trial judge is properly governed by the interest of justice and truth, and is not compelled to act as if he were merely presiding at a sporting match. He is not a "mere moderator". As Justice Frankfurter put it, "(f)ederal judges are not referees at prize-fights but functionaries of justice". ... A federal trial judge has inherent authority not only to comment on the evidence adduced by counsel, but also -- in appropriate instances -- to call or recall and question witnesses. He may do this when he believes the additional testimony will be helpful to the jurors in ascertaining the truth and discharging their fact-finding function.

6/30

Some other federal cases recognizing this discretion are: *Young v. United States*, 107 F.2d 490 (5th Cir. 1939); *Estrella-Ortega v. United States*, 423 F.2d 509 (9th Cir. 1970); *United States v. Pape*, 144 F.2d 778 (2nd Cir. 1944); *Steinberg v. United States*, 162 F.2d 120 (5th Cir. 1947); *United States v. Browne*, 313 F.2d 197 (2nd Cir. 1963).

It has been observed that appellate courts should be hesitant to interfere in the trial judge's exercise of his discretion:

An appellate court should not interfere with the district court's performance of that sensitive task [exercising the discretion] absent a clear showing of an abuse of discretion, resulting in prejudice to the defendant.

(*Estrella-Ortega v. United States*, *supra*, at p. 511.)

page 861

In the United States the trial judge's discretion to call witnesses exists both at common law, and under Rule 614(a) of the *Federal Rules of Evidence*, which has been held to be declaratory of the pre-existing common law: *United States v. Ostrer*, 422 F.Supp. 93 (S.D.N.Y. 1976), at p. 103.

(iii)Summary as to the Discretion of the Trial Judge to Call Witnesses and the Exercise of that Discretion in this Case

In order to take this unusual and serious step of calling witnesses, the trial judge must believe it is essential to exercise the discretion in order to do justice in the case. In the case at bar, where the trial judge had decided that certain evidence was essential to the narrative it was a reasonable and proper exercise of the discretion to call the evidence if the Crown refused to do so. It is essential in a case where the events took place 45 years ago that all material evidence be put before the jury. With the passage of time it becomes increasingly difficult to get at the truth of events; witnesses die or cannot be located, memories fade, and evidence can be so easily forever lost. It is then essential that in such a case all available accounts are placed before the court. The majority of the Court of Appeal dismissed concerns about the problems of defending in this case by saying that all cases pose difficulties in presenting a defence. With respect, I think this fails to recognize that this case presents very real difficulties for the defence in getting at the truth which are not comparable to other cases due to the length of time that has elapsed since the events at issue occurred.

The Court of Appeal erred in holding that the trial judge was wrong to take into account the fact that if he did not call the evidence the defence would lose its right to address the jury last. In a case where the trial judge has found that the evidence in question should have been called by the

page 862

Crown, the issue of who addresses the jury last is indeed relevant. If this were not so it would be open to the Crown not to call certain evidence in order to force the defence to give up its right to address the jury last. I am certainly not suggesting the Crown acted for improper reasons in this case, but it seems to me that the opportunity for such abuse should not be left open. Further, I think the trial judge's concern for the order of addresses to the jury was secondary to his finding that the evidence was essential to the narrative, which was the principal reason for calling the evidence himself.

6/31

Finally, I do not think the appellant can be correct that the trial judge should have waited until after the defence had decided whether or not to call evidence before he called the evidence in question himself. The trial judge could not do that without risking offending the rule that a trial judge should not call evidence him- or herself after the close of the defence case unless the matter was unforeseeable. If the trial judge had waited, and the defence had elected not to call evidence, the trial judge would have been prevented from calling the evidence, as the matter was readily foreseeable, and calling it at that point would have been prejudicial to the defence.

(7) *Jury Instructions on the Identification Evidence*

The appellant argues that the trial judge improperly linked the Dallos evidence to the Crown's identification evidence of the respondent, and thereby called into question the Crown's *viva voce* evidence which identified the respondent as the commander of the brickyard. A witness by the name of Mrs. Fonyo testified that there was someone who looked like the respondent who was not in charge of the brickyard. She stated that **Finta** was in charge of the brickyard. The appellant argues that the trial judge's linking of Mrs. Fonyo's evidence to that of the witness Dallos may have created a strong impression in the mind of the jury that **Finta** was the look-alike while a man by

page 863

the name of Lieutenant Bodolay was the commander of the brickyard. The appellant argues that there was little evidence to support such an inference and the trial judge should have indicated this to the jury.

A reading of the trial judge's charge to the jury leads me to believe that his instructions on this point were satisfactory. He did not dwell on this connection, and his reference to it was preceded and followed by admonitions to be very cautious about the weight to be attached to the evidence. Furthermore, throughout his charge to the jury, the trial judge reminded the jury that they were the judges of the facts, and that they were free to disregard any inferences which he may have suggested that they make. In other words, they were free to disagree with his conclusions on the evidence and to draw their own inferences based on their perceptions of the strength of the witnesses' testimony and other factors. Thus, in my view, the jury was not misdirected on the identification issue.

Conclusion on the Appeal

For the reasons stated above, I am of the view that the appeal should be dismissed.

The Cross-Appeal (8) and (9)

Leave was granted to the respondent to cross-appeal. The Chief Justice stated the following constitutional questions:

1.Does s. 7(3.74) of the *Criminal Code* violate ss. 7, 11(*a*), 11(*b*), 11(*d*), 11(*g*), 12 or 15 of the *Canadian Charter of Rights and Freedoms*?

2.If the answer to this question is in the affirmative, is s. 7(3.74) of the *Criminal Code* a reasonable limit in a free and democratic society and justified under s. 1 of the *Canadian Charter*

6132

of Rights and Freedoms?

3.Does s. 7(3.71) read with s. 7(3.76) of the *Criminal Code* violate ss. 7, 11(*a*), 11(*b*), 11(*d*), 11 (*g*), 12 or 15 of the *Canadian Charter of Rights and Freedoms*?

4.If the answer to this question is in the affirmative, is s. 7(3.71) read with s. 7(3.76) of the *Criminal Code* a reasonable limit in a free and

page 864

democratic society and justified under s. 1 of the *Canadian Charter of Rights and Freedoms*?

(i)Do Sections 7(3.74) and (3.76) of the *Criminal Code* Violate Section 7 of the *Charter* Because These Purport to Remove the Protection of Section 15 of the *Criminal Code*?

(8)*Charter Violation*

The respondent argues that the removal of the defence of obedience to *de facto* law by operation of s. 7(3.74) of the *Criminal Code* constitutes a violation of the principles of fundamental justice. It is contended that it is reasonable to assume that because **Finta** acted in obedience to the law (the Baky Order), he did not have the guilty mind required to found a conviction for the offence. In other words, he might well have had an honest, though mistaken belief that the Baky Order was lawful and therefore, if he acted in obedience to the law, he cannot be faulted. I cannot agree.

It was noted earlier that s. 7(3.74) is permissive rather than mandatory. There may well be situations where the law is not manifestly unlawful, and as a consequence the accused may be able to argue mistaken belief in the validity of the law successfully. The existence of a law which is unlawful but not manifestly so will not give rise to a defence of obedience to *de facto* law *per se*. Rather, it will be one of the factors that may be taken into account in determining whether the individual had the requisite guilty mind. However if the jury finds that the accused was aware of factual circumstances which would render his or her actions a crime against humanity or a war crime, it would be highly unlikely that a mistaken belief in the validity of a law could provide a defence to the commission of the inhumane acts. However, the removal of the defence of obedience to *de facto* law does not relieve the Crown of its obligation to prove the requisite *mens rea*. As well, the accused is entitled to raise any defence that may be appropriate, such as obedience to military orders. The issue was

page 865

aptly dealt with in Smith and Hogan, *Criminal Law* (7th ed. 1992), at pp. 261-62, in this way:

Though there is little authority on this question, it is safe to assert that it is not a defence for D merely to show that the act was done by him in obedience to the orders of a superior, whether military or civil.... The fact that D was acting under orders may, nevertheless, be very relevant. It may negative *mens rea* by, for example, showing that D was acting under a mistake of fact or that he had a claim of right to do as he did, where that is a defence; or, where the charge is one of negligence, it may show that he was acting reasonably.

6133

I agree with Callaghan A.C.J.H.C. that s. 7(3.74) does not, by permitting the removal of this defence, result in a breach of fundamental justice. In *R. v. Holmes*, [1988] 1 S.C.R. 914, Dickson C.J. stated that Parliament may re-define the meaning of "excuse", by expanding or narrowing it to include only certain excuses. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Dickson C.J. explained the rationale for this at p. 70:

The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met.

When the *Criminal Code* provides that a defence is to be expressly excluded it is because Parliament has determined that the criminal act is of such a nature that not only is the disapprobation of society warranted, but also the act cannot be justified by the excluded defence. Such a legislative provision will not generally violate s. 7 when a defence is inconsistent with the offence proscribed in that it would excuse the very evil which the offence seeks to prohibit or punish. For example it would be illogical and senseless to permit an

page 866

accused to rely on the laws of a sovereign state which violate international law by legislating the commission of crimes against humanity on the grounds that the laws themselves justify criminal conduct. In this case the expert testified that the accused's awareness of his country's directed policy of persecution or discrimination constituted the "international element" of crimes against humanity. Similarly the accused's awareness of his state's conduct of war is the international element of war crimes. The trial judge identified these as essential elements of the offences in question. It follows that just as it is not a violation of s. 7 to prevent drunkenness' being used as a defence to a charge of impaired driving (*R. v. Penno*, [1990] 2 S.C.R. 865) it is not a violation of s. 7 to limit the use that can be made of the defence of obedience to superior orders.

(ii)Do the Impugned Sections of the *Code* Violate the *Charter* by Reason of Vagueness?

The respondent argues that s. 7(3.71) and s. 7(3.76) of the *Criminal Code* violate the principle that there must be no crime or punishment except in accordance with fixed, predetermined law. That is to say the citizen must be able to ascertain beforehand how he or she stands with regard to the criminal law. If the citizen cannot determine the consequences of his or her actions due to the vagueness of the law then to punish the citizen for breach of that law would be purposeless cruelty. Specifically, the respondent argues that the state of international law prior to 1944 was such that it could not provide fair notice to the accused of the consequences of breaching the still evolving international law offences.

Secondly, the respondent argues that the definitions of "war crime" and "crime against humanity" constitute a standardless sweep authorizing imprisonment. He submits that the definition of "crimes against humanity" which includes "murder, extermination, enslavement, deportation, persecution or any other inhumane act or omission that ... constitutes a contravention of customary international

page 867

6134

law or conventional international law or is criminal according to the general principles of law recognized by the community of nations" permits the inclusion of any act so long as it is seen by the jury to be "persecution" etc. An accused would have no notice that his or her acts were contrary to international law since the proscribed acts are not adequately defined.

At the outset it may be helpful to reiterate some of the major points which this Court has established with respect to the issue of vagueness. In the *Reference re ss. 193 and 195.1 (1)(c) of the Criminal Code (Man.) (Prostitution Reference)*, [1990] 1 S.C.R. 1123, it was held that it is not fatal that a particular legislative term is open to varying interpretations by courts. In *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, it was stated that the threshold for finding a law vague is relatively high. There Gonthier J. provided guidance for determining whether a provision is so vague that it violates the principle of legality in these words at p. 639:

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion.

And later, at p. 643 he stated:

The doctrine of vagueness can therefore be summed up in this proposition: a law will be found unconstitutionally vague [only] if it so lacks in precision as not to give sufficient guidance for legal debate.

In my view, the fact that the entire body of international law is not codified and that reference must be made to opinions of experts and legal writing in interpreting it does not in itself make the legislation vague or uncertain. This material is often helpful in determining the proper interpretations to be given to a statute. Further, the fact that there

page 868

may be differences of opinion among international law experts does not necessarily make the legislation vague. It is ultimately for the court to determine the interpretation that is to be given to a statute. That questions of law and of fact arise in the interpretation of these provisions and their application in specific circumstances does not render them vague or uncertain. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, it was recognized at p. 983 that:

Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies.

Thus I agree with the following statement made by Tarnopolsky J.A. in this context, at pp. 64-65:

The fact ... that reference may have had to be made to legal texts and even to the opinions of experts to determine, for purposes of jurisdiction, what constitutes a war crime or a crime against humanity, is not an issue concerning vagueness of a charge, any more than any other piece of new legislation may require legal research and analysis beyond the competence of some accused but

6/35

not, presumably, that of a lawyer.

In *Nova Scotia Pharmaceutical*, *supra*, Gonthier J. distinguished between formal and substantive notice. Formal notice involved an acquaintance with the actual text of a statute. The substantive aspect of notice is described as an understanding that some conduct comes under the law. This is considered to be the "core concept of notice".

Gonthier J., at p. 634, set out an analysis of the concept of notice using the crime of homicide as an example which I think is apposite in this context:

Let me take homicide as an example. The actual provisions of the *Criminal Code* dealing with homicide are numerous (comprising the core of ss. 222-240 and other

page 869

related sections). When one completes the picture of the *Code* with case law, both substantive and constitutional, the result is a fairly intricate body of rules. Notwithstanding formal notice, it can hardly be expected of the average citizen that he know the law of homicide in detail. Yet no one would seriously argue that there is no substantive fair notice here, or that the law of homicide is vague. It can readily be seen why this is so. First of all, everyone (or sadly, should I say, almost everyone) has an inherent knowledge that taking the life of another human being is wrong. There is a deeply-rooted perception that homicide cannot be tolerated, whether one comes to this perception from a moral, religious or sociological stance. Therefore, it is expected that homicide will be punished by the State. Secondly, homicide is indeed punished by the State, and homicide trials and sentences receive a great deal of publicity.

The same principles must apply with respect to a war crime and a crime against humanity. The definitions of crimes against humanity and war crimes include the gravest, cruellest, most serious and heinous acts that can be perpetrated upon human beings. These crimes, which violate fundamental human values, are vehemently condemned by the citizens of all civilized nations. War crimes or crimes against humanity are so repulsive, so reprehensible, and so well understood that it simply cannot be argued that the definition of crimes against humanity and war crimes are vague or uncertain.

The same considerations apply with respect to the respondent's second argument. So long as the crimes are ones which any reasonable person in the position of the accused would know that they constituted a violation of basic human values or the laws of war, it cannot be said that the crimes constitute a "standardless sweep authorizing imprisonment". The standards which guide the determination and definition of crimes against humanity are the values that are known to all people and shared by all.

I am in agreement with the decision of the Court of Appeal, unanimous on this issue, that the law is not vague.

page 870

(iii)Do the Impugned Sections of the *Code* Violate Section 7 and Section 11(*g*) of the *Charter*?

The respondent's arguments with respect to ss. 7 and 11(*g*) relate to the allegedly retrospective character of the impugned provisions. Most nations recognize that a statute can neither

6136

retroactively make criminal an act which was lawful at the time it was done, nor impose a penalty for past acts which were not criminal when they were committed.

In an effort to avoid violating the principle against retroactivity, the provisions of the *Criminal Code* concerning a war crime and a crime against humanity were drafted in such a way that the accused is deemed to have committed Canadian *Criminal Code* offences which were in existence at the time the actions were alleged to have occurred. Perhaps the drafters hoped that by not creating new offences they could avoid violating the principle against retroactivity.

However, as I have indicated earlier the only constitutionally permissible way to interpret the provisions in question is to conclude that two new offences have been created, namely, crimes against humanity and war crimes. This however, does not result in a violation of the principle that actions cannot be retroactively made criminal.

There are two approaches which have generally been advanced in this debate. There are those who, like Robert H. Jackson J., Chief Counsel for the United States in the Nuremberg prosecution, believe that the humanitarian principles which form the basis of crimes against humanity evolved from the law of war which is itself over 7,000 years old. See Bassiouni, *supra*, at p. 150. Jackson J., in his report to the President of the United States on June 6, 1945 stated: "These principles (crimes against humanity) have been assimilated as part of International Law at least since 1907" (quoted in Bassiouni at p. 168). Jackson J. thought that the recognition of "crimes against humanity" as constituting violations of the already existing conventional and customary international law was

page 871

clearly demonstrated by the previous efforts of the international community to prohibit the same kind of conduct which was the subject of Article 6(*c*) of the *Charter of the International Military Tribunal*. (See also: Egon Schwelb, "Crimes Against Humanity" (1946), 23 *Brit. Y.B. Int'l L.* 178.)

The primary evidence of the prohibition of violations of the laws of humanity (or crimes against humanity) is found in the Preamble of the two Hague Conventions. The preamble to the *Convention Respecting the Laws and Customs of War on Land* (Hague Convention IV, 1907) contains a clause known as the Martens clause which states:

Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.

With regard to Hague Convention IV, the International Military Tribunal (IMT) at Nuremberg, *Trial of the Major War Criminals before the International Military Tribunal*, *supra*, held at p. 497:

The rules of land warfare expressed in the convention undoubtedly represented an advance over existing international law at the time of their adoption. But the convention expressly stated that it was an attempt "to revise the general laws and customs of war", which it thus recognized to be then existing, but by 1939 these rules laid down in the convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war....

6/37

In his article entitled "The Prosecution of War Criminals in Canada" (1989), 12 *Dalhousie L.J.* 256, W. J. Fenrick notes at p. 261 that "[a]lthough this statement is unsubstantiated in the judgment, it has been unchallenged since it was first uttered". In the German High Command Trial, a U.S. Military Tribunal sitting at Nuremberg in 1947-48 adopted at vol. 22, p. 497, the IMT position that

page 872

Hague Convention IV of 1907 was binding as declaratory of international law and went on to outline how specific provisions of Hague Convention IV and of the 1929 Geneva Prisoners of War Convention (*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, 27 July 1929, 118 L.N.T.S. 303) were incorporated into customary law.

In 1946, the United Nations General Assembly passed, without dissent or abstention, a resolution reaffirming the principles of international law recognized by the *Charter of the International Military Tribunal* and the judgment of the Nuremberg Tribunal. David Matas in his book *Justice Delayed* (1987) expressed the view that this universal acceptance gave the Nuremberg trials an authoritative position in international law. Mr. Matas at p. 90 writes:

Its pronouncements on the international law of war crimes and crimes against humanity must be regarded as authoritative. Any statement by a Tribunal whose judgment has been accepted by all nations of the world must carry more weight than any declaration on international law made by the courts of a single state.

The second approach to the problem of retrospectivity is that put forward by people such as Professors Kelsen and Schwarzenberger. Schwarzenberger rejected the argument that the International Military Tribunal's jurisdiction regarding "crimes against humanity" extended to crimes committed against German nationals, other nationals and stateless persons under German control, irrespective of whether such acts were lawful under any particular local law, so long as the war connection existed. He thought that the Nuremberg and Tokyo Charters were not declarative of already existing international law but were merely meant to punish the atrocious behaviour of the Nazi and Japanese regimes because their deeds could not go unpunished. Thus, he stated:

page 873

... the limited and qualified character of the rule on crimes against humanity as formulated in the Charters of the Nuremberg and Tokyo Tribunals militates against the rule being accepted as one declaratory of international customary law. This rudimentary legal system [of international law] does not know of distinctions as subtle as those between crimes against humanity which are connected with other types of war crime and, therefore, are to be treated as analogous to war crimes in the strict sense and other types of inhumane acts which are not so linked and, therefore, are beyond the pale of international law. The Four-Power Protocol of October 6, 1945, offers even more decisive evidence of the anxiety of the Contracting Parties to avoid any misinterpretation of their intentions as having codified a generally applicable rule of international customary law.

[Schwartzenberger, *International Law as Applied by International Courts and Tribunals*, *supra*, at p. 498.]

Similarly, Professor Kelsen is of the view that the rules created by the *Charter of the International Military Tribunal* and applied by the Nuremberg Trial represented "a new

6/38

law" (Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?" (1947), 1 *Int'l L.Q.* 153; see also: Hans Kelsen, "The Rule Against *Ex Post Facto* Laws and the Prosecution of the Axis War Criminals" (1945), 2:3 *Judge Advocate J.* 8). However, he proposed the following solution to the problem of retrospectivity in his article "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?", at p. 165:

A retroactive law providing individual punishment for acts which were illegal though not criminal at the time they were committed, seems also to be an exception to the rule against ex post facto laws. The London Agreement is such a law. It is retroactive only in so far as it established individual criminal responsibility for acts which at the time they were committed constituted violations of existing international law, but for which this law has provided only collective responsibility. The rule against retroactive legislation is a principle of justice. Individual criminal responsibility represents certainly a higher degree of justice than collective

page 874

responsibility, the typical technique of primitive law. Since the internationally illegal acts for which the London Agreement established individual criminal responsibility were certainly also morally most objectionable, and the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force. In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions.

See also: Professor Julius Stone, *Legal Controls of International Conflict* (1974), at p. 359.

The approach of Professor Kelsen seems eminently sound and reasonable to me. I would adopt it as correct and apply it in reaching the conclusion that the provisions in question do not violate the principles of fundamental justice.

(iv)Did the Pre- and Post-Charge Delay Violate Sections 7, 11(*b*) and 11(*d*) of the *Charter*?

The respondent argues that this Court should extend the principles set out in *R. v. Askov*, [1990] 2 S.C.R. 1199, to the situation of pre-charge delay. He argues that since 45 years have elapsed between the date of the actions giving rise to the charges and the date of the trial, there is bound to be prejudice. However, in my view Callaghan A.C.J.H.C. was correct in deciding that the trial judge, after hearing all the evidence, would be in the best position to decide whether or not a s. 24 (1) *Charter* remedy is available (*Mills v. The Queen*, [1986] 1 S.C.R. 863) and therefore that the legislation itself should not be struck down.

page 875

In the present case, I am unable to see any merit in the respondent's arguments that he suffered prejudice as a result of the pre-charge delay. Indeed, it is far more likely that the delay was more prejudicial to the Crown's case than it was that of the defence. Defence counsel was entitled to argue that the witnesses' memories had become blurred with the passage of 45 years. Further, the documentary and physical evidence that the respondent now complains is not available was

6139

probably destroyed during World War II. Thus it is difficult to accept the respondent's assertion that any documentary or physical evidence that would have been available within a few years after the war has since been lost. Additionally, any prejudice occasioned by the death of witnesses that could have helped the defence was substantially reduced by the admission of the Dallos statements.

With regard to the post-charge delay, less than a year passed from the time when the legislation was proclaimed in force to when the indictment was preferred. In light of the amount of investigatory work that had to be done before any charges could be laid, this seems to be a minimal and very reasonable period of delay.

(v)Do the Impugned Sections of the *Code* Violate Sections 7 and 15 of the *Charter*?

The respondent argues that the legislation contravenes s. 15 of the *Charter* because it relates only to acts or omissions performed by individuals outside Canada. Thus, a Canadian who committed a crime against humanity in Canada, arising for example, from the internment of Japanese Canadians, could not be charged under the impugned provisions, whereas someone in the position of **Finta** who committed the offence outside of Canada could be charged.

In my view, the apparent difference in treatment is not based on a personal characteristic but on the location of the crime. In *R. v. Turpin*, [1989] 1 S.C.R. 1296, it was held that the determination of whether a group falls into an analogous category to those specifically enumerated in s. 15 is not to be

page 876

made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society. The question to be resolved is whether the group represents a discrete and insular minority which has suffered stereotyping, historical disadvantage or vulnerability to political and social prejudice. It was decided that in some circumstances the person's province of residence could be a personal characteristic. However, in this case I do not think that the group of persons who commit a war crime or a crime against humanity outside of Canada could be considered to be a discrete and insular minority.

The respondent's submission that it is contrary to the principles of fundamental justice to subject an individual to prosecution based on an extension of jurisdiction founded on alleged crimes for which Parliament does not make its own government members and its own people in Canada criminally liable cannot be accepted for the same reasons.

(vi) Do the Impugned Provisions violate Section 12 of the *Charter*?

No argument was made by the parties with respect to s. 12.

(9) *Section 1 of the Charter*

As I have concluded that ss. 7(3.74) and (3.76) of the *Criminal Code* do not violate ss. 7, 11(*a*), (*b*), (*d*) and (*g*), or 15 of the *Charter*, it is not necessary to consider the application of s. 1 of the *Charter*.

6140

Conclusion on the Cross-Appeal

For the reasons set out above, I am of the view that Callaghan A.C.J.H.C. and the Court of Appeal, unanimous on this issue, were correct in their conclusion that the challenged provisions of the *Criminal Code* do not violate the *Charter*.

Appeal dismissed, LA FOREST, L'HEUREUX-DUBÉ *and* MCLACHLIN JJ. *dissenting*.

page 877

Cross-appeal dismissed. Sections 7(3.74) and 7(3.76) of the Criminal Code do not violate ss. 7, 11(a), (b), (d), (g), 12 or 15 of the Charter.

Solicitor for the appellant: John C. Tait, Ottawa.

Solicitor for the respondent: Douglas H. Christie, Victoria.

Solicitors for the intervener Canadian Holocaust Remembrance Association: Tory, Tory, DesLauriers & Binnington, Toronto.

Solicitors for the intervener League for Human Rights of B'Nai Brith Canada: David Matas, Winnipeg and Dale, Streiman and Kurz, Brampton.

Solicitors for the intervener Canadian Jewish Congress: Davies, Ward & Beck, Toronto.

Solicitors for the intervener InterAmicus: Ahern, Lalonde, Nuss, Drymer, Montreal.

1- See Erratum, [1994] 2 S.C.R. iv
2- See Erratum, [1994] 2 S.C.R. iv

ANNEX 14:

"Promotion and Protection of the Rights of Children-Impact of Armed Conflict on Children-Note by the Secretary-General", U.N. Doc. A/51/306, 26 August 1996, to which was annexed the Report of the expert of the Secretary General, Ms. Graça Machel, submitted pursuant to General Assembly Resolution 48/157, "Impact of Armed Conflict on Children".

6142

UNITED
NATIONS

A

General Assembly

Distr.
GENERAL

A/51/306
26 August 1996

ORIGINAL: ENGLISH

Fifty-first session
Item 108 of the provisional agenda*

PROMOTION AND PROTECTION OF THE RIGHTS OF CHILDREN

Impact of armed conflict on children

Note by the Secretary-General

1. The Secretary-General has the honour to transmit herewith to the General Assembly the study on the impact of armed conflict on children, prepared by Ms. Graça Machel, the expert appointed by him on 8 June 1994, pursuant to General Assembly resolution 48/157 of 20 December 1993. The study was undertaken with the support of the United Nations Centre for Human Rights and the United Nations Children's Fund, as provided for in the resolution, and is the fruit of extensive and wide-ranging consultations.

2. In the study, the expert proposes the elements of a comprehensive agenda for action by Member States and the international community to improve the protection and care of children in conflict situations, and to prevent these conflicts from occurring. The study demonstrates the centrality of these issues to the international human rights, peace and security and development agendas, and should serve to promote urgent and resolute action on the part of the international community to redress the plight of children affected by armed conflicts.

3. The Secretary-General trusts that the General Assembly will give thorough consideration to this study and to the mechanisms required for following up and monitoring the implementation of the conclusions and recommendations it will adopt on this important subject.

* A/51/150.

IMPACT OF ARMED CONFLICT ON CHILDREN

Report of the expert of the Secretary-General, Ms. Graça Machel, submitted pursuant to General Assembly resolution 48/157

CONTENTS

		Paragraphs	Page
I.	INTRODUCTION	1 - 28	9
	A. The attack on children	1 - 8	9
	B. Course of the study and its methodology	9 - 21	10
	C. Patterns and characteristics of contemporary armed conflicts	22 - 28	13
II.	MITIGATING THE IMPACT OF ARMED CONFLICT ON CHILDREN	29 - 203	15
	A. Child soldiers	34 - 62	16
	1. Recruitment	36 - 43	16
	2. How child soldiers are used	44 - 48	18
	3. Demobilization and reintegration into society	49 - 57	19
	4. Preventing future recruitment	58 - 61	21
	5. Specific recommendations on child soldiers	62	22
	B. Refugees and internally displaced children	63 - 90	22
	1. Vulnerability of children in flight	67 - 68	23
	2. Unaccompanied children	69 - 74	23
	3. Evacuation	75 - 76	25
	4. Children in camps	77 - 80	25
	5. The situation of internally displaced children	81 - 83	26
	6. Asylum and the right to identity and nationality	84 - 86	27
	7. Returning home and durable solutions	87 - 89	28
	8. Specific recommendations for refugee and internally displaced children	90	28

CONTENTS (continued)

		Paragraphs	Page
C.	Sexual exploitation and gender-based violence	91 - 110	29
	1. Gender-based violence: a weapon of war	91 - 95	29
	2. Child victims of prostitution and sexual exploitation	96 - 102	30
	3. Ending impunity	103 - 106	32
	4. Preventing gender-based violence	107 - 109	32
	5. Specific recommendations on sexual exploitation and gender-based violence	110	33
D.	Landmines and unexploded ordnance	111 - 126	34
	1. The threat to children	113 - 118	34
	2. Mine clearance, mine awareness and rehabilitation	119 - 122	36
	3. The need for an international ban	123 - 125	37
	4. Specific recommendations on landmines and unexploded ordnance	126	38
E.	Sanctions	127 - 135	38
	1. Humanitarian exemptions	128 - 130	39
	2. The need for child impact assessments and monitoring	131 - 134	40
	3. Specific recommendations on sanctions	135	41
F.	Health and nutrition	136 - 165	41
	1. Communicable diseases	140 - 142	42
	2. Reproductive health	143 - 144	43
	3. Disability	145	43
	4. Destruction of health facilities	146 - 148	44
	5. Protecting health services and health workers .	149 - 151	44
	6. Disruption of food supplies	152 - 154	45

CONTENTS (continued)

		Paragraphs	Page
	7. Malnutrition	155 - 161	46
	8. Protecting food security	162 - 164	47
	9. Specific recommendations on health and nutrition	165	48
G.	Promoting psychological recovery and social reintegration	166 - 183	49
	1. Psychosocial impact of violence on children	168 - 171	50
	2. Best practices for recovery programmes	172 - 182	51
	3. Specific recommendations to promote psychosocial well-being	183	53
H.	Education	184 - 203	54
	1. Risks to education during conflict	186 - 188	54
	2. Challenges and opportunities	189 - 202	55
	3. Specific recommendations on education	203	58
III.	RELEVANCE AND ADEQUACY OF EXISTING STANDARDS FOR THE PROTECTION OF CHILDREN	204 - 240	59
A.	Humanitarian law	211 - 218	61
B.	Human rights law	219 - 231	62
	1. Convention relating to the Status of Refugees	223 - 225	63
	2. Convention on the Rights of the Child	226 - 231	64
C.	Implementation of standards and monitoring of violations	232 - 239	65
D.	Specific recommendations on standards	240	67
IV.	RECONSTRUCTION AND RECONCILIATION	241 - 252	68
A.	Reconstruction	241 - 246	68
B.	Reconciliation	247 - 252	69

CONTENTS (continued)

		Paragraphs	Page
V.	CONFLICT PREVENTION	253 - 265	71
	A. Education for peace	255 - 258	71
	B. Demilitarization	259 - 262	73
	C. Early warning	263 - 265	74
VI.	IMPLEMENTATION MECHANISMS	266 - 311	74
	A. Follow-up action for Governments	270 - 278	75
	B. Regional and subregional arrangements	279 - 280	77
	C. Responsibilities of the United Nations	281 - 306	77
	1. The United Nations human rights system	285 - 287	79
	2. Institutional arrangements	288 - 302	80
	3. Inter-institutional mechanisms	303 - 306	86
	D. Civil society organizations	307 - 311	87
VII.	CONCLUSION	312 - 318	88
Annex.	Research contributions to the report on the impact of armed conflict on children		94

CONTENTS (continued)

ADDENDUM

Annexes*

I. Statement of the First Regional Consultation on the Impact of Armed Conflict on Children in the Horn, Eastern, Central and Southern Africa (Addis Ababa, 17-19 April 1995)

II. Statement of the Second Regional Consultation on the Impact of Armed Conflict on Children in the Arab Region (Cairo, 27-29 August 1995)

III. Statement of the Third Regional Consultation on the Impact of Armed Conflict on Children in West and Central Africa (Abidjan, 7-10 November 1995)

IV. Statement of the Fourth Regional Consultation on the Impact of Armed Conflict on Children in Asia and the Pacific (Manila, 13-15 March 1996)

V. Statement of the Fifth Regional Consultation on the Impact of Armed Conflict on Children in Latin America and the Caribbean (Santafé de Bogotá, 17-19 April 1996)

VI. Statement of the Sixth Regional Consultation on the Impact of Armed Conflict on Children in Europe (Florence, 10-12 June 1996)

VII. Statement adopted by the World Conference on Religion and Peace: Children and Violent Conflict

VIII. Selected bibliography on children and armed conflict

---

* Annexes I-VIII are contained in A/51/306/Add.1.

IMPACT OF ARMED CONFLICT ON CHILDREN

I. INTRODUCTION

A. The attack on children

1. Millions of children are caught up in conflicts in which they are not merely bystanders, but targets. Some fall victim to a general onslaught against civilians; others die as part of a calculated genocide. Still other children suffer the effects of sexual violence or the multiple deprivations of armed conflict that expose them to hunger or disease. Just as shocking, thousands of young people are cynically exploited as combatants.

2. In 1995, 30 major armed conflicts raged in different locations around the world. 1/ All of them took place within States, between factions split along ethnic, religious or cultural lines. The conflicts destroyed crops, places of worship and schools. Nothing was spared, held sacred or protected - not children, families or communities. In the past decade, an estimated two million children have been killed in armed conflict. Three times as many have been seriously injured or permanently disabled, many of them maimed by landmines. 2/ Countless others have been forced to witness or even to take part in horrifying acts of violence.

3. These statistics are shocking enough, but more chilling is the conclusion to be drawn from them: more and more of the world is being sucked into a desolate moral vacuum. This is a space devoid of the most basic human values; a space in which children are slaughtered, raped, and maimed; a space in which children are exploited as soldiers; a space in which children are starved and exposed to extreme brutality. Such unregulated terror and violence speak of deliberate victimization. There are few further depths to which humanity can sink.

4. The lack of control and the sense of dislocation and chaos that characterize contemporary armed conflicts can be attributed to many different factors. Some observers point to cataclysmic political upheavals and struggles for control over resources in the face of widespread poverty and economic disarray. Others see the callousness of modern warfare as a natural outcome of the social revolutions that have torn traditional societies apart. The latter analysts point as proof to many African societies that have always had strong martial cultures. While fierce in battle, the rules and customs of those societies, only a few generations ago, made it taboo to attack women and children.

5. Whatever the causes of modern-day brutality towards children, the time has come to call a halt. The present report exposes the extent of the problem and proposes many practical ways to pull back from the brink. Its most fundamental demand is that children simply have no part in warfare. The international community must denounce this attack on children for what it is - intolerable and unacceptable.

6. Children can help. In a world of diversity and disparity, children are a unifying force capable of bringing people to common ethical grounds. Children's needs and aspirations cut across all ideologies and cultures. The needs of all children are the same: nutritious food, adequate health care, a decent education, shelter and a secure and loving family. Children are both our reason to struggle to eliminate the worst aspects of warfare, and our best hope for succeeding at it.

7. Concern for children has brought us to a common standard around which to rally. In the Convention on the Rights of the Child, the world has a unique instrument that almost every country has ratified. The single most important resolve that the world could make would be to transform universal ratification of this Convention into universal reality.

8. It was this challenge, of turning good intentions into real change for children, that led the United Nations Committee on the Rights of the Child in 1993 to recommend to the General Assembly, in accordance with article 45 (c) of the Convention on the Rights of the Child, that it request the Secretary-General to undertake a comprehensive study on the impact of armed conflict on children.

B. Course of the study and its methodology

9. At its forty-eighth session, the General Assembly adopted resolution 48/157, entitled "Protection of children affected by armed conflicts", in which it requested the Secretary-General to appoint an expert to undertake a comprehensive study with the support of the Centre for Human Rights and the United Nations Children's Fund (UNICEF). The expert was asked to make recommendations in five areas: (1) the participation of children in armed conflict; (2) the reinforcement of preventive measures; (3) the relevance and adequacy of existing standards; (4) the measures required to improve the protection of children affected by armed conflict; and (5) the actions needed to promote the physical and psychological recovery and social reintegration of children affected by armed conflict.

10. In accordance with the resolution, the expert submitted progress reports to the forty-ninth and fiftieth sessions of the General Assembly (A/49/643 and A/50/537). The expert, Ms. Graça Machel, hereby transmits her final report on the impact of armed conflict on children, pursuant to resolution 48/157. The report sets out the findings and recommendations of the expert, who used the Convention on the Rights of the Child throughout her work as a guiding source of operative principles and standards. The Convention on the Rights of the Child represents a new, multidisciplinary approach to protecting children. It demonstrates the interdependence of all children's rights, and the relevance of those rights to the activities of a whole host of actors at all levels. In accordance with the Convention on the Rights of the Child, this report uses the term "child" to include everyone under the age of 18.

11. In the process of her work, the expert identified a number of particular concerns in addition to those identified in paragraph nine of resolution 48/157, including: the changing patterns of conflict; specific impacts on girls and the children of minority and indigenous groups; economic embargoes; rape and other

forms of gender-based violence and sexual exploitation; torture; the inadequate provision of education, health and nutrition and psychosocial programmes; the protection and care of refugee and internally displaced children and other children at particular risk; and the inadequate implementation of international human rights and humanitarian law. Accordingly, with the cooperation of relevant inter-governmental and non-governmental organizations and individual experts, a programme of research into these issues was undertaken through the preparation of twenty-five thematic papers and field-based case studies.

12. Six regional consultations were held to determine regional priorities relating to children in armed conflict and to draw these issues to the attention of Governments, policy makers and opinion leaders. The following consultations took place: First Regional Consultation on the Impact of Armed Conflict on Children in the Horn, Eastern, Central and Southern Africa: Addis Ababa, 17-19 April 1995 (co-convened with the Economic Commission for Africa); Second Regional Consultation on the Impact of Armed Conflict on Children in the Arab Region: Cairo, August 1995 (co-convened with the Economic and Social Commission for Western Asia and UNICEF); Third Regional Consultation on the Impact of Armed Conflict on Children in West and Central Africa: Abidjan, 7-10 November 1995 (co-convened with the African Development Bank, the Economic Commission for Africa and UNICEF); Fourth Regional Consultation on the Impact of Armed Conflict on Children in Asia and the Pacific: Manila, 13-15 March 1996 (co-convened with UNICEF); Fifth Regional Consultation on the Impact of Armed Conflict on Children in Latin America and the Caribbean: Bogota, 17-19 April 1996 (co-convened with the Government of Colombia, Save the Children UK, the Fundación para la Educación Superior de Colombia, and UNICEF); and Sixth Regional Consultation on the Impact of Armed Conflict on Children in Europe: Florence, Italy, 10-12 June 1996 (co-convened with the Government of Italy, the Italian National Committee for UNICEF, the Istitutó degli Innocenti and UNICEF International Child Development Centre).

13. The consultations included Governments, military authorities and legal experts. They also involved human rights organizations, the media, religious organizations, eminent leaders from civil society and women and children directly involved in armed conflicts.

14. The expert personally conducted field visits to areas affected by armed conflicts. Visits were made to Angola, Cambodia, Colombia, Northern Ireland, Lebanon, Rwanda (and refugee camps in Zaire and the United Republic of Tanzania), Sierra Leone and various places in the former Yugoslavia. During these visits, she met with Government representatives, non-governmental organizations, community organizations, women's organizations, religious groups, agencies, national institutions and other interested parties, as well as with children and their families. This direct contact has helped ensure that the present report and its recommendations are firmly based on conditions and priorities within countries. It also ensures that the report reflects not only the experience of those most involved in the care and protection of children, but also the immediate concerns of the affected families and children themselves.

15. The expert received guidance from a group of eminent persons representing a variety of political, religious and cultural backgrounds. The members of the

group are: Belisario Betancur (Colombia), Francis Deng (Sudan), Marian Wright Edelman (United States of America), Devaki Jain (India), Julius K. Nyerere (United Republic of Tanzania), Lisbet Palme (Sweden), Wole Soyinka (Nigeria) and Archbishop Desmond Tutu (South Africa). In addition, the expert received analysis and guidance from an advisory group of technical experts. The members of the advisory group include: Thomas Hammarberg, Chair (Sweden), Philip Alston (Australia), Rachel Brett (United Kingdom of Great Britain and Northern Ireland), Victoria Brittain (United Kingdom of Great Britain and Northern Ireland), Maricela Daniel (Mexico), Helena Gezelius (Sweden), Jim Himes (United States of America), Duong Quynh Hoa (Viet Nam), Elizabeth Jareg (Norway), Helga Klein (United States of America), Salim Lone (Kenya), Jacques Moreillon (Switzerland), Vitit Muntarbhorn (Thailand), Olara A. Otunnu (Uganda), Sadig Rasheed (Sudan), Everett Ressler (United States of America), Jane Schaller (United States of America), Anne Skatvedt (Norway) and Jody Williams (United States of America). The special advisers are: Ibrahima Fall (Senegal), Kimberly Gamble-Payne (United States of America), Stephen Lewis (Canada) and Marta Santos Pais (Portugal).

16. In all of her undertakings, the expert has enjoyed widespread support from Governments, regional bodies, intergovernmental and non-governmental organizations, as well as from United Nations bodies, especially the United Nations Children's Fund (UNICEF), the Centre for Human Rights and the Office of the United Nations High Commissioner for Refugees (UNHCR). Inter-agency consultations convened periodically in Geneva and New York were attended by representatives of the following major international bodies: the Centre for Human Rights, the Department of Humanitarian Affairs, the Food and Agriculture Organization of the United Nations (FAO), the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and their National Societies, the International Labour Organization (ILO), UNICEF, the United Nations Educational, Scientific and Cultural Organization (UNESCO), UNHCR, the United Nations Research Institute for Social Development (UNRISD), the World Food Programme (WFP) and the World Health Organization (WHO).

17. Working groups on children and armed conflict of international non-governmental organizations (NGOs), particularly the Working Group on Children in Armed Conflict of the New York-based NGO Committee on UNICEF and the SubGroup on Refugee Children and Children in Armed Conflict of the Geneva-based NGO Group on the Convention on the Rights of the Child, provided substantial contributions to the expert's research and mobilization activities. Other international, regional (including the Forum of African Voluntary Development Organizations and the African Network on Prevention and Protection Against Child Abuse and Neglect) and national NGOs also contributed to these activities.

18. Seminars were convened on the role of religious communities in protecting children in situations of armed conflict (in Geneva, in cooperation with the World Conference on Religion and Peace) and on the impact of low intensity conflicts on children (in Belfast, in cooperation with Save the Children Fund-UK and Rädda Barnen (Save the Children Fund-Sweden)). A third seminar was held on landmines, child soldiers and rehabilitation (convened in Stockholm in cooperation with the Swedish National Committee for UNICEF, the Swedish Foreign Policy Office, Rädda Barnen, the Swedish Red Cross and other Swedish NGOs).

19. Beyond collecting information, the expert undertook a widespread and unusual process of sensitization and mobilization. This facilitated the development of new networks and coalitions organized both nationally and regionally, and helped to place the concerns addressed in the present report on political and development agendas. The collaborative nature of this undertaking created an opportunity to develop unique new partnerships across disciplines and interest groups. For example, following the First Regional Consultation in Addis Ababa, a new alliance of children's NGOs was set up to coordinate action on child rights and development in eastern, central and southern Africa; following the Third Regional Consultation in Abidjan, a regional initiative was developed to promote the role of women in peace-building, and another proposal is currently being negotiated to provide child rights and protection training for African Chiefs of Defence Staffs; following the Second Regional Consultation in Cairo, a selected bibliography on children and war in the Arab region was published; and following the field visit to Cambodia, UNICEF was requested to assist the Ministry of Social Affairs in training its personnel in the concrete implementation of the rights of children.

20. The expert wishes to acknowledge the considerable support and financial contributions received from national committees for UNICEF and from Redd Barna (Save the Children Fund-Norway), without which this work would not have been possible. Specifically, she wishes to thank the UNICEF National Committees of Germany, Greece, Hong Kong, Japan, the Netherlands, Portugal, Spain, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland and the United States of America.

21. While the present report is formally submitted for the consideration of the United Nations General Assembly and its Member States, it is also addressed to regional institutions, United Nations bodies, specialized agencies and other competent bodies, including NGOs, relevant special rapporteurs and working groups, intergovernmental bodies and civil society.

C. Patterns and characteristics of contemporary armed conflicts

22. Violent conflict has always made victims of non-combatants. The patterns and characteristics of contemporary armed conflicts, however, have increased the risks for children. Vestiges of colonialism and persistent economic, social and political crises have greatly contributed to the disintegration of public order. Undermined by internal dissent, countries caught up in conflict today are also under severe stress from a global world economy that pushes them ever further towards the margins. Rigorous programmes of structural adjustment promise long-term market-based economic growth, but demands for immediate cuts in budget deficits and public expenditure only weaken already fragile States, leaving them dependent on forces and relations over which they have little control. While many developing countries have made considerable economic progress in recent decades, the benefits have often been spread unevenly, leaving millions of people struggling for survival. The collapse of functional Governments in many countries torn by internal fighting and the erosion of essential service structures have fomented inequalities, grievances and strife. The personalization of power and leadership and the manipulation of ethnicity and

religion to serve personal or narrow group interests have had similarly debilitating effects on countries in conflict.

23. All of these elements have contributed to conflicts, between Governments and rebels, between different opposition groups vying for supremacy and among populations at large, in struggles that take the form of widespread civil unrest. Many drag on for long periods with no clear beginning or end, subjecting successive generations to endless struggles for survival.

24. Distinctions between combatants and civilians disappear in battles fought from village to village or from street to street. In recent decades, the proportion of war victims who are civilians has leaped dramatically from 5 per cent to over 90 per cent. The struggles that claim more civilians than soldiers have been marked by horrific levels of violence and brutality. Any and all tactics are employed, from systematic rape, to scorched-earth tactics that destroy crops and poison wells, to ethnic cleansing and genocide. With all standards abandoned, human rights violations against children and women occur in unprecedented numbers. Increasingly, children have become the targets and even the perpetrators of violence and atrocities.

25. Children seek protection in networks of social support, but these have been undermined by new political and economic realities. Conflict and violent social change have affected social welfare networks between families and communities. Rapid urbanization and the spread of market-based values have also helped erode systems of support that were once based on the extended family.

26. Unbridled attacks on civilians and rural communities have provoked mass exoduses and the displacement of entire populations who flee conflict in search of elusive sanctuaries within and outside their national borders. Among these uprooted millions, it is estimated that 80 per cent are children and women.

27. Involving children as soldiers has been made easier by the proliferation of inexpensive light weapons. Previously, the more dangerous weapons were either heavy or complex, but these guns are so light that children can use them and so simple that they can be stripped and reassembled by a child of 10. The international arms trade has made assault rifles cheap and widely available so the poorest communities now have access to deadly weapons capable of transforming any local conflict into a bloody slaughter. In Uganda, an AK-47 automatic machine gun can be purchased for the cost of a chicken and, in northern Kenya, it can be bought for the price of a goat.

28. Moreover, the rapid spread of information today has changed the character of modern warfare in important ways. While the world surely benefits from ready access to information, it will pay a price if it fails to recognize that information is never entirely neutral. International media are frequently influenced by one or another of the parties to a conflict, by commercial realities and by the public's degree of interest in humanitarian action. The result of these influences are depictions that can be selective or uneven, or both. Whether a story is reported or not may depend less on its intrinsic importance than on subjective perceptions of the public's appetite for information and on the expense of informing them. For example, while coverage of the conflicts in Bosnia and Herzegovina and Somalia was extensive, very

little has been reported about the conflicts in Afghanistan and Angola. The media is capable of effectively galvanizing international public support for humanitarian action, as it did for Indo-Chinese refugees in the late 1970s and for Somalia in 1992. The threat of adverse international publicity may also be positive, holding the potential for keeping some gross violations of human rights in check. Ultimately, however, while reports of starving children or overcrowded camps for displaced persons may be dramatic, they do little to support efforts for long-term reconstruction and reconciliation.

II. MITIGATING THE IMPACT OF ARMED CONFLICT ON CHILDREN

29. Armed conflicts across and between communities result in massive levels of destruction; physical, human, moral and cultural. Not only are large numbers of children killed and injured, but countless others grow up deprived of their material and emotional needs, including the structures that give meaning to social and cultural life. The entire fabric of their societies - their homes, schools, health systems and religious institutions - are torn to pieces.

30. War violates every right of a child - the right to life, the right to be with family and community, the right to health, the right to the development of the personality and the right to be nurtured and protected. Many of today's conflicts last the length of a "childhood", meaning that from birth to early adulthood, children will experience multiple and accumulative assaults. Disrupting the social networks and primary relationships that support children's physical, emotional, moral, cognitive and social development in this way, and for this duration, can have profound physical and psychological implications.

31. In countless cases, the impact of armed conflict on children's lives remains invisible. The origin of the problems of many children who have been affected by conflicts is obscured. The children themselves may be removed from the public, living in institutions or, as is true of thousands of unaccompanied and orphaned children, exist as street children or become victims of prostitution. Children who have lost parents often experience humiliation, rejection and discrimination. For years, they may suffer in silence as their self-esteem crumbles away. Their insecurity and fear cannot be measured.

32. This section of the report documents some of the most grave impacts of armed conflict on children. The presentation is not intended to be exhaustive, but to signal major concerns and to suggest practical steps for improvement. It attempts to demonstrate that the impact of armed conflict on children cannot be fully understood without looking at the related effects on women, families and communities. It strives to illustrate how children's well-being is best ensured through family and community-based solutions to armed conflict and its aftermath, and that those solutions work best when they are based on local cultures and drawn from an understanding of child development. This section also emphasizes the importance of considerations of age - in particular, that adolescents have special needs and special strengths. Young people should be seen in that light; as survivors and active participants in creating solutions, not just as victims or problems.

33. The discussion that follows necessarily includes specific examples. It is not an effort to single out specific groups, Governments, or non-state entities. Countries are named representatively and on the basis of what is widely known. In reality, the impact of armed conflict on children is an area in which everyone shares responsibility and a degree of blame.

A. Child soldiers

34. One of the most alarming trends in armed conflict is the participation of children as soldiers. Children serve armies in supporting roles, as cooks, porters, messengers and spies. Increasingly, however, adults are deliberately conscripting children as soldiers. Some commanders have even noted the desirability of child soldiers because they are "more obedient, do not question orders and are easier to manipulate than adult soldiers". 3/

35. A series of 24 case studies on the use of children as soldiers prepared for the present report, covering conflicts over the past 30 years, indicate that government or rebel armies around the world have recruited tens of thousands of children. Most are adolescents, though many child soldiers are 10 years of age or younger. While the majority are boys, girls also are recruited. The children most likely to become soldiers are those from impoverished and marginalized backgrounds and those who have become separated from their families.

1. Recruitment

36. Child soldiers are recruited in many different ways. Some are conscripted, others are press-ganged or kidnapped and still others are forced to join armed groups to defend their families. Governments in a few countries legally conscript children under 18, but even where the legal minimum age is 18, the law is not necessarily a safeguard. In many countries, birth registration is inadequate or non-existent and children do not know how old they are. Recruiters can only guess at ages based on physical development and may enter the age of recruits as 18 to give the appearance of compliance with national laws.

37. Countries with weak administrative systems do not conscript systematically from a register. In many instances, recruits are arbitrarily seized from the streets or even from schools and orphanages. This form of press ganging, known in Ethiopia as "afesa", was prevalent there in the 1980's, when armed militia, police or army cadres would roam the streets picking up anyone they encountered. 4/ Children from poorer sectors of society are particularly vulnerable. Adolescent boys who work in the informal sector, selling cigarettes or gum or lottery tickets, are a particular target. In Myanmar, whole groups of children from 15 to 17 years old have been surrounded in their schools and forcibly conscripted. 4/ Those who can subsequently prove they are under-age may be released, but not necessarily. In all conflicts, children from wealthier and more educated families are at less risk. Often they are left undisturbed or are released if their parents can buy them out. Some children whose parents

have the means are even sent out of the country to avoid the possibility of forced conscription.

38. In addition to being forcibly recruited, youth also present themselves for service. It is misleading, however, to consider this voluntary. While young people may appear to choose military service, the choice is not exercised freely. They may be driven by any of several forces, including cultural, social, economic or political pressures.

39. One of the most basic reasons that children join armed groups is economic. Hunger and poverty may drive parents to offer their children for service. In some cases, armies pay a minor soldier's wages directly to the family. 5/ Child participation may be difficult to distinguish as in some cases whole families move with armed groups. Children themselves may volunteer if they believe that this is the only way to guarantee regular meals, clothing or medical attention. Some case studies tell of parents who encourage their daughters to become soldiers if their marriage prospects are poor. 6/

40. As conflicts persist, economic and social conditions suffer and educational opportunities become more limited or even non-existent. Under these circumstances, recruits tend to get younger and younger. Armies begin to exhaust the supplies of adult manpower and children may have little option but to join. In Afghanistan, where approximately 90 per cent of children now have no access to schooling, the proportion of soldiers who are children is thought to have risen in recent years from roughly 30 to at least 45 per cent. 7/

41. Some children feel obliged to become soldiers for their own protection. Faced with violence and chaos all around, they decide they are safer with guns in their hands. Often such children join armed opposition groups after experiencing harassment from government forces. Many young people have joined the Kurdish rebel groups, for example, as a reaction to scorched earth policies and extensive human rights violations. In El Salvador, children whose parents had been killed by government soldiers joined opposition groups for protection. In other cases, armed forces will pick up unaccompanied children for humanitarian reasons, although this is no guarantee that the children will not end up fighting. This is particularly true of children who stay with a group for long periods of time and come to identify it as their protector or "new family".

42. In some societies, military life may be the most attractive option. Young people often take up arms to gain power and power can act as a very strong motivator in situations where people feel powerless and are otherwise unable to acquire basic resources. In many situations, war activities are glorified. In Sierra Leone, the expert met with child soldiers who proudly defended the number of "enemies" they had killed.

43. The lure of ideology is particularly strong in early adolescence, when young people are developing personal identities and searching for a sense of social meaning. As the case of Rwanda shows, however, the ideological indoctrination of youth can have disastrous consequences. Children are very impressionable and may even be lured into cults of martyrdom. In Lebanon and Sri Lanka, for example, some adults have used young people's immaturity to their

own advantage, recruiting and training adolescents for suicide bombings. 8/ However, it is important to note that children may also identify with and fight for social causes, religious expression, self-determination or national liberation. As happened in South Africa or in occupied territories, they may join the struggle in pursuit of political freedom.

2. How child soldiers are used

44. Once recruited as soldiers, children generally receive much the same treatment as adults - including the often brutal induction ceremonies. Many start out in support functions which entail great risk and hardship. One of the common tasks assigned to children is to serve as porters, often carrying very heavy loads of up to 60 kilograms including ammunition or injured soldiers. Children who are too weak to carry their loads are liable to be savagely beaten or even shot. Children are also used for household and other routine duties. In Uganda, child soldiers have often done guard duty, worked in the gardens, hunted for wild fruits and vegetables and looted food from gardens and granaries. Children have also been used extensively in many countries as lookouts and messengers. While this last role may seem less life-threatening than others, in fact it puts all children under suspicion. In Latin America, reports tell of government forces that have deliberately killed even the youngest children in peasant communities on the grounds that they, too, were dangerous. 9/

45. Although the majority of child soldiers are boys, armed groups also recruit girls, many of whom perform the same functions as boys. In Guatemala, rebel groups use girls to prepare food, attend to the wounded and wash clothes. Girls may also be forced to provide sexual services. In Uganda, girls who are abducted by the Lord's Resistance Army are "married off" to rebel leaders. 10/ If the man dies, the girl is put aside for ritual cleansing and then married off to another rebel.

46. A case study from Honduras illustrates one child's experience of joining an armed group:

> "At the age of 13, I joined the student movement. I had a dream to contribute to make things change, so that children would not be hungry ... later I joined the armed struggle. I had all the inexperience and the fears of a little girl. I found out that girls were obliged to have sexual relations 'to alleviate the sadness of the combatants'. And who alleviated our sadness after going with someone we hardly knew? At my young age I experienced abortion. It was not my decision. There is a great pain in my being when I recall all these things ... In spite of my commitment, they abused me, they trampled my human dignity. And above all, they did not understand that I was a child and that I had rights." 11/

47. While children of both sexes might start out in indirect support functions, it does not take long before they are placed in the heat of battle. Here, their inexperience and lack of training leave them particularly exposed. The youngest children rarely appreciate the perils they face. A number of case studies

report that when the shelling starts the children get over-excited and forget to take cover. Some commanders deliberately exploit such fearlessness in children, even plying them with alcohol or drugs. A soldier in Myanmar recalls: "There were a lot of boys rushing into the field, screaming like banshees. It seemed like they were immortal, or impervious, or something, because we shot at them but they just kept coming." 12/

48. The progressive involvement of youth in acts of extreme violence desensitizes them to suffering. In a number of cases, young people have been deliberately exposed to horrific scenes. Such experience makes children more likely to commit violent acts themselves and may contribute to a break with society. In many countries, including Afghanistan, Mozambique, Colombia and Nicaragua, children have even been forced to commit atrocities against their own families or communities.

3. Demobilization and re-integration into society

49. Clearly one of the most urgent priorities is to remove everyone under 18 years of age from armed forces. No peace treaty to date has formally recognized the existence of child combatants. As a result, their special needs are unlikely to be taken into account in demobilization programmes. In Mozambique, for example, where recruitment of children was well known, child soldiers were not recognized in demobilization efforts by the Resistência Nacional de Moçambique (RENAMO), the Government or the international community. Official acknowledgement of children's part in a war is a vital step. Peace agreements and related documents should incorporate provisions for the demobilization of children; without this recognition, there can be no effective planning or programming on a national scale.

50. The process of reintegration must help children to establish new foundations in life based on their individual capacities. Former child soldiers have grown up away from their families and have been deprived of many of the normal opportunities for physical, emotional and intellectual development. As article 39 of the Convention on the Rights of the Child emphasizes, recovery and reintegration should take place in an environment that fosters the health, self-respect and dignity of the child.

51. Reintegration programmes must re-establish contact with the family and the community. Even children who are successfully reunited with their families, however, have little prospect of smoothly taking up life as it was before. A formerly cheerful 12-year-old may return home as a sullen 16-year-old who feels newly assertive and independent. Reunification may be particularly difficult for girl soldiers who have been raped or sexually abused, in part because cultural beliefs and attitudes can make it very difficult for them to stay with their families or to have any prospects of marriage. With so few alternatives, many children have eventually become victims of prostitution.

52. In many cases, reunification is impossible. Families may have perished in the conflict or may be untraceable. For some children, a transitional period of collective care may be necessary. Institutional approaches have proven

ineffective, but one way to provide such care is through peer-group living arrangements that are strongly integrated into communities.

53. Effective social reintegration depends upon support from families and communities. But families are also worn down by conflict, both physically and emotionally, and face increased impoverishment. The field visits and research for the present report repeatedly stressed the importance of links between education, vocational opportunities for former child combatants and the economic security of their families. These are most often the determinants of successful social reintegration and, importantly, they are the factors that prevent re-recruitment.

54. Education, and especially the completion of primary schooling, must be a high priority. For a former child soldier, education is more than a route to employment. It also helps to normalize life and to develop an identity separate from that of the soldier. The development of peer relationships and improved self-esteem may also be facilitated through recreational and cultural activities. A difficulty to be faced is the likelihood that former combatants may have fallen far behind in their schooling, and may be placed in classes with much younger children. Specific measures may be required, such as establishing special classes for former child soldiers who can then progressively be reintegrated into regular schools.

55. Many teachers and parents may object to having ex-combatants enrol in schools, fearing that they will have a disruptive effect. Programmes must address these wider community concerns. In some African cultures, strong spiritual convictions hold that anyone who has killed is haunted by the evil spirits of the victims. Thus, to accept a former child soldier into one's village is to accept evil spirits. In such a context, programmes for re-entry into the community have effectively involved traditional healers in "cleansing" and other processes.

56. For older children especially, effective education will require strong components of training in life-skills and vocational opportunity. Preparing older children to find employment will not only help them survive, but may also facilitate their acceptance at home and provide them with a sense of meaning and identity.

57. Child soldiers may find it difficult to disengage from the idea that violence is a legitimate means of achieving one's aims. Even where the experience of participating in "the cause" has been positive, as was often the case for youth who identified with and drew meaning from their part in the struggle against apartheid, the transition to a non-violent lifestyle will be difficult. This is particularly true where the frustrations of poverty and injustice remain. The challenge for Governments and civil society is to channel the energy, ideas and experience of youth into contributing in positive ways to the creation of their new, post-conflict society.

4. Preventing future recruitment

58. The research conducted for this study uncovered many practical steps to be taken to prevent future recruitment. First, Governments should work for the finalization and rapid adoption of the draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts. Next, Governments must pay much closer attention to their methods of recruitment, and in particular, they must renounce the practice of forced recruitment. They should ensure that all children are registered at birth and receive documentation of age. To be certain that these measures succeed, Governments must establish effective monitoring systems and back them up with legal remedies and institutions that are sufficiently strong to tackle abuses. For example, in Guatemala in May and June of 1995, the human rights ombudsman's office intervened in 596 cases of forced recruitment of youth. As a result, 148 children under the age of 18 were released.

59. The recruitment of children can be minimized if local communities are aware of national and international laws governing the age of recruitment and if they are sufficiently organized and determined. In El Salvador, Guatemala and Paraguay, ethnic groups and the mothers of child soldiers have formed organizations to pressure authorities for the release of under-age soldiers. NGOs, religious groups and civil society in general have important roles in establishing ethical frameworks that characterize children's participation in armed conflicts as unacceptable. In Peru, it has been reported that forced recruitment drives have declined in areas where parish churches have denounced the activity. Another important preventive measure is the active and early documentation and tracing of unaccompanied children.

60. The United Nations and other international organizations also have important roles in reporting child conscription, raising the issue with those in authority and supporting local groups in their work for the release of children. In Myanmar, protests from aid agencies led to the return of men and boys who had been forcibly recruited from a refugee camp.

61. Armed opposition groups are less amenable to external or formal pressure than government-sponsored armies. Even with such groups, however, Governments and international organizations can exert influence. When Governments ratify the international humanitarian conventions that apply to internal conflicts, then international law holds all armed groups within those countries accountable. In Sudan, humanitarian organizations have negotiated agreements with rebel groups to prevent the recruitment of children. The human rights component within the United Nations Observer Mission in El Salvador (ONUSAL) supported local groups investigating complaints of forced recruitment of minors and raised the issue with authorities. In many cases, United Nations intervention secured the release of the minors involved.

6162

5. Specific recommendations on child soldiers

62. The expert submits the following recommendations on the question of child soldiers:

(a) Building on the existing efforts of the Committee on the Rights of the Child, Rädda Barnen, the Friends World Committee for Consultation (Quakers), UNICEF, UNHCR and the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and their National Societies, a global campaign should be launched, led by those same organizations, aimed at eradicating the use of children under the age of 18 years in the armed forces. The media, too, should be encouraged to expose the use of child soldiers and the need for demobilization;

(b) United Nations bodies, specialized agencies and international civil society actors should begin to pursue quiet diplomacy with Government and non-state forces and their international supporters to encourage the immediate demobilization of child soldiers and adherence to the Convention on the Rights of the Child;

(c) All peace agreements should include specific measures to demobilize and reintegrate child soldiers into society. There is an urgent need for the international community to support programmes, including advocacy and social services programmes, for the demobilization and re-integration into the community of child soldiers. Such measures must address the family's economic security and include educational, life-skills and vocational opportunities;

(d) States should ensure the early and successful conclusion of the drafting of the optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts, raising the age of recruitment and participation in the armed forces to 18 years.

B. Refugees and internally displaced children

63. Armed conflict has always caused population movements. During full-scale conflicts, whether or not they cross national boundaries, people flee in large numbers. Their destinations determine whether those who flee will become internally displaced people 13/ in their own countries or refugees 14/ who have crossed national borders. Africa and Asia have been most affected by massive population upheavals but no region has escaped either the phenomenon itself or its ramifications. Wherever it occurs, displacement has a profound physical, emotional and developmental impact on children and increases their vulnerability. Except where otherwise distinguished in the present report, refugees and internally displaced persons, as well as persons in refugee-like situations, are referred to collectively as displaced persons.

64. At the beginning of the 1980s, there were 5.7 million refugees worldwide. By the end of the decade, the number had increased to 14.8 million, and today there are more than 27.4 million refugees and "persons of concern" to UNHCR, that is, some returnees and people living in "safe havens". 15/

65. According to the report of the Representative of the Secretary-General on Internally Displaced Persons (E/CN.4/1996/52/Add.2), the number of internally displaced people has also escalated in recent years, now reaching an estimated 30 million - more than the number of refugees. The protection and assistance needs of the internally displaced are similar to those of refugees in nearly all respects, and yet their situation can be worse. While refugees have often moved outside the war zone, internally displaced persons usually remain within or close to the scene of conflict and they are often likely to be displaced repeatedly.

66. At least half of all refugees and displaced people are children. At a crucial and vulnerable time in their lives, they have been brutally uprooted and exposed to danger and insecurity. In the course of displacement, millions of children have been separated from their families, physically abused, exploited and abducted into military groups, or they have perished from hunger and disease.

1. Vulnerability of children in flight

67. To flee from one's home is to experience a deep sense of loss, and the decision to flee is not taken lightly. Those who make this decision do so because they are in danger of being killed, tortured, forcibly recruited, raped, abducted or starved, among other reasons. They leave behind them assets and property, relatives, friends, familiar surroundings and established social networks. Although the decision to leave is normally taken by adults, even the youngest children recognize what is happening and can sense their parents' uncertainty and fear.

68. During flight from the dangers of conflict, families and children continue to be exposed to multiple physical dangers. They are threatened by sudden attacks, shelling, snipers and landmines, and must often walk for days with only limited quantities of water and food. Under such circumstances, children become acutely undernourished and prone to illness, and they are the first to die. Girls in flight are even more vulnerable than usual to sexual abuse. Children forced to flee on their own to ensure their survival are also at heightened risk. Many abandon home to avoid forced recruitment, only to find that being in flight still places them at risk of recruitment, especially if they have no documentation and travel without their families.

2. Unaccompanied children

69. Unaccompanied children are those who are separated from both parents and are not in the care of another adult who, by law or custom, has taken responsibility to do so. 16/ Children are often separated from parents in the chaos of conflict, escape and displacement. Parents or other primary care-givers are the major source of a child's emotional and physical security and for this reason family separation can have a devastating social and psychological impact. Unaccompanied children are especially vulnerable and at risk of neglect, violence, military recruitment, sexual assault and other abuses. An

essential goal of relief programmes must be to provide assistance to families to prevent separations.

70. The first priority of relief programmes is to identify a child as unaccompanied and to ensure their survival and protection. The next priorities are documenting, tracing and - whenever possible - reunifying families. Most unaccompanied children are not orphans and, even when both parents are dead, often have relatives, bound by custom and tradition, who are willing and able to care for them. In all cases, it is essential to keep siblings together. In the Great Lakes region of Africa, a vast tracing programme was set up in 1994 by ICRC, IFRC and their National Societies, UNHCR, UNICEF, the Save the Children Fund and other NGOs. More than 100,000 children were registered as unaccompanied, both inside and outside their countries of origin. According to UNHCR, by May 1996, more than 33,000 of these children had been reunited with family members. This positive outcome resulted largely because identification and tracing activities were implemented from the outset of the emergency, and because agencies had committed themselves to cooperate together. Many traditional and non-traditional tracing methods were used, including photo tracing programmes.

71. While families are sought, procedures must be set up to prevent further separation and to provide each unaccompanied child with continuous alternative care. Alternative care is most appropriately found with the extended family, but when this is not possible, it can come from neighbours, friends or other substitute families. Nevertheless these arrangements need careful supervision. Many foster families take excellent care of a child, but where economic and social situations have been undermined by war, children may be at risk of exploitation. The situation of a child in a foster family should therefore always be closely monitored through a community-based system. Initiatives of this kind in the Great Lakes region have produced positive results. These programmes have resulted in closing down unaccompanied children's centres and returning children into the refugee community, combining family mediation and projects to support vulnerable families, enabling them to keep their children.

72. Centres for unaccompanied children, such as orphanages or other institutions, cannot fully meet the emotional and developmental needs of children. And there is always the risk that temporary centres may become permanent. The creation of centres may also in itself generate higher numbers of unaccompanied children. During her visit to the Great Lakes region, the expert was deeply concerned that, as a result of media attention, many centres had been created as a way of profiting from humanitarian aid. Such centres may be attractive to parents who are having difficulty feeding their families and who might easily think it best to leave their children where they will be provided with food and health care. This underlines the need to prevent family separation by ensuring that vulnerable families are supported in caring for their children.

73. In response to the many protection and care problems facing unaccompanied children, UNICEF and UNHCR, in consultation with ICRC, IFRC and their National Societies and some specialized NGOs, have jointly developed an emergency kit to facilitate coordination and to enhance the quality of response to the needs of unaccompanied children. The tools included in the kit, such as registration

forms and Polaroid cameras, are derived from experiences gained from earlier emergencies. The kit also comes with guidelines on the protection and care of unaccompanied children, and it is essential that these are widely disseminated among and followed by relief workers.

74. At the height of a conflict, tracing is particularly difficult. Precisely because that is the case, unaccompanied children should not be considered available for adoption. Adoption severs family links permanently and should not be considered unless all family tracing efforts have been exhausted. This principle is safeguarded by a recommendation adopted in the Convention on Protection of Children and Cooperation in respect of Inter-country Adoption signed at The Hague on 29 May 1994. 17/

3. Evacuation

75. Parents living in zones of armed conflict can become so concerned for the safety of their children that they decide to evacuate them, sending them to friends or relatives or having them join large-scale programmes. To parents, evacuation may appear at the time to be the best solution, but this is frequently not the case. In Bosnia and Herzegovina, for example, evacuations were often hastily organized with little documentation. Evacuation also poses a long-term risk to children, including the trauma of separation from the family and the increased danger of trafficking or of illegal adoption. On her visit to Bosnia and Herzegovina, the expert was concerned to learn that some evacuations had been organized by groups intent on exploiting adoption markets. In the case of medical evacuations, difficulties often arise when the foster family, thinking the child will have better opportunities in the host country, does not want to allow the child in their care to return to the original family.

76. As is stressed in the Convention on the Rights of the Child, with articles 9 and 10 regarding family unity being of particular note, all such decisions must be based on the best interests of the child and take her or his opinions into account. If evacuation is essential, whole families should move together, and if this is not possible, children should at least move with their primary care-givers and siblings. Great care should also be taken to ensure that any evacuation is properly documented, and that arrangements are made for the effective reception and care for children and for maintaining contact with other family members, as well as for early reunification. Guidelines on these criteria are supported by UNHCR, UNICEF, ICRC, IFRC and their National Societies. Evacuations are sometimes essential, as international agencies concluded in the Great Lakes region when orphanages were being targeted for purposes of ethnic cleansing. In 1992, UNHCR/UNICEF issued a publication on considerations and guidelines on evacuation of children from conflict areas. These require wide dissemination.

4. Children in camps

77. Ideally, camps for refugees or the internally displaced should be places of safety, offering protection and assistance. However, displaced populations are complex societies that often reproduce former divisions and power struggles. At

the same time their traditional systems of social protection come under strain or break down completely and there are often high levels of violence, alcohol and substance abuse, family quarrels and sexual assault. Women and adolescent girls are particularly vulnerable and even the youngest children can be affected when they witness an attack on a mother or a sister. The UNHCR guidelines on sexual violence against refugees outline practical protection measures such as careful lighting, arrangement of latrines and the organizing of people into groups for tasks such as gathering firewood. 18/ These and the UNHCR guidelines on the protection and care of refugee children should be applied to all internally displaced women and children.

78. One important aspect of relief that particularly affects women and children is the distribution of resources such as food, water, firewood and plastic sheeting. Control of these resources represents power. Men are usually in charge of distribution and often abuse their power by demanding bribes or sexual favours. This puts women at risk and especially female heads of households. As recommended in the UNHCR Guidelines on the Protection of Refugee Women, UNHCR and WFP should be in the forefront of ensuring that women are the initial point of control in distribution systems and that appropriate support systems are established for female-headed households.

79. The first days and weeks of a mass displacement of people usually result in high mortality rates for children. Among displaced children, measles, diarrhoeal diseases, acute respiratory infections (ARI), malaria and malnutrition account for 60 to 80 per cent of reported deaths. Factors contributing to high mortality include overcrowding and lack of food and clean water, along with poor sanitation and lack of shelter. Pregnant and lactating women require particular attention, as do displaced children living with disabilities. Children coming from armed conflict are likely to have injuries that require special medical attention. In these circumstances, only a multi-sectoral approach to health and nutrition can protect young children.

80. Camp environments are often highly militarized. In some instances, children have been taken, either forcibly or fraudulently, from camps to a third country for "political education" or military training. In several cases, host Governments have recruited refugee children for military service. 19/

5. The situation of internally displaced children

81. Children who are displaced but remain in their own countries face perilous circumstances. They are often worse off than refugees, since they may lack access to protection and assistance. There are an increasing number of situations where families and communities are chronically displaced due to localized, continued armed conflict. Surveys have shown that the death rate among internally displaced persons has been as much as 60 per cent higher than the death rate of persons within the same country who are not displaced. 20/ Even when internally displaced families are housed with relatives or friends, they may not be secure, eventually facing resentment from their hosts because of the limited resources to be shared.

82. Another acute problem for internally displaced children is access to health and education services. In contravention of humanitarian law, the access of internally displaced persons to humanitarian assistance is often impeded. Flight can put them beyond the reach of existing Government or NGO programmes. Even if schools exist, the children may not be able to enrol because they lack proper documentation, are not considered residents of the area or are unable to pay school fees. Feelings of exclusion, as well as the struggle for survival and protection, may lead children to join parties to the conflict or to become street children.

83. While some organizations such as UNHCR, ICRC, IFRC and their National Societies and the International Organization for Migration (IOM) have specific mandates with regard to internally displaced persons, at present there is no clear institutional responsibility for their protection and assistance needs. Organizations with mandates to protect and care for children affected by armed conflicts such as UNICEF, UNHCR and WFP, do not consistently ensure the protection and care of internally displaced children. The expert supports the call of the Representative of the Secretary-General on Internally Displaced Persons for the development of an appropriate legal framework and institutional arrangements to clearly establish assistance and protection responsibilities. The legal framework should be based on the report of the Representative on the compilation and analysis of legal norms applicable to internally displaced persons (E/CN.4/1996/52/Add.2).

6. Asylum and the right to identity and nationality

84. Statelessness is a risk for refugee children as they may have difficulty in establishing their identity and nationality. As article 7 of the Convention on the Rights of the Child provides, all children should be registered and receive citizenship at birth. In the case of refugee children, only the host State is in a position to register the child. It is particularly important for a refugee child, especially if unaccompanied, to be provided with clear documentation concerning the identity of parents and place of birth.

85. Families who reach a border are still very exposed, and young girls and women who have been separated from their families are particularly vulnerable to exploitation and abuse from border guards and others. Even those who succeed in crossing a border have no guarantee of asylum. The 1951 Convention and the 1967 Protocol relating to the Status of Refugees may not fully cover those fleeing armed conflict. In cases of mass exodus from countries like Afghanistan and Viet Nam, many Governments were sufficiently flexible to grant temporary refuge. However, since the end of the cold war, many Governments have been more reluctant to grant asylum and have even sought to prevent asylum seekers from reaching their borders. As a minimum, Governments should grant temporary asylum pending the identification of a durable solution.

86. One consequence of current policies is that a number of asylum seekers, including children, are detained while their cases are considered. Seeking asylum cannot be considered an offence or a crime, yet in some cases women and children are incarcerated with criminals. Countries that determine refugee status on an individual basis should under no circumstances refuse access to

unaccompanied children seeking asylum. The Statement of the Sixth Regional Consultation on the Impact of Armed Conflict on Children in Europe stressed that unaccompanied children should have access to asylum procedures regardless of age. Bearing in mind the critical development needs of children, long-term solutions should be found as quickly as possible. In accordance with the Convention on the Rights of the Child and UNHCR guidelines, children should be fully involved in decisions about their future.

7. Returning home and durable solutions

87. Long-term solutions for refugees involve voluntary repatriation, local integration or resettlement into new national communities. Whichever is chosen, procedures should be expeditious and carried out in the best interests of the child. The principles relating to voluntary repatriation and reintegration should also be applied to the return of internally displaced persons. These are to ensure that conditions of safety and dignity as well as national protection are available.

88. For refugee or internally displaced families and children returning to their home communities, reintegration may be very difficult. In countries disrupted by many years of conflict, there are often tensions between returnees and residents. For children in particular, one of the most important measures is to ensure education and the opportunity to re-establish family life and productive livelihoods.

89. Another major difficulty is that female heads of households may, on their return, lose property rights and custody of their children. Loss of property rights may also affect child-headed households. These are usually family units of siblings, children of extended family members, or even unrelated children, headed by a minor, usually an adolescent girl. In September 1995, UNICEF and the Rwandan Ministry of Labour and Social Affairs identified 1,939 children living in child-headed households. Their need for legal and social protection is especially acute; lack of land, property and inheritance rights add to their instability. Child-headed households are particularly vulnerable to exploitative labour and prostitution. Dilemmas have arisen in designing appropriate policy and programme responses, especially around the feasibility of foster arrangements. The principle of family unity, even where there are not parents, as safeguarded in the Convention on the Rights of the Child, must be the basis of all support for these children.

8. Specific recommendations for refugee and internally displaced children

90. The expert submits the following recommendations for refugee and internally displaced children:

(a) As a priority in all emergencies, procedures should be adopted to ensure the survival and protection of unaccompanied children. Family tracing programmes should be established from the outset of assistance programmes;

(b) Unaccompanied children should, wherever possible, be cared for by their extended family and community rather than in institutions. It is essential that donors support this principle. The vast majority of unaccompanied children have some family somewhere. Therefore, no adoptions should be permitted until exhaustive family tracing, including into the post-conflict phase, has been attempted;

(c) Practical protection measures to prevent sexual violence, discrimination in delivery of relief materials, and the recruitment of children into armed forces must be a priority in all assistance programmes in refugee and displaced camps. Such measures should involve women and youth fully in their design, delivery and monitoring and include advocacy and social services to address abuses and violations of children's rights;

(d) The Inter-Agency Standing Committee and its Task Force on Internally Displaced Persons should evaluate the extent to which assistance and protection are being provided to internally displaced children and develop appropriate institutional frameworks to address their needs. In cooperation with the Department of Humanitarian Affairs in its role under the authority of the Emergency Relief Coordinator, and in consultation with other major humanitarian agencies, in each emergency, a lead agency should be assigned overall responsibility for the protection and assistance of internally displaced persons. In collaboration with the lead agency, UNICEF should provide leadership for the protection and assistance of internally displaced children;

(e) The General Assembly, the Commission on Human Rights, as well as regional organizations, should support the work of the Representative of the Secretary-General on Internally Displaced Persons to develop an appropriate legal framework to increase protection for internally displaced persons and to give particular emphasis to the specific concerns of children;

(f) Intergovernmental bodies, UNHCR, the United Nations Development Fund for Women (UNIFEM) and other organizations should support Governments in strengthening national legislative frameworks challenging any aspect of discrimination against women, girls and child-headed households with particular respect to custody, inheritance and property rights;

(g) The expert urges that UNICEF, UNHCR, FAO and ILO give urgent attention to the situation of child-headed households, and develop policy and programme guidelines to ensure their protection and care.

C. Sexual exploitation and gender-based violence

1. Gender-based violence: a weapon of war

91. Rape poses a continual threat to women and girls during armed conflict, as do other forms of gender-based violence including prostitution, sexual humiliation and mutilation, trafficking and domestic violence. While abuses such as murder and torture have long been denounced as war crimes, rape has been downplayed as an unfortunate but inevitable side effect of war. Acts of gender-based violence, particularly rape, committed during armed conflicts

constitute a violation of international humanitarian law. When it occurs on a massive scale or as a matter of orchestrated policy, this added dimension is recognized as it was at the most recent International Conference of the Red Cross and Red Crescent, as a crime against humanity. Recent efforts to prosecute rape as a war crime, however, have underscored the difficulties in applying international human rights law and humanitarian law.

92. Women of all ages may be victims of violence in conflict, but adolescent girls are particularly at risk for a range of reasons, including size and vulnerability. Their vulnerability is even greater in some localities where they are considered less likely to have sexually transmitted diseases and the HIV/AIDS virus. Characteristics such as ethnicity, class, religion or nationality may be factors that determine which women or girls are subjected to violence. Women and girls are at risk in all settings whether in the home, during flight or in camps to which they have fled for safety. Children affected by gender-based violence also include those who have witnessed the rape of a family member and those who are ostracized because of a mother's assault.

93. Most child victims of violence and sexual abuse are girls, but boys are also affected and cases of young boys who have been raped or forced into prostitution are under-reported. In Bosnia and Herzegovina, sons and fathers have been forced to commit sexual atrocities against each other. In some cases, boys traumatized by violence have also subsequently been the perpetrators of sexual violence against girls.

94. Rape is not incidental to conflict. It can occur on a random and uncontrolled basis due to the general disruption of social boundaries and the license granted to soldiers and militias. Most often, however, it functions like other forms of torture and is used as a tactical weapon of war to humiliate and weaken the morale of the perceived enemy. During armed conflict, rape is used to terrorize populations or to force civilians to flee.

95. Often, gender-based violence is practised with the intent of ethnic cleansing through deliberate impregnation. The Special Rapporteur on the situation of human rights in the territory of the former Yugoslavia found that this was the case in Bosnia and Herzegovina and in Croatia. 21/ The thousands of Korean women forced to serve as military sexual slaves during the Second World War is another example of rape being used as a weapon of war. 22/

2. Child victims of prostitution and sexual exploitation

96. Poverty, hunger and desperation may force women and girls into prostitution, obliging them to offer sex for food or shelter, for safe conduct through the war zone or to obtain papers or other privileges for themselves and their families. Children have been trafficked from conflict situations to work in brothels in other countries, transported from Cambodia to Thailand, for example, and from Georgia to Turkey. In refugee camps in Zaire, the expert heard numerous reports of girls who had been pressured by their families to enter prostitution. Similarly, some parents among the internally displaced communities in Guatemala have been forced to prostitute their children. Other girls have done so in the hope of securing greater protection. In Colombia, for

example, there have been reports of girls as young as twelve submitting themselves to paramilitary forces as a means of defending their families against other groups.

97. With time, different forms of gender-based violence experienced during armed conflicts become institutionalized, since many of the conditions that created the violence remain unchanged. Young girls who have become victims of prostitution for armies, for example, may have no other option but to continue after the conflict has ceased. In Phnom Penh, the number of child victims of prostitution continues to escalate with an estimated 100 children sold into prostitution each month for economic reasons.

98. Children may also become victims of prostitution following the arrival of peacekeeping forces. In Mozambique, after the signing of the peace treaty in 1992, soldiers of the United Nations Operation in Mozambique (ONUMOZ) recruited girls aged 12 to 18 years into prostitution. After a commission of inquiry confirmed the allegations, the soldiers implicated were sent home. 23/ In 6 out of 12 country studies on sexual exploitation of children in situations of armed conflict prepared for the present report, the arrival of peacekeeping troops has been associated with a rapid rise in child prostitution.

99. Sexual exploitation has a devastating impact on physical and emotional development. Unwanted and unsafe sex is likely to lead to sexually transmitted diseases and HIV/AIDS, which not only affect immediate health but also future sexual and reproductive health and mortality. In Cambodia, according to a study prepared for the present report, it is estimated that 60 to 70 per cent of the child victims of prostitution are HIV positive. Adolescent girls may nonetheless suffer in silence after the trauma of sexual exploitation; they often fear reprisals from those who attacked them or rejection by their families, not to mention the sheer personal humiliation and anguish which causes so many of them to withdraw into a shell of pain and denial. WHO has found that among rape victims the risk of suicide is high.

100. When a pregnancy is forced, the determination about whether it will be carried to term depends on many local circumstances, including access to and the safety of abortion, community support systems and existing religious or cultural mores. In Rwanda, the expert heard conflicting reports about the numbers of pregnancies that had been terminated or brought to term, abandoned or adopted.

101. All women and young girls who give birth during conflict must contend with the unexpected economic and psychosocial consequences of raising a child without adequate systems of support. The deterioration of public health infrastructure reduces access to reproductive health services, such as family planning, treatment for sexually transmitted diseases and gynaecological complications, and pre- and post-natal care.

102. Complications in pregnancy and delivery are especially likely for children who have children. Owing to their physical immaturity, many pregnant adolescents experience infection as a result of unsafe or incomplete abortion. Victims of repeated rape and young girls who give birth in the absence of trained birth attendants and in unhygienic conditions are at greater risk of chronic pelvic inflammatory diseases and muscle injury that can result in

incontinence. Without sensitive, timely and adequate medical care, many of these victims die. Some commit suicide because of the humiliation and embarrassment they suffer.

3. Ending impunity

103. The failure to denounce and prosecute wartime rape is partly a result of its mischaracterization as an assault against honour or a personal attack rather than a crime against the physical integrity of the victim. The International Tribunal established to try war crimes committed in the former Yugoslavia has indicted eight people on specific charges of rape and sexual assault, despite estimates of up to 20,000 victims. This limited result underscores the difficulties in applying international human rights and humanitarian law to rape - difficulties which are reflected both in the codification and interpretation of national, and even international, law.

104. The widespread practice of rape as an instrument of armed conflict and ethnic cleansing must be ended and its perpetrators prosecuted. National and international law must codify rape as a crime against the physical integrity of the individual, national Governments must hold those who commit rape in internal conflicts accountable and must reform their national laws to address the substantive nature of the abuse. Unwanted pregnancy resulting from forced impregnation should be recognized as a distinct harm and appropriate remedies provided.

105. Overall procedures and mechanisms to investigate, report, prosecute and remedy gender-based violations should be reviewed and strengthened, ensuring the protection of victims who report violations. It is encouraging that some organizations are beginning to include trained and qualified personnel in international human rights monitoring, investigation and verification operations to consider issues of gender violence more systematically.

106. As recommended in the Beijing Platform for Action, gender balance must be sought when nominating or promoting candidates for judicial and all relevant international bodies, including the International Tribunals for the former Yugoslavia and for Rwanda, the International Court of Justice and other bodies related to the peaceful settlement of disputes. Both legal and medical programme personnel, including medical and relief personnel, prosecutors, judges and other officials who respond to crimes of rape, forced impregnation, and other forms of gender-based violence in armed conflict, should be trained to integrate a gender-specific perspective into their work.

4. Preventing gender-based violence

107. Prevention of gender-based violence should include a role for the military, and United Nations peacekeepers in particular. Senior officers often have turned a blind eye to the sexual crimes of those under their command, but they must be held accountable for both their own behaviour and that of the men they supervise. The 12 case studies on gender-based violence prepared for the present report found the main perpetrators of sexual abuse and exploitation to

be the armed forces of parties to a conflict, whether governmental or other actors. Military training should emphasize gender sensitivity, child rights and responsible behaviour towards women and children. Offenders must be prosecuted and punished for acts against women and children.

108. Other preventive measures include the construction of shelter, water and sanitation facilities in camps which must be carefully designed to avoid creating opportunities for gender-based aggression against displaced women and children. In situations of armed conflict, all humanitarian assistance must include community-based psychosocial and reproductive health programmes. Higher priority should be given to addressing the needs of children who have witnessed or been subjected to gender-based violence.

109. Humanitarian responses have been largely inadequate. UNHCR, however, has published guidelines on prevention and response to sexual violence against refugees and guidelines on evaluation and care of victims of trauma and violence. These are important efforts to ensure that relief workers are equipped to respond to the special needs of victims of sexual violence. Some effective programmes do exist, such as the "Women Victims of Violence" project in Kenya. This was initiated by UNHCR following the very large number of rapes committed by bandits and local security personnel in the Somali refugee camps of north-eastern Kenya. During a field visit to Bosnia and Herzegovina, the expert visited a number of community-based programmes, such as "Bosfam" and "Bospo" that provide support for women, including victims of sexual violence, in regaining control over their lives through small-scale income-generating activities. Such programmes have been few and far between, however. To be effective, they should provide comprehensive services including economic assistance and psychosocial support, and they should not overtly identify the women as victims. If such initiatives are to succeed, the local community must be involved in their design and implementation.

5. Specific recommendations on sexual exploitation and gender-based violence

110. The expert submits the following recommendations on sexual exploitation and gender-based violence:

(a) All humanitarian responses in conflict situations must emphasize the special reproductive health needs of women and girls including access to family planning services, pregnancy as a result of rape, sexual mutilation, childbirth at an early age or infection with sexually transmitted diseases, including HIV/AIDS. Equally important are the psychosocial needs of mothers who have been subjected to gender-based violence and who need help in order to foster the conditions necessary for the healthy development of their children;

(b) All military personnel, including peacekeeping personnel, should receive instruction on their responsibilities towards civilian communities and particularly towards women and children as part of their training;

(c) Clear and easily accessible systems should be established for reporting on sexual abuse within both military and civilian populations;

(d) The treatment of rape as a war crime must be clarified, pursued within military and civilian populations, and punished accordingly. Appropriate legal and rehabilitative remedies must be made available to reflect the nature of the crime and its harm;

(e) Refugee and displaced persons camps should be so designed as to improve security for women and girls. Women should also be involved in all aspects of camp administration but especially in organizing distribution and security systems. Increased numbers of female personnel should be deployed to the field as protection officers and counsellors;

(f) In every conflict, support programmes should be established for victims of sexual abuse and gender-based violence. These should offer confidential counselling on a wide range of issues, including the rights of victims. They should also provide educational activities and skills training.

D. Landmines and unexploded ordnance

111. The spread of light weapons of all kinds has caused untold suffering to millions of children caught up in armed conflict. Many of these weapons have a devastating impact not only during the period of conflict, but for decades thereafter. Landmines and unexploded ordnance probably pose the most insidious and persistent danger. Today, children in at least 68 countries live amid the contamination of more than 110 million landmines. Added to this number are millions of items of unexploded ordnance, bombs, shells and grenades that failed to detonate on impact. Like landmines, unexploded ordnance are weapons deemed to have indiscriminate effects, triggered by innocent and unsuspecting passers-by. 24/

112. Landmines have been employed in most conflicts since the Second World War, and particularly in internal conflicts. Afghanistan, Angola and Cambodia alone have a combined total of at least 28 million landmines, as well as 85 per cent of the world's landmine casualties. Angola, with an estimated 10 million landmines, has an amputee population of 70,000, of whom 8,000 are children. African children live on the continent most plagued by landmines - there are as many as 37 million mines in at least 19 African countries - but all continents are affected to some extent. 25/

1. The threat to children

113. Landmines and unexploded ordnance pose a particular danger for children, especially because children are naturally curious and likely to pick up strange objects they come across. Devices like the "butterfly" mines used extensively by the former Union of Soviet Socialist Republics in Afghanistan are coloured bright green and have two "wings". Although they were not designed to look like toys, such devices can still hold a deadly attraction for children. Children are also more vulnerable to the danger of landmines than adults because they may not recognize or be able to read warning signs. Even if they are aware of mines, small children may be less able than adults to spot them: a mine laid in

grass and clearly visible to an adult may be less so to a small child, whose perspective is two or three feet lower.

114. The risk to children is further compounded by the way in which mines and unexploded ordnance become a part of daily life. Children may become so familiar with mines that they forget they are lethal weapons. In northern Iraq, children have been known to use mines as wheels for toy trucks, and in Cambodia children have been seen playing "boules" with B40 anti-personnel mines, even beginning their own collections of landmines. 26/ The dangers from unexploded ordnance are very similar, and in many places these weapons are much more numerous. During her field visit to Cambodia, the expert noted that civilians increasingly use mines and other devices for daily activities such as fishing, guarding private property and even settling domestic disputes. Such familiarity dulls awareness of the dangers of these devices.

115. The victims of mines and unexploded ordnance tend to be concentrated among the poorest sectors of society, where people face danger every day when cultivating their fields, herding their animals or searching for firewood. In many cultures, these are the very tasks carried out by children. In Viet Nam, for example, it is young children who look after the family water buffalo, which often roam freely in areas where the ground has been mined or contains unexploded bombs and shells. Many poor children also work as scavengers. In a village in Mozambique in 1995, several children were collecting scrap metal to sell in the local market. When they took it to the market and placed it on a scale, the metal exploded, killing 11 children. 27/ Child soldiers are particularly vulnerable, as they are often the personnel used to explore known minefields. In Cambodia, a survey of mine victims in military hospitals found that 43 per cent had been recruited as soldiers between the ages of 10 and 16.

116. A mine explosion is likely to cause greater damage to the body of a child than to that of an adult. Anti-personnel mines are designed not to kill, but to maim, yet even the smallest mine explosion can be lethal for a child. In Cambodia, an average 20 per cent of all children injured by mines and unexploded ordnance die from their injuries. 28/ For the children who survive, the medical problems related to amputation are often severe, as the limb of a growing child grows faster than the surrounding tissue and requires repeated amputation. As they grow, children also need new prostheses regularly. For young children, this can mean a new prosthesis every six months. The extended medical treatment and psychosocial support that mine injuries demand make them extremely expensive for the families of the victims and for society in general. Girls are even less likely than boys to receive special medical attention and prostheses. The burden and the expense of rehabilitative care should be considered in recovery and social reintegration programmes.

117. Even where children themselves are not the victims, landmines and unexploded ordnance have an overwhelming impact on their lives. Families already living on the edge of survival are often financially devastated by mine incidents. Surveys in Cambodia have revealed that 61 per cent of families with a mine victim to support were in debt because of the accident. Additionally, when a parent is a mine casualty, the lost ability to work can substantially weaken the care and protection available to children. A field survey in

Afghanistan reported that unemployment for adult males rose from 6 to 52 per cent as a result of landmine accidents.

118. Indiscriminate weapons also strike at a country's reconstruction and development. Roads and footpaths strewn with landmines impede the safe repatriation and return of refugee and displaced children and their families. Land seeded with millions of landmines and unexploded ordnance is unfit for sowing productive crops, and the threat of mines inhibits the circulation of goods and services.

2. Mine clearance, mine awareness and rehabilitation

119. Protecting children and other civilians from landmines and unexploded ordnance demands rapid progress in four major areas: a ban on landmines; mine clearance that will eventually remove the problem; mine awareness programmes that help children to avoid injury; and rehabilitation programmes that help children recover. The Department of Humanitarian Affairs of the Secretariat has advanced the relatively new concept of humanitarian mine clearance. The United Nations considers that an area meets safety standards when it is 99.9 per cent free of landmines. Clearing landmines is a long and expensive business: each one takes 100 times longer to remove than to deploy and a weapon that costs $3 or less to manufacture may eventually cost $1,000 to remove. The countries most contaminated by mines are generally among the world's poorest, so there is little prospect that they can afford to finance their own de-mining programmes. Only Kuwait has been able to devote the necessary resources to mine clearance.

120. The United Nations is responding to this problem with the Voluntary Trust Fund for Assistance in Mine Clearance. To date, countries have pledged $22 million of the United Nations goal of $75 million, and so far $19.5 million has been received. 29/ The Department of Humanitarian Affairs, as the focal point for mine-related activities within the United Nations system, is developing the Voluntary Trust Fund and de-mining stand-by capacity as quick response instruments to develop national programmes. Protection from landmines is a shared international responsibility and the costs should be borne by the companies and countries that have profited from the manufacture and sale of mines.

121. Far greater attention must be paid to increasing national capacity to address the consequences of landmines and unexploded ordnance. This requires sustainable financial support for mine-clearance teams and medical rehabilitation programmes. It is essential to establish and support local mechanisms for coordination, the open sharing of information and the development of consistent mine awareness messages. Commercial teams often clear only the major roads and generally follow the priorities of central Government or of businesses such as airports and commercial transportation routes. Too often, children's needs are ignored and the areas around schools or rural footpaths are left uncleared. Mine clearance should be adapted to local knowledge and priorities. In the area of medical rehabilitation, the development of local capacity for prosthetics production is essential. This can provide economic opportunity for victims and contribute to their psychosocial well being.

122. Mine awareness programmes help people to recognize landmines and suspected mined areas and explain what to do when a mine is discovered or an incident occurs. These programmes have been undertaken in a number of countries, but for children, they are not as effective as they need to be, making relatively little use of techniques that are interactive or tailored to the needs of different age groups. Often, mine awareness teams simply enter a community, present information and leave - an approach that does not address the behavioural changes an affected community must make to prevent injury. Recent programmes have been more carefully prepared, not merely telling participants about the issues, but trying to involve them in the learning process. For example, a new programme developed by Save the Children Fund - US for Kabul (a city with more than 1 million mines) emphasizes participants' involvement, child-to-child approaches, multi-media presentations, role playing, survivors as educators and the creation of safe play areas.

3. The need for an international ban

123. The immense impact of landmines and the damage they will continue to cause for many years to come has stimulated an international campaign to ban their manufacture and use. In 1992, a global coalition of non-governmental organizations formed the International Campaign to Ban Landmines, and there has been considerable progress since. The Secretary-General has strongly advocated an end to the landmine scourge and, in resolution 49/75 D, the General Assembly has called for their eventual elimination. UNICEF and UNHCR have adopted stringent policies against doing any business with companies or subsidiaries of companies that produce or sell anti-personnel mines. Some 41 countries have now stated that they are in favour of banning landmines and some have already taken concrete steps to ban the use, production and trade of the weapons and have begun to destroy their stocks. The expert urges that all States follow the lead of countries like Belgium and enact comprehensive national legislation to ban landmines.

124. Many legal experts believe that landmines are already an illegal weapon under international law and should be prohibited because they counter two basic principles of humanitarian law. First, the principle of distinction holds that attacks may only be directed against military objectives. Landmines do not distinguish between military and civilian targets. Second, the principle of unnecessary suffering holds that, even if an attack is directed against a legitimate military objective, the attack is not lawful if it can result in excessive injury or suffering to civilians. Thus, the military utility of a weapon must outweigh its impact on civil society, and the long destructive life of a landmine is clearly greater than any immediate utility. These principles apply to all States as part of customary international law.

125. The use of landmines is specifically regulated by Protocol II of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects. Worldwide pressure resulting from the International Campaign to Ban Landmines led to a call for a review conference on the Convention, which took place between September 1995 and May 1996. While some progress was made in revising Protocol II to the Convention, this legal

protection falls far short of even the bare minimum needed to protect children and their families. The expert hopes that the next conference in 2001 will agree on a total ban, at least on anti-personnel mines.

4. Specific recommendations on landmines and unexploded ordnance

126. The expert submits the following recommendations on landmines and unexploded ordnance:

(a) Governments should immediately enact comprehensive national legislation to ban the production, use, trade and stockpiling of landmines. Governments should support the campaign for a worldwide ban, at least on anti-personnel mines, at the next review conference to the Convention on Conventional Weapons in 2001. In order to reduce the threat of unexploded ordnance, the conference should also make concrete proposals to address the impact on children of other conventional weapons, such as cluster bombs and small-calibre weapons;

(b) In reports to the Committee on the Rights of the Child, States Parties, where relevant, should report on progress in enacting comprehensive legislation. Furthermore, they should report on measures being taken in mine clearance and in programmes to promote children's awareness of landmines and to rehabilitate those who have been injured;

(c) Humanitarian mine clearance should be established as a part of all peace agreements, incorporating strategies to develop national capacity for mine clearance;

(d) Governments must provide sufficient resources to support long-term humanitarian mine clearance. Such funding should be provided bilaterally and through international assistance such as the United Nations Voluntary Trust Fund for Assistance in Mine Clearance;

(e) Countries and companies that have profited from the sale of mines should be especially required to contribute to funds designated for humanitarian mine clearance and mine awareness programmes. Measures to reduce the proliferation and trade of landmines, such as consumer boycotts, should be explored;

(f) A technical workshop on mine awareness should be held by the Department of Humanitarian Affairs, UNICEF, UNESCO and involved NGOs. The purpose would be to assess lessons learned, promote best practice in child-focused mine awareness programmes and improve coordination, assessment and evaluation.

E. Sanctions

127. The present report focuses on armed conflict, but a closely-related issue that also has a serious impact on children is the imposition of economic sanctions. In recent years, economic sanctions have been seen as a cheaper,

non-violent alternative to warfare. In his follow-up report to "An Agenda for Peace" (A/50/60), the Secretary-General of the United Nations recognized that sanctions raise the ethical question of whether suffering inflicted on vulnerable groups in the target country is a legitimate means of exerting pressure on political leaders. Since 1991, under Article 41, Chapter VII of the Charter of the United Nations, the international community has collectively imposed sanctions on Iraq, the Federal Republic of Yugoslavia (Serbia and Montenegro), the Libyan Arab Jamahiriya and Haiti. In addition, countries can and have employed bilateral sanctions. In the post-cold war era, it seems likely that sanctions will play an increasingly important part in international policy. Governments are reluctant to commit troops and funds to international military intervention and see sanctions as a safer recourse that can be applied at lower cost to the embargoing power. While not necessarily the case, sanctions also appear less deadly than military action for the population of the target country.

1. Humanitarian exemptions

128. In theory, most sanctions regimes exempt critical humanitarian supplies from general embargoes. In practice, sanctions have so far proved blunt instruments. Humanitarian exemptions tend to be ambiguous and are interpreted arbitrarily and inconsistently. They often cause resource shortages; disrupt the distribution of food, pharmaceuticals and sanitation supplies; and reduce the capacity of the public health system to maintain the quality of food, water, air, and medicine. Delays, confusion and the denial of requests to import essential humanitarian goods cause resource shortages. While these effects might seem to be spread evenly across the target populations, they inevitably fall most heavily on the poor. Those with power and influence will usually have ways of acquiring what they need, while the general population struggles to survive with what remains. While adults can endure long periods of hardship and privation, children have much less resistance, and they are less likely to survive persistent shortages. Studies from Cuba, Haiti and Iraq following the imposition of sanctions each showed a rapid rise in the proportion of children who were malnourished. In Haiti after 1991, for example, one study indicated that the price of staple foods increased fivefold and the proportion of malnourished children increased from 5 to 23 per cent. 30/

129. Even when exemptions are permitted, the conditions applied may be unacceptable to the Government in power. Indeed, those Governments and authorities against which sanctions are imposed are rarely personally affected and may be precisely those less responsive to the plight of their people. Iraq since 1990 has experienced the most comprehensive regime ever imposed. In order to mitigate some of the effects on health and nutrition, the Security Council adopted resolution 706 (1991) to permit the use of frozen Iraqi funds to purchase food and medicine, stipulating that these supplies had to be purchased and distributed under the supervision of the United Nations. The Iraqi Government considered these conditions unacceptable and only started to discuss them in 1995. Meanwhile, the situation for children has deteriorated. Over the past five years, infant mortality is thought to have tripled. 31/ The "oil-for-food" procedures contained in Security Council resolution 986 (1995) present an opportunity to mitigate the negative impact of sanctions on Iraqi

children. To take full advantage of this opportunity, however, all currency generated through oil sales should be dedicated to humanitarian and civilian purposes.

130. In the interests of children, the international community should cease to impose comprehensive economic sanctions without obligatory and enforceable humanitarian exemptions and agreed mechanisms for monitoring the impact of sanctions on children and other vulnerable groups. Any measures taken should be precisely targeted at the vulnerabilities of the political or military leaders whose behaviour the international community wishes to change. These actions could include an arms embargo, the freezing of all corporate and individual overseas assets, the stopping of certain kinds of economic transactions, the suspension of air links and other forms of communication and the isolation of countries from the rest of the world through cultural, academic and economic boycotts.

2. The need for child impact assessments and monitoring

131. Sanctions should be judged against the standards of universal human rights, particularly the Convention on the Rights of the Child. The primary consideration must always be the potential human impact, which should influence the imposition and choice of sanctions, the duration, the legal provisions and the operation of the sanctions regime. Sanctions should not be imposed without advance assessment of the economic and social structure of the target country and the ability of the international community to sustain continuous monitoring.

132. Monitoring systems make it possible to assess the impact of the embargo on health and well-being. At minimum, such assessments should measure changes in access to essential medicines and medical supplies (especially items that may serve both civilian and military purposes such as chlorine for water purification or lab reagents for health screening and testing), water quality and quantity, the nutritional state of children and the infant mortality rate.

133. When targeted sanctions are imposed, humanitarian exemptions should be formulated with clear guidelines. At the same time, in order to help vulnerable groups, the established agencies should formulate appropriate humanitarian assistance programmes. If essential humanitarian goods are denied to the population, the sanctioning powers have a responsibility to assure new sources of supply. When the Security Council imposes sanctions, it should also simultaneously provide resources to neutral, independent bodies to monitor the situation of vulnerable groups. In the event that the position of children deteriorates, the United Nations should assume responsibility for redressing the situation.

134. Since many of the effects of sanctions, particularly the health impact, may only become evident over a period of years, no sanctions regime should be allowed to continue indefinitely. When the Security Council imposes sanctions, it should also clearly define the circumstances under which they should be lifted. If the sanctions fail to produce the desired result within a predetermined period, they should be replaced by other measures.

3. Specific recommendations on sanctions

135. The expert submits the following recommendations on sanctions:

(a) The international community should ensure that whenever sanctions are imposed they provide for humanitarian, child-focused exemptions. The international community should establish effective monitoring mechanisms and child impact assessments. These must be developed with clear application guidelines;

(b) Humanitarian assistance programmes of the United Nations specialized agencies and of NGOs should be exempt from approval by the Security Council Sanctions Committee;

(c) A primary concern when planning a targeted sanctions regime should be to minimize its impact on vulnerable groups, and particularly children. Sanctions or other measures taken by the Security Council should be precisely targeted at the vulnerabilities of those whose behaviour the international community wishes to change;

(d) The Security Council Sanctions Committee should closely monitor the humanitarian impact of sanctions and amend sanctions immediately if they are shown to cause undue suffering to children.

F. Health and nutrition

136. The effects of armed conflict on child development accumulate and interact with each other. The stage of physical, psychosocial, cognitive and moral development that a child has reached directly affects his or her ability to cope with these impacts. Consistent with article 39 of the Convention on the Rights of the Child, obliging States Parties to promote the physical and psychological recovery and social reintegration of children affected by armed conflict, the following three subsections of the report are devoted to health and nutrition, psychosocial well-being and education.

137. Thousands of children are killed every year as a direct result of fighting, from knife wounds, bullets, bombs and landmines, but many more die from malnutrition and disease caused or increased by armed conflicts. The interruption of food supplies, the destruction of food crops and agricultural infrastructures, the disintegration of families and communities, the displacement of populations, the destruction of health services and programmes and of water and sanitation systems all take a heavy toll on children. Many die as a direct result of diminished food intake that causes acute and severe malnutrition, while others, compromised by malnutrition, become unable to resist common childhood diseases and infections.

138. Given their vulnerability, it is no surprise that around 2 million children are estimated to have died as a result of armed conflict in the last decade. 32/ In Mozambique alone, between 1981 and 1988, armed conflict caused 454,000 child deaths, while in Somalia, according to WHO, crude mortality rates increased 7 to 25 times. Some of the highest death rates occur among children in refugee

camps. These statistics are in stark contrast to the intent behind article 6 of the Convention on the Rights of the Child, which asserts that States Parties shall ensure to the maximum extent possible the survival and development of the child. Article 24 states that the child has a right to the highest standard of health and medical care available.

139. Many of today's armed conflicts take place in some of the world's poorest countries, where children are already vulnerable to malnutrition and disease, and the onset of armed conflict increases death rates up to 24 times. All children are at risk when conflicts break out, but the most vulnerable are those who are under five and already malnourished.

1. Communicable diseases

140. Since 1990, the most commonly reported causes of death among refugees and internally displaced persons during the early influx phase have been diarrhoeal diseases, acute respiratory infections, measles and other infectious diseases. Even in peacetime, these are the major killers of children, accounting for some seven million child deaths each year. 33/ Their effects are heightened during conflicts, partly because malnutrition is likely to be more prevalent, thereby increasing chances of infection.

141. Diarrhoea is one of the most common diseases. In Somalia during 1992, 23 to 50 per cent of deaths in Baidoa, Afgoi and Berbera were reported to be due to diarrhoea. Cholera is also a constant threat and, following armed conflicts, it has occurred in refugee camps in Bangladesh, Kenya, Malawi, Nepal, Somalia and Zaire, amongst others. Acute respiratory infections, including pneumonia, are particularly lethal in children and, according to WHO, killing one-third of the children who died in six refugee centres in Goma, Zaire, in 1994. Measles epidemics have been reported in recent situations of conflict or displacement in several African countries - at the height of the conflict in Somalia, more than half the deaths in some places were caused by measles. As tuberculosis re-emerges as a dangerous threat to health the world over, its effect is heightened by armed conflict and disruption. WHO estimates that half the world's refugees may be infected with tuberculosis, as the crowded conditions in refugee camps often promote the spread of tubercular infection. Malaria has always been a major cause of morbidity and mortality among refugees in tropical areas, particularly among people who come from areas of marginal transmission and who move through or settle in endemic areas. Children, as always, are the most vulnerable to these collective assaults on health and well-being.

142. The potential for greater spread of sexually transmitted diseases, including HIV/AIDS, increases dramatically during conflicts. Population movements, rape, sexual violence and the breakdown of established social values all increase the likelihood of unprotected sexual activity and larger numbers of sexual partners. Reduced access to reproductive health services, including education, increases the vulnerability of adolescents in particular. The breakdown of health services and blood transfusion services lacking the ability to screen for HIV/AIDS also increase transmission. NGOs and agencies such as FAO and UNICEF have noted a dramatic increase in the incidence of child headed households as one of the consequences of HIV/AIDS in parts of Africa. This

trend is likely to increase. It is essential that agencies design clear strategies to assist children in these situations without disrupting family unity.

2. Reproductive health

143. In times of conflict, the provision of primary health care in conjunction with interventions to secure clean water, adequate nutrition, shelter and sanitation, will be the priority health agenda. However, reproductive health is also important for the physical and psychosocial well-being of men and women, and particularly of young girls. The reproductive health of pregnant women and mothers is integrally tied to the health of newborns and children. WHO advocates that reproductive health services based on women's needs and demands, with full respect for religious and cultural backgrounds, should be available in all situations. The effects of armed conflicts - family and community breakdown, rapid social change, the breakdown of support systems, increased sexual violence and rape, malnutrition, epidemics and inadequate health services, including poor prenatal care - make it imperative that the right to reproductive health care is given high priority. The problems caused by complications in pregnancy and delivery and by unwanted and unsafe sex can be immediate, as is the case with chronic pelvic inflammatory diseases. They can also adversely effect women's future sexual and reproductive health and that of their children by leading to health conditions such as infertility, paediatric AIDS and congenital syphilis.

144. The insufficient attention paid to reproductive health issues in emergency situations led to the development of the UNHCR/UNFPA Inter-Agency Field Manual on Reproductive Health in Refugee Situations. Reproductive health programmes that involve women and adolescents in their design, implementation and assessment help to build personal capacities, lead to more relevant programmes and can make important contributions to the health and development of young people and women in situations of armed conflict. In South Africa, for example, UNICEF reports that young people have been involved effectively in the design, testing and implementation of youth health situation analyses, and in Ghana, peer educators in health projects for children living or working in the streets, 34/ have improved their programmes by involving young people in assessments.

3. Disability

145. Millions of children are killed by armed conflict, but three times as many are seriously injured or permanently disabled by it. According to WHO, armed conflict and political violence are the leading causes of injury, impairment and physical disability and primarily responsible for the conditions of over 4 million children who currently live with disabilities. In Afghanistan alone, some 100,000 children have war-related disabilities, many of them caused by landmines. The lack of basic services and the destruction of health facilities during armed conflict mean that children living with disabilities get little support. Only 3 per cent in developing countries receive adequate rehabilitative care, and the provision of prosthetics to children is an area

that requires increased attention and financial support. In Angola and Mozambique, less than 20 per cent of children needing them received low-cost prosthetic devices; in Nicaragua and El Salvador, services were also available for only 20 per cent of the children in need. This lack of rehabilitative care is contrary to article 23 of the Convention on the Rights of the Child, which lays out clearly the responsibilities of States Parties for ensuring effective access of disabled children to education, health and rehabilitation services.

4. Destruction of health facilities

146. In most wars, and particularly in internal conflicts, health facilities come under attack, in direct violation of the Geneva Conventions of 1949. During the armed conflict from 1982 to 1987 in Nicaragua, for example, 106 of the country's 450 health units were eventually put out of service as a result of complete or partial destruction, and a further 37 health posts were closed owing to frequent attacks. The intensity of the war also diverted much of the health service to the needs of immediate casualties. Hospitals maintained low occupancy rates in order to be able to receive the injured at short notice and they were forced either to neglect the regular care of patients or to shift them to health centres. Even health facilities that remain open during a conflict offer very restricted service. In Mozambique, between 1982 and 1990, about 70 per cent of health units were looted or forced to close down and the remainder were difficult to reach because of curfews.

147. A concentration on military needs also means that children injured in a conflict may not get effective treatment or rehabilitation. Effects on general health care can be just as severe. Health services suffer from a shortage of personnel as health workers move to other areas or leave the country. After the Khmer Rouge period, for example, Cambodia was left with only about 30 doctors. Restrictions on travel also hamper the distribution of drugs and other medical supplies, and health referral services, supervision and logistic support break down.

148. For children, one of the most dangerous implications of this breakdown is the disruption of rural vaccination programmes. During Bangladesh's struggle for independence in 1971-1972, childhood deaths increased 47 per cent. Smallpox, a disease that had virtually disappeared prior to the conflict, claimed 18,000 lives. By 1973, in Uganda, immunization coverage had reached an all-time high of 73 per cent. After the fighting started in that country, coverage declined steadily until, according to WHO sources, by 1990, fewer than 10 per cent of eligible children were being immunized with anti-tuberculosis vaccine (BCG), and fewer than 5 per cent against diphtheria, pertussis and tetanus (DPT), measles and poliomyelitis. The situation has improved dramatically, but the lessons are clear.

5. Protecting health services and health workers

149. In actions at both global and national level, the health sector should continue to promote children's rights to survival and development while doing all it can to prevent and alleviate their suffering. In the midst of armed

conflict, WHO urges that health facilities be respected as safe environments for the care of patients and as safe workplaces for health workers. The delivery of medical assistance should not be prevented or obstructed. Moreover, the health care system and the community should work together, using health care wherever possible as an opportunity to gain access to children for other positive purposes.

150. During times of war, health services should emphasize the need for continuity of care and long-term follow-up. Emergency health relief must be linked with long-term development support and planning that not only permit survival, but also bring about long-lasting positive changes in children's lives. Paediatric and gynaecological care must become a regular component of all relief programmes. In the post-conflict phase, health systems must be sustainable, and programmes must be designed with as much involvement as possible from the affected communities. One obstacle to the full enjoyment of health services is that they are often dominated by men, whether expatriate or from the host country. For cultural or religious reasons, many women and girls underutilize the services despite risks to their health. Governments, United Nations bodies and specialized agencies such as WHO, UNHCR and UNICEF should increase the numbers of female health and protection professionals available in emergency situations.

151. Armed conflict is a major public health hazard that cannot be ignored. Any disease that had caused as much large-scale damage to children would long ago have attracted the urgent attention of public health specialists. When armed conflict kills and maims more children than soldiers, the health sector has a special obligation to speak out. Health professionals must be advocates of the rights of the child.

6. Disruption of food supplies

152. One of the most immediate effects of armed conflict is to disrupt food supplies. Food production is affected in many ways. Farmers, who are often women and older children, become fearful of working on plots of land too far from their homes. They reduce the area under cultivation, and their water sources, systems of irrigation and flood control may also be destroyed. Restrictions on movement limit access to such necessities as seeds and fertilizers and stop farmers from taking their produce to market. Damage to food systems is incidental to conflicts in some cases. In others it is deliberate, as in the early 1980s in Ethiopia, when the Government's scorched earth policies destroyed hundreds of thousands of acres of food-producing land in Tigray. 35/ Both the quantity and quality of available food is affected by damage done to food systems, and even when the conflict subsides, it is difficult to recover quickly. In many countries, mined fields prevent their use as agricultural land. In the Juba valley in Somalia, where people have been returning to their villages since 1993, the continuing lack of security means that the main harvest in 1995 was as much as 50 per cent lower than before the conflict. 36/

153. Warfare also takes its toll on livestock. In the Kongor area of Sudan, for example, a massacre of both people and cattle reduced livestock from around

1.5 million down to 50,000. 37/ This situation creates particular problems for young children who rely on milk as part of their basic diet. Loss of livestock also undermines family security in general, since cattle are frequently used as a form of savings.

154. Most households in developing countries, including many farm households, rely on market purchases to meet their food needs. Economic disruption heightens unemployment, reducing people's ability to buy food. People in cities are sometimes tempted to resort to looting to feed their families, thus escalating the violence. The continuation of conflict also hinders the distribution of relief. In contravention of humanitarian law, warring parties frequently block relief supplies or divert them for their own use. In addition, feeding centres for children and vulnerable groups are frequently bombed or attacked.

7. Malnutrition

155. For the youngest children especially, many health problems during armed conflicts are linked to malnutrition. Before the war in former Yugoslavia, per capita food supplies were relatively abundant, representing 140 per cent of daily requirements compared with 98 per cent in Liberia and 81 per cent in Somalia. The situation in Bosnia and Herzegovina subsequently deteriorated, but still did not reach levels as shockingly low as in Somalia during 1993 or Liberia in 1995. At those times, more than 50 per cent of the children in some regions were suffering from moderate or severe malnutrition. 38/

156. Malnutrition can affect all children, but it causes the greatest mortality and morbidity among young children, especially those under the age of three. In emergencies, very young children may be at high risk of "wasting" or acute malnutrition, a condition indicated by low weight for height. During the 1983 famine in southern Sudan, FAO reported that the prevalence of wasting reached the unprecedented level of 65 per cent. Recent refugee crises have shown how rapidly morbidity and mortality can progress. Malnutrition weakens children's ability to resist attacks of common childhood diseases, and the course and outcome of these diseases are more severe and more often fatal in malnourished children. Malnutrition also has a negative impact on children's cognitive development. In addition to these nutritional hazards, the circumstances of armed conflict greatly increase exposure to environmental hazards. Poor waste disposal and inadequate or contaminated water supplies aggravate the vicious circle of malnutrition and infection.

157. Adequate nourishment also depends on the way food is distributed, the way children are fed, their hygiene and the time parents have available to care for children. Armed conflict puts heavy constraints on the care system, forcing mothers and other members of the family to spend more time outside the home searching for water, food or work. Above all, when the whole family has to take flight, it has little chance to give children the close attention they need.

158. Breastfeeding provides ideal nutrition for infants, reduces the incidence and severity of infectious diseases and contributes to women's health. Infants should be breastfed exclusively for about six months and should continue to be

breastfed with adequate complementary food for two years or beyond. During conflicts, mothers may experience hunger, exhaustion and trauma that can make them less able to care for their children. Breastfeeding may be endangered by the mother's loss of confidence in her ability to produce milk. Unless they are severely malnourished, mothers can breastfeed adequately despite severe stress. In addition, the general disruption can separate mothers from their children for long periods. As the conflicts proceed, social structures and networks break down. Knowledge about breastfeeding is passed from one generation to the next and this can be lost when people flee and families are broken up. Artificial feeding, risky at all times, is even more dangerous in unsettled circumstances.

159. In times of armed conflict, it is important to support women's capacity to breastfeed by providing adequate dietary intake for lactating women and ensuring that they are not separated from their children. Unfortunately, during emergencies, donors often respond with large quantities of breast milk substitutes for which there has been little medical or social justification. In July 1996, in response to the increasing prevalence of HIV infection globally and to additional information on the risk of HIV transmission through breastfeeding, the Joint and Co-sponsored United Nations Programme on HIV/AIDS circulated an interim statement on HIV and infant feeding. That statement emphasized the importance of breastfeeding, while highlighting the urgency of developing policies on HIV infection and infant feeding. It provided policy makers with a number of key elements for the formulation of such policies, laying particular stress on empowering women to make informed decisions about infant feeding. 39/

160. Children's health and growth are also affected by the lack of fresh fruits and vegetables, which are good sources of vitamins and minerals. Quality of diet is particularly important for small children, who can only eat small quantities of food at one time. Thus, it is essential to ensure that their food has a high concentration of energy and nutrients or is given frequently. When, during a conflict, the nutritional quality of food deteriorates, the family may not have the necessary means or knowledge to make changes that will assure children an adequate diet.

161. Even when the conflict is over, it may take a long time to return to normal feeding. FAO reports that, in Mozambique, for example, some young couples returning to the country from refugee camps did not know how to prepare any foods other than the maize, beans and oil that had been distributed to them as rations. They were not familiar with traditional foods or feeding practices and did not know which local foods to use during weaning. And where parents or grandparents had been lost, there was no one available to teach them.

8. Protecting food security

162. One of the most common responses to emergencies of all kinds, including armed conflicts, is food relief. It is important to move away from the view that food relief is a solution in itself, and towards the more constructive approach that includes food relief as part of a wider strategy aimed at improving household food security and the general health status of the population. This is particularly crucial in many long-running conflicts, where

people need to build up their own capacities to support themselves. In southern Sudan, the short-term distribution of food is now being linked with support for agriculture, livestock and fisheries programmes.

163. In many cases, recourse to outside food assistance is unavoidable. In these circumstances the goal should be to meet the food needs of all persons, including young children, by ensuring access to a nutritionally adequate general ration. When this is not feasible, it may be necessary to establish supplementary feeding programmes for vulnerable groups, but these should be regarded as short-term measures to compensate for inadequate general rations. Dry rations that can be used by families in their own homes are preferable to feeding centres, as WHO surveys suggest that less than 50 per cent of malnourished children actually attend the centres. They may be too far away, and mothers may be reluctant to spend a disproportionate amount of time with a malnourished child over other members of the family. During a field visit to Rwanda, the expert was made aware of how many children from the poorest families did not attend feeding centres. UNICEF staff reported that these families often expressed feelings of shame or spoke of discouragement from better-off neighbours. Moreover, many such programmes have been poorly managed. Overcrowded feeding centres lacking basic sanitation and hygiene, with inadequate water supplies and poorly mixed food, do little for malnourished children and actually lead to the spread of disease.

164. In too many situations, children are considered separately from the family, and feeding programmes for children are established without considering other options that would improve their nutritional status. These options include improving household food security and reducing women's workloads by offering better access to water and fuel. This would clear more time in a woman's day for caring for her children. The Statements of the First and Third Regional Consultations on Africa and the field trips for this study underlined the importance of family unity and of capacity-building for family and community self-reliance.

9. Specific recommendations on health and nutrition

165. The expert submits the following recommendations on health and nutrition:

(a) All parties to a conflict must ensure the maintenance of basic health systems and services and water supplies. Where new programmes must be introduced, they should be based on community participation and take into account the need for long-term sustainability. Special attention should be paid to primary health care and the care of children with chronic or acute conditions. Adequate rehabilitative care, such as provision of artificial limbs for injured and permanently disabled children, should be ensured to facilitate the fullest possible social integration;

(b) Child-focused basic health needs assessments involving local professionals, young people and communities should be speedily carried out by organizations working in conflict situations. They should take into account food, health and care factors and the coping strategies likely to be used by the affected population;

(c) During conflicts, Governments should support the health and well-being of their population by facilitating "days of tranquillity" or "corridors of peace" to ensure continuity of basic child health measures and delivery of humanitarian relief. United Nations bodies, international NGOs and civil society groups (particularly religious groups) should approach and persuade non-state armed entities to cocperate in such efforts;

(d) WFP, in collaboration with WHO, UNHCR and other United Nations bodies, specialized agencies and other international organizations, should take a lead role in consolidating current attempts to ensure that emergency food and other relief distribution is structured so as to strengthen family unity, integrity and coping mechanisms. It should be an integral part of a broader strategy for improving the nutrition and health status and physical and mental development of children and the food and health securities of their families;

(e) Parties in conflict should refrain from destruction of food crops, water sources and agriculture infrastructures in order to cause minimum disruption of food supply and production capacities. Emergency relief should give more attention to the rehabilitation of agriculture, livestock, fisheries and employment or income generating programmes in order to enhance local capacities to improve household food security on a self-reliant and sustainable basis;

(f) The expert urges WHO, in collaboration with professional, humanitarian and human rights organizations such as the International Paediatric Association, Medecins Sans Frontières and Physicians for Human Rights, to encourage doctors, paediatricians and all other health workers to disseminate child rights information and report rights violations encountered in the course of their work.

G. Promoting psychological recovery and social reintegration

166. Armed conflict affects all aspects of child development - physical, mental and emotional - and to be effective, assistance must take each into account. Historically, those concerned with the situation of children during armed conflict have focused primarily on their physical vulnerability. The loss, grief and fear a child has experienced must also be considered. This concern is reflected in article 39 of the Convention of the Rights of the Child, which requires States Parties to take all appropriate measures to promote children's physical and psychological recovery and social reintegration. This is best achieved by ensuring, from the outset of all assistance programmes that the psychosocial concerns intrinsic to child growth and development are addressed.

167. In a survey of 3,030 children conducted by UNICEF in Rwanda in 1995, nearly 80 per cent of the children had lost immediate family members, and more than one third of these had actually witnessed their murders. These atrocities indicate the extremes to which children have been exposed during conflicts. But apart from direct violence, children are also deeply affected by other distressing experiences. Armed conflict destroys homes, splinters communities and breaks down trust among people, undermining the very foundations of children's lives.

The impact of being let down and betrayed by adults is measureless in that it shatters the child's world view.

1. Psychosocial impact of violence on children

168. The ways in which children respond to the stress of armed conflict will depend on their own particular circumstances. These include individual factors such as age, sex, personality type, personal and family history and cultural background. Other factors will be linked to the nature of the traumatic events, including their frequency and the length of the exposure. Children who suffer from stress display a wide range of symptoms, including increased separation anxiety and developmental delays, sleep disturbances and nightmares, lack of appetite, withdrawn behaviour, lack of interest in play, and, in younger children, learning difficulties. In older children and adolescents, responses to stress can include anxious or aggressive behaviour and depression.

169. Relatively little is known about the psychosocial long-term effects of recent lengthy civil wars. The loss of parents and other close family members leaves a life-long impression and can dramatically alter life pathways. During the events marking the fiftieth anniversary of the Second World War, many people recalled the pain and sorrow they suffered as children at the loss of loved ones and described how such losses continue to affect them.

170. All cultures recognize adolescence as a highly significant period in which young people learn future roles and incorporate the values and norms of their societies. The extreme and often prolonged circumstances of armed conflict interfere with identity development. As a result, many adolescents - especially those who have had severely distressing experiences - cannot conceive of any future for themselves. They may view their lives very pessimistically, suffer from serious depression or, in the worst of circumstances, commit suicide. They may not wish to seek help or support from adults. Moreover, sudden changes in family circumstances, such as the death or disappearance of parents, can leave youth without guidance, role models and sustenance. During conflicts, some adolescents become responsible for the care of younger siblings. Youth are also often under pressure to actively join in the conflict, or are threatened with forced recruitment. Despite all of this, adolescents, during or after wars, seldom receive any special attention or assistance. This is a matter of urgent concern.

171. In addition to the suffering they undergo as a result of their own difficult experiences, children of all ages also take cues from their adult care-givers. Seeing their parents or other important adults in their lives as vulnerable can severely undermine children's confidence and add to their sense of fear. When armed conflict causes a change in the behaviour of adults, such as extreme protectiveness or authoritarianism, children find it very difficult to understand.

2. Best practices for recovery programmes

172. All programmes for children should take into account the rights of children and their developmental needs. They should also incorporate best practices that emphasize knowledge and respect for local culture and traditions and ensure ongoing consultation and participation with local authorities and communities. Programmes must have a long-term perspective and be flexible enough to adapt to the changing circumstances of armed conflict. They must also be sustainable and continue well after the conflict.

173. Experience has shown that with supportive care-givers and secure communities, most children will achieve a sense of healing and some will prove remarkably resilient. A large group of unaccompanied boys from southern Sudan, for example, arrived in Ethiopia after a long and harrowing journey on foot. These were boys who had been trained from an early age to survive in harsh conditions, away from home, in nomadic cattle camps. When they reached the relative safety of refugee camps, they were able to recuperate quickly.

174. The ways in which individuals and communities cope with, react to and understand stressful events can differ markedly from one culture to another. Although many symptoms of distress have universal characteristics, the ways in which people express, embody and give meaning to their distress are largely dependent on social, cultural, political and economic contexts. Likewise, the manner in which different cultures deal with manifestations of emotional distress is based on different belief systems. In some eastern spiritual traditions, for example, the body and mind are perceived as a continuum of the natural world. Indeed, in many ethno-medical systems, the body and the mind are always dependent on the actions of others, including spirits and ancestors. In Angola, for example, and in many areas of Africa, the main sources of trauma are considered to be spiritual. If a child's mother dies in armed conflict and the child flees without having conducted the proper burial ritual, the child will live with the strong fear that the mother's spirit will cause harm. Western diagnostic approaches can be ill-suited to a context in which people are more likely to turn for assistance to family, friends and traditional healers than to seek medical help for their problems.

175. Psychotherapeutic approaches based on western mental health traditions tend to emphasize individual emotional expression. This method may not be feasible in all contexts. While many forms of external intervention can help promote psychosocial recovery, experience with war trauma programmes has shown that even those designed with the best intentions can do harm. Some organizations, for example, put a great deal of emphasis on trauma therapy in residential treatment centres. Exploring a child's previous experience with violence and the meaning that it holds in her or his life is important to the process of healing and recovery. However, such an exploration should take place in a stable, supportive environment, by care-givers who have solid and continuing relationships with the child. In-depth clinical interviews intended to awaken the memories and feelings associated with a child's worst moments risk leaving the child in more severe pain and agitation than before, especially if the interviews are conducted without ongoing support for follow-up.

176. Another difficulty is faced when journalists or researchers encourage children to relate horror stories. Such interviews can open up old wounds and tear down a child's defences. Children who are photographed and identified by name can be exposed to additional problems and harassment. Journalists and researchers must carry out their important work with awareness of the ethical issues at stake. For example, there should be an understanding in advance of the kind of information that is confidential and should not be used.

177. Best practice emphasizes that the most effective and sustainable approach is to mobilize the existing social care system. This may, for example, involve mobilizing a refugee community to support suitable foster families for unaccompanied children. Through training, and raising the awareness of central care-givers including parents, teachers and community and health workers, a diversity of programmes can enhance the community's ability to provide care for its children and vulnerable groups. Building expensive facilities and removing children to them is not a sustainable approach. Institutionalizing children and identifying them as traumatized can impose an inadvertent stigma and contribute to isolation and withdrawal. Nor should groups of children who have had especially traumatic experiences, such as former child soldiers or unaccompanied children, be segregated from the community, since this will contribute to further risk, distress and marginalization. At regional consultations in Africa and Europe, as well as during several field trips, the importance of urging Governments, donors and programme practitioners to minimize and actively avoid institutional approaches was emphasized.

178. Those who wish to help with healing should have a deep understanding of and respect for the societies in which they are working. Aside from knowing the basic principles of child development and the way it is understood locally, they should also understand local culture and practices, including the rites and ceremonies related to growing up and becoming an adult as well as those associated with death, burial and mourning. People involved in healing should be aware, for example, of what children are told about the death of their parents, how they are expected to behave when they experience distressing events and what actions might be taken to give "cleansing" to a girl who has been raped or to a child who has killed someone.

179. Integrating modern knowledge of child development and child rights with traditional concepts and practices may take time, but it will result in more effective and sustainable ways to meet children's needs. In research contributed to the present study, the International Save the Children Alliance identified a number of principles and activities that promote healing by fostering a sense of purpose, self-esteem and identity. These include establishing a sense of normalcy through daily routines such as going to school, preparing food, washing clothes and working in the fields. Children also need the intellectual and emotional stimulation that is provided by structured group activities such as play, sports, drawing and storytelling. The most important factor contributing to a child's resilience is the opportunity for expression, attachment and trust that comes from a stable, caring and nurturing relationship with adults.

180. Children who have been continually exposed to violence almost always experience a significant change in their beliefs and attitudes, including a

fundamental loss of trust in others. This is especially true of children who have been attacked or abused by people previously considered neighbours or friends, as happened in Rwanda and the former Yugoslavia. At a seminar convened on behalf of the study, a Bosnian boy told of this devastation: "We spent our childhood together. I saw him and hoped that he would save my life. He was ready to kill me". Rebuilding the ability to trust is a universal challenge in the wake of conflicts, but it is particularly important for those who are a part of children's daily lives. Establishing good relationships with children involves playing with, listening to and supporting them, as well as keeping promises.

181. Families and communities can better promote the psychosocial well-being of their children when they themselves feel relatively secure and confident about the future. Recognizing that families and communities are often fragmented and weakened by armed conflict, programmes should focus on supporting survivors in their efforts to heal and rebuild their social networks. It is therefore vital that all forms of external help be given in such a way as to enhance people's ability to help themselves. This should include, for example, assisting parents and teachers to communicate with children on difficult issues. Reconstructing a social web and a sense of community helps people act together to improve their lives. It is particularly important that aid programmes include women at an early stage in making decisions about designing, delivering and evaluating initiatives. The process of evaluation can draw upon its relevance for the community, the improved capacities of parents and care-givers to support child development, and the enhanced abilities of children to form relationships and to function well in school and other activities.

182. In order to ensure that their needs are met, young people should themselves be involved in community-based relief, recovery and reconstruction programmes. This can be achieved through vocational and skills training that not only helps to augment their income, but also increases their sense of identity and self-worth in ways that enhance healing. One way in which programmes have succeeded in giving adolescents a sense of meaning and purpose is to involve them in developing and implementing programmes for younger children.

3. Specific recommendations to promote psychosocial well-being

183. The expert submits the following recommendations to promote psychosocial well-being:

(a) All phases of emergency and reconstruction assistance programmes should take psychosocial considerations into account, while avoiding the development of separate mental health programmes. They should also give priority to preventing further traumatic experience;

(b) Rather than focusing on a child's emotional wounds, programmes should aim to support healing processes and to re-establish a sense of normalcy. This should include establishing daily routines of family and community life, opportunity for expression and structured activities such as school, play and sports;

(c) Programmes to support psychosocial well-being should include local culture, perceptions of child development, an understanding of political and social realities and children's rights. They should mobilize the community care network around children;

(d) Governments, donors and relief organizations should prevent the institutionalization of children. When groups of children considered vulnerable, such as child soldiers, are singled out for special attention, it should be done with full cooperation of the community so as to ensure their long-term reintegration.

H. Education

184. Article 28 of the Convention on the Rights of the Child underlines the right to education, and article 29 states that education should develop the child's personality, talents and mental and physical abilities to their fullest potential. Education also serves much broader functions. It gives shape and structure to children's lives and can instil community values, promote justice and respect for human rights and enhance peace, stability and interdependence.

185. Education is particularly important at times of armed conflict. While all around may be in chaos, schooling can represent a state of normalcy. School children have the chance to be with friends and enjoy their support and encouragement. They benefit from regular contacts with teachers who can monitor their physical and psychological health. Teachers can also help children to develop new skills and knowledge necessary for survival and coping, including mine awareness, negotiation and problem solving and information about HIV/AIDS and other health issues. Formal education also benefits the community as a whole. The ability to carry on schooling in the most difficult circumstances demonstrates confidence in the future: communities that still have a school feel they have something durable and worthy of protection.

1. Risks to education during conflict

186. Schools are targeted during war, in part because they have such high profiles. In rural areas, the school building may be the only substantial permanent structure, making it highly susceptible to shelling, closure or looting. In Mozambique, for example, a study prepared for the present report estimated that 45 per cent of primary school networks were destroyed. Often, local teachers are also prime targets because they are important community members and tend to be more than usually politicized. According to the above-mentioned study, during the crisis in Rwanda, more than two-thirds of teachers either fled or were killed. The destruction of educational infrastructures represents one of the greatest developmental setbacks for countries affected by conflict. Years of lost schooling and vocational skills will take equivalent years to replace and their absence imposes a greater vulnerability on the ability of societies to recover after war.

187. Formal education is also generally at risk during war because it relies on consistent funding and administrative support that is difficult to sustain

during political turmoil. During the fighting in Somalia and under the Khmer Rouge regime in Cambodia, public expenditure on education was reduced to nearly nothing.

188. It is less difficult to maintain educational services during low-intensity conflicts, as in Sri Lanka and Peru, and schooling is likely to continue during periodic lulls in countries where fighting is intermittent or seasonal. Even where services are maintained, however, education will be of lower quality. Funds will be short and the supply of materials slow or erratic. In addition, fear and disruption make it difficult to create an atmosphere conducive to learning and the morale of both teachers and pupils is likely to be low. Studies in Palestinian schools reported that teachers and students had difficulty concentrating, particularly if they had witnessed or experienced violence or had family members in prison or in hiding. Teachers are also exposed to political pressure: in Kurdish areas in Turkey, for example, teachers have been threatened by non-state forces for continuing to teach the Turkish curriculum. In some countries, teachers have been forced to inform on students and their families. Teachers who go for long periods without salaries are more susceptible to corruption.

2. Challenges and opportunities

189. Though still inadequate, relief programmes direct most attention in times of armed conflict to the education of refugee children. This is partly because, when children are massed together in camps, there are economies of scale and it is easier to approximate a classroom situation. In some countries, this reality simply reflects the dominance of inflexible formal education systems that persist despite growing doubts about their quality, relevance and content. Insufficient attention to the education needs of non-refugees during armed conflict is also attributable to the fact that some of the donors most active during conflicts are constrained by their mandates to work exclusively with refugees. Other donors have been reluctant to use emergency funds for what they have chosen to interpret as long-term development activities.

190. The education needs of children remaining within conflict zones must be met. The expert calls, therefore, for educational activity to be established as a priority component of all humanitarian assistance. Educational administrators who wish to ensure continuity must, when possible, collaborate closely with local political and military authorities and be assured of considerable support from a wide range of community groups and NGOs. Indeed, where public sector agencies are absent or severely weakened, such groups may provide the only viable institutional frameworks.

191. Since schools are likely to be targets, one element of the planning process should be to establish alternative sites for classrooms, changing the venues regularly. In Eritrea in the late 1980s, classes were often held under trees, in caves or in camouflaged huts built from sticks and foliage. Similar arrangements were made during the height of the fighting in many places in the former Yugoslavia, where classes were held in the cellars of people's homes, often by candlelight. During the field trip to Croatia and Bosnia and

Herzegovina, many people stressed to the expert the importance of maintaining education, no matter how difficult the circumstances.

192. Education can also incorporate flexible systems of distance learning after the conflict has ended, which can be cost-effective when school facilities have been destroyed and teachers have been lost. These involve home or group study using pre-packaged teaching materials complemented by broadcast and recorded media. Such systems are particularly valuable for girls when parents are reluctant to have them travel far from home. The statement of the Second Regional Consultation on the Impact of Armed Conflict on Children in the Arab Region emphasized the importance of such programmes and called upon Governments, educators, NGOs and concerned international bodies to ensure that formal, non-formal and informal education interventions are delivered through a variety of community channels.

193. When children have been forced to leave their homes and are crowded into displaced persons camps, establishing schooling systems as soon as possible reassures everyone by signalling a degree of stability and a return to normal roles and relationships within the family and the community. Such education requires only the most basic materials. One important innovation in recent years has been the development by UNESCO and UNICEF of a teacher's emergency pack (TEP), otherwise known as "school-in-a-box". The pack contains very basic items including a brush and paint for a blackboard, chalk, paper, exercise books, pens and pencils. It was first used in Somalia in 1992 and further refined in the refugee camps in Djibouti. The packs were widely used for the rapid establishment of schools for Rwandan refugees at Ngara in Tanzania, where children attended primary grades in tents on a shift basis. Agreements with a number of international NGOs have led to several programmes in which the distribution of TEPs has been linked with teacher training and other initiatives. The TEP is intended to cover the first few months of emergency schooling. Longer-term initiatives require the development of materials tailored to specific groups of children.

194. Notwithstanding the success of initiatives like TEP, the expert was particularly concerned to discover the lack of meaningful educational activity for adolescents, particularly at secondary school level. In situations of armed conflict, education can prove particularly effective in assisting the psychosocial well-being of adolescents and keeping them out of military service.

195. Many modern educators prefer non-competitive learner-centred approaches that help foster self-confidence in children and develop a wide range of skills. The expert agrees, but cautions that such methods are still unfamiliar in many countries and must be introduced carefully in programmes so as not to disempower local teachers or confuse pupils. Special care should also be taken to adapt the methods and content of education to the social context. At the Second Regional Consultation in the Arab Region, it was suggested that local relevance could be facilitated by allowing parents, communities and children to play more active roles in the design, content and implementation of curricula and in flexible education methodologies. Youth volunteers and local community leaders should be involved in baseline assessments, which are a necessary first step in identifying the educational strengths and weaknesses that are available for those planning educational services in communities affected by conflict. During

her field visit to Sierra Leone, the expert was encouraged by the enthusiasm shown for innovative educational alternatives, particularly for the training and deployment of mothers, adolescents and other non-traditional teachers in emergency programmes.

196. Apart from emergency education programmes in camps, refugee children can sometimes attend regular schools in host countries, though very few get the opportunity to do so. Host States can be reluctant to allow refugee education, fearing that this will encourage refugees to remain permanently on their territory. The denial of education clearly contravenes both article 22 of the 1951 Convention relating to the Status of Refugees and article 28 of the Convention on the Rights of the Child, which require that States Parties provide refugee children with the same treatment as is accorded to nationals with respect to elementary education. The expert noted with grave concern that some host Governments refuse to provide, or to allow international agencies to provide, educational activity for refugee children. Despite active intervention and strong protests, UNHCR has sometimes proven unable to persuade Governments that such action is destructive to children. The expert calls upon the international community to support the efforts of United Nations bodies, specialized agencies and other organizations to meet more effectively the international standards for the care, protection and welfare of children. Further, host Governments, international agencies and other educational providers are urged to work more closely with the World Bank, UNICEF, the United Nations Development Programme (UNDP) and UNESCO to ensure that education services are part of both relief and immediate reconstruction activities. Upon their return home, children should be provided with access to continued schooling of a consistent level and quality.

197. When international agencies and partners operate programmes for refugees in remote locations, there is a danger that the education standards will be higher for the refugees than for the local population. Clearly, local children should also be educated to at least a similar standard. This requires greater collaboration among international agencies, NGOs and host Governments.

198. When refugee children attend local schools, they may need special programmes to help them fill knowledge gaps and learn the language. Even when language is not a barrier, children may still suffer harassment, discrimination or bullying unless school staff take preventive measures.

199. Even when educational opportunities exist, parents may be reluctant to send their children to school during armed conflicts. Some need their children to work to contribute to the family economy; others are worried about what their children will learn. During the conflict between the Muslim and Croat factions in Bosnia and Herzegovina, for example, refugee parents were worried about the content of education, particularly in subjects like history, geography and literature. Some parents have religious objections to girls and boys attending school together after a certain age. The recent decision of the Taliban in Afghanistan to curtail girls' access to education in the areas under their control has been of particular concern for United Nations specialized agencies and NGOs. The expert commends the difficult decisions taken by NGOs and agencies such as UNICEF to stop working in the affected areas until there is the possibility of equality of opportunity between girls and boys, and of

implementing the agreed principles of the Convention on the Rights of the Child and the World Declaration on Education for All and Framework for Action to Meet Basic Learning Needs adopted at Jomtien, Thailand, in 1990.

200. The expert supports the call from the 1996 Inter-Agency Consultation on Education for Humanitarian Assistance and Refugees that post-conflict educational planning be initiated during emergencies with local, national and regional educational and resource actors, including the World Bank and others who are currently only involved in reconstruction efforts. Education has a vital role to play in rehabilitation, yet is rarely considered a priority in relief programmes. Educational initiatives developed for conflict situations should therefore be designed to allow for easy integration in the post-conflict period.

201. Many Governments and specialized agencies have given easy priority to the physical reconstruction of schools, but rather less attention to teacher training and the development of new curricula and teaching methods. Even where the critical political will to invest in education has been present, education systems often suffer from a persistent shortage of funds.

202. Countries that host refugees often lack resources; most host Governments in Africa have yet to achieve universal primary education for their own populations. Investment in education requires political commitment from Governments. The declaration of the 1990 World Conference on Education for All noted that many developing countries spent more on average on the military than on education and health combined. If countries continue to employ four times as many soldiers as teachers, education and social systems will remain fragile and inadequate and Governments will continue to fail children and break the promises made to them through ratification of the Convention on the Rights of the Child. At the World Conference on Education for All, UNESCO, UNICEF, UNDP and the World Bank, called on Governments to adapt their spending priorities so as to achieve basic education for 80 per cent of the world's children by the year 2000, and equality of educational opportunity for girls and boys. The expert fully supports this call and, further, wishes to encourage those bodies to reorder their own spending priorities, operational policies and partnerships to help ensure that the right to education is fulfilled for children caught up in situations of armed conflict.

3. Specific recommendations on education

203. The expert submits the following recommendations on education:

(a) All possible efforts should be made to maintain education systems during conflicts. The international community must insist that Government or non-state entities involved in conflicts do not target educational facilities, and indeed promote active protection of such services;

(b) Preparations should also be made for sustaining education outside of formal school buildings, using other community facilities and strengthening alternative education through a variety of community channels;

(c) Donors should extend the boundaries of emergency funding to include support for education. The establishment of educational activity, including the provision of teaching aids and basic educational materials, should be accepted as a priority component of humanitarian assistance;

(d) As soon as camps are established for refugees or internally displaced persons, children should be brought together for educational activities. Incentives for attendance should also be encouraged through, for example, measures to promote safety and security. Special emphasis should be placed on providing appropriate educational activities for adolescents. Besides promoting access to secondary education, the expert urges Governments, international agencies and NGOs to develop age-appropriate educational programmes for out of school youth, in order to address their special needs and reflect their rights to participation;

(e) Support for the re-establishment and continuity of education must be a priority strategy for donors and NGOs in conflict and post-conflict situations. Training should equip teachers to deal with new requirements. These will include recognizing signs of stress in children as well as imparting vital survival information on issues such as landmines, health and promoting respect for human rights;

(f) The expert urges the Committee on the Rights of the Child to issue strong guidance to States Parties on the interpretation of articles of the Convention on the Rights of the Child relating to their responsibility to provide education to children.

III. RELEVANCE AND ADEQUACY OF EXISTING STANDARDS FOR THE PROTECTION OF CHILDREN

204. Through the Convention on the Rights of the Child, now ratified by nearly all countries, the world has recognized that the rights of children include the right to have their basic needs met. It is a basic need of children to be protected when conflicts threaten and such protection requires the fulfilment of their rights through the implementation of international human rights and humanitarian law.

205. States Parties to the Convention on the Rights of the Child are responsible for all children within their territory without discrimination. In accepting the role of the Committee on the Rights of the Child in monitoring the implementation of the Convention on the Rights of the Child, States Parties have also recognized that the protection of children is not just a national issue, but a legitimate concern of the international community. This is especially important since many of the most serious violations of children's rights are taking place in situations of conflict, such as Liberia and Somalia, where there is currently no functioning national Government. National and international strategies to protect children must empower and build the capacities of women, families and communities to address the root causes of conflict and strengthen local development.

206. Increased efforts are needed to ensure that relief and protection measures specifically include child-centred actions. During the expert's field visits and regional consultations, she found that many relief organizations offer assistance without taking into account the broader needs of children or ensuring effective cooperation. Moreover, in many cases only cursory attention was given to developing appropriate emergency responses that take age and gender into consideration.

207. One of the greatest challenges in providing protection is to ensure safe access. Formerly, hospitals and refugee camps were considered miniature safe havens, but this is no longer the case. Humanitarian activities from relief convoys to health clinics have all become targets, imperiling families, children and those who try to assist them - particularly locally recruited staff. Many governmental and non-governmental agencies have been least able to assist internally displaced children and their families and to help those who are living in besieged communities.

208. In some conflicts, temporary cessations of hostilities have been negotiated to permit the delivery of humanitarian relief in the form of "corridors of peace" and "days of tranquillity". In El Salvador, Lebanon and Afghanistan, for example, these agreements were supported by all warring parties to permit the vaccination of children. In the case of Operation Lifeline Sudan, such arrangements were made to deliver relief supplies and vaccines during relative lulls in the conflict. The precedents set by these child-centred agreements are useful models to relate practical protection measures to the implementation of humanitarian and human rights law.

209. Thus it is that we seek to have protection framed by the standards and norms embodied in international law, national legislation and local custom and practice. Politicians and soldiers have long recognized that they can achieve many of their objectives if they fight within agreed standards of conduct. Considerations and concerns in the area of protection have led to the development of two main bodies of law, humanitarian law and human rights law, that form the legal bases that afford children protection in situations of armed conflict.

210. Many aspects of both bodies of law are relevant to the protection of children in armed conflict. The Convention on the Rights of the Child is of special note, as it is one of the most important bridges linking two bodies of law whose complementarity is increasingly recognized. Building on this complementarity, the international community must achieve the fullest possible protection of children's rights. Any purported mitigating circumstances through which Governments or their opponents seek to justify infringements of children's rights in times of armed conflict must be seen by the international community for what they are: reprehensible and intolerable. The next section of this report highlights features of the standards of humanitarian and human rights law and assesses their adequacy for meeting present needs.

A. Humanitarian law

211. The international humanitarian law of armed conflict, usually referred to simply as international humanitarian law 40/ limits the choice of means and methods of conducting military operations and obliges belligerents to spare persons who do not, or who no longer, participate in hostilities. These standards are reflected in the four Geneva Conventions of 12 August 1949 and the two 1977 Protocols Additional to these Conventions.

212. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War is one of the main sources of protection for civilian persons, and thus for children. It prohibits not only murder, torture or mutilation of a protected person, but also any other measures of brutality whether applied by civilian or military agents. The Fourth Geneva Convention has been ratified, almost universally, by 186 States.

213. The Geneva Conventions of 1949 have been considered to apply primarily only to conflicts between States. However, the Conventions also include common article 3 which applies also to internal conflicts. This article enumerates fundamental rights of all persons not taking an active part in the hostilities, namely, the right to life, dignity and freedom. It also protects them from torture and humiliating treatment, unjust imprisonment or being taken hostage.

214. In 1977, the Geneva Conventions were supplemented by two additional Protocols that bring together the two main branches of international humanitarian law - the branch concerned with protection of vulnerable groups and the branch regulating the conduct of hostilities.

215. Protocol I requires that the fighting parties distinguish at all times between combatants and civilians and that the only legal targets of attack should be military in nature. Protocol I covers all civilians, but two articles also offer specific protection to children. Article 77 stipulates that children shall be the object of special respect and shall be protected against any form of indecent assault and that the Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason. Article 78 deals with the evacuation of children to another country, saying that this should not take place except for compelling reasons, and establishing some of the terms under which any evacuation should take place.

216. Non-international armed conflicts, that is to say, conflicts within States, are covered by Protocol II. Protocol II supplements common article 3 and provides that children be provided with the care and aid they require, including education and family reunion. However, Protocol II applies only to a restricted category of internal conflicts: they must involve conflicts between the armed forces of a High Contracting Party and dissident armed forces or other organized armed groups. According to this criterion, it can be argued that Protocol II would not apply to the majority of current civil wars. The reason is obvious: few Governments (High Contracting Parties) are likely to concede that any struggle within their borders amounts to an armed conflict. Protocol II does not apply to an internal disturbance or tension, a riot or isolated acts of violence. Naturally, for children who are victims of such struggles, it makes

little difference that the violence to which they are subject does not rise above this minimum threshold.

217. While the Fourth Geneva Convention has been almost universally ratified, the Protocols have been ratified by far fewer States. To date, 144 States have ratified Protocol I, and those absent include a number of significant military powers; of Gulf War combatants, for example, the United States of America, the United Kingdom of Great Britain and Northern Ireland, France and Iraq have yet to ratify Protocol I. The situation with Protocol II is even less satisfactory: only 136 have ratified.

218. In general, humanitarian law represents a compromise between humanitarian considerations and military necessity. This gives it the advantage of being pragmatic. It acknowledges military necessity yet it also obliges armed groups to minimize civilian suffering and, in a number of articles, requires them to protect children. However, these articles cannot be considered adequate to ensure the safety and survival of children trapped in internal conflicts.

B. Human rights law

219. Human rights law establishes rights that every individual should enjoy at all times, during both peace and war. The obligations, which are incumbent upon every State, are based primarily on the Charter of the United Nations and are reflected in the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)).

220. In formal legal terms, the primary responsibility for ensuring human rights rests with States, since they alone can become contracting parties to the relevant treaties. It follows that opposition groups, no matter how large or powerful, cannot be considered directly bound by human rights treaty provisions. It is significant, however, that the situation is precisely the opposite in relation to the application of international humanitarian law to non-state entities in internal conflicts. This relative inconsistency between the bodies of law is further ground for insisting that non-state entities should, for all practical purposes, be treated as though they are bound by relevant human rights standards. Nevertheless, just as the international community has insisted that all States have a legitimate concern that human rights be respected by others, so too it is clear that all groups in society, no matter what their relationship to the State concerned, must respect human rights. In relation to non-state entities, the channels for accountability must be established more clearly.

221. Although human rights law applies both in peacetime and in war, there are circumstances where the enjoyment of certain rights may be restricted. Many human rights treaties make allowance for States to derogate from their obligations by temporarily suspending the enjoyment of certain rights in time of war or other public emergency. However, human rights law singles out certain rights that can never be subject to derogation. These include the right to life; freedom from torture and other inhuman or degrading treatment or punishment; freedom from slavery; and the non-retroactivity of penal laws. In relation to rights from which derogation is permitted, strict conditions must be met: the emergency must threaten the life of the nation (and not merely the

current Government's grip on power); the relevant international bodies must be notified; any measures taken must be proportionate to the need; there must be no discrimination; and the measure must be consistent with other applicable international obligations. International bodies such as the Commission on Human Rights, the Human Rights Committee and the Committee on the Rights of the Child carefully scrutinize the assertion by any Government that derogation is necessary and justified.

222. Human rights law has a number of specialized treaties which are of particular relevance to the protection of children in armed conflict. The International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI)) covers many rights including the right to life and the right to freedom from slavery, torture and arbitrary arrest. The International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200 A (XXI)) recognizes the right to food, clothing, housing, health and education. The Convention on the Elimination of All Forms of Discrimination against Women (General Assembly resolution 34/180) is of particular note. In addition, there are treaties that deal with particular themes or groups of people, covering such issues as genocide, torture, refugees, and racial discrimination. In the context of this report, the most notable specialized treaty is the Convention on the Rights of the Child.

1. Convention relating to the Status of Refugees

223. As armed conflicts frequently produce large numbers of refugees, refugee law is of particular relevance. In its work, UNHCR relies principally on the Convention relating to the Status of Refugees adopted on 28 July 1951 and its Protocol of 1967. These instruments provide basic standards for the protection of refugees in countries of asylum; most important is the principle of non-refoulement. The 1951 Convention and the 1967 Protocol are complemented by regional refugee instruments - notably, the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969 and the Cartagena Declaration on Refugees of 1984. States have primary responsibility to ensure the protection of refugees within their boundaries. UNHCR is mandated to provide international protection for refugees and to find permanent solutions to refugee situations.

224. Many refugees fleeing armed conflict have reason to fear some form of persecution on ethnic, religious, social or political grounds at the hands of one or more of the parties to a conflict, but others are fleeing the indiscriminate effects of conflict and the accompanying disorder, including the destruction of homes and food stocks that have no specific elements of persecution. While the latter victims of conflict require international protection, including asylum on at least a temporary basis, they may not fit within the literal terms of the 1951 Convention. States Parties and UNHCR, recognizing that such persons are also deserving of international protection and humanitarian assistance, have adopted a variety of solutions to ensure that they receive both. This is most recently exemplified by the regime of "temporary protection" adopted by States in relation to the conflict in former Yugoslavia.

225. The standards of the Convention on the Rights of the Child are also of particular relevance to the refugee child. Through its guidelines on the protection and care of refugee children, UNHCR seeks to incorporate the standards and principles of the Convention into its protection and assistance framework.

2. Convention on the Rights of the Child

226. The most comprehensive and specific protection for children is provided by the Convention on the Rights of the Child, adopted by the General Assembly in resolution 44/25 in November 1989. The Convention establishes a legal framework that greatly extends the previous recognition of children as the direct holders of rights and acknowledges their distinct legal personality. The Convention on the Rights of the Child has, in a very short space of time, become the most widely ratified of all human rights treaties. Currently, only six States have not ratified the Convention on the Rights of the Child: Cook Islands, Oman, Somalia, the United Arab Emirates, Switzerland and the United States of America.

227. The Convention recognizes a comprehensive list of rights that apply during both peacetime and war. As stressed by the Committee on the Rights on the Child (A/49/41) these include protection of the family environment; essential care and assistance; access to health, food and education; the prohibition of torture, abuse or neglect; the prohibition of the death penalty; the protection of the child's cultural environment; the right to a name and nationality; and the need for protection in situations of deprivation of liberty. States must also ensure access to, and the provision of, humanitarian assistance and relief to children during armed conflict.

228. In addition, the Convention on the Rights of the Child contains, in articles 38 and 39, provisions specifically related to armed conflict. The former article is of major significance because it brings together humanitarian law and human rights law, showing their complementarity. Its provisions require that States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to children in armed conflicts, and paragraph 4 states that:

> "In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict."

229. If the Convention on the Rights of the Child were to be fully implemented during armed conflicts, this would go a long way towards protecting children. Children's right to special protection in these situations has long been recognized. The Convention on the Rights of the Child has no general derogation clause and, in light of this, the Committee on the Rights of the Child stresses that the most positive interpretation be adopted with a view to ensuring the widest possible respect for children's rights. In particular, the Committee has stressed that, in view of the essential nature of articles 2, 3 and 4, they do not admit any kind of derogation (A/49/41).

230. As with other human rights treaties, the Convention on the Rights of the Child can only be formally ratified by States. Nevertheless, it is well worth encouraging non-state entities to make a formal commitment to abide fully by the relevant standards. Many non-state entities aspire to form governments and to invoke an existing Government's lack of respect for human rights as a justification for their opposition. In order to establish their commitment to the protection of children, non-state entities should be urged to make a formal statement accepting and agreeing to implement the standards contained in the Convention on the Rights of the Child. There are encouraging precedents here. In 1995 in Sudan, for example, several combatant groups became the first non-state entities to commit to abide by the provisions of the Convention on the Rights of the Child. Significantly, once the commitments were enacted, the non-state entities immediately put information, reporting and complaint systems in place.

231. While the Convention on the Rights of the Child offers comprehensive protection to children, it needs strengthening with respect to the participation of children in armed conflict. The Committee on the Rights of the Child has recognized the importance of raising the minimum age of recruitment to 18 years, and in 1994 the Commission on Human Rights established a working group to draft an optional protocol to the Convention to achieve this. The scope of the draft text has been significantly broadened to include articles on non-state entities, on rehabilitation and social reintegration of child victims of armed conflicts, and on a procedure of confidential enquiries by the Committee on the Rights of the Child. Despite the progress that has been made, there continues to be resistance on the issue of voluntary recruitment and on distinguishing between direct and indirect participation. The argument that the age of recruitment is merely a technical matter to be decided by individual Governments fails to take into account the fact that effective protection of children from the impact of armed conflict requires an unqualified legal and moral commitment which acknowledges that children have no part in armed conflict.

C. Implementation of standards and monitoring of violations

232. Standards will only be effective, however, if and when they are widely known, understood, and implemented by policy makers, military and security forces and professionals dealing with the care of children, including the staff of United Nations bodies, specialized agencies and humanitarian organizations. Standards should also be known and understood by children themselves, who must be taught about their rights and how to assert them. Everyone professionally concerned with the protection of children during armed conflict should familiarize themselves with both humanitarian and human rights law.

233. International peacekeepers in particular, must be trained in humanitarian and human rights law and, particularly, about the fundamental rights of children. The Swedish Armed Forces International Centre has developed a training programme for peacekeeping regiments which includes components on child rights as well as rules of engagement, international humanitarian law and ethics. Child rights components, developed in collaboration with Rädda Barnen, provide an orientation about the impact of armed conflict on children and

situations that peacekeepers are likely to encounter that would require a humanitarian response.

234. Human rights and humanitarian standards reflect fundamental human values which exist in all societies. An aspect of implementation requiring greater attention is the translation of international instruments into local languages and their wide dissemination through the media and popular activities such as expositions and drama. In Rwanda, Save the Children Fund-US, Haguruka (a local NGO) and UNICEF supported the development of an official Kinyarwanda version of the Convention on the Rights of the Child. This has been adopted into Rwandan law and projects are being developed to implement its provisions widely.

235. An effective international system for the protection of children's rights must be based on the accountability of Governments and other actors. This in turn requires prompt, efficient and objective monitoring. The international community must attach particular importance to responding effectively to each and every occasion when those involved in armed conflicts trample upon children's rights.

236. Within the organs of the United Nations, the principal responsibility for monitoring humanitarian violations rests, in practice, upon the Commission on Human Rights. The Commission can receive information from any source and take an active role in gathering data. The latter role is accomplished through a system of rapporteurs and working groups, whose reports can be an effective means of publicizing violations and attempting to persuade States to change their policies. The reports of each of the rapporteurs and working groups should reflect the concerns of children in situations of armed conflict.

237. Another dimension of monitoring by international bodies relates to the supervision of treaty obligations. Each of the principal human rights treaties has its own monitoring body composed not of formal representatives of States, but of independent experts. The various committees and, in particular, the Committee on the Rights of the Child, should embark upon more concerted and systematic monitoring and reporting to protect children in situations of armed conflict. They should also assist States in translating their political commitment to children into action, consequently elevating the priority accorded to this concern.

238. The Geneva Conventions entrust to ICRC, IFRC and their National Societies the mandate to monitor respect for international humanitarian law. ICRC, IFRC and their National Societies report breaches of international humanitarian law and makes concrete recommendations on how to end breaches and prevent their recurrence. As has been noted, international humanitarian law also recognizes a role for other humanitarian organizations.

239. Where protection of children is concerned, much broader participation in the monitoring and reporting of abuses is required. Many of those working for relief agencies consider that reporting on infractions of either humanitarian or human rights law is outside their mandate or area of responsibility. Others are worried that they will be expelled from the country concerned or have their operations severely curtailed if they report sensitive information. But a balance must be struck. Without reports of such violations, the international

community is deprived of vital information and is unable to undertake effective monitoring. Appropriate public or confidential channels should be established nationally through which to report on matters of grave concern relating to children. The High Commissioner for Human Rights, national institutions and national ombudspersons, international human rights organizations and professional associations should be actively utilized in this regard. The media should also do more to raise awareness of infringements of children's rights.

D. Specific recommendations on standards

240. The expert submits the following recommendations on standards:

(a) The few Governments which have not become Parties to the Convention on the Rights of the Child should do so immediately;

(b) All Governments should adopt national legislative measures to ensure the effective implementation of relevant standards, including the Convention on the Rights of the Child, the Geneva Conventions of 1949 and their Additional Protocols and the 1951 Convention relating to the Status of Refugees and its Protocol;

(c) Governments must train and educate the judiciary, police, security personnel and armed forces, especially those participating in peacekeeping operations, in humanitarian and human rights law. This should incorporate the advice and experience of ICRC and other humanitarian organizations and, in the process, undertake widespread dissemination;

(d) Humanitarian organizations should train their staff in human rights and humanitarian law. All international bodies working in conflict zones should establish procedures for prompt, confidential and objective reporting of violations that come to their attention;

(e) Humanitarian organizations should assist Governments in educating children about their rights through the development of curricula and other relevant methods;

(f) Humanitarian agencies and organizations should seek to reach signed agreements with non-state entities, committing them to abide by humanitarian and human rights laws;

(g) Civil society should actively disseminate humanitarian and human rights law and engage in advocacy, reporting and monitoring of infringements of children's rights;

(h) Building on existing guidelines, UNICEF should develop more comprehensive guidelines on the protection and care of children in conflict situations;

(i) Particularly in the light of articles 38 and 39 of the Convention on the Rights of the Child, the Committee on the Rights of the Child should be encouraged to include, in its report to the General Assembly, specific

information on the measures adopted by States Parties to protect children in situations of armed conflict.

IV. RECONSTRUCTION AND RECONCILIATION

A. Reconstruction

241. The task of rebuilding war-torn societies is a huge one that must take place not only at the physical, economic, cultural and political, but also at the psychosocial level. Reconstruction must relate to the child, the family, the community and the country. Rebuilding need not simply mean returning to the way things were, but can offer opportunities to leap into the future rather than follow a slow but steady path of progress. Programmes designed during reconstruction can lay foundations for child protection and strengthen social infrastructures, particularly in relation to health and education. Children are rarely mentioned in reconstruction plans or peace agreements, yet children must be at the centre of rebuilding.

242. Part of putting children at the centre means using youth as a resource. Young people must not be seen as problems or victims, but as key contributors in the planning and implementation of long-term solutions. Children with disabilities, children living or working in the streets and children who are in institutions as a result of conflict should all become essential participants in post-conflict planning and reconstruction. In countries emerging from conflict, agencies such as ILO have a key role to play through skills and entrepreneurship training programmes that address youth. The international community has an important responsibility for sharing technical skills and knowledge as well as financial resources.

243. The challenges facing communities attempting to rebuild are enormous. As a consequence of scorched-earth policies, communities often have little from which to reconstruct. In many countries, landmines restrict the use of roads and agricultural lands. "Donor pullout" can leave populations struggling to survive, particularly if humanitarian assistance has been structured in ways that encourage dependency rather than build family and community strength and integrity. For these reasons, the seeds of reconstruction should be sown even during conflict. Particularly for children, emergency aid - investment that secures their physical and emotional survival - will also be the basis for their long-term development. In this sense, emergencies and development should never be arbitrarily or artificially separated.

244. As daunting as reconstruction is the task of restoring family livelihood. UNHCR and others have developed a form of reintegration assistance known as "quick impact projects". These are simple, small-scale projects designed to act as bridges between returnees and residents while bringing immediate, tangible economic and social benefits. They involve the beneficiary community in determining priorities and implementation. One version of the quick impact projects gives female-headed households special consideration and provides loans and credits to enable them to form cooperatives and open small businesses. Before the conflict, women may have been less involved than men in economic activity, but armed conflicts can change this pattern dramatically. These

projects have been particularly successful in Central America. However, not all quick impact projects have managed to involve local communities meaningfully, and some have been criticised for offering quick fix approaches which fail to benefit the community in the long term.

245. Such bridging programmes are crucial in providing a more formalized transition from the emergency phase to the longer-term reconstruction phase. In Cambodia, the expert was told that the phasing out of UNHCR has left a gap in support for many children and families. Agency staff argue that more defined programming, using development principles for a transitional rehabilitation phase would promote the rebuilding of a cohesive, caring social network supportive of women and children. The memoranda of understanding recently agreed between agencies such as UNHCR and UNICEF should be of help in establishing clearer directives for transition planning between agencies, but such planning needs to involve a variety of agencies and NGOs.

246. Education for children must be a priority in all reconstruction. For refugee children, it is important that their home countries recognize the schooling they have undertaken in the country of asylum. To facilitate this process, students should be provided with appropriate documentation of courses and qualifications. The recovery and reintegration of children will affect the success of the whole society in returning to a more peaceful path. To some extent, returning to non-violent daily activities can start the process of healing and national reconciliation, but communities must also take positive steps that signal to children the break with the violence of the past. In the demilitarization of communities, eroding the cultures of violence that conflict has engendered must be an important priority. Women's groups, religious groups and civil society all play key roles in this area.

B. Reconciliation

247. Truth commissions, human rights commissions and reconciliation groups can be important vehicles for community healing. To date, 16 or more countries in transition from conflict have organized truth commissions as a means of establishing moral, legal and political accountability and mechanisms for recourse. In South Africa and Guatemala, the commissions are aimed at preserving the memory of the victims, fostering the observance of human rights and strengthening the democratic process. In Argentina, where there was an assumption that offenders would receive punishment, there have subsequently been amnesties to the consternation of the human rights community.

248. It is difficult, if not impossible, to achieve reconciliation without justice. The expert believes that the international community should develop more systematic methods for apprehending and punishing individuals guilty of child rights abuses. Unless those at every level of political and military command fear that they will be held accountable for crimes and subject to prosecution, there is little prospect of restraining their behaviour during armed conflicts. Allowing perpetrators to benefit from impunity can only lead to contempt for the law and to renewed cycles of violence.

249. In the case of the gravest abuses, including but not limited to genocide, international law can be more appropriate than national action. In view of this, the Security Council has established International Tribunals to punish perpetrators of war crimes and crimes against humanity committed in the former Yugoslavia and Rwanda. The expert welcomes these tribunals, but is concerned that they may have neither the resources nor the powers to fulfil their objectives. They deserve greater financial support and more determined political backing. The expert supports the proposed creation of an international criminal court, which would have a permanent prosecutor's office to try cases of genocide and other violations of international law.

250. One of the most disturbing and difficult aspects of children's participation in armed conflict is that, manipulated by adults, they may become perpetrators of war crimes including rape, murder and genocide. As of June 1996 in Rwanda, 1,741 children were being held in detention in dreadful conditions. Of these, approximately 550 were under 15 years, and therefore beneath the age of criminal responsibility under Rwandan law. The Government of Rwanda has transferred responsibility for the cases of young people who were under the age of 15 at the time of the genocide from the Ministry of Justice to the Ministry of Labour and Social Affairs. They were subsequently released into newly established juvenile or community detention facilities. For the estimated 1,191 children who are in detention and deemed criminally responsible, UNICEF, through the Ministry of Justice, provides legal assistance for their defence. It is also advocating special provisions for the trial of these adolescents. The dilemma of dealing with children who are accused of committing acts of genocide illustrates the complexity of balancing culpability, a community's sense of justice and the "best interests of the child".

251. The severity of the crime involved, however, provides no justification to suspend or to abridge the fundamental rights and legal safeguards accorded to children under the Convention on the Rights of the Child. States Parties should establish a minimum age below which children are presumed not to have the capacity to infringe penal law. While the Convention does not mention a specific age, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) stress that this age shall not be fixed at too low a level, bearing in mind the child's emotional, mental and intellectual maturity. The Committee on the Rights of the Child states that the assessment of the children's criminal responsibility should not be based on subjective or imprecise criteria, such as the attainment of puberty, age of discernment or the child's personality. 41/ Those children who have been deemed criminally responsible should, as article 40 of the Convention asserts, be treated with dignity, and have their social reintegration taken into account. Children should, inter alia, be given the opportunity to participate in proceedings affecting them, either directly or through a representative or an appropriate body, benefit from legal counselling and enjoy due process of law. Deprivation of liberty should never be unlawful or arbitrary and should only be used as a measure of last resort. In all instances, alternatives to institutional care should be sought.

252. The prime responsibility for consistent monitoring and prosecution of violations rests with the national authorities of the State in which the violations occurred. Whether justice is pursued after the conflict depends

largely on the prevailing social and political environment. Even when there is a willingness to prosecute offenders, the country may not have the capacity to do so adequately, since the system of justice itself may have been largely destroyed. Following the conflict in Rwanda, for example, only 20 per cent of the judiciary survived, and courts lacked the most basic resources. 42/ At the Fourth Regional Consultation on the Impact of Armed Conflict on Children in Asia and the Pacific it was proposed that the reconstruction of legal systems must be viewed as an urgent task of rebuilding and that substantial international assistance may be required.

V. CONFLICT PREVENTION

"Children are dropping out of childhood. We must envision a society free of conflict where children can grow up as children, not weapons of war." 43/

253. Much of the present report has focused on methods by which children can be protected from the worst impacts of armed conflict. However well such measures are implemented, clearly the most effective way to protect children is to prevent the outbreak of armed conflicts. The international community must shatter the political inertia that allows circumstances to escalate into armed conflict and destroy children's lives. This means addressing the root causes of violence and promoting sustainable and equitable patterns of human development. All people need to feel that they have a fair share in decision-making, equal access to resources, the ability to participate fully in civil and political society and the freedom to affirm their own identities and fully express their aspirations. Such ideas have been eloquently expressed, with analytic power that cannot be attempted here, in such texts as The Challenge to the South: The Report of the South Commission and the report of the Commission on Global Governance entitled "Our Global Neighbourhood".

254. Preventing conflicts from escalating is a clear responsibility of national Governments and the international community, but there is also an important role for civil society. Religious, community and traditional leaders have often been successful at conflict management and prevention, as have scholars and NGOs involved in mediation and capacity building. Women's organizations, too, have been very influential, promoting the presence of women at the negotiating table, where they can act as their own advocates and agents for peace. One example is African Women in Crisis, a UNIFEM programme working to strengthen the capacity of women's peace movements throughout Africa. The statement of the Third Regional Consultation on the Impact of Armed Conflict on Children in West and Central Africa recommends that peace missions, reconciliation forums and all peace-building efforts should incorporate women as key members of negotiating teams. The expert agrees.

A. Education for peace

255. All sectors of society must come together to build "ethical frameworks", integrating traditional values of cooperation through religious and community leaders with international legal standards. Some of the groundwork for the

building of "ethical frameworks" can be laid in schools. Both the content and the process of education should promote peace, social justice, respect for human rights and the acceptance of responsibility. Children need to learn skills of negotiation, problem solving, critical thinking and communication that will enable them to resolve conflicts without resorting to violence. To achieve this, a number of countries have undertaken peace education programmes. In Lebanon, the expert visited the education for peace programme, jointly undertaken in 1989 by the Lebanese Government, NGOs, youth volunteers and UNICEF and now benefiting thousands of children nationally. In Liberia, the student palaver conflict management programme employs adolescents as resources in peer conflict resolution and mediation activities in schools. In Northern Ireland, the expert was informed about initiatives aimed at the universal inclusion of peace education elements in school curricula. Similarly in Sri Lanka, an education for conflict resolution programme has been integrated into primary and secondary school education. An innovative element is the programme's use of various public media to reach to out-of-school children and other sectors of the community. While such initiatives are not always successful, they are indispensable to the eventual rehabilitation of a shattered society.

256. The statement of the Second Regional Consultation on the Impact of Armed Conflict in the Arab Region called for a comprehensive review of the content, process and structure of peace education programmes (sometimes called "global education" or "education for development" programmes). The review was to include an assessment of best practice and coordination, the promotion of effective evaluation techniques and an exploration of stronger methods of involving and responding to local needs, aspirations and experiences. The consultation also emphasized the importance of integrating peace education principles, values and skills into the education of every child.

257. Adults are just as much in need of conflict management skills and human rights education as children and youth. Here, the most difficult challenge is to achieve tolerance not just between individuals, but also between groups. The media can play an important role by helping readers and viewers to enjoy diversity and by promoting the understanding that is needed for peaceful co-existence and the respect that is required for the enjoyment of human rights. The media's role as mediator has been explored in South Africa, where some journalists have been trained to use their access to both sides of conflict in order to help bring about national consensus on divisive issues.

258. Current levels of animosity in the former Yugoslavia, which had a long-running peace education programme, illustrates that programmes promoting respect for human rights and teaching conflict management skills are not enough on their own. Also essential are clear and strong mechanisms for reconciliation, the protection of minorities and access to social justice. Governments can specifically outlaw the kinds of discrimination that breed resentment. The persistent violation of the rights of minority and indigenous groups has helped generate the conditions that lead to armed conflict.

B. Demilitarization

259. In addition to pursuing equitable patterns of development, Governments can lower the risk of armed conflict by reducing levels of militarization and by honouring the commitments made at the World Summit for Social Development to support the concept of human security. Towards that end, Governments must take firm action to shift the allocation of resources from arms and military expenditures to human and social development. Sub-Saharan Africa, for example, is heavily militarized: between 1960 and 1994, the proportion of the region's gross domestic product (GDP) devoted to military spending rose from 0.7 per cent to 2.9 per cent. The region's military expenditure is now around $8 billion, despite the fact that 216 million people live in poverty. South Asia is another region that spends heavily on arms. In 1994, it spent $14 billion on the military although 562 million South Asians live in absolute poverty. 44/ Governments worldwide should take uncompromising steps to demilitarize their societies by strictly limiting and controlling access to weapons.

260. At the international level, Governments must exercise the political will to control the transfer of arms to conflict zones, particularly where there is evidence of gross violation of children's rights. The United Nations must adopt a much firmer position on the arms trade, including a total ban on arms shipments to areas of conflict and determined efforts to eliminate the use, production, trade and stockpiling of anti-personnel landmines. The United Nations Register of Conventional Arms should be expanded to include more types of weapons and mandatory reporting should be required.

261. Donors and development agencies should give priority to programmes that include conflict prevention components designed to help manage diversity and reduce economic disparities within countries. Economic development in itself will not resolve conflicts. However, unless the reduction of economic disparities becomes an essential ingredient in all programmes, human development will be constantly thwarted by violent conflict. Donors should make stronger efforts to ensure that a greater percentage of their funding is aimed directly at social infrastructures and programmes for children.

262. In a report on strengthening of the coordination of emergency humanitarian assistance (A/50/203-E/1995/79), the United Nations Secretary-General estimated that spending on refugees doubled between 1990 and 1992, that the cost of peace operations increased 5-fold in the same period and 10-fold in 1994 and that spending on humanitarian programmes tripled from $845 million to $3 billion between 1989 and 1994. Significantly, official development assistance (ODA) figures for 1994 were at their lowest point for the past 20 years amongst the world's richer countries - just 0.3 per cent of combined gross national product (GNP), rather than the 0.7 per cent agreed by the Development Assistance Committee of the Organisation for Economic Cooperation and Development (OECD) and endorsed by the General Assembly. Decreasing levels of aid and increasing costs of emergencies have a negative impact on aid for long term development, despite growing awareness that longer term development may be one of the more effective methods of preventing conflicts and rebuilding communities.

C. Early warning

263. Improvements in early warning systems and stand-by capacity are necessary to reduce the dangers of armed conflict for children. On numerous field visits, it was stressed to the expert that, although massive displacement and threats to children had been anticipated in a region, they had not been sufficiently taken up by the international community. Recent efforts of the international humanitarian community to establish improved early warning systems and contingency planning have included NGOs and local institutions. Noting the rare inclusion of child-specific expertise in stand-by arrangements, the expert recommends the full consideration of children's rights and needs in the development of early warning systems and contingency planning. The media can alert the international community to child rights violations, but early warning must be linked to early action to be of any use. The escalation of conflict in the Great Lakes region of Africa is a clear example of the failure to link early warning with preventive measures and early action.

264. The burden and consequences of armed conflict usually have transborder impacts, diverting energy and resources from all countries in the region and leading to increased impoverishment. Civil society and international NGOs can mitigate these impacts by providing their own early warning, advocating international and local human rights standards, promoting community-level peace-building and offering mediators. Action can also come from regional organizations such as the Organization of American States (OAS), the League of Arab States, the Organization of African Unity (OAU), OECD and the European Union (EU), as well as those assembled for particular projects, such as the former Contadora Group, which was related to the central American peace process, and the Economic Community of West African States Military Observer Group (ECOMOG), related to peacekeeping in Liberia. The capacity of regional bodies, which differ greatly in their experience and resources, should not be overstated, but they can engender frank and open discussion among neighbouring governments. Regional organizations, NGOs and other actors have a number of preventive diplomacy instruments open to them, including grass roots dialogues, mediation, human rights missions, peacekeeping and peace-building.

265. In the long run, conflict prevention is everyone's responsibility. It requires action at local, national and international levels to remove both the underlying causes of conflict and the immediate provocations for violence. Ultimately, the failure to achieve comprehensive peace-building, the failure to settle disputes peacefully and the failure to prevent child rights violations each represent a collapse of moral and political will.

VI. IMPLEMENTATION MECHANISMS

266. To keep these issues very high on the international human rights, peace, security and development agendas, the expert believes that it is essential to ensure a follow-up to the present report. She recommends the establishment of a special representative of the Secretary-General on children and armed conflict.

267. The special representative would act as a standing observer, assessing progress achieved and difficulties encountered in the implementation of the recommendations presented by the present study. The representative would raise awareness about the plight of children affected by armed conflict and promote information collection, research, analysis and dissemination at the global, regional and national levels. The representative would encourage the development of networking to exchange experiences and facilitate the adoption of measures intended to improve the situation of children and reinforce action undertaken to such a purpose and would also foster international cooperation to ensure respect for children's rights in these situations, contribute to the coordination of efforts by Governments, United Nations bodies, specialized agencies, and other competent bodies, including NGOs, regional organizations, relevant special rapporteurs and working groups, as well as United Nations field operations.

268. The special representative would prepare an annual report to be submitted to the General Assembly as well as to the Commission on Human Rights. The report would contain information received from all relevant sources, including Governments, United Nations bodies, specialized agencies, NGOs and other competent bodies, on progress achieved as well as on any other steps adopted to strengthen the protection of children in situations of armed conflict.

269. The special representative would work closely with the Committee on the Rights of the Child, relevant United Nations bodies, specialized agencies and other competent bodies, including NGOs. The representative would also maintain close contact with Department of Humanitarian Affairs and members of the Inter-Agency Standing Committee, and would make use of the mechanisms established by the Administrative Committee on Coordination for inter-agency follow-up to recent global conferences. The representative would be supported in her/his work, including financial support, by the United Nations system and, in particular, by the High Commissioner for Human Rights/Centre for Human Rights, UNICEF and UNHCR.

A. Follow-up action for Governments

270. Governments bear the primary responsibility for protecting children from the impact of armed conflict, and indeed, for preventing conflicts from occurring. While this report provides testimony of the efforts of Governments, United Nations bodies and civil society to protect children from the atrocities of war, it is ultimately a testimony of their collective failure to do so. Governments have clearly failed to harness the necessary financial and human resources or to demonstrate the compassion, the commitment and the tenacity required to fulfil their moral, political and social obligations to children. The following recommendations are addressed to all Governments. Improvement in the situation of children affected by armed conflicts requires improved international cooperation, political commitment and action not only on the part of Governments within whose borders conflict exists, but also on the part of those Governments whose citizens are indirectly responsible for inciting or protracting conflicts for economic or political gain.

271. All States Parties are encouraged to implement the Convention on the Rights of the Child in times of peace and conflict, inter alia, through legislative, administrative, budgetary, judicial, educational and social measures. In addition, States Parties should engage in international cooperation through bilateral and multilateral actions and by providing and facilitating humanitarian assistance and relief programmes during conflict situations.

272. Governments that have not yet ratified the Convention on the Rights of the Child should do so. All States should support the adoption of the proposed draft optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts, and adhere to it as soon as possible. In addition, they should support the international ban on landmines and other weapons deemed to have indiscriminate effects. Governments should also ratify and implement other relevant instruments, such as the Geneva Conventions of 1949 and the Additional Protocols; the 1951 Convention and the 1967 Protocol relating to the Status of Refugees; the Convention on the Elimination of All Forms of Discrimination against Women; and other specific regional undertakings that address children's rights.

273. Governments must give priority to preventive measures by ensuring balanced economic, social and human development through capacity building, the promotion of a child-centred culture and the equitable reallocation of resources, including land. States must enact measures to eliminate discrimination, particularly against children, women, indigenous and minority populations, and must carry out their responsibilities to ensure protection for refugee and internally displaced children.

274. Governments should recognize that economic and social disparities, neglect and patterns of discrimination contribute to armed conflict, and should consequently review their national budgets with a view to reducing military expenditure and redirecting those resources to economic and social development. Child development and child rights indicators should form the basis for national strategies for children which assess progress and indicate policy and programme reforms. Governments should also ensure that, on matters affecting the child, children's views are taken into account.

275. Governments must create enabling environments within which civil society can work on issues related to armed conflict and child rights. Governments should actively encourage and support coalitions that represent the views of parliamentarians, the judiciary, religious communities, educators, the media, professional associations, the private sector, NGOs and children themselves. Such coalitions will facilitate service delivery, social mobilization and advocacy for children affected by armed conflicts. The establishment of national ombudspersons, national human rights commissions, international courts and other institutions should be explored. So should long-term measures designed to ensure respect for children's rights.

276. Immediately following conflicts and during periods of transition, Governments must ensure that health, education and psychosocial support are central to reconstruction efforts. Demilitarization, the demobilization of all armed groups, de-mining, mine awareness and the control of the flow of arms within and outside of national borders must become immediate priorities. To

achieve justice and reconciliation, it is essential for Governments to engage in national-level dialogues with the military, to strengthen their judicial systems, to carry out human rights monitoring and to establish investigative mechanisms, tribunals and truth commissions that consider violations of children's rights.

277. Multilateral, bilateral and private funding sources should be committed to the implementation of the Convention on the Rights of the Child as part of the process of development and post-conflict reconstruction. In the light of article 4 of the Convention on the Rights of the Child, States Parties should commit themselves, with regard to economic, social and cultural rights, to the maximum extent of their available resources and, where needed, within the framework of international cooperation. This means that those countries with greater resources have an obligation to support the implementation of the Convention on the Rights of the Child in those countries with fewer resources.

278. States should use the collective authority of their intergovernmental (such as the Commonwealth secretariat), regional and subregional bodies to support region-wide initiatives for conflict prevention, management and resolution.

B. Regional and subregional arrangements

279. Regional organizations, such as OAU, OAS, EU and the Asia-Pacific Regional Cooperation Framework (APEC), economic commissions, development banks and subregional organizations, such as the Association of South-East Asian Nations (ASEAN), the Southern African Development Community (SADC) and the Intergovernmental Authority on Drought and Development (IGADD), should be encouraged to work with national organizations and Government entities to formulate plans of action to protect children. The work should be undertaken within the framework of the Convention on the Rights of the Child and other relevant international and regional treaties, declarations and guidelines that emphasize children's rights. These include the African Charter on the Rights and Welfare of the Child, the European Convention on Human Rights and the Santiago declaration.

280. In seeking to promote peace and stability within regions, regional and subregional organizations are encouraged to share information and develop common preparedness measures, early warning systems and rapid-reaction responses that use child rights indicators and are sensitive to children's needs. The organizations should convene meetings with the military and its chiefs of staff to develop systems of accountability and measures to protect children and civilians in conflict situations. Such measures may include, for example, human rights training and monitoring, the creation of regional mine-free zones, "days of tranquillity", "corridors of peace" and the demobilization of child soldiers.

C. Responsibilities of the United Nations

281. The Vienna Declaration and Programme of Action of the World Conference on Human Rights (A/CONF.157/24 (Part I) chap. III) recommended that matters relating to children's rights be regularly reviewed and monitored by all

relevant organs and mechanisms of the United Nations system and by the supervisory bodies of the specialized agencies, in accordance with their mandates. The protection of children must be central to the humanitarian, peacemaking and peacekeeping policies of the United Nations, and should be given priority within existing human rights and humanitarian procedures.

282. Humanitarian concerns are increasingly an important component of the Security Council's international peace and security agenda. In recent years, the Council has authorized United Nations operations which support political, military and humanitarian objectives. 45/ Consistent with this trend, the Council should therefore be kept continually and fully aware of humanitarian concerns, including child specific concerns, in its actions to resolve conflicts, to keep or to enforce peace or to implement peace agreements. When taking up issues such as demobilization, the Council should bear in mind the very special situation of child soldiers. Where appropriate, the protection of children should be considered in comprehensive resolutions which set out peacekeeping and demobilization mandates reflecting considerations such as monitoring adherence to human rights, the establishment and maintenance of safe areas and humanitarian access. With regard to the issue of landmines, the Security Council is encouraged to consider their particular threat to children. In circumstances where a lack of political stability and peace hinder the provision of humanitarian assistance, the expert urges the Security Council to take up requests for the provision of such assistance to children and other vulnerable groups.

283. The Economic and Social Council requested, in its resolution 1995/56 of 28 July 1995, that certain issues pertaining to humanitarian assistance be reviewed in anticipation of a more general analysis of institutional needs. Many of these issues, such as resource mobilization, internally displaced persons, coordination, relief, rehabilitation, development and local coping mechanisms, relate to the situation of children affected by conflict situations. Working groups in these areas should ensure that the particular needs of children are included in recommendations presented to the Economic and Social Council and that this subject should become one of the main themes for discussion.

284. Within their respective mandates, the executive boards of relevant United Nations specialized agencies and other competent bodies should consider the recommendations contained in this report and inform the Secretary-General of the ways and means that they can contribute more effectively to the protection of children in armed conflict. Particular emphasis should be placed on systematically addressing these concerns in field activities, monitoring and reporting, the development of preventive measures and post-conflict recovery. The Department of Humanitarian Affairs, UNICEF, UNHCR, UNDP, WHO, FAO, WFP, UNFPA, UNIFEM, the High Commissioner for Human Rights/Centre for Human Rights and other United Nations bodies must treat children affected by armed conflicts as a distinct and priority concern. Such treatment should result in the establishment of the mechanisms necessary for reporting on violations of children's rights.

1. The United Nations human rights system

285. The Vienna Declaration and Programme of Action of the World Conference on Human Rights recommended that matters relating to human rights and the situation of children be regularly reviewed and monitored by all relevant organs and mechanisms of the United Nations system and by the supervisory bodies of the specialized agencies, in accordance with their mandates. Children's rights must become distinct and priority concerns within all United Nations human rights and humanitarian monitoring and reporting activities. Within the framework of their mandates, all special rapporteurs and working groups for countries or themes should consider the situation of children affected by armed conflict and should suggest measures to prevent children's involvement in conflicts and to promote the physical and psychological recovery and social reintegration of those who are affected. The legal framework to increase the protection provided for internally displaced persons that is being developed by the Representative of the Secretary-General on Internally Displaced Persons should be supported and endorsed by the Commission on Human Rights and the General Assembly as a matter of priority.

High Commissioner for Human Rights/Centre for Human Rights

286. The General Assembly, in resolution 48/141, recognized the responsibility of the High Commissioner for Human Rights for the coordination of the human rights promotion and protection activities throughout the United Nations system. In addition, the World Conference on Human Rights considered that the Centre for Human Rights should play an important role in coordinating system-wide attention to human rights. The High Commissioner for Human Rights/Centre for Human Rights are encouraged to consider children's rights in conflict situations by institutionalizing cooperation in agreements with UNICEF, UNHCR, UNDP, and UN Volunteers. The Centre must be given the necessary resources and qualified staff to carry out these functions in a way which does not compromise the mandate which it has been given to fulfil. The priority of children's rights within human rights field operations in conflict areas should be ensured through the training of human rights officers and peacekeepers, and attention to these concerns should be given when defining relevant mandates and manuals of field operations.

International treaties and their monitoring systems

287. The Committee on the Rights of the Child, the Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the Committee Against Torture, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women should consider the situation of children affected by armed conflicts when reviewing States Parties reports and when requesting information from States Parties. The meeting of chairpersons of the monitoring treaty bodies should periodically assess the progress achieved in the protection of children in situations of armed conflict, as well as any additional measures required to improve the level of implementation of their fundamental rights. More specifically, the Committee on the Rights of the Child should:

(a) Continue to monitor the measures adopted by States Parties to ensure compliance with the principles and provisions of the Convention on the Rights of the Child, giving particular consideration to steps undertaken to promote respect for children's rights and to prevent the negative effects of conflicts on children, as well as to any violation of children's rights committed in times of war;

(b) Assess, in the light of article 41 of the Convention, the measures adopted by States Parties which are even more conducive to the realization of children's rights than those prescribed by the Convention;

(c) Include, in its reports to the General Assembly, specific information on the implementation of the Convention on the Rights of the Child of relevance to the protection of children's rights in times of armed conflict;

(d) In the light of article 45 of the Convention, strengthen its role as a focal point for children's rights, thus ensuring a multidisciplinary and holistic approach to the United Nations system-wide action. It should also encourage and foster international cooperation, particularly with United Nations bodies, specialized agencies and other competent bodies, including NGOs, to improve the situation of children affected by armed conflicts, to ensure the protection of their fundamental rights and to prevent their violation, whenever necessary, through the effective application of relief programmes and humanitarian assistance.

2. Institutional arrangements

288. In armed conflicts, everyone concerned with children must practice a consistent set of principles, standards and guidelines. All United Nations field personnel should follow principles similar to those proposed in the operational guidelines for the protection of humanitarian mandates. This should include the situation of conflict-affected children, the human rights of children, and violations of their rights. For these purposes agencies should ensure access to relevant training. Recognizing the crucial role that women play in situations of armed conflict, and the ways in which women and children are rendered vulnerable in situations of armed conflict, humanitarian assistance should be gender and age specific. This should apply to needs assessments, as well as to preparedness and post-conflict reconstruction activities.

289. United Nations field personnel and the staff of humanitarian relief organizations must treat children in armed conflict as a distinct and priority concern. This principle applies to staff in all sectors - military, political, humanitarian, human rights, electoral and administrative - and in all their monitoring and reporting activities. In the light of article 45 of the Convention on the Rights of the Child and of the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, all such sectors should establish mechanisms to assess and to report on the implementation of the Convention in areas falling within the scope of their activities.

290. Governments bear the primary responsibility for protecting children in situations of armed conflict and in preventing those conflicts from taking place. The present report documents the magnitude of the task and the need for civil society and United Nations bodies and the specialized agencies to support these efforts. Through her work, the expert has come to believe that the singular capacity of a number of United Nations and specialized agencies bodies provides significant hope for the protection and care of children affected by armed conflicts. Indeed, the expert came to believe that their contributions posited one of the strongest hopes for the future. In both the short and long-term, the principle aim of these contributions must be to strengthen the capacity of Governments to fulfil their obligations to children, even in the most difficult circumstances. The present report describes many of the excellent initiatives on the part of United Nations bodies and specialized agencies while at the same time acknowledging that many of the United Nations bodies and specialized agencies themselves are far from satisfied with their results overall. With this in mind, the expert has chosen to be particularly forthright in making recommendations about future activities and priority actions. The following recommendations are addressed to related United Nations bodies, programmes and funds, specialized agencies and other autonomous bodies and the Bretton Woods Institutions.

Department of Humanitarian Affairs

291. The rapid response, assessment, policy planning, training and evaluation activities of the Department of Humanitarian Affairs should ensure a child and gender focus. This will require the development of new indicators to be used in information gathering and in training and evaluation programmes. The Department's mine-awareness and rehabilitation activities should emphasize age- and gender-appropriate design and delivery. On behalf of UNICEF, UNHCR and other relevant bodies, the Department should request the Department of Political Affairs and Department of Peacekeeping Operations of the Secretariat to identify ways in which military and civilian defence assets (logistics, supplies, equipment and specialist personnel) can offer better protection for children. Through the framework for coordination established by the Department of Peacekeeping Operations, the Department of Political Affairs and the Department of Humanitarian Affairs and in collaboration with the High Commissioner for Human Rights/Centre for Human Rights, guidelines, accountability mechanisms and systematic training in humanitarian and human rights instruments for peacekeepers should be developed with an emphasis on child rights. As Chair of the Inter-Agency Standing Committee's Task Force on Internally Displaced Persons, the Department of Humanitarian Affairs should ensure the development of an appropriate institutional framework to address the special needs of internally displaced children.

United Nations Children's Fund

292. UNICEF's anti-war agenda is a reflection of the agency's commitment to reaching children affected by conflict and the recently approved policy on child protection is an important step in giving greater impact to the agenda. Within this framework UNICEF needs to accelerate development of policy and programme guidelines specifically designed for the protection of children in situations of armed conflict, with special attention given to measures for the recovery and

development of those children who are displaced or separated from their families, who are living with disabilities, who have been sexually exploited or unlawfully imprisoned or conscripted to armed groups. UNICEF should also accelerate the development of programming for adolescents, including opportunities for their participation in programme design, implementation and evaluation and reflecting the importance of education, sport and recreation in adolescent recovery and development. UNICEF should ensure that all these concerns are incorporated into inter-agency consolidated appeals. In addition, the agency should establish channels through which its personnel can report on violations of children's rights. In collaboration with other specialized agencies and NGOs, UNICEF should develop a set of indicators based on child rights that will guide assessment and country programming. In cooperation with the Department of Humanitarian Affairs and with major humanitarian organizations, UNICEF should provide leadership for the protection and care of internally displaced children. UNICEF should pay special attention to the situation of women and girls affected by armed conflict, ensuring a gender-sensitive approach to emergency assessments, programme planning, design and implementation - and offer appropriate training in this and other child rights areas for field and headquarters staff. UNICEF should ensure that peacemaking and peacekeeping actions take into account the needs of children - through the Department of Humanitarian Affairs/Department of Political Affairs/Department of Peacekeeping Operations framework for coordination and by monitoring Security Council meetings.

Office of the United Nations High Commissioner for Refugees

293. Relying on strong policy guidelines, particularly the Guidelines on the Protection and Care of Refugee Children, UNHCR needs to ensure that gender and age related principles and standards are consistently implemented in all country programmes and agreements with implementing partners. This will require further development of its response capacity and training programmes for staff and implementing partners. Recognizing that UNHCR is often first to respond to emergencies, it is essential that it deploys qualified staff in the initial emergency phase to ensure that assessments and programme responses are gender and age appropriate. Among other matters, this would entail the systematic inclusion of issues relating to sexual violence in health and psychosocial programmes, and practical prevention measures identified for camp design, security and distribution processes. UNHCR should ensure a psychosocial focus from the outset of an emergency, taking into account local community and social networks. Building upon its experience with returnees, local capacity building and institution strengthening, UNHCR should ensure that the protection and assistance needs of women and children, in particular, custody, property and inheritance issues for female- and child-headed households, are fully addressed in repatriation and reintegration programmes.

World Health Organization

294. At all stages of conflict, WHO should promote emergency preparedness and responses in relation to child health and development. The organization should design indicators and instruments which would enable other organizations and specialized agencies to rapidly assess, plan and implement essential and priority child health activities, involving affected communities. WHO should

produce materials for children of differing ages and stages of development in situations of armed conflict. Reflecting WHO's definition of health as encompassing physical, mental and social well being, the organization should increase its collaboration with UNICEF, UNHCR, the World Bank and UNDP in multi-sectoral programming for children and in strengthening public health infrastructures in the reconstruction of conflict-affected countries. This would include provision of substantial technical support through technical guidelines and planned work on child health, plus technical support and training materials to assist countries and NGOs in the prevention and management of health issues related to violence against women and girls during armed conflict. These issues should be reflected in WHO's humanitarian and consolidated emergency appeals. Inter-agency collaboration in a critical appraisal of best practice in conflict situations could lay the foundation for improved programming for children and adolescents. WHO should provide reproductive health expertise in emergency responses and develop the inclusion of gender and women's perspectives into health policies and programmes. WHO should take a lead role in training for all health workers in children's human rights. At the same time it should establish and promote appropriate child rights monitoring and reporting mechanisms for health professionals. While these are not new ideas or policies, WHO is encouraged to give priority to their implementation.

United Nations Development Programme

295. UNDP is encouraged to give greater priority to the special needs of children and women in special development situations. UNDP's efforts to reduce regional, political, economic and social disparities through country programmes should emphasize a preventative approach through, for example, measures to prevent discrimination against women, minorities and indigenous communities. Within the resident coordinator system, UNDP has a responsibility to ensure that children are central to the overall programme framework for national and international action. UNDP should consider the restoration of health, education and judicial services, as well as economic and national institutions, to be essential elements of post conflict recovery. UNDP's support for the role of women in rebuilding institutions and improving governance should be strengthened, as should its support for the work of UNIFEM in these areas. Throughout its multi-sectoral country and regional programmes, UNDP should integrate measures designed to prevent conflict, namely, through the strengthening of civil society.

World Food Programme

296. Food aid can be a powerful instrument in the rehabilitation process, not only as a practical matter in providing a nutritional supplement, but also as a resource to be used in recovery. WFP should encourage community participation in the design and delivery of food aid and, in particular, ensure that in refugee and internally displaced persons camps women are the initial point of control for distribution systems. WFP should collaborate with other United Nations specialized agencies and with NGOs in combining food aid with programmes designed to strengthen family unity, integrity and coping mechanisms. Food aid programmes such as "food for guns" should be linked to health, education and other development activities in recovery and reintegration, particularly for adolescents and former child combatants.

Food and Agriculture Organization of the United Nations

297. Given the importance of FAO's work in early warning systems and food security assessments and analysis, the organization should, during armed conflicts, incorporate data and information that identify the particular vulnerabilities of children. FAO should provide technical expertise and advice in the design of programmes, such as food security programmes that disproportionately benefit children, and projects for demobilized child soldiers that offer alternative livelihoods and promote social integration. Having identified a growing number of child-headed households through its work with rural farmers, FAO should develop, implement and share guidelines on appropriate support with other specialized agencies. FAO should work with WFP, UNICEF, UNHCR and WHO, among others, to strengthen the capacity of families to care for their children, and to ensure that these programmes are linked to development activities in the areas of agriculture, fisheries and forestry.

United Nations Educational, Scientific and Cultural Organization

298. Education has a crucial preventive and rehabilitative part to play in fulfilling the needs and rights of children, particularly those in conflict and post-conflict situations. UNESCO's expertise in educational curricula development and teacher training should be utilized in support of educational programmes run by operational agencies in all phases of conflict, but especially during emergency situations and in the critical period of rehabilitation and reconstruction. UNESCO is encouraged to collaborate with ILO, UNICEF, UNHCR, UNDP and relevant specialized agencies, as well as with international and national NGOs, in the more rapid development of appropriate activities and programming for adolescents, particularly former child combatants. Such activities could include the development of communication, sports and recreation as opportunities to develop life-skills and promote health. In collaboration with the Department of Humanitarian Affairs, UNICEF and involved NGOs, UNESCO should produce and promote mine-awareness materials through a technical meeting to identify best practices and evaluate mine-awareness programmes for children. UNESCO should also assist other United Nations bodies and specialized agencies, NGOs and educational systems in peace education, identifying best practice, developing strong evaluation mechanisms, assessing programmes and better coordinating principles and materials.

United Nations Development Fund for Women

299. UNIFEM should work closely with UNICEF in expanding its support for girls and women in crisis situations. It should also expand its women's peace-building and peacemaking activities. UNIFEM should take the lead in ensuring that system-wide emergency assessments, guidelines, training and evaluation are gender sensitive. UNIFEM should develop and promote training in women's human rights for the military and judicial systems. In cooperation with UNFPA, WHO and UNICEF, UNIFEM should ensure that all humanitarian responses address the special reproductive health needs of girls and women, and should develop guidelines for reporting on gender-based violations. Further, the Fund should facilitate access to appropriate legal and rehabilitative remedies for victims of gender-based violence and sexual exploitation.

The Bretton Woods Institutions

300. The momentum of collaboration between Bretton Woods Institutions and the specialized agencies of the United Nations system should help to make available the resources that are needed to address the issues of children affected by armed conflict. The World Bank is encouraged to pay increasing attention to the preservation and development of human capital in conflict-affected countries, particularly children and youth. Post-conflict recovery initiatives that are not fundamentally linked to relief, especially in the area of education, will ultimately undermine any potential benefit. Macroeconomic initiatives cannot sustain peaceful reconstruction without equivalent attention to micro-level cooperation. The World Bank can make an important contribution overall by evaluating the preventive value of development aid, and by ensuring a better coordinated and funded response to the needs of conflict-affected countries. Within these parameters, the Bank's emerging work in education, mine clearance and demobilization should provide an even greater focus on children.

Other related organizations

301. There are some organizations of the United Nations system that have mandates closely related to many of the concerns raised in the present report. The International Labour Organization's (ILO) standards, for example, in areas such as vocational rehabilitation, the employment of disabled persons, special youth employment and training schemes and human resource development, should form the basis of innovative rehabilitation and social reintegration programmes for adolescents in post-conflict situations, especially for former child soldiers, children with disabilities and children who have missed educational opportunities. The United Nations Population Fund (UNFPA) should increase its collaboration with operational agencies to ensure that the reproductive health needs of girls and women are fully addressed in emergency and post-conflict situations. Furthermore, the role of the International Organization for Migration (IOM) in refugee and migration activities is increasingly important. As a special intergovernmental agency, IOM is encouraged further to develop its role in the care and protection of internally displaced children, in particular to ensure that the special concerns of children are incorporated in its activities of evacuation, transportation and processing. The expert also wishes to call attention to the work of the United Nations Research Institute for Social Development's (UNRISD) war torn societies project, recognizing its potential to draw attention to the needs of children in post-conflict recovery.

International Committee of the Red Cross, the International Federation of Red Cross and Red Crescent Societies and National Societies

302. The International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and National Societies have a special mandate and unique contribution, including emergency medical assistance, the reunification of separated families, and access to the internally displaced. The resolutions adopted at the twenty-sixth International Conference of the Red Cross and Red Crescent, in particular resolution 2, and the plan of action for child victims of armed conflict should be implemented throughout the movement. The role of the Central Tracing Agency of ICRC is vitally important in the reunification of children and families. The expert

urges continued and expanded cooperation in tracing and reunification programmes with UNHCR, UNICEF and specialized NGOs. As a critical contribution to prevention and to promoting the practical application of humanitarian law, the ICRC's advisory services to Governments should be strengthened with special attention to children. Dissemination should be extended to civil society and other humanitarian agencies. The development of the guidelines for United Nations forces regarding respect for international humanitarian law is especially welcome.

3. Inter-institutional mechanisms

303. Further discussion of inter-institutional mechanisms is needed to ensure that sufficient priority is given to the dimensions of peacekeeping and humanitarian operations that involve children.

Department of Peacekeeping Operations/Department of Political Affairs/Department of Humanitarian Affairs: framework for coordination

304. In 1994, a framework for sharing information was established by the Department of Peacekeeping Operations, the Department of Political Affairs and the Department of Humanitarian Affairs of the Secretariat. In consultation with members of the Inter-Agency Standing Committee, the United Nations Emergency Relief Coordinator must ensure that special consideration for children affected by conflict is incorporated in United Nations peacekeeping and humanitarian planning, advice, recommendations and proposals presented to the Security Council. In this context, the role of peacekeeping forces in promoting and respecting children's rights should be emphasized, with special attention to the demobilization and social reintegration of child soldiers. The Emergency Relief Coordinator should insist that the situation of conflict-affected children is addressed in all country level activities as well as in United Nations field operations mandated by the Security Council, the General Assembly or the High Commissioner for Human Rights. The Coordinator should also ensure priority consideration for programmes that support the needs of conflict-affected children and their primary care providers in the preparation of the inter-agency consolidated appeals.

Inter-Agency Standing Committee

305. Emanating from General Assembly resolution 46/182 of 19 December 1991, the Inter-Agency Standing Committee was established to ensure a coordinated policy and operational response to emergency issues. Concerned agencies such as UNICEF should develop generic inter-agency guidelines regarding conflict-affected children to be used in the consolidated inter-agency appeal process. The substance of the guidelines should be reflected in the terms of reference for resident and humanitarian coordinators and those with political responsibilities, such as special representatives of the Secretary-General.

Administrative Committee on Coordination and Consultative Committee for Programme and Operational Questions

306. The Administrative Committee on Coordination and its subsidiary machinery, namely the Committee for Programme and Operational Questions should discuss ways to link child-related rehabilitation and development activities with relief and recovery, and ensure that all relevant guidelines and strategy proposals reflect the specific needs of war-affected children. The Administrative Committee on Coordination should endorse the principles and guidelines that result from this process, and use them as a model for incorporating child-related concerns into inter-agency assessments, consolidated appeals, round tables and consultative group meetings. In addition, the Administrative Committee on Coordination should be informed periodically by the Department of Humanitarian Affairs, UNICEF and UNHCR about developments relating to children's issues. Special areas of concern should be considered by the various working-groups established by the Administrative Committee on Coordination for Inter-Agency follow-up to recent global conferences, and as a part of the peace-building, conflict-resolution and national reconciliation activities of the United Nations System-wide Special Initiative on Africa. In other words, children in conflict must be a regular part of the agenda of the Administrative Committee on Coordination.

D. Civil society organizations

307. In the course of the regional consultations, field trips and research undertaken by the expert, civil society organizations have contributed an enormous range of knowledge and expertise in children and conflict issues. Many of these organizations have been central in spreading the message of the Convention on the Rights of the Child and in implementing its principles. They have shown themselves willing and able to break new ground in developing programmes, to be daring in advocacy and to take risks in protecting and promoting the rights of children in situations of conflict. From international federations of religious groups and national development organizations to local service delivery projects, civil society organizations continue to demonstrate their critical role in promoting the rights and ensuring the well-being of children and families. Many of these groups have helped develop the issues and recommendations contained in the present report. The role of civil society will be crucial in implementing these recommendations and in assisting Governments and international agencies to fulfil their obligations to children.

308. Civil society organizations play a fundamental role in preventing conflicts, protecting children and in reconstructing conflict-affected societies. They do so through advocacy, research and information, human rights monitoring, programme interventions, training and humanitarian assistance. Because of their importance, it is essential to have lively dialogue and cooperation between and among all groups and with regional bodies, national institutions and the international community. NGOs, religious communities, cultural organizations, educators, professional and academic networks and associations and the media are encouraged to use international standards relating to the protection of children's rights as the framework for their work,

and to continue to bring these issues of concern to the attention of the international community.

309. Organizations dealing specifically with women, family and communities are especially important. While women's roles in protecting and sustaining children and families are well recognized, their participation in the economic, political and security arenas is less well acknowledged and supported. Women have been active agents of peace-building and conflict resolution at the local level and their participation at the national, regional and international levels should be increased. Governments, agencies and other civil society actors must utilize the ideas, knowledge and experience women have gained from protecting their children, maintaining families and sustaining communities, often in perilous or insecure circumstances. Women's organizations and networks should be strengthened at all levels as one way to maximize women's contributions to child protection, peace, social justice and human development.

310. Civil society organizations are encouraged to develop capacities, at national, regional and global levels, to undertake relevant research; form alliances, networks and campaigns on key issues such as child soldiers; and to assist in creating an enabling environment for child rights activities.

311. With support from the international community, the expert encourages civil society organizations to prepare an international meeting on children's rights and armed conflict. Such a meeting might be held in September 2000, 10 years after the Convention on the Rights of the Child went into force and world leaders met at the World Summit for Children. The meeting should evaluate progress achieved globally subsequent to the tabling of the present report, as well as future ways and means to continue to improve the situation of children affected by armed conflict. While it may be thought that this is an unusual recommendation for the expert to make, it must be realized that we are dealing with often desperate circumstances for children, and the ongoing role for civil society is crucial for their rescue and well-being.

VII. CONCLUSION

"We want a society where people are more important than things, where children are precious; a world where people can be more human, caring and gentle." 46/

312. The present report has set forth recommendations for the protection of children during armed conflict. It has concentrated on what is practical and what is possible, but this cannot be enough. In considering the future of children, we must be daring. We must look beyond what seems immediately possible and find new ways and new solutions to shield children from the consequences of war and to directly address the conflicts themselves.

313. There is a clear and overwhelming moral case for protecting all children while seeking the peaceful resolution of wars and challenging the justification for any armed conflict. That children are still being so shamefully abused is a clear indication that we have barely begun to fulfil our obligations to protect them. The immediate wounds to children, the physical injury, the sexual

violence, the psychosocial distress, are affronts to each and every humanitarian impulse that inspired the Convention on the Rights of the Child. The Convention commits States to meet a much broader range of children's rights, to fulfil the rights to health, to education and to growth and development within caring and supportive families and communities.

314. The report has shown how all rights to which children are entitled are consistently abused during armed conflict. Throwing a spotlight on such abuses is one small step towards addressing them. Exposure challenges perpetrators to face up to their actions and reminds defenders of children's rights of the enormity of the task ahead. The only measure by which the present report can be judged is the response it draws and the action it stimulates. To some extent, both are already under way: the report has in many ways broken new ground, focusing not just on the debate or resolution that form the final product, but on a process of consultation and cooperation among Governments, international agencies, NGOs and many other elements of civil society. Above all, the report has engaged families and children in explaining their situations and asserting their rights.

315. The present report's mobilization work is ongoing. Commitments have already been made, at national and regional levels, to hold meetings that will begin to implement the report's conclusions. Further publications are planned, including a book, a series of research papers, information kits and a popular version of the report. In the preparation of the report, there were many other issues that could not be covered in the time available, and that demand further investigation. These include: operational issues affecting the protection of children in emergencies; child-centred approaches to the prevention of conflict and to reconstruction and development; the treatment of child rights violations within existing human rights mechanisms; the role of the military in protecting child rights; child rights issues in relation to peace and security agendas; special programming for adolescents in conflict situations, and particularly child-headed households; the role of women in conflict prevention, management and resolution; community and regional approaches to humanitarian relief; and the development of effective training programmes in the area of child rights for all actors in conflict situations. In following up the present report, it is recommended that each of these issues be pursued through research and other means.

316. The flagrant abuse and exploitation of children during armed conflict can and must be eliminated. For too long, we have given ground to spurious claims that the involvement of children in armed conflict is regrettable but inevitable. It is not. Children are regularly caught up in warfare as a result of conscious and deliberate decisions made by adults. We must challenge each of these decisions and we must refute the flawed political and military reasoning, the protests of impotence, and the cynical attempts to disguise child soldiers as merely the youngest "volunteers".

317. Above all else, the present report is a call to action. It is unconscionable that we so clearly and consistently see children's rights attacked and that we fail to defend them. It is unforgivable that children are assaulted, violated, murdered and yet our conscience is not revolted nor our sense of dignity challenged. This represents a fundamental crisis of our

civilization. The impact of armed conflict on children must be everyone's concern and is everyone's responsibility; Governments, international organizations and every element of civil society. Each one of us, each individual, each institution, each country, must initiate and support global action to protect children. Local and national strategies must strengthen and be strengthened through international mobilization.

318. Let us claim children as "zones of peace". In this way, humankind will finally declare that childhood is inviolate and that all children must be spared the pernicious effects of armed conflict. Children present us with a uniquely compelling motivation for mobilization. Universal concern for children presents new opportunities to confront the problems that cause their suffering. By focusing on children, politicians, Governments, the military and non-State entities will begin to recognize how much they destroy through armed conflict and, therefore, how little they gain. Let us take this opportunity to recapture our instinct to nourish and protect children. Let us transform our moral outrage into concrete action. Our children have a right to peace. Peace is every child's right.

Notes

1/ Smith, Chris and D. Henrickson, "The Transformation of Warfare and Conflict in the Late-Twentieth Century", London, Centre for Defence Studies, King's College, 1996, p. 50.

2/ United Nations Children's Fund, State of the World's Children 1996, Oxford, Oxford University Press, p. 13.

3/ Brett, Rachel, Margaret McCallin and Rhonda O'Shea, "Children: The Invisible Soldiers", Geneva, Quaker United Nations Office and the International Catholic Child Bureau, April 1996, p. 88.

4/ Ibid., p. 23.

5/ Ibid., p. 33.

6/ Ibid., p. 34.

7/ Ibid., p. 53.

8/ Ibid., p. 31.

9/ Ibid., p. 52.

10/ Almquist, Kate, Robbie Muhumuza and David Westwood, "The Effects of Armed Conflict on Girls", Geneva, World Vision International, May 1996, p. 21.

11/ Brett, Rachel, Margaret McCallin and Rhonda O'Shea, "Children: The Invisible Soldiers", Geneva, Quaker United Nations Office and the International Catholic Child Bureau, April 1996, p. 84.

12/ Ibid., p. 53.

13/ See E/CN.4/1996/52/Add.2. The Representative of the Secretary-General on Internally Displaced Persons has developed the following working definition of internally displaced persons: "Persons who have been forced to flee their homes suddenly or unexpectedly in large numbers as a result of armed conflict, internal strife, systematic violation of human rights or natural or man-made disasters, and who are within the territory of their own country".

14/ Article 1A, paragraph 2, of the 1951 Convention relating to the Status of Refugees defines a refugee as someone who, "owing to well founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside of the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having nationality and being outside of the country of his former habitual residence, as a result of such events, is unable or unwilling to return to it".

15/ United Nations High Commissioner for Refugees, State of the World's Refugees 1995: In Search of Solutions, New York, Oxford University Press, 1995, p. 248.

16/ United Nations High Commissioner for Refugees, Refugee Children: Guidelines on Protection and Care. Geneva: UNHCR, 1994.

17/ See also General Assembly resolution 41/85 entitled Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally.

18/ United Nations High Commissioner for Refugees, Sexual Violence Against Refugees: Guidelines on Prevention and Response. Geneva: UNHCR, 1995.

19/ United Nations High Commissioner for Refugees, The Impact of Armed Conflict on Children: The Refugee and Displaced Children Dimension, Geneva, 1996, p. 36.

20/ Ibid., p. 53.

21/ See E/CN.4/1996/63.

22/ See E/CN.4/1996/53/Add.1.

23/ Schade, Ernst, "Experiences with regard to the United Nations Peace-keeping Forces in Mozambique", Norway, Redd Barna, 1995.

24/ Statistics from the United Nations Department of Humanitarian Affairs.

25/ Williams, Jody, "The Protection of Children Against Landmines and Unexploded Ordnance", Washington, D.C., Viet Nam Veterans of America Foundation, p. 1.

26/ Ibid., p. 12.

27/ Ibid.

28/ Ibid., p. 13.

29/ Information obtained from the United Nations Department of Humanitarian Affairs.

30/ Garfield, Richard, "The Impact of Economic Sanctions on the Health of Women and Children", New York, Columbia University, April 1996, p. 9.

31/ Ibid., p. 11.

32/ Ibid., p. 13.

33/ United Nations Children's Fund, State of the World's Children 1995, New York, Oxford University Press, p. 20.

34/ Youth for Population Information and Communication, "Improved Quality of Life, Empowerment and Development for Street Youth in Kumasi", Ghana, Youth for Population Information and Communication, 1996.

35/ United Nations Children's Fund, State of the World's Children 1996, Oxford, Oxford University Press, p. 20.

36/ Food and Agriculture Organization of the United Nations, "Report of the Study on the Nutritional Impact of Armed Conflicts on Children", Rome, 1996, p. 16.

37/ Ibid., p. 18.

38/ Ibid., p. 10.

39/ Joint and Co-sponsored United Nations Programme on HIV/AIDS, "HIV and Infant Feeding: An Interim Statement", Geneva, July 1996.

40/ The International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies (IFRC) and the National Societies have adapted the following as a full definition of international humanitarian law: "international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict".

41/ Committee on the Rights of the Child, CRC/C/46, paras. 203-238.

42/ United Nations Research Institute for Social Development, States of Disarray: The social effects of globalization, Geneva, 1995, p. 112.

43/ Devaki Jain speaking at the Eminent Persons Group meeting for the United Nations Study on the Impact of Armed Conflict on Children, Tarrytown, New York, 9 May 1995.

44/ United Nations Development Programme, Human Development Report 1996, New York, Oxford University Press, 1996, p. 72.

45/ See E/AC.51/1995/2.

46/ Archbishop Desmond Tutu speaking at the Eminent Persons Group meeting for the United Nations Study on the Impact of Armed Conflict on Children, Tarrytown, New York, 9 May 1995.

Annex

RESEARCH CONTRIBUTIONS TO THE REPORT ON THE IMPACT OF ARMED CONFLICT ON CHILDREN

(Unpublished manuscripts)

Adam, Hubertus and Joachim Walter et al., "Refugee Children in Industrial Countries - Reports of the Psychosocial Situation and Case Studies in the United Kingdom, Germany and South Africa", University Clinics of Hamburg, Germany, 1996.

Almquist, Kate, Robbie Muhumuza and David Westwood, "The Effects of Armed Conflict on Girls", Geneva, World Vision International, May 1996. The paper draws on the work of more than 15 World Vision country offices and was prepared in consultation with other international non-governmental organizations.

Balian, Hrair, "Armed Conflict in Chechnya: Its Impact on Children", Covcas Center for Law and Conflict Resolution, Virginia, November 1995.

Barnes, Catherine, ed., "The Impact of Armed Conflict on Children from Minority and Indigenous Communities: Four Case Studies on the Experiences of Jumma, Mayan, Roma and Somali Children", United Kingdom, Minority Rights Group International, May 1996. Three of the case studies for this report were prepared with local non-governmental organizations.

Boyden, Jo and Sara Gibbs, "Vulnerability and Resilience: Perceptions and Responses to Psycho-social Distress in Cambodia", United Kingdom, May 1996. This report was prepared in cooperation with other United Nations agencies, UNICEF and UNRISD in particular, and a local working group on psychosocial vulnerability and coping strategies in Cambodia.

Boyden, Jo and Paul Ryder, "The Provision of Education to Children Affected by Armed Conflict", April 1996.

Brett, Rachel, Margaret McCallin and Rhonda O'Shea, "Children: The Invisible Soldiers", Geneva, Quaker United Nations Office and the International Catholic Child Bureau, April 1996. The report is the result of the Child Soldiers Research Project of the Sub-Group on Refugee Children and Children in Armed Conflict of the Group for the Convention on the Rights of the Child. Many of the 24 case studies were prepared by local non-governmental organizations. Rädda Barnen was a major funding partner of the study on the impact of armed conflict on children and will publish a more detailed study later in 1996.

Cohn, Ilene, "Verification and Protection of Children's Rights by United Nations Human Rights Missions (MINUGUA and ONUSAL)", Guatemala, May 1996.

Djeddah, Carol and P. M. Shah, "The Impact of Armed Conflict on Children: A Threat to Public Health", Geneva, World Health Organization, Family and Reproductive Health and Division of Emergency and Humanitarian Action, June 1996.

Food and Agriculture Organization of the United Nations, "Report of the Study on the Nutritional Impact of Armed Conflicts on Children", Rome, 1996.

Garfield, Richard, "The Impact of Economic Sanctions on the Health of Women and Children", New York, Columbia University, April 1996.

Hamilton, Carolyn and Tabatha Abu El-Haj, "Children and War: Humanitarian Law and Children's Rights", United Kingdom, University of Essex, May 1996.

Hampson, Françoise J., "Legal Protection Afforded to Under International Humanitarian Law", United Kingdom, University of Essex, May 1996.

Kadjar-Hamouda, Eylah, "An End to Silence: A Preliminary Study on Sexual Violence, Abuse and Exploitation of Children Affected by Armed Conflicts", Geneva, International Federation Terre des Hommes and Group for the Convention on the Rights of the Child, July 1996. This study was based on 12 case studies prepared by a number of contributing local and international non-governmental organizations.

Kur, Dengtiel A., ed. and Larjour Consultancy, "The Impact of War on Children and the Role of Traditional Values and International Humanitarian Principles in South Sudan", Nairobi, South Sudan Law Society, June 1996.

Marcelino, Elizabeth Protacio et al., "Community Participation in the Recovery and Reintegration of Children in Situations of Armed Conflict (The Philippine Experience)", contribution to the Asia Pacific Regional Consultation of the study on the impact of armed conflict on children, Philippines, University of the Philippines, 1996.

Marcelino, Elizabeth Protacio, "Torture of Children in Armed Conflict", Philippines, Center for Integrative and Development Studies, 1996.

Monan, Jim, "The Impact of Landmines on Children in Quang Tri Province - Central Viet Nam", report prepared for the Asia Pacific Regional Consultation of the study on the impact of armed conflict on children, Hanoi, Viet Nam Veterans of America Foundation and UNICEF, 1995.

Save the Children Alliance Working Group on Children Affected by Armed Conflict and Displacement, "Promoting Psychosocial Well-Being Among Children Affected by Armed Conflict and Displacement: Principles and Approaches", Working Paper No. 1, March 1996. The paper was based on the experience of a number of international and local professionals with over 15 Save the Children field programmes.

Smith, Chris and D. Hendrickson, "The Transformation of Warfare and Conflict in the Late-Twentieth Century", London, Centre for Defence Studies, King's College, 1996.

Thinh, Nguyen Tien, "The Impact of Herbicides and Defoliants on Vietnamese Children", report prepared for the Asia Pacific Regional Consultation of the study on the impact of armed conflict on children, Hanoi, UNICEF, 1996.

United Nations Centre for Human Rights, "The Impact of Armed Conflict on Children: A Survey of Existing Standards and of their Relevance and Adequacy", Geneva, 1996.

United Nations Development Fund for Women, "Women in Crisis Situations Resulting from Armed Conflict", UNIFEM contribution to the study on the impact of armed conflict on children, New York, March 1996.

United Nations High Commissioner for Refugees, "Refugee and Displaced Children", Geneva, 1996.

Williams, Jody, "The Protection of Children Against Landmines and Unexploded Ordnance", Viet Nam Veterans of America Foundation, International Campaign to Ban Landmines, April 1996.

ANNEX 15:

Security Council Resolution 955 (1994), 8 November 1994.

United Nations

S/RES/955 (1994)

8 November 1994

RESOLUTION 955 (1994)

Adopted by the Security Council at its 3453rd meeting,

on 8 November 1994

The Security Council,

Reaffirming all its previous resolutions on the situation in Rwanda,

Having considered the reports of the Secretary-General pursuant to paragraph 3 of resolution 935 (1994) of 1 July 1994 (S/1994/879 and S/1994/906), and *having taken note* of the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II),

Expressing appreciation for the work of the Commission of Experts established pursuant to resolution 935 (1994), in particular its preliminary report on violations of international humanitarian law in Rwanda transmitted by the Secretary-General's letter of 1 October 1994 (S/1994/1125),

Expressing once again its grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda,

Determining that this situation continues to constitute a threat to international peace and security,

Determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,

Convinced that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace,

Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,

 6239

Stressing also the need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects,

Considering that the Commission of Experts established pursuant to resolution 935 (1994) should continue on an urgent basis the collection of information relating to evidence of grave violations of international humanitarian law committed in the territory of Rwanda and should submit its final report to the Secretary-General by 30 November 1994,

Acting under Chapter VII of the Charter of the United Nations,

1.*Decides* hereby, having received the request of the Government of Rwanda (S/1994/1115), to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 and to this end to adopt the Statute of the International Criminal Tribunal for Rwanda annexed hereto;

2.*Decides* that all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and *requests* States to keep the Secretary-General informed of such measures;

3.*Considers* that the Government of Rwanda should be notified prior to the taking of decisions under articles 26 and 27 of the Statute;

4.*Urges* States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel;

5.*Requests* the Secretary-General to implement this resolution urgently and in particular to make practical arrangements for the effective functioning of the International Tribunal, including recommendations to the Council as to possible locations for the seat of the International Tribunal at the earliest time and to report periodically to the Council;

6.*Decides* that the seat of the International Tribunal shall be determined by the Council having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy, and subject to the conclusion of appropriate arrangements between the United Nations and the State of the seat, acceptable to the Council, having regard to the fact that the International Tribunal may meet away from its seat when it considers it necessary for the efficient exercise of its functions; and

decides that an office will be established and proceedings will be conducted in Rwanda, where feasible and appropriate, subject to the conclusion of similar appropriate arrangements;

7.*Decides* to consider increasing the number of judges and Trial Chambers of the International Tribunal if it becomes necessary;

8.*Decides* to remain actively seized of the matter.

Annex

Statute of the International Tribunal for Rwanda

Having been established by the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994 (hereinafter referred to as "the International Tribunal for Rwanda") shall function in accordance with the provisions of the present Statute.

Article 1

Competence of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

Article 2

Genocide

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

2.Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a)Killing members of the group;

(b)Causing serious bodily or mental harm to members of the group;

(c)Deliberately inflicting on the group conditions of life calculated to

bring about its physical destruction in whole or in part;

(d)Imposing measures intended to prevent births within the group;

(e)Forcibly transferring children of the group to another group.

3.The following acts shall be punishable:

(a)Genocide;

(b)Conspiracy to commit genocide;

(c)Direct and public incitement to commit genocide;

(d)Attempt to commit genocide;

(e)Complicity in genocide.

Article 3

Crimes against humanity

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

(a)Murder;

(b)Extermination;

(c)Enslavement;

(d)Deportation;

(e)Imprisonment ;

(f)Torture;

(g)Rape;

(h)Persecuti ons on political, racial and religious grounds;

(i)Other inhumane acts.

Article 4

Violations of Article 3 common to the Geneva

Conventions and of Additional Protocol II

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

(a)Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b)Collective punishments;

(c)Taking of hostages;

(d)Acts of terrorism;

(e)Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f)Pillage;

(g)The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h)Threats to commit any of the foregoing acts.

Article 5

Personal jurisdiction

The International Tribunal for Rwanda shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6

Individual criminal responsibility

1.A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.

2.The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3.The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4.The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires.

Article 7

Territorial and temporal jurisdiction

The territorial jurisdiction of the International Tribunal for Rwanda shall extend to the territory of Rwanda including its land surface and airspace as well as to the territory of neighbouring States in respect of serious violations of international humanitarian law committed by Rwandan citizens. The temporal jurisdiction of the International Tribunal for Rwanda shall extend to a period beginning on 1 January 1994 and ending on 31 December 1994.

Article 8

Concurrent jurisdiction

1.The International Tribunal for Rwanda and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2.The International Tribunal for Rwanda shall have primacy over the national courts of all States. At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.

Article 9

Non bis in idem

1.No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2.A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried

by the International Tribunal for Rwanda only if:

(a)The act for which he or she was tried was characterized as an ordinary crime; or

(b)The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

3.In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10

Organization of the International Tribunal for Rwanda

The International Tribunal for Rwanda shall consist of the following organs:

(a)The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b)The Prosecutor; and

(c)A Registry.

Article 11

Composition of the Chambers

The Chambers shall be composed of eleven independent judges, no two of whom may be nationals of the same State, who shall serve as follows:

(a)Three judges shall serve in each of the Trial Chambers;

(b)Five judges shall serve in the Appeals Chamber.

Article 12

Qualification and election of judges

1.The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

2.The members of the Appeals Chamber of the International Tribunal for

the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia since 1991 (hereinafter referred to as "the International Tribunal for the Former Yugoslavia") shall also serve as the members of the Appeals Chamber of the International Tribunal for Rwanda.

3.The judges of the Trial Chambers of the International Tribunal for Rwanda shall be elected by the General Assembly from a list submitted by the Security Council, in the following manner:

(a)The Secretary-General shall invite nominations for judges of the Trial Chambers from States Members of the United Nations and non-member States maintaining permanent observer missions at United Nations Headquarters;

(b)Within thirty days of the date of the invitation of the Secretary-General, each State may nominate up to two candidates meeting the qualifications set out in paragraph 1 above, no two of whom shall be of the same nationality and neither of whom shall be of the same nationality as any judge on the Appeals Chamber;

(c)The Secretary-General shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twelve and not more than eighteen candidates, taking due account of adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world;

(d)The President of the Security Council shall transmit the list of candidates to the President of the General Assembly. From that list the General Assembly shall elect the six judges of the Trial Chambers. The candidates who receive an absolute majority of the votes of the States Members of the United Nations and of the non-Member States maintaining permanent observer missions at United Nations Headquarters, shall be declared elected. Should two candidates of the same nationality obtain the required majority vote, the one who received the higher number of votes shall be considered elected.

4.In the event of a vacancy in the Trial Chambers, after consultation with the Presidents of the Security Council and of the General Assembly, the Secretary-General shall appoint a person meeting the qualifications of paragraph 1 above, for the remainder of the term of office concerned.

5.The judges of the Trial Chambers shall be elected for a term of four years. The terms and conditions of service shall be those of the judges of the International Tribunal for the Former Yugoslavia. They shall be eligible for re-election.

Article 13

Officers and members of the Chambers

1.The judges of the International Tribunal for Rwanda shall elect a

President.

2.After consultation with the judges of the International Tribunal for Rwanda, the President shall assign the judges to the Trial Chambers. A judge shall serve only in the Chamber to which he or she was assigned.

3.The judges of each Trial Chamber shall elect a Presiding Judge, who shall conduct all of the proceedings of that Trial Chamber as a whole.

Article 14

Rules of procedure and evidence

The judges of the International Tribunal for Rwanda shall adopt, for the purpose of proceedings before the International Tribunal for Rwanda, the rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters of the International Tribunal for the Former Yugoslavia with such changes as they deem necessary.

Article 15

The Prosecutor

1.The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

2.The Prosecutor shall act independently as a separate organ of the International Tribunal for Rwanda. He or she shall not seek or receive instructions from any Government or from any other source.

3.The Prosecutor of the International Tribunal for the Former Yugoslavia shall also serve as the Prosecutor of the International Tribunal for Rwanda. He or she shall have additional staff, including an additional Deputy Prosecutor, to assist with prosecutions before the International Tribunal for Rwanda. Such staff shall be appointed by the Secretary-General on the recommendation of the Prosecutor.

Article 16

The Registry

1.The Registry shall be responsible for the administration and servicing of the International Tribunal for Rwanda.

2.The Registry shall consist of a Registrar and such other staff as may be required.

3.The Registrar shall be appointed by the Secretary-General after consultation with the President of the International Tribunal for Rwanda. He or she shall serve for a four- year term and be eligible for reappointment. The terms and conditions of service of the Registrar shall be those of an Assistant Secretary-General of the United Nations.

4.The staff of the Registry shall be appointed by the Secretary-General on the recommendation of the Registrar.

Article 17

Investigation and preparation of indictment

1.The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2.The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.

3.If questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as to necessary translation into and from a language he or she speaks and understands.

4.Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 18

Review of the indictment

1.The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a prima facie case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.

2.Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 19

Commencement and conduct of trial proceedings

1.The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.

2.A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Tribunal for Rwanda, be taken into custody, immediately informed of the charges against him or her and transferred to the International Tribunal for Rwanda.

3.The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.

4.The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

Article 20

Rights of the accused

1.All persons shall be equal before the International Tribunal for Rwanda.

2.In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to article 21 of the Statute.

3.The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4.In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

(a)To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b)To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c)To be tried without undue delay;

(d)To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or

she does not have sufficient means to pay for it;

(e)To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f)To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda;

(g)Not to be compelled to testify against himself or herself or to confess guilt.

Article 21

Protection of victims and witnesses

The International Tribunal for Rwanda shall provide in its rules of procedure and evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 22

Judgement

1.The Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.

2.The judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 23

Penalties

1.The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.

2.In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3.In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 24

Appellate proceedings

1.The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds:

(a)An error on a question of law invalidating the decision; or

(b)An error of fact which has occasioned a miscarriage of justice.

2.The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

Article 25

Review proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the International Tribunal for Rwanda an application for review of the judgement.

Article 26

Enforcement of sentences

Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the International Tribunal for Rwanda.

Article 27

Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal for Rwanda accordingly. There shall only be pardon or commutation of sentence if the President of the International Tribunal for Rwanda, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 28

Cooperation and judicial assistance

1.States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.

2.States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a)The identification and location of persons;

(b)The taking of testimony and the production of evidence;

(c)The service of documents;

(d)The arrest or detention of persons;

(e)The surrender or the transfer of the accused to the International Tribunal for Rwanda.

Article 29

The status, privileges and immunities of the

International Tribunal for Rwanda

1.The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the International Tribunal for Rwanda, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.

2.The judges, the Prosecutor and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

3.The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under articles V and VII of the Convention referred to in paragraph 1 of this article.

4.Other persons, including the accused, required at the seat or meeting place of the International Tribunal for Rwanda shall be accorded such treatment as is necessary for the proper functioning of the International Tribunal for Rwanda.

Article 30

Expenses of the International Tribunal for Rwanda

The expenses of the International Tribunal for Rwanda shall be expenses of the Organization in accordance with Article 17 of the Charter of the United Nations.

- 6252

Article 31

Working languages

The working languages of the International Tribunal shall be English and French.

Article 32

Annual report

The President of the International Tribunal for Rwanda shall submit an annual report of the International Tribunal for Rwanda to the Security Council and to the General Assembly.

ANNEX 16:

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, U.N. Doc. S/2000/915, 4 October 2000.

United Nations S/200

Security Council

Distr.: General
4 October 2000

Original: English

Report of the Secretary-General on the establishment of a Special Court for Sierra Leone

I. Introduction

1. The Security Council, by its resolution 1315 (2000) of 14 August 2000, requested me to negotiate an agreement with the Government of Sierra Leone to create an independent special court (hereinafter "the Special Court") to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone.

2. The Security Council further requested that I submit a report on the implementation of the resolution, in particular on my consultations and negotiations with the Government of Sierra Leone concerning the establishment of the Special Court. In the report I was requested, in particular, to address the questions of the temporal jurisdiction of the Court; an appeals process, including the advisability, feasibility and appropriateness of an appeals chamber in the Special Court, or of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda; and a possible alternative host State, should it be necessary to convene the Special Court outside the seat of the Court in Sierra Leone, if circumstances so require.

3. Specific recommendations were also requested by the Security Council on the following issues:

(a) Any additional agreements that might be required for the provision of the international assistance necessary for the establishment and functioning of the Special Court;

(b) The level of participation, support and technical assistance of qualified persons required from Member States, including, in particular, States members of the Economic Community of West African States (ECOWAS) and the Commonwealth, and from the United Nations Mission in Sierra Leone (UNAMSIL) that would be necessary for the efficient, independent and impartial functioning of the Special Court;

(c) The amount of voluntary contributions of funds, equipment and services, including expert personnel from States, intergovernmental organizations and non-governmental organizations;

(d) Whether the Special Court could receive, as necessary and feasible, expertise and advice from the International Tribunals for the Former Yugoslavia and for Rwanda.

4. The present report, submitted in response to the above requests, is in two parts. The first part (chaps. II-VI) examines and analyses the nature and specificity of the Special Court, its jurisdiction (subject-matter, temporal and personal), the organizational structure (the Chambers and the nature of the appeals process, the offices of the Prosecutor and the Registry), enforcement of sentences in third States and the choice of the alternative seat. The second part (chaps. VII and VIII) deals with the practical implementation of the resolution on the establishment of the Special Court. It describes the requirements of the Court in terms of personnel, equipment, services and funds that would be required of States, intergovernmental and non-governmental organizations, the type of advice and expertise that may be expected from the two International Tribunals, and the logistical support and

00-66177 (E) 041000

security requirements for premises and personnel that could, under an appropriate mandate, be provided by UNAMSIL. The Court's requirements in all of these respects have been placed within the specific context of Sierra Leone, and represent the minimum necessary, in the words of resolution 1315 (2000), "for the efficient, independent and impartial functioning of the Special Court". An assessment of the viability and sustainability of the financial mechanism envisaged, together with an alternative solution for the consideration of the Security Council, concludes the second part of the report.

5. The negotiations with the Government of Sierra Leone, represented by the Attorney General and the Minister of Justice, were conducted in two stages. The first stage of the negotiations, held at United Nations Headquarters from 12 to 14 September 2000, focused on the legal framework and constitutive instruments establishing the Special Court: the Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Special Court which is an integral part thereof. (For the texts of the Agreement and the Statute, see the annex to the present report.)

6. Following the Attorney General's visit to Headquarters, a small United Nations team led by Ralph Zacklin, Assistant Secretary-General for Legal Affairs, visited Freetown from 18 to 20 September 2000. Mr. Zacklin was accompanied by Daphna Shraga, Senior Legal Officer, Office of the Legal Counsel, Office of Legal Affairs; Gerald Ganz, Security Coordination Officer, Office of the United Nations Security Coordinator; and Robert Kirkwood, Chief, Buildings Management, International Tribunal for the Former Yugoslavia. During its three-day visit, the team concluded the negotiations on the remaining legal issues, assessed the adequacy of possible premises for the seat of the Special Court, their operational state and security conditions, and had substantive discussions on all aspects of the Special Court with the President of Sierra Leone, senior government officials, members of the judiciary and the legal profession, the Ombudsman, members of civil society, national and international non-governmental organizations and institutions involved in child-care programmes and rehabilitation of child ex-combatants, as well as with senior officials of UNAMSIL.

7. In its many meetings with Sierra Leoneans of all segments of society, the team was made aware of the high level of expectations created in anticipation of the establishment of a special court. If the role of the Special Court in dealing with impunity and developing respect for the rule of law in Sierra Leone is to be fully understood and its educative message conveyed to Sierra Leoneans of all ages, a broad public information and education campaign will have to be undertaken as an integral part of the Court's activities. The purpose of such a campaign would be both to inform and to reassure the population that while a credible Special Court cannot be established overnight, everything possible will be done to expedite its functioning; that while the number of persons prosecuted before the Special Court will be limited, it would not be selective or otherwise discriminatory; and that although the children of Sierra Leone may be among those who have committed the worst crimes, they are to be regarded first and foremost as victims. For a nation which has attested to atrocities that only few societies have witnessed, it will require a great deal of persuasion to convince it that the exclusion of the death penalty and its replacement by imprisonment is not an "acquittal" of the accused, but an imposition of a more humane punishment. In this public information campaign, UNAMSIL, alongside the Government and non-governmental organizations, could play an important role.

8. Since the present report is limited to an analysis of the legal framework and the practical operation of the Special Court, it does not address in detail specifics of the relationship between the Special Court and the national courts in Sierra Leone, or between the Court and the National Truth and Reconciliation Commission. It is envisaged, however, that upon the establishment of the Special Court and the appointment of its Prosecutor, arrangements regarding cooperation, assistance and sharing of information between the respective courts would be concluded and the status of detainees awaiting trial would be urgently reviewed. In a similar vein, relationship and cooperation arrangements would be required between the Prosecutor and the National Truth and Reconciliation Commission, including the use of the Commission as an alternative to prosecution, and the prosecution of juveniles, in particular.

II. Nature and specificity of the Special Court

9. The legal nature of the Special Court, like that of any other legal entity, is determined by its constitutive instrument. Unlike either the International Tribunals for the Former Yugoslavia and for Rwanda, which were established by resolutions of the Security Council and constituted as subsidiary organs of the United Nations, or national courts established by law, the Special Court, as foreseen, is established by an Agreement between the United Nations and the Government of Sierra Leone and is therefore a treaty-based sui generis court of mixed jurisdiction and composition. Its implementation at the national level would require that the agreement is incorporated in the national law of Sierra Leone in accordance with constitutional requirements. Its applicable law includes international as well as Sierra Leonean law, and it is composed of both international and Sierra Leonean judges,[1] prosecutors and administrative support staff.[2] As a treaty-based organ, the Special Court is not anchored in any existing system (i.e., United Nations administrative law or the national law of the State of the seat) which would be automatically applicable to its non-judicial, administrative and financial activities. In the absence of such a framework, it would be necessary to identify rules for various purposes, such as recruitment, staff administration, procurement, etc., to be applied as the need arose.[3]

10. The Special Court has concurrent jurisdiction with and primacy over Sierra Leonean courts. Consequently, it has the power to request at any stage of the proceedings that any national Sierra Leonean court defer to its jurisdiction (article 8, para. 2 of the Statute). The primacy of the Special Court, however, is limited to the national courts of Sierra Leone and does not extend to the courts of third States. Lacking the power to assert its primacy over national courts in third States in connection with the crimes committed in Sierra Leone, it also lacks the power to request the surrender of an accused from any third State and to induce the compliance of its authorities with any such request. In examining measures to enhance the deterrent powers of the Special Court, the Security Council may wish to consider endowing it with Chapter VII powers for the specific purpose of requesting the surrender of an accused from outside the jurisdiction of the Court.

11. Beyond its legal and technical aspects, which in many ways resemble those of other international jurisdictions, the Special Court is Sierra Leone-specific. Many of the legal choices made are intended to address the specificities of the Sierra Leonean conflict, the brutality of the crimes committed and the young age of those presumed responsible. The moral dilemma that some of these choices represent has not been lost upon those who negotiated its constitutive instruments.

III. Competence of the Special Court

A. Subject-matter jurisdiction

12. The subject-matter jurisdiction of the Special Court comprises crimes under international humanitarian law and Sierra Leonean law. It covers the most egregious practices of mass killing, extrajudicial executions, widespread mutilation, in particular amputation of hands, arms, legs, lips and other parts of the body, sexual violence against girls and women, and sexual slavery, abduction of thousands of children and adults, hard labour and forced recruitment into armed groups, looting and setting fire to large urban dwellings and villages. In recognition of the principle of legality, in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.

1. Crimes under international law

13. In its resolution 1315 (2000), the Security Council recommended that the subject-matter jurisdiction of the Special Court should include crimes against humanity, war crimes and other serious violations of international humanitarian law. Because of the lack of any evidence that the massive, large-scale killing in Sierra Leone was at any time perpetrated against an identified national, ethnic, racial or religious group with an intent to annihilate the group as such, the Security Council did not include the crime of genocide in its recommendation, nor was it considered appropriate by the Secretary-General to include it in the list of international crimes falling within the jurisdiction of the Court.

14. The list of crimes against humanity follows the enumeration included in the Statutes of the International Tribunals for the Former Yugoslavia and for Rwanda, which were patterned on article 6 of the Nürnberg Charter. Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused. Under the Statute of the International Criminal Court (ICC), though it is not yet in force, they are recognized as war crimes.

15. Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

(a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities;

(b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict; and

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

16. The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established. Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection. The specification of the crime of attacks against peacekeepers, however, does not imply a more serious crime than attacks against civilians in similar circumstances and should not entail, therefore, a heavier penalty.

17. The prohibition on the recruitment of children below the age of 15, a fundamental element of the protection of children, was for the first time established in the 1977 Additional Protocol II to the Geneva Conventions, article 4, paragraph 3 (c), of which provides that children shall be provided with the care and aid they require, and that in particular:

> "Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities".

A decade later, the prohibition on the recruitment of children below 15 into armed forces was established in article 38, paragraph 3, of the 1989 Convention on the Rights of the Child; and in 1998, the Statute of the International Criminal Court criminalized the prohibition and qualified it as a war crime. But while the prohibition on child recruitment has by now acquired a customary international law status, it is far less clear whether it is customarily recognized as a war crime entailing the individual criminal responsibility of the accused.

18. Owing to the doubtful customary nature of the ICC Statutory crime which criminalizes the conscription or enlistment of children under the age of 15, whether forced or "voluntary", the crime which is included in article 4 (c) of the Statute of the Special Court is not the equivalent of the ICC provision. While the definition of the crime as "conscripting" or "enlisting" connotes an administrative act of putting one's name on a list and formal entry into the armed forces, the elements of the crime under the proposed Statute of the Special Court are: (a) abduction, which in the case of the children of Sierra Leone was the original crime and is in itself a crime under common article 3 of the Geneva Conventions; (b) forced recruitment in the most general sense — administrative formalities, obviously, notwithstanding; and (c) transformation of the child into, and its use as, among other degrading uses, a "child-combatant".

2. Crimes under Sierra Leonean law

19. The Security Council recommended that the subject-matter jurisdiction of the Special Court should also include crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. While most of the crimes committed in the Sierra Leonean conflict during the relevant period are governed by the international law provisions set out in articles 2 to 4 of the Statute, recourse to Sierra Leonean law has been had in cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law. The crimes considered to be relevant for this purpose and included in the Statute are: offences relating to the abuse of girls under the 1926 Prevention of Cruelty to Children Act and offences relating to the wanton destruction of property, and in particular arson, under the 1861 Malicious Damage Act.

20. The applicability of two systems of law implies that the elements of the crimes are governed by the respective international or national law, and that the Rules of Evidence differ according to the nature of the crime as a common or international crime. In that connection, article 14 of the Statute provides that the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda shall be applicable mutatis mutandis to proceedings before the Special Court, and that the judges shall have the power to amend or adopt additional rules, where a specific situation is not provided for. In so doing, they may be guided, as appropriate, by the 1965 Criminal Procedure Act of Sierra Leone.

B. Temporal jurisdiction of the Special Court

21. In addressing the question of the temporal jurisdiction of the Special Court as requested by the Security Council, a determination of the validity of the sweeping amnesty granted under the Lomé Peace Agreement of 7 July 1999 was first required. If valid, it would limit the temporal jurisdiction of the Court to offences committed after 7 July 1999; if invalid, it would make possible a determination of a beginning date of the temporal jurisdiction of the Court at any time in the pre-Lomé period.

1. The amnesty clause in the Lomé Peace Agreement

22. While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict,[4] the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

23. At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement ("absolute and free pardon") shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This reservation is recalled by the Security Council in a preambular paragraph of resolution 1315 (2000).

24. In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows:

> "An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution."

With the denial of legal effect to the amnesty granted at Lomé, to the extent of its illegality under international law, the obstacle to the determination of a beginning date of the temporal jurisdiction of the Court within the pre-Lomé period has been removed.

2. Beginning date of the temporal jurisdiction

25. It is generally accepted that the decade-long civil war in Sierra Leone dates back to 1991, when on 23 March of that year forces of the Revolutionary United Front (RUF) entered Sierra Leone from Liberia and launched a rebellion to overthrow the one-party military rule of the All People's Congress (APC). In determining a beginning date of the temporal jurisdiction of the Special Court within the period since

23 March 1991, the Secretary-General has been guided by the following considerations: (a) the temporal jurisdiction should be reasonably limited in time so that the Prosecutor is not overburdened and the Court overloaded; (b) the beginning date should correspond to an event or a new phase in the conflict without necessarily having any political connotations; and (c) it should encompass the most serious crimes committed by persons of all political and military groups and in all geographical areas of the country. A temporal jurisdiction limited in any of these respects would rightly be perceived as a selective or discriminatory justice.

26. Imposing a temporal jurisdiction on the Special Court reaching back to 1991 would create a heavy burden for the prosecution and the Court. The following alternative dates were therefore considered as realistic options:

(a) *30 November 1996* — the conclusion of the Abidjan Peace Agreement, the first comprehensive Peace Agreement between the Government of Sierra Leone and RUF. Soon after its signature the Peace Agreement had collapsed and large-scale hostilities had resumed;

(b) *25 May 1997* — the date of the coup d'état orchestrated by the Armed Forces Revolutionary Council (AFRC) against the Government that was democratically elected in early 1996. The period which ensued was characterized by serious violations of international humanitarian law, including, in particular, mass rape and abduction of women, forced recruitment of children and summary executions;

(c) *6 January 1999* — the date on which RUF/AFRC launched a military operation to take control of Freetown. The first three-week period of full control by these entities over Freetown marked the most intensified, systematic and widespread violations of human rights and international humanitarian law against the civilian population. During its retreat in February 1999, RUF abducted hundreds of young people, particularly young women used as forced labourers, fighting forces, human shields and sexual slaves.

27. In considering the three options for the beginning date of the temporal jurisdiction of the Court, the parties have concluded that the choice of 30 November 1996 would have the benefit of putting the Sierra Leone conflict in perspective without unnecessarily extending the temporal jurisdiction of the Special Court. It would also ensure that the most serious crimes committed by all parties and armed groups would be encompassed within its jurisdiction. The choice of 25 May 1997 would have all these advantages, with the disadvantage of having a political connotation, implying, wrongly, that the prosecution of those responsible for the most serious violations of international humanitarian law is aimed at punishment for their participation in the coup d'état. The last option marks in many ways the peak of the campaign of systematic and widespread crimes against the civilian population, as experienced mostly by the inhabitants of Freetown. If the temporal jurisdiction of the Court were to be limited to that period only, it would exclude all crimes committed before that period in the rural areas and the countryside. In view of the perceived advantages of the first option and the disadvantages associated with the other options, the date of 30 November 1996 was selected as the beginning date of the temporal jurisdiction of the Special Court, a decision in which the government negotiators have actively concurred.

28. As the armed conflict in various parts of the territory of Sierra Leone is still ongoing, it was decided that the temporal jurisdiction of the Special Court should be left open-ended. The lifespan of the Special Court, however, as distinguished from its temporal jurisdiction, will be determined by a subsequent agreement between the parties upon the completion of its judicial activities, an indication of the capacity acquired by the local courts to assume the prosecution of the remaining cases, or the unavailability of resources. In setting an end to the operation of the Court, the Agreement would also determine all matters relating to enforcement of sentences, pardon or commutation, transfer of pending cases to the local courts and the disposition of the financial and other assets of the Special Court.

C. Personal jurisdiction

1. Persons "most responsible"

29. In its resolution 1315 (2000), the Security Council recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes", which is understood as an indication of a limitation on the number of accused by reference to

their command authority and the gravity and scale of the crime. I propose, however, that the more general term "persons most responsible" should be used.

30. While those "most responsible" obviously include the political or military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime. It must be seen, however, not as a test criterion or a distinct jurisdictional threshold, but as a guidance to the Prosecutor in the adoption of a prosecution strategy and in making decisions to prosecute in individual cases.

31. Within the meaning attributed to it in the present Statute, the term "most responsible" would not necessarily exclude children between 15 and 18 years of age. While it is inconceivable that children could be in a political or military leadership position (although in Sierra Leone the rank of "Brigadier" was often granted to children as young as 11 years), the gravity and seriousness of the crimes they have allegedly committed would allow for their inclusion within the jurisdiction of the Court.

2. Individual criminal responsibility at 15 years of age

32. The possible prosecution of children for crimes against humanity and war crimes presents a difficult moral dilemma. More than in any other conflict where children have been used as combatants, in Sierra Leone, child combatants were initially abducted, forcibly recruited, sexually abused, reduced to slavery of all kinds and trained, often under the influence of drugs, to kill, maim and burn. Though feared by many for their brutality, most if not all of these children have been subjected to a process of psychological and physical abuse and duress which has transformed them from victims into perpetrators.

33. The solution to this terrible dilemma with respect to the Special Court[5] could be found in a number of options: (a) determining a minimum age of 18 and exempting all persons under that age from accountability and individual criminal responsibility; (b) having children between 15 to 18 years of age, both victims and perpetrators, recount their story before the Truth and Reconciliation Commission or similar mechanisms, none of which is as yet functional; and (c) having them go through the judicial process of accountability without punishment, in a court of law providing all internationally recognized guarantees of juvenile justice.

34. The question of child prosecution was discussed at length with the Government of Sierra Leone both in New York and in Freetown. It was raised with all the interlocutors of the United Nations team: the members of the judiciary, members of the legal profession and the Ombudsman, and was vigorously debated with members of civil society, non-governmental organizations and institutions actively engaged in child-care and rehabilitation programmes.

35. The Government of Sierra Leone and representatives of Sierra Leone civil society clearly wish to see a process of judicial accountability for child combatants presumed responsible for the crimes falling within the jurisdiction of the Court. It was said that the people of Sierra Leone would not look kindly upon a court which failed to bring to justice children who committed crimes of that nature and spared them the judicial process of accountability. The international non-governmental organizations responsible for child-care and rehabilitation programmes, together with some of their national counterparts, however, were unanimous in their objection to any kind of judicial accountability for children below 18 years of age for fear that such a process would place at risk the entire rehabilitation programme so painstakingly achieved. While the extent to which this view represents the majority view of the people of Sierra Leone is debatable, it nevertheless underscores the importance of the child rehabilitation programme and the need to ensure that in the prosecution of children presumed responsible, the rehabilitation process of scores of other children is not endangered.

36. Given these highly diverging opinions, it is not easy to strike a balance between the interests at stake. I am mindful of the Security Council's recommendation that only those who bear "the greatest responsibility" should be prosecuted. However, in view of the most horrific aspects of the child combatancy in Sierra Leone, the employment of this term would not necessarily exclude persons of young age from the jurisdiction of the Court. I therefore thought that it would be most prudent to demonstrate to the Security Council for its consideration how provisions on

prosecution of persons below the age of 18 — "children" within the definition of the Convention on the Rights of the Child — before an international jurisdiction could be formulated.[6] Therefore, in order to meet the concerns expressed by, in particular, those responsible for child care and rehabilitation programmes, article 15, paragraph 5, of the Statute contains the following provision:

> "In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk, and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability."

37. Furthermore, the Statute of the Special Court, in article 7 and throughout the text, contains internationally recognized standards of juvenile justice and guarantees that juvenile offenders are treated in dignity and with a sense of worth. Accordingly, the overall composition of the judges should reflect their experiences in a variety of fields, including in juvenile justice (article 13, para. 1); the Office of the Prosecutor should be staffed with persons experienced in gender-related crimes and juvenile justice (article 15, para. 4). In a trial of a juvenile offender, the Special Court should, to the extent possible, order the immediate release of the accused, constitute a "Juvenile Chamber", order the separation of the trial of a juvenile from that of an adult, and provide all legal and other assistance and order protective measures to ensure the privacy of the juvenile. The penalty of imprisonment is excluded in the case of a juvenile offender, and a number of alternative options of correctional or educational nature are provided for instead.

38. Consequently, if the Council, also weighing in the moral-educational message to the present and next generation of children in Sierra Leone, comes to the conclusion that persons under the age of 18 should be eligible for prosecution, the statutory provisions elaborated will strike an appropriate balance between all conflicting interests and provide the necessary guarantees of juvenile justice. It should also be stressed that, ultimately, it will be for the Prosecutor to decide if, all things considered, action should be taken against a juvenile offender in any individual case.

IV. Organizational structure of the Special Court

39. Organizationally, the Special Court has been conceived as a self-contained entity, consisting of three organs: the Chambers (two Trial Chambers and an Appeals Chamber), the Prosecutor's Office and the Registry. In the establishment of ad hoc international tribunals or special courts operating as separate institutions, independently of the relevant national legal system, it has proved to be necessary to comprise within one and the same entity all three organs. Like the two International Tribunals, the Special Court for Sierra Leone is established outside the national court system, and the inclusion of the Appeals Chamber within the same Court was thus the obvious choice.

A. The Chambers

40. In its resolution 1315 (2000), the Security Council requested that the question of the advisability, feasibility and appropriateness of sharing the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda should be addressed. In analysing this option from the legal and practical viewpoints, I have concluded that the sharing of a single Appeals Chamber between jurisdictions as diverse as the two International Tribunals and the Special Court for Sierra Leone is legally unsound and practically not feasible, without incurring unacceptably high administrative and financial costs.

41. While in theory the establishment of an overarching Appeals Chamber as the ultimate judicial authority in matters of interpretation and application of international humanitarian law offers a guarantee of developing a coherent body of law, in practice, the same result may be achieved by linking the jurisprudence of the Special Court to that of the International Tribunals, without imposing on the shared Appeals Chamber the financial and administrative constraints of a formal institutional link. Article 20, paragraph 3, of the Statute accordingly provides that the judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the Yugoslav and the Rwanda Tribunals; article 14, paragraph 1, of the Statute provides that the Rules of Procedure and Evidence of the Rwanda Tribunal shall be applicable mutatis mutandis to the proceedings before the Special Court.

42. The sharing of one Appeals chamber between all three jurisdictions would strain the capacity of the already heavily burdened Appeals Chamber of the two Tribunals in ways which could either bring about the collapse of the appeals system as a whole, or delay beyond acceptable human rights standards the detention of accused pending the hearing of appeals from either or all jurisdictions. On the assumption that all judgements and sentencing decisions of the Trial Chambers of the Special Court will be appealed, as they have been in the cases of the two International Tribunals, and that the number of accused will be roughly the same as in each of the International Tribunals, the Appeals Chamber would be required to add to its current workload a gradual increase of approximately one third.

43. Faced with an exponential growth in the number of appeals lodged on judgements and interlocutory appeals in relation to an increasing number of accused and decisions rendered, the existing workload of the Appeals Chamber sitting in appeals from six Trial Chambers of the two ad hoc Tribunals is constantly growing. Based on current and anticipated growth in workload, existing trends[7] and the projected pace of three to six appeals on judgements every year, the Appeals Chamber has requested additional resources in funds and personnel. With the addition of two Trial Chambers of the Special Court, making a total of eight Trial Chambers for one Appeals Chamber, the burden on the Yugoslav and Rwanda Appeals Chamber would be untenable, and the Special Court would be deprived of an effective and viable appeals process.

44. The financial costs which would be entailed for the Appeals Chamber when sitting on appeals from the Special Court will have to be borne by the regular budget, regardless of the financial mechanism established for the Special Court itself. These financial costs would include also costs of translation into French, which is one of the working languages of the Appeals Chamber of the International Tribunals; the working language of the Special Court will be English.

45. In his letter to the Legal Counsel in response to the request for comments on the eventuality of sharing the Appeals Chamber of the two international Tribunals with the Special Court, the President of the International Tribunal for the Former Yugoslavia wrote:

> "With regard to paragraph 7 of Security Council resolution 1315 (2000), while the sharing of the Appeals Chamber of [the two International Tribunals] with that of the Special Court would bear the significant advantage of ensuring a better standardization of international humanitarian law, it appeared that the disadvantages of this option — excessive increase of the Appeals Chambers' workload, problems arising from the mixing of sources of law, problems caused by the increase in travelling by the judges of the Appeals Chambers and difficulties caused by mixing the different judges of the three tribunals — outweigh its benefits."[8]

46. For these reasons, the parties came to the conclusion that the Special Court should have two Trial Chambers, each with three judges, and an Appeals Chamber with five judges. Article 12, paragraph 4, provides for extra judges to sit on the bench in cases where protracted proceedings can be foreseen and it is necessary to make certain that the proceedings do not have to be discontinued in case one of the ordinary judges is unable to continue hearing the case.

B. The Prosecutor

47. An international prosecutor will be appointed by the Secretary-General to lead the investigations and prosecutions, with a Sierra Leonean Deputy. The appointment of an international prosecutor will guarantee that the Prosecutor is, and is seen to be, independent, objective and impartial.

C. The Registrar

48. The Registrar will service the Chambers and the Office of the Prosecutor and will have the responsibility for the financial management and external relations of the Court. The Registrar will be appointed by the Secretary-General as a staff member of the United Nations.

V. Enforcement of sentences

49. The possibility of serving prison sentences in third States is provided for in article 22 of the Statute. While imprisonment shall normally be served in Sierra Leone, particular circumstances, such as the security

risk entailed in the continued imprisonment of some of the convicted persons on Sierra Leonean territory, may require their relocation to a third State.

50. Enforcement of sentences in third countries will be based on an agreement between the Special Court[9] and the State of enforcement. In seeking indications of the willingness of States to accept convicted persons, priority should be given to those which have already concluded similar agreements with either of the International Tribunals, as an indication that their prison facilities meet the minimum standards of conditions of detention. Although an agreement for the enforcement of sentences will be concluded between the Court and the State of enforcement, the wishes of the Government of Sierra Leone should be respected. In that connection, preference was expressed for such locations to be identified in an East African State.

VI. An alternative host country

51. In paragraph 7 of resolution 1315 (2000), the Security Council requested that the question of a possible alternative host State be addressed, should it be necessary to convene the Special Court outside its seat in Sierra Leone, if circumstances so required. As the efforts of the United Nations Secretariat, the Government of Sierra Leone and other interested Member States are currently focused on the establishment of the Special Court in Sierra Leone, it is proposed that the question of the alternative seat should be addressed in phases. An important element in proceeding with this issue is also the way in which the Security Council addresses the present report, that is, if a Chapter VII element is included.

52. In the first phase, criteria for the choice of the alternative seat should be determined and a range of potential host countries identified. An agreement, in principle, should be sought both from the Government of Sierra Leone for the transfer of the Special Court to the State of the alternative seat, and from the authorities of the latter, for the relocation of the seat to its territory.

53. In the second phase, a technical assessment team would be sent to identify adequate premises in the third State or States. Once identified, the three parties, namely, the United Nations, the Government of Sierra Leone and the Government of the alternative seat, would conclude a Framework Agreement, or "an agreement to agree" for the transfer of the seat when circumstances so required. The Agreement would stipulate the nature of the circumstances which would require the transfer of the seat and an undertaking to conclude in such an eventuality a Headquarters Agreement. Such a principled Agreement would facilitate the transfer of the seat on an emergency basis and enable the conclusion of a Headquarters Agreement soon thereafter.

54. In the choice of an alternative seat for the Special Court, the following considerations should be taken into account: the proximity to the place where the crimes were committed, and easy access to victims, witnesses and accused. Such proximity and easy access will greatly facilitate the work of the Prosecutor, who will continue to conduct his investigations in the territory of Sierra Leone.[10] During the negotiations, the Government expressed a preference for a West African alternative seat, in an English-speaking country sharing a common-law legal system.

VII. Practical arrangements for the operation of the Special Court

55. The Agreement and the Statute of the Special Court establish the legal and institutional framework of the Court and the mutual obligations of the parties with regard, in particular, to appointments to the Chambers, the Office of the Prosecutor and the Registry and, the provision of premises. However, the practical arrangements for the establishment and operation of the Special Court remain outside the scope of the Agreement in the sense that they depend on contributions of personnel, equipment, services and funds from Member States and intergovernmental and non-governmental organizations. It is somewhat anomalous, therefore, that the parties which establish the Special Court, in practice, are dependent for the implementation of their treaty obligations on States and international organizations which are not parties to the Agreement or otherwise bound by its provisions.

56. Proceeding from the premise that voluntary contributions would constitute the financial mechanism of the Special Court, the Security Council requested the Secretary-General to include in the report recommendations regarding the amount of voluntary contributions, as appropriate, of funds, equipment and services to the Special Court, contributions in

personnel, the kind of advice and expertise expected of the two ad hoc Tribunals, and the type of support and technical assistance to be provided by UNAMSIL. In considering the estimated requirements of the Special Court in all of these respects, it must be borne in mind that at the current stage, the Government of Sierra Leone is unable to contribute in any significant way to the operational costs of the Special Court, other than in the provision of premises, which would require substantial refurbishment, and the appointment of personnel, some of whom may not even be Sierra Leonean nationals. The requirements set out below should therefore be understood for all practical purposes as requirements that have to be met through contributions from sources other than the Government of Sierra Leone.

A. Estimated requirements of the Special Court for the first operational phase

1. Personnel and equipment

57. The personnel requirements of the Special Court for the initial operational phase[11] are estimated to include:

(a) Eight Trial Chamber judges (3 sitting judges and 1 alternate judge in each Chamber) and 6 Appeals Chamber judges (5 sitting judges and 1 alternate judge), 1 law clerk, 2 support staff for each Chamber and 1 security guard detailed to each judge (14);

(b) A Prosecutor and a Deputy Prosecutor, 20 investigators, 20 prosecutors and 26 support staff;

(c) A Registrar, a Deputy Registrar, 27 administrative support staff and 40 security officers;

(d) Four staff in the Victims and Witnesses Unit;

(e) One correction officer and 12 security officers in the detention facilities.

58. Based on the United Nations scale of salaries for a one-year period, the personnel requirements along with the corresponding equipment and vehicles are estimated on a very preliminary basis to be US$ 22 million. The calculation of the personnel requirements is premised on the assumption that all persons appointed (whether by the United Nations or the Government of Sierra Leone) will be paid from United Nations sources.

59. In seeking qualified personnel from States Members of the United Nations, the importance of obtaining such personnel from members of the Commonwealth, sharing the same language and common-law legal system, has been recognized. The Office of Legal Affairs has therefore approached the Commonwealth Secretariat with a request to identify possible candidates for the positions of judges, prosecutors, Registrar, investigators and administrative support staff. How many of the Commonwealth countries would be in a position to voluntarily contribute such personnel with their salaries and emoluments is an open question. A request similar to that which has been made to the Commonwealth will also be made to the Economic Community of West African States (ECOWAS).

2. Premises

60. The second most significant component of the requirements of the Court for the first operational phase is the cost of premises. During its visit to Freetown, the United Nations team visited a number of facilities and buildings which the Government believes may accommodate the Special Court and its detention facilities: the High Court of Sierra Leone, the Miatta Conference Centre and an adjacent hotel, the Presidential Lodge, the Central Prison (Pademba Road Prison), and the New England Prison. In evaluating their state of operation, the team concluded that none of the facilities offered were suitable or could be made operational without substantial investment. The use of the existing High Court would incur the least expenditure (estimated at $1.5 million); but would considerably disrupt the ordinary schedule of the Court and eventually bring it to a halt. Since it is located in central Freetown, the use of the High Court would pose, in addition, serious security risks. The use of the Conference Centre, the most secure site visited, would require large-scale renovation, estimated at $5.8 million. The Presidential Lodge was ruled out on security grounds.

61. In the light of the above, the team has considered the option of constructing a prefabricated, self-contained compound on government land. This option would have the advantage of an easy expansion paced with the growth of the Special Court, a salvage value at the completion of the activities of the Court, the prospect of a donation in kind and construction at no

rental costs. The estimated cost of this option is $2.9 million.

62. The two detention facilities visited by the team were found to be inadequate in their current state. The Central Prison (Pademba Road Prison) was ruled out for lack of space and security reasons. The New England Prison would be a possible option at an estimated renovation cost of $600,000.

63. The estimated cost requirements of personnel and premises set out in the present report cover the two most significant components of its prospective budget for the first operational stage. Not included in the present report are the general operational costs of the Special Court and of the detention facilities; costs of prosecutorial and investigative activities; conference services, including the employment of court translators from and into English, Krio and other tribal languages; and defence counsel, to name but a few.

B. Expertise and advice from the two International Tribunals

64. The kind of advice and expertise which the two International Tribunals may be expected to share with the Special Court for Sierra Leone could take the form of any or all of the following: consultations among judges of both jurisdictions on matters of mutual interest; training of prosecutors, investigators and administrative support staff of the Special Court in The Hague, Kigali and Arusha, and training of such personnel on the spot by a team of prosecutors, investigators and administrators from both Tribunals; advice on the requirements for a Court library and assistance in its establishment, and sharing of information, documents, judgements and other relevant legal material on a continuous basis.

65. Both International Tribunals have expressed willingness to share their experience in all of these respects with the Special Court. They have accordingly offered to convene regular meetings with the judges of the Special Court to assist in adopting and formulating Rules of Procedure based on experience acquired in the practice of both Tribunals; to train personnel of the Special Court in The Hague and Arusha to enable them to acquire practical knowledge of the operation of an international tribunal; and when necessary, to temporarily deploy experienced staff, including a librarian, to the Special Court. In addition, the International Tribunal for the Former Yugoslavia has offered to provide to the Special Court legal material in the form of CD-ROMs containing motions, decisions, judgements, court orders and the like. The transmission of such material to the Special Court in the period pending the establishment of a full-fledged library would be of great assistance.

C. Support and technical assistance from UNAMSIL

66. The support and technical assistance of UNAMSIL in providing security, logistics, administrative support and temporary accommodation would be necessary in the first operational phase of the Special Court. In the precarious security situation now prevailing in Sierra Leone and given the state of the national security forces, UNAMSIL represents the only credible force capable of providing adequate security to the personnel and the premises of the Special Court. The specificities of the security measures required would have to be elaborated by the United Nations, the Government of Sierra Leone and UNAMSIL, it being understood, however, that any such additional tasks entrusted to UNAMSIL would have to be approved by the Security Council and reflected in a revised mandate with a commensurate increase in financial, staff and other resources.

67. UNAMSIL's administrative support could be provided in the areas of finance, personnel and procurement. Utilizing the existing administrative support in UNAMSIL, including, when feasible, shared facilities and communication systems, would greatly facilitate the start-up phase of the Special Court and reduce the overall resource requirements. In that connection, limited space at the headquarters of UNAMSIL could be made available for the temporary accommodation of the Office of the Prosecutor, pending the establishment or refurbishment of a site for the duration of the Special Court.

VIII. Financial mechanism of the Special Court

68. In paragraph 8 (c) of resolution 1315 (2000), the Security Council requested the Secretary-General to include recommendations on "the amount of voluntary contributions, as appropriate, of funds, equipment and

services to the special court, including through the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations". It would thus seem that the intention of the Council is that a Special Court for Sierra Leone would be financed from voluntary contributions. Implicit in the Security Council resolution, therefore, given the paucity of resources available to the Government of Sierra Leone, was the intention that most if not all operational costs of the Special Court would be borne by States Members of the Organization in the form of voluntary contributions.

69. The experience gained in the operation of the two ad hoc International Tribunals provides an indication of the scope, costs and long-term duration of the judicial activities of an international jurisdiction of this kind. While the Special Court differs from the two Tribunals in its nature and legal status, the similarity in the kind of crimes committed, the temporal, territorial and personal scope of jurisdiction, the number of accused, the organizational structure of the Court and the Rules of Procedure and Evidence suggest a similar scope and duration of operation and a similar need for a viable and sustainable financial mechanism.

70. A financial mechanism based entirely on voluntary contributions will not provide the assured and continuous source of funding which would be required to appoint the judges, the Prosecutor and the Registrar, to contract the services of all administrative and support staff and to purchase the necessary equipment. The risks associated with the establishment of an operation of this kind with insufficient funds, or without long-term assurances of continuous availability of funds, are very high, in terms of both moral responsibility and loss of credibility of the Organization, and its exposure to legal liability. In entering into contractual commitments which the Special Court and, vicariously, the Organization might not be able to honour, the United Nations would expose itself to unlimited third-party liability. A special court based on voluntary contributions would be neither viable nor sustainable.

71. In my view, the only realistic solution is financing through assessed contributions. This would produce a viable and sustainable financial mechanism affording secure and continuous funding. It is understood, however, that the financing of the Special Court through assessed contributions of the Member States would for all practical purposes transform a treaty-based court into a United Nations organ governed in its financial and administrative activities by the relevant United Nations financial and staff regulations and rules.

72. The Security Council may wish to consider an alternative solution, based on the concept of a "national jurisdiction" with international assistance, which would rely on the existing — however inadequate — Sierra Leonean court system, both in terms of premises (for the Court and the detention facilities) and administrative support. The judges, prosecutors, investigators and administrative support staff would be contributed by interested States. The legal basis for the special "national" court would be a national law, patterned on the Statute as agreed between the United Nations and the Government of Sierra Leone (the international crimes being automatically incorporated into the Sierra Leonean common-law system). Since the mandate of the Secretary-General is to recommend measures consistent with resolution 1315 (2000), the present report does not elaborate further on this alternative other than to merely note its existence.

IX. Conclusion

73. At the request of the Security Council, the present report sets out the legal framework and practical arrangements for the establishment of a Special Court for Sierra Leone. It describes the requirements of the Special Court in terms of funds, personnel and services and underscores the acute need for a viable financial mechanism to sustain it for the duration of its lifespan. It concludes that assessed contributions is the only viable and sustainable financial mechanism of the Special Court.

74. As the Security Council itself has recognized, in the past circumstances of Sierra Leone, a credible system of justice and accountability for the very serious crimes committed there would end impunity and would contribute to the process of national reconciliation and to the restoration and maintenance of peace in that country. In reviewing the present report and considering what further action must be taken, the Council should bear in mind the expectations that have been created and the state of urgency that permeates all discussions of the problem of impunity in Sierra Leone.

Notes

[1] At the request of the Government, reference in the Statute and the Agreement to "Sierra Leonean judges" was replaced by "judges appointed by the Government of Sierra Leone". This would allow the Government flexibility of choice between Sierra Leonean and non-Sierra Leonean nationals and broaden the range of potential candidates from within and outside Sierra Leone.

[2] In the case of the Tribunals for the Former Yugoslavia and for Rwanda, the non-inclusion in any position of nationals of the country most directly affected was considered a condition for the impartiality, objectivity and neutrality of the Tribunal.

[3] This method may not be advisable, since the Court would be manned by a substantial number of staff and financed through voluntary contributions in the amount of millions of dollars every year.

[4] Article 6, paragraph 5, of the 1977 Protocol II Additional to the Geneva Conventions and Relating to the Protection of Non-international Armed Conflicts provides that:

> "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained."

[5] The jurisdiction of the national courts of Sierra Leone is not limited by the Statute, except in cases where they have to defer to the Special Court.

[6] While there is no international law standard for the minimum age for criminal responsibility, the ICC Statute excludes from the jurisdiction of the Court persons under the age of 18. In so doing, however, it was not the intention of its drafters to establish, in general, a minimum age for individual criminal responsibility. Premised on the notion of complementarity between national courts and ICC, it was intended that persons under 18 presumed responsible for the crimes for which the ICC had jurisdiction would be brought before their national courts, if the national law in question provides for such jurisdiction over minors.

[7] The Appeals Chamber of the International Tribunal for the Former Yugoslavia has so far disposed of a total of 5 appeals from judgements and 44 interlocutory appeals; and the Appeals Chamber of the Rwanda Tribunal of only 1 judgement on the merits with 28 interlocutory appeals.

[8] Letter addressed to Mr. Hans Corell, Under-Secretary-General, The Legal Counsel, from Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, dated 29 August 2000.

[9] Article 10 of the Agreement between the United Nations and the Government endows the Special Court with a treaty-making power "to enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court".

[10] Criteria for the choice of the seat of the Rwanda Tribunal were drawn up by the Security Council in its resolution 955 (1994). The Security Council decided that the seat of the International Tribunal shall be determined by the Council "having regard to considerations of justice and fairness as well as administrative efficiency, including access to witnesses, and economy".

[11] It is important to stress that this estimate should be regarded as an illustration of a possible scenario. Not until the Registrar and the Prosecutor are in place will it be possible to make detailed and precise estimates.

Annex

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone

Whereas the Security Council, in its resolution 1315 (2000) of 14 August 2000, expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone and United Nations and associated personnel and at the prevailing situation of impunity;

Whereas by the said resolution, the Security Council requested the Secretary-General to negotiate an agreement with the Government of Sierra Leone to create an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law;

Whereas the Secretary-General of the United Nations (hereinafter "the Secretary-General") and the Government of Sierra Leone (hereinafter "the Government") have held such negotiations for the establishment of a Special Court for Sierra Leone (hereinafter "the Special Court");

Now therefore the United Nations and the Government of Sierra Leone have agreed as follows:

Article 1
Establishment of the Special Court

1. There is hereby established a Special Court for Sierra Leone to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

2. The Special Court shall function in accordance with the Statute of the Special Court for Sierra Leone. The Statute is annexed to this Agreement and forms an integral part thereof.

Article 2
Composition of the Special Court and appointment of judges

1. The Special Court shall be composed of two Trial Chambers and an Appeals Chamber.

2. The Chambers shall be composed of eleven independent judges who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General;

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be appointed by the Government of Sierra Leone and three judges shall be appointed by

the Secretary-General upon nominations forwarded by States, and in particular the member States of the Economic Community of West African States and the Commonwealth, at the invitation of the Secretary-General.

3. The Government of Sierra Leone and the Secretary-General shall consult on the appointment of judges.

4. Judges shall be appointed for a four-year term and shall be eligible for reappointment.

5. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General to be present at each stage of the trial and to replace a judge if that judge is unable to continue sitting.

Article 3
Appointment of a Prosecutor and a Deputy Prosecutor

1. The Secretary-General, after consultation with the Government of Sierra Leone, shall appoint a Prosecutor for a four-year term. The Prosecutor shall be eligible for reappointment.

2. The Government of Sierra Leone, in consultation with the Secretary-General and the Prosecutor, shall appoint a Sierra Leonean Deputy Prosecutor to assist the Prosecutor in the conduct of the investigations and prosecutions.

3. The Prosecutor and the Deputy Prosecutor shall be of high moral character and possess the highest level of professional competence and extensive experience in the conduct of investigations and prosecution of criminal cases. The Prosecutor and the Deputy Prosecutor shall be independent in the performance of their functions and shall not accept or seek instructions from any Government or any other source.

4. The Prosecutor shall be assisted by such Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently.

Article 4
Appointment of a Registrar

1. The Secretary-General, in consultation with the President of the Special Court, shall appoint a Registrar who shall be responsible for the servicing of the Chambers and the Office of the Prosecutor, and for the recruitment and administration of all support staff. He or she shall also administer the financial and staff resources of the Special Court.

2. The Registrar shall be a staff member of the United Nations. He or she shall serve a four-year term and shall be eligible for reappointment.

Article 5
Premises

The Government shall provide the premises for the Special Court and such utilities, facilities and other services as may be necessary for its operation.

Article 6
Expenses of the Special Court[a]

The expenses of the Special Court shall ...

Article 7
Inviolability of premises, archives and all other documents

1. The premises of the Special Court shall be inviolable. The competent authorities shall take whatever action may be necessary to ensure that the Special Court shall not be dispossessed of all or any part of the premises of the Court without its express consent.

2. The property, funds and assets of the Special Court, wherever located and by whomsoever held, shall be immune from search, seizure, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. The archives of the Court, and in general all documents and materials made available, belonging to or used by it, wherever located and by whomsoever held, shall be inviolable.

Article 8
Funds, assets and other property

1. The Special Court, its funds, assets and other property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process, except insofar as in any particular case the Court has expressly waived its immunity. It is understood, however, that no waiver of immunity shall extend to any measure of execution.

2. Without being restricted by financial controls, regulations or moratoriums of any kind, the Special Court:

(a) May hold and use funds, gold or negotiable instruments of any kind and maintain and operate accounts in any currency and convert any currency held by it into any other currency;

(b) Shall be free to transfer its funds, gold or currency from one country to another, or within Sierra Leone, to the United Nations or any other agency.

Article 9
Seat of the Special Court

The Special Court shall have its seat in Sierra Leone. The Court may meet away from its seat if it considers it necessary for the efficient exercise of its functions, and may be relocated outside Sierra Leone, if circumstances so require, and subject to the conclusion of a Headquarters Agreement between the Secretary-General of the United Nations and the Government of Sierra Leone, on the one hand, and the Government of the alternative seat, on the other.

[a] The formulation of this article is dependent on a decision on the financial mechanism of the Special Court.

Article 10
Juridical capacity

The Special Court shall possess the juridical capacity necessary to:

(a) Contract;

(b) Acquire and dispose of movable and immovable property;

(c) Institute legal proceedings;

(d) Enter into agreements with States as may be necessary for the exercise of its functions and for the operation of the Court.

Article 11
Privileges and immunities of the judges, the Prosecutor and the Registrar

1. The judges, the Prosecutor and the Registrar, together with their families forming part of their household, shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic agents in accordance with the 1961 Vienna Convention on Diplomatic Relations. They shall, in particular, enjoy:

(a) Personal inviolability, including immunity from arrest or detention;

(b) Immunity from criminal, civil and administrative jurisdiction in conformity with the Vienna Convention;

(c) Inviolability for all papers and documents;

(d) Exemption, as appropriate, from immigration restrictions and other alien registrations;

(e) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic agents by the Vienna Convention;

(f) Exemption from taxation in Sierra Leone on their salaries, emoluments and allowances.

2. Privileges and immunities are accorded to the judges, the Prosecutor and the Registrar in the interest of the Special Court and not for the personal benefit of the individuals themselves. The right and the duty to waive the immunity, in any case where it can be waived without prejudice to the purpose for which it is accorded, shall lie with the Secretary-General, in consultation with the President.

Article 12
Privileges and immunities of international and Sierra Leonean personnel

1. Sierra Leonean and international personnel of the Special Court shall be accorded:

(a) Immunity from legal process in respect of words spoken or written and all acts performed by them in their official capacity. Such immunity shall continue to be accorded after termination of employment with the Special Court;

(b) Immunity from taxation on salaries, allowances and emoluments paid to them.

2. International personnel shall, in addition thereto, be accorded:

(a) Immunity from immigration restriction;

(b) The right to import free of duties and taxes, except for payment for services, their furniture and effects at the time of first taking up their official duties in Sierra Leone.

3. The privileges and immunities are granted to the officials of the Special Court in the interest of the Court and not for their personal benefit. The right and the duty to waive the immunity in any particular case where it can be waived without prejudice to the purpose for which it is accorded shall lie with the Registrar of the Court.

Article 13
Counsel

1. The Government shall ensure that the counsel of a suspect or an accused who has been admitted as such by the Special Court shall not be subjected to any measure which may affect the free and independent exercise of his or her functions.

2. In particular, the counsel shall be accorded:

(a) Immunity from personal arrest or detention and from seizure of personal baggage;

(b) Inviolability of all documents relating to the exercise of his or her functions as a counsel of a suspect or accused;

(c) Immunity from criminal or civil jurisdiction in respect of words spoken or written and acts performed in his or her capacity as counsel. Such immunity shall continue to be accorded after termination of his or her functions as a counsel of a suspect or accused.

Article 14
Witnesses and experts

Witnesses and experts appearing from outside Sierra Leone on a summons or a request of the judges or the Prosecutor shall not be prosecuted, detained or subjected to any restriction on their liberty by the Sierra Leonean authorities. They shall not be subjected to any measure which may affect the free and independent exercise of their functions.

Article 15
Security, safety and protection of persons referred to in this Agreement

Recognizing the responsibility of the Government under international law to ensure the security, safety and protection of persons referred to in this Agreement and its present incapacity to do so pending the restructuring and rebuilding of its security forces, it is agreed that the United Nations Mission in Sierra Leone shall provide the necessary security to premises and personnel of the Special Court, subject to an appropriate mandate by the Security Council and within its capabilities.

Article 16
Cooperation with the Special Court

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.

2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:

(a) Identification and location of persons;

(b) Service of documents;

(c) Arrest or detention of persons;

(d) Transfer of an indictee to the Court.

Article 17
Working language

The official working language of the Special Court shall be English.

Article 18
Practical arrangements

1. With a view to achieving efficiency and cost-effectiveness in the operation of the Special Court, a phased-in approach shall be adopted for its establishment in accordance with the chronological order of the legal process.

2. In the first phase of the operation of the Special Court, judges, the Prosecutor and the Registrar will be appointed along with investigative and prosecutorial staff. The process of investigations and prosecutions and the trial process of those already in custody shall then be initiated. While the judges of the Appeals Chamber shall serve whenever the Appeals Chamber is seized of a matter, they shall take office shortly before the trial process has been completed.

Article 19
Settlement of disputes

Any dispute between the Parties concerning the interpretation or application of this Agreement shall be settled by negotiation, or by any other mutually agreed-upon mode of settlement.

Article 20
Entry into force

The present Agreement shall enter into force on the day after both Parties have notified each other in writing that the legal instruments for entry into force have been complied with.

DONE at [place] on [day, month] 2000 in two copies in the English language.

For the United Nations | For the Government of Sierra Leone

Enclosure

Statute of the Special Court for Sierra Leone

Having been established by an Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone (hereinafter "the Special Court") shall function in accordance with the provisions of the present Statute.

Article 1
Competence of the Special Court

The Special Court shall have the power to prosecute persons most responsible for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.

Article 2
Crimes against humanity

The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation;

(e) Imprisonment;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence;

(h) Persecution on political, racial, ethnic or religious grounds;

(i) Other inhumane acts.

Article 3
Violations of article 3 common to the Geneva Conventions and of Additional Protocol II

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) Collective punishments;

(c) Taking of hostages;

(d) Acts of terrorism;

(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) Pillage;

(g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;

(h) Threats to commit any of the foregoing acts.

Article 4
Other serious violations of international humanitarian law

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

(a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(c) Abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities.

Article 5
Crimes under Sierra Leonean law

The Special Court shall have the power to prosecute persons who have committed the following crimes under Sierra Leonean law:

(a) Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act, 1926 (Cap. 31):

(i) Abusing a girl under 13 years of age, contrary to section 6;

(ii) Abusing a girl between 13 and 14 years of age, contrary to section 7;

(iii) Abduction of a girl for immoral purposes, contrary to section 12.

(b) Offences relating to the wanton destruction of property under the Malicious Damage Act, 1861:

(i) Setting fire to dwelling-houses, any person being therein to section 2;

(ii) Setting fire to public buildings, contrary to sections 5 and 6;

(iii) Setting fire to other buildings, contrary to section 6.

Article 6
Individual criminal responsibility

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.

2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

3. The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

4. The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

5. Individual criminal responsibility for the crimes referred to in article 5 shall be determined in accordance with the respective laws of Sierra Leone.

Article 7
Jurisdiction over persons of 15 years of age

1. The Special Court shall have jurisdiction over persons who were 15 years of age at the time of the alleged commission of the crime.

2. At all stages of the proceedings, including investigation, prosecution and adjudication, an accused below the age of 18 (hereinafter "a juvenile offender") shall be treated with dignity and a sense of worth, taking into account his or her young age and the desirability of promoting his or her rehabilitation, reintegration into and assumption of a constructive role in society.

3. In a trial of a juvenile offender, the Special Court shall:

(a) Consider, as a priority, the release of the juvenile, unless his or her safety and security requires that the juvenile offender be placed under close supervision or in a remand home; detention pending trial shall be used as a measure of last resort;

(b) Constitute a "Juvenile Chamber" composed of at least one sitting judge and one alternate judge possessing the required qualifications and experience in juvenile justice;

(c) Order the separation of his or her trial, if jointly accused with adults;

(d) Provide the juvenile with the legal, social and any other assistance in the preparation and presentation of his or her defence, including the participation in legal proceedings of the juvenile offender's parent or legal guardian;

(e) Provide protective measures to ensure the privacy of the juvenile; such measures shall include, but not be limited to, the protection of the juvenile's identity, or the conduct of in camera proceedings;

(f) In the disposition of his or her case, order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.

Article 8
Concurrent jurisdiction

1. The Special Court and the national courts of Sierra Leone shall have concurrent jurisdiction.

2. The Special Court shall have primacy over the national courts of Sierra Leone. At any stage of the procedure, the Special Court may formally request a national court to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence.

Article 9
Non bis in idem

1. No person shall be tried before a national court of Sierra Leone for acts for which he or she has already been tried by the Special Court.

2. A person who has been tried by a national court for the acts referred to in articles 2 and 4 of the present Statute may be subsequently tried by the Special Court if:

(a) The act for which he or she was tried was characterized as an ordinary crime; or

(b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility or the case was not diligently prosecuted.

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the Special Court shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10
Amnesty

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.

Article 11
Organization of the Special Court

The Special Court shall consist of the following organs:

(a) The Chambers, comprising two Trial Chambers and an Appeals Chamber;

(b) The Prosecutor; and

(c) The Registry.

Article 12
Composition of the Chambers

1. The Chambers shall be composed of eleven independent judges, who shall serve as follows:

(a) Three judges shall serve in each of the Trial Chambers, of whom one shall be a judge appointed by the Government of Sierra Leone, and two judges appointed by the Secretary-General of the United Nations (hereinafter "the Secretary-General");

(b) Five judges shall serve in the Appeals Chamber, of whom two shall be judges appointed by the Government of Sierra Leone, and three judges appointed by the Secretary-General.

2. Each judge shall serve only in the Chamber to which he or she has been appointed.

3. The judges of the Appeals Chamber and the judges of the Trial Chambers, respectively, shall elect a presiding judge who shall conduct the proceedings in the Chamber to which he or she was elected. The presiding judge of the Appeals Chamber shall be the President of the Special Court.

4. In addition to the judges sitting in the Chambers and present at every stage of the proceedings, the presiding judge of a Trial Chamber or the Appeals Chamber shall designate an alternate judge appointed by either the Government of Sierra Leone or the Secretary-General, to be present at each stage of the trial, and to replace a judge, if that judge is unable to continue sitting.

Article 13
Qualification and appointment of judges

1. The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. They shall be independent in the performance of their functions, and shall not accept or seek instructions from any Government or any other source.

2. In the overall composition of the Chambers, due account shall be taken of the experience of the judges in international law, including international humanitarian law and human rights law, criminal law and juvenile justice.

3. The judges shall be appointed for a four-year period and shall be eligible for reappointment.

Article 14
Rules of Procedure and Evidence

1. The Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court shall be applicable mutatis mutandis to the conduct of the legal proceedings before the Special Court.

2. The judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not

adequately, provide for a specific situation. In so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965, of Sierra Leone.

Article 15
The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons most responsible for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other source.

2. The Office of the Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor shall, as appropriate, be assisted by the Sierra Leonean authorities concerned.

3. The Prosecutor shall be appointed by the Secretary-General for a four-year term and shall be eligible for reappointment. He or she shall be of high moral character and possess the highest level of professional competence and have extensive experience in the conduct of investigations and prosecution of criminal cases.

4. The Prosecutor shall be assisted by a Sierra Leonean Deputy Prosecutor, and by such other Sierra Leonean and international staff as may be required to perform the functions assigned to him or her effectively and efficiently. Given the nature of the crimes committed and the particular sensitivities of girls, young women and children victims of rape, sexual assault, abduction and slavery of all kinds, due consideration should be given in the appointment of staff to the employment of prosecutors and investigators experienced in gender-related crimes and juvenile justice.

5. In the prosecution of juvenile offenders, the Prosecutor shall ensure that the child-rehabilitation programme is not placed at risk and that, where appropriate, resort should be had to alternative truth and reconciliation mechanisms, to the extent of their availability.

Article 16
The Registry

1. The Registry shall be responsible for the administration and servicing of the Special Court.

2. The Registry shall consist of a Registrar and such other staff as may be required.

3. The Registrar shall be appointed by the Secretary-General after consultation with the President of the Special Court and shall be a staff member of the United Nations. He or she shall serve for a four-year term and be eligible for reappointment.

4. The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance

for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. The Unit personnel shall include experts in trauma, including trauma related to crimes of sexual violence and violence against children.

Article 17
Rights of the accused

1. All accused shall be equal before the Special Court.

2. The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.

3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.

4. In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her;

(b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

(c) To be tried without undue delay;

(d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her;

(f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court;

(g) Not to be compelled to testify against himself or herself or to confess guilt.

Article 18
Judgement

The judgement shall be rendered by a majority of the judges of the Trial Chamber or of the Appeals Chamber, and shall be delivered in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended.

Article 19
Penalties

1. The Trial Chamber shall impose upon a convicted person, other than a juvenile offender, imprisonment for a specified number of years. In determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone.

2. In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

3. In addition to imprisonment, the Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.

Article 20
Appellate proceedings

1. The Appeals Chamber shall hear appeals from persons convicted by a Trial Chamber or from the Prosecutor on the following grounds:

(a) A procedural error;

(b) An error on a question of law invalidating the decision;

(c) An error of fact which has occasioned a miscarriage of justice.

2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chamber.

3. The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the Former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

Article 21
Review proceedings

1. Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chamber or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit an application for review of the judgement.

2. An application for review shall be submitted to the Appeals Chamber. The Appeals Chamber may reject the application if it considers it to be unfounded. If it determines that the application is meritorious, it may, as appropriate:

(a) Reconvene the Trial Chamber;

(b) Retain jurisdiction over the matter.

Article 22
Enforcement of sentences

1. Imprisonment shall be served in Sierra Leone. If circumstances so require, imprisonment may also be served in any of the States which have concluded with the International Criminal Tribunal for Rwanda or the International Tribunal for the Former Yugoslavia an agreement for the enforcement of sentences, and which have indicated to the Registrar of the Special Court their willingness to accept convicted persons. The Special Court may conclude similar agreements for the enforcement of sentences with other States.

2. Conditions of imprisonment, whether in Sierra Leone or in a third State, shall be governed by the law of the State of enforcement subject to the supervision of the Special Court. The State of enforcement shall be bound by the duration of the sentence, subject to article 23 of the present Statute.

Article 23
Pardon or commutation of sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the Special Court accordingly. There shall only be pardon or commutation of sentence if the President of the Special Court, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 24
Working language

The working language of the Special Court shall be English.

Article 25
Annual report

The President of the Special Court shall submit an annual report on the operation and activities of the Court to the Secretary-General and to the Government of Sierra Leone.

ANNEX 17:

Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General, U.N. Doc. S/2000/1234, 22 December 2000.

6284

United Nations S/2000/1234

Security Council

Distr.: General
22 December 2000

Original: English

Letter dated 22 December 2000 from the President of the Security Council addressed to the Secretary-General

The members of the Security Council have carefully reviewed your report of 4 October 2000 on the establishment of a Special Court for Sierra Leone (S/2000/915). The Council members wish to convey their deep appreciation for the observations and recommendations set forth in your report.

The members of the Security Council reaffirm their support for resolution 1315 (2000) and its reiteration that the situation in Sierra Leone constitutes a threat to international peace and security. With the objective of conforming to resolution 1315 (2000) and related concerns, and subject to the agreement of the Government of Sierra Leone as necessary and appropriate, the members of the Council suggest that the draft Agreement between the United Nations and the Government of Sierra Leone and the proposed Statute of the Court be amended to incorporate the views set forth below.

1. *Personal jurisdiction.* The members of the Security Council continue to hold the view, as expressed in resolution 1315 (2000), that the Special Court for Sierra Leone should have personal jurisdiction over persons who bear the greatest responsibility for the commission of crimes, including crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone. The members of the Security Council believe that, by thus limiting the focus of the Special Court to those who played a leadership role, the simpler and more general formulations suggested in the appended draft will be appropriate. It is the view of the members of the Council that the Truth and Reconciliation Commission will have a major role to play in the case of juvenile offenders, and the members of the Security Council encourage the Government of Sierra Leone and the United Nations to develop suitable institutions, including specific provisions related to children, to this end. The members of the Security Council believe that it is the responsibility of Member States who have sent peacekeepers to Sierra Leone to investigate and prosecute any crimes they may have allegedly committed. Given the circumstances of the situation in Sierra Leone, the Special Court would have jurisdiction over those crimes only if the Security Council considers that the Member State is not discharging that responsibility. Therefore, Council members propose the inclusion of language in the Agreement to be concluded between the United Nations and the Government of Sierra Leone and in the Statute of the Special Court to that effect.

00-81277 (E) 221200
0081277

2. *Funding.* Pursuant to resolution 1315 (2000), members of the Security Council support the creation of a Special Court for Sierra Leone funded through voluntary contributions. Such contributions shall take the form of funds, equipment and services, including the offer of expert personnel that may be needed from States, intergovernmental organizations and non-governmental organizations. It is understood that you cannot be expected to create any institution for which you do not have adequate funds in hand for at least 12 months and pledges to cover anticipated expenses for a second year of the Court's operation.

In order to assist the Court on questions of funding and administration, it is suggested that the arrangements between the Government of Sierra Leone and the United Nations provide for a management or oversight committee which could include representatives of Sierra Leone, the Secretary-General of the United Nations, the Court and interested voluntary contributors. The management committee would assist the court in obtaining adequate funding, provide advice on matters of Court administration and be available as appropriate to consult on other non-judicial matters.

3. *Court size.* The members of the Security Council do not believe the creation of two Trial Chambers and the use of alternate judges as proposed in your report is necessary, at least not from the very outset. The Special Court should begin its work with a single Trial Chamber, with the possibility of adding a second Chamber should the developing caseload warrant its creation. Council members also question the provision in the draft Agreement and Statute calling for alternate judges. It should be noted in this connection that neither the International Tribunal for the Former Yugoslavia nor the International Criminal Tribunal for Rwanda employs alternate judges.

The members suggest the following further adjustments of a technical or drafting nature to the Agreement: Add an express provision to article 13 as a new subparagraph (d) under paragraph 2, concerning immigration restrictions; to article 14 concerning witnesses and experts; and to article 4 (c) of the Statute of the Court, modifying it so as to conform it to the statement of the law existing in 1996 and as currently accepted by the international community.

The members of the Security Council express their hope that you will concur with the proposals outlined above and adjust the draft Agreement between the United Nations and the Government of Sierra Leone and the Statute of the Court as expeditiously as possible, along the above lines and as indicated in the attached annex.

(*Signed*) Sergey **Lavrov**
President of the Security Council

ANNEX 18:

Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, U.N. Doc.S/2001/693, 13 July 2001.

United Nations S/2001/693

Security Council

Distr.: General
13 July 2001

Original: English

Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council

Members of the Security Council will recall that, following the submission of the report of the Secretary-General on the establishment of a Special Court for Sierra Leone (S/2000/915) on 4 October 2000, letters were exchanged between the Council and the Secretary-General on 22 December 2000 (S/2000/1234), 12 January 2001 (S/2001/40) and 31 January 2001 (S/2001/95), which led to modifications in the text of both the draft Agreement with the Government of Sierra Leone and the draft statute of the Court. The Government of Sierra Leone was consulted on these changes and by letter of 9 February 2001 to the Legal Counsel expressed its willingness to accept the texts.

As agreed, however, between members of the Council and the Secretary-General, implementation of the revised Agreement would commence only after it could be ascertained that sufficient contributions were in hand to finance the establishment of the Court and 12 months of its operation, and pledges equal to the anticipated expenses of the following 24 months. At that time also, the Secretary-General and the Government of Sierra Leone would conclude the Agreement on the Establishment of the Special Court for Sierra Leone, thus establishing the legal framework for the commencement of the operation.

On 23 March 2001, I launched an appeal to all States to make contributions in funds, personnel and services to the Special Court for Sierra Leone. The estimated requirements for the establishment and first year of operation of the Court and for the following 24 months, based on the application of the United Nations Financial Regulations and Rules and the Staff Regulations and Rules, amounted to $30.2 million and $84.4 million, respectively, and a total of $114.6 million.

With the start of the appeal period of 60 days, a process of regular informal consultations between the Secretariat and a group of interested States was initiated by the Legal Counsel. The purpose of those consultations was to discuss the practical arrangements for the establishment and operation of the Special Court, in particular the establishment of a Management Committee, elements of the budget estimates, the level of posts and scale of salaries for international and local personnel, and premises for the Court. In the course of these meetings it became apparent that the financial parameters had been substantially reduced, and that the amount of contributions likely to be made available for the start-up phase and the first year of operation of the Court would range between $15 million and $18 million only.

01-45550 (E) 130701
0145550

Concerned about the viability of a Special Court budgeted at a reduced level, I invited the 15 members of the Security Council to an informal meeting on 1 June 2001. Different views were expressed at that meeting on the need to downsize the operation of the Special Court commensurate with the amount of funds likely to be made available. Members of the Council reiterated their understanding that, without prejudice to the independence of the Prosecutor, the personal jurisdiction of the Special Court remains limited to the few who bear the greatest responsibility for the crimes committed. At my suggestion, it was agreed to continue the discussion on revising the concept of operation of the Special Court in a small working group consisting of interested States and a Secretariat team. On 14 June 2001, the Secretariat presented to the group of interested States revised budget estimates amounting approximately to $57 million for the first three years of operation of the Court, with $16.8 million for the first year.

The revised budget estimates reflect a scaled-down operation of the Special Court, while maintaining its nature and sui generis character, international standards of justice and the applicable law. A combination of factors including a different basis for calculation of salaries, a reduction in the normal rates of programme backstopping and contingency requirements, as well as a reliance on Sierra Leonean institutions and personnel, and on UNAMSIL administrative and security capacity, at least in the initial start-up phase, resulted in the reduction of the budget estimates.

On the basis of the revised budget, I renewed on 18 June 2001 the appeal for States to indicate by 29 June 2001 what contributions in funds, personnel, equipment and services they would be willing to make for the establishment and first 12 months of operation of the Special Court, and pledges for the following 24 months. In that appeal, I underlined the importance of appointing a Prosecutor, prosecutorial and investigative staff, a Registrar, and Judges for the Trial and the Appeals Chambers. Nominations or contributions of any or all such personnel were welcomed.

As at 6 July 2001, the Secretariat has received indications of contributions in funds for the first year of operation of the Special Court in the amount of $15 million — a shortfall of approximately $1.8 million — and pledges for the following 24 months in the amount of approximately $20.4 million — a shortfall of approximately $19.6 million for the second and third years. Very limited contributions of personnel have been offered. In addition, one State offered an in-kind contribution of furniture.

Considering that the amount of contributions obtained is sufficient to commence the establishment and operation of the Special Court according to the scaled-down concept of operation, I intend to circulate a letter to the countries which have made pledges for the first three years of operation of the Special Court, and request that they deposit their contributions for the first year into a Trust Fund within 30 days. When funds are available in the pledged amount in the Trust Fund, I will ask the Legal Counsel to conclude on behalf of the United Nations the Agreement on the Establishment of the Special Court with the Government of Sierra Leone. I also intend to dispatch a planning mission to Freetown to discuss with the Sierra Leonean authorities the practical implementation of the Agreement and the kind and scope of contributions expected in Sierra Leonean personnel and services, and to lay the ground work for the arrival of the advance elements of the Special Court, consisting of the nucleus of its administrative and prosecutorial staff.

In ascertaining the sufficiency of funds to commence the establishment and operation of the Special Court, I remain conscious of the difficulties inherent in securing funding on the basis of voluntary contributions. I therefore reserve the right to revert to the Council at any time in the course of the operation of the Special Court and ask it to reconsider alternate means of financing the Court. Once the Special Court is established, Member States have a responsibility to ensure that sufficient resources are available to secure the completion of proceedings against those indicted.

I would appreciate the concurrence of the Council with the proposed approach.

(*Signed*) Kofi A. **Annan**

ANNEX 19:

Resolution of the Plight of African Children in Situation of Armed Conflicts (CM/Res.1659 (LXIV) REV.1, adopted by the Council of Ministers of the Organization of African Unity at its 64th Ordinary Session from 1-5 July 1996.

6292

COUNCIL OF MINISTERS

Sixty-Fourth Ordinary Session
1-5 July 1996
(LXIV)
Yaoundé, Cameroon

CM/Res. 1647-1680

RESOLUTIONS ADOPTED BY THE SIXTY-FOURTH ORDINARY SESSION OF THE COUNCIL OF MINISTERS

6293

RESOLUTION OF THE PLIGHT OF AFRICAN

CHILDREN IN SITUATION OF ARMED CONFLICTS

The Council of Ministers of the Organization of African Unity meeting in its Sixty-Fourth Ordinary Session, in Yaounde, Cameroon, from 1 to 5 July, 1996,

Having carefully listened to the report of the Secretary-General on conflict situations in Africa, and to the UNICEF statement on the Situation of Children under Armed Conflicts and its Anti-War Agenda,

Noting with deep concern that the negative effects of armed conflicts are jeopardizing the survival and development of African children and hence the future of the continent,

Painfully aware that civil strife and armed conflicts have been impeding the tangible progress achieved through Member States' programmes on child survival, protection and development,

Recalling the strong commitment of African Heads of State and Government towards the eradication of wars and armed conflicts in Africa as demonstrated by the establishment, within the OAU General Secretariat, in 1993, of a Mechanism for Conflict Prevention, Management and Resolution,

Convinced that dialogue is one of the most effective tool for creating conditions of peace, security and stability on the continent;

Mindful that Africa has committed itself to ensuring its children's welfare on the occasion of the World Summit for Children in 1990 as well as the OAU International Conference on Assistance to African Children, and through adopting several declarations and resolutions on child survival, protection and development, including the Consensus of Dakar and the African Charter on the Rights and Welfare of the Child;

1. **TAKES NOTE** of the UNICEF Anti-War Agenda, aimed at protecting children and women from the scourge of armed conflicts;

2. **APPEALS** to OAU Member States which have not yet done so to sign and ratify the African Charter on the Rights and Welfare of the Child;

3. **APPEALS FURTHER** to OAU Member States to fulfill their commitments to children by fully implementing the Consensus of Dakar and the Convention on the Rights of the Child especially the articles on the protection of children under armed conflicts;

4. **CALLS ON UNICEF** and the international community as a whole to assist African countries concerned in clearing land-mines, and in rehabilitating people and lands affected by these deadly weapons;

5. **EXHORTS** all African countries, in particular the warring parties in those countries embroiled in civil wars, to keep children out of war situations and to refrain from recruiting children under the age of 18 in armed conflict or violent activities of any kind whatsoever;

6. **URGES** all the warring parties, Governments and others release child combatants from the army and give them adequate education and training, rehabilitate and reintegrate them in civil society so as to make them once more productive and

responsible citizens of their respective countries;

7. **REAFFIRSM** that the use of children in armed conflicts constitutes a violation of their rights and should be considered as war crimes;

8. **REQUESTS** the Secretary-General, in cooperation with international organizations and NGOs to consider modalities for organizing regional training programmes for members of the armed forces relating to the respect of basic human rights and international humanitarian law and to the protection of civilians, most of whom are children and women, during military operations;

9. **RECOMMENDS** that, zones and corridors of peace be established during armed conflicts to protect children and mothers in order to facilitate both the delivery of humanitarian aid and the provision of social services, such as education and health, and, in particular immunizations;

10. **INVITES** warring parties to pay special attention to the protection of girls and women;

11. **REQUESTS ONE MORE**, the UNICEF and the OAU General Secretariat to recommit themselves to the existing Cooperation Agreement as well as all earlier Resolutions which all upon UNICEF to assist the OAU with the necessary financial, logistical as well as material support aimed at promoting the welfare, survival, protection and development of African Children;

12. **COMMENDS** the active participation of children in the 1996 celebration of the Day of the African Child, and recommends that an Annual Children's Parliamentary Session to be held in each OAU Member States, for the Day of the African Child, in order to enable children discuss issues not only affecting their welfare, but also their respective countries;

13. **CALLS UPON** the Secretary-General of the OAU to follow-up closely the working relations between UNICEF and OAU and to submit a Report relating to the implementation of this resolution to the Council of Ministers as appropriate.

ANNEX 20:

Security Council Resolution 935 (1994), 1 July 1994.

6298

UNITED NATIONS

S

Security Council

Distr.
GENERAL

S/RES/935 (1994)
1 July 1994

RESOLUTION 935 (1994)

Adopted by the Security Council at its 3400th meeting, on 1 July 1994

The Security Council,

Reaffirming all its previous resolutions on the situation in Rwanda,

Reaffirming, in particular, resolutions 918 (1994) and 925 (1994), which expanded the United Nations Assistance Mission for Rwanda (UNAMIR), and stressing in this connection the need for early deployment of the expanded UNAMIR to enable it to carry out its mandate,

Recalling the statement by the President of the Security Council of 30 April 1994 (S/PRST/1994/21) in which the Security Council, inter alia, condemned all breaches of international humanitarian law in Rwanda, particularly those perpetrated against the civilian population, and recalled that persons who instigate or participate in such acts are individually responsible,

Recalling also the requests it addressed to the Secretary-General in the statement by the President of the Security Council of 30 April 1994 and in resolution 918 (1994), concerning the investigation of serious violations of international humanitarian law committed in Rwanda during the conflict,

Having considered the report of the Secretary-General of 31 May 1994 (S/1994/640), in which he noted that massacres and killings have continued in a systematic manner throughout Rwanda and also noted that only a proper investigation can establish the facts in order to enable the determination of responsibility,

Welcoming the visit to Rwanda and to the region by the United Nations High Commissioner for Human Rights and noting the appointment, pursuant to resolution S-3/1 of 25 May 1994 adopted by the United Nations Commission on Human Rights, of a Special Rapporteur for Rwanda,

Expressing once again its grave concern at the continuing reports indicating that systematic, widespread and flagrant violations of international humanitarian law, including acts of genocide, have been committed in Rwanda,

Recalling that all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice,

1. Requests the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse information submitted pursuant to the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or the efforts of other persons or bodies, including the information made available by the Special Rapporteur for Rwanda, with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide;

2. Calls upon States and, as appropriate, international humanitarian organizations to collate substantiated information in their possession or submitted to them relating to grave violations of international humanitarian law, including breaches of the Convention on the Prevention and Punishment of the Crime of Genocide, committed in Rwanda during the conflict, and requests States, relevant United Nations bodies, and relevant organizations to make this information available within thirty days of the adoption of the present resolution and as appropriate thereafter, and to provide appropriate assistance to the Commission of Experts referred to in paragraph 1;

3. Requests the Secretary-General to report to the Council on the establishment of the Commission of Experts, and further requests the Secretary-General, within four months from the establishment of the Commission of Experts, to report to the Council, on the conclusions of the Commission and to take account of these conclusions in any recommendations for further appropriate steps;

4. Also requests the Secretary-General and as appropriate the High Commissioner for Human Rights through the Secretary-General to make the information submitted to the Special Rapporteur for Rwanda available to the Commission of Experts and to facilitate adequate coordination and cooperation between the work of the Commission of Experts and the Special Rapporteur in the performance of their respective tasks;

5. Urges all concerned fully to cooperate with the Commission of Experts in the accomplishment of its mandate, including responding positively to requests from the Commission for assistance and access in pursuing investigations;

6. Decides to remain actively seized of the matter.

6300

ANNEX 21:

General Assembly Resolution 50/46, 18 December 1995.

.6301

UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/RES/50/46
18 December 1995

Fiftieth session
Agenda item 142

RESOLUTION ADOPTED BY THE GENERAL ASSEMBLY

[on the report of the Sixth Committee (A/50/639 and Corr.1)]

50/46. Establishment of an international criminal court

The General Assembly,

Recalling its resolution 47/33 of 25 November 1992, in which it requested the International Law Commission to undertake the elaboration of a draft statute for an international criminal court,

Recalling also its resolution 48/31 of 9 December 1993, in which it requested the International Law Commission to continue its work on the question of the draft statute for an international criminal court, with a view to elaborating a draft statute for such a court, if possible at the Commission's forty-sixth session in 1994,

Recalling further that the International Law Commission adopted a draft statute for an international criminal court 1/ at its forty-sixth session and decided to recommend that an international conference of plenipotentiaries be convened to study the draft statute and to conclude a convention on the establishment of an international criminal court, 2/

Recalling its resolution 49/53 of 9 December 1994, in which it decided to establish an ad hoc committee, open to all States Members of the United Nations or members of specialized agencies, to review the major substantive and administrative issues arising out of the draft statute prepared by the

---

1/ Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 91.

2/ Ibid., para. 90.

International Law Commission and, in the light of that review, to consider arrangements for the convening of an international conference of plenipotentiaries,

Noting that the Ad Hoc Committee on the Establishment of an International Criminal Court has made considerable progress during its sessions on the review of the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission,

Noting also that the States participating in the Ad Hoc Committee still have different views on major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and that, therefore, further discussions are needed for reaching consensus on the above issues in the future,

Noting further that the Ad Hoc Committee is of the opinion that issues can be addressed most effectively by combining further discussions with the drafting of texts, with a view to preparing a consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries,

Noting that the Ad Hoc Committee recommends that the General Assembly take up the organization of future work with a view to its early completion, given the interest of the international community in the establishment of an international criminal court,

Noting also that the Ad Hoc Committee encourages participation by the largest number of States in its future work in order to promote universality,

Expressing deep appreciation for the renewed offer of the Government of Italy to host a conference on the establishment of an international criminal court,

1. Takes note of the report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 3/ including the recommendations contained therein, and expresses its appreciation to the Ad Hoc Committee for the useful work done;

2. Decides to establish a preparatory committee open to all States Members of the United Nations or members of specialized agencies or of the International Atomic Energy Agency, to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission and, taking into account the different views expressed during the meetings, to draft texts, with a view to preparing a widely acceptable consolidated text of a convention for an international criminal court as a next step towards consideration by a conference of plenipotentiaries, and also decides that the work of the Preparatory Committee should be based on the draft statute prepared by the International Law Commission and should take into account the report of the Ad Hoc Committee and the written comments submitted by States to the Secretary-General on the draft statute for an international criminal court pursuant to paragraph 4 of General

---

3/ Ibid., Fiftieth Session, Supplement No. 22 (A/50/22).

Assembly resolution 49/53 4/ and, as appropriate, contributions of relevant organizations;

3. Also decides that the Preparatory Committee will meet from 25 March to 12 April and from 12 to 30 August 1996 and submit its report to the General Assembly at the beginning of its fifty-first session, and requests the Secretary-General to provide the Preparatory Committee with the necessary facilities for the performance of its work;

4. Urges participation in the Preparatory Committee by the largest number of States in order to promote universal support for an international criminal court;

5. Decides to include in the provisional agenda of its fifty-first session an item entitled "Establishment of an international criminal court", in order to study the report of the Preparatory Committee and, in the light of that report, to decide on the convening of an international conference of plenipotentiaries to finalize and adopt a convention on the establishment of an international criminal court, including on the timing and the duration of the conference.

87th plenary meeting
11 December 1995

4/ A/AC.244/1 and Add.1-4.

6304

ANNEX 22:

Security Coucil Resolution 1072 (1996).

6305

UNITED
NATIONS

S

Security Council

Distr.
GENERAL

S/RES/1072 (1996)
30 August 1996

RESOLUTION 1072 (1996)

Adopted by the Security Council at its 3695th meeting,
on 30 August 1996

The Security Council,

Reaffirming all its previous resolutions and statements by its President on the situation in Burundi,

Recalling the statement by its President of 24 July 1996 (S/PRST/1996/31) in which the Council strongly condemned any attempt to overthrow the legitimate Government of Burundi by force or coup d'état, and recalling also the statement by its President of 29 July 1996 (S/PRST/1996/32) in which the Council condemned the actions that led to the overthrow of constitutional order in Burundi,

Deeply concerned at the continued deterioration in the security and humanitarian situation in Burundi that has been characterized in the last years by killings, massacres, torture and arbitrary detention, and at the threat that this poses to the peace and security of the Great Lakes Region as a whole,

Reiterating its appeal to all parties in Burundi to defuse the present crisis and to demonstrate the necessary cohesion, unity and political will to restore constitutional order and processes without delay,

Reiterating the urgent need for all parties in Burundi to commit themselves to a dialogue aimed at establishing a comprehensive political settlement and the creation of conditions conducive to national reconciliation,

Recalling that all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for such violations and should be held accountable, and reaffirming the need to put an end to impunity for such acts and the climate that fosters them,

Strongly condemning those responsible for the attacks on personnel of international humanitarian organizations, and underlining that all parties in Burundi are responsible for the security of such personnel,

Emphasizing the urgent need to establish humanitarian corridors to ensure the unimpeded flow of humanitarian goods to all people in Burundi,

Taking note of the letter from the Permanent Representative of the United Republic of Tanzania of 2 August 1996 (S/1996/620, annex and appendix),

Taking note also of the note from the Secretary-General transmitting a letter from the Secretary-General of the Organization of African Unity of 5 August 1996 (S/1996/628, annex),

Reiterating its support for the immediate resumption of dialogue and negotiations under the auspices of the Mwanza Peace Process facilitated by former President Nyerere and the Joint Communiqué of the Second Arusha Regional Summit on Burundi of 31 July 1996 which seeks to guarantee democracy and security for all people in Burundi,

Determined to support the efforts and initiatives of the countries in the region, which were also supported by the Central Organ of the Organization of African Unity (OAU) Mechanism for Conflict Prevention, Management and Resolution aimed at returning Burundi to a democratic path and contributing to stability in the region,

Underlining the importance it attaches to the continuation of the efforts of the OAU and its Observer Mission (MIOB),

Welcoming the efforts made by interested Member States and by the European Union to contribute to a peaceful solution of the political crisis in Burundi,

Underlining that only a comprehensive political settlement can open the way for international cooperation for the reconstruction, development and stability of Burundi, and expressing its readiness to support the convening, when appropriate, of an international conference involving the United Nations system, regional organizations, international financial institutions, donor countries and non-governmental organizations aimed at mobilizing international support for the implementation of a comprehensive political settlement,

Recalling its resolution 1040 (1996) of 29 January 1996, in particular paragraph 8, in which the Council declared its readiness to consider the imposition of measures under the Charter of the United Nations,

Taking note of the report of the Secretary-General of 15 August 1996 (S/1996/660),

A

1. Condemns the overthrow of the legitimate government and constitutional order in Burundi and condemns also all those parties and factions which resort to force and violence to advance their political objectives;

2. Expresses its strong support for the efforts of regional leaders, including at their meeting in Arusha on 31 July 1996, of the OAU and of former President Nyerere, to assist Burundi to overcome peacefully the grave crisis

which it is undergoing, and encourages them to continue to facilitate the search for a political solution;

3. Calls upon the regime to ensure a return to constitutional order and legality, to restore the National Assembly and to lift the ban on all political parties;

4. Demands that all sides in Burundi declare a unilateral cessation of hostilities, call an immediate halt to violence and assume their individual and collective responsibilities to bring peace, security and tranquillity to the people of Burundi;

5. Demands also that the leaders of all parties in Burundi ensure basic conditions of security for all in Burundi by a commitment to abstain from attacking civilians, to ensure the security of humanitarian personnel operating in the territory they control, and to guarantee the protection within Burundi and safe passage out of the country for the members of President Ntibantunganya's government and the members of parliament;

6. Demands also that all of Burundi's political parties and factions without exception, whether inside or outside the country and including representatives of civil society, initiate unconditional negotiations immediately, with a view to reaching a comprehensive political settlement;

7. Declares its readiness to assist the people of Burundi with appropriate international cooperation to support a comprehensive political settlement resulting from these negotiations and, in this context, requests the Secretary-General in consultation with the international community to undertake preparations when appropriate for the convening of a pledging conference to assist in the reconstruction and development of Burundi following the achievement of a comprehensive political settlement;

8. Encourages the Secretary-General in consultation with all those concerned, including the neighbouring States, other Member States, the OAU and international humanitarian organizations, to establish mechanisms to ensure the safe and timely delivery of humanitarian relief throughout Burundi;

9. Acknowledges the implication of the situation in Burundi for the region and underlines the importance of convening at an appropriate time a Regional Conference of the Great Lakes Region, under the auspices of the United Nations and the OAU;

B

10. Decides to re-examine the matter on 31 October 1996, and requests that the Secretary-General report to the Council by that time on the situation in Burundi, including on the status of the negotiations referred to in paragraph 6 above;

11. Decides, in the event that the Secretary-General reports that the negotiations referred to in paragraph 6 above have not been initiated, to consider the imposition of measures under the Charter of the United Nations to further compliance with the demand set out in paragraph 6 above; these may

include, among others, a ban on the sale or supply of arms and related matériel of all types to the regime in Burundi and to all factions inside or outside Burundi, and measures targeted against the leaders of the regime and all factions who continue to encourage violence and obstruct a peaceful resolution of the political crisis in Burundi;

12. Reiterates the importance it attaches to the contingency planning called for in paragraph 13 of resolution 1049 (1996) of 5 March 1996 and encourages the Secretary-General and Member States to continue to facilitate contingency planning for an international presence and other initiatives to support and help consolidate a cessation of hostilities, as well as to make a rapid humanitarian response in the event of widespread violence or a serious deterioration in the humanitarian situation in Burundi;

13. Decides to remain actively seized of the matter.

6309

ANNEX 23:

Security Council Resolution 865 (1993).

6310

UNITED NATIONS

S

Security Council

Distr.
GENERAL

S/RES/865 (1993)
22 September 1993

RESOLUTION 865 (1993)

Adopted by the Security Council at its 3280th meeting, on 22 September 1993

The Security Council,

Reaffirming its resolutions 733 (1992) of 23 January 1992, 746 (1992) of 17 March 1992, 751 (1992) of 24 April 1992, 767 (1992) of 27 July 1992, 755 (1992) of 28 August 1992, 794 (1992) of 3 December 1992, 814 (1993) of 26 March 1993 and 837 (1993) of 6 June 1993,

Having considered the report of the Secretary-General (S/26317) of 17 August 1993,

Stressing the importance of continuing the peace process initiated by the Addis Ababa agreement and in this connection welcoming the efforts of African countries, the Organization of African Unity, in particular its Horn of Africa Standing Committee, the League of Arab States and the Organization of the Islamic Conference, in cooperation with and in support of the United Nations, to promote national reconciliation in Somalia,

Stressing the commitment of the international community to help Somalia regain a normal, peaceful life, while recognizing that the people of Somalia bear the ultimate responsibility for national reconciliation and reconstruction of their own country,

Expressing its appreciation for the improvements in the overall situation, which have been achieved by the United Nations Operation in Somalia (UNOSOM II), in particular, eradication of starvation, establishment of a large number of district councils, opening of schools and resumption by the Somali people in most areas of the country of their normal lives,

Recognizing the continuing need for broadbased consultations and consensus on basic principles to achieve national reconciliation and the establishment of democratic institutions,

Calling upon all Somali parties, including movements and factions, to show the political will to achieve reconciliation, peace and security,

Recognizing that the highest priority for UNOSOM II is to assist the people of Somalia in the furtherance of the national reconciliation process and to promote and advance the re-establishment of regional and national institutions and civil administration in the entire country, as set out in resolution 814 (1993),

Noting with great concern, despite the improvements in the overall situation in Somalia, continuing reports of violence in Mogadishu and the absence of law enforcement and judicial authorities and institutions in the country as a whole, and recalling the request to the Secretary-General in resolution 814 (1993) to assist in the re-establishment of the Somali police and the restoration and maintenance of peace, stability, and law and order,

Convinced that the re-establishment of the Somali police, and judicial and penal systems, is critical for the restoration of security and stability in the country,

Gravely concerned at the continuation of armed attacks against the personnel of UNOSOM II, and recalling its resolution 814 (1993) which emphasized the fundamental importance of a comprehensive and effective programme for disarming Somali parties, including movements and factions,

A

1. Welcomes the reports by the Secretary-General and his Special Representative on the progress achieved in accomplishing the objectives set out in resolution 814 (1993);

2. Commends the Secretary-General, his Special Representative, and all the personnel of UNOSOM II, for their achievements in greatly improving the conditions of the Somali people and beginning the process of nation-building apparent in the restoration in much of the country of stable and secure conditions in stark contrast with the prior suffering caused by inter-clan conflict;

3. Condemns all attacks on UNOSOM II personnel and reaffirms that those who have committed or have ordered the commission of such criminal acts will be held individually responsible for them;

4. Affirms the importance it attaches to the successful fulfilment on an urgent and accelerated basis of UNOSOM II's objectives of facilitation of humanitarian assistance and the restoration of law and order, and of national reconciliation in a free, democratic and sovereign Somalia, so that it can complete its mission by March 1995;

5. Requests, in that context, the Secretary-General to direct the urgent preparation of a detailed plan with concrete steps setting out UNOSOM II's future concerted strategy with regard to its humanitarian, political and security activities and to report thereon to the Council as soon as possible;

6. Urges the Secretary-General to re-double his efforts at the local, regional and national levels, including encouraging broad participation by all sectors of Somali society, to continue the process of national reconciliation

and political settlement, and to assist the people of Somalia in rehabilitating their political institutions and economy;

7. Calls on all Member States to assist, in all ways possible, including the urgent full staffing of UNOSOM II civil positions, the Secretary-General, in conjunction with regional organizations, in his efforts to reconcile the parties and rebuild Somali political institutions;

8. Invites the Secretary-General to consult the countries of the region and regional organizations concerned on means of further reinvigorating the reconciliation process;

B

9. Approves the recommendations of the Secretary-General contained in annex I to his report of 17 August 1993 (S/26317) relating to the re-establishment of the Somali police, judicial and penal systems in accordance with resolution 814 (1993) and requests the Secretary-General to take the necessary steps on an urgent and accelerated basis to implement them;

10. Welcomes the Secretary-General's intention to convene at the earliest possible date a meeting of Member States interested in supporting UNOSOM II in the re-establishment of the police, judicial and penal systems, for the purpose of determining specific requirements and identifying specific sources of support;

11. Further requests the Secretary-General to undertake actively and as a matter of great urgency an international recruiting programme for staffing the UNOSOM II Justice Division with police, judicial and penal system specialists;

12. Welcomes the Secretary-General's intention to maintain and utilize the fund established pursuant to resolution 794 (1992) and maintained in resolution 814 (1993) for the additional purpose of receiving contributions for the re-establishment of the Somali judicial and penal systems in addition to the establishment of the Somali police, other than for the cost of international staff;

13. Urges Member States, on an urgent basis, to contribute to that fund or otherwise to provide assistance for the re-establishment of the Somali police, judicial and penal systems, including personnel, financial support, equipment and training to help attain the objectives outlined in annex I to the Secretary-General's report (S/26317);

14. Encourages the Secretary-General to take the necessary steps to ensure continuation of the current police, judicial and penal programme from October to the end of December 1993 until additional funding from Member States is forthcoming, and to make recommendations as appropriate to the General Assembly;

15. Requests the Secretary-General to keep the Council fully informed on a regular basis on the implementation of this resolution;

16. Decides to remain actively seized of the matter.

6313

ANNEX 24:

List of State parties to Additional Protocol II.

6314

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

States parties

Albania		16.07.1993	
Algeria		16.08.1989	
Antigua and Barbuda		06.10.1986	
Argentina		26.11.1986	26.11.1986
Armenia		07.06.1993	
Australia	07.12.1978	21.06.1991	
Austria	12.12.1977	13.08.1982	13.08.1982
Bahamas		10.04.1980	
Bahrain		30.10.1986	
Bangladesh		08.09.1980	
Barbados		19.02.1990	
Belarus	12.12.1977.	23.10.1989	
Belgium	12.12.1977.	20.05.1986	
Belize		29.06.1984	
Benin		28.05.1986	
Bolivia		08.12.1983	
Bosnia-Herzegovina		31.12.1992	
Botswana		23.05.1979	
Brazil		05.05.1992	
Brunei Darussalam		14.10.1991	
Bulgaria	11.12.1978.	26.09.1989	
Burkina Faso	11.01.1978.	20.10.1987	
Burundi		10.06.1993	
Cambodia		14.01.1998	
Cameroon		16.03.1984	
Canada	12.12.1977.	20.11.1990	20.11.1990
Cape Verde		16.03.1995	
Central African Republic		17.07.1984	
Chad		17.01.1997	
Chile	12.12.1977.	24.04.1991	
China		14.09.1983	
Colombia		14.08.1995	
Comoros		21.11.1985	
Congo		10.11.1983	
Congo (Dem. Rep.)		12.12.2002	
Cook Islands		07.05.2002	
Costa Rica		15.12.1983	
Côte d'Ivoire	12.12.1977.	20.09.1989	
Croatia		11.05.1992.	
Cuba		23.12.1999	
Cyprus		18.03.1996	
Czech Republic		05.02.1993	

6315

Denmark	12.12.1977.	17.06.1982	
Djibouti		08.04.1991	
Dominica		25.04.1996	
Dominican Republic		26.05.1994	
Ecuador	12.12.1977.	10.04.1979	
Egypt	12.12.1977.	09.10.1992	09.10.1992
El Salvador	12.12.1977.	23.11.1978	
Equatorial Guinea		24.07.1986	
Estonia		18.01.1993	
Ethiopia		08.04.1994	
Finland	12.12.1977.	07.08.1980	
Former Yugoslav Republic of Macedonia		01.09.1993	
France		24.02.1984	24.02.1984
Gabon		08.04.1980	
Gambia		12.01.1989	
Georgia		14.09.1993	
Germany	23.12.1977.	14.02.1991	14.02.1991
Ghana	12.12.1977.	28.02.1978	
Greece		15.02.1993	
Grenada		23.09.1998	
Guatemala	12.12.1977.	19.10.1987	
Guinea		11.07.1984	
Guinea-Bissau		21.10.1986	
Guyana		18.01.1988	
Holy See	12.12.1977.	21.11.1985	21.11.1985
Honduras	12.12.1977.	16.02.1995	
Hungary	12.12.1977.	12.04.1989	
Iceland	12.12.1977.	10.04.1987	
Ireland	12.12.1977.	19.05.1999	19.05.1999
Italy	12.12.1977.	27.02.1986	
Jamaica		29.07.1986	
Jordan	12.12.1977.	01.05.1979	
Kazakhstan		05.05.1992	
Kenya		23.02.1999	
Korea (Republic of)	07.12.1977.	15.01.1982	
Kuwait		17.01.1985	
Kyrgyzstan		18.09.1992	
Lao People's Dem.Rep.	18.04.1978.	18.11.1980	
Latvia		24.12.1991	
Lebanon		23.07.1997	
Lesotho		20.05.1994	
Liberia		30.06.1988	
Libyan Arab Jamahiriya		07.06.1978	
Liechtenstein	12.12.1977.	10.08.1989	10.08.1989
Lithuania		13.07.2000	

6316

Luxembourg	12.12.1977.	29.08.1989	
Madagascar	13.10.1978.	08.05.1992	
Malawi		07.10.1991	
Maldives		03.09.1991	
Mali		08.02.1989	
Malta		17.04.1989	17.04.1989
Mauritania		14.03.1980	
Mauritius		22.03.1982	
Micronesia		19.09.1995	

6317

States Parties and Signatories	Sign.	Ratif./Acc.	Reserve
Micronesia		19.09.1995	
Moldova (Republic of)		24.05.1993	
Monaco		07.01.2000	
Mongolia	12.12.1977.	06.12.1995	
Mozambique		12.11.2002	
Namibia		17.06.1994	
Netherlands	12.12.1977.	26.06.1987	
New Zealand	27.11.1978.	08.02.1988	
Nicaragua	12.12.1977.	19.07.1999	
Niger	16.06.1978.	08.06.1979	
Nigeria		10.10.1988	
Norway	12.12.1977.	14.12.1981	
Oman		29.03.1984	29.03.1984
Palau		25.06.1996	
Panama	12.12.1977.	18.09.1995	
Paraguay		30.11.1990	
Peru	12.12.1977.	14.07.1989	
Philippines		11.12.1986	
Poland	12.12.1977.	23.10.1991	
Portugal	12.12.1977.	27.05.1992	
Romania	28.03.1978.	21.06.1990	
Russian Federation	12.12.1977.	29.09.1989	29.09.1989
Rwanda		19.11.1984	
Saint Kitts and Nevis		14.02.1986	
Saint Lucia		07.10.1982	
Saint Vincent Grenadines		08.04.1983	
Samoa		23.08.1984	
San Marino	22.06.1978	05.04.1994	
Sao Tome and Principe		05.07.1996	
Saudi Arabia		28.11.2001	
Senegal	12.12.1977.	07.05.1985	
Serbia and Montenegro		16.10.2001	
Seychelles		08.11.1984	
Sierra Leone		21.10.1986	
Slovakia		02.04.1993	
Slovenia		26.03.1992	
Solomon Islands		19.09.1988	
South Africa		21.11.1995	
Spain	07.11.1978.	21.04.1989	
Suriname		16.12.1985	
Swaziland		02.11.1995	
Sweden	12.12.1977.	31.08.1979	
Switzerland	12.12.1977.	17.02.1982	
Tajikistan		13.01.1993	

6318

Tanzania (United Rep.of)		15.02.1983	
Togo	21.06.1984.	21.06.1984	
Tonga		20.01.2003	
Trinidad and Tobago		20.07.2001	
Tunisia	12.12.1977.	09.08.1979	
Turkmenistan		10.04.1992	
Uganda		13.03.1991	
Ukraine	12.12.1977.	25.01.1990	
United Arab Emirates		09.03.1983	09.03.1983
United Kingdom	12.12.1977	28.01.1998	
Uruguay		13.12.1985	
Uzbekistan		08.10.1993	
Vanuatu		28.02.1985	
Venezuela		23.07.1998	
Yemen	14.02.1978.	17.04.1990	
Zambia		04.05.1995	
Zimbabwe		19.10.1992	

States signatories

ANNEX 25:

R.Boed, "Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda" (2002) 13 *Criminal Law Forum* p. 293.

CRIMINAL LAW FORUM Volume 13, No. 3, 2002

Volume 13, No. 3, 2002

CRIMINAL LAW FORUM

An International Journal

Rwanda Tribunal Special Issue

Prepared with the assistance of Roger-Noel Kouambo

ADAMA DIENG / Preface

CÉCILE APTEL / The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda

ROMAN BOED / Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda

MAME MANDIAYE NIANG / The Right to Counsel Before the International Criminal Tribunal for Rwanda

ELIZABETH NAHAMYA and ROKHAYATOU DIARRA / Disclosure of Evidence Before the International Criminal Tribunal for Rwanda

JAMIE A. WILLIAMSON / Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda

Subscription prices year 2002 (Volume 13, 4 issues) including postage and handling: USD 267.00/ EUR 266.00 (print *or* electronic access), USD 320.40/ EUR 319.20 (print *and* electronic access). Individuals may subscribe at the reduced rate of USD 84.00/ EUR 84.00 (print only). They must declare that the subscription is for their own private use, it will not replace any institutional subscription, and it will not be put at the disposal of any library.
Subscriptions should be sent to **Kluwer Academic Publishers, Sales and Distribution Center, P.O. Box 322, 3300 AH Dordrecht, The Netherlands,** or at **P.O. Box 358, Accord Station, Hingham, MA 02018-0358, U.S.A.,** or to any subscription agent. Private subscriptions should be sent direct to the publishers.
Changes of mailing address should be notified together with our latest label.
Periodicals postage paid at Rahway, N.J. USPS No. 018-295.
For advertisement rates, prices of back volumes, and other information, please apply to Kluwer Academic Publishers, Van Godewijckstraat 30, P.O. Box 990, 3300 AZ Dordrecht, the Netherlands.

CRIMINAL LAW FORUM
An International Journal
Volume 13 No. 3 2002

Rwanda Tribunal Special Issue

Prepared with the assistance of Roger-Noel Kouambo

ADAMA DIENG / Preface 271–272

CÉCILE APTEL / The Intent to Commit Genocide in the Case Law of the International Criminal Tribunal for Rwanda 273–291

ROMAN BOED / Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case Law of the International Criminal Tribunal for Rwanda 293–322

MAME MANDIAYE NIANG / The Right to Counsel Before the International Criminal Tribunal for Rwanda 323–338

ELIZABETH NAHAMYA and ROKHAYATOU DIARRA / Disclosure of Evidence Before the International Criminal Tribunal for Rwanda 339–364

JAMIE A. WILLIAMSON / Command Responsibility in the Case Law of the International Criminal Tribunal for Rwanda 365–384

Published by Kluwer Academic Publishers
Van Godewijckstraat 30
P.O. Box 990
3300 AZ Dordrecht
The Netherlands

Sold and distributed in Switzerland, Germany and Austria by Helbing & Lichtenhahn Verlag AG Basel CH-4051 Basel Switzerland

In all other countries, sold and distributed by Kluwer Academic Publishers Van Godewijckstraat 30 P.O. Box 990 3300 AZ Dordrecht The Netherlands

ISSN 1046-8374

Subscription queries should be directed to:
Kluwer Academic Publishers
Sales and Distribution Center
PO Box 322
3300 AA Dordrecht
The Netherlands
Tel +31-(0)78-6576 000
Fax +31-(0)78-6576 254
E-mail orderdept@wkap.nl

Criminal Law Forum is published quarterly.
Subscription prices year 2002 (Volume 13, 4 issues) including postage and handling: USD 267.00/EUR 266.00 (print *or* electronic access), USD 320.40/EUR 319.20 (print *and* electronic access). Individuals may subscribe at the reduced rate of USD 84.00/ EUR 84.00 (print only).

Periodicals postage paid at Rahway, NJ, USPS No. 018-295

ADAMA DIENG*

PREFACE

When Raphael Lemkin coined the word "genocide" in 1944, the tragic reality which that concept sought to encompass had nothing in common with the sufferings that certain peoples endured in the course of the history of the human race. The discriminatory atrocities committed against certain human groups on account of their distinctiveness had not always been taken into account in the assessment of the gravity of such acts. The uncompleted persecution and extermination of these groups was always perceived as attacks on the human race, in particular, and as crimes against human civilization or against humanity, as a whole.

History has characterised on hindsight certain tragedies as genocide, whether they be the massacre of the Armenians in 1915, the Cambodians in the seventies; or the extermination of the Jews during the Second World War, or other less well-known physical persecutions of such groups as the Gypsies and the Amerindians. The International Criminal Tribunal for Rwanda (ICTR) – *for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994* – finally brought the crime of genocide to the limelight and imposed thereon a legal and judicial sanction. A legal definition of the concept had been broached in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.

The ICTR was to confer a new and hitherto unprecedented dimension on the international repression of the crime of genocide. From indictment to conviction for genocide, ICTR case law has paved the way for an organised, systematic and exemplary punishment of this crime in all its manifestations.

The ICTR and the International Criminal Tribunal for the former Yugoslavia, as international courts, are trail-blazers in terms of their composition and functioning. Both have had to be innovative in their endeavour in view of the absence of established precedents in law.

* Assistant Secretary General of the United Nations, Registrar of International Criminal Tribunal for Rwanda.

The articles published in this issue of *Criminal Law Forum* are the brainchild of distinguished jurists who have contributed to the emergence of international jurisprudence. They have, individually or collectively, assisted ICTR judges in the preparation of major decisions which have enabled international justice to grow from its initial faltering steps and be transformed into a bulwark of human civilisation.

ICTR case law is credited with upholding some of the principles enshrined in conventions relating to international humanitarian law and enforcing the punishment of violations of human dignity which are crimes under its jurisdiction.

The vacillations in case law are but a reflection of the dimension of the phenomenon and the legal issues that it raises. Proof of "culpable intent" on the part of an individual who seeks to destroy, in whole or in part, a group is by itself an arduous task. Proof of intent to destroy only "part" of a group is equally daunting. Is intent to destroy the whole group not present even if only a part thereof is ultimately destroyed?

In the intent to exterminate a group, in this case the Tutsis and other Hutus who were blacklisted, criminal acts were often carried out on orders. There were those who issued the orders and those who implemented them. The very fact that, in addition to the armed forces with an organised hierarchy, other administrative, political and partisan structures were involved in the conflict raises questions as to the real nature of hierarchical authority and the effectiveness of the subordinate relationship among the authorities, particularly with respect to civilians, and their subordinates.

The innovative and pioneering character of the system adopted by the international court has definitely had an impact on its procedure, particularly with regard to resolving fundamental issues such as the statutory right of the accused to be assigned counsel and *inter partes* disclosure of evidentiary material.

The internal armed conflict that brought about the serious violations of international humanitarian law in Rwanda raises the issue of individual criminal responsibility in regard to serious violations of article 3 common to the 1949 Geneva Conventions and of Additional Protocol II thereto.

ICTR case law has attempted with remarkable analytical discipline to address all of these issues. Its legal rationale, based more on doctrine than on precedent, has averted a trivialisation of these crimes which otherwise would be characterised as ordinary crimes. The ICTR, in that manner, has charted the way forward.

CÉCILE APTEL*

THE INTENT TO COMMIT GENOCIDE IN THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The preamble to the Convention for the Prevention and Punishment of the Crime of Genocide recalls: "At all periods of history genocide has inflicted great losses on humanity."[1] The General Assembly of the United Nations affirmed, when it drafted the Convention, that "genocide is a crime under international law which the civilised world condemns, and for the commission of which principals and accomplices – whether private individuals, public officials or statesmen, and whether the crime is committed on religious, racial, political or any other grounds – are punishable".[2] However, it is only recently that serious efforts have been made by the international community to enforce the Genocide Convention by bringing perpetrators of this crime to justice. The creation of two *ad hoc* international criminal tribunals by the Security Council of the United Nations in 1993 and 1994,[3] followed by the adoption of the Statute of the International Criminal

* Coordinator in the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, formerly Legal Officer, International Criminal Tribunal for Rwanda. Diplôme de l'Institut d'Etudes Politiques (Aix-Marseille III, 1991), Master (College of Europe, Bruges, 1993). The opinions expressed in this article are the author's and do not necessarily represent those of the ICTR or of the United Nations.

[1] Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 U.N.T.S. 277. The Convention came into force on 12 January 1951.

[2] G.A. Res. 96(I).

[3] The International Criminal Tribunal for the Former Yugoslavia was established on 25 May 1993 by Security Council Resolution 808 (subsequently amended by U.N. Doc. S/RES/1166, U.N. Doc. S/RES/1329 and U.N. Doc. S/RES/1411 (2002)). The International Criminal Tribunal for Rwanda was created by Resolution 955 of the Security Council, adopted on 8 November 1994 (subsequently amended by U.N. Doc. S/RES/1165, U.N. Doc. S/RES/1329 and U.N. Doc. S/RES/1411 (2002) and U.N. Doc. S/RES/1431 (2002)). Article 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia, which is an annex to Resolution 827, and article 2 of the Statute of the Inter

Court,[4] constitute major breakthroughs in the prosecution of perpetrators of genocide.

The International Criminal Tribunal for Rwanda (ICTR) was the first international jurisdiction to try and convict individuals on charges of genocide. On 1 May 1998, an ICTR Trial Chamber found Jean Kambanda, former Prime Minister of Rwanda, guilty of genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, complicity in genocide, and crimes against humanity, after he pleaded guilty to all six counts against him.[5] On 2 September 1998, the ICTR condemned Jean-Paul Akayesu for genocide. Its judgment in *Akayesu* provides the first comprehensive judicial definition of genocide, complicity in genocide and direct and public incitement to commit genocide.[6] These rulings have been followed by several others at the ICTR, in the cases of *Kayishema* and *Ruzindana*,[7] *Serushago*,[8] *Rutaganda*,[9] *Musema*,[10] *Ruggiu*,[11] and *Bagilishema*.[12] Similarly, the International Criminal Tribunal for the Former Yugoslavia (ICTY) has ruled on charges of genocide in the *Sikirica*,[13] *Krstic*,[14] and *Jelesic cases*.[15] The Appeals Chamber, common to both the ICTR and the ICTY, has also further clarified certain aspects of the crime of genocide in decisions on some of

[4] The Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, often referred to as the "Rome Statute", was adopted in Rome on 17 July 1998 and entered into force on 1 July 2002.

[5] *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, paras. 3–4.

[6] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998.

[7] *Prosecutor* v. *Kayishema & Ruzindana* (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999.

[8] *Prosecutor* v. *Serushago* (Case No. ICTR-98-39-T), Sentence, 5 February 1999. Omar Serushago had pleaded guilty on 14 December 1998.

[9] *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999.

[10] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000.

[11] *Prosecutor* v. *Ruggiu* (Case No. ICTR-97-32-T), Judgment and Sentence, 1 June 2000. He pleaded guilty to the two counts against him, one for direct and public incitement to commit genocide, on 15 May 2000.

[12] *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001.

[13] *Prosecutor* v. *Sikirica* et al. (Case No. IT-95-8), Judgment on Defence Motions to Acquit, 3 September 2001, and Sentencing Judgment, 13 November 2001.

[14] *Prosecutor* v. *Krstic* (Case No. IT-98-33), Judgment, 2 August 2001.

[15] *Prosecutor* v. *Jelisic* (Case No. IT-95-10-T), Judgment, 14 December 1999. Goran Jelesic was acquitted of genocide by the Trial Chamber, but pleaded guilty to crimes against humanity and violations of the laws or customs of war.

the above-mentioned cases.[16] A corpus of international criminal jurisprudence on genocide is thus being developed, leading to a clarification of the constitutive elements of this crime.[17]

Criminal law requires specification of what must be proven for the offence to be established, in regard to both its material element and its mental or moral element. To establish the crime of genocide, article II of the Genocide Convention separates these two elements. On the one hand, it defines the mental element of genocide in its introductory paragraph (or *chapeau*), as "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". On the other hand, the same provision lists five prohibited acts constituting the material element of a crime of genocide: killing; causing serious bodily or mental harm; deliberately inflicting conditions of life calculated to bring about the physical destruction of a group; imposing measures intended to prevent births; or forcibly transferring children. It is important to note at this juncture that each of these five acts has its own respective mental elements.[18] As noted by the International Law Commission:

[16] To date, the ICTR Appeals Chamber has reviewed the *Akayesu*, *Kambanda*, *Kayishema & Ruzindana*, *Serushago*, *Jelisic* and *Bagilishema* judgments. Only the *Kayishema & Ruzindana* appeals judgment deals with the issue of the requisite intent for genocide, noting: "Kayishema submits that the Trial Chamber erred in finding that he possessed the requisite *mens rea* for the crime of genocide, a challenge which is limited to the factual aspects of the Trial Chamber's finding. Accordingly, Kayishema does not take issue with the Trial Chamber's conclusion in respect of *how* intent may be inferred." *Kayishema & Ruzindana* v. *Prosecutor* (Case No. ICTR-95-1-A), Motifs de l'arrêt, 1 June 2001, para. 147. It should be noted that a number of Trial Chambers findings reviewed in this article are still subject to appeal and that the jurisprudence could therefore obviously be modified in the future.

[17] The Statutes of the *ad hoc* tribunals do not define the elements of the crimes over which they have jurisdiction. It is thereby left to the judges, through jurisprudence, to determine them, if only to conform to the principle of *nullem crimen sine lege*. This principle, also sometimes referred to as the principle of legality, provides that conduct does not constitute a crime unless it has previously been declared to be so by law and also clearly defined. Paragraph 2 of article 22 of the Statute of the International Criminal Court, entitled *Nullum crimen sine lege*, stipulates: "The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." For the International Criminal Court, this resulted in the preparation of the Elements of the Crimes, drafted by the Preparatory Commission for the International Criminal Court, U.N. Doc. PCNICC/2000/1/Add.2, para. 3, adopted by the Assembly of States Parties on 30 June 2000.

[18] As Otto Triffterer clearly expresses: "... there are *two* subjective elements required to establish criminal responsibility for genocide: the mens rea as the pendant to the actus reus *and* the 'intent to destroy ...'" Otto Triffterer, *Genocide, its Particular Intent to Destroy in Whole or in Part the Group as Such*, 14 LEIDEN J. INT'L L. 400 (2001).

> The prohibited acts [...] are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence.[19]

The provisions granting the two *ad hoc* tribunals jurisdiction over genocide – article 2 of the ICTR Statute, and article 4 of the ICTY Statute – reproduce *verbatim* the provisions contained in articles II and III of the Genocide Convention.[20] A conviction for genocide by an international tribunal shall accordingly only take place if the two constitutive elements are established beyond reasonable doubt, namely the commission of at least one of the prohibited acts, with the requisite intent. In practice, proving the intent to commit genocide poses serious challenges in a criminal process. This article attempts to present some of these difficulties in reviewing the jurisprudence of the ICTR on the determination of the intent to commit genocide. It focuses on the mental element of genocide *per se*, and does not discuss the mental element of each of the five underlying acts constitutive of genocide, nor does it address the requisite intent for the ancillary forms of genocide, the forms of participation compatible with the intent to commit genocide.[21] Although the developing ICTY case law on genocide raises a number of interesting issues, this article concentrates on the more expansive ICTR jurisprudence.[22] It studies the components of the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" in the ICTR case-law, before looking into some of the challenges encountered in proving this intent.

[19] Report of the International Law Commission on the work of its forty-eighth session, 6 May–26 July 1996, U.N. Doc. A/51/10, comment no. 5 on article 17 (genocide).

[20] The definition of genocide has remained unchanged over the last fifty years, notwithstanding various attempts at amendment, notably to enlarge the categories of groups protected.

[21] The ancillary forms of genocide – complicity in genocide, direct and public incitement to commit genocide, conspiracy to commit genocide, attempt to commit genocide defined in article III of the Genocide Convention – also form part of the material jurisdiction of the ICTR. In GENOCIDE IN INTERNATIONAL LAW, THE CRIMES OF CRIMES (2000), William A. Schabas indicates that "the considerations concerning the *mens rea* of genocide [...] should also apply *mutatis mutandis* to the other acts listed in article III". The jurisprudence of the ICTR, as exposed in the *Prosecutor* v. *Akayesu*, with regard the intent to commit complicity in genocide stipulates however that "an accused is liable as an accomplice to genocide if he knowingly aided and abetted or instigated one or more persons in the commission of genocide, while knowing that such a person or persons were committing genocide, even though the accused himself did not have the specific intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". See *Prosecutor* v. *Akayesu*, *supra* note 6, para. 544.

THE INTENT TO DESTROY

General Intent or Dolus Specialis?

For Hannah Arendt: "[t]he point of [genocide] is that an altogether different order is broken and an altogether different community is violated".[23] Genocide is indeed distinct from other crimes because it targets not only individual human beings, but entire human groups. As indicated by the Trial Chamber in the *Kambanda* judgment, in which it found the former Rwandese Prime Minister guilty of genocide, sentencing him to life imprisonment:

> The crime of genocide is unique because of its element of *dolus specialis* (special intent) which requires that the crime be committed with the intent "to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". [H]ence the Chamber is of the opinion that genocide constitutes the crime of crimes.[24]

Although various ICTR Trial Chambers have referred to the intent required for genocide as a "special intent",[25] a "specific intent"[26] or also a "specific genocidal intent",[27] they unanimously recognise that genocide is characterised by a "*dolus specialis*".[28]

> Genocide is distinct from other crimes inasmuch as it embodies a special intent or *dolus specialis*. Special intent of a crime is the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged. Thus, the special intent in the crime of genocide lies in "the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such".[29]

The concept of *dolus specialis* corresponds to the French legal concept of *dol spécial*. It is used in certain civil law countries, although its definition is often disputed. In the *Akayesu* judgment, *dolus specialis* is described as qualifying the key element of an intentional offence, basically requiring that the perpetrator was clearly seeking to produce the act charged, or that he or she clearly intended the result of the offence:

> Special intent [...] is required as a constituent element of certain offences and demands that the perpetrator have the clear intent to cause the offence charged. According to this

[23] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 272 (1963).

[24] *Prosecutor* v. *Kambanda*, *supra* note 5, para. 16.

[25] *Prosecutor* v. *Akayesu*, *supra* note 6, para. 498.

[26] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 7, para. 91.

[27] *Prosecutor* v. *Bagilishema*, *supra* note 12, para. 55.

[28] See notably *Prosecutor* v. *Kambanda*, *supra* note 5, para. 16; *Prosecutor* v. *Akayesu*, *supra* note 6, para. 498; *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 7, para. 91; and

meaning, special intent is the key element of an intentional offence, which offence is characterized by a psychological relationship between the physical result and the mental state of the perpetrator.[30]

Among the recognised authorities on genocide, it has been argued that the intent to commit genocide should not be qualified as a "special or specific intent".[31] The special or specific intent referred to in common law systems, corresponding broadly to the *dolus specialis* known in the civil law systems, would constitute "a qualified form of intent", which, these writers have argued, is not required – not even mentioned – in the international instruments defining genocide.[32] Professor Otto Triffterer remarks that:

The international jurisprudence establishes quite often that the perpetrator acted with the specific, special intent "to destroy" and that he in fact was aiming at such a destruction. But it nowhere expressly states that this special intent needs a minimum threshold an extremely strong will as an indispensable element and, therefore, has to be denied, if this intensity on the volitive side is lacking.[33]

He argues that a textual approach should be favoured, leading to a narrower interpretation of the intent to commit genocide.[34] With this interpretation, it is sufficient that one of the constitutive or underlying acts be committed with an ordinary intent "to destroy", meaning "that [the perpetrator] accepts that his or her act ought to or most probably might have this additional consequence".[35]

It should however be recalled that the International Law Commission noted, when defining the Code of the Crimes against the Peace and Security of Mankind, and addressing the question of the intent to commit genocide, that:

[A] general intent to commit one of the enumerated acts combined with a general awareness of the probable consequences of such an act with respect to the immediate victim or victims is not sufficient for the crime of genocide. The definition of this crime requires a particular state of mind or a specific intent with respect to the overall consequences of the prohibited act.[36]

30 *Ibid.*, para. 518.

31 See in particular Otto Triffterer, *supra* note 18; and Alexander K.A. Greenawalt, *Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation*, 99 COLUM. L. REV. 2259 (1999).

32 Otto Triffterer, *supra* note 18.

33 *Ibid.*

34 *Ibid.*

35 *Ibid.*

36 [illegible]

In any case, the understanding of the concept of "intent" to commit genocide could be further clarified in the jurisprudence of the ICTR, notably by the Appeals Chamber. As noted by Professor William Schabas: "It would probably be preferable to eschew importation of enigmatic concepts like *dolus specialis* or 'specific intent' from national systems of criminal law."[37] The difficulty in grasping the exact meaning to be accorded to the concept of intent illustrates, however, the concrete problem facing judges who, only equipped with concepts of national criminal law, have to define crimes under international criminal law.

Targeting a Group qua *Group*

For genocide to be established, one of the underlying acts must be committed against the group *qua* group, meaning that the act must target members of the group because of their membership to the group. The Genocide Convention protects the groups, and as such, their social fabric. According to the International Law Commission, "[t]he action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group".[38] Similarly, a German High Court, in the *Jorgic* case, found that intent to commit genocide as provided in paragraph 220(a) of the German Criminal Code "means destroying the group as a social unit in its specificity, uniqueness and feelings of belonging".[39]

The *Akayesu* judgment noted:

In concrete terms, for any of the acts charged under article 2(2) of the Statute to be a constitutive element of genocide, the act must have been committed against one or several individuals, because such individual or individuals were members of a specific group, and specifically because they belonged to this group. Thus, the victim is chosen not because of his individual identity, but rather on account of his membership in a national, ethnical, racial or religious group. The victim of the act is therefore a member of a group, chosen as such, which, hence, means that the victim of the crime of genocide is the group itself and not only the individual.[40]

The Chamber continued: "The perpetration of the act charged therefore extends beyond its actual commission, for example, the murder of a particular individual, for the realisation of an ulterior motive, which is to destroy,

37 William A. Schabas, *The* Jelesic *case and the* mens rea *of the Crime of Genocide*, 14 LEIDEN J. INT'L L. 125 (2001).

38 1996 Report of the International Law Commission, *supra* note 19, comment no. 6 on article 17 (genocide).

39 State Attorney's Office against Nikola Jorgic, High Court of Dusseldorf, IV – 26/96,

E326

in whole or part, the group of which the individual is just one element".[41] This position has been constantly reiterated in the subsequent ICTR case law.

Destroying a Group

In *Kayishema & Ruzindana*, the Trial Chamber reviewed the question of what constitutes the "destruction of a group". It noted that the prosecution had suggested that the term be broadly interpreted as encompassing acts that are undertaken not only with the intent to cause death but also acts that may fall short of causing death.[42] In *Akayesu*, acts of sexual violence that occurred in Taba Commune were found to form an integral part of the process of destruction, specifically targeting Tutsi women and contributing to their destruction and the destruction of the Tutsi as a group.

The destruction does therefore not have to be realised for genocide to occur. In the *Akayesu* judgment, the Trial Chamber recalled that "[c]ontrary to popular belief, the crime of genocide does not imply the actual extermination of the group in its entirety, but is understood as such once any one of the acts mentioned in article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy 'in whole or in part' a national, ethnical, racial or religious group".[43] Indeed, the actual destruction of the group is not a requirement, to the extent that the physical destruction of all the members of a group – or their definitive eradication, annihilation – does obviously not have to occur. Destruction is therefore a process. It is the aim that the perpetrator intends to achieve.

The destruction of the group "as such" must be intended. Notwithstanding different opinions,[44] the addition of the two words "as such" can be interpreted as an indication that the essential element of the crime is the intentional attack against the existence of a group of human beings. For the International Law Commission, "... the intention must be to destroy the

41 *Ibid.*, para. 522.

42 *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 7, para. 95.

43 *Prosecutor* v. *Akayesu*, *supra* note 6, para. 497.

44 Commenting on the 1948 Convention, Nehemiah Robinson supported the idea that "the intended destruction must take place on grounds of the national or racial origin, religious beliefs or political opinion of the group's members. In other words, besides the intention of the destruction, there must be a specific motive for the act, deriving from the peculiar characteristics of the group. Thus, the intention to destroy the group would not suffice to represent an act of Genocide if the motives were other than those described above. If the destruction was carried out in the conduct of a war, for instance, or with the intention of robbery, or for motives of profit, or the like, it would not constitute Genocide."

group 'as such', meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group."[45]

IN WHOLE OR IN PART

With regard to the interpretation of the words "in whole or in part" contained in the expression "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" the Trial Chamber, in the *Kayishema & Ruzindana* judgment, indicated that

> "in part" requires the intention to destroy a considerable number of individuals who are part of the group. Individuals must be targeted due to their membership of the group to satisfy this definition.[46]

The Trial Chamber cited the Special Rapporteur of the Sub-Commission on the Protection and Promotion of Human Rights[47] before concluding, in quoting the International Law Commission, that "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe".[48] Similarly, in *Bagilishema*, the Trial Chamber found:

> As for the meaning of the terms "in whole or in part", the Chamber agrees with the statement of the International Law Commission, that "the intention must be to destroy the group as such, meaning as a separate and distinct entity, and not merely some individuals because of their membership in a particular group". Although the destruction sought need not be directed at every member of the targeted group, the Chamber considers that the intention to destroy must target at least a substantial part of the group.[49]

This jurisprudence of the ICTR thereby reiterates the well accepted position according to which the destruction should concern a substantial part of the group.[50]

45 1996 Report of the International Law Commission, *supra* note 19, comment no. 7 on article 17 (genocide).

46 *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 7, para. 96.

47 *Ibid.* For the Special Rapporteur, "in part" would seem to imply a reasonably significant number, relative to the total of the group as a whole, or else a significant section of a group such as its leadership.

48 *Ibid*, "the crime of Genocide by its very nature requires the intentic ... destr ... least a substantial part of a particular group".

49 *Prosecutor* v. *Bagilishema*, *supra* note 12, para. 64.

50 Nevertheless, when reviewing the notion of "in whole or in part", it ... important ... introduce the notion of attempt to commit genocide, as recalled by Prote... or Daniel D. Ntanda Nsereko: "It is submitted that as long as the perpetrator injures or kills [a person, even if only one] with intent and in execution of a co-ordinated plan to destroy the rest of his victim's group or a substantial part of it, he is guilty of genocide or at least attempt

The exact determination of what amounts to a substantial part of a group is obviously a difficult and relative question. For some writers, "[a]lso qualifying as substantial is a significant section of the group, such as the intelligentsia and the leadership, whose destruction results in a significant reduction of both the quantitative and the qualitative strength of the group".[51] Defining more precisely what constitutes the "substantial" part of a group would result in a crude assessment of the number of victims considered large enough to amount to a crime of genocide.[52] This logic is difficult to follow and it is submitted that there can be no gradation in the horror of a crime such as genocide, which, in any case, is characterised by its intent rather than by the number of victims. As pointed out by Professor Otto Triffterer:

> [F]]or the commission of genocide it is sufficient that the perpetrator merely intended "to destroy, in whole or in part, a ... group, as such". This means that the perpetrator must only intend to achieve this consequence or result ... The appearances of acts of genocide committed on the territory of former Yugoslavia since 1991 and those later committed in Rwanda rather show, as do many others in the world, that it regularly needs a process, continuing for a while, to achieve such a destruction.[53]

On this basis, even when the destruction is not achieved, a crime of genocide is committed as long as the intent was to destroy the group, or part thereof.

The definition of genocide provides that in fact the intent of the perpetrator may possibly be to destroy only part of a given group. In this context, the question has also been raised of whether genocide should be understood as covering acts aiming at the "cultural" destruction of a group, namely at destroying the group not by killing all its members but by killing a few selected individuals chosen so as to ultimately destroy the structure of the group.[54]

in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW – THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURT 125 (Gabrielle Kirk McDonald & Olivia Swaak-Goldman, eds., 1999).

[51] *Ibid*, p. 125.

[52] This exercise would almost surely lead to a difficult position, with possible discrepancies, depending on the "original" size of the group. Indeed, while "destroying" twenty members of a group constituted of millions of people may not be considered as "substantial enough" to constitute genocide, in another situation, the killing of twenty members of a rather limited group constituted of no more than a few hundred persons, could be deemed a substantial number.

[53] Otto Triffterer, *supra* note 18.

[54] An example of such a "cultural" genocide would be the systematic elimination of the religious leaders of a given religion, which would intentionally aim at destroying the very

As a concluding remark on the issue of destroying a group "in whole or in part", it should be noted that the debate on this point is probably not crucial at the ICTR. The first judgment rendered by this jurisdiction on genocide, the *Akayesu* judgment, had not even addressed the definition of this expression. The judges may have omitted this question as irrelevant in the context of the massive and widespread character of the crimes falling within the jurisdiction of the ICTR.[55]

A NATIONAL, ETHNICAL, RACIAL OR RELIGIOUS GROUP

An interesting and contentious dimension of the ICTR jurisprudence concerns the categories of groups protected by the Genocide Convention and, hence, by article 2 of the ICTR Statute. Despite several attempts since the adoption of the Convention to have the protected categories extended to encompass groups other than the national, ethnical, racial or religious groups, even the Statute of the International Criminal Court provides only for the explicit protection of these four groups. Two main issues are at stake regarding these protected groups: firstly their definitions; and secondly, whether this list should be read *stricto sensu* or whether the protection provided by the Convention should be extended to other groups.

Defining the Groups

Regarding the definition of the four protected groups expressly mentioned in the Genocide Convention, the ICTR jurisprudence has clearly evolved, from the *Akayesu* judgment rendered in 1998 to the *Rutaganda* judgment of 2000. The ICTR Trial Chambers began by defining the four groups in an "objective" manner, which is obviously a very perilous exercise,[56] and later on, adopted a more "subjective" definition.

[55] It is estimated that, at the very least, 500,000 victims died throughout the country, during the 1994 genocide in Rwanda. For certain sources, more than a million perished. This estimate does not even take into consideration the victims of genocide who did not died, but to whom permanent physical or mental harm was caused.

[56] In *Prosecutor* v. *Akayesu, supra* note 6, the Chamber wrote: "Based on the *Nottebohm* decision rendered by the International Court of Justice, the Chamber holds that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties" (para. 512). "An ethnic group is generally defined as a group whose members share a common language or culture" (para. 513). "The conventional definition of racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors" (para. 514). "The religious group is one whose members share the same religion, denomination or mode of worship" (para. 515). Simi-

The jurisprudence of the ICTR thus illustrates two possible ways for identifying a protected group: an objective or a subjective approach. For the first one, the group should be considered as a social reality, in a stable and permanent way. People are considered as being almost irremediably and automatically members of the group by birth, as inheritance is the key to transmission of membership. For the subjective approach, a group exists insofar as the members perceive themselves as a part of that group (self-identification), or as they are perceived as such by the perpetrator(s) of the crime (identification by others).

The subjective approach was first adopted in the *Rutaganda* judgment. In *Rutaganda*, the Trial Chamber did not completely renounce an objective approach, but favoured a combined definition of the group, noting that "the concepts of national, ethnical, racial and religious groups have been researched extensively and that, at present, there are no generally and internationally accepted precise definitions thereof".[57] It continued:

> Each of these concepts must be assessed in the light of a particular political, social and cultural context. Moreover, the Chamber notes that for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group [...]. In some instances, the victim may perceive himself/herself as belonging to the said group.[58]

In the most recent ICTR judgment on genocide, the *Bagilishema* case, the Trial Chamber noted:

> [T]he concepts of national, ethnical, racial, and religious groups enjoy no generally or internationally accepted definition. Each of these concepts must be assessed in the light of a particular political, social, historical, and cultural context. Although membership of the targeted group must be an objective feature of the society in question, there is also a subjective dimension. A group may not have precisely defined boundaries and there may be occasions when it is difficult to give a definitive answer as to whether or not a victim was a member of a protected group. Moreover, the perpetrators of genocide may characterise the targeted group in ways that do not fully correspond to conceptions of the group shared generally, or by other segments of society. In such a case, the Chamber is of the opinion that, on the evidence, if a victim was perceived by a perpetrator as belonging to a protected group, the victim could be considered by the Chamber as a member of the protected group, for the purposes of genocide.[59]

This combined definition of a protected group is particularly adequate to judicial proceedings, as neither the subjective nor the objective approach, taken exclusively, addresses both the need to ensure that the group targeted is indeed a group protected by the Genocide Convention, and the protection of the rights of the accused (so that her or his mere perception of a group is not unduly presumed).

Extending Protection to Other Groups

The question of whether protection against destruction afforded by the Genocide Convention should be granted only to the four groups expressly mentioned in the Convention remains a source of controversy. Certain groups, such as political groups, were purposely excluded by the drafters of the Convention. However, the question remains open for other groups, especially those which were not known or recognised *per se* at the time of the adoption of the Genocide Convention. An example is the tribal group, a concept which was not fully developed in the 1940s. When reviewing the provisions applicable to the crime of genocide, the International Law Commission remarked that it "was of the view that the present article covered the prohibited acts when committed with the necessary intent against members of a tribal group".[60] Other groups, such as groups determined by their gender or sexual orientation, were probably not considered by the drafters of the Genocide Convention. Some States have attempted to cure this situation when enacting national legislation on genocide. New groups, such as political, economic or social groups, have been added to the list of groups protected by certain specific national legislation.[61] For example, in the French *Code pénal*, genocide is defined as the destruction of any group whose identification is based on arbitrary criteria.[62]

---

whose members share a common language and culture; or, a group which distinguishes itself, as such (self identification); or, a group identified as such by others, including perpetrators of the crimes (identification by others). A racial group is based on hereditary physical traits often identified with geography. A religious group includes denomination or mode of worship or a group sharing common beliefs" (para. 98). As noted by Rafaelle Maison: "L'appartenance à un groupe humain ne peut etre qu'une revendication individuelle: rechercher une catégorisation objective revient à employer le schéma d'analyse qui est celui des auteurs des discriminations." Rafaelle Maison, *Le crime de génocide dans les premiers jugements du Tribunal pénal international pour le Rwanda*, 103 REVUE GÉNÉRALE DE DROIT INT'L PUBLIC 137 (1999).

57 *Prosecutor* v. *Rutaganda*, *supra* note 9, para. 56.

58 *Ibid.* An additional and interesting dimension of the most recent jurisprudence of the ICTR on this point is found in *Prosecutor* v. *Bagilishema*, where the Trial Chamber, in a footnote, indicated that it agrees with the comment of the Commission of Experts on Rwanda that "to recognise that there exists discrimination on racial or ethnic grounds, it is not necessary to presume or posit the existence of race or ethnicity itself as a scientifically objective fact", as cited in V. MORRIS & M. SCHARF I THE INTERNATIONAL CRIMINAL

59 *Prosecutor* v. *Bagilishema*, *supra* note 12, para. 65.

60 1996 Report of the International Law Commission, *supra* note 19, comment no. 9 on article 17 (genocide).

61 See William A. Schabas, *supra* note 21, p. 5

The ICTR jurisprudence has considered the issue of extending protection afforded by the Genocide Convention to other groups. In *Akayesu*, the Trial Chamber found:

> On reading through the *travaux préparatoires* of the Genocide Convention, it appears that the crime of genocide was allegedly perceived as targeting only "stable" groups, constituted in a permanent fashion and membership of which is determined by birth, with the exclusion of the more "mobile" groups which one joins through individual voluntary commitment, such as political and economic groups. Therefore, a common criterion in the four types of groups protected by the Genocide Convention is that membership in such groups would seem to be normally not challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.

It continued:

> Moreover, the Chamber considered whether the groups protected by the Genocide Convention, echoed in article 2 of the Statute, should be limited to only the four groups expressly mentioned and whether they should not also include any group which is stable and permanent like the said four groups. In other words, the question that arises is whether, under the Genocide Convention, it would be possible to punish the destruction of a group as such, if the said group, although stable and membership by birth, does not meet the definition of any one of the four groups expressly protected by the Genocide Convention. In the opinion of the Trial Chamber, it is particularly important to respect the intention of the drafters of the Genocide Convention, which according to the *travaux préparatoires*, was patently to ensure the protection of any stable and permanent group.[63]

Despite the advances realised by the evolving national legislation and the international jurisprudence, the delegates participating to the Rome Conference in 1998, leading to the adoption of the Rome Statute, did not revise the list of groups protected against the crime of genocide. Therefore, the International Criminal Court is left to adjudicate the matter, and it will be interesting to see whether it will adopt a narrow interpretation, as stipulated in its Statute, or whether it will draw upon the case law developed by the ICTR, with the idea that the spirit of the Genocide Convention shall prevail.

[63] *Prosecutor* v. *Akayesu*, *supra* note 6, para. 516. Consequently, the Trial Chamber found: "In the light of the facts brought to its attention during the trial, the Chamber is of the opinion that, in Rwanda in 1994, the Tutsi constituted a group referred to as 'ethnic' in official classifications. Thus, the identity cards at the time included a reference to 'ubwoko' in Kinyarwanda or '*ethnie*' (ethic group) in French which, depending on the case, referred to the designation Hutu or Tutsi, for example. The Chamber further noted that all the Rwandan witnesses who appeared before it invariably answered spontaneously and without hesitation the questions of the Prosecutor regarding their ethnic identity. Accordingly, the Chamber finds that, in many cases, at the time of the alleged events, the Tutsi did indeed

PROVING INTENT

Demonstrating the intent is the cornerstone of a conviction for genocide. As indicated by Nehemiah Robinson, of particular complexity is the subjective appraisal of the guilt of the culprit, namely, whether the culprit *intended* to destroy the group or whether the destruction was achieved without such intent, simply as a *result* of an otherwise intentional action.[64] As the ICTR was the first international jurisdiction to rule on charges of genocide, it is not surprising that its jurisprudence has reviewed the issue and analysed how the requisite intent for genocide is to be proven. What could be considered by the bench as a clear manifestation of intent "beyond reasonable doubt"?

In *Akayesu*, the Trial Chamber remarked that: "[...] intent is a mental factor which is difficult, even impossible, to determine. This is the reason why, in the absence of a confession from the accused, his intent can be inferred from a certain number of presumptions of fact".[65] The Chamber continued by indicating that: "[...] it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act."[66]

A similar finding was made in *Kayishema & Ruzindana*:

[64] Nehemiah Robinson, *supra* note 44, p. 15.

[65] *Prosecutor* v. *Akayesu*, *supra* note 6, para. 523.

[66] *Ibid.* See also para. 728: "[T]he Chamber holds the view that the intent underlying an act can be inferred from a number of facts. The Chamber is of the opinion that it is possible to infer the genocidal intention that presided over the commission of a particular act, *inter alia*, from all acts or utterances of the accused, or from the general context in which other culpable acts were perpetrated systematically against the same group, regardless of whether such other acts were committed by the same perpetrator or even by other perpetrators." Regarding the specific case of the accused Jean-Paul Akayesu, the Chamber found that "regarding Akayesu's acts and utterances during the period relating to the [illegible] alleged in the Indictment, the Chamber is satisfied beyond reasonable doubt, on the [illegible]is of all evidence brought to its attention during the trial, that on several occasions the ac[illegible]ed made speeches calling, more or less explicitly, for the commission of genocide. Th[illegible]hamber, in particular, held in its findings on Count 4, that the accused incurred individual criminal responsibility for the crime of direct and public incitement to commit genocide. Yet, according to the Chamber, the crime of direct and public incitement to commit genocide lies in the intent to directly lead or provoke another to commit genocide, which implies

Regarding the assessment of the requisite intent, the Trial Chamber acknowledges that it may be difficult to find explicit manifestations of intent by the perpetrators. The perpetrator's actions, including circumstantial evidence, however may provide sufficient evidence of intent. [...] [T]he intent can be inferred either from words or deeds and may be demonstrated by a pattern of purposeful action. In particular, the Chamber considers evidence such as the physical targeting of the group or their property; the use of derogatory language toward members of the targeted group; the weapons employed and the extent of bodily injury; the methodical way of planning, the systematic manner of killing. Furthermore, the number of victims from the group is also important. In the Report of the Sub-Commission on Genocide, the Special Rapporteur stated that "the relative proportionate scale of the actual or attempted destruction of a group, by any act listed in articles II and III of the Genocide Convention, is strong evidence to prove the necessary intent to destroy a group in whole or in part".[67]

Thus, the ICTR jurisprudence recognises that, apart from direct evidence, such as utterances pronounced or documents written by the accused, which would clearly express or manifest the intent to commit genocide, circumstantial evidence may also be used to establish the requisite intent. The specific genocidal intent may in these conditions be inferred from the circumstances in which the prohibited acts were committed by an accused. These findings rely on *factum probandum*, or indirect or circumstantial evidence which is factual evidence from which a court may infer the existence of the principal fact at stake.

Whether such a determination of the genocidal intent of an accused, based on the general context of perpetration of crimes, is sufficient to meet the stringent requirements of criminal law remains open for discussion. This question is particularly pertinent in view of the gravity of the crime of genocide and the nature of the required intent to commit genocide.

that is, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" (para. 729). The Chamber further noted: "Owing to the very high number of atrocities committed against the Tutsi, their widespread nature not only in the commune of Taba, but also throughout Rwanda, and to the fact that the victims were systematically and deliberately selected because they belonged to the Tutsi group, with persons belonging to other groups being excluded, the Chamber is also able to infer, beyond reasonable doubt, the genocidal intent of the accused in the commission of the above-mentioned crimes" (para. 730). In a similar manner, *Prosecutor* v. *Rutaganda* provides that: "in practice, intent can be, on a case-by-case basis, inferred from the material evidence submitted to the Chamber, including the evidence which demonstrates a consistent pattern of conduct by the Accused" (para. 63).

[67] *Prosecutor* v. *Kayishema & Ruzindana, supra* note 7, para. 93. In this judgment, when reviewing specifically Kayishema's and Ruzindana's intent to destroy in whole or in part the Tutsi group, the Chamber reviewed the accuseds' utterances, their words and deeds, the number of victims, the fact that the latter were killed regardless of gender or age, and the persistent pattern of conduct (the attacks were carried out in a methodical manner, the repetitive character of the planned and programmed massacres, and the constant focus on

A word of caution is added in the *Bagilishema* judgment, where the Trial Chamber, after quoting the reasoning followed in *Akayesu*,[68] indicated:

Thus evidence of the context of the alleged culpable acts may help the Chamber to determine the intention of the Accused, especially where the intention of a person is not clear from what that person says or does. The Chamber notes, however, that the use of context to determine the intent of an accused must be counterbalanced with the actual conduct of the Accused. The Chamber is of the opinion that the Accused's intent should be determined, above all, from his words and deeds, and should be evident from patterns of purposeful action.[69]

The concern so expressed is obviously to avoid going beyond the liability or the direct responsibility of a particular perpetrator. As one writer has argued:

The use of circumstantial evidence to demonstrate mens rea is of course nothing new, but the ICTR's standard suggests that courts should presume specific intent largely by virtue of the fact that a perpetrator participates in a genocidal campaign. In this way, it begs the question as to whether the specific intent standard does any work at the individual level.[70]

Although the question raised regarding the applicability of the standard set by the Genocide Convention to criminal proceedings is valid, it is not accurate to indicate that the ICTR findings on intent are presumed from the accused's participation in a genocidal campaign. At this juncture, it is noteworthy that the General Introduction of the draft "Elements of the Crime" of the International Criminal Court provides: "Existence of intent and knowledge can be inferred from relevant facts and circumstances."[71] It is therefore likely that international criminal jurisprudence will continue to develop on this basis, with a cautious use of *factum probandum* combined with due regard for the highest standard of criminal justice, while concentrating on the direct responsibility of a particular perpetrator.

This leads to another essential question pertaining to the requisite intent for genocide, namely whether this intent should be determined solely at the individual level or also at the "policy" level. In other words, for an individual to have genocidal intent, must he or she have acted with knowledge of a genocidal plan? Both in terms of academic research and of jurisprudence, it is still unclear whether, for an individual to be convicted of genocide, he or she must have had knowledge of a pre-conceived plan to commit genocide. In *Kayishema & Ruzindana*, it was "the opinion of

[68] *Prosecutor* v. *Akayesu, supra* note 6, para. 523.

[69] *Prosecutor* v. *Bagilishema, supra* note 12, para. 63.

[70] Alexander K. A. Greenawalt, [illegible]

the Trial Chamber that the existence of such a [genocidal] plan would be strong evidence of the specific intent requirement for the crime of genocide".[72] It continued:

> It is also the view of the Chamber that although a specific plan to destroy does not constitute an element of genocide, it would appear that it is not easy to carry out a genocide without such a plan, or organisation. Morris and Scharf note that "it is virtually impossible for the crime of genocide to be committed without some direct or indirect involvement on the part of the State given the magnitude of this crime". They suggested that "it is unnecessary for an individual to have knowledge of all details of the genocidal plan or policy". The Chamber concurs with this view.[73]

Several authors, including authoritative sources, consider indeed that for genocide to take place, there must be a plan. For Professor William Schabas:

> Because of the scope of the crime of genocide, it can hardly be committed by an individual, acting alone. Indeed, while exceptions cannot be ruled out, it is virtually impossible to imagine genocide that is not planned and organized either by the State itself or by some clique associated with it. This is another way of saying that, for genocide to take place, there must be a plan, even though there is nothing in the Convention that explicitly requires this.[74]

He quotes Raphael Lemkin, who is at the origin of the very concept of genocide, as regularly speaking of a plan as a *sine qua non* condition for genocide.[75] Similarly, for Thomas W. Simon,

> genocide has an underlying rationale, a rationale that situates itself both in individuals and in bureaucratic structures that include state-sponsored rules, edicts, and proclamations. Acts of genocide do not occur randomly, accidentally, or indiscriminately. The perpetrator identifies the targeted group in some way, however perverse, generally through accompanying state structures, such as laws, and then fully employs the state apparatus to eliminate members of the group.[76]

It is important to note, however, that, as indicated by the International Law Commission, "[t]he definition of the crime of genocide requires a degree of knowledge of the ultimate objective of the criminal conduct rather that knowledge of every detail of a comprehensive plan or policy of genocide".[77] In the context of the crimes falling within the jurisdiction

[72] *Prosecutor* v. *Kayishema & Ruzindana, supra* note 7, para. 276.

[73] *Ibid.*, para. 94.

[74] William A. Schabas, *supra* note 21, p. 207.

[75] *Ibid.*, p. 208.

[76] Thomas W. Simon, *Defining Genocide*, 15 WISCONSIN INT'L L. J. 250 (1996).

[77] 1996 Report of the International Law Commission, *supra* note 19, p. 90. The Appeals Chamber of the ICTY made a finding on the same basis in *Jelisic*: "[T]he existence of a

of the ICTR, the prosecution has been in a position to present overwhelming evidence of the collective and organised nature of the crimes. The Chambers have therefore been able to practically rely on the evidence of the organised and "massive and widespread" character of the crimes committed, including genocide, without resorting to a legal debate to assess in legal terms the importance to be given to the existence of a plan. This issue is however likely to take a tremendous importance with the forthcoming joint trials involving multiple defendants, against whom the Prosecutor alleges that they planned and conspired together to commit genocide.

CONCLUSION

The ICTR jurisprudence has undoubtedly contributed to clarifying the elements of the crime of genocide, in particular as regards its mental or moral element. Certain issues, such as the definition of the protected groups or the fact that the group is targeted *qua* group, are now well established. However, the question of whether the "intent to destroy" should be construed as a general intent or as a *dolus specialis* has yet to be resolved. Question marks remain also on the nature of evidence required to prove the necessary intent to commit genocide. Nevertheless, given that the definition of genocide provided in the Statute of the International Criminal Court reflects the one contained in the statutes of the two *ad hoc* tribunals, the ICTR jurisprudence provides key precedents for the International Criminal Court.

of proving specific intent, the existence of a plan or policy may become an impor actor in most cases. The evidence may be consistent with the existence of a plan or poli r may even show such existence, and the existence of a plan or policy may facilitate proof of the crime." *Prosecutor* v. *Jelisic* (Case no. IT-95-10-A), Judgment, 5 July 2001, para. 48. This finding had already previously been made by the ICTR Appeals Chamber in *Kayishema &*

ROMAN BOED*

INDIVIDUAL CRIMINAL RESPONSIBILITY FOR VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS OF 1949 AND OF ADDITIONAL PROTOCOL II THERETO IN THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Despite the fact that internal armed conflicts occur with a far greater frequency than international conflicts,[1] enforcement of the international humanitarian law provisions that aim to protect their victims has been largely lacking until recently.[2] This is likely due, in part, to the fact that the two legal instruments specifically designed to protect victims of internal armed conflicts, article 3 common to the 1949 Geneva Conventions for the Protection of War Victims[3] and the 1977 Additional Protocol II thereto,[4] contain no implementation or enforcement provisions.[5] In contrast, the

* Legal Officer-Judgment Coordinator, International Criminal Tribunal for Rwanda. LL.D. candidate, University of South Africa; LL.M., Justice Harlan Fiske Stone Scholar, Columbia University, 1999; LL.M., University of Cambridge, 1998; J.D., with Honour, DePaul University, 1994; B.A., Lawrence University, 1987. The opinions expressed in this article are the author's and do not necessarily represent those of the ICTR or of the United Nations.

1 See, *e.g.*, Theodor Meron, *International Criminalisation of Internal Atrocities*, 89 AM. J. INT'L L. 554, 554 (1995).

2 See, *e.g.*, Daniel Smith, *New Protections for Victims of International Armed Conflicts: The Proposed Ratification of Protocol II by the United States*, 120 MIL. L. REV. 59, 65 (1988).

3 Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (1950) 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, (1950) 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, (1950) 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, (1950) 75 U.N.T.S. 287 (hereinafter the "Geneva Conventions").

4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, (1978) 1125 U.N.T.S. 609 (hereinafter "Additional Protocol II").

5 See, *e.g.*, Michael Bothe, Karl Josef Partsch & Waldemar A. Solf, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949, 608 (1982); Stefan Oeter, *Civil*

portions of the Geneva Conventions applicable to international armed conflicts and Additional Protocol I to the Conventions,[6] which is applicable exclusively to such conflicts, contain express provisions on their enforcement.[7]

In a relatively short span of time, the two United Nations tribunals established to prosecute persons responsible for serious humanitarian violations in the former Yugoslavia and Rwanda have demonstrated and affirmed that violations of common article 3 and Additional Protocol II within their respective jurisdictions are acts carrying individual criminal responsibility.[8] Penalisation of the acts proscribed by these instruments, as developed in the statutes and case law of the International Criminal Tribunal for Rwanda (ICTR)[9] and the International Tribunal for the former Yugoslavia (ICTY),[10] engenders individual accountability. This, in turn, promotes enforcement of the provisions of common article 3 and Additional Protocol II and contributes to repression of inhumane treatment of victims of internal armed conflicts. Furthermore, the jurisprudence of the

Rights Abuses in Internal Conflicts: A Positivist View, 93 AM. J. INT'L L. 302, 310, 311 (1999); Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice*, 33 AM. U. L. REV. 53, 58, 59 (1983).

6 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, (1978) 1125 U.N.T.S. 3 (hereinafter "Additional Protocol I").

7 Note, for example, that Additional Protocol I contains an entire section dealing with repression of breaches of the Conventions and of the Protocol. See Additional Protocol I, *supra* note 6, part V, sec. II. See also Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 3, arts. 49–54 (repression of abuses and infractions); Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *supra* note 3, arts. 50–53 (repression of abuses and infractions); Convention Relative to the Treatment of Prisoners of War, *supra* note 3, arts. 129–132 (repression of abuses and infractions); Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 3, arts. 146–149 (repression of abuses and infractions). See also Solf, *supra* note 5, at 55.

8 See, *e.g.*, Erik Mose, *The Criminality Perspective*, 15 GEO. IMMIGR. L.J. 463, 465 (2001).

9 The Security Council acting under Chapter VII of the Charter of the United Nations established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994 by Resolution 955 on 8 November 1994. See U.N. Doc. S/RES/955 (1994).

10 The Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed

two tribunals has, for the first time, clarified the conditions of applicability of common article 3 and the Protocol as penal instruments.

It is thus the thesis underlying this article that the ICTR and the ICTY have been instrumental in the development of the application of common article 3 and Additional Protocol II and in the elucidation of their elements. Section I of this article will show the development and affirmation of the concept of individual criminal responsibility for serious violations of common article 3 and Additional Protocol II through the establishment and jurisprudence of the two tribunals. Section II will detail how the ICTR has interpreted the material elements of common article 3 and the Protocol as penal instruments for the protection of victims of internal armed conflicts.

While, as Ratner and Abrams have noted, "[t]he criminality of acts violating the laws or customs of war in non-international armed conflicts has been somewhat obscure until quite recently",[11] the work of the two United Nations tribunals in this area has shown the way for the future. The tribunals' jurisprudence has already had a considerable positive effect, encouraging the inclusion of penal provisions relating to violations of international humanitarian law in internal armed conflicts in the Statute of the International Criminal Court.[12] In the more immediate term, the tribunals' contributions may assist the newly established Special Court for Sierra Leone as well as national courts, and will continue to stimulate discourse on penal repression of breaches of common article 3 and Additional Protocol II.[13] All of this will, without a doubt, strengthen the still limited regime of international protection for victims of internal armed conflicts.

11 Steven R. Ratner & Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY, 94 (1997).

12 See Luigi Condorelli, *War Crimes and Internal Conflicts in the Statute of the International Criminal Court*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 107, 109 (2001). Whether provisions covering non-international conflicts should be incorporated in the Statute of the International Criminal Court was one of the most controversial issues. See Thomas Graditzky, *War Crime Issues before the Rome Diplomatic Conference on the Establishment of an International Criminal Court*, 5 U.C. DAVIS J. INT'L L. & POL'Y 199, 208 (1999). The jurisprudence of the ICTR and the ICTY will assist the work of the International Criminal Court. See, *e.g.*, L.C. Green, *Enforcement of the Law in International and Non-International Conflicts – The Way Ahead*, 24 DENVER J. INT'L L. & POL'Y 285, 319 (1996).

13 See, *e.g.*, Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 391, 409 (200.); Gabrielle Kirk McDonald, *The International Criminal Tribunals: Crime and Punishment in the International Arena*, 25 NOVA L. REV. 463, 482 (2001); Sean D. Murphy, *Progress and*

6334

In sum, the ICTR and the ICTY have established on the international stage the criminality of breaches of humanitarian law applicable to non-international armed conflicts and through their jurisprudence have illuminated the elements of the offences.[14] As the former President of the ICTY, Judge Gabrielle Kirk McDonald, eloquently put it, the judgments of the two tribunals "are evidence of actual enforcement of international norms". These norms are more than promises: in the circumstances where they apply they are the law.[15]

I. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR BREACHES OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN INTERNAL ARMED CONFLICTS

A. ICTR Statute

The Statute of the ICTR expressly grants the Tribunal the power to prosecute persons who have committed or ordered to be committed serious violations of common article 3 and of Additional Protocol II. According to article 4 of the Statute, such violations include, but are not limited to:

(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
(b) Collective punishments;
(c) Taking of hostages;
(d) Acts of terrorism;
(e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
(f) Pillage;
(g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples;
(h) Threats to commit any of the foregoing acts.[16]

[14] On the standard-setting nature of the work of the ICTR and the ICTY in the field of humanitarian law, see L.C. Green, THE CONTEMPORARY LAW OF ARMED CONFLICT 335 (2d ed., 2000).

[15] McDonald, *supra* note 13, at p. 484.

Moreover, the Statute prescribes that a "person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" within the Tribunal's jurisdiction "shall be *individually* responsible for the crime".[17] Finally, the Statute stipulates that the official position of an accused person shall not relieve him or her of criminal responsibility.[18] Clearly, the principle of individual criminal responsibility for crimes within the jurisdiction of the Tribunal is firmly embedded in the Tribunal's constitutive instrument. However, in respect of acts falling within Article 4 of the ICTR Statute, that is violations of common article 3 and Additional Protocol II, this principle was not well accepted prior to the establishment of the ICTR and the ICTY.

B. The Situation Prior to the Establishment of the ICTR and the ICTY

Unlike international humanitarian law provisions applicable in international armed conflicts,[19] the normative international instruments dedicated to internal conflicts do not contain enforcement or implementation measures.[20] This is so by design rather than by chance, for states have traditionally sought to limit the reach of international humanitarian law applicable to internal armed conflicts.[21] The motivating factor for this limitation surely was the desire of state actors to safeguard their sovereign prerogative to take action against those who on their territory may take up arms against them.[22] In other words, states have traditionally wanted to

[17] *Ibid.*, art. 6(1) (emphasis added).

[18] *Ibid.*, art. 6(2). Indeed, in the case of *Prosecutor* v. *Kambanda*, the Tribunal found the former Prime Minister of Rwanda criminally liable on six counts of genocide and crimes against humanity following his guilty plea. *Prosecutor* v. *Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998. The Judgment and Sentence have been affirmed by the Appeals Chamber. See *Kambanda* v. *Prosecutor* (Case No. ICTR-97-23-A), Judgment, 19 October 2000.

[19] See *supra* note 7 and accompanying text.

[20] See *supra* note 5 and accompanying text.

[21] See Meron, *supra* note 1, at 554. In traditional doctrine, laws of war were conceived to govern relations among states, as sovereign entities and subjects of international law, and were therefore not applicable to internal conflicts. INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II) [illegible] (1987) [hereinafter the "ICRC COMMENTARY: ADDITIONAL PROTOCOL II"]. See also Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 105 (2001).

[22] See Meron, *supra* note 1, at 554. In this respect, the ICTR observed that during

keep a relatively free hand to deal with internal armed conflicts, even as they consented to much more extensive limitations on the way they could conduct international conflicts.

One manifestation of this is the fact that the international provisions applicable to internal armed conflicts are excluded from the grave breaches regime set out in the Geneva Conventions and Additional Protocol I thereto, applicable to international armed conflicts. This regime prescribes effective penal measures, that is, criminalisation of the offences, prosecution or extradition, and punishment of persons responsible for grave breaches of the Conventions and the Protocol.[23] In contrast, common article 3 and Additional Protocol II contain no mention of individual criminal responsibility for breaches of any of their provisions.[24]

Conventions to internal armed conflicts had been treated by many delegations as unfriendly attempts to interfere in the internal affairs of the states . . . ." *Prosecutor* v. *Kayishema & Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 163. See also David P. Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 AM. J. INT'L L. 272, 278 (1978) (discussing the negotiating history of Additional Protocol II on this point). Note also that the Additional Protocol II includes an express provision on non-intervention:

1. Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend national unity and territorial sovereignty of the State.
2. Nothing in this Protocol shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

Additional Protocol II, *supra* note 4, art. 3. This provision recognises the sovereign prerogative of States to take measures within their territory to maintain law and order, national unity, and territorial integrity. Article 3 of the Protocol was included in the instrument to overcome the fears that Additional Protocol II could be used to violate State sovereignty by intervening in the internal affairs of States parties. See ICRC COMMENTARY: ADDITIONAL PROTOCOL II, *supra* note 21, at 1362.

[23] See Additional Protocol I, *supra* note 6, arts. 85–87. See also Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *supra* note 3, arts. 49–50; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *supra* note 3, arts. 50–51; Convention Relative to the Treatment of Prisoners of War, *supra* note 3, arts. 129–130; Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 3, arts. 146–147. On the grave breaches regime see *generally* Rudiger Wolfrum, *Enforcement of International Humanitarian Law, in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 530–31 (Dieter Fleck, ed., 1995). See also Yves Sandoz, *Penal Aspects of International Humanitarian Law, in* I INTERNATIONAL CRIMINAL LAW: CRIMES 393, 404, 406 (M. Cherif Bassiouni, ed., 2nd ed., 1999) (setting out the grave

Until the establishment of the two United Nations tribunals, the ICTR and the ICTY, the customary law position on individual criminal responsibility for serious violations of humanitarian law during internal armed conflicts reflected the conventional position outlined above. In other words, as in conventional law, in custom such acts were not considered to be criminal on the international plane.[25]

The creation of the United Nations tribunals, in particular the ICTR, spurred a major development in the law on this point. As noted above, the ICTR Statute expressly prescribes individual criminal responsibility for serious violations of common article 3 and Additional Protocol II.[26] In commenting on this, the U.N. Secretary General reported that the United Nations Security Council included in the jurisdiction of the ICTR

international instruments regardless of whether they were considered part of customary international law *or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime.* Article 4 of the [ICTR] statute, accordingly, includes violations of Additional Protocol II . . . and for the first time criminalizes common article 3.[27]

The Schizophrenias of International Criminal Law, 33 TEX. INT'L L.J. 237, 240 (1998); Simma & Paulus, *supra* note 5, at p. 310.

[25] See, *e.g.*, Ratner & Abrams, *supra* note 11, at 95; William Schabas, *Commentary:* Prosecutor v. Akayesu, *in* II ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994–1999 539, 550 (Andre Klip & Goran Sluiter eds., 2001) ("Until the adoption of Security Council resolution 955 creating the Rwanda Tribunal, it was widely believed among specialists in humanitarian law that the very concept of war crimes in non-international armed conflict did not exist."); Meron, *supra* note 1, at p. 559; Ratner, *supra* note 24, at p. 240. Ratner and Abrams pointed out that while states prosecuted the acts listed in common article 3 under their domestic criminal laws, "only a few instances are documented of prosecutions for war crimes as such in the context of internal conflicts until the creation of . . . [ICTY and ICTR] in the 1990s". Ratner & Abrams, *supra* note 11, at p. 95. L.C. Green in a similar vein observed that "[u]ntil the conflicts in Bosnia and Rwanda, no attempt was made to prosecute any accused for any sort of war crime as defined either in the Conventions or in customary Law". Green, *supra* note 12, at p. 309. And Simma and Paulus wrote that they "know of no case in which a national, let alone an international, tribunal prior to the ICTY's establishment has exercised jurisdiction over war crimes in internal conflicts irrespective of the nationality of the victim and the perpetrator". Simma & Paulus, *supra* note 5, at p. 312. See also Catherine Cisse, *The International Tribunals for the former Yugoslavia and Rwanda: Some Elements of Comparison*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 103, 116 (1997); Marsha V. Mills, *War Crimes in the [illegible] Century*, 3 HOFSTRA L. & POL'Y SYMP. 47, 51 (1999).

[26] See ICTR Statute, *supra* note 16, arts. 4 and 6. In comparison, the ICTY Statute does not expressly refer to common article 3 or Additional Protocol II.

[27] Report of the Secretary-General pursuant to Paragraph 5 of Security Council Resolution 955 (1994), 13 February 1995, U.N. Doc. S/1995/134, para. 12 (1995) (emphasis

Judge Theodor Meron has speculated that perhaps because Security Council members realised that the crimes of genocide and crimes against humanity might not encompass the entire array of offences committed during the conflict in Rwanda in 1994, in the ICTR Statute they opted to recognise individual criminal responsibility for serious violations of common article 3 and Additional Protocol II.[28] Whatever the motivation of states may have been, there was no opposition to this development in the Council[29] and the Statute is the first international instrument which expressly attributes individual criminal responsibility to serious violations of common article 3 and Additional Protocol II, albeit only within the limited jurisdiction of the ICTR.

The promulgation of the ICTR Statute in 1994 may serve as evidence of the *opinio juris* of states in respect of individual criminal responsibility for serious violations of common article 3 or Additional Protocol II.[30] The inclusion of these crimes as crimes carrying individual criminal responsibility in the 1998 Statute of the International Criminal Court demonstrates how rapidly the law has developed.[31] Additionally, ICTR and ICTY jurisprudence in this area may stimulate international practice, further confirming that perpetrators of violations of international humanitarian law applicable in internal conflicts may be held criminally liable for their acts under customary law.[32]

C. *ICTR Jurisprudence*

To date, the ICTR has not convicted any accused person of violations of article 4 of its Statute, that is for serious violations of common article 3 or Additional Protocol II. This is because the elements, or some of them, of the particular offences were from the point of view of the Trial Chambers not proven, not because of any hesitation to recognise that individual criminal liability attaches to acts falling under article 4 of the ICTR Statute.

28 Meron, *supra* note 1, at 561. Professor Greenwood, on the other hand, has suggested that in granting the ICTR jurisdiction over violations of Additional Protocol II, the Security Council "considered that criminal responsibility for violations of [the Protocol] was implicit in the obligations which it contained ...." Christopher Greenwood, *A Critique of the Additional Protocols to the Geneva Conventions of 1949, in* THE CHANGING FACE OF CONFLICT AND THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW 3, 14 (Helen Durham & Timothy L.H. McCormack eds., 1999).

29 *Ibid.*

30 See Simma & Paulus, *supra* note 5, at p. 312.

31 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9,

From its first judgment following a full trial in the *Akayesu* case[33] to the most recent, the Tribunal has consistently and unambiguously held that individual criminal responsibility attaches, as a matter of custom, to serious violations of common article 3 and Additional Protocol II within its jurisdiction.[34] The Tribunal has based its position[35] on the interlocutory appeal decision on jurisdiction of the ICTY Appeals Chamber in the case of *Prosecutor* v. *Tadic*.[36]

The *Tadic* decision involved a claim by the accused that international customary law prohibitions applicable in internal conflicts do not entail individual criminal responsibility.[37] In deciding this matter, the ICTY Appeals Chamber acknowledged at the outset that conventional law, such as common article 3, lacks an explicit reference to criminal liability.[38] The Appeals Chamber however pointed out that the International Military Tribunal at Nuremberg (IMT) concluded "that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches".[39]

Following the lead of the IMT, the Appeals Chamber set out that the principle of criminal responsibility of persons who breach customary prohibitions may be established where international law and state practice clearly recognise certain rules, with the intention to criminalise their breaches, as evidenced by statements of officials of states and international organisations, and punishment of perpetrators by national and military tribunals.[40] The Chamber then reviewed state practice in respect of criminalisation of breaches of rules of international humanitarian law applicable in internal conflicts, including national legislation, military manuals, and domestic prosecutions.[41] On the basis of this analysis, and taking into

33 *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998.

34 *Ibid.*, para. 617; *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 98; *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 242; *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Judgment and Sentence, 6 December 1999, para. 90; *Prosecutor* v. *Kayishema & Ruzindana* (Case No. ICTR-95-1-T), Judgment and Sentence, 21 May 1999, paras. 156–157.

35 See *Prosecutor* v. *Akayesu, supra* note 33, para. 615.

36 *Prosecutor* v. *Tadic* (Case No. IT-94-1-AR72), Decision on the Defer Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995. See Christopher nwood, *International Humanitarian Law and the* Tadic *Case*, 7 EUR. J. INT'L L. 265 96).

37 *Prosecutor* v. *Tadic, ibid.*, para. 128.

38 *Ibid.*

39 *Ibid.*

40 *Ibid.*

41 *Ibid.*, paras. 130–132.

account certain resolutions of the United Nations Security Council,[42] the ICTY Appeals Chamber concluded that "customary international law imposes criminal liability for serious violations of common article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife".[43]

Commentators' reaction to the *Tadic* holding that individual criminal responsibility attaches to serious violations of common article 3 and Additional Protocol II has been largely positive[44] and has recognised the weight of the authority of the ICTY Appeals Chamber.[45] Significantly, in ICTR jurisprudence the criminality of serious breaches of the applicable international humanitarian law instruments in internal conflicts seems to be so well settled now that the Trial Chambers uniformly repeat the principle in their judgments without any elaboration.[46]

Simma and Paulus have commented that "widespread acceptance of the jurisprudence of the Tribunals [ICTR and ICTY] represents evidence that the punishment of perpetrators of offenses against international humanitarian law in internal conflicts is nowadays permitted by a general principle of law".[47] In light of the adoption of the ICTR Statute, the *Tadic* interlocutory appeal decision, and the jurisprudence of the two tribunals, not to mention the provisions of the Rome Statute of the International Criminal Court and the implementing legislation of the Statute in many states, all should be on notice that serious violations of common article 3 and Additional Protocol II committed in internal conflicts are now regarded as crimes by the international community. Prosecutions of alleged perpetrators of these crimes committed henceforth will therefore not give rise to concerns related to the observance of the *nullum crimen sine lege* principle.[48]

[42] *Ibid.*, para. 133. The Chamber made particular reference to two resolutions on the situation in Somalia during that country's civil strife in 1992 and 1993. "[T]he Security Council unanimously condemned breaches of humanitarian law and stated that the authors of such breaches or those who had ordered their commission would be held 'individually accountable' for them."

[43] *Ibid.*, para. 134.

[44] See, *e.g.*, George H. Aldrich, *Jurisdiction of the International Criminal Tribunal for the former Yugoslavia*, 90 AM. J. INT'L L. 64, 69 (1996); Aldykiewicz & Corn, *supra* note 21, at p. 137; Cisse, *supra* note 25, at p. 116; Greenwood, *supra* note 36, at pp. 279–81, 282–83; Simma & Paulus, *supra* note 5, at p. 313.

[45] That is to say that even those who find the proof of the existence of custom in the decision lacking agree on the significance of the decision. See, *e.g.*, Ratner & Abrams, *supra* note 11, at pp. 96–97; W.J. Fenrick, *International Humanitarian Law and Criminal Trials*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 23, 39–41 (1997).

[46] See, *e.g.*, *Prosecutor* v. *Bagilishema*, *supra* note 34, para. 98; *Prosecutor* v. *Musema*, *supra* note 34, para. 242; *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 90.

[47] Simma & Paulus, *supra* note 5, at pp. 312–13.

D. *Article 4 of the Statute of the ICTR and the Principle of* Nullum Crimen Sine Lege

For the Tribunal to have been able to validly exercise its jurisdiction under article 4 of its Statute in respect of serious violations of common article 3 and Additional Protocol II, however, it first had to satisfy itself that, in 1994 in Rwanda, individual criminal responsibility attached to the conduct proscribed by these instruments. This was necessary in order to ensure that the application of the Statute, which was adopted after the acts which were to be prosecuted under it had been committed, would not violate the principle of *nullum crimen sine lege*.[49]

It was for this reason that in its first judgment after a full trial, in the *Akayesu* case,[50] the Tribunal examined the legal basis of the criminality of serious violations of common article 3 and Additional Protocol II. Because these instruments lack any express provision as to individual criminal liability for their breaches, it could not therefore be maintained that the criminality was based on conventional law. However, as discussed above, the Tribunal satisfied itself that individual criminal responsibility

[48] Ratner & Abrams, *supra* note 11, at p. 98.

[49] See, *e.g.*, *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 86. *Nullum crimen, nulla poena, sine lege* is a principle of legality which requires that no one may be punished except for a breach of an existing rule of law. See, *e.g.*, Francis G. Jacobs & Robin C.A. White, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 162 (2d ed. 1996); Manfred Nowak, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 274–81 (1993). The International Covenant on Civil and Political Rights, (1976) 999 U.N.T.S. 171 (ICCPR) contains the *nullum crimen* principle in article 15 (prohibition of retroactive criminal laws) which reads, in part: "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed." See also, *e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, (1955) 213 U.N.T.S. 221, E.T.S. 5, art. 7(1). Upon review of the drafting history of the ICCPR, Professor Nowak has clarified the meaning of this provision as follows: "A person may be held guilty of an act or omission that was not punishable by the applicable national law at the time the offence was committed so long as this was punishable under international tre law or customary international law in force at the time the offence was committed." No , *ibid.*, at p. 276. See also Jacobs & White, *ibid.*, at p. 167. Therefore, the *nullum crim* nciple is not violated when the act being prosecuted was recognised, at the time of lleged act, as criminal under national law of the State where the alleged act occurre under conventional or customary international law binding on the State in question.

[50] *Prosecutor* v. *Akayesu*, *supra* note 33.

for serious violations of common article 3 and Additional Protocol II was based on customary international law.

Moreover, in the *Akayesu* judgment,[51] as in every subsequent judgment rendered after a full trial,[52] the Tribunal was further bolstered in its assessment that article 4 of its Statute could be validly applied to the situation in Rwanda in 1994 because of the following factors. First, the Tribunal found that common article 3 and Additional Protocol II were then applicable in Rwanda as a matter of convention and custom.[53] Rwanda became a party to the Geneva Conventions of 1949 on May 5, 1964 through succession[54] and, through ratification, to the Additional Protocol II thereto on November 19, 1984.[55] Second, the offences enumerated in article 4 of the Statute also constituted crimes under the laws of Rwanda.[56] The Tribunal therefore found that the application of article 4 of the ICTR Statute to the situation in Rwanda during the Tribunal's temporal jurisdiction did not violate the *nullum crimen sine lege* principle.[57]

[51] *Ibid.*

[52] *Prosecutor* v. *Bagilishema*, *supra* note 34; *Prosecutor* v. *Musema*, *supra* note 34; *Prosecutor* v. *Rutaganda*, *supra* note 34; *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34.

[53] *Prosecutor* v. *Bagilishema*, *supra* note 34, para. 98; *Prosecutor* v. *Musema*, *supra* note 34, para. 242; *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 90; *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, paras. 156–157, *Prosecutor* v. *Akayesu*, *supra* note 33, para. 617.

[54] The Geneva Conventions of 1949 entered into force for Rwanda with a retroactive effect as from 1 July 1962, the date of Rwanda's independence.

[55] See <www.icrc.org/ihl.nsf>. The non-governmental party to the conflict, the Rwandese Patriotic Front, had stated to the International Committee of the Red Cross that it was bound by the rules of international humanitarian law. See *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, para. 157.

[56] See, *e.g.*, Kayishema & Ruzindana, *supra* note 34, para. 157, *Prosecutor* v. *Akayesu*, *supra* note 33, para. 617. For example, articles 311–312 of the Rwandan Penal Code in force during the massacres in 1994 proscribed murder, article 316 proscribed torture, article 359 proscribed indecent assault, article 360 proscribed rape, and articles 339–342 proscribed threats to commit any of these offences. See CODES ET LOIS DU RWANDA, titre II (des infractions contre les personnes) 207–12 (Filip Reyntjens *et al.* eds., 1979). See also Meron, *supra* note 1, at p. 566; Condorelli, *supra* note 12, at p. 114 ("[T]he principle of legality is by no means violated when a system of criminal prosecution is organised at the international level to punish acts having a criminal character which the author could not possibly ignore as those acts were clearly and exhaustively defined as criminal offences by the law").

[57] See *Prosecutor* v. *Bagilishema*, *supra* note 34, para. 98; *Prosecutor* v. *Musema*, *supra* note 34, para. 242; *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 90; *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, paras. 156–157, *Prosecutor* v. *Akayesu*, *supra* note 33, para. 617. See Meron, *supra* note 1, at pp. 566, 568 (agreeing with this position).

E. Concluding Observations on Individual Criminal Responsibility for Breaches of International Humanitarian Law Applicable in Internal Armed Conflicts

In sum, the ICTR is a beacon signalling that serious breaches of common article 3 and Additional Protocol II carry individual criminal responsibility on the international plane. First, the promulgation of the ICTR Statute showed the readiness of states in the United Nations Security Council to recognise this principle, albeit in the specific context of the 1994 conflict in Rwanda. Second, ICTR jurisprudence, following the *Tadic* interlocutory appeal decision of the ICTY Appeals Chamber, has repeatedly confirmed the criminality of serious breaches of humanitarian law applicable to non-international armed conflicts.[58]

As the two *ad hoc* tribunals have led the way in affirming this principle of criminal responsibility, they have also been instrumental in elucidating the material elements of common article 3 and Additional Protocol II as penal instruments. This is a fundamental contribution to promoting enforcement of the provisions of these instruments and to facilitating repression of inhumane treatment of victims of internal armed conflicts.

II. INTERPRETATION OF COMMON ARTICLE 3 AND ADDITIONAL PROTOCOL II BY THE ICTR

In the time before the existence of the ICTR and the ICTY, common article 3 and Additional Protocol II had rarely been enforced in any way and there had been little precedent for their interpretation and application.[59] For example, it has been observed that states had been able to evade the obligations of common article 3 because it was seen as reciting general principles rather than setting out precise standards of conduct.[60]

[58] Common article 3 and Additional Protocol II established international interest in internal armed conflicts, but did not provide any mechanism for interpretation of their provisions. Duncan B. Hollis, *Accountability in Chechnya – Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793, 834 (1995). Until the establishment of the ICTR and the ICTY, these instruments were left to the auto-interpretation of states. See *ibid.* at 832.

[59] See Mariann M. Wang, *The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact*, 27 COLUM. HUM. RTS. L. REV. 177, 222 (1995).

[60] See, *e.g.*, ICRC COMMENTARY: ADDITIONAL PROTOCOL II, *supra* note 2) at p. 1348 ("In the absence of clarity of this concept [a definition of armed conflict], it gave rise to a great variety of interpretations and in practice its applicability was often dem[illegible]"); Forsythe, *supra* note 22, at p. 273 ("No one has been completely sure as to what factual situations ... [common article 3] applies, and no one has been totally sure exactly what is

article 3 and Additional Protocol II in the context of the cases before the Tribunal. The jurisprudence of the ICTR now indicates the material elements of common article 3 and Additional Protocol II as penal instruments aimed at protecting victims of internal armed conflicts. This section will focus on the analysis undertaken by the Tribunal to decide whether particular alleged facts constitute acts punishable under article 4 of its Statute, that is, as serious violations of common article 3 or Additional Protocol II. The analysis consists of examining the nature of the conflict, the application of the instruments *ratione loci* and *ratione personae*, and the existence, if any, of a nexus between the alleged acts and the armed conflict. The final steps in the analysis are determining whether the alleged violation was serious and whether the elements of the specific alleged offence are proven.

A. Ratione Materiae: *The Nature of the Conflict*

Common article 3 and Additional Protocol II are expressly applicable to armed conflicts of a non-international character. The Tribunal therefore had to answer whether the conflict in Rwanda in 1994 was of such a character as to fall within the scope of application of these provisions and, consequently, within the ambit of article 4 of the ICTR Statute.

Common article 3 prescribes: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, ... [certain] provisions ...."[61] Therefore, common article 3 is applicable to any non-international armed conflict within the territory of a state party. The Geneva Conventions, however, do not define what is meant by "armed conflict not of an international character".[62] In general, the International Committee of the Red Cross (ICRC) has suggested, non-international armed conflicts referred to in common article 3 are conflicts with armed forces on either side engaged in hostilities that are "in many respects similar to an international war, but take place within the confines of a single country".[63]

prohibited in whatever situation it is that is regulated"); Smith, *supra* note 2, at p. 65. In this regard the ICTR has observed that common article 3 "lacked clarity and enabled the States to have a wide area of discretion in its application". *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 94. See also *Prosecutor* v. *Musema*, *supra* note 34, para. 252.

61 Geneva Conventions, *supra* note 3, art. 3.

62 See Geneva Conventions, *supra* note 3, art. 3. See also ICRC COMMENTARY: ADDITIONAL PROTOCOL II, *supra* note 21, at p. 1348; Geoffrey Best, WAR AND LAW SINCE 1945 177 (1994); Solf, *supra* note 5, at p. 63.

63 INTERNATIONAL COMMITTEE OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 36 (1958) [hereinafter "ICRC COMMENTARY: GENEVA CONVENTIONS"].

Additional Protocol II, by its own terms, develops and supplements common article 3 "without modifying its existing conditions of application".[64] Its article 1, however, expands on common article 3 in as much as it sets out that Additional Protocol II covers non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[65]

Additional Protocol II represents an attempt to strengthen the protections of common article 3 by setting out objective criteria for determining its applicability.[66] The objective criteria, essentially, are the requirements of a responsible command, control over part of the territory so as to enable insurgents to carry out sustained and concerted military operations, and the ability to implement the Protocol.[67] By adding these criteria to the terms of common article 3, the drafters of Additional Protocol II restricted the applicability of the Protocol to internal conflicts of "a certain degree of intensity".[68] This is confirmed by an express prescription in the Protocol, notably absent from common article 3, that it "shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".[69]

The Tribunal has interpreted and applied common article 3 and article 1 of Additional Protocol II, holding that the conflict in Rwanda in 1994 was

64 Additional Protocol II, *supra* note 4, art. 1.

65 *Ibid.*

66 See ICRC COMMENTARY: ADDITIONAL PROTOCOL II, *supra* note 21, at 1348. See also Bothe et al. *supra* note 5, at 628.

67 See Additional Protocol II, *supra* note 4, art. 1. See also ICRC COMMENTARY: ADDITIONAL PROTOCOL II, *supra* note 21, at 1349; Bothe et al., *supra* note 5, at p. 627.

68 ICRC COMMENTARY: ADDITIONAL PROTOCOL II, *supra* note 21, at 1349. For a review of the drafting history on this point see Forsythe, *supra* note 22, at pp. 284–85. See also Bothe et al., *supra* note 5, at p. 606; Leslie C. Green, *International Regulation of Armed Conflicts*, *in* INTERNATIONAL CRIMINAL LAW: CRIMES 355, 377–78 (M. Cherif Bassiouni, ed., 2nd ed., 1999) (commenting on the high threshold of application of the Protocol); Richard N. Kiwanuka, *Humanitarian Norms and Internal Strife: Problems and Prospects*, *in* IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW 229, 231 (Frits Kalshoven & Yves Sandoz, eds., 1989); Oeter, *supra* note 5, at pp. 205. Professor Greenwood has commented that Additional Protocol II was "made subject to a definition of internal conflicts which excludes the majority of such conflicts". Greenwood, *supra* note 29, at p. 19.

69 Additional Protocol II, *supra* note 4, art. 1(2).

a non-international armed conflict within the scope of these provisions.[70] The *Akayesu* judgment showed the way for future work in this area when it suggested tests for evaluating whether a conflict is within the scope of common article 3 and Additional Protocol II.[71]

With respect to common article 3, the *Akayesu* test focused on the intensity of the conflict and organisation of the parties thereto.[72] The Trial Chamber concluded that armed conflict not of an international character as covered by common article 3 existed in Rwanda at the time of the alleged events.[73] In reaching this conclusion, the Chamber took into account that the evidence presented in the case has shown that there had been a civil war between the governmental forces (FAR) and the insurgent forces of the Rwandese Patriotic Front (RPF) and that both groups were well organised to an extent where they were both considered to be "armies in their own right".[74] As for the intensity of the conflict, the Chamber recalled that all observers unanimously characterised the conflict between the FAR and the RPF as a war.[75]

The *Akayesu* Trial Chamber also found the conflict to have been such as to fall within the scope of Additional Protocol II.[76] The Chamber considered that the FAR and the RPF were engaged in a conflict on the territory of Rwanda and during that conflict the RPF controlled a significant part of the territory.[77] Moreover, the RPF carried out continuous and sustained military operations until the cease-fire. Its troops were disciplined and were under "a structured leadership which was answerable to authority".[78] Finally, the RPF had represented to the ICRC that it was bound by international humanitarian law.[79] The Chamber therefore was satisfied that the facts of the case fell squarely into the categories prescribed in article 1 of Additional Protocol II, the precise terms of which the Trial Chamber recalled in the judgment.[80] This approach to testing the applicability of common article 3 and Additional Protocol II to given

[70] *Prosecutor* v. *Musema, supra* note 34, para. 971; *Prosecutor* v. *Rutaganda, supra* note 34, para. 436; *Prosecutor* v. *Kayishema & Ruzindana, supra* note 34, paras. 172 and 597; *Prosecutor* v. *Akayesu, supra* note 33, paras. 621 and 627.

[71] *Prosecutor* v. *Akayesu, supra* note 33, paras. 619–621 and 622–627.

[72] *Ibid.*, para. 620.

[73] *Ibid.*, paras. 621 and 639.

[74] *Ibid.*, para. 621.

[75] *Ibid.*

[76] *Ibid.*, paras. 627 and 639.

[77] *Ibid.*, para. 627.

[78] *Ibid.*

[79] *Ibid.*

conflicts and the consequent findings of the Trial Chamber in *Akayesu* on this matter were endorsed in subsequent judgments of the Tribunal.[81]

Additionally, the Trial Chamber, in the case of *Prosecutor* v. *Kayishema & Ruzindana* clarified the distinction between international and internal armed conflicts.[82] The Chamber specified that international armed conflicts are conflicts conducted by two or more states, whereas internal armed conflicts are those between a state and a non-state entity.[83]

In sum, it may be observed that while common article 3 and Additional Protocol II have differing thresholds of application,[84] the test employed by the ICTR to assess the applicability of these instruments to concrete situations is based on the same two factors, namely the organisation of the forces and the intensity of the conflict.[85] Additionally, ICTR jurisprudence reflects the higher threshold of Additional Protocol II in the requirement that the insurgent forces control a part of the territory of the state.

The interpretation evident in ICTR judgments may appear to elevate the threshold of applicability of common article 3 which, unlike article 1 of Additional Protocol II, does not prescribe any requirement as to the organisation of the forces or the intensity of the conflict. Such a conception would have no effect on the findings of the ICTR since whenever the Tribunal had considered the nature of the armed conflict in Rwanda in

[81] See *Prosecutor* v. *Musema, supra* note 34, paras. 250–251 and 256–258; *Prosecutor* v. *Rutaganda, supra* note 34, paras. 93 and 436; *Prosecutor* v. *Kayishema & Ruzindana, supra* note 34, paras. 172 and 597.

[82] *Prosecutor* v. *Kayishema & Ruzindana, supra* note 34, para. 170. Note that drawing such a distinction can be exceedingly difficult in practice and that the propriety of drawing such a distinction in the first place has been criticised. *Application of Humanitarian Law in Non-International Armed Conflicts: Remarks by W. Michael Reisman*, 85 AM. SOC'Y INT'L L. PROC. 83, 85, 87, 88 (1991).

[83] *Prosecutor* v. *Kayishema & Ruzindana, supra* note 34, para. 170. See also *Prosecutor* v. *Tadic, supra* note 36, para. 72; *Prosecutor* v. *Musema, supra* note 34, para. 247 ("... a non-international conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory"); ICRC COMMENTARY: ADDITIONAL PROTOCOL II, *supra* note 21, at 1351.

[84] See, *e.g.*, Bothe et al., *supra* note 5, at p. 606 (noting that Additional Protocol II has a threshold of application "clearly above that of common Art. 3").

[85] This approach is in line with the general position of the ICTY that an inte armed conflict exists where there is "protracted armed violence between governmental iorities and organised armed groups or between such groups within a State." *Prosecut Tadic, supra* note 36, para. 70. See also, *e.g.*, *Prosecutor* v. *Furundzija* (Case No. IT- 7/1-T), Judgment, 10 December 1998, para. 59; *Prosecutor* v. *Delalic et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 183; *Prosecutor* v. *Tadic* (Case No. IT-94-1-T),

1789

1994, it has concluded that it fell within the ambit not only of common article 3 but also of Additional Protocol II. However, the proposition that only conflicts of a certain intensity and involving forces with a certain level of organisation are within the scope of common article 3, if accepted and strictly applied, could result in the non-applicability of the protections of the article to other internal armed conflicts that may not rise to the level of carnage that Rwanda suffered in 1994.

Such a result could be at odds with the spirit of common article 3. In its *Commentary*, the ICRC rhetorically asked whether common article 3 is inapplicable where "armed strife" breaks out in a country, but, for example, does not involve an *organised* insurgent armed force.[86] The ICRC answered in the negative. "We do not subscribe to this view. We think, on the contrary, that the scope of application of the article must be as wide as possible."[87] With this caution in mind, the jurisprudence reviewed above in respect of determining whether a particular conflict falls within the scope of common article 3 or Additional Protocol II may serve as a useful guide in future cases.

B. Ratione Loci

Common article 3 and Additional Protocol II have no express provisions *ratione loci*. The ICTR jurisprudence indicates that once the conditions for applicability of common article 3 and Additional Protocol II are satisfied, their scope extends throughout the territory of the state where the hostilities are taking place without limitation to the "war front" or to the "narrow geographical context of the actual theatre of combat operations".[88] Therefore, the Tribunal has considered alleged violations of common article 3 or Additional Protocol II to be subject to its jurisdiction under article 4 of the ICTR Statute so long as they took place in the territory of Rwanda. For future applications what is dispositive, therefore, is not where in the territory the alleged violation occurred, but rather whether it involved a person protected by the instruments.

[86] See ICRC COMMENTARY: GENEVA CONVENTIONS, *supra* note 72, at 36.

[87] *Ibid.* See also Kiwanuka, *supra* note 69, at p. 244 (arguing for a broad application of common article 3: "... where a government takes extraordinary measures, that objectively reveal the existence of a military situation, there is an 'armed conflict' within the meaning of common article 3").

[88] See *Prosecutor* v. *Bagilishema*, *supra* note 34, para. 101; *Prosecutor* v. *Musema*, *supra* note 34, paras. 283–284; *Prosecutor* v. *Rutaganda*, *supra* note 34, paras. 102–103; *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, paras. 176, 182–183; *Prosecutor* v. *Akayesu*, *supra* note 33, paras. 635–636. This is also the position taken by the ICTY Appeals Chamber: *Prosecutor* v. *Tadic*, *supra* note 36, para. 69. See also ICRC

C. Ratione Personae

1. *Victims*

Common article 3 extends its protection to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause".[89] The ICRC *Commentary* explains this provision as follows:

> ... article 3 has an extremely wide field of application and covers members of the armed forces as well as persons who do not take part in the hostilities. In this instance, however, *the article naturally applies first and foremost to civilians – that is to people who do not bear arms.*[90]

Additional Protocol II applies to "all persons affected by an armed conflict".[91] The ICRC *Commentary* included in this category "persons who do not, or no longer take part in hostilities".[92] Article 4(1) of Additional Protocol II further specifies that its guarantees extend to "[a]ll persons who do not take a direct part or who have ceased to take part in hostilities".[93]

In essence, both common article 3 and Additional Protocol II protect persons not taking an active part in the hostilities.[94] The ICTY Appeals Chamber emphasised that common article 3 covers "*any* individual not taking part in the hostilities".[95] This is also the position taken by the ICTR.[96] The question to be answered simply is whether, at the time of the

[89] Geneva Conventions, *supra* note 3, art. 3.

[90] ICRC COMMENTARY: GENEVA CONVENTIONS, *supra* note 72, at p. 40 (emphasis added).

[91] Additional Protocol II, *supra* note 4, art. 2(1).

[92] ICRC COMMENTARY: ADDITIONAL PROTOCOL II, *supra* note 21, at p. 1359. See also Smith, *supra* note 2, at p. 66.

[93] Additional Protocol II, *supra* note 4, art. 4(1).

[94] See *Prosecutor* v. *Akayesu*, *supra* note 33, para. 629. See also Green, *supra* note 14, at pp. 59, 231, 323, 325 ("In a non-international armed conflict civilians are protected by [common] article 3 ... which ... applies to civilians as well as those *hors de combat*". *Ibid.* at 231); Bothe et al., *supra* note 5, at p. 640; Hans-Peter Gasser, *Protection of Civilian Population*, *in* THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 214 (Dieter Fleck, ed., 1995); International Committee of the Red Cross, *Memorandum on Compliance with International Humanitarian Law by Forces, "Operation Turquoise"*, Geneva, June 23, 1994, *reprinted in* Marco Sassoli & Antoine A. Bouvier, HOW DOES LAW PROTECT IN WAR?: CASES, DOCUMENTS AND TEACHING MATERIAL ON CONTEMPORARY PRACTICE IN INTERNATIONAL HUMANITARIAN LAW 1307, 1308 (1999).

[95] *Prosecutor* v. *Delalic et al.* (Case No. IT-96-21-A), Judgment, 20 February 2001, para. 420 (emphasis in original). Moreover, if there is "doubt as to a person's status, he is to be considered as a civilian". Green, *supra* note 14, at p. 234.

6342

alleged offence, the alleged victim was directly taking part in the hostilities.[97] If the answer is negative, the alleged victim was a person protected by common article 3 and Additional Protocol II.[98]

2. *Perpetrators*

Until a recent correction by the ICTR Appeals Chamber,[99] the ICTR Trial Chambers had held that the applicability of common article 3 and Additional Protocol II *ratione personae* must be assessed not only in respect of victims, but also perpetrators.[100] Article 4 of the ICTR Statute provides that the Tribunal "shall have the power to prosecute persons committing or ordering to be committed serious violations of [common article 3 and Additional Protocol II]".

The Trial Chamber in the *Akayesu* case reasoned that since the Geneva Conventions and their Additional Protocols primarily aim at protection of victims of armed conflicts, they are first of all "addressed to persons who by virtue of their authority, are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities".[101] Hence, according to this position, the responsibilities prescribed in these instruments normally fall to members of the armed forces, or to "individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government,

Kayishema & Ruzindana, *supra* note 34, para. 179; *Prosecutor* v. *Akayesu*, *supra* note 33, para. 629.

97 See *Prosecutor* v. *Bagilishema*, *supra* note 34, para. 104; *Prosecutor* v. *Musema*, *supra* note 34, para. 279; *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 100; *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, para. 179; *Prosecutor* v. *Akayesu*, *supra* note 33, para. 629. This is also the test used by the International Tribunal for the former Yugoslavia. See *Prosecutor* v. *Tadic* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, para. 615. The *Tadic* Trial Chamber noted, at para. 616: "It is unnecessary to define exactly the line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time." To take a direct part in hostilities means, for the purposes of these provisions, to engage in acts of war that strike at personnel or equipment of the enemy armed forces. See *Prosecutor* v. *Bagilishema*, *supra* note 34, para. 104; *Prosecutor* v. *Musema*, *supra* note 34, para. 279; *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 100. See also ICRC COMMENTARY: ADDITIONAL PROTOCOL II, *supra* note 21, at p. 1453.

98 See *Prosecutor* v. *Tadic*, *ibid.*, para. 615.

99 *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-A), Judgment, 1 June 2001, paras. 425–446.

100 See, *e.g.*, *Prosecutor* v. *Akayesu*, *supra* note 33, para. 628 ("Two distinct issues arise with respect to personal jurisdiction over serious violations of common article 3 and Additional Protocol II, the class of victims and the class of perpetrators").

to support or fulfil the war efforts".[102] These are the persons who, in the view of the Trial Chamber, constitute the class of potential perpetrators and who are consequently within the personal field of application of common article 3 and Additional Protocol II.

The Chamber therefore set out that for Akayesu, a civilian mayor of a commune, to be held criminally responsible under article 4 of the ICTR Statute, the Prosecutor would have to prove beyond a reasonable doubt a link between him and one of the parties to the conflict, that is the forces of the Rwandan Government or the RPF.[103] After reviewing the relevant evidence, the Trial Chamber held that the Prosecutor did not meet this burden.[104] The Chamber found that the Prosecutor did not prove "beyond reasonable doubt that Akayesu was a member of the armed forces, or that he was legitimately mandated and expected, as a public official or agent or person otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts".[105] Crucially for its holding, the Chamber did not see "how and in what capacity Akayesu was supporting the Government effort against the RPF".[106] In part because a link between Akayesu and a party to the conflict was not established, the Chamber found that Akayesu could not incur criminal responsibility under article 4 of the Statute for serious violations of common article 3 and Additional Protocol II.[107]

The analysis set out in *Akayesu* found favour with ICTR Trial Chambers in subsequent cases, until the Appeals Chamber held that the Trial Chamber in *Akayesu* erred on a point of law in restricting the application of common article 3 to a class of persons with a link to one of the parties.

102 *Ibid.*, para. 631.

103 *Ibid.*, para. 640.

104 *Ibid.*, para. 643. The Chamber took into consideration that Akayesu wore a military jacket, carried a rifle, assisted the military upon their arrival in his *commune*, and referred to certain individuals as "RPF accomplices". *Ibid.*, para. 641. The Chamber also noted that Akayesu represented the communal authority and that "he held an executive civilian position in the territorial administrative subdivision of [the] Commune". *Ibid.*, para. 642. The Chamber decided, however, that evidence as to the wearing of a military uniform and carrying the rifle as well as that of "the limited assistance" given to the government forces was insufficient to establish that Akayesu actively supported the war effort.

105 *Ibid.*, para. 643.

106 *Ibid.*, para. 642.

107 *Ibid.*, para. 644. The Trial Chamber's holding was criticised for setting and ing a "standard for civilian liability [that] is unduly high, in that it excludes Akayesu, lected official who held chief executive power in his community, who was a local repres ive of the national Government, and who gave some assistance to the Government's wa fort". Diane Marie Amann, *Case Note, Prosecutor v. Akayesu*, 93 AM. J. INT'L L. 195, 199

In *Prosecutor* v. *Kayishema & Ruzindana*, the Trial Chamber, concurred with the approach in *Akayesu*, opining that the laws of war apply only to members of armed forces and to individuals with a link to the forces.[108] The Chamber reasoned that although Kayishema, a civilian politician, and Ruzindana, a civilian businessman, had carried rifles and participated in massacres, there was no showing of their connection with the armed forces of either side. This position was based on the Chamber's finding that neither the Government forces nor the RPF were involved in the same massacres as Kayishema and Ruzindana.[109] In part because Kayishema and Ruzindana were not members of the armed forces and because the Prosecutor did not demonstrate a link between them and the armed forces, the Chamber held they did not incur criminal liability under article 4 of the ICTR Statute.[110]

The "class of perpetrator" notion from *Akayesu* also appeared in the judgment in the case of *Prosecutor* v. *Rutaganda*, rendered by the same judges who decided the *Akayesu* case.[111] The Trial Chamber in *Rutaganda* pointed out that "[u]nder common article 3 . . ., the perpetrator must belong to a 'Party' to the conflict, whereas under Additional Protocol II the perpetrator must be a member of the 'armed forces' of either the Government or of the dissidents".[112] The Chamber, however, proposed that the class of persons should be interpreted as broadly as possible[113] and repeated the test set out in *Akayesu*.[114] Applying this test to Rutaganda, a civilian

[108] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, paras. 175 and 176. The Chamber wrote that the question is "whether the accused falls within the class of perpetrator s who may be held responsible for serious violations of [common article 3 and Additional Protocol II]". *Ibid.*, para. 173. On this point the Chamber expounded that "individuals of all ranks belonging to the armed forces under the military command of either of the belligerent Parties fall within the class of perpetrators. If individuals do not belong to the armed forces, they could bear the criminal responsibility only when there is a link between them and the armed forces". *Ibid.*, para. 175.

[109] *Ibid.*, para. 619.

[110] *Ibid.*, para. 624. Like the *Akayesu* holding on this point, this ruling was criticised. See Kelly D. Askin, *Judgments Rendered in 1999 by the International Criminal Tribunals for the former Yugoslavia and for Rwanda:* Tadic; Aleksovski; Jelisic; Ruzindana & Kayishema; Serushago; Rutaganda, 6 ILSA J. INT'L & COMP. L. 485, 502, 504 (2000) ("The not guilty verdicts as to the common article 3 and Additional Protocol II counts were made based on determinations that the Prosecution did not prove that the Accused, both civilians, were suporting the Government efforts against the RPF (the standard seemingly erroneously adopted in Akayesu), and that therefore the Accused did not incur criminal liability for their crimes under article 4 of the Statute." *Ibid.* at 504).

[111] *Prosecutor* v. *Rutaganda*, *supra* note 33.

[112] *Ibid.*, para. 96 (citation omitted).

[113] *Ibid.*

who was second vice president of *Interahamwe*, the ruling party's militia, the Chamber found that he "[fell] within the category of persons who can be held individually criminally responsible for serious violations of the provisions of article 4 of the Statute".[115] The necessary linkage between the accused and the government forces was established when the Chamber concluded that Rutaganda exerted control over the *Interahamwe* who, in turn, supported the effort of the Government forces against the RPF.[116]

Similarly, the Chamber in *Prosecutor* v. *Musema* invoked the notion of a class of perpetrators falling within the personal field of application of common article 3 and Additional Protocol II.[117] The Chamber, however, did not have the occasion to apply the test to determine whether a link between the accused and a party to the conflict existed.

Against this current of first instance ICTR jurisprudence,[118] however, the Appeals Chamber of the ICTR recently pointed out that "[a]rticle 4 makes no mention of a possible delimitation of classes of persons likely to be prosecuted under this provision".[119] Common article 3 and Additional Protocol II, like the ICTR Statute, do not specify classes of potential perpetrators; rather they indicate to whom their provisions apply. In the case of common article 3 this is "each Party to the conflict".[120] In respect of Additional Protocol II it is "all persons affected by an armed conflict".[121] The respective provisions of these instruments do not further clarify upon whom the obligation to respect them rests and therefore who could be responsible for their breach.[122]

[115] *Ibid.*, para. 441.

[116] *Ibid.*, para. 439.

[117] *Prosecutor* v. *Musema*, *supra* note 34, paras. 264–266. Under this conception, if a person had a link with a party to the conflict he or she "could fall into the class of individuals who may be held responsible for serious violations of internation al humanitaria n law". *Ibid.*, paras. 274–275.

[118] The ICTR Appeals Chamber observed that the issue of a link between a perpetrator and a party to the conflict had arisen only once in ICTY jurisprudence, in a Trial Chamber's judgment in the case of *Prosecutor* v. *Kunarac et al.* (Case No. IT-96-23-T & IT-96-23/1-T), Judgment, 22 February 2001, para. 407. *Prosecutor* v. *Akayesu*, *supra* note 99, 1 June 2001, para. 439. The ICTY Trial Chamber said: "It would appear to the Trial Chamber that common article 3 may also require some relationship to exist between a perpetrator and a party to the conflict." The ICTR Appeals Chamber, however, observed "that this holding finds no support either in Statute or in case law."

[119] *Prosecutor* v. *Akayesu*, *supra* note 99, para. 435.

[120] See Geneva Conventions, *supra* note 3, art. 3.

[121] See Additional Protocol II, *supra* note 4, art. 2(1).

[122] The ICRC *Commentary* on Additional Protocol II simply says that the field of application *ratione personae* includes "those who must, within the meaning of the Protocol,

Indeed, further clarification in respect of potential perpetrators is not necessary in view of the core purpose of common article 3 and Additional Protocol II: the protection of victims.[123] In the view of the ICTR Appeals Chamber, the protections of common article 3 imply effective punishment of perpetrators, whoever they may be.[124] In its judgment in the *Akayesu* case, the Appeals Chamber, as noted above, held that the Trial Chamber erred on a point of law when it restricted the application of common article 3 to a certain category of perpetrators.[125] The ICTR Appeals Chamber rejected the notion that a link between the perpetrator and one of the parties to the conflict should be a separate condition for criminal responsibility: "such a special relationship is not a condition precedent to the application of common article 3 and, hence of article 4 of the Statute".[126] The Appeals Chamber reasoned as follows:

> The Appeals Chamber is of the view that the minimum protection provided for victims under common article 3 implies necessarily effective punishment on persons who violate it. Now, such punishment must be applicable to everyone without discrimination, as required by the principles governing individual criminal responsibility as laid down by the Nuremberg Tribunal in particular. The Appeals Chamber is therefore of the opinion that international humanitarian law would be lessened and called into question if it were to be admitted that certain persons be exonerated from individual criminal responsibility for a violation of common article 3 under the pretext that they did not belong to a specific category.[127]

Criminal responsibility for acts covered by article 4 of the Statute of the Tribunal, therefore, does not depend on any particular classification of the alleged perpetrator. Consequently, it is not necessary to adjudicate whether the accused person belonged to any kind of a class of persons who could breach common article 3 or Additional Protocol II, or whether a link existed between him or her and one of the parties to the conflict. The judgment in *Prosecutor* v. *Bagilishema*, handed down shortly after the *Akayesu* appeal, illustrates this point.[128] While the Trial Chamber discussed the *ratione personae* of common article 3 and Additional Protocol II in respect of victims, the *Bagilishema* judgment contains no discussion of a class of perpetrators or of a requisite link between the accused and one of the parties.[129]

In conclusion, the *ratione personae* of common article 3 and Additional Protocol II extends to persons not taking an active part in the hostilities, including civilians and members of armed forces who have laid down their arms or have been placed *hors de combat*. A link between a perpetrator and any party to the conflict is not a factor in determining the applicability *ratione personae* of common article 3 or Additional Protocol II. On the other hand, such a link, if it exists, may be a factor in assessing the existence of another element, that of a nexus between the alleged act and the conflict.

D. The Nexus between the Alleged Violation and the Armed Conflict

For an offence to fall within the scope of article 4 of the Statute of the Tribunal, a Trial Chamber must find that there existed a nexus between the alleged breach of common article 3 or Additional Protocol II and the underlying armed conflict.[130] This requirement is best understood upon appreciation of the purpose of common article 3 and Additional Protocol II. The purpose of these provisions is the protection of people as victims of internal armed conflicts,[131] not the protection of people against crimes unrelated to the conflict, however reprehensible such crimes may be.

Whether the requisite nexus existed at the time of the alleged offence is a matter for determination on the evidence adduced. It has been the position of both the ICTR and the ICTY that the nexus requirement is met if the alleged offence is "closely related to the hostilities" or is "committed in conjunction" with them.[132] However, in ICTR jurisprudence to date, the

[123] See *Prosecutor* v. *Akayesu, supra* note 99, para. 442; *Prosecutor* v. *Akayesu, supra* note 33, paras. 603, 618, 630. See also Antonio Cassese, *The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts*, 30 INT'L & COMP. L.Q. 416, 418–19 (1981) (The Protocol "has an almost exclusively *humanitarian* content; in other words, it is primarily designed to protect '*victims*' of the armed conflict . . . ." (emphases in original)).

[124] See *Prosecutor* v. *Akayesu, supra* note 99, para. 443.

[125] *Prosecutor* v. *Akayesu, supra* note 99, paras. 444–445. Specifically, the category of persons in question in the Trial Chamber's judgment consisted of members of the armed forces "under the military command of either of the belligerent parties, or to individuals who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the Government, to support or fulfil the war efforts". See *Prosecutor* v. *Akayesu, supra* note 33, para. 631; *Prosecutor* v. *Akavesu. supra* note 99, para. 444.

[128] *Prosecutor* v. *Bagilishema, supra* note 34.

[129] See *ibid.*, paras. 103–104.

[130] See *Prosecutor* v. *Bagilishema, supra* note 34, para. 105; *Prosecutor* v. *Musema, supra* note 34, para. 259; *Prosecutor* v. *Rutaganda, supra* note 34, para. 104; *Prosecutor* v. *Kayishema & Ruzindana, supra* note 34, para. 185; *Prosecutor* v. *Akayesu, supra* note 33, para. 643. This is also the position taken by the International Tribunal for the former Yugoslavia. See, *e.g.*, *Prosecutor* v. *Tadic, supra* note 36, para. 70.

[131] See *Prosecutor* v. *Kayishema & Ruzindana, supra* note 34, para. 189.

[132] See *Prosecutor* v. *Bagilishema, supra* note 34, para. 105 ("The 'nexus' requirement is met when the offence is closely related to the hostilities or committed in conjunction

Trial Chambers have not been satisfied that the alleged offences bore the necessary nexus to the armed conflict.[133]

In *Akayesu*, the Chamber held that it had not been proved beyond a reasonable doubt that the alleged acts "were committed in conjunction with the armed conflict".[134] The Chamber reached this decision, without a further discussion, upon the analysis it had carried out to determine whether a link existed between Akayesu and one of the parties to the conflict. This may suggest that the Chamber treated the concepts of a link between the alleged perpetrator and a party to the conflict, and that of a nexus between the alleged act and the conflict, as so closely related that they did not merit distinct analysis. In the circumstances of the case this may have been an acceptable approach, although it is easy to appreciate that in other cases the alleged perpetrator may well have a link to one of the parties yet his or her acts may have nothing to do with the armed conflict. Conversely, although perhaps less likely, the alleged perpetrator could have no link with a party to the conflict, but his or her acts could be committed in conjunction with it.

The Appeals Chamber recognised that the "nexus between violations and the armed conflict implies that, in most cases, the perpetrator of the crime will probably have a special relationship with one party to the conflict".[135] However, since the existence of a link between the alleged perpetrator and a party to the conflict is not a condition precedent to the application of common article 3,[136] the analysis must focus on the nexus of the alleged act to the armed conflict.

In subsequent judgments, the Trial Chambers were more deliberate than in *Akayesu* in treating separately the issues of a link of the perpetrators and a nexus to the conflict. Before proceeding to evaluate the facts, the Trial Chamber in *Kayishema & Ruzindana* first highlighted that the aim of common article 3 and Additional Protocol II is to protect victims

armed conflict."); *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 104 ("[T]he offence must be closely related to the hostilities or committed in conjunction with them."); *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, para. 186; *Prosecutor* v. *Akayesu*, *supra* note 33, para. 643 ("[I]t has not been proved beyond reasonable doubt that the acts ... were committed in conjunction with the armed conflict.") This is also the position taken by the International Tribunal for the former Yugoslavia. See, *e.g.*, *Prosecutor* v. *Tadic*, *supra* note 36 ("It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict.")

133 See *Prosecutor* v. *Musema*, *supra* note 34, para. 974; *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 444; *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, para. 623; *Prosecutor* v. *Akayesu*, *supra* note 33, para. 643.

134 *Prosecutor* v. *Akayesu*, *supra* note 33, para. 643.

135 *Prosecutor* v. *Akayesu*, *supra* note 99, para. 444.

136 *Ibid.*

of internal armed conflicts[137] and, therefore, stressed the necessity of establishing a nexus between the alleged crimes and the conflict.

> It is important to establish whether all the crimes committed during the non-international armed conflict should be considered as crimes connected with serious violations of common article 3 and Additional Protocol II. The Chamber is of the opinion that only offences, which have a nexus with the armed conflict, fall within this category. If there is not a direct link between the offences and the armed conflict there is no ground for the conclusion that common article 3 and Protocol II are violated.[138]

The Chamber, however, found that while there was an armed conflict in Rwanda at the time of the alleged events, the massacres in which the accused Kayishema and Ruzindana participated were not committed in "direct conjunction" with the armed conflict.[139] Rather, in the view of the Chamber, the massacres "were committed as part of a distinct policy of genocide; they were committed parallel to, and not as a result of, the armed conflict".[140]

The Trial Chamber in *Kayishema & Ruzindana* seems to have raised the bar on the proof of nexus between the alleged acts and the armed conflict. Whereas the judgment in the case of *Akayesu* speaks only about acts being committed "in conjunction" with the conflict,[141] in *Kayishema & Ruzindana* this test has been set out as acts committed "in *direct* conjunction" with the conflict.[142] Similarly, while the ICTY Appeals Chamber wrote that it is "sufficient that the alleged crimes were closely related to the hostilities",[143] the judges in *Kayishema & Ruzindana* were apparently looking for more, that the acts be the "result of" the armed conflict.[144]

This elevated nexus standard makes it more difficult to prove that the acts were within the scope of common article 3 and Additional Protocol II and that as such they are punishable under article 4 of the ICTR Statute. Although the Chamber, in the case of *Prosecutor* v. *Rutaganda*,[145] did not repeat the words of the *Kayishema & Ruzindana* judgment on this point, it is palpable that the Tribunal adhered to a high nexus standard.

137 *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, para. 189.

138 *Ibid.*, para. 185.

139 *Ibid.*, para. 623.

140 *Ibid.*, para. 621.

141 See *Prosecutor* v. *Akayesu*, *supra* note 33, para. 643.

142 *Ibid.*, para. 623 (emphasis added).

143 *Prosecutor* v. *Tadic*, *supra* note 36, para. 70. See also, *e.g.*, *Prosecutor* v. *Ta* *upra* note 97, para. 573.

144 See *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, para. 622. See also *osecutor* v. *Bagilishema*, *supra* note 34, para. 105 ("The Chamber will determine wh ...er the alleged acts were committed against the victims *because of* the conflict at issue" (emphasis added)).

Rutaganda was second vice president of the *Interahamwe* militia.[146] The Chamber found that he was in a position of authority vis-à-vis the *Interahamwe*[147] and that this militia supported the Government forces' war effort against the RPF.[148] Based on this, the Chamber acknowledged that "there is merit in the submission of the Prosecutor that, considering the position of authority of the Accused over the *Interahamwe*, and the role that the *Interahamwe* served in supporting the RAF [the Government forces] against the RPF, there is a nexus between the crimes committed and the armed conflict".[149] However, because the Prosecutor did not sufficiently prove that Rutaganda's acts formed part of the support to the Government forces in the conflict against the RPF, in the view of the Chamber, it held that it had not been proved beyond a reasonable doubt that a nexus existed between his acts and the armed conflict.[150]

In *Kayishema & Ruzindana* the Chamber suggested that no nexus test "can be defined *in abstracto*".[151] A case-by-case determination on the facts must be carried out.[152] Therefore, it may not be useful to engage in polemics about the precise words used in the various judgments to describe in the abstract the required nexus between the acts and the conflict. This notwithstanding, the ICTR Trial Chambers, thus far, seem to require a very direct conjunction between the alleged acts and the armed conflict. The requirement of showing a nexus between the alleged acts and the conflict is a justified consequence of the purpose of common article 3 and Additional Protocol II. However, if the nexus standard is set too high, perpetrators may win impunity in respect of their violations of international humanitarian law applicable to internal armed conflicts.

E. Specific and Serious Violations

The final steps in determining the applicability of article 4 of the ICTR Statute to particular alleged facts are ascertaining whether the alleged violations were serious and whether the allegations prove the specific elements of the offences. As the Tribunal has not yet engaged in the analysis of facts against elements of the offences charged under article 4, much cannot be said on this point. Suffice it to note that the judgments of the Tribunal have laid out the specific elements of murder and rape as crimes against

146 *Ibid.*, para. 441.

147 *Ibid.*, para. 439.

148 *Ibid.*, para. 440.

149 *Ibid.*

150 *Ibid.*, para. 444. The Chamber's determination of the nexus issue in *Rutaganda* has been considered "unconvincing". See Askin, *supra* note 122, at p. 505.

humanity, and that the Trial Chambers consider these elements applicable to the corresponding offences under article 4.[153] Additionally, in the *Musema* judgment, the Trial Chamber set out the elements of torture, humiliating and degrading treatment, and indecent assault as violations of common article 3 and Additional Protocol II within the scope of article 4 of the Statute.[154]

Article 4 of the Statute grants the Tribunal jurisdiction over *serious* violations of common article 3 and Additional Protocol II. The Tribunal has stated that a serious violation within the meaning of article 4 of the Statute is a breach of a rule protecting important values with grave consequences for the victim.[155] On this basis, the Tribunal has determined that the acts enumerated in article 4 of the Statute constitute serious violations of common article 3 and Additional Protocol II, entailing individual criminal responsibility.[156] Consequently, should the Prosecutor prove that any of the acts set out in article 4 of the Statute have occurred, a Chamber will consider such act to constitute a serious violation within the meaning of article 4.

153 See *Prosecutor* v. *Bagilishema*, *supra* note 34, para. 102; *Prosecutor* v. *Musema*, *supra* note 34, para. 285; *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 107.

154 *Prosecutor* v. *Musema*, *supra* note 34, para. 285.

155 See *Prosecutor* v. *Bagilishema*, *supra* note 34, para. 102; *Prosecutor* v. *Musema*, *supra* note 34, para. 286; *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 106; *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, para. 184; *Prosecutor* v. *Akayesu*, *supra* note 33, para. 616. This position is based on a decision of the Appeals Chamber of the International Tribunal for the former Yugoslavia where the Tribunal stated that "the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim". *Prosecutor* v. *Tadic*, *supra* note 36, para. 94.

156 See *Prosecutor* v. *Musema*, *supra* note 34, para. 288; *Prosecutor* v. *Rutaganda*, *supra* note 34, para. 106 ("The fundamental guarantees included in article 4 of the Statute represent elementary considerations of humanity. Violations thereof would, by their very nature, be deemed serious."); *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, para. 184; *Prosecutor* v. *Akayesu*, *supra* note 33, para. 616. For example, in *Prosecutor* v. *Akayesu*, *supra* note 33, para. 616, the Trial Chamber wrote: "The list of serious violations which is provided in article 4 of the Statute is taken from common article 3 – which contains fundamental prohibitions as a humanitarian minimum of protection for war victims – and article 4 of Additional Protocol II, which equally outlines "Fundamental Guarantees". The list in article 4 of the Statute thus comprises *serious* violations [illegible] the fundamental humanitarian guarantees which, as has been stated above, are recogn[illegible] as part of international customary law" (emphasis in original). Similarly, the Cha[illegible] in *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 34, para. 184 stated: "The list of [illegible]ibited acts, which is provided in article 4 of the ICTR Statute, as well as in common article 3 and in article 4 of Protocol II, undeniably should be recognised as serious violations entailing individual criminal responsibility."

CONCLUSION

We have seen the extent to which the jurisprudence of the ICTR has elucidated the provisions of common article 3 and Additional Protocol II. Until recently common article 3 was seen as so vague that its prescriptions could be hardly ascertained and thus could easily be evaded. Owing in good part to the Tribunal's work, it is now possible to assess whether an alleged factual situation falls within the ambit of international humanitarian law applicable in internal armed conflicts and whether it transgresses the rules enshrined in that law.

Furthermore, as a result of the establishment and jurisprudence of the ICTR and the ICTY, it is now accepted that serious violations of the norms indicated in common article 3 and Additional Protocol II carry individual criminal responsibility. The two United Nations tribunals have highlighted that the law governing internal strife is indeed ascertainable and enforceable. The work of the tribunals has thus shown a way for future penal enforcement of the fundamental norms of international humanitarian law applicable in non-international armed conflicts. Without a doubt, this will contribute to the repression of breaches of such norms and will improve the situation of victims of internal armed conflicts.

Not long ago, Stefan Oeter observed that if international lawyers take seriously the order-preserving role of international law in the world community,

> they must set limits on the use of military force in wars as well as in civil wars, and not only on a symbolic level, but also on a practical level. International law must endeavour to implement and enforce these rules, if it wants to be taken seriously as a discipline of law, and may not restrict itself to merely symbolic or programmatic rhetoric.[157]

The judgments of the *ad hoc* tribunals are evidence that the legal rules on the protection of victims of internal armed conflicts are now more than promises or rhetoric, they are law. To the benefit of victims, the international community has shown its growing resolve to enforce this law: first, on an *ad hoc* basis, in respect of the conflicts in the former Yugoslavia, Rwanda, and Sierra Leone, and globally, through the permanent International Criminal Court.[158]

---

157 Oeter, *supra* note 5, at 216.

158 The Statute of the International Criminal Court came into force on 1 July 2002, in accordance with article 126 of the Statute, *supra* note 32. Article 8(2)(c) of the Statute gives the Court jurisdiction over serious violations of common article 3 and article 8(2)(e) gives the Court jurisdiction over "[o]ther serious violations of the laws and customs applicable in armed conflict not of an international character, within the established framework of

MAME MANDIAYE NIANG*

THE RIGHT TO COUNSEL BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The International Criminal Tribunal for Rwanda (ICTR) was set up to prosecute persons responsible for the most serious crimes the world has ever known, namely genocide, crimes against humanity and war crimes.[1] The gravity of these crimes combined with the intricacies of the common law procedure largely followed by the ICTR, with which the accused are far from familiar,[2] render the right to counsel a paramount necessity for a full and unfettered defence.

Article 20 of the ICTR Statute, which recites Article 14 of the International Covenant on Civil and Political Rights, provides that "[t]he accused shall be entitled to . . . defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it . . ." The Rules of Procedure and Evidence extend this principle of legal assistance of the accused to the mere suspect when the latter is being questioned by the Prosecutor.[3] The ICTR attributes such importance to the right to legal assistance that even when an accused

---

* Legal Officer, International Criminal Tribunal for Rwanda. Master in Private Law [with distinction] 1985, University of Dakar (Senegal); Certificate of Ecole Nationale d'Administration de Magistrature [with distinction] 1987. The opinions expressed in this article are the author's and do not necessarily represent those of the ICTR or of the United Nations.

1 Article 1 of the ICTR Statute defines its jurisdiction. Articles 2, 3 and 4 of the Statute set out the crimes falling within the jurisdiction of the Tribunal. There is no specific reference to war crimes. However the new and wide definition of war crimes (see Article 8 of the Statute of the International Criminal Court) encompasses violations of Article 3 common to the Geneva Conventions and Additional Protocol II.

2 All the persons prosecuted before the ICTR but one have been citizens of Rwanda, a country belonging to the civil law tradition of criminal procedure.

3 According to Rule 42:

> (A) A suspect who is to be questioned by the Prosecutor shall have the following rights, of which he shall be informed by the Prosecutor prior to questioning, in a language he

has elected not to defend himself or herself either by self-representation or through defence counsel, choosing instead to boycott the trial, the Tribunal, going beyond its statutory obligations, has deemed it necessary to appoint a counsel to safeguard his or her interests.[4]

As in most of national jurisdictions, the principle of legal assistance in the ICTR texts is designed following a two-fold pattern: the accused or the suspect may retain counsel of choice when he or she can afford the costs involved; in the case of indigence, counsel is assigned at the Tribunal's expense.[5] Thus far, all persons accused before the ICTR have claimed to be indigent.[6] As a result, counsel have been assigned for their defence at the expense of the Tribunal.

Contrary to the saying "he who cannot pay cannot choose", the issue of choice of counsel as well as their removal is a very live issue in ICTR daily practice. Most accused have at least once refused an assigned counsel or have expressed the wish to change the counsel assigned to them.[7] Of course, the issue of assignment or withdrawal of counsel is addressed as it arises.

Difficulties lie in the fact that different organs of the Tribunal may be involved, not always in the most orderly fashion, in dealing with these matters. The Registrar, the President acting under her administrative

(i) The right to be assisted by counsel of his choice or to have legal assistance assigned to him without payment if he does not have sufficient means to pay for it.

[...]

(B) Questioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived his right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel.

[4] *Prosecutor* v. *Barayagwiza* (Case No. ICTR-97-19-T), Decision on Defence Counsel Motion to Withdraw, 2 November 2000. A somewhat similar ruling was made in the Milosevic case: *Prosecutor* v. *Milosevic* (Case No. IT-99-37-PT), Order Inviting Designation of *Amicus Curiæ* , 31 August 2001. Rather than appoint defence counsel, the ICTY Trial Chamber asked the Registrar to appoint three *amici curiae* charged with presenting the arguments that the accused could put forward and exploiting any evidence that might exonerate the accused.

[5] *Powell* v. *Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932).

[6] Roland Amoussouga, *La problématique d'appui aux victimes*, September 2000.

[7] An internal document produced by the Section of Lawyers and Detention Facilities indicates that of twenty-five accused, only nine have not changed counsel. A dozen have changed counsel more than twice, including: Arsène Ntahobali (three times), Elie Ndayambaje (three times), Georges Rutaganda (three times), Hassan Ngeze (three times), Jean-Bosco Barayagwiza (three times), Joseph Nzirorera (three times), etc. ...

authority, the Bureau,[8] the Judges sitting in Trial Chambers or in the Appeals Chamber, may all at one point in time be called upon to address an issue of assignment or withdrawal of counsel. This inflation of competence over the same subject matter has generated an important body of jurisprudence worthy of examination.

A. STANDARD FOR ASSIGNMENT OF COUNSEL

Assignment of counsel is governed by Rules 44, 44*bis* and 45 of the Rules, complemented by the Directive on the Assignment of Counsel (the Directive) as well as some other regulations issued by the Office of the Registrar.[9] They set forth the criteria for assignment of counsel and the procedure to be followed. Rule 45(A) provides: "A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, have at least ten years' relevant experience and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar." Rule 44, to which reference is made,[10] establishes that to be eligible, a person must be admitted to the practice of law in a state, or be a university professor of law.

The requirements of language ability and willingness to represent indigent persons have not hitherto given rise to any controversy. All counsel registered on the list kept by the Registrar come from English or French speaking countries. The willingness to represent a suspect or an accused may be presumed from counsel's application to be enrolled on the Registrar's list. Besides, before being appointed, counsel reiterate in writing their commitment to represent indigent accused throughout the proceedings. However, the criterion relating to the relevant experience as well as other requirements not specifically provided for in the Rules have been the source of controversy.

[8] Pursuant to Rule 23 of the Rules, the Bureau is composed of the President, the Vice-President and the Presiding Judges of the Trial Chambers.

[9] See the Information Circular on Assignment of Defence Counsel issued by the Office of the Registrar on 22 November 1999.

[10] Rule 44 governs the standard to be applied to counsel engaged and paid by a suspect or an accused. The only requirement under this Rule to qualify to represent an accused or a suspect is to be admitted in a national bar or to be a professor of law, regardless of the length of time during which such an activity has been performed. Surprisingly, Rule 44 *bis*, governing the assignment of a duty counsel for an indigent accused, sets out the same requirements as Rule 44. It would make more sense to copy the requirements to qualify as duty counsel from Rule 45, which governs the qualifications of assigned counsel. However, in practice all duty counsel enrolled on the Registrar's list satisfy the requirements of

In ICTR practice, counsel have at times seen their application to be enrolled on the list of assigned counsel refused by the Office of the Registrar on the ground that they do not meet the requirements set forth in the relevant texts governing the subject. The reasons exposed in the Registrar's letter of refusal usually resolve the issue, because the applicable test looks straightforward at first glance. However some decisions of the Registrar refusing the appointment of a counsel or a co-counsel have been challenged and have generated interesting developments with respect to the standard to be applied. Two decisions require particular mention.

In *Ntakirutimana*, lead counsel sought judicial review of the Registrar's denial of his request for the appointment of a specific co-counsel. In part, the Registrar denied appointment on the ground that the person chosen did not meet the requirements of the Rules governing the assignment of counsel. After noting that the candidate did not qualify as a lawyer admitted to the practice of law in a state, nor did he fully establish his activities as a professor of law, a single Judge of Trial Chamber I redefined the standard for assignment, focussing on the rationale which underlies the requirements set forth in the Rules.

"The purpose of these provisions is to ensure assignment of counsel with relevant and extensive expertise at a high level who can mount an effective defence of the accused", the Judge wrote.[11] "Mr. G ... served as a Prosecutor for three years and as a judge, including as Presiding Judge of the Court of Appeals, for sixteen years in Rwanda ..."[12] Accordingly,

> [t]here is every reason to assume that he has valuable experience in criminal proceedings which may be useful for the Defence in the present case. It is also noted that among his publications figure a manual for the police and a commentary on the law of 30 August 1996 concerning the prosecution of crimes constituting genocide and crimes against humanity. Even if he was a visiting-not permanent-professor at academic institutions the Chamber is convinced that his qualifications, ***seen as a whole***, are sufficient to meet the requirements of Rules 44 and 45 and Articles 13 and 15 of the Directive.[13]

In *Nyiramasuhuko*, the Chamber, in instructing the Registrar to assign a co-counsel, expanded upon the criteria to be taken into consideration, to include "the resources of the Tribunal, competence and recognised experience of counsel, geographical distribution, a balance of the principal legal systems of the world, irrespective of the age, gender, race or nationality of the candidates".[14]

[11] *Prosecutor* v. *Ntakirutimana & Ntakirutimana* (Case No. ICTR-96-10-T, ICTR-96-17-T), Decision, 13 July 2001, para. 17 *in fine*.

[12] *Ibid*, para. 19.

[13] *Ibid*. (emphasis added).

[14] *Prosecutor* v. *Nyiramasuhuko & Ntahobali* (Case No. ICTR-97-21-T), Decision, [illegible]

The standards set out in the *Ntakuritimana* and *Nyiramasuhuko* decisions present obvious advantages, as the Chamber, in allowing itself to look into the substantive qualifications of the candidate, may be in a better position to determine the fundamental issue of ability of a person to perform satisfactorily the tasks for which he or she is assigned. However there is a risk involved in embarking on the use of such a wide and hazy test as "valuable experience" or "relevant expertise", as the Chambers did in both decisions. The introduction of subjective elements of assessment may eventually lead to adoption of a position totally contrary to the clear provisions of the Rules. Indeed, in focussing on the allegedly rationale underlying the formal requirements of the Rules, nothing theoretically prevents a Chamber from denying the appointment of a lawyer or professor of law who meets the formal requirements of the Rules, but who the Judges do not find having justified enough practice or enough ability to handle criminal cases.

The piecemeal elements referred to as constituting "relevant expertise" in *Ntakirutimana* make it difficult to catch the real test being used, particularly in light of the operative part of the *Ntakirutimana* decision, where the Chamber orders the defence to produce evidence with respect to the candidate's qualification as professor of law. After having dwelt at length on the relevant expertise of the candidate "*seen as a whole*", did the Chamber simply come back to the criteria set forth in the Rules? Otherwise the order does not make much sense.

The more or less free interpretation of the Rules also raises the question of the limits of the discretion of the Judges. Normally when a rule is clear enough to be understood as it stands, Judges should stick to it. Resort to teleological interpretation is allowed only when the intent of the legislator is not discernable at first glance. To do otherwise amounts to usurping the role of the legislator.[15]

B. PROCEDURE FOR ASSIGNMENT OF COUNSEL

Rule 45 of the Rules entrusts the Registrar with keeping a list of counsel meeting the specified criteria. Once the requirement of indigence is satisfied by an accused,[16] a counsel chosen from the list is assigned. The question of free choice of counsel arises. The litigation arisi[illegible] from

[15] Actually, the judges are also the legislators, as far as the Rules are conce[illegible]. But they act in such capacity only when they meet at the plenary session held in a[illegible]dance with Rule 6.

[16] The criteria of indigence as well as the procedure for determining it are set out in Articles 4 through 12 of the Directive on Assignment of Defence Counsel.

6350

the choice is dealt with following a procedure set forth in the relevant provisions of the Rules, the Directive and the Tribunal's case law.

Article 10 of the Directive, indicates that the Registrar, after being satisfied that the suspect or the accused meets the requirement of indigence, "... shall decide ... to assign counsel and *choose for this purpose a name from the list* drawn up in accordance with Article 13 ..." (emphasis added). This seems to indicate clearly that the Registrar is able not only to appoint counsel but also to choose counsel from the list. Several holdings of Trial Chambers seem to go along with the discretionary power of the Registrar to choose assigned counsel.[17]

However, most of the accused being tried before the Tribunal do not accept that free choice of counsel only applies to those being retained and paid by the accused. The fact that they are indigent should not, they think, deprive them of choosing freely the counsel they want. In some decisions, although the discretionary power of the Registrar was not called into question, it was held that indigent accused should be offered the opportunity of designating the counsel of choice from the list drawn up by the Registrar.[18] In fact, the general practice of the Registrar's Office has always consisted of requesting the indigent accused to choose three names from the list, in order of preference. The Registrar will respect the choice expressed by the accused in appointing counsel, unless he has good reason to do otherwise.[19] The flexibility of the Registry in accommodating the accused has gone even further, when the accused has chosen counsel not on the list. In such cases, the Registrar requests counsel to make a formal application to be enrolled on the list.[20]

Sometimes the Registry and the accused do not agree upon appointment of a particular counsel. The Appeals Chamber has not been entirely clear on the scope of the right of the accused to choice of counsel in case of indigence. In *Akayesu*, it seemed to recognise such a right deriving from a practice followed by the Registrar. The Chamber held that "... the

[17] *Prosecutor* v. *Nyiramasuhuko* (Case No. ICTR-97-21-T), *Prosecutor* v. *Bicamumpaka* (Case No. ICTR-99-50-I), Decision, 6 October 1999, para. 11.

[18] *Prosecutor* v. *Ntakirutimana* (Case No. ICTR-96-17-T), Decision, 11 June 1997.

[19] This practice is governed by Information Circular N.2 of 22 November 1999.

[20] The case of counsel for Alfred Musema, Maître Honneger, who was first appointed in Switzerland during the proceedings held before that country's courts. Upon transfer of the accused to Arusha, Musema expressed his wish to be assisted by the same counsel. Honneger was therefore asked to apply to be enrolled on the list kept by the Registry. Thereafter she was formally assigned as counsel for the accused. Jérôme Bicumpaka made a similar request for the assignment of Francine Veilleux: *Prosecutor* v. *Bicumpaka* (Case No. ICTR-99-50-I), Decision, 6 October 1999.

Registrar gave the Appellant a legitimate expectation that Mr. ... would be assigned to represent him before the Tribunal".[21]

In recent decisions, a clearer position on this issue has been taken by the Appeals Chamber. Jean Kambanda, who was the first accused to be sentenced by the ICTR, following his guilty plea, challenged his conviction on the question of right to counsel. Kambanda submitted that his defence was vitiated due to the lack of free choice of counsel. The Appeals Chamber, settling definitively this issue, held that an indigent accused has no right to counsel of choice. The judges recalled the jurisprudence of numerous domestic jurisdictions as well as that of the European Court of Human Rights, which has taken the same view.[22]

The Appeals Chamber confirmed this position in dismissing the appeal of Jean-Paul Akayesu. It held that

> an indigent accused may choose from among counsel in the list and the Registrar generally takes into consideration the choice of the accused. Nevertheless, in the opinion of the Appeals Chamber the Registrar is not necessarily bound by the wishes of an indigent accused. *He has wide discretion, which he exercises in the interest of justice* (emphasis added).[23]

The limits of the liberty of choice of a counsel by an indigent accused are clearly defined. Thus, the Registrar's discretion is subject to review.

C. THE REVIEW PROCESS ON ASSIGNMENT OF COUNSEL

Article 12 of the Directive distinguishes between the suspect, the accused at the stage of the initial appearance and the accused thereafter. The suspect whose request for assignment of counsel is denied may challenge the decision of the Registrar before the President of the Tribunal. As far as the accused is concerned, depending on the stage of the proceedings, he or she may challenge the Registrar's decision either before the Trial Chamber that sits for the initial appearance, or before the Trial Chamber assigned for the trial, by way of preliminary motion. In the latter case, as it applies to all preliminary motions, the motion to be admissible is to be filed within a prescribed time limit.[24]

[21] *Akayesu* v. *Prosecutor* (Case No. ICTR-96-4-A), Decision, 27 July 1999.

[22] *Kambanda* v. *Prosecutor* (Case No. ICTR-97-23-A), Judgment, 19 October [illegible].

[23] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-A), Judgment, 16 May 2001.

[24] Calculation of the deadline appears to be confusing because it is dealt with di[illegible]ntly in two provisions. As a preliminary motion governed by Rule 72 of the Rules, th[illegible]rty-day time limit starts from the disclosure by the Prosecutor to the Defence of the material set forth in Rule 66(A). Article 12 of the Directive provides that the sixty-day time limit

Article 12 of the Directive is silent about the review process open to the accused after the time limit for filing preliminary motions has elapsed, or when the trial has started. This provision was certainly drafted on the assumption that at the trial stage the issue of assignment of counsel cannot arise because the accused must have already been assigned counsel for the defence at the pre-trial stage. However, this assumption may be wrong where the suspect who has later become an accused has consistently waived the right to counsel and has elected to act in his or her own defence,[25] but has a change of mind during the trial when, for the first time, he or she requests that the Registrar assign defence counsel. Apart from this flaw, the review process described in Article 12 seems to be quite complete and clearly set up.

However, the case law on review of decisions of the Registrar in respect of assignment of counsel shows that there is still confusion. First, the Registrar's Office in some cases has contended that it has a discretionary power to assign co-counsel, which should not be subject to judicial review.[26] The Trial Chamber has not upheld this position.[27] On the other hand, the President has been asked to review cases where only a Chamber should be competent to adjudicate. The President has nonetheless exercised jurisdiction.[28] Lastly, although noting that the Directive does not contemplate appeal before the Appeals Chamber, following precedents set by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY),[29] the Appeals Chamber has consistently held that "... in respect of a decision to assign counsel to represent an Appellant before the Appeals Chamber, a right of recourse to the Appeals Chamber is required for the effective exercise of the Appellant's rights under Article 20(4) of the Statute of the Tribunal ..."[30] The Appeals Chamber's position has widened the scope of the review process and has made it more complicated in the sense that the first review before the

[25] The defendant may also have become indigent after having previously retained paid counsel.

[26] *Prosecutor* v. *Nyiramasuhuko*, *supra* note 14, para. 8.

[27] *Ibid.*

[28] *Rutaganda* v. *Prosecutor* (Case No. ICTR-96-3-A), President's Review of the Decision of the Registrar in terms of Article 12 of the Directive on the Assignment of Defence Counsel, Decision, 7 July 2000. In retaining the competence of the President, the decision erroneously relied upon Article 12A of the Directive, which only applies to suspects. The proceedings were at the appeals stage, and thus Rutaganda was no longer a suspect.

[29] *Prosecutor* v. *Delalic* et al. (Case No. IT-96-21-A), Decision, 6 May 1999, and *Prosecutor* v. *Delalic* et al. (Case No. IT-96-21-A), Decision, 24 June 1999.

[30] *Akayesu* v. *Prosecutor*, *supra* note 21. The same position was taken in *Barayagwiza*

President or the Trial Chamber no longer closes the issue of assignment of counsel. As a result, accused persons have a third level of review open to them by the Appeals Chamber.[31]

D. WITHDRAWAL OF COUNSEL

Rules 45(H), 45 *ter*(B), 46(C), Article 19 of the Directive, and the jurisprudence of the Tribunal set forth the standard to be applied as well as the procedure to be followed.

1. STANDARD FOR WITHDRAWAL OF COUNSEL

Counsel may be withdrawn for several reasons, but these may be boiled down to two categories,[32] which are not always easy to distinguish: exceptional circumstances and wrongdoing of counsel.

The relevant texts do not specify the meaning or the content of "exceptional circumstances", leaving the definition to the wisdom of those charged to apply the Rules and the other relevant texts. The case law on the notion of "exceptional circumstances" is wide ranging. Some decisions of the Appeals Chamber reduce the notion to nothing, ordering the Registrar to appoint a new counsel without bothering to qualify the "exceptional circumstances" warranting the change.[33] Other decisions elaborate further on the subject. "Exceptional circumstances" were found in cases of non-availability of counsel due either to medical reasons of counsel[34] or

[31] The position of the Appeals Chamber might make more sense if once the proceedings reach the appeal stage the review of the Registrar's decision was left to the Appeals Chamber. Unfortunately this is not the case, as reflected in *Rutaganda* v. *Prosecutor*, *supra* note 28, where the President exercised her jurisdiction despite the fact the proceedings were at the stage of appeal.

[32] In setting out the standard for withdrawal of counsel, Article 19 of the Directive distinguishes between: (1) exceptional circumstances, (2) serious violations of the Code of Conduct, (3) misconduct which has resulted in a refusal of audience by a Chamber, (4) where counsel no longer satisfies the requirements of Article 13(i), is no longer admitted to practice law in a State or is no longer a professor of law at a university, and (4) failure to observe the undertaking made pursuant to Rule 45 *ter*, *i.e.*, availability within a reasonable time upon assignment. Apart from the fourth criterion, that has never been brought into play to the author's knowledge, the other criteria are applied without a clear distinction.

[33] *Akayesu* v. *Prosecutor*, *supra* note 21; *Barayagwiza* v. *Prosecutor*, *supra* note 1.

[34] *Prosecutor* v. *Imanishimwe* (Case No. ICTR-99-46-T), Décision de Retrait de la Commission d'office de Maître So'o, conseil adjoint de M. Samuel Imanishimwe, 17 May

members of counsel's family[35] or because counsel had given priority to other domestic commitments.[36]

On the other hand, breakdown in communication and loss of confidence have been held to constitute "exceptional circumstances". In several decisions loss of confidence and breakdown in communication were motivated by the ineffectiveness of counsel's assistance, illustrated by unjustified absences of counsel from the proceedings.[37] In *Nyiramasuhuko & Ntahobali*, the Chamber found that "the breakdown in communication and trust between the accused and his defence team, a situation which the Chamber has even observed in Court on several occasions since the start of the trial of the Accused constitutes exceptional circumstances within the ambit of Rule 45(H) of the Rules."[38] The Chamber conceded that it was unaware of the underlying reasons for the breakdown in communication[39] and somehow suspected the accused bore the responsibility.[40] In an earlier decision in *Akayesu*, Trial Chamber I found "exceptional circumstances" warranting the change of counsel in the lack of confidence expressed by the accused, without any reasons being given as to the circumstances underlying the loss of confidence.[41]

One may infer from the findings of these two decisions that accused persons run the show. It suffices for them to express their loss of confidence in assigned counsel or to refuse to collaborate with counsel, in order to terminate their assignment.[42] Such power has been expressly recognised in *Barayagwiza*, where the Chamber, in refusing the withdrawal sought by both lead counsel and co-counsel upon being notified by the accused that he no longer wanted them to represent him in the proceedings, made the following finding:

[35] *Prosecutor* v. *Nteziryayo* (Case No. ICTR-97-29-T), Decision of withdrawal of Mr. Richard Perras as co-counsel of the Accused Alphonse Nteziryayo; 15 February 2002.

[36] *Prosecutor* v. *Bagosora* (Case No. ICTR-98-41-T), Décision de retrait de la commission d'office de Maître Jacques Larochelle, conseil adjoint de M. Théoneste Bagosora; 8 January 2002.

[37] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Decision, 31 October 1996; *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Decision, 31 October 1997.

[38] *Prosecutor* v. *Nyiramasuhuko & Ntahobali* (Case No. ICTR-97-21-T), Decision, 22 June 2001, para. 14.

[39] *Ibid*, para. 15.

[40] *Ibid*, para. 16.

[41] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Decision, 20 November 1996.

[42] In some cases, the difficulty in spelling out the reasons underlying the loss of confidence lies with unjustified fears of counsel about breaching lawyer-client privilege. See *Prosecutor* v. *Ngeze* (Case No. ICTR-97-27-I), Separate and dissenting opinion of Judge Gunawardana, 29 March 2001. Another consequence of the almost absolute power of the

> This is not an unequivocal termination of Counsel's mandate. Unless Mr. Barayagwiza *makes* a clear and unequivocal *decision* to terminate representation, the Chamber has to deny the request for withdrawal (emphasis added).[43]

Some decisions have departed from this approach by refusing withdrawal of counsel when the Registrar or the Judges have found that the difficulty lay with the accused's behaviour.[44] However, attempts to refuse the dictates of the accused have been doomed to failure whenever the accused has persisted in unwillingness to cooperate with assigned counsel.[45] The compromise which the Chambers have come up with seems to be that a request for withdrawal of assigned counsel may be granted even without exceptional circumstances being justified, so long as such withdrawal does not delay the proceedings.[46] This shift in the criteria from "exceptional circumstances" to "request not designed to delay the proceedings" is not consistent with the spirit of Rule 45(H), which does not set up alternate criteria but rather cumulative criteria. However, practical concerns, particularly the need to avoid deadlocks in the conduct of the proceedings, have led to more flexibility in assessing and applying the "exceptional circumstances".

Besides the "exceptional circumstances", wrongdoing of counsel may also lead to withdrawal. Upon his/her assignment a counsel undertakes to be available for the needs of the proceedings before the Tribunal, which take priority over any other domestic commitments. Counsel is also expected to have a certain conduct as an officer of the court. A Code of Professional Conduct for Defence Counsel promulgated by the Registrar on 8 June 1998 sets forth the high standards of professional conduct

[43] *Prosecutor* v. *Barayagwiza* (Case No. ICTR-97-19-T), Decision, 2 November 2000, para. 27.

[44] *Prosecutor* v. *Ngeze*, *supra* note 42; *Prosecutor* v. *Nzuwonemeye* (Case No. ICTR-2000-56-I), Registrar's decision denying Mr. François-Xavier Nzuwonemeye Request for Withdrawal of assignment of his counsel, Mr. François-Xavier Charvet, 24 July 2001; *Prosecutor* v. *Bagambiki* (Case No. ICTR-99-46-T), Décision du Greffier rejetant la demande formée par Emmanuel Bagambiki en vue du retrait de la commission d'office de Maître Luc Boutin, 29 May 2001.

[45] In *Bagambiki*, *ibid*, the Registrar ended up withdrawing the assignment of co-counsel Luc Boutin due to the persistent refusal of the accused to have any contact with him. In *Ngeze*, *supra* note 44, one of the reasons for not granting the accused's request was that the Chamber was not convinced that it was not intended to delay the proceedin[illegible] see the penultimate paragraph on page 4 of the decision.

[46] *Prosecutor* v. *Ntagerura* (Case No. ICTR-99-46-T), Oral decision on l[illegible]erura's motion for withdrawal of the Lead counsel Faky Konaté, 18 September 2000. The [illegible]amber found that the exceptional circumstances were not justified. However, given that co-counsel Benoît Henry was ready to proceed with the case, the Chamber ordered the Registrar to withdraw counsel Konaté from the case.

expected from counsel appearing before the ICTR. A counsel remains bound by his or her own domestic codes of practice and ethics in so far as they do not contradict the regulations of the Tribunal.

Failure of counsel to observe one of the above-mentioned requirements has resulted in withdrawal. Unfortunately a number of decisions keep referring to "exceptional circumstances", although in substance, the criteria which have been brought into play are "the breaches of the undertakings made by counsel".[47] However, a few decisions clearly refer to the relevant criteria. In *Musema*, the Registrar had been instructed to withdraw counsel whose conduct had been found by the Chamber to obstruct the proceedings and to be contrary to the interests of justice.[48] In the Registrar's decision of 5 February 2002, the lead counsel was discharged principally on grounds of financial dishonesty, which constitutes a serious violation of the Code of Conduct for Defence Counsel.[49]

2. PROCEDURE FOR WITHDRAWAL OF COUNSEL

The procedure for withdrawal of counsel is described in Rules 45, 45 *ter* and Article 19 of the Directive. Two issues may arise from these provisions, the initiative of withdrawal and review of decisions on withdrawal.

There is a correlation between the ground underlying the withdrawal and the procedure to be followed. If withdrawal is based upon "exceptional circumstances", Rule 45(H) provides that the suspect or the accused, or his or her counsel may move for the withdrawal. However, Article 19(ii) of the Directive, narrows the scope of intervention of the accused by allowing only lead counsel to make the request for withdrawal of co-counsel. This

[47] *Prosecutor* v. *Rutaganda* (Case No. ICTR-96-3-T), Decision 31 October 1997, para. 3; *Prosecutor* v. *Bagosora* (Case No. ICTR-98-41-I), Décision de retrait de la commission d'office de Maître Jacques Larochelle, conseil adjoint de M. Théoneste Bagosora, 8 January 2002; *Prosecutor* v. *Nteziryayo* (Case No. ICTR-97-29-T), Decision of withdrawal of Mr. Richard Perras as co-counsel of the Accused Alphonse Nteziryayo, 15 February 2002, para. 6.

[48] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-I), Decision, 18 November 1997. The decision to refuse further audience to counsel pursuant to Rule 46(C) followed a warning issued on 31 October 1997, following several absences which delayed the initial appearance of the accused. It would have been preferable to base the decision upon the "failure to abide by the undertakings provided for in Rule 45 *ter* (A)".

[49] *Prosecutor* v. *Nzirorera* (Case No. ICTR-98-44-A), Decision, 5 February 2002. Although financial dishonesty was sufficient to sustain the decision, the Deputy Registrar also referred to the breakdown in communication between counsel and the accused as a further argument.

restriction has been the ground for denial of a request for withdrawal of co-counsel made directly by an accused.[50]

A difficulty may arise when the accused intends to seek the withdrawal of both lead counsel and co-counsel on the same ground. It would not make much sense in such circumstances to dismiss the request, as far as co-counsel is concerned, on the mere basis that he is not qualified to seek directly such withdrawal and that this should pass through lead counsel.

In case of a serious violation of the Code of Conduct, the Registrar appears to be entrusted with a discretionary power to decide *proprio motu* on the withdrawal of counsel, while he is compelled by Article 19(B) to withdraw counsel in other circumstances. Those circumstances are: the decision by a Chamber to refuse audience to assigned counsel for misconduct under Rule 46(A)[51]; where counsel is no longer admitted to practice law in a national bar or is no longer a professor of law; where counsel fails to observe the undertaking of availability made under Rule 45 *ter*.

The withdrawal of counsel is in principle within the competence of the Registrar.[52] A confusion may arise in respect of the provisions of Rule 45(H), which allow the moving party seeking withdrawal on the basis of "exceptional circumstances" to refer the matter directly for the consideration of the Trial Chamber, while in using Article 19(A)(i) of the Directive, the Registrar adjudicates upon the withdrawal without any interference from the Trial Chamber. In fact, Rule 45 refers to the Registrar but only as an organ enforcing a decision already made by the Trial Chamber. Therefore, one may wonder whether a Registrar's decision on withdrawal rendered upon a Trial Chamber's order issued under Rule 45 can be subject to review, as would be the case for decisions made under Article 19(A) of the Directive. The answer should in our view be negative, given the narrow scope of review drawn by the provisions of Article 19(E).[53] Moreover, to allow such recourse would amount to entrusting the President with the power to review a Trial Chamber's decision. So far this issue has not arisen. However, there have been other difficulties in the review process.

Article 19(E) of the Directive provides: "Where a request for withdrawal made pursuant to paragraph (A) [of this provision] has been denied, the person making the request may seek the President's review of the decision of the Registrar." Since the Registrar does not only act under paragraph (A), the question becomes whether the decisions made under

[50] *Prosecutor* v. *Bagambiki, supra* note 44.

[51] *Supra* note 48.

[52] Article 19 of the Directive.

[53] This paragraph refers only to decisions of the Registrar under Article 19(A) as being potentially subject to review.

paragraph (B) can be subject to a review. In fact the issue may arise mainly (only!) with respect to decisions on withdrawal for failure to observe the undertakings of availability made pursuant to Rule 45 *ter*.[54] Indeed such a decision may be taken by the Registrar *proprio motu* or upon the accused's or the lead counsel's request, unless Rule 45 *ter*(B) is held to mean that only a Trial Chamber may adjudicate on the failure of counsel to be available.

On the other hand, even within the narrow scope of review defined in Article 19(E), the case law of the Tribunal reveals some difficulties in applying the proper procedure. Unlike Article 12 of the Directive, which provides for review before different organs of the Tribunal, depending on the stage of the proceedings, in respect of the primary assignment of counsel, Article 19(E) provides for review only before the President. Despite this exclusive jurisdiction with which the President is vested, on several occasions the President has felt that she was not in a position to make any factual determination as to the circumstances underlying the withdrawal sought.[55] As a result, the President has consistently held that consideration of the matter is better left to the Trial Chamber before which the trial is conducted.[56] When trial has started, the Judges conducting the proceedings may well be in a privileged position to assess the quality of the relationship between an accused and his or her counsel.

However, this ought not to lead the President to decline to exercise her jurisdiction. Indeed, the review function is not based on the personal knowledge or experience of the trial judges.[57] Rather, it rests upon the evidence adduced by the parties as well as the grounds (or the lack thereof) set out in the decision challenged. Therefore, the position of the President or the Trial Chamber vis-à-vis the litigants does not seem to justify declining to exercise this jurisdiction. Moreover, nothing would prevent the President, before making her decision, from seeking the opinion of

54 Indeed, the decision on withdrawal following a Chamber's refusal of audience cannot be subject to a review before the President for the reasons set out above.

55 *Prosecutor* v. *Nyiramasuhuko & Ntahobali* (Case No. ICTR-97-21-T), President's decision on review, in accordance with Article 19(E) of the Directive on Assignment of Defence Counsel, 4 June 2001; *Prosecutor* v. *Nzirorera* (Case No. ICTR-98-44-I), President's Decision on review, in accordance with Article 19(E) of the Directive on Assignment of Defence Counsel, 13 June 2001.

56 *Ibid.*

57 For an example of the difficulty in distinguishing between the personal knowledge the Judges have of the case and the evidence being adduced by the parties, which ought to be the sole basis for the decision, see the decision of Trial Chamber II referred to *supra* note 38. The Judges stated that they have observed breakdown in communication several times in the court

the Chamber or from making any other queries on relevant issues, such as the risks of delaying proceedings in withdrawing a particular counsel at a particular moment of the trial. This would allow an informed decision without departing from the clear provisions of the Directive with respect to jurisdiction.

Lastly, in decisions where the President has expressed her inability to adjudicate on the facts, she has nonetheless "confirmed" the decision of the Registrar.[58] Technically, when a decision is held to be confirmed, the meaning thereof is that the review sought against that decision has been found baseless, or that the reviewer shares the motives set out in the impugned decision. It would therefore be better, for the sake of consistency and clarity, to declare that the review is handed over to the Trial Chamber, rather than confirm the decision after having expressed inability to make any factual findings. But despite these reservations, the Trial Chambers have taken up the reviews "handed over" to them by the President.[59]

In one case, a decision of a Trial Chamber, rendered following the President's decision not to exercise her jurisdiction to review, was challenged before the Appeals Chamber.[60] The Appeals Chamber found the application to be inadmissible, holding that its constructions of the inherent rights of recourse of an accused to the Appeals Chamber[61] only apply where an incidental issue is already pending before the Appeals Chamber, justifying a legitimate interest of the Court in guaranteeing the adequate representation of the accused.[62] Such a holding would normally close the issue. However, the Appeals Chamber went on to address the merits. After having noticed the likelihood of the breakdown in the communication between the accused and counsel, the Chamber instructed the Registrar to investigate the matter further and to take an appropriate decision.

The casuistic approach of the Appeals Chamber has the merit of focussing on the practical aspects of the issues before it. However, it makes it difficult to have an overall understanding of the jurisprudence. Lack of

58 *Ibid.*

59 In both cases referred to *supra* note 55, following the decision of the President, the Trial Chamber before which the trial was being conducted has been asked to adjudicate on the review of the Registrar's decision. However it remains unclear whether the Trial Chamber acted on review or was merely seised under Rule 45(H), which gives it competence to adjudicate directly.

60 *Nzirorera* v. *Prosecutor* (Case No. ICTR-98-44-A), Decision, 1 February

61 *Supra* notes 29 and 30.

62 "Considérant que les décisions *Akayesu* et *Barayagwiza* ont été rendues sur des requêtes incidentes à d'autres questions dont la Chambre d'appel était saisie et pour lesquelles la Chambre avait un intérêt légitime de garantir la représentation adéquate de [illegible]"

clarity in the case law may hinder the task of lawyers and researchers. Case law is not only a question of theoretical interests. All practitioners, particularly in the common law system, make their case with due regard to precedent set in previous decisions. The higher the jurisdiction setting the precedent is in the judicial pyramidal structure, the more important is the authority.[63]

CONCLUSION

The ICTR has made a major contribution to the development of international standards, particularly with respect to the difficult reconciliation between the status of indigent defendants and the need to ensure their right to counsel of their choice. The process has certainly not been straightforward, and some may have found it difficult to see the general trend, particularly when it comes to the procedure to be followed. The ICTR has the means to overcome this difficulty because the Judges are not bound to express themselves solely through judicial decisions. Vested with the power to create and amend the rules governing the conduct of the proceedings, with the contribution of the other organs of the Tribunal,[64] they may take up, in the forum of the plenary session, all issues relating to the review process which are not satisfactorily settled by way of jurisprudence. In this vein, the President's jurisdiction for review when the trial has started may be transferred to the Trial Chamber. The Rules may also grant jurisdiction to the Appeals Chamber when the trial is at the appeal stage.[65] All other gaps,[66] uncertainties and inconsistencies may be remedied in the same way.

[63] In most common law systems the "*stare decisis*" principle, unknown in civil law, makes a legal finding of the higher jurisdiction binding over the lower jurisdictions.

[64] *Supra* note 3.

[65] Or when proceedings are pending before the Appeals Chamber.

[66] *Supra* notes 10, 24 and 25. See also our comments on the initiative for withdrawal of

ELIZABETH NAHAMYA* and ROKHAYATOU DIARRA**

DISCLOSURE OF EVIDENCE BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The fundamental principle of criminal procedural law – *lex certa* – prescribes that before the trial commences the accused should be cognizant of the charges and case against him or her as well as the applicable procedures. In accordance with this tradition, the Statute of the International Criminal Tribunal for Rwanda (ICTR) contains several provisions that set out the basic rights of the accused. Article 19(1) introduces the right to a "fair and expeditious" trial and requires, *inter alia*, that the proceedings be conducted in accordance with the Rules of Procedure and Evidence ("the Rules"), with full respect for the rights of the accused. Article 20 captures the core and minimum rights of the accused.[1] For the purposes of this paper, the right of the accused to be informed of the "nature and cause of the charges against him or her" and the provision of "adequate time and facilities for the preparation of his or her defence" are crucial.[2]

For smooth and effective proceedings, it is essential for the defence to have a clear and cohesive view of the prosecution's strategy in order to prepare its case. The defence must know with certitude and in advance the rules to be applied. Thus there must be no surprises. Scholars who support a liberal defence discovery emphasise the need to make the trial "less a

* Trial Chamber I Coordinator, International Criminal Tribunal for Rwanda. LLB (Honours) (Makerere University, Kampala, Uganda) (1975); Master of Science in Criminal Justice (MSCJ) (University of New Haven, CT, USA) (1980). The opinions expressed in this article are the authors' and do not necessarily represent those of the ICTR or of the United Nations.

** Trial Chamber II Coordinator, former Associate Legal Officer in Trial Chambe[illegible] International Criminal Tribunal for Rwanda. LL.M. (Human Rights Fellow) (Columb[illegible] University School of Law, New York) (2003); DEA. International Law (Hon[illegible] (Rober[illegible] Schuman University, Strasbourg, France) (1995). The opinions expressed in t[illegible] ticle ar[illegible] the authors' and do not necessarily represent those of the ICTR or of the Unit[illegible] ations.

[1] See also the International Covenant on Civil and Political Rights, (1976) [illegible] J.N.T.S. 171, art. 14.

[2] Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/RES/955

game of blind man's bluff and more a fair contest with the basic issue and facts disclosed to the fullest practicable extent".[3]

The indictment is the basic document that articulates the charges against the accused. Disclosure of all relevant materials by the Prosecutor will substantiate and support the allegations. A general obligation is placed upon the Prosecutor to disclose to the defence prior to the trial evidence that she will rely upon. However, disclosure is limited to materials essential to the preparation of the defence. Although the prosecution has the discretion to decide what is relevant to the case, the ultimate responsibility for the fairness of the trial process lies with the Trial Chamber. When contentious matters on disclosure arise, the Chamber can exercise its discretion in judging the merits of withholding disclosure in any given case.

A. PROVISIONS GOVERNING DISCLOSURE

Disclosure before the ICTR is governed essentially by provisions of the Rules of Procedure and Evidence, specifically Rules 66, 67, 68 and 69, together with incidental provisions such as Rules 53, 70, 75 and 94*bis*. A review of the legal constraints affecting the Prosecutor's obligation to disclose will, notably, show how the interests of all the components of a trial are taken into account. The section on remedies discusses the options available to the Chambers in cases where the Prosecutor has failed to disclose. Finally, the concluding part of this article explains the difference between the Prosecutor and the Defence's disclosure obligations.

The purpose of Rule 66 is to prepare a fair and expeditious trial. Although intended to be applied at the pre-trial stage, it has been interpreted as being applicable at the trial stage under some circumstances. Rule 66(C) will be discussed separately, because it deals with a particular aspect of disclosure, which has to be done *inter partes*. Rules 67 and 68, dealing respectively with the "disclosure" required from the defence, its duty to inform about the line of defence it intends to use, and the disclosure of exculpatory materials, will be discussed in this section since they can be considered as a counterpart and as a prolongation of the disclosure obligation contained in Rule 66.

[3] W. R. LaFave, Jerold H. Israel & Nancy J. King, CRIMINAL PROCEDURE 911

1. RULE 66(A)(I)

Rule 66 (A)(i) is a two-pronged provision concerned with the disclosure of supporting materials that the Prosecutor has relied upon during the confirmation of the indictment[4] as well as the disclosure of prior statements of the accused. This Rule provides

> (A) The Prosecutor shall disclose to the defence:
> i) Within thirty days of the initial appearance of the accused copies of the supporting material which accompanied the indictment when confirmation was sought as well as all prior statements obtained by the Prosecutor from the accused.

Disclosure of Supporting Material within Thirty Days

The stipulated time frame is of the essence in disclosing the supporting materials. In the jurisprudence of the ICTR, this has generated many applications challenging the validity of disclosure where the Prosecutor has disclosed such materials belatedly.[5]

Since the term "supporting material" has not been defined under Rule 2 of the Rules,[6] it has to be construed contextually under Rule 47(D) and (E), which makes reference to the Registrar forwarding an indictment and accompanying material to the designated judge. Additionally, the Rule enjoins the reviewing judge to examine each of the counts in the indictment and any supporting materials that the Prosecutor may provide. The purpose of the review is to determine whether a *prima facie* case exists against the suspect within the ambit of article 18 of the ICTR Statute.[7] Thus, implicitly, whatever the Judges have relied upon during the review of the indictment is part of the "supporting materials". Trial Chamber I, in *Prosecutor* v. *Nahimana et al.* ("the *Media case*"), while dealing with another matter, outlined the meaning of "supporting material". The Chamber stated that "within thirty days of Initial Appearance, the accused will be served *with the very same* information relied upon by the confirming Judge".[8]

[4] See Rule 47 of the Rules, which relates to the confirmation of Indictment.

[5] *Prosecutor* v. *Ruggiu* (Case No. ICTR-97-32-I), Decision on the Defence Motion for Disclosure of Evidential Material, 16 April 1998.

[6] This provision defines certain terms referred to in the Rules.

[7] Article 18 stipulates: "1. The judge of the Trial Chamber to whom the indictment h been transmitted shall review it. If satisfied that a prima facie case has been established the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictme shall be dismissed. 2. Upon confirmation of an indictment, the judge may, at the requ of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender o transfer of persons, and any other orders as may be required for the conduct of the trial."

[8]

6357

Similarly, the ICTY also defined the term as "the material upon which the charges are based and does not include other material that may be submitted to the confirming Judge such as a brief of argument or statement of fact".[9]

Rule 66(A)(i) is, however, unclear as to what happens if the defence fails to raise the issue of incompleteness of the supporting materials within the prescribed time frame or where it requests the Prosecutor to disclose fuller materials. Concerning the latter point, the defence of Ferdinand Nahimana made an oral application requesting the statement of a witness ZC, whom it alleged to be the same person as a prosecution witness called X, in the course of the trial, but long after the initial appearance.[10] That statement formed part of the supporting materials considered in the review of the indictment against Nahimana. The Chamber held that

> provision of material in confirmation of the Indictment (or of an amended Indictment) is procedurally separate from disclosure of information to the defence at the post-confirmation stage preceding trial. The two procedures are governed by distinct sets of provisions.[11]

The Chamber was of the view that where supporting materials are disclosed within thirty days of the initial appearance, but the defence wishes to obtain additional materials, such as the full statement of a person referred to in the supporting material, the disclosure of such a statement is not required by Rule 66. The defence is entitled to make a request pursuant to Rule 66(B) (inspection of books), which attracts a reciprocal disclosure obligation from defence to prosecution, in accordance with Rule 67(C). The Chamber concluded that the prosecution is not obliged to disclose "more than that original extract" of a statement contained in the supporting materials, sixty days before the trial, if the Prosecutor does not intend to call the person to testify. There was no evidence that witness ZC was a prospective witness. However, after the examination-in-chief of Witness X, the defence renewed its request. The Chamber was of the opinion that the circumstances had changed because the Prosecutor had disclosed the name and identity of witness X, the testimony had started and the cross-examination was about to begin. The Trial Chamber, therefore, granted the

[9] *Prosecutor* v. *Kordic & Cerkez* (Case No. IT-95-14/2.PT), Order on Motion to Compel Compliance by the Prosecutor with Rules 66(A) and 68, 26 February 1999, p. 3.

[10] The defence alleged that Witness ZC was known by the Prosecutor since the beginning and was in fact the Witness X, which the prosecution intended to call, and was therefore a [illegible]

defense motion for the Prosecutor to disclose whether the pseudonym ZC was used for Witness X in respect of this case.[12]

Prior Statements from the Accused

Under Rule 66(A)(i), the Prosecutor is required to disclose prior statements of the accused obtained by it. Failure to do so is an infringement upon the rights of the accused. Several issues arise in connection with this provision, such as the source of the statements and their form. First, should the statements of the accused be prepared by the Prosecutor? Second, should the statements be in a particular format, that is, given under oath, signed and recognised by the accused? These same issues have been considered by the ICTY. In *Delalic*, a trial chamber interpreted Rule 66(A)(i) of the ICTY Rules to the effect that the prosecution is required to disclose all statements of the accused that it has in its possession. The was held to be a continuing obligation.[13] In *Blaskic*, another trial chamber agreed, observing that there is no room for a different interpretation as this "would restrict the rights of the accused as expressly indicated in Article 21 of the Statute".[14] All previous statements of the accused that appear in the Prosecutor's file, whether collected by the Prosecutor or originating from some other source, must be disclosed to the defence immediately.[15]

As already noted, Rule 66(A)(i) principally defines the disclosure at the pre-trial stage, but is not limited to it. As such it is a necessary provision that safeguards the rights of the accused from the outset of the proceedings against him or her. The time period stipulated in this Rule determines another important aspect of the criminal proceedings, the filing of preliminary motions pursuant to Rule 72(A) of the Rules. This Rule provides: "Preliminary motions by either party shall be brought within *thirty* days following disclosure by the Prosecutor to the defence of *all the material envisaged by Rule 66(A)(i)*" [emphasis added]. Thus failure to disclose supporting materials and prior statements of the accused, in a timely manner, will frustrate this rule and this will necessitate an extension of time beyond the prescribed period.[16] The fixed time limit may not be extended if there is no infringement upon the rights of accused. In the

[12] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Transcript of 20 February 2002, p. 4.

[13] *Prosecutor* v. *Delalic* (Case No. IT-96-21-T), Decision on the Motion by the [illegible]sed Zejnil Delalic for the Disclosure of Evidence, 26 September 1996, para. 4.

[14] *Prosecutor* v. *Blaskic* (Case No. IT-95-14), Decision on the Production of [illegible]very Materials, 27 January 1997, p. 14.

[15] *Ibid.*, p. 15.

[16] [illegible]

Ruggiu case, although the Chamber held that the Prosecutor had violated Rule 66(A)(i), it concluded that, in the particular circumstances of the case, failure to disclose to the defence on time had not affected its right to file prescribed motions.[17]

2. RULE 66(A)(II)

Rule 66(A)(ii) consists of two parts; one specifying the period within which to disclose copies of statements of all the witnesses the Prosecutor intends to call at trial, the other concerning extension of time upon showing "good cause". Scrutiny of this rule sheds light on the difficulties that arise regarding definition of the terms "witness statements" and "whom the Prosecutor intends to call to testify at trial".

Disclosure within the Sixty-Day Period prior to Trial

At the pre-trial phase, this rule is crucial for the swift and effective conduct of the proceedings. It enables the defence to properly prepare its case, and in sufficient time. The first important element concerns the date set for trial upon which depends all the disclosures. Having a firm and definitive date is therefore of utmost importance in defining the rights of the accused at this stage. The date of trial is the reference point for the counting of the sixty days and delimits the right of the accused to contest any late disclosures.

In *Prosecutor* v. *Bagosora*, the Trial Chamber scheduled a date for the start of the trial. The defence filed a motion challenging disclosure, alleging a breach of Rule 66(A)(ii) because the prosecution was late in disclosing witness statements. The Prosecutor contended that the date "was merely a tactical date dependant on several factors". The Chamber found that "despite the failure of the prosecution to strictly comply with the provisions of Rule 66 of the Rules in furnishing the witnesses' statements to the defence, this Trial Chamber is clearly of the view that the defence will not be prejudiced in any way in as much as the trial of the case has

Considering the Requirements of Rules 47 & 72 and for an Adjournment *pro tem* of any Decision on any Issue Relevant to this Indictment and for the Relief Pleaded, filed on 16 November 1999. In this motion, the defence sought the disclosure of prior statements of the accused in terms of Rule 66(i) of the Rules. Trial Chamber II decided a similar matter, prior to the amendment of the Rules in June 2000. At that time, the prescribed period was sixty days after disclosure under Rule 66(A)(i). The defence was late in submitting its preliminary motions because of the late disclosures by the Prosecutor. The defence agreed to file a preliminary motion within a forty-day period, provided that the Prosecutor effected the disclosure by a given date. The Chamber granted the defence's request.

been postponed and the defence will consequently have sufficient time to prepare for the trial".[18] The Chamber directed the prosecution to fulfil its obligation under the Rules.

In the *Niyitegeka case*, where no date had yet been fixed for the commencement of the trial, the Chamber held that

> this mandatory obligation stated in Rule 66(A)(ii) indicates a final time limit for disclosure. This disclosure process should be regularly updated as the prosecution gathers evidence against the accused during on going investigations. Even if no date for trial has yet been set, the prosecution should not wait for the setting of this date to disclose any evidence relevant to the preparation of the case by the defence.[19]

It is noteworthy that the judges of the Tribunal encourage the parties to cooperate, particularly in disclosure matters. However, this cooperation is elusive, and matters often end up being decided by the trial chambers.

Witnesses' Statements

Pursuant to Rule 66(A)(ii), statements of all the witnesses that the Prosecutor intends to call at the trial must be disclosed sixty days before the trial. The Rules of the ICTR and ICTY do not define the term "witness statement", nor do they specify the form of such documents. Therefore what amounts to "witness statement" is left to judicial interpretation. One textbook definition provides as follows:

(1) a written statement made by the witness that is signed or otherwise adopted or approved by the witness;
(2) a substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic mechanical, electrical or other recording or transcription thereof; or
(3) a statement, however taken or recorded, or a transcription thereof, made by the witness to a Grand Jury.[20]

In the practice of the ICTR, statements have always been recorded by the Prosecutor's investigators and approved by the witness. The ICTY has defined the term "witness statement", holding that "the testimony of another Prosecution witness in another case before the Tribunal is a

[18] *Prosecutor* v. *Bagosora* et al. (Case No. ICTR-96-7-I), Decision on the Motio he Defence Counsel for Disclosure, 27 November 1997, p. 6.

[19] *Prosecutor* v. *Niyitegeka* (Case No. ICTR-96-14-I), Decision on the Defence on for Disclosure of Evidence, 4 February 2000, para. 18.

[20] FEDERAL CRIMINAL CODE AND RULES 98 (1996).

statement' of that witness, which must be disclosed to the accused under Rule 66(A)".[21]

Issues concerning prior statements have also arisen before the ICTR. In the *Nyiramasuhuko* case, the Chamber held that statements made in the course of judicial proceedings by prosecution witnesses expected to testify at trial, regardless of the origin of the said proceedings, are subject to the obligation of disclosure under Rule 66(A)(ii), provided they are within the custody and control of the prosecution. The defence did not bring *prima facie* evidence to prove that the prosecution was in possession or custody of any such statement. Thus the Trial Chamber dismissed the defence's request.[22] In that case, the Chamber departed from the approach of Trial Chamber III of the Tribunal, which ruled that Rule 66(A)(ii) does not apply to disclosure of statements made by prosecution witnesses to the Rwandan authorities because such statements are not taken by the Prosecutor.[23]

In the *Media case*, during the testimony of prosecution witness Jose Kagabo, an issue arose about his statement. The Prosecutor identified two documents, namely, a statement dated 22 May 1999, and other documents written by Kagabo, dated 25 April 1999, which pertained to proceedings in France against Ferdinand Nahimana. These documents were handed over to investigators on 26 May 1999. The Prosecutor sought to tender these documents as witness statements and to have them admitted as exhibits in their entirety, in order to expedite proceedings. Upon objection by counsel for the defence, the Chamber ruled that written statements of witness Kagabo could be admitted as part of his oral testimony because the witness had identified their contents and stood by what was contained in them.[24] The same issue arose during the testimony of prosecution witness Georges Ruggiu, whose handwritten organisational chart and another document, disclosed well before, were produced in the course of his testimony in order to be exhibited and to be part of his statement. The defence opposed it on the ground that testimony has probative value only when made under

[21] *Prosecutor* v. *Kupreskic* (Case No. IT-25-16-T), Decision on the Prosecutor' s Request to Release Testimony Pursuant to Rule 66 of the Rules, 29 July 1998 (Closed Session under Rule 79, ICTY Rules).

[22] *Prosecutor* v. *Nyiramasuhuko* et al. (Case No. ICTR-97-21-T), Decision on the Defence's Motion for Disclosure of the Declarations of the Prosecutor's Witnesses detained in Rwanda and All Other Documents or Information Pertaining to the Judicial Proceedings in their Respect, 18 September 2001, para. 9.

[23] *Prosecutor* v. *Bagambiki* (Case No. ICTR-99-46-I), Decision on Bagambiki's Motion for Disclosure of Guilty Pleas of Detained Witness and of Statements by Jean Kambanda, 1 December 2000, para. 12.

[24] *Prosecutor* v. *Nahimana* et. al. (Case No. ICTR-99-52-I), Transcript of 4 April 2001, p. 26.

solemn declaration. The judges admitted them as part of the oral testimony of Ruggiu since he had said, under oath, that these were notes prepared by him, and therefore considered then as his evidence.[25]

In yet another instance, in the *Media case*, the Prosecutor produced an undated and unsigned statement of prosecution witness GO. The Chamber commented upon the form of witness statements and stated that, although the Prosecutor did not intend to exhibit this statement, she is nevertheless obliged to disclose documents relevant to the case, including unsigned ones. The Chamber also expounded upon the principle behind disclosure, explaining that it aims at putting the defendant on notice to be able to cross-examine the witness. Therefore, the Chamber noted that it was not a question of admissibility but of disclosure and allowed use of the witness statement.[26]

Although the first part of Rule 66(A)(ii) is apparently clear and unambiguous, in practice, the application of this Rule has not been without difficulty. The jurisprudence of the Tribunal has instances where issues have arisen which are connected with premature applications[27] and ongoing investigations. In the case of *Prosecutor* v. *Niyitegeka*, the Chamber was of the view that disclosure should be regularly updated according to the results of ongoing investigations.[28]

The expression "statements of witnesses *whom the Prosecutor intends to call to testify at trial*" (emphasis added) may also prove to be problematic. In the *Media case*, the Prosecutor filed an *ex parte* application, under Rule 73*bis*(E) of the Rules, seeking to add to her list a new prosecution witness, called witness X.[29] The Prosecutor contended that pursuant to Rule 66(A)(ii), her obligation to disclose statements concerns only the witnesses she *intends to call* to testify at trial. The Prosecutor had no such intention with regard to witness X, who decided to testify only after June 2001, after having been convinced to do so, given his importance to ongoing investigations and arrests. In response, the defence argued that the Prosecutor knew about the existence of this witness well before the trial date was fixed. The Trial Chamber found that there was "good cause" in terms of Rule 66(A)(ii) and granted the motion. The Chamber took into account the materiality of the anticipated testimony, the lack of surprise to

[25] *Ibid.*, Transcript of 27 February 2002, p. 42.

[26] *Ibid.*, Transcript of 10 April 2001, p. 37.

[27] *Prosecutor* v. *Bagosora* et al. (Case No. ICTR-98-41-I), Decision on the Defence Motion for Disclosures, 5 December 2001, p. 2.

[28] *Prosecutor* v. *Niyitegeka*, *supra* note 19.

[29] Rule 73*bis*(E) states: "After commencement of Trial, the Prosecutor may if he considers it to be in the interests of justice, move the Trial Chamber for leave to reinstate

the defence and the absence of undue delay, as the witness was anticipated to replace six prosecution witnesses.[30] One of the judges dissented, considering that the prosecution had known of witness X as a potential witness from the beginning and had intended to call him for a long time. There the condition of intention was met. The dissenting judge noted that the Prosecutor, in so doing, had violated the Rule.[31]

Extension of Time within which to Disclose Materials upon Showing Good Cause

The example evoked below is an illustration of how the second part of Rule 66(A)(ii) enables the Chamber to use its discretion to decide whether the prosecution has shown "good cause" to extend the time within which to disclose copies of the witness statements. The Rules are silent on what amounts to "good cause", and judges have approached the matter on a case-by-case basis. In the *Media case*, the Prosecutor had initially disclosed, well before the trial started, several statements relating to the witnesses she intended to call, in accordance with the Rules. However, several months after the beginning of the trial, it appeared that it was impossible for the prosecution to provide a final list of witnesses, because of ongoing investigations. The Prosecutor therefore presented an oral motion, pursuant to Rule 73*bis*(E) of the Rules in order to amend her initial list of witnesses. She argued that the application would reduce the number of witnesses and would consequently shorten the trial. In determining whether the request was well founded, the judges had to assess whether the "good cause" of Rule 66 outweighs the "interests of justice" of Rule 73*bis*, and whether it was opportune to base such a request on Rule 73*bis* and invoke the "interests of justice". The Chamber opined that, although Rule 66 deals with the pre-trial stage, the factor of "good cause" can also be applied at the trial stage. They decided that

> when a Trial Chamber has granted leave to call new prosecution witnesses under Rule 73*bis*, statements of such witnesses will form part of the case against the Accused. It follows that the Chamber in its determination will bear in mind also the question of "good cause".[32]

[30] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Decision on the Prosecutor's Motion to add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, para. 19.

[31] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Separate and Dissenting Opinion of Judge Asoka de Z. Gunawardana, 14 September 2001, paras. 8 and 9.

[32] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Decision on the Prosecutor's Oral Motion for Leave to Amend the List of Selected Witnesses, 26 June 2001, para. 19.

The Chamber attempted to define "good cause":

> In assessing the "interests of justice" and "good cause" Chambers have taken into account such considerations as the materiality of the testimony, the complexity of the case, prejudice to the defence, including elements of surprise, on-going investigations, replacements and corroboration of evidence.[33]

In so doing, the Judges noted that the two notions are interrelated. The Trial Chamber therefore concluded: "The prosecution's duty under the Statute to present the best available evidence to prove its case has to be balanced against the right of the Accused to have adequate time and facilities to prepare his Defence and his right to be tried without undue delay."[34]

The time period specified in Rule 66(A)(ii) is of such essence that this rule is basic and is referred to in several provisions of the Rules. Sometimes, it is referred to as an exclusionary rule where a new time frame for the disclosure of other materials is being stipulated. This is particularly the case in Rule 94*bis*(A), which comprises an exception to Rule 66(A)(ii). It provides: "Notwithstanding the provisions of Rule 66(A)(ii), Rule 73*bis*(B)(iv)(b) and Rule 73*ter*(B)(iii)(b) of the present Rules, the full statement of any expert witness called by a party shall be disclosed to the opposing party *as early as possible* and shall be filed with the Trial Chamber *not less than twenty-one days* prior to the date on which the expert is expected to testify (emphasis added)". According to this provision, the sixty-day period mentioned in Rule 66(A)(ii) is vacated where expert witnesses are concerned. The Rule underscores the importance of disclosure to the opposing party "as early as possible" and filing with the Trial Chamber not less than twenty-one days prior to the date on which the expert is expected to testify.

The term "as early as possible" has again no definite meaning. It is usually considered according to the circumstances of each case. In *Prosecutor* v. *Elizaphan & Gerard Ntakirutimana*, the Prosecutor had not shown an intention to call any expert witnesses. The defence invoked Rule 94*bis*, emphasising its need to know as soon as possible whether the prosecution will call experts, to be informed of their qualifications and to obtain copies of their reports. The Chamber directed the Prosecutor to clarify her intention as to whether she would call the expert witness and, if so, it required her to make the report "timely available [. . .] in order to avoid complication during [. . .] the presentation of the Prosecutor's case".[35]

[33] *Ibid.*, para. 20.

[34] *Ibid.*

[35] *Prosecutor* v. *Elizaphan and Gerard Ntakirutimana* (Case Nos. ICTR-96-10-T & ICTR-96-17-T), Decision on the Prosecution Motion for Contempt of Court and on Two Defence Motions for Disclosure, 16 July 2001, paras. 18 and 19.

3. THE RIGHT TO INSPECT DOCUMENTS IN THE POSSESSION OF THE PROSECUTOR

Not all materials within the possession of the Prosecutor can and will be used at trial. Therefore, if the defence wishes to rely on any other material besides that which the Prosecutor will use at the trial, the defence has to request it and to show its relevance and materiality. Hence, Rule 66 involves a request "to inspect documents and any tangible objects in the custody or control of the Prosecutor, which are *material to the preparation* of the defence's *case* or intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused" (emphasis added). The emphasised portion of the Rule is the "guiding principle of disclosability".[36] It is the responsibility of the defence to demonstrate materiality and it is only when the two parties do not agree on this point, that the judges adjudicate the matter. Rule 66(B) is therefore highly consensual and implies a dialogue between prosecution and defence.

With respect to the request and materiality, the *Bagosora case* has laid down guidelines to be applied. Specifically, that

> the defence must demonstrate *prima facie* materiality of the evidence in question, and secondly that the said evidence should be in the custody or control of the prosecution. Hence, it is implied therein that the defence Counsel must make specific identification of any requested documentation to enable the Prosecutor to take action.[37]

Although Trial Chambers have discretion to interpret the Rules, they have tended to implicitly agree with this decision. In the *Media case*, where the trial is related to print and electronic media based upon complex and voluminous documentary evidence, the Chamber has often dealt with Rule 66(B) since problems of disclosure have been recurrent. The defence brought a motion for the complete discovery of materials. In response, the Prosecutor submitted that the defence may not go on a "fishing expedition" to divulge into the Prosecutor's database. The Chamber held that

> there is no specific provision in the Rules enabling the defence to request a Trial Chamber to order complete discovery [. . .] of *all* the evidence regarding the accused, which is in the possession of the Prosecutor. The defence may only receive, from the Prosecutor, evidence that is likely to be used in the case against the accused as well as past statements by the accused and any exculpatory evidence, *all* the evidence regarding the accused, which may support the defence case, pursuant to Rule 68 of the Rules.[38]

[36] See Lord Mustil's opinion in *R.* v. *Preston*, [1993] 4 All E.R. 638 (H.L.).

[37] *Prosecutor* v. *Bagosora* et al. (Case No. ICTR-96-7-I), Decision on the Motion by the Defence Counsel for Disclosure, 27 November 1997, p. 6.

[38] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Decision on the Defence's Motion to Compel Complete Discovery, 16 March 2000, paras. 12 and 13 (emphasis

Another example arose when Counsel for the defence filed a motion complaining that the Prosecutor's disclosure under Rule 66(B) was inadequate. Among the documentary evidence requested were the Belgian investigator's report on the activities of the RTLM, and all evidence and witness statements in the Barayagwiza and Ruggiu cases. The prosecution submitted that although the sources of the broadcast in this case were unspecified, it had nonetheless disclosed all material indicated by the defence. Additionally, the Prosecutor had made the Belgian files available to the defence. The Trial Chamber underscored the need for the defence to show materiality and to specifically identify the object in respect of which the inspection is sought. The Chamber did not order the disclosure of the requested material but obliged the parties to resolve the issue of inspection of documents and materials at a Status Conference.[39]

Furthermore, still in the *Media case*, a similar problem arose during the testimony of Prosecution witness BU. On that occasion, the defence objected to the production of a diary, allegedly maintained by the witness in 1994, in support of his four statements made to the prosecution investigators. The defence's major complaint was that it had not been accorded an opportunity to examine the document and that this required a lot of time. The Prosecutor explained that she had received the diary only three days prior to the trial and that in any event, the diary was not a statement subject to disclosure under Rule 66(A) but a document to be inspected under Rule 66(B). Thus it was for the defence to inspect the diary, which could be done during a short adjournment. The Chamber held that the diary could be an exhibit and that the Prosecutor should allow the defence to inspect the document, under Rule 66(B), as this is the only obligation placed upon the Prosecutor.[40] In a similar matter, Trial Chamber II, in the *Nyiramasuhuko* case, stated that "Rule 66(B) of the Rules provides only for the inspection of designated materials [. . .] and this provision articulates a *duty to reveal* rather than a *duty to transmit* evidence".[41]

[39] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Decision on the Defence's Motion for Disclosure in the Case of Ferdinand Nahimana, 29 March 2000, p. 4.

[40] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Transcript of 20 August 2001, pp. 28 and 29.

[41] *Prosecutor* v. *Nyiramasuhuko* et al. (Case No. ICTR-97-21-T), Decision on the[illegible]gent Motion by the Defence for Disclosure of Evidence by the Prosecutor, 1 Novemb[illegible]000 (emphasis added). See also *Prosecutor* v. *Bagambiki* et al. and *Prosecutor* v. *Nta[illegible]tra* (Case No. ICTR-99-46-T), Decision on Bagambiki' s Motion for Disclosure of th[illegible]lty Pleas of Detained Witnesses and of Statements by Jean Kambanda, 1 Decembe[illegible]00, para. 16. The defendant requested the Chamber to order the Prosecutor "to disclose the audio recordings and transcripts from the questioning of Jean Kambanda." The Chamber

Pertaining to the same Rule, an interesting point was raised in *Prosecutor* v. *Kabiligi & Ntabakuze*. The defence requested the disclosure of the 1 August 1997 report on the death of the former President of Rwanda, Juvenal Habyarimana. The Trial Chamber held that since the 1 August 1997 report was not in the Prosecutor's possession, Rules 66(B) and 68 were not applicable. However, the Chamber went beyond the legal stipulation and invoked its inherent powers in the "interests of justice" and requested the said report to the President of the Tribunal. The Chamber stated that it was not setting a precedent but limited the decision to the circumstances of that particular case.[42]

4. RULE 67 AND ACTIONS REQUESTED FROM THE DEFENCE

This provision is the main rule that deals with the "disclosure" obligation of the defence. A request by the defence to the Prosecutor under Rule 66(B) triggers a reciprocal request from prosecution under Rule 67(C).[43] However, this reciprocity is not anticipated to be equal to the original obligation of the Prosecutor to disclose under Rule 66(A)(ii). Rule 67(C) provides: "If the defence makes a request pursuant to Rule 66(B), the prosecutor shall in turn be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial."

The issue of what the defence intends to use at trial was raised in the *Media case*. During the testimony of prosecution witness Jose Kagabo, the defence asked the Prosecutor to enable it to inspect documents, pursuant to Rule 66(B). The Prosecutor agreed but immediately submitted an application under Rule 67(C), which the defence refused to comply with. The defence contended that the rule should be read as referring to documents which the defence had a formed intention of using, which intention it had not yet formed. The judges ruled that the Prosecutor's obligation to disclose is not identical to the obligation that rests on the defence. Whereas the defence's obligation arises only in respect of documents its intend to

Prosecutor to permit the inspection. Resorting to the Chamber is permissible only if the request to the Prosecutor is unsuccessful."

[42] *Prosecutor* v. *Kabiligi* et al. (Case No. ICTR-97-34-I), Decision on Ntabakuze's

use as evidence, the Prosecutor's obligation is to disclose documents which are material to the defence case.[44]

Reciprocal to the prosecution's obligation to disclose materials is the defence's duty to notify the prosecution about the use of a defence of alibi or a special defence. These have been the two most common defences used before ICTR.

Rule 67 (A)(ii) and (B) stipulates:

(A)(ii) The defence shall notify the Prosecutor of its intent to enter:

(a) The defence of alibi; in which case the notification shall specify the place or places at which the accused claims to have been present at the time of the alleged crime and the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the alibi;

(b) Any special defence, including that of diminished or lack of mental responsibility; in which case the notification shall specify the names and addresses of witnesses and any other evidence upon which the accused intends to rely to establish the special defence.

(B) Failure of the defence to provide such notice under this Rule shall not limit the right of the accused to rely on the above defences.

The *Kayishema & Ruzindana* case interpreted Rule 67(A)(ii). Trial Chamber II underscored that the aim of this Rule is to put the other party, namely the Prosecutor, in a position of countering evidence put forward by the defence. The judges further stated that, "if the defence of alibi or special defence is contemplated, then this is an opportune moment for the defence to disclose. Disclosure at a later stage will vitiate the spirit of the Statute".[45] The judges also interpreted Rule 67(B) as tending to cancel the requirement for the defence to disclose its intention to rely upon the defences of alibi and special defence.[46]

5. DISCLOSURE OF EXCULPATORY EVIDENCE (RULE 68)

The defence is entitled to know what materials are in the possession of the prosecution the tends to suggest the innocence or mitigate the [illegible]t of the accused, or that may affect the credibility of the prosecution [illegible]idence.

[44] Transcript of 4 April 2001, p. 22.

[45] *Prosecutor* v. *Kayishema & Ruzindana* (Case No. ICTR-95-1-T), Decision on

Rule 68 requires that this disclosure shall be made by the Prosecutor "as soon as practicable". In *Prosecutor* v. *Bagilishema*, Trial Chamber I analysed Rule 68 and observed that it has two main elements. "Firstly the evidence must be known to the Prosecutor and secondly, it must, in some way be exculpatory". The Chamber equated the term "known" to "custody, control or possession" by the Prosecutor, which are also words used in Rule 66(B) and 67(C).[47]

Trial Chamber I of the ICTR had another opportunity to pronounce itself on the issue of exculpatory materials in the *Media case*. During an *inter partes* hearing, counsel for the defence requested the disclosure of the seventeen transcripts of witness X's interview, alleging that they contained exculpatory materials. The Prosecutor submitted that they could not be disclosed as yet because disclosure would impact upon ongoing investigations. The judges directed the Prosecutor to disclose the transcripts to the Chamber only, pursuant to Rule 66(C), to enable the Chamber to review them and determine whether they contained exculpatory materials. In the course of the hearing of the motion, one of the judges requested that the defence submit a document providing examples of exculpatory material contained in the nine transcripts already disclosed to them. After the defence submitted the examples, the judge concluded that the Prosecutor had breached her obligation under Rule 68.[48]

In the meantime, the majority of the Trial Chamber reviewed the seventeen transcripts and found that they contained no exculpatory material, except for one page of one of the transcripts. It ordered that this be disclosed in a redacted form to the defence and that the non-redacted copy of the excerpt be disclosed thirty days before Witness X was to testify at trial.[49]

ICTY Trial Chamber I considered the extent of the applicability of Rule 68 in the *Blaskic* case. The Chamber held that the Rule extends to such evidence contained in case files of other accused.[50]

[47] *Prosecutor* v. *Bagilishema* (Case No. ICTR-96-13-T), Decision on the Request of the Defence for an Order for Disclosure by the Prosecutor of the Admissions of Guilt of Witnesses Y, Z and AA, 8 June 2000, para. 5.

[48] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Separate and Dissenting Opinion of Judge Asoka de Z. Gunawardana to Decision on the Prosecutor's Motion to add Witness X to its List of Witnesses and for Protective Measures, 14 September 2001, paras. 12 and 13.

[49] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Decision on the Defence's Application for the Prosecution to Disclose Exculpatory Material Contained in the 17 Transcripts of Interview with Witness X, 29 October 2001, p. 2.

[50] *Prosecutor* v. *Blaskic* (Case No. IT-95-14), Decision on the Production of Discovery

The ICTR and ICTY have not applied Rule 68 in a vacuum. They have had to consider the rule in light of the facts of a given case and have established some guidelines. In the *Blaskic* case, the Chamber stated that, "after having previously shown that they were in the possession of the Prosecutor, the defence must present a *prima facie* case which would make probable the exculpatory nature of the materials sought".[51] In the same case, the Trial Chamber added another dimension to Rule 68, namely "whether the Prosecutor believes that, although she does possess exculpatory materials, Sub-rule 66(C) or any other relevant provision require that their confidentiality be protected".[52]

A deeper analysis of Rule 68 shows, behind the apparent clarity of its wording, ambiguous elements embedded within the term "as soon as practicable". This term may not be straight-forward and connotes an objective consideration on a case by case basis. However, the Prosecutor has to demonstrate "practicability" on each occasion, which will import a subjective test.

B. EXCEPTIONS TO DISCLOSURE

It is the prosecution's responsibility to withhold information, which is clearly irrelevant or privileged, and to delay disclosure to protect witnesses or to complete investigation. Non-disclosure can also be justified when documents are held by a State.

1. COOPERATION OF STATES

An exception to the Prosecutor's obligation to disclose materials in her possession is that she is not expected to seek out material in the hands of third parties. Under the ICTR Statute, pursuant to Article 28, the Tribunal can request the cooperation of States, and they have generally shown their willingness in this respect.[53]

In the *Media case*, Trial Chamber I, after being requested by the defence, ordered the Prosecutor to make efforts to obtain from t' Govern ment of Rwanda plea agreements, and dates of conviction an sntence

[51] *Ibid.*, para. 49.

[52] *Ibid.*

[53] See Virginia Morris & Michael P. Scharf, I THE INTERNATIONAL CRIMINAL

with respect to witnesses the Prosecutor intended to call and who were in the custody of Rwanda.[54]

> [1] in the interests of justice [...] the Prosecutor bears the responsibility of obtaining the said statements from the Rwandan Authorities and of providing them to the defence pursuant to Rule 66(A)(ii) of the Rules [...] The Chamber [...] requires *proprio motu*, the Prosecutor to make all efforts to obtain, to the extent possible, the prior statements made before the Rwandan authorities of all detained witnesses and to disclose them to the defence.[55]

Recently, in a similar case, Trial Chamber III requested the Rwandan authorities to provide to the Registry the confessions made to the Rwandan judicial authorities by some Prosecution witnesses.[56]

2. PROTECTION OF WITNESSES

Additionally, the obligations placed upon the Prosecutor to disclose certain materials to the defence may be curtailed in exceptional circumstances as, for example, under Articles 19(1) and 21 of the Statute. Article 19(1) provides that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses". Article 21 provides:

> The International Tribunal for Rwanda shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victims identity.

Thus the accused's right to the minimum procedural guarantees as enshrined in these provisions may be encroached upon where issues of witness protection arise. Indeed, the issue of disclosure is logically linked to the issue of the security of witnesses. The disclosure provisions in

[54] *Prosecutor* v. *Nahimana* et al. (Case No. 99-52-T), Oral Decision on he Defence's Motion to Furnish in Respect of Custodial Witnesses, Transcript of 4 September 2001, p. 41.

[55] *Prosecutor* v. *Ndayambaje & Nsabimana* (Case Nos. ICTR-96-8-T & ICTR-97-29-A-T), Decision on the Defence Motion Seeking Documents Relating to Detained Witnesses or Leave of the Chamber to Contact Protected Detained Witnesses, 15 November 2001, para. 25.

[56] *Prosecutor* v. *Bagambiki* et al. (Case No. ICTR-99-46-T), Decision on Bagambiki's and Ntagerura's Motions for Disclosure of Confessions of Detained Witnesses, 8 March

Rule 66 are subject to the important provisions in Rule 69, particularly Rule 69(A) which provides that "[i]n exceptional circumstances, either of the parties may apply to a Trial Chamber to order the non-disclosure of the identity of a victim or witness who may be in danger or at risk, until the Chamber decides otherwise".

However, at some point, the non-disclosure order has to be lifted to allow for the preparation of the case by either party. For this purpose, Rule 69(C) stipulates that the identity of the victims or witnesses shall be disclosed prior to the trial. In this sense, Rule 67(A)(i), has to be read in conjunction with Rule 69(C), as these provisions are interrelated. Rule 67(A)(i), which completes and reinforces Rule 66(A)(ii), reads: "*As early as reasonably practicable* and in any event *prior to the commencement of the trial*: The Prosecutor shall notify the defence of the names of the witnesses that he intends to call to establish the guilt of the accused and in rebuttal of any defence plea of which the Prosecutor has received notice in accordance with Sub-Rule (ii) below" [emphasis added]. Rule 69(C) stipulates that "[s]ubject to Rule 75, the identity of the victim or witness shall be disclosed in sufficient time prior to the trial to allow adequate time for preparation of the prosecution and the defence".

Pertaining to the issue of the protection of witnesses and disclosure, Trial Chamber II in the *Nyiramasuhuko* et al. *case*, while commenting on Rule 69, stated:

> It is further noted that a practice has evolved whereby Parties make application to the Tribunal for the implementation of certain protective measures for witnesses and victims. These applications are generally made after the confirmation of the Indictment and after the Initial appearance of the accused where such measures are in fact granted, this has a direct bearing on the timing, nature and extent of disclosure to the defence. It is essential for the proper administration of justice to balance the interests of the victims and witnesses for protection and the rights of the accused for disclosure.[57]

Disclosure under Rule 66(A)(ii) will not be automatically hindered because of the protection of witnesses since, pursuant to Rule 69(A), the Prosecutor is required to make a non-disclosure application only in exceptional circumstances.

Such exceptional circumstances surfaced in the *Bagosora* et al. *case*. Trial Chamber III tried to find a balance between the accused's right to a fair trial and the protection of witnesses. It allowed the Prosecutor to disclose, on a "rolling basis", the names of her witnesses thi ive days before being called to testify, and not prior to the trial, although Prosec-

[57] *Prosecutor* v. *Nyiramasuhuko* et al. (Case No. ICTR-97-21-T), Decision on the Status of the Hearings for the Amendment of the Indictments and for Disclosure of Supporting Material, 30 September 1998, para. 11

utor had requested twenty-one days. The judges departed from Rule 69(C) and based their decision on the discretion given to them by Rule 69(A) to decide whether there were exceptional circumstances justifying non-disclosure. The Trial Chamber based its argument on a contradiction in the Rules, particularly between the letter of Rule 69(C) and its object and purpose. The majority decided that thirty-five days before the witness is called to testify is "a sufficient period of advance disclosure to provide the defence with a fair opportunity to effectively exploit the witnesses' unredacted statements and identification data to formulate an effective cross-examination".[58] One of the judges dissented, observing that the right of the accused to the minimum procedural guarantees, that is to a fair trial and to know the case against him, must overweigh the protection of victims and witnesses, as it is "non-negotiable and cannot be balanced against other interests".[59]

3. APPLICATION FOR LEAVE TO DISPENSE WITH DISCLOSURE

Under certain circumstances, the Trial Chamber may authorise the Prosecutor not to disclose information or materials. According to Rule 66(C):

> Where information or materials are in the possession of the Prosecutor, the disclosure of which may prejudice further or *ongoing investigations*, or *for any other reasons may be contrary to the public interest or affect the security interests of any State*, the Prosecutor may apply to the Trial Chamber sitting *in camera* to be relieved from the obligation to disclose pursuant to Sub-Rule (A) and (B). When making such an application the Prosecutor shall provide the Trial Chamber, and only the Trial Chamber, with the information or materials that are sought to be kept confidential. (emphasis added)

In principle, the Rules support the public nature of the hearings and encourage transparency, and the Chambers uphold the same. There have been several applications for disclosure under Rule 66(C). For instance, in the *Media case*, concerning the *ex parte* application for the addition of witness X, the Trial Chamber directed the prosecution to provide it with the relevant documents for perusal in order to assess whether the argument of ongoing investigations was valid.[60]

[58] *Prosecutor* v. *Bagosora* et al. (Case No. ICTR-98-41-I), Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December 2001, para. 22.

[59] *Prosecutor* v. *Bagosora* et al. (Case No. ICTR-98-41-I), Separate and Dissenting Opinion of Judge Pavel Dolenc, 7 December 2001, para. 14.

[60] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Decision on the Prosecutor's Motion to Add Witness X to its List of Witnesses and for Protective Measures, 14

Trial Chamber I was later seized of the Prosecutor's request to continue the temporary redaction of a portion of the transcripts of witness X. The Chamber was provided with the information showing prejudice to the ongoing investigations and, after perusal, allowed the motion.[61] In another instance, the Chamber observed, in its conclusion, that Rule 66(C) envisages that the prosecution may undertake further or on-going investigations. Furthermore, that it would be contrary to this provision to exclude all testimonies unearthed as a result of such investigations. Consequently, the Chamber decided to consider the matter on a case-by-case basis taking into account the materiality of the testimony and the potential prejudice of the late disclosure.[62]

Regarding the same issue but at another instance, Trial Chamber I put a limit on the applicability and scope of Rule 66(C). The Prosecutor requested the Chamber to consider newly-found material under Rule 66(C). In response, the defence requested the Prosecutor to disclose any exculpatory information contained in it. The Chamber directed the Prosecutor to

> first begin its work. Review the material, disclose what you determine is relevant, and it is the part that you wish to hold back that you disclose to the Chamber in terms of Rule 66(C).[63]

4. NON DISCLOSURE OF CONFIDENTIAL MATERIAL UNDER RULE 70

An important right for the prosecution is to withhold disclosure of certain highly confidential documents, pursuant to Rule 70 of the Rules. This Rule generally bars the Prosecutor from disclosing her investigative notes and similar documents. Like other provisions pertaining to disclosure, Rule 70(A) has been the basis of contentious issues. On several occasions in the *Media case*, defence counsel have asked the Chamber to order the Prosecutor to reveal her investigative notes. In one instance, the Chamber held:

[61] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Decision on the Prosecutor's Application for Continued Temporary Redaction of One Portion of t[illegible]ranscripts of Witness X, Pursuant to Rule 66(C) of the Rules of Procedure and Eviden[illegible] February 2002, p. 2.

[62] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Decision on t[illegible]rosecutor's Oral Motion for Leave to Amend the list of Selected Witnesses, 26 June 20[illegible], para. 29.

[63] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Transcript of 20 February

Regarding the request by Counsel for Nahimana for the Prosecutor to disclose a list of questions put to the witnesses by the investigators, the dates and the participants in the Georges Ruggiu interview, the Trial Chamber has considered the provisions in Rule 70 on matters not subject to disclosure, which exclude documents prepared by a Party, its assistants, or representatives in connection with the investigation or preparation of the case from being disclosed. The Trial Chamber directs that the Prosecutor shall not be required to disclose them, as this is a matter for cross-examination at the trial.[64]

Although it was not imperative to disclose her investigative notes, the Prosecutor opted to do so in the exceptional case of prosecution witness AFO.[65] This witness had made statements which went missing. The prosecution decided to use its investigative notes, which were endorsed by the witness and signed as her statement. The defence challenged this. The Chamber held that it would only rely on the oral testimony of the witness and not on the Prosecutor's notes. However, it would consider them as a confirmation of the witness allegations.[66]

An interesting matter to be considered, in light of Rule 70(A), is whether the trial chamber has the discretion to order the defence to disclose to the prosecution a witness's prior statement taken by or on behalf of the defence in anticipation of litigation whether before or after the witness has testified. In *Prosecutor* v. *Tadic*, the Prosecutor requested the Chamber to order the defence to disclose the statement of a witness who had already testified. The majority of Trial Chamber II of the ICTY held that such statements were protected by legal professional privilege and thus not available to the prosecution.[67]

C. Remedies For Breach Of The Disclosure Obligations

Discussion on the breach of the discussed provisions concentrates on the Prosecutor since she bears the greatest burden for disclosure of materials. There exists a panoply of trial remedies, which are not specifically stated in the Rules but may be implied in case of failure to disclose by the Prosecutor. The judges possess wide discretionary powers to determine the appropriate remedy depending upon the circumstances of each case.

[64] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Scheduling Order, 6 October 2000, para. 2.

[65] Witness AFO later asked for protection to be lifted and used her real name, Agnes Murebwayire.

[66] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Transcript of 4 December 2001, pp. 1–9.

[67] *Prosecutor* v. *Tadic* (Case No. IT-94-I), Decision on the Prosecutor's Motion for Production of Defence Witness Statements, Separate Opinions of Judges Stephen and

The remedial options may include: a stay, adjournment of the trial or hearing of the witness, a specific order for disclosure, extension of time within which to disclose or accord extra time to the defence to prepare for cross examination. Additionally, there is the option of granting the defence a continuance to inspect and respond to evidence lately disclosed. Furthermore, the chambers may caution the Prosecutor or exclude evidence. According to John Theuman, writing of the American context, one of the most important factors considered by the courts in determining whether an exclusionary sanction is appropriate in a particular case has been whether or not the defence has actually been prejudiced in the development and preparation of its case.[68]

Although Theuman's discussion concerns cases falling within American state jurisdictions, his observations are pertinent to the ICTR, which has expressed similar considerations. It is indeed true that non disclosure by the prosecution normally involves an infringement of the rights of the accused to a fair trial.[69] It is usual, in ICTR jurisprudence, for the chambers to remedy non-disclosure by issuing a disclosure order combined with an adjournment or by ordering a total exclusion of evidence. In some instances, the trial chambers have had to caution the Prosecutor. In the *Bagosora* case, the Prosecutor had disregarded orders of Trial Chamber II in three prior disclosure decisions. The Chamber "deplored the prosecution's non compliance with the Rules and decisions of the Trial Chamber, which could undermine a fair and expedient administration of justice".[70] Similarly, Trial Chamber I, in the *Media case*, pointed out that as far as disclosure was concerned, "the prosecution has been dilatory in doing so". Although the Trial Chamber did not condone this failure, the judges stated that in their view "the Prosecutor's alleged failure to disclose [. . .] doesn't amount to serious egregious violation of the Rules to warrant severe Sanctions". Consequently, the Chamber concluded that material prejudice to the defence has not been demonstrated, in the sense that the accused had not lost an otherwise available defence. The Chamber also added that in

[68] John E. Theuman, *Exclusion of Evidence in State Criminal Action fc ailure of Prosecution To Comply with Discovery Requirements as to Physical or nentary Evidence or the Like Modern Cases*, 27 AMERICAN L. REPORTS 6 (1984).

[69] *Prosecutor* v. *Bagosora* (Case No. ICTR-97-7-I), Decision on the M i by the Defence Counsel for Disclosure, 27 November 1997, p. 4.

[70] *Prosecutor* v. *Bagosora* (Case No. ICTR-97-7-I), Decision on the Defence's Motion for Inadmissibility of Disclosure based on the Decision of 11 June 1998, ICT-1996-70, 7

the course of the trial it would be open to the defence to raise objections "every step of the way against the use of undisclosed material".[71]

Regarding the exclusion of evidence, in the *Media case*, Trial Chamber I disallowed portions of the testimony of prosecution witness FW on the grounds that there was insufficient disclosure of new material, which had come as a surprise to the defence.[72] At the same time, the Trial Chamber had to decide on the next prosecution witness, witness ABH. The Chamber directed that if new information was discovered, the proper procedure would be to record a fresh statement from the witness in respect of the new information. The prosecution decided, as a precautionary step, to obtain the statement of witness ABH, but produced it six months later, on 3 August 2001. Upon an objection from the defence on this delay, the Chamber decided that the defence had had notice as early as 13 February 2001, have not been caught by surprise, and would therefore not suffer any prejudice.[73]

The remedy of stay of proceedings may be ordered in respect of conduct which is so oppressive, vexatious or unfair that it cannot be tolerated.[74] In the *Media case*, the Chamber stated that "in the event of default of disclosure [...], stay of proceedings and suppression of evidence are drastic sanctions".[75]

In respect of the question of adjournment of proceedings, Trial Chamber I has been seized of various motions. For instance, counsel for Hassan Ngeze requested an adjournment of one year alleging lack of preparation. In an oral decision, the Chamber considered that such an extended adjournment would cause serious prejudice to the co-accused and denied the motion.[76] The Chamber also had to decide three motions based on non-disclosure of evidence, filed on behalf of Ferdinand Nahimana, who sought a stay of proceedings, Jean Bosco Barayagwiza, who asked for suppression of evidence, and Hassan Ngeze, who requested a continuance. The Chamber, after inquiring into whether the prosecution had complied

[71] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Transcript of 26 September 2000. pp. 32, 33 and 35.

[72] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Transcript of 1 March 2001, p. 38.

[73] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Transcript of 30 November 2001, p. 57.

[74] See *R.* v. *Larve*, (1991) 65 CCC (3d) 1 (British Columbia C.A) or *R.* v. *D.(E.)*, (1990) 57 C.C.C. (3d) 151, at 160 (Ontario C.A.).

[75] *Prosecutor* v. *Nahimana* et al. (Case No. ICTR-99-52-T), Transcript of 26 September 2000, p. 35.

[76] *Ibid.*, p. 39.

with Rule 66 of the Rules, *inter alia*, held that a substantial volume of disclosure had in fact been completed and denied the motions.[77]

D. Conclusion

It is a fundamental principle that the burden of proving the guilt of the accused, beyond a reasonable doubt, lies upon the Prosecutor. For a trial to be fair, there must be substantial prior disclosure by the Prosecutor. Observably, the accused has no disclosure obligation at all unless an alibi or special defence is sought to be relied upon or unless the reciprocal rights of inspection are activated under Rule 67(C). Even so, "[t]he range is not as extensive because it does not extend, as does Sub-rule 66(B), to that which is 'material to the preparation' of the prosecution case".[78] Indeed disclosure by the defence never involves disclosure of statements of defence witnesses.

It should be noted that the *ad hoc* tribunal proceedings are basically adversarial rather than inquisitorial in character.[79] The passiveness of the accused is in line with his or her rights as stipulated in article 20(4)(g) of the ICTR Statute, providing that an accused may not to be compelled to testify against himself or herself or to confess guilt. Having regard to the general principle of equality of arms, the non-disclosure of certain documents may also constitute an infringement of the right of defence.[80] In fact, one ICTY judge has observed that "the application of the equality of arms principle, especially in criminal proceedings, should be inclined in favour of the defence acquiring parity with the prosecution in the presentation of the defence case before Court to preclude any injustice against the accused".[81]

[77] *Ibid.*, p. 25.

[78] *Prosecutor* v. *Tadic* (Case No. IT-94-I), Decision on the Prosecutor's Motion for Production of Defence Witness Statements, Separate Opinion of Judge Stephen to Decision on Prosecutor Motion for Production of Defence Witness Statement, 27 November 1996, p. 2. Judge Stephen added that "the accused [...] is under no similar duty of disclosure of evidence, there is no reciprocity of obligation."

[79] V. Morris & M. Scharf, *supra* note 53, pp. 158 and 181.

[80] *Solvay SA* v. *Commission of the European Communities*, [1995] ECR-II 1775, 1802 at 1812–1813, citing the judgment of the Court of Justice of the European Communities in Case 85/76, *Hoffman-La Roche* v. *Commission of the European Communities*, [1979] ECR 461.

[81] *Prosecutor* v. *Tadic* (Case No. IT-94-T), Separate Opinion of Judge Jurah on the prosecution motion for the Production of Defence Witness statements, 27 November 1996, p. 3.

In finding remedies, there may exist strong reasons for the strict application of the Rules in several instances. This will lessen the threat of untoward practical ramifications plus any ensuing debate involving the lack of consistency. However, justice is not always encased in a straight jacket, and the interests of justice have to be considered. In applying these options, the chambers must give due regard to the delicate relationship between the continuing obligation of disclosure, ongoing investigations, fair trial and the rights of the accused. Where violations of the rights of the accused occur due to non-disclosure, whatever remedy is ordered by the trial chambers, it should not be crafted to discipline the Prosecutor *per se*, nor should it allow the Prosecutor to be advantaged by her failure to disclose. Rather, the remedy should be commensurate with the violation in the context of prevailing circumstances.

JAMIE A. WILLIAMSON*

COMMAND RESPONSIBILITY IN THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

Since the inception of the International Criminal Tribunal for Rwanda (ICTR), the Prosecutor, through a strategy akin to that of the International Tribunal for the Former Yugoslavia (ICTY), has given priority to investigating and prosecuting individuals who held important responsibilities during the massacres which occurred in Rwanda in 1994.[1] As a result, many of the supposed leaders at the time of the events, including ministers of the 1994 interim government, senior military commanders, high ranking central and regional government officials, prominent businessmen, church leaders, intellectuals and other influential figures, are to be tried by the ICTR. Although most of these individuals are accused of having directly participated in the events,[2] by virtue of their positions of authority within the Rwandan hierarchy, they are also charged as superiors pursuant to article 6(3) of ICTR Statute. It provides that superiors have a duty to prevent and punish the criminal acts of their subordinates:

> The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[3]

* Legal Officer, International Criminal Tribunal for Rwanda, The Hague. LL.M., University of London, England (2000), LL.B. with Honours, Bristol University, England (1995), Diplôme d'Etudes en Droit, Université de Poitiers, France (1994). The opinions expressed in this article are the author's and do not necessarily represent those of the ICTR or of the United Nations.

[1] First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994, U.N. Doc. A/51/399-S/1996/778, 24 September 1996, para. 42.

[2] Article 6(1) of the ICTR Statute reads: "A person who planned, instig , ordered, committed or otherwise aided and abetted in the planning, preparation or e ution of a crime referred to in articles 2 to 4 of the present Statute, shall be individual esponsible for the crime."

[3] In effect, article 6(3) introduces a form of liability by way of omission.

Despite superior responsibility[4] being a well-established norm of conventional and customary law, the judgments of the ICTR reveal that its application in practice can still give rise to a number of difficulties. This article, by way of review of selected cases, will discuss how the ICTR has dealt with the issue of superior responsibility, in particular in the case of civilians, and with the specific requirements of article 6(3) which must be met for such responsibility to be imposed, namely, (i) that there existed a superior-subordinate relationship between the accused and the perpetrator of the crime; (ii) that the accused knew or had reason to know that the crime was about to be, was being, or had been committed by subordinates; and , (iii) that the accused failed to take the necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrators thereof.

COMMAND RESPONSIBILITY OF CIVILIANS

Initially, the doctrine of command responsibility was applied only in a military context.[5] Recent jurisprudence of both the ICTR and the (ICTY) has recognised that civilians can also incur responsibility as superiors. Despite finally endorsing this principle, the ICTR was initially cautious in applying command responsibility to civilians, and preferred a pragmatic approach to blanket acceptance.

This concern was clearly stated in *Akayesu* where the Trial Chamber, after reference to the dissenting opinion of Judge Röling in *Hirota* before the Tokyo Tribunal, held:

> The Chamber therefore finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in article 6(3), to civilians remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.[6]

Similarly, in *Musema*, the Chamber remarked that "in view of such disparate legal interpretations, it is disputable whether the principle of individual criminal responsibility, articulated in article 6(3) of the Statute,

[4] The terms command responsibility and superior responsibility are used interchangeably throughout.

[5] See V. Morris & M.P. Scharf, I THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 249–262 (1998).

[6] *Prosecutor* v. *Akayesu* (Case No. ICTR-96-4-T), Judgment, 2 September 1998,

should be applied to civilians".[7] Again, as in *Akayesu*, the Chamber favoured a case-by-case approach: "Accordingly, the Chamber reiterates its reasoning [...] that it is appropriate to assess on a case-by-case basis the power of authority actually devolved on an accused to determine whether or not he possessed the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish their perpetration."[8]

Despite this apparent reticence to extend the principle of superior responsibility beyond military commanders, the view now prevailing at the ICTR is that civilians can be held responsible under article 6(3). Indeed, in *Kayishema & Ruzindana*, the Trial Chamber found that "the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one".[9] This opinion was echoed in *Bagilishema* where it was stated that "there can be no doubt [...] that the doctrine of command responsibility extends beyond the responsibility of military commanders to encompass civilian superiors in positions of authority".[10] These precedents indeed reflect the current position of the law, inspired from post World War II jurisprudence, to recent rulings from the ICTY, that the doctrine of superior responsibility extends to civilians.[11]

Consequently, whether a person can be held responsible as a superior under article 6(3) of the Statute depends not on any particular military or civilian status, but rather on the degree and nature of authority and control wielded by the individual.[12] In sum, "the superior's actual or formal power

[7] *Prosecutor* v. *Musema* (Case No. ICTR-96-13-T), Judgment and Sentence, 27 January 2000, para. 135.

[8] *Ibid.*

[9] *Prosecutor* v. *Kayishema & Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999, para. 213.

[10] *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-T), Judgment, 7 June 2001, para. 42.

[11] See for instance *Prosecutor* v. *Delalic* et al. (Case No. IT-96-21-T), Judgment, 16 November 1998, para. 363: "[I]t must be concluded that the applicability of the principle of superior responsibility extends not only to military commanders but also to individuals in non military positions of superior responsibility." *Germany* v. *Roechling* et al., Indictment and Judgment of the General Tribunal of the Military Government of the French Zone of Occupation in Germany, 14 T.W.C., Appendix B; *United States* v. *Flick* et al., 6 T.W.C. 1. Likewise, article 28 of the Rome Statute makes provision for civilians to be held responsible as superiors.

[12] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 216. See also *Prosecutor* v. *Aleksovski* (Case No. IT-95-14/1), Judgment, 25 June 1999, para. 76: "Any person acting *de facto* as a superior may be held responsible under article 7(3). The decisive criterion in determining who is a superior according to customary international law is not only the accused's formal legal status but also his ability, as demonstrated by his duties and

of control over his subordinates remains a determining factor in charging civilians with superior responsibility."[13]

EXISTENCE OF A SUPERIOR-SUBORDINATE RELATIONSHIP

Central to the doctrine of superior responsibility is the existence of a superior-subordinate relationship and of a chain of command. However, unlike situations involving military commanders, in a civilian context, obvious chains of command with strict hierarchical requirements can often be difficult to identify. Consequently, in situations of civilian superiors, a position of command cannot be determined by reference to formal status alone.[14] Instead, an assessment must be made of both the *de jure* and *de facto* authority of an individual before the imposition of command responsibility.[15] Ultimately therefore, command responsibility is "predicated upon the power of the superior to control the acts of his subordinates".[16]

This approach is particularly relevant in a context such as that which prevailed in Rwanda in 1994, where individuals who possessed formal authority prior to the massacres found themselves devoid of any power when the killings started, and vice versa.[17] For the Chambers therefore, "the power of the superior to control the acts of his subordinates"[18] and "the nature of the authority exercised by an individual"[19] were deemed crucial in establishing whether an accused exercised superior responsibility over individuals said to have committed acts covered by articles 2, 3 and 4 of the Statute.[20]

In effect, although a formal position could be indicative of authority, for the purposes of findings pursuant to article 6(3), especially in situations involving civilian superiors, it is necessary to assess the actual or real powers of the accused, within the context of the events.[21] Ultimately, whether authority stems from *de facto* or *de jure* powers, the decisive criterion in determining a position of command is that of "effective control."[22] That an individual exercises the necessary control to be imposed superior responsibility is an evidentiary question.

Although the Chambers have consistently accepted the "effective control" standard, there exists some divergence within the jurisprudence as to whether *de facto* powers alone are sufficient to establish a position of command or whether there is also a requirement of *de jure* authority. It appeared initially that authority could stem from either of the two powers. In *Kayishema & Ruzindana*, following reference to the Rome Statute, the Chamber was of the opinion that it had to be established that superiors simply exercised "effective control" over subordinates, whether *de jure* or *de facto*.[23] After having found that *Kayishema* "exercised *de jure* authority over [the] assailants", the Chamber specified that:

13 *Prosecutor* v. *Musema, supra* note 7, para. 135. See also *Prosecutor* v. *Kayishema & Ruzindana* (Case No. ICTR-95-1-A), Judgment, 1 June 2001, para. 294: "Il s'agit de rechercher si le supérieur hiérarchique exerçait un contrôle effectif sur les auteurs des crimes allégués. L'existence d'un contrôle effectif peut être liée à la question de savoir si l'accusé avait une autorité *de jure* mais sans nécessairement en dépendre. Un tel contrôle ou une telle autorité peut revêtir un caractère *de facto* ou *de jure*."

14 *Prosecutor* v. *Delalic, supra* note 11, para. 370.

15 To date all the accused judged by the Rwanda Tribunal under article 6(3) of the Statute have been civilians: Ignace Bagilishema held the post of mayor (*bourgmestre*) of Mabanza commune in Kibuye prefecture of which Clément Kayishema was the prefect. Alfred Musema was the director of Gisovu tea factory also in Kibuye prefecture.

16 *Prosecutor* v. *Delalic, supra* note 11, para. 376.

17 See also M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 368–369 (1996): "... thus, a commander in chief despite the title, may fail to exercise the full powers of the office. Conversely, a civilian who occupies a position of military command and control actually may make decision on strategic or tactical matters or both."

18 *Prosecutor* v. *Kayishema & Ruzindana, supra* note 9, para. 217.

20 This approach was expounded in *Prosecutor* v. *Delalic, supra* note 11, para. 370: "While the matter is, thus, not undisputed, it is the Trial Chamber's opinion that a position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates."

21 *Prosecutor* v. *Kayishema & Ruzindana, supra* note 9, para. 218. "Therefore, in view of the chaotic situation that which prevailed in Rwanda in these pivotal months of 1994, the Chamber must be free to consider whether Kayishema had the requisite control over those committing the atrocities to establish individual criminal liability under article 6(3), whether by *de jure* or *de facto* command." See also *Prosecutor* v. *Delalic, supra* note 11, para 377, where the Chamber explained: "[We] must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts."

22 *Prosecutor* v. *Bagilishema, supra* note 10, para. 39. See also Rome Statute of the International Criminal Court, article 28(b): "With respect to superior and subordinate relationship not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates [...]"

23 *Prosecutor* v. *Kayishema & Ruzindana, supra* note 9, paras. 221–22[illegible] confirmed on appeal, *supra* note 13, para. 294.

> . . . even where a clear hierarchy based upon *de jure* authority is not present, this does not prevent the finding of command responsibility. Equally, [. . .] the mere existence of *de jure* power does not always necessitate the imposition of command responsibility.[24]

For the Chamber, to establish a position of command, it was enough to show that the accused exercised influence over subordinates:

> The Trial Chamber has found that acts or omissions of a *de facto* superior can give rise to individual criminal responsibility pursuant to article 6(3) of the Statute. Thus no legal or formal position of authority need exist between the accused and the perpetrators of the crimes. Rather, the influence that an individual exercises over the perpetrators of the crime may provide sufficient grounds for the imposition of command responsibility if it can be shown that such influence was used to order the commission of the crime or that, despite such *de facto* influence, the accused failed to prevent the crime.[25]

It would seem from the findings in *Kayishema & Ruzindana* that a mere showing of "strong affiliations" is sufficient to establish effective control.[26] In theory therefore, following this reasoning, superior responsibility could be imposed on the basis of *de facto* powers alone, without *de jure* requirements. This conclusion however has not been followed in all subsequent judgments.

In *Musema*, the Chamber stipulated that "a civilian superior may be charged with superior responsibility only where he has effective control, be it *de jure* or merely *de facto*, over the persons committing violations of international humanitarian law".[27] The Chamber added that, although a superior's authority may be only *de facto*, derived from influence or indirect power, the determining question was the extent of the "power of control over persons who *a priori* were not under his authority".[28] The Chamber suggested that the existence of such control would undoubtedly be linked to influence of the accused in the context of the events:

[24] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 491.

[25] *Ibid.* para. 492

[26] *Ibid.* para. 501: "The facts of the case also reflect the *de facto* control that Kayishema exercised over *all* of the assailants participating in the massacres. Kayishema was often identified transporting or leading many of the assailants to the massacre sites. He was regularly identified, for example, in the company of members of the *Interahamwe* – transporting them, instructing them, rewarding them, as well as directing and leading their attacks. The Trial Chamber, therefore, is satisfied that Kayishema had strong affiliations with these assailants, and his command over them at each massacre site, as with the other assailants, was clearly established by witness testimony."

[27] *Prosecutor* v. *Musema, supra* note 7, para. 141. See also para. 864: ". . . the authority, whether *de facto* or *de jure*, or the effective control, exercised by Alfred Musema in the context of the events alleged, may provide the basis for such individual criminal responsibility".

[28] . . . ibility in these circumstances would be through

> The influence at issue in a superior – subordinate command relationship often appears in the form of psychological pressure. This is particularly relevant to the case at bar, insofar as Alfred Musema was a socially and politically prominent person in Gisovu Commune.[29]

The Trial Chamber in *Musema*, after having examined all the pertinent evidence, found that the accused had "legal and financial control over [his] employees, particularly through his power to appoint and remove these employees from their positions at the Tea Factory",[30] and that he "was in a position, by virtue of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute".[31] It concluded that there therefore existed a *de jure* superior – subordinate relationship between Alfred Musema and the employees of the Gisovu Tea Factory.[32]

However, the Chamber was not satisfied that there existed a superior – subordinate relationship between the accused and members of the population of Kibuye prefecture and *thé villageois* plantation workers, despite being satisfied that that these individuals perceived the accused "as a figure of authority and as someone who wielded considerable power in the region",[33] and noting that:

> Many of the witnesses testified that Musema was perceived as a figure of authority and considerable influence in the Gisovu region. Witness H stated that Musema was "very well respected" in the locality. Witness W testified that Musema "occupied an important position in Rwanda", and that he occupied a place higher in the regime than others of equivalent or higher age or qualifications. Witness E stated that Musema was considered to have the same powers as a Préfet.[34]

Although the Chamber in *Musema* premised that effective control could be both *de facto* and *de jure*, the findings of the Chamber suggest, unlike the *Kayishema & Ruzindana* precedent, that the existence of substantial *de facto* authority and influence is insufficient alone to satisfy the requirements of article 6(3).[35] Rather, it appears from *Musema*, although not conclusively, that an individual will be labelled a superior only where it

[29] *Ibid.*, para. 140.

[30] *Ibid.*, para. 880.

[31] *Ibid.*

[32] *Ibid.*, para. 882.

[33] *Ibid.*, para. 881.

[34] *Ibid.*, para. 868.

[35] See also *Prosecutor* v. *Delalic* et al. (Case No. IT-96-21-A), Judgn . 20 February 2001, para. 266 where it was held that "customary law has specified a sta . of *effective* control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense

can be shown that there prevails some form of *de jure* authority, which includes legal or financial power.

A more restrictive approach is to be found in *Bagilishema*, where the Chamber, concurring with *Delalic* (or "Celebici"), held that the doctrine of command responsibility "extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates *which is similar to that of military commanders*" (emphasis added).[36] It explained:

> According to the Trial Chamber in *Celebici*, for a civilian superior's degree of control to be "similar to" that of a military commander, the control over subordinates must be "effective", and the superior must, have the "material ability" to prevent and punish any offences. Furthermore, the exercise of *de facto* authority must be accompanied by "the trappings of the exercise of *de jure* authority". The present Chamber concurs.[37]

For the Chamber in *Bagilishema*, these trappings included factors such as a chain of command, the issuing and obeying of orders, and disciplinary action for insubordination.[38] It then introduced a two-pronged test for determining whether a civilian superior exercises effective control over his or her subordinates. First, it must be established that the trappings of *de jure* authority exist. Thereafter and where necessary, the extent of *de facto* control is to be assessed on a case-by-case basis.[39] The Chamber held that without real or contrived *de jure* authority comparable to that found in a military context, no individual could be considered a superior.[40] As such, by contrast to *Musema*, a bare legal relationship between an accused and his or her staff would not satisfy the requirements of article 6(3). In applying this test in its findings on communal employees being subordinates of the accused, the Chamber held that:

> Both in law and in practice, therefore, the Accused's formal relationship with his administrative and technical staff, at least until April 1994, appears to have been equivalent to that of a general manager of a public agency focused essentially on social development. This model implies that the Accused's *de jure* authority over lower-level staff was altogether different from that of a military commander over subordinates.[41]

the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions."

[36] *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 42.

[37] *Ibid.*, para. 43.

[38] *Ibid.* The Chamber added: "It is by these trappings that the law distinguishes civilian superiors from mere rabble-rousers or other persons of influence."

[39] *Ibid.*, para. 152.

[40] That being said, the Chamber did recognise elsewhere in the judgment, at para. 39, that "ultimately it is the actual relationship of command (whether *de jure* or *de facto*) that is required for command responsibility"

However, the Appeals Chamber in *Bagilishema* recently ruled that the Trial Chamber's approach to the principle of 'effective control', namely that the control exercised by a civilian superior must be of the same nature as that exercised by a military commander, was erroneous. For the Appeals Chamber, it suffices that the accused exercises the required "degree" of control over his subordinates, namely, that of effective control. It reiterated that the test in all cases is whether the accused exercises effective control over his or her subordinates, and not just whether he or she had *de jure* authority.[42]

As can be seen, the jurisprudence of the ICTR has consistently accepted that the level of *de jure* and *de facto* authority is crucial in assessing whether there exists a superior subordinate relationship. The judgments have been pragmatic, and were initially content to assess the authority of a superior within the realities of the given circumstances. That which mattered was the position of the superior *in casu*. Although it is now established that superior responsibility may be applied to civilian commanders, the juris prudence reflects the concern that "great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote".[43]

THE "KNOWLEDGE" REQUIREMENT

In conformity with article 6(3) of the Statute, if a superior is to be held responsible for criminal conduct of subordinates, it must be established that he or she possessed the requisite *mens rea*, namely that he or she knew or had reason to know of such conduct. It is generally agreed that both direct and circumstantial evidence can be relied upon to prove the "knowledge" of a superior,[44] yet difficulties arise as to the requisite level of proof needed to show that a superior "had reason to know". In addition, it remains unclear whether the ICTR considers the standard applicable to military and civilian superiors to be one and the same.

Distinction between Civilian and Military Superiors

In the two cases that have dealt with the existence of a different *mens rea* for civilian and military superiors, divergences in the r oning are apparent. It would appear as though different conclusion ave been

[42] *Prosecutor* v. *Bagilishema* (Case No. ICTR-95-1A-A), Appeal udgement, 13 December 2002, paras 55 and 62.

[43] *Prosecutor* v. *Delalic*, *supra* note 11, para. 377

6374

reached depending on the source of law relied upon in the case. In *Musema*, the Chamber recognised that article 6(3) "closely resembles in spirit and form" article 86(2) of the 1977 Additional Protocol I to the Geneva Conventions of 1949.[45] According to article 86(2),

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all necessary measures within their power to prevent or repress the breach.

Although noting that the drafters of this article had been of the opinion that a "should have known" standard "was too broad and would subject the commander, a posteriori, to arbitrary judgments", the Chamber offered little guidance as to its understanding of "had reason to know" in the case.[46] That being said, the Chamber considered that the applicable standard for criminal responsibility under article 86(2) does not distinguish between military and civilian superiors.[47]

By contrast, in *Kayishema & Ruzindana*, the Chamber, basing its findings in part on article 28 of the Rome Statute,[48] held that:

> [...] the distinction between military commanders and other superiors embodied in the Rome Statute [is] an instructive one. In the case of the former it imposes a more active duty upon the superior to inform himself of the activities of his subordinates when he, "knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes." This is juxtaposed with the *mens rea* element demanded of all other superiors who must have, "[known], or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes".[49]

For the Chamber, as stipulated in the Rome Statute, civilian leaders unlike military leaders should not have imposed "a *prima facie* duty" to be seised of every activity of their subordinates.[50]

Although the two judgments advance little on whether a distinction is to be drawn between the nature of the duty to inquire of civilian and military leaders, they reflect the fact that the question is still open to debate. This can also be seen in recent ICTY findings. Indeed, in the *Delalic* appeal, it was noted that: "civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law".[51] By contrast, in a subsequent judgment, *Krnojelac*, an ICTY Trial Chamber was of the opinion that the knowledge requirement had been applied uniformly in cases before the ICTY to both civilian and military commanders and accordingly that "the same state of knowledge is required for both civilian and military commanders".[52]

Had Reason to Know

A superior is under a duty to act where he or she "had reason to know" subordinates were about to commit or had committed offences covered by articles 2, 3 and 4 of the Statute. The ambiguity of this terminology makes it unclear whether, for the purposes of article 6(3), "had reason to know" means only that a superior had information yet failed to act on it or whether it also imposes a positive duty upon the superior to inform himself or herself.

The early ICTR judgments offer little reasoning as to why one standard rather than another was adopted. In *Kayishema & Ruzindana*, the Trial Chamber simply referred to the positions in *Delalic* and article 28 of the Rome Statute[53] before coming to the conclusion that a superior would have

[45] *Prosecutor* v. *Musema*, *supra* note 7, para. 146.

[46] *Ibid.*

[47] *Ibid.*, para. 147.

[48] "Responsibility of commanders and other superiors. In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court: 1. A military commander or person effectively acting as a military commander shall be criminally responsible for control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (a) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution. 2. With respect to superior and subordinate relationships not described in paragraph 1, a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where: (a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; (b) The crimes concerned activities that were within the effective responsibility and control of the superior; and (c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution."

[49] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 227.

[50] *Ibid.*, para. 228.

[51] *Prosecutor* v. *Delalic* et al., *supra* note 35, para. 240. The Chamber declined to r on the question of law given that the Trial Chamber had made a factual determination t the accused was not in a position of superior authority in any capacity.

[52] *Prosecutor* v. *Krnojelac* (Case No. IT-97-25), Judgment, 15 March 2002, para. 94.

[53] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, paras. 226–228. The Chamber

"had reason to know" where he or she "consciously disregarded information which put him on notice that his subordinates had committed, or were about to commit acts in breach" of the Statute.[54] For the Chamber, Kayishema knew or had reason to know that large scale attacks were imminent at Mubuga church:

> First, the Tutsis were the subject of attacks throughout Rwanda by the date of the attack at Mubuga Church, and Kayishema was privy to this information. Second, following Kayishema's conversation with the Hutu priest, witnessed by a number of Tutsis at the Church, the priest refused the Tutsis access to water and informed them that they were about to die. Finally, the attackers included soldiers, gendarmes, and the members of the *Interahamwe*, all of whom he exercised either *de jure* or *de facto* control over.[55]

The Chamber ultimately found that Kayishema was present during the attacks.[56] It may therefore seem to be a redundant exercise for the purposes of the findings on superior responsibility to establish whether he knew or had reason to know that the attacks were imminent.[57] Nevertheless, had Kayishema's presence not been demonstrated, it is arguable whether knowledge of massacres elsewhere in Rwanda and of subordinates being amongst the attackers can be said to have put Kayishema on notice of the killings at the church.[58]

In *Musema*, again no clear position is set out by the Chamber as to its understanding of "had reason to know" save to note that a "should

that some information be available that would put the accused on notice of an offence and require further investigation by him". Then, regarding article 28 of the Rome Statute, the Trial Chamber agreed with the distinction made between military and on-military superiors inasmuch as there is no "*prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control".

54 *Ibid.*, para. 228.

55 *Ibid.*, para. 509.

56 *Ibid.*, para. 404.

57 Kayishema had not been accused of being present during the attacks, which thereby justifies the charge of command responsibility.

58 For instance, at para. 400: "Each one of these eyewitnesses, with the exception of PP, placed Kayishema at the site on at least one day either shortly before or during the attacks of 15 and 16 April." The Chamber also concluded, in para. 400: "It is clear from the evidence presented to the Trial Chamber that of the thousands of Tutsis gathered at Mubuga Church, only a few survived this weekend massacre. The Trial Chamber is satisfied, beyond a reasonable doubt, that Kayishema and his subordinates, including local authorities, the gendarmes, the communal police and the members of the *Interahamwe* were present and participated at the attacks at Mubuga Church between 14 and 16 April. As aforementioned, Kayishema, is not charged with having been present during the attacks under paragraph 41 of the Indictment. In light of the testimony of the five witnesses the Chamber nevertheless finds that Kayishema was present during the actual attacks. We further find that his presence and the presence and the participation of other local authorities, encouraged the

have known" standard may be too broad.[59] For the Chamber to have said so little may seem as an inadvertent *lapsus* on its part. However, given that Musema's superior responsibility was largely incurred through his actual presence and activity in the build up and during the various attacks involving his subordinates, it appears to have been self-evident for the Chamber to determine that he was fully and directly knowledgeable in the circumstances of their acts.[60] Consequently, the Chamber may not have deemed it necessary to develop the issue of him having or not "had reason to know".[61]

By contrast, *Bagilishema* offers more insight into the *mens rea* required under article 6(3) of the ICTR Statute. As a preliminary remark, it is recalled in the judgment that although an individual's command position may be a significant indicator of knowledge, such knowledge cannot be presumed on the basis of position alone.[62] The Chamber then proceeded to explain in which conditions "a superior possesses or will be imputed the *mens rea* required to incur criminal liability", namely:

> he or she had actual knowledge, established through direct or circumstantial evidence, that his or her subordinates were about to commit, were committing, or had committed, a crime under the Statutes; or,
>
> he or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed, by subordinates; or,
>
> the absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she *should* have known.[63]

Thus, the third possibility envisaged by the Chamber introduces a "duty to know" on the part of the superior. Responsibility will be imposed upon the superior where he or she "should have known" of the offences, or, in other words, where he or she was negligent in his or her duty and with the means available to obtain information relevant to the offences.

59 *Prosecutor* v. *Musema*, *supra* note 7, para. 146.

60 *Ibid.*, paras. 894, 899, 905, 914, 919, 924, 945 and 950.

61 If presence and active participation is established, a charge based on superior responsibility may seem unnecessary. See for instance *Prosecutor* v. *Kordic & Cerkez* (Case No. IT-95-14/2), Judgment, 26 February 2001, para. 371: "... in cases where the evidence presented demonstrates that a superior would not only have been informed of subordinates' crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the mode of criminal responsibility incurred may be better characterised by article 7(1)."

62 *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 45.

63 ...

Accordingly, if a superior is diligent in his or her duty yet remains ignorant of crimes committed or to be committed by subordinates, he or she may not necessarily incur responsibility. The Chamber adopted this *mens rea* standard basing itself on conclusions of the ICTY Trial Chambers in *Aleksovski*[64] and *Blaskic*.[65] This standard is stricter than that proposed in article 28 of Rome Statute for civilian superiors, and reflects instead the one applicable to military superiors. Indeed, in the case of civilian superiors before the International Criminal Court, responsibility will be incurred only if the superior "either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes". By contrast, in the case of military superiors it only needs to be shown that the superior "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes".

Similarly, the "should have known" standard suggested in *Bagilishema* may be difficult to reconcile with the *Delalic* appeal judgment, whereby "a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates",[66] and with the recent ICTY judgment in *Krnojelac*, which held that "it must be proved that [the superior] had in his possession information which would at least

[64] *Prosecutor* v. *Aleksovski*, *supra* note 12, para. 80: "Admittedly, as regards 'indirect' responsibility, the Trial Chamber is reluctant to consider that a 'presumption' of knowledge about a superior exists which would somehow automatically entail his guilt whenever a crime was allegedly committed. The Trial Chamber deems however that an individual's superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances." Zlatko Aleksovski was a superior of prison guards for all matters relating to their duties in connection with the organisation and functioning of Kaonik prison

[65] *Prosecutor* v. *Blaskic* (Case No. IT-95-14), Judgment, 3 March 2000, para. 332: "In conclusion, the Trial Chamber finds that if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute." Tihomir Blaskic was the commander of the Croatian Defence Council armed forces (HVO) in central Bosnia.

[66] *Prosecutor* v. *Delalic* et al., *supra* note 35, para. 241. In other words the superior is not permitted to remain wilfully blind to the acts of subordinates. Although the Appeals Chamber limited its pronouncement to the customary law standard of *mens rea* as existing at the time of the offences charged in the indictment, it is submitted that this finding is still

put him on notice of the risk of such offences, such information alerting him to the need for additional investigation to determine whether such crimes were or were about to be committed by his subordinates".[67]

Although in *Bagilishema* the Chamber advanced a possible "should have known" standard as a basis for superior responsibility, its findings in relation to the superior responsibility of the accused seem to be based solely on the stricter standard of whether he had information which put him or her on notice of the risk of offences being committed.[68] This reflects the position of the Appeals Chamber in *Delalic*, whereby "the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, 'in the possession of'. It is not required that he actually acquainted himself with the information."[69] In effect, knowledge is to be presumed only if the superior had the means to obtain it and deliberately refrained from doing so, rather than if he or she fails in his or her duty to obtain the relevant information.[70]

Of course, as noted in *Bagilishema*, a superior is unlikely to admit being in possession of relevant information if in so doing it would mean incriminating himself or herself. In such situations, and where there is no direct evidence of the superior's knowledge, this may be established by way of circumstantial evidence.[71] To this end, according to *Bagilishema*, a number of indicia may determine whether a superior possessed the requisite knowledge:

(a) The number of illegal acts;
(b) The type of illegal acts;
(c) The scope of illegal acts;
(d) The time during which the illegal acts occurred;
(e) The number and type of troops involved;
(f) The logistics involved, if any;

[67] *Prosecutor* v. *Krnojelac*, *supra* note 51, para. 94.

[68] The Chamber subsequently reviewed the responsibility of the accused on the basis of negligence for having established or permitted the establishment of a system of roadblocks without adequately supervising its operations. In this section of the judgment, the Chamber dealt not only with the issue of establishing a dangerous system, but also with questions of whether it was foreseeable that an inadequately supervised roadblock might result in deaths (para. 1020) and of whether the accused showed "wanton disregard for high-risk activities at roadblocks" (para. 1021). Findings on these questions are relevant to establishing [illegible] knowledge on a "should have known" basis. Arguably, given that killings were committed [illegible] the roadblocks by at least one [illegible] the accused (para. 973), this section may be perceived as also relating to the [illegible] responsibility of the accused.

[69] *Prosecutor* v. *Delalic* et al., *supra* note 35, para. 241.

[70] *Ibid.*, para. 226.

(g) The geographical location of the acts;
(h) The widespread occurrence of the acts;
(i) The tactical tempo of operations;
(j) The *modus operandi* of similar illegal acts;
(k) The officers and staff involved;
(l) The location of the commander at the time.[72]

After reviewing the evidence, the Chamber concluded:

> In summary, the indicium of the Accused's contemporaneous presence in the vicinity of the crime in the case of Judith, together with the indicia of geographical location, time and *modus operandi* in relation to the killings of both Bigirimana and Judith, combined with the fact that no more than two people were killed in a period when attacks on civilians were alleged to be common – telling though these indicia may seem when taken in combination – are in the Chamber's assessment nevertheless not sufficient to prove that the Accused had the requisite *mens rea*. The findings in *Celebici* and *Aleksovski* were made on a much firmer foundation.[73]

As can be seen therefore, the jurisprudence of the ICTR on the *mens rea* requirements for superiors to incur responsibility is still evolving. Although it appears clear that circumstantial evidence may be used to establish knowledge, the question of whether a "should have known" standard is acceptable under article 6(3) is yet to be satisfactorily resolved.

FAILURE TO PREVENT OR PUNISH

Where it is shown that an individual is a superior for the purposes of article 6(3) of the Statute, subject to the requisite knowledge being established, he or she is then under an obligation "to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof". In other words, a superior has a positive duty to act, in such circumstances where he or she is able to exercise effective control over subordinates and has the material ability to prevent and punish their crimes.[74]

Kayishema was found to have exercised *de facto* control over all of the assailants participating to the massacres and was in a position of command "over them at each massacre".[75] It was also held that Kayishema played a pivotal role in the massacres and that "the perpetrators committed

[72] *Ibid.*, para. 968. Citing *Prosecutor* v. *Delalic* et al., *supra* note 11, para. 386.
[73] *Ibid.*, para. 988.
[74] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, paras. 229 & 230.
[75] *Ibid.*, para. 501. The assailants included armed civilians and militia, *gendarmes*, and

the crimes pursuant to [his] orders".[76] Consequently, given the position of authority of the accused, he was duty bound to take preventive and repressive action, and would incur superior responsibility where he failed in this duty: "In light of this uncontestable control that Kayishema enjoyed, and his overarching duty as *Prefect* to maintain public order, the Trial Chamber is of the opinion that a positive duty upon Kayishema existed to prevent the commission of the massacres."[77]

A superior may be held responsible for failing to take "only such measures that were within his or her powers".[78] Whether the superior possessed such material ability is not an abstract question but is "inherently linked with the given factual situation".[79] It is clear that the impossible cannot be demanded of the superior.[80]

To date, no blanket description is to be found in the ICTR judgments as to what constitutes "necessary and reasonable measures". Instead, the Chambers have adopted a pragmatic approach, evaluating, on the basis of the available evidence, the extent of the control of the superior, and whether he or she could, in fact, have taken such measures as to prevent and punish subordinates. It follows that the extent of the measures to which a superior has recourse depends essentially on his or her position and status within the given circumstances of the case.[81]

In *Musema*, where the accused was the director of a tea factory, these measures were said to include the threat of or actual disciplinary action over tea factory employees, and restricting the use of certain resources. Indeed, for the Chamber, by virtue of his *de jure* power and *de facto* control over the employees of the tea factory, measures at Musema's disposal included "removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes punishable under the Statute" and "attempti[ng] to prevent or

[76] *Ibid.*, paras. 504 & 505.
[77] *Ibid.*, para. 513.
[78] *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 48. Regarding the meaning of "necessary" and "reasonable", the Chamber stated, at para. 47, that it "understands 'necessary' to be those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time; and, 'reasonable' to be those measures which the commander was in a position to take in the circumstances".
[79] *Ibid.*, para. 48 and *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 231
[80] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 511.
[81] See also INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF ARMED CONFLICTS para. 3548 (1987), where it is explained that it is matter of common sense that the measures described in relation as feasible measures which the superiors are expected to take under article 86

to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes".[82] In certain circumstances, as noted in *Bagilishema*, evidence of actions such as the holding of meetings to restore security and ethnic harmony, the issuing of fake identity cards, falsifying resident registers and attempting generally to restore law and order may support a finding that a superior took necessary and reasonable measures to prevent and punish offences.[83]

Of course, where an accused is found to have actively directed and ordered subordinates to commit acts prohibited by the Statute, then it would be difficult to plead inability to prevent or punish them. Effectively, active participation negates any defence of powerlessness.[84] This was alluded to in *Kayishema & Ruzindana* where, in addition to it being established that the accused had a positive duty to act by virtue of his or her position of authority, it was stated that where the crimes were committed pursuant to the orders of the accused, "it is self-evident [...] that he failed to take reasonable measure to prevent them".[85] Similarly, in *Musema* it was found that, rather than taking the necessary and reasonable measures to prevent the perpetration of acts by his subordinates, by his presence and personal participation at the attack sites, he in effect abetted his subordinates in the commission of those acts.[86]

Conceivably, a superior could contend that despite not being in a position to prevent his or her subordinates from committing offences at the time

[82] *Prosecutor* v. *Musema*, *supra* note 7, para. 880. It should be noted that it is unclear from the findings whether the accused would also have been found responsible under article 6(3) had he not been present at the scene of the attacks whilst his subordinates committed crimes. For instance, had the accused come to know of his or her subordinates being involved in massacres, would dismissal or suspension from office be considered as a measure sufficient to exonerate him or her under article 6(3)? It could be contended that the accused had the duty as *de jure* superior to take the matter further by, for instance, reporting the offender to the police and judicial authorities.

[83] *Prosecutor* v. *Bagilishema*, *supra* note 10, paras. 226–303.

[84] As noted elsewhere in the article, article 6(1) charges may be more appropriate than superior responsibility in situations of active participation and presence of the accused during the events.

[85] *Prosecutor* v. *Kayishema & Ruzindana*, *supra* note 9, para. 505.

[86] *Prosecutor* v. *Musema*, *supra* note 7, para. 894: "The Chamber finds that it has also been established that Musema was the superior of said employees and that he held not only *de jure* power over them, but also *de facto* power. Considering that Musema was personally present at the attack sites, the Chamber is of the opinion that he knew or, at least, had reason to know that his subordinates were about to commit such acts or had done so. The Chamber notes that the Accused nevertheless failed to take the necessary and reasonable measures to prevent the commission of said acts by his subordinates, but rather abetted in the commission of those acts, by his presence and personal participation." See also paras. 905, 914, 919, and 924.

of the events, he or she nevertheless intended to take repressive action at a later date. Such an argument might be raised in circumstances where, had the superior spoken out in the "midst of battle" to prevent subordinates, there might have been a real risk that he or she would be perceived as a traitor and thereby endanger his or her life. According to *Bagilishema*, such a position is untenable:

> [T]he obligation to prevent or punish does not provide the Accused with alternative options. For example, where the Accused knew or had reason to know that his or her subordinates were about to commit crimes and failed to prevent them, the Accused cannot make up for the failure to act by punishing the subordinates afterwards.[87]

Moreover, where a superior creates an environment of impunity, thereby condoning and encouraging culpable actions by subordinates, he or she may incur criminal responsibility. Thus, a regime implemented by a superior must be such as to effectively deter subordinates from committing offences.

> [I]n the case of failure to punish, a superior's responsibility may arise from his or her failure to create or sustain among the persons under his or her control, an environment of discipline and respect for the law. ... It follows that command responsibility for failure to punish may be triggered by a broadly based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates.[88]

The issue of failing to prevent or punish remains contentious. Indeed, *post facto* assessments of events within a judicial context rarely allow for a full understanding of past chaotic realities. Likewise it remains difficult to truly comprehend the extent to which a superior could have acted in the given circumstances.[89]

[87] *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 49, with reference to *Prosecutor* v. *Blaskic*, *supra* note 64, para. 336.

[88] *Prosecutor* v. *Bagilishema*, *supra* note 10, para. 50.

[89] See in this regard *Prosecutor* v. *Blaskic*, *supra* note 64, para 335 where it was held that "it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator. As stated above in the discussion of the definition of 'superior', this implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities." There is of course the risk that such an assessment as to whether a superior could have done more may err into the domain of speculation.

CONCLUSION

The application of the doctrine of command responsibility, in particular to civilian authorities, gives rise to a number of complex issues. The ICTR, through its early judgments, has endeavoured to address these to the extent possible, and, despite a case by case approach being favoured, a consistent body of law is slowly being developed. Although initial dicta suggested that the imposition of superior responsibility upon civilians was contentious, it is clear that any individual who possesses the necessary authority and effective control can theoretically be held liable for the acts of subordinates. However, it still remains to be seen whether civilians bear the same standard of responsibility as military commanders. Hopefully, this may be resolved when the ICTR rules in the military cases before it.[90]

[90] The joint "military" trial of of Théoneste Bagasora (Director of Cabinet, Ministry of Defence), Anatole Nsengiyumva (Lieutenant-Colonel), Gratien Kabiligi (Brigadier-General in FAR) and Aloys Ntabakuze (Commander of Battalion in FAR) commenced on 2 April 2002. The second "military trial", which is yet to open, involves Innocent Sagahutu (second-in-command of the Renaissance Battalion), François-Xavier Nzuwonemeye (Commander of the 42nd Battalion) and Augustin Ndindiliyimana (Chief of Staff of Gendarmerie Nationale)

CRIMINAL LAW FORUM
The Official Journal of the International Society for the Reform of Criminal

Criminal Law Forum is a peer-review journal dedicated to the advancement of criminal law theory, practic reform throughout the world. Under the direction of an international editorial board, *Criminal Law Forum* the global community of criminal law scholars and practitioners through the publication of original contrib and the dissemination of noteworthy public documents.
Criminal Law Forum is published pursuant to an agreement with the International Society for the Refo Criminal Law, based in Vancouver, British Columbia, Canada.

Submission of manuscripts. Articles for publication (in triplicate and on diskette) and communic concerning them should be sent to the following address:

Professor William A. Schabas
Director, Irish Centre for Human Rights
National University of Ireland, Galway
Galway, Ireland
Tel: +353 (91) 512103
Fax: +353 (91) 750575
E-mail: william.schabas@nuigalway.ie

Offprints: The author will receive 25 copies of the article without charge. Additional offprints may be on when the proofs are returned. The first-named author of an article receives one copy of the journal.

No page charges are levied on authors or their institutions.

Consent to publish in this journal entails the author's irrevocable and exclusive authorisation of the publish collect any sums or considerations for copying or reproduction payable by third parties (as mentioned in ar 17, paragraph 2, of the Dutch Copyright Act of 1912 and in the Royal Decree of June 20, 1974 (S.351) purs to article 16b of the Dutch Copyright Act of 1912) and/or to act in or out of court in connection herewith.

Instructions for authors can be obtained from our website http://www.wkap.nl.
Criminal Law Forum is indexed/abstracted in *ASSIA: Applied Social Science Index and Abstracting; Crin Justice Abstracting.*

ANNEX 26:

Akehurst's Modern Introduction to International Law (7th edn Malanczuk (ed.), 1997) [Extract].

AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW

Seventh revised edition

Peter Malanczuk

Assessor iur., Dr. iur.,
Professor of International Law, Law Faculty, Erasmus University Rotterdam,
Former Legal Assistant to the President of the Iran–United States Claims Tribunal,
Counsel, Lalive & Partners, Attorneys-at-Law, Geneva,
Member, Tianjin Board of Arbitration, China

London and New York

First published in 1970 by HarperCollins Academic
Second edition 1971
Third edition 1977
Fourth edition 1982
Fifth edition 1987
Sixth edition 1987

Reprinted four times
by Routledge
11 New Fetter Lane, London EC4P 4EE

Simultaneously published in the USA and Canada
by Routledge
29 West 35th Street, New York, NY 10001

Seventh edition 1997
Reprinted 1998 (twice) and 1999 (twice), 2000, 2001, 2002

Routledge is an imprint of the Taylor & Francis Group

Typeset in Ehrhardt by
RefineCatch Ltd, Bungay, Suffolk
Printed and bound in Great Britain by
T.J. International Ltd, Padstow, Cornwall

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

Library of Congress Cataloging in Publication Data
A catalog record for this book is available from the Library of Congress

ISBN 0–415–16553–9 (hbk)
ISBN 0–415–11120–X (pbk)

3 Sources of international law

The word 'source of law' ('source de droit', 'Rechtsquelle') has a variety of interpretations.[1] The English legal philosopher H.L.A. Hart distinguishes between its use in a 'material' or 'historical sense' and in a 'formal' or 'legal' sense.[2] In the first non-legal sense it refers to a causal or historical influence explaining the factual existence of a given rule of law at a given place and time, for example, to show that a certain contemporary rule of Dutch law may originate from Roman law, or to state that the development of labour law has resulted from the political action taken by trade unions. In the legal sense, the term means the criteria under which a rule is accepted as valid in the given legal system at issue. These criteria distinguish binding law from legally non-binding other social or moral norms and the law *de lege lata* (the law as it currently stands) from the law *de lege ferenda* (the law as it may be, or should be, in the future).[3] In this sense, the term 'source' has a technical meaning related to the law-making process and must not be confused with information sources, research sources or bibliographies on international law.[4]

In developed national legal systems there are definite methods of identifying the law, primarily by reference to the constitution, legislation (statutes) and judicial case law. In the decentralized international legal system, lacking a hierarchical structure,[5] the problem of finding the law is much more complicated. There is no authority to adopt universally binding legislation[6] and no compulsory jurisdiction of international courts and tribunals without the consent of states. In this system the same subjects of international law[7] that are bound by international rules and principles have created them themselves.

The most important source of international law for centuries was customary law, evolving from the practice of states.[8] The recent attempt to codify international law and the conclusion of multilateral treaties in many important areas, such as diplomatic and consular relations,[9] the law of war[10] or the law of the sea,[11] have sought to clarify the law and to establish universally accepted norms. But customary law has still retained its predominance over treaty law or other sources in many other areas, such as, for example, state immunity[12] or state responsibility.[13] The changes in international society since 1945 have led to basic disputes on the sources of international law and it must be noted at the outset that they have become an area of considerable theoretical controversy. In particular, the two main traditional elements, custom and treaties, are now often difficult to distinguish clearly. As R. Jennings put it in 1981:

1 *Harris CMIL*, 23–68; *Restatement (Third)*, Vol. 1, paras. 102–3, 24–39; C. Dominice, Methodology of International Law, *EPIL* 7 (1984), 334 *et seq.*; R. Monaco, Sources of International Law, *ibid.*, 424 *et seq.*; B. Simma/P. Alston, The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles, *AYIL* 12 (1988/9), 82–108; C. Sepúlveda, Methods and Procedures for the Creation of Legal Norms in the International System of States: An Inquiry into the Progressive Development of International Law in the Present Era, *GYIL* 33 (1990), 432; O. Schachter, *International Law in Theory and Practice*, 1991, Chapter III; U. Fastenrath, *Lücken im Völkerrecht*, 1991; E. Riedel, Standards and Sources. Farewell to the Exclusivity of the Sources Triad in International Law?, *EJIL* 2 (1991), 58–84; E. Frangou-Ikonomidou (ed.), *Sources of International Law*, 1992; U. Fastenrath, Relative Normativity in International Law, *EJIL* 4 (1993), 305–40; G. Tunkin, Is General International Law Customary Law Only?, *ibid.*, 534–41; H.H.G. Post, Some Curiosities in the Sources of the Law of Armed Conflict Conceived in a General International Legal Perspective, *NYIL* 25 (1994), 83–118.

2 H.L.A. Hart, *The Concept of Law*, 1961, 246–7. On the meaning of 'sources' see also R.Y. Jennings, International Law, *EPIL* 7 (1984), 284; I. Brownlie, *Principles of Public International Law*, 4th edn 1990, 1–3, discussing the common distinction between 'formal' sources (legal procedures and methods for creating binding rules) and 'material' sources (providing evidence of the content of rules in the sense of substantive law) which is not clearly applicable in international law.

3 On the need to distinguish clearly between the *lex lata* and mere propositions on the *lex ferenda* see R.Y. Jennings, An International Lawyer Takes Stock, *ICLQ* 39 (1990), 513–29, 514.

6384

> I doubt whether anybody is going to dissent from the proposit[illegible]e has never been a time when there has been so much confusion and doubt about the tests of the validity – or sources – of international law, than the present.[14]

Article 38(1) of the Statute of the International Court of Justice[15] provides:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilized nations;
> (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

This provision is usually accepted as constituting a list of the sources of international law.[16] Some writers have criticized it on the grounds that it does not list all the sources of international law, or that it includes aspects which are not genuine sources, but none of the alternative lists which have been suggested has won general approval. It is therefore proposed to examine the sources listed in the Court's Statute before considering other possible sources of international law.

Treaties

The Statute of the International Court of Justice speaks of 'international conventions, whether general or particular, establishing rules expressly recognized by the contesting states'.[17] The word 'convention' means a treaty, and that is the only meaning which the word possesses in international law, and in international relations generally. This is a point worth emphasizing, because students have been known to confuse conventions with conferences, or to mix up conventions in international law with conventions of the constitution in British constitutional law. Other terms used as a synonym for treaties, or for particular types of treaties, are agreement, pact, understanding, protocol, charter, statute, act, covenant, declaration, engagement, arrangement, accord, regulation and provision. Some of these words have alternative meanings (that is, they can also mean something other than treaties), which makes the problem of terminology even more confusing.

Treaties are of growing importance in international law. The practice of publishing collections of treaties concluded by a certain state or group of states commenced during the second half of the seventeenth century. The most important collection, under various titles, until the Second World War, was started by G.F. von Martens in 1771 with his '*Recueil des principaux traités*'. Since 1945, in accordance with Article 102 of the UN Charter, more than 33,000 treaties have been registered with the United

4 An excellent guide to the literature in this respect is *Public International Law – A Current Bibliography of Books and Articles*, published regularly by the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, which evaluates over 1400 journals, in addition to other collected works, and also lists newly published books on all areas of public international law.

5 See Chapter 1 above, 3–5.

6 See O. Schachter, The Nature and Process of Legal Development in International Society, in R.St.J. Macdonald/D.M. Johnston (eds), *The Structure and Process of International Law*, 1983, 745–808; G.M. Danilenko, *Law-Making in the International Community*, 1993; K. Skubiszewski, International Legislation, *EPIL* II (1995), 1255–62..

7 See Chapters 5, 75–90 and 6, 91–108 below.

8 See R. Bernhardt, Customary International Law, *EPIL* I (1992), 898–905.

9 See Chapter 8 below, 123–9.

10 See Chapter 20, 342–63 below.

11 See Chapter 12 below, 173–5.

12 See Chapter 8 below, 118–23.

13 See Chapter 17 below, 254–72.

14 R.Y. Jennings, What is International Law and How Do We Tell When We See It?, *ASDI* 37 (1981), 59–88, at 60.

15 Text in *Brownlie BDIL*, 438.

16 On the practice of the ICJ see M. Mendelson, The International Court of Justice and the Sources of International Law, in V. Lowe/M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice*, 1996, 63–89.

17 *Op. cit.* See R. Bernhardt, Treaties, *EPIL* 7 (1984), 459–64. Further literature is listed in Chapter 9 below, 130, which deals with the law of treaties.

Nations, several thousand of which are multilateral.[18] As collectivism has replaced *laissez-faire*, a large number of questions have become subject to governmental regulation – and to intergovernmental regulation when they transcend national boundaries. Modern technology, communications and trade have made states more interdependent than ever before, and more willing to accept rules on a vast range of problems of common concern – extradition of criminals, safety regulations for ships and aircraft, economic aid, copyright, standardization of road signs, protection of foreign investment, environmental issues and so on. The rules in question are usually laid down in treaties, with the result that international law has expanded beyond all recognition in the last 140 years (although it must be pointed out that most of the rules are too specialized to be dealt with in ordinary textbooks on international law).

Treaties are the major instrument of cooperation in international relations, and cooperation often involves a change in the relative positions of the states involved (for example, rich countries give money to poor countries). Treaties, therefore, are often an instrument of change – a point which is forgotten by those who regard international law as an essentially conservative force. The general trend, particularly after the Second World War, has been to enhance the role of treaties in international law-making, partly in response to increasing interdependence, partly as a solution to the controversies that exist between diverse groups of states as to the content and validity of older customary rules.

To some extent treaties have begun to replace customary law. Where there is agreement about rules of customary law, they are codified by treaty; where there is disagreement or uncertainty, states tend to settle disputes by *ad hoc* compromises – which also take the form of treaties. For example, capital-exporting countries have concluded some 1000 bilateral treaties promoting and protecting foreign investment to clarify the relevant legal framework.[19]

Law-making treaties and 'contract treaties'

Treaties are the maids-of-all-work in international law. Very often they resemble contracts in national systems of law, but they can also perform functions which in national systems would be carried out by statutes, by conveyances, or by the memorandum of association of a company. In national legal systems, legislative acts of parliament are regarded as sources of law, but contracts are not; contracts are merely legal transactions. (Contracts create rights and duties only for the contracting parties, who are very few in number, and it is generally agreed that a 'source of law' means a source of rules which apply to a very large number of people.) Some writers have tried to argue that treaties should be regarded as sources of international law only if they resemble national statutes in content, that is, if they impose the same obligations on all the parties to the treaty and seek to regulate the parties' behaviour over a long period of time. Such treaties are called 'law-making treaties' (*traités-lois*) and their purpose is to conclude an agreement on universal substantive legal principles (i.e. human rights treaties, Genocide Convention).[20] According to this theory, 'contract-treaties' (*traités-contrat*), that is, treaties which resemble contracts (for instance, a

18 *United Nations Treaties Series (UNTS)*; for a good reference work see M.J. Bowman/D.J. Harris (eds), *Multilateral Treaties: Index and Current Status*, 1984 and 10th cumulative supplement, 1993, with regular cumulative supplements. See also L. Wildhaber, Treaties, Multilateral, *EPIL* 7 (1984), 480–4; C. Parry (ed.), *The Consolidated Treaty Series (CTS)*, 1648–1918 (annotated); Hudson, *International Legislation* (1931–1950); C. Parry (ed.), *Index to British Treaties* (1101–1918); *United Kingdom Treaties Series (UKTS)* (from 1892); *League of Nations Treaty Series (LNTS)*. *International Legal Materials (ILM)*, which regularly publishes not only treaties but also other important documents relating to international law, is also very useful.

19 See Chapter 15 below, 237.

20 See V. de Visscher, *Problèmes d'interpretation judicaire en droit international public*, 1963, 128 *et seq.*

treaty whereby one state agrees to lend a certain sum of mo[illegible]ther state) are not sources of law, but merely legal transactions.

However, the analogy between national statutes and law-making treaties is misleading for two reasons. First, in national systems of law anyone who is contractually competent (i.e. anyone who is sane and not a minor) can enter into a contract, but parliamentary legislation is passed by a small group of people. In international law, any state can enter into a treaty, including a law-making treaty. Secondly, in national systems of law contracts create rights and duties only for the contracting parties, who are very few in number, whereas statutes of national law apply to a very large number of people. In international law all treaties, including law-making treaties, apply only to states which agree to them. Normally the parties to a law-making treaty are more numerous than the parties to a 'contract-treaty', but there is no reason why this should always be so.

The only distinction between a 'law-making treaty' and a 'contract-treaty' is one of content. As a result, many treaties constitute borderline cases, which are hard to classify. A single treaty may contain some provisions which are 'contractual', and others which are 'law-making'. The distinction between 'law-making treaties' and 'contract-treaties' is not entirely useless; for instance, a 'contract-treaty' is more likely to be terminated by the outbreak of war between the parties than a law-making treaty.[21] But it is too vague and imprecise to justify regarding law-making treaties as the only treaties which are a source of international law. The better view is to regard all treaties as a source of law. At any rate, the law of treaties applies to both types of treaties.

Parties to international treaties and 'internationalized contracts'

Only the subjects of international law – states, international organizations, and the other traditionally recognized entities[22] – can conclude treaties under international law. An international business contract concluded between a company based in state A and another enterprise located in state B is subject to one or another national legal system, but it is not a treaty under international law. Similarly, private law contracts between states, i.e. for the sale and purchase of goods, are usually concluded under the national law of one of the parties.

Some interesting problems have arisen in connection with agreements made between states and foreign corporations,[23] especially in the field of oil concessions,[24] permitting a foreign company to explore and exploit oil resources on the territory of the state. Usually, the parties to such agreements consent to a certain national legal system governing the contract. But occasionally, in the case of powerful multinational companies, such contracts have not been, fully or partially, placed under a national law, but under international law, general principles of law or only under the provisions of the contract itself. The reason for concluding such so-called internationalized contracts is to establish a balance between the parties and prevent the state party from evading its obligations under the contract by changing its own internal law. This is mostly secured by an arbitration clause referring disputes under the agreement to an international body.[25] There have been various attempts to find a proper legal classification of

21 See Chapter 9 below, 145–6. Another aspect where the distinction may be relevant is in the interpretation and application of the particular treaty, see Bernhardt (1984), *op. cit.*, 461. See also E. Raftopoulos, *The Inadequacy of the Contractual Analogy in the Law of Treaties*, 1990.

22 See Chapters 5, 75–90 and 6, 91–108 below.

23 R. Jennings, State Contracts in International Law, *BYIL* 32 (1961), 156 *et seq.*; K.-H. Böckstiegel, *Der Staat als Vertragspartner ausländischer Privatunternehmen*, 1971; D.W. Bowett, State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach, *BYIL* 59 (1988), 49 *et seq.*; E. Paasivirta, Internationalization and Stabilization of Contracts versus State Sovereignty, *BYIL* 60 (1989), 315 *et seq.*; M. Sornarajah, *International Commercial Arbitration: The Protection of State Contracts*, 1990; G.v. Hecke, Contracts Between States and Foreign Private Law Persons, *EPIL* I (1992), 814–19; see also v. Hecke, Contracts Between International Organizations and Private Law Persons, *ibid.*, 812–14; A.F.M. Maniruzzaman, State Contracts with Aliens. The Question of Unilateral Change by the State in Contemporary International Law, *JIArb.* 9 (1992), 141–71; G.R. Delaume, *Transnational Contracts – Applicable Law and Settlement of Disputes*, 1992.

24 P. Fisher, Concessions, *EPIL* I (1992), 715–21; A.Z.E. Chiali, Protection of Investment in the Context of Petroleum Agreements, *RdC* 204 (1987-IV), 13–169.

25 The most important arbitration cases since 1929 are listed in v. Hecke, *op. cit.*

these internationalized contracts, but the practical relevance of the issue has declined in recent years, as parties now mostly declare a certain national law to be applicable.

The law of treaties is dealt with in Chapter 9 below.[26]

Custom

The second source of international law listed in the Statute of the International Court of Justice is 'international custom, as evidence of a general practice accepted as law'.[27] As confirmed by the ICJ in the *Nicaragua* case,[28] custom is constituted by two elements, the objective one of 'a general practice', and the subjective one 'accepted as law', the so-called *opinio iuris*. In the *Continental Shelf (Libya v. Malta)* case, the Court stated that the substance of customary international law must be 'looked for primarily in the actual practice and *opinio juris* of States'.[29] The definition has given rise to some vexed theoretical questions, such as: How is it possible to make law by practice? And how can something be accepted as law before it has actually developed into law?[30] But it is nevertheless the established doctrine, accepted by states, international tribunals and most writers alike.

Where to look for evidence of customary law

The main evidence of customary law is to be found in the actual practice of states, and a rough idea of a state's practice can be gathered from published material – from newspaper reports of actions taken by states, and from statements made by government spokesmen to Parliament, to the press, at international conferences and at meetings of international organizations; and also from a state's laws and judicial decisions, because the legislature and the judiciary form part of a state just as much as the executive does. At times the Foreign Ministry of a state may publish extracts from its archives; for instance, when a state goes to war or becomes involved in a particular bitter dispute, it may publish documents to justify itself in the eyes of the world. But the vast majority of the material which would tend to throw light on a state's practice concerning questions of international law – correspondence with other states, and the advice which each state receives from its own legal advisers – is normally not published; or, to be more precise, it is only recently that efforts have been made to publish digests of the practice followed by different states.[31] As far as the latter are reliable as evidence of the law,[32] it must also be taken into consideration that such an expensive enterprise is mostly not undertaken in developing countries and that the empirical basis for analytical generalizations, therefore, is in fact rather limited to the practice of certain countries. Valuable evidence can also be found in the documentary sources produced by the United Nations.[33]

Evidence of customary law may sometimes also be found in the writings of international lawyers, and in judgments of national and international tribunals, which are mentioned as subsidiary means for the determination of rules of law in Article 38(1)(d) of the Statute of the International Court of Justice.[34]

26 See Chapter 9 below.

27 M. Akehurst, Custom as a Source of International Law, *BYIL* 47 (1974–5), 1 *et seq.*; G.M. Danilenko, The Theory of International Customary Law, *GYIL* 31 (1988), 9 et seq; M.H. Mendelson, The Formation of Rules of Customary (General) International Law, *ILA Rep.* 1988, 935–59; J.A. Barberis, Réflexions sur la coutume internationale, *AFDI* 36 (1990), 9–46; J. Kirchner, Thoughts about a Methodology of Customary International Law, *AJPIL* 43 (1992), 215–39; Bernhardt (1992), *op. cit.*, 898–905; K. Wolfke, Some Persistent Controversies regarding Customary International Law, *NYIL* 24 (1993), 1–16; Wolfke, *Custom in Present International Law*, 2nd edn 1993; O. Elias, The Nature of the Subjective Element in Customary International Law, *ICLQ* 44 (1995), 501–20; I. M. Lobo de Souza, The Role of State Consent in the Customary Process, *ibid.*, 521–39; Meron, The Continuing Role of Custom in the Formation of International Humanitarian Law, *AJIL* 90 (1996), 238–49.

28 *Nicaragua v. USA* (Merits), *ICJ Rep.* 1986, 14, at 97. See Chapters 18, 284, 289 and 19, 311, 317, 319–22 and text below, 41.

29 *ICJ Rep.* 1985, 29. See also *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *ILM* 35 (1996), 809, at 826, para. 64. On the case see Chapter 20 below, 347–9.

30 See *Restatement (Third)*, Vol. 1, Reporters' Note to para. 102, at 30.

31 For example, C. Parry/G. Fitzmaurice (eds), *British Digest of International Law, British and Foreign State Papers* (1812–1970). On United States practice see Moore (ed.), *Digest of International Law* (1906); Hackworth (ed.), *Digest of International Law* (1940–1944); M.M. Whiteman (ed.), *Digest of International Law* (1963–1973); State Department (ed.), *Annual Digests of United States Practice in International Law* (since 1973); M. Nash (Leich) (ed.), *Cumulative Digest of United States Practice in International Law 1981–1988*, Book II, 1994; *Foreign Relations of the United States, Diplomatic Papers, and Papers Relating to the Foreign Relations of the United States* (since 1861), and the *Restatement (Third)*. On the practice of France see A. Kiss, *Répertoire de la pratique française en matière de droit international public* (1962–1972). Furthermore, a number of periodicals provide regular repertories of national state practice, for example, *AFDI*, *AJIL*, *AYIL*, *AJPIL*, *ASDI*, *BYIL*, *CYIL*, *IYIL*, *NYIL*, *RBDI* and *ZaöRV*.

Similarly, treaties can be evidence of customary law;[35] but great care must be taken when inferring rules of customary law from treaties, especially bilateral ones. For instance, treaties dealing with a particular subject matter may habitually contain a certain provision; thus, extradition treaties almost always provide that political offenders shall not be extradited.[36] It has sometimes been argued that a standard provision of this type has become so habitual that it should be regarded as a rule of customary law, to be inferred even when a treaty is silent on that particular point. On the other hand, why would states bother to insert such standard provisions in their treaties, if the rule existed already as a rule of customary law? The problem is a difficult one, and one needs to know more about the intentions of the parties to the treaties in question before one is safe in invoking a standard treaty provision as evidence of customary law. Even so, the mere existence of identical bilateral treaties does not generally support a corresponding norm of customary law. At least the network of bilateral treaties must be widespread before it can amount to state practice resulting in customary law.[37]

The case of multilateral treaties is different and may definitely constitute evidence of customary law. If the treaty claims to be declaratory of customary law, or is intended to codify customary law, it can be quoted as evidence of customary law even against a state which is not a party to the treaty. This is so even if the treaty has not received enough ratifications to come into force.[38] It may be asked why states should be unwilling to ratify a treaty if it merely restates customary law. Explanations include inertia and lack of parliamentary time (if ratification requires the participation of the legislature, as it does in many countries). Moreover, only part of the treaty may codify customary law, and a state may refuse to ratify because it objects to other parts thereof.

Good examples are many (but not all) provisions of the 1969 Vienna Convention on the Law of Treaties.[39] Such a state is not bound by the treaty, but by customary law; therefore, if it can produce other evidence to show that the treaty misrepresents customary law it can disregard the rule stated in the treaty. This possibility is not open to states which are parties to the treaty, since they are bound by the treaty in their relations with other parties to the treaty, regardless of whether the treaty accurately codifies customary law or not. But treaty law and customary law can exist side by side. In the *Nicaragua* case, the International Court of Justice held that its jurisdiction was excluded with regard to the relevant treaty law (in that case the UN Charter), but nevertheless proceeded to reach a decision on the basis of customary international law, the content of which it considered to be the same as that laid down in the Charter (concerning the prohibition of the use of force).[40]

Moreover, there is the possibility that customary law may change so as to conform with an earlier treaty.[41] For instance, the Declaration of Maritime Law issued by the signatory states to the Treaty of Paris 1856[42] altered certain rules about the conduct of war at sea. It prohibited privateering, the capture of enemy goods except contraband on neutral ships, and of neutral goods except contraband on enemy ships. It also required blockades to be effective and supported by a force sufficient to actually prevent

32 See H. Mosler, Repetorien der nationalen Praxis in Völkerrechtsfragen – Eine Quelle zur Erschließung des allgemeinen Völkerrechts?, *Receuil d'études de droit international en hommage à P. Guggenheim*, 1968, 460–89.

33 For example, *UN Juridical Yearbook; UN Legislative Series; List of Treaty Collections; Cumulative Index of the Treaty Series; Repertoire of the Practice of the Security Council* (1946–1951, with supplements until 1971); *Repertory of Practice of United Nations Organs; Report of International Arbitral Awards (RIAA).*

34 See text below, 51–2 and cf. also *The Paquete Habana* (1900), 175 US 677, 700–1.

35 M.E. Villiger, *Customary International Law and Treaties*, 1985.

36 See Chapter 7 below, 117.

37 *Restatement (Third)*, Vol. 1, para. 102, 27; B. Kishoiyian, The Utility of Bilateral Investment Treaties in the Formulation of Customary International Law, *NJILB* 14 (1994), 327–75.

38 On ratification and entry into force of treaties generally, see Chapter 9 below, 131–6.

39 Text in *Brownlie BDIL*, 388. See Chapter 9 below, 130–46.

40 See Chapters 18, 284 and 19, 311, 317, 319–22 below.

41 For the opposite case see D.W. Bowett, Treaty Revision in the Light of the Evolution of Customary International Law, *AJICL* 5 (1993), 84–96 and text below, 56–7.

42 See Chapter 2 above, 21–2.

access to the coast of the enemy.[43] As a treaty, it applied only between the parties to it: Austria, France, Prussia, Russia, Sardinia, Turkey and the United Kingdom. Subsequently, however, the rules contained in the Declaration were accepted by a large number of other states as rules of customary law.

Similar problems arise with resolutions passed at meetings of international organizations, particularly resolutions of the United Nations General Assembly which will be discussed separately below.[44]

Finally, it must be noted that the debate on what constitutes proper evidence of customary law needs to be separated from procedural questions, such as the burden of proof or general rules on evidence before international courts and tribunals.[45] It is true that a state seeking to rely on a particular rule of customary law normally has the burden of proving the fact that the relevant state practice exists.[46] But an international judge or arbitrator will not rely on rules of procedure to decide whether a norm exists or not, but will rather make a value judgment.

The problem of repetition

It has sometimes been suggested that a single precedent is not enough to establish a customary rule, and that there must be a degree of repetition over a period of time; thus, in the *Asylum* case the International Court of Justice suggested that a customary rule must be based on 'a constant and uniform usage'.[47] However, this statement must be seen in the light of the facts of the *Asylum* case, where the Court said: 'The facts . . . disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions . . . that it is not possible to discern . . . any constant and uniform usage, accepted as law.'[48] (In this case, Victor Raúl Haya de la Torre, the leader of an unsuccessful rebellion in Peru in 1948, obtained asylum in the Colombian Embassy in Lima. Peru and Colombia referred to the ICJ the question of whether Colombia had the right to grant asylum and whether he should be handed over to the Peruvian authorities or be granted safe-conduct out of the country.) In other words, what prevented the formation of a customary rule in the *Asylum* case was not the absence of repetition, but the presence of major inconsistencies in the practice.

In the *Nicaragua* case, the ICJ held:

> It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.[49]

In sum, *major* inconsistencies in the practice (that is, a large amount of

43 Nussbaum, *A Concise History of the Law of Nations*, 1962, 192. See also Chapter 20 below, 350–1.

44 See text below, 52–4.

45 See M. Kazazi, *Burden of Proof and Related Issues. A Study on Evidence Before International Tribunals*, Studies and Materials on the Settlement of International Disputes (P. Malanczuk ed.), Vol. 1, 1996.

46 See Bernhardt (1992), *op. cit.*, 900–1.

47 *Asylum Case*, *ICJ Rep.* 1950, 266–389, at 277. The case gave rise to three decisions by the ICJ, but these decisions are not viewed as giving a precise picture of the nature of diplomatic asylum, see J.A. Barberis, Asylum, Diplomatic, *EPIL* I (1995), 281–3, at 282; A. Grahl-Madsen, Asylum, Territorial, *ibid.*, 283–7; K. Hailbronner, Haya de la Torres Cases, *ibid.*, 683–5

48 *Ibid.*

49 *Nicaragua v. US* (Merits), *ICJ Rep.* 1986, at 98, para. 186. See H.C.M. Charlesworth, Customary International Law and the Nicaragua Case, *AYIL* 11 (1984/7), 1–31; H.G. Anthony, Appraisals of the ICJ's Decision: Nicaragua *v.* United States (Merits), *AJIL* 81 (1987), 77–183; A. D'Amato, Trashing Customary International Law, *ibid.*, 101–5; F.L. Kirgis, Jr., Custom on A Sliding Scale, *ibid.*, 146–51; J.I. Charney, Customary International Law in the Nicaragua Case. Judgment on the Merits, *Hague YIL* 1 (1988), 16–29; W. Czaplinski, Sources of International Law in the Nicaragua Case, *ICLQ* 38 (1989), 151–66; P.P. Rijpkem, Customary International Law in the Nicaragua Case, *NYIL* 20 (1989), 91–116; J. Crawford, Military Activities Against Nicaragua Case (Nicaragua *v.* United States), *EPIL* III (forthcoming). On the relevance of the case for the use of force see Chapter 19 below, 311, 317, 319–22, and on the problem of the jurisdiction of the Court see Chapter 18 below, 284.

6390

practice which goes against the 'rule' in question) prevent the creation of a customary rule. As noted by the ICJ in the *Fisheries* case, *minor* inconsistencies (that is, a small amount of practice which goes against the rule in question) do not prevent the creation of a customary rule,[50] although in such cases the rule in question probably needs to be supported by a large amount of practice, in order to outweigh the conflicting practice in question.[51] (The *Fisheries* case concerned British claims against Norway for introducing national legislation on exclusive fishing rights in the waters surrounding Norway's entire coastline north of the Arctic Circle. The Court upheld the Norwegian method of delimitation of the territorial sea and its fixing of actual baselines.) On the other hand, where there is no practice which goes against an alleged rule of customary law, it seems that a *small* amount of practice is sufficient to create a customary rule, even though the practice involves only a small number of states and has lasted for only a short time.

There remains the question of what constitutes 'general' practice. This much depends on the circumstances of the case and on the rule at issue. 'General' practice is a relative concept and cannot be determined in the abstract. It should include the conduct of all states, which can participate in the formulation of the rule or the interests of which are specially affected. 'A practice can be general even if it is not universally accepted; there is no precise formula to indicate how widespread a practice must be, but it should reflect wide acceptance among the states particularly involved in the relevant activity.'[52] Therefore, in the law of the sea,[53] the practice of sea powers and maritime nations will have greater significance than the practice of land-locked states, while in the law governing outer space activities,[54] the practice of the United States and Russia will exert a more dominant influence than that of Burundi or Chile. This can also be seen from the Advisory Opinion of the ICJ in the *Legality of Nuclear Weapons* case in which the Court in discussing whether there is a customary rule prohibiting the use of nuclear weapons, *inter alia*, found that it could not ignore the 'practice referred to as 'policy of deterrence', to which an appreciable section of the international community has adhered for many years'.[55] Obviously, this refers to the practice of certain nuclear weapons states and not to the practice of the international community at large.[56] However, as observed by Judge Schwebel in his Dissenting Opinion:

> This nuclear practice is not a practice of a lone and secondary persistent objector. This is not a practice of a pariah Government crying out in the wilderness of otherwise international opinion. This is the practice of five of the world's major Powers, of the permanent Members of the Security Council, significantly supported for almost 50 years by their allies and other States sheltering under their nuclear umbrellas. That is to say, it is the practice of States – and a practice supported by a large and weighty number of other States – that together represent the bulk of the world's population. This practice has been recognized, accommodated and in some measure accepted by the international community. That measure of acceptance is ambiguous but not meaningless.[57]

What is certain is that general practice does not require the unanimous

50 *UK v. Norway, ICJ Rep.* 1951, 116, at 138; see L. Gündling, Fisheries Case (U.K. *v.* Norway), *EPIL* II (1995), 381–3 and Chapter 12 below, 181.
51 See Akehurst (1974–5), Custom, *op. cit.*, 12–21.
52 The *Restatement (Third)*, Vol. 1, para. 102, 25.
53 See Chapter 12 below, 173–97.
54 See Chapter 13 below, 201–8.
55 *ILM* 35 (1996), 830, para. 96. On the case see Chapter 20 below, 347–9.
56 For a criticism see the Declaration attached to the Opinion by Judge Shi Jiuyong, *ibid.*, 832. But see also the Separate Opinion of Judge Fleischhauer, *ibid.*, 834, at 835–6.
57 Dissenting Opinion of Vice-President Schwebel, *ibid.*, 836–7.

practice of all states or other international subjects. This means that a state can be bound by the general practice of other states even against its wishes if it does not protest against the emergence of the rule and continues persistently to do so (persistent objector).[58] Such instances are not frequent and the rule also requires that states are sufficiently aware of the emergence of the new practice and law. Thus, for example, the contention can hardly be sustained that the practice of space powers to launch their space objects into outer space after 1957 by crossing the air space under the sovereignty of other countries developed into custom by the acquiescence of those states.[59] The countries affected simply often lacked the technological capacities to find out.

What states say and what states do

It is sometimes suggested that state practice consists only of what states do, not of what they say. For instance, in his dissenting opinion in the *Fisheries* case, Judge Read argued that claims made to areas of the sea by a state could not create a customary rule unless such claims were enforced against foreign ships.[60] But in the later *Fisheries Jurisdiction* cases ten of the fourteen judges inferred the existence of customary rules from such claims, without considering whether they had been enforced.[61] (These two parallel cases dealt with the validity of the establishment by Iceland of a fifty-mile exclusive fishery zone and its effect on the fishing rights of the United Kingdom and Germany which these two states had traditionally enjoyed within this zone.) Similarly, the Nuremberg Tribunal cited resolutions passed by the League of Nations Assembly and a Pan-American Conference as authority for its finding that aggressive war was criminal according to the 'customs and practices of states'.[62] The better view therefore appears to be that state practice consists not only of what states do, but also of what they say.

This becomes even clearer if one takes the fact into account that in the modern world states have found new means of communication. As noted in a recent empirical study on state practice, Zemanek arrives at the following conclusion:

> The beloved 'real' acts become less frequent because international law, and the Charter of the UN in particular, place more and more restraints on States in this respect. And what formerly was confined to diplomatic notes is now often transmitted via new forms of communication, mainly for reasons of domestic or international policy. The present information society forces governments which seek the widest possible support for their stance to resort to publicity.[63]

Finally, state practice also includes omissions; many rules of international law forbid states to do certain acts, and, when proving such a rule, it is necessary to look not only at what states do, but also at what they do not do.[64] Even silence on the part of states is relevant because passiveness and inaction with respect to claims of other states can produce a binding effect creating legal obligations for the silent state under the doctrine of acquiescence.[65]

58 See text below, 46–8.
59 See Chapter 13 below, 206. On the doctrines of acquiescence and estoppel, see Chapter 10 below, 154–5.
60 *ICJ Rep.* 1951, 116, 191; Gündling, *op. cit.*
61 *UK v. Iceland* (Merits), *ICJ Rep.* 1974, 3, at 47, 56–8, 81–8, 119–20, 135, 161. The remaining four judges did not deal with this issue. See G. Jaenicke, Fisheries Jurisdiction Cases (U.K. *v.* Iceland; Federal Republic of Germany *v.* Iceland), *EPIL* II (1995), 386–9. See Chapter 12 below, 183.
62 *AJIL* 41 (1947), 172, 219–20. See Chapter 20 below, 354–5 and *Nicaragua v. USA*, *op. cit.*, 99–104, 106–8.
63 K. Zemanek, What is 'State Practice' and Who Makes It?, in *FS Bernhardt*, 289–306, at 306.
64 Similarly, the Draft Articles on State Responsibility for Internationally Wrongful Acts adopted by the ILC in its first reading in 1980 (text in *Brownlie BDIL*, 426), in defining an 'internationally wrongful act', *inter alia*, refer to 'conduct consisting of an action or omission' that is attributable to the state under international law, draft Article 3(a). See Chapter 17 below, 257–60.
65 See Müller/Cottier, *op. cit.*

6392

**The psychological element in the formation of customary law (*op*

When inferring rules of customary law from the conduct of states, it is necessary to examine not only what states do, but also why they do it. In other words, there is a psychological element in the formation of customary law. State practice alone does not suffice; it must be shown that it is accompanied by the conviction that it reflects a legal obligation. For instance, there are many international acts performed habitually, such as flag salutes greeting a foreign ship on the high seas, or in the field of ceremony and protocol, which are motivated solely by courtesy or tradition, 'but not by any sense of legal duty'.[66] Such behaviour is based merely on what is called 'comity' or '*courtoisie*' in the relations between states.[67]

The technical name given to this psychological element is *opinio iuris sive necessitatis* (*opinio iuris* for short).[68] It is usually defined as a conviction felt by states that a certain form of conduct is required by international law. This definition presupposes that all rules of international law are framed in terms of duties. But that is not so; in addition to rules laying down duties, there are also permissive rules, which permit states to act in a particular way (for example, to prosecute foreigners for crimes committed within the prosecuting state's territory) without making such actions obligatory.[69] In the case of a rule imposing a duty, the traditional definition of *opinio iuris* is correct; in the case of a permissive rule, *opinio iuris* means a conviction felt by states that a certain form of conduct is *permitted* by international law.

There is clearly something artificial about trying to analyse the psychology of collective entities such as states. Indeed, the modern tendency is not to look for direct evidence of a state's psychological convictions, but to infer *opinio iuris* indirectly from the actual behaviour of states. Thus, official statements are not required; *opinio iuris* may be gathered from acts or omissions.[70] For these purposes, it must be remembered that rules of international law govern the behaviour of states in their relations with other states; it is therefore necessary to examine not only what one state does or refrains from doing, but also how other states react. If conduct by some states provokes protests from other states that such conduct is illegal, the protests can deprive such conduct of any value as evidence of customary law.[71]

Permissive rules can be proved by showing that some states have acted in a particular way (or have claimed that they are entitled to act in that way) and that other states, whose interests were affected by such acts (or claims), have not protested that such acts (or claims) are illegal.

In the case of rules imposing duties, it is not enough to show that states have acted in the manner required by the alleged rule, and that other states have not protested that such acts are illegal. It also needs to be proved that states regard the action as obligatory. Recognition of the obligatory character of particular conduct can be proved by pointing to an express acknowledgment of the obligation by the states concerned, or by showing that failure to act in the manner required by the alleged rule has been condemned as illegal by other states whose interests were affected.

The difference between permissive rules and rules imposing duties can be clearly seen in the *Lotus* case.[72] The facts of the case were as follows: a

66 *North Sea Continental Shelf* cases, *ICJ Rep.* 1969, 3, at 44; G. Jaenicke, North Sea Continental Shelf Cases, *EPIL* 2 (1981), 205–8. See also Chapter 12, 184–91 and text below, 46.

67 See L.D. Paul, Comity in International Law, *Harvard ILJ* 32 (1991), 1–79; P. Macalister-Smith, Comity, *EPIL* I (1992), 671–4. See also Chapter 4 below, 73.

68 J.L. Slama, Opinio juris in Customary International Law, *Okla. CULR* 15 (1990), 603–56; Elias (1995), *op. cit.*

69 See Chapter 7 below, 110–15.

70 See *Restatement (Third)*, Vol. 1, para. 101, 25.

71 See W. Karl, Protest, *EPIL* 9 (1986), 320–2.

72 *Lotus Case*, PCIJ, series A, no. 10, 28 *et seq.* See K. Herndl, Lotus, The, *EPIL* 2 (1981), 173–7. See also Chapter 12 below, 190–1.

French merchant ship collided with a Turkish merchant ship on the high seas, and as a result (allegedly) of negligence on the part of Lieutenant Demons, an officer on the French ship, several people on the Turkish ship lost their lives. France had jurisdiction to try Lieutenant Demons for manslaughter, but the question was whether Turkey also had jurisdiction to try him. Turkey argued that there was a permissive rule empowering it to try him; France argued the exact opposite, namely, that there was a rule imposing a duty on Turkey not to try him. The Permanent Court of International Justice accepted the Turkish argument and rejected the French argument because, first, although there were only a few cases in which states in Turkey's position had instituted prosecutions, the other states concerned in those cases had not protested against the prosecutions; and secondly, although most states in Turkey's position had refrained from instituting prosecutions, there was no evidence that they had done so out of a sense of legal obligation.

Moreover, if states are clearly divided on whether a certain conduct (such as non-recourse to nuclear weapons over the past fifty years) constitutes the expression of an *opinio iuris* (in this case that the use of nuclear weapons is illegal), it is impossible to find that there is such *opinio iuris*.[73]

Opinio iuris is sometimes interpreted to mean that states must believe that something is already law before it can become law. However, that is probably not true; what matters is not what states believe, but what they say. If some states claim that something is law and other states do not challenge that claim, a new rule will come into being, even though all the states concerned may realize that it is a departure from pre-existing rules.

Customary law has a built-in mechanism of change. If states are agreed that a rule should be changed, a new rule of customary international law based on the new practice of states can emerge very quickly; thus the law on outer space developed very quickly after the first artificial satellite was launched.[74] If the number of states supporting a change, or the number of states resisting a change, is small, they will probably soon fall into line with the practice of the majority. The real difficulty comes when the states supporting the change and the states resisting the change are fairly evenly balanced. In this case change is difficult and slow, and disagreement and uncertainty about the law may persist for a long time until a new consensus emerges, as, for example, in the dispute about the width of the territorial sea.[75] Another example is the case of the *Legality of Nuclear Weapons* in which the ICJ found:

> The emergence, as *lex lata*, of a customary rule specifically prohibiting the use of nuclear weapons as such is hampered by the continuing tensions between the nascent *opinio juris* on the one hand, and the still strong adherence to the practice of deterrence on the other.[76]

'Instant' customary law

A special problem is the existence or non-existence of the category of '*diritto spontaneo*' or 'instant customary international law' which has been brought to the forefront by some authors, such as Roberto Ago[77] and Bin

73 See *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *op. cit.*, 826, para. 67. On this case see Chapter 20 below, 347–9.
74 See Chapter 13 below, 201–7.
75 See Chapter 12 below, 176–82.
76 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *op. cit.*, 827, para. 73. However, the Court also noted in this case: 'In the long run, international law, and with it the stability of the international order which it is intended to govern, are bound to suffer from the continuing difference of views with regard to the legal status of weapons as deadly as nuclear weapons. It is consequently important to put an end to this state of affairs; the long-promised complete nuclear disarmament appears to be the most appropriate means of achieving that result.' *Ibid.*, 830, para. 98.
77 R. Ago, Science juridique et droit international, *RdC* (1956-II), 849–955, at 932 *et seq.*

Cheng.[78] The result is to deny the significance of state practice and the relevance of the time factor in the formation of customary international law and to rely solely on *opinio iuris*, as expressed in non-binding resolutions and declarations, as the constitutive element of custom.

It is true that the International Court of Justice has clarified in the *North Sea Continental Shelf* cases that customary law may emerge even within a relatively short passage of time.[79] It may also be noted that changes in the international law-making process have modified the concept of modern customary law in several respects, including the tendency that it is made with relative speed, written in textual form, and is more elaborate than traditional custom.[80] The possibility of 'instant' customary international law, or '*droit spontane*',[81] based upon *opinio iuris* only and without the requirement of any practice, however, has remained a matter of dispute.[82] In view of the nature of the decentralized international legal system and the elementary role of state practice as the objective element in the formation of customary law, enabling one to distinguish it from non-binding commitments, *opinio iuris* on its own, even if clearly established for some states as the subjective element, does not suffice to establish general custom in controversial areas. In addition, the very notion of 'custom' implies some time element and 'instant custom' is a contradiction in terms, although it appears that this is more a matter of appropriate terminology than of substance.

This view is confirmed by the jurisprudence of the ICJ. In the *North Sea Continental Shelf* cases the Court insisted that 'an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and uniform'.[83] In other words, the reduction of the time-element requirement is carefully balanced with a stronger emphasis on the scope and nature of state practice. An even clearer implicit rejection of the doctrine of 'instant custom' can be found in the following words of the Court in the *Nicaragua* case:

> The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law . . . Bound as it is by Article 38 of its Statute . . . the Court must satisfy itself that the existence of the rule in the *opinio iuris* of States is confirmed by practice.[84]

Bernhardt also denies that under the traditional concepts of international law 'instant' custom is possible, but he can imagine 'exceptional cases and situations in which such instant law is useful or even necessary: If, for instance, the community of States unequivocally and without any dissent considers certain acts, which have not been known before, to be illegal, the *opinio juris* might suffice even if no practice could evolve.'[85] There may indeed be a need for this, but then it is not custom but some other (new) source of international law.

Universality and the consensual theory of international law

It has already been suggested that the practice followed by a small number of states is sufficient to create a customary rule, if there is no practice

78 B. Cheng, United Nations Resolutions on Outer Space: 'Instant' International Customary Law?, *Indian JIL* (1965), 23 *et seq.*
79 *ICJ Rep.* 1969, at 4.
80 See Jennings (1984), *op. cit.*, 285.
81 For a discussion of the Italian doctrine see F. Münch, *A Propos du Droit Spontane, Studi in Onore di Guiseppe Sperduti*, 1984, 149–62.
82 See P. Malanczuk, Space Law as a Branch of International Law, *NYIL* 25 (1994), 143–80, 160–1.
83 *ICJ Rep.* 1969, 43.
84 *ICJ Rep.* 1986, 97 *et seq.*
85 Bernhardt (1992), *op. cit.*, 902.

which conflicts with that rule.[86] But what if some states oppose the alleged rule? Can the opposition of a single state prevent the creation of a customary rule? If so, there would be very few rules, because state practice differs from state to state on many topics. On the other hand, to allow the majority to create a rule against the wishes of the minority would lead to insuperable difficulties. How large must the majority be? In counting the majority, must equal weight be given to the practice of Guatemala and that of the United States? If, on the other hand, some states are to be regarded as more important than others, on what criteria is importance to be based? Population? Area? Wealth? Military power? In a different context, the same questions have arisen with regard to the reform of the composition of the UN Security Council currently under discussion.[87]

In the *Lotus* case, the Permanent Court of International Justice said: 'The rules of law binding upon states . . . emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law.'[88] This consensual theory, as it is called, has been criticized in the West, but it has been accepted with enthusiasm by Soviet lawyers. Soviet doctrine used to teach that international law is the result of an agreement between states, and that the only difference between treaties and custom is one of form, treaties representing an express agreement and custom representing an implied agreement.[89] The merit of this approach is that it explains divergences in state practice; just as different treaties can be in force between different groups of states, so different rules of customary law can apply between different groups of states. The International Court of Justice came some way towards the Soviet approach in the *Asylum* case, where it recognized the existence of regional customs applying among groups of states in Latin America.[90]

The consensual theory explains divergences in state practice, but it is rather unconvincing when it is applied to new states. The orthodox rule is that new states are automatically bound by generally accepted international law. The problem of the relation of new states to existing international law is primarily a matter belonging to the area of state succession, and will be taken up later.[91] As far as customary law is concerned, the prevailing view is, with different reasoning, that new states cannot in principle escape existing customary obligations. One cannot select rights granted by a legal system '*à la carte*' and at the same time reject the duties one dislikes. However, the reservations of the decolonized new states towards the international legal order created by the old colonial powers have had a considerable impact in particular areas, such as international economic law[92] and the law of the sea,[93] which, at a minimum, has led to legal uncertainty. It has become more and more difficult to find the required general practice and *opinio iuris* for customary international law to retain its universal significance.[94]

The element of consent[95] can also become fictitious when one is dealing with the emergence of new rules of customary law among existing states. The International Court of Justice has emphasized that a claimant state which seeks to rely on a customary rule must prove that the rule has become binding on the defendant state.[96] The obvious way of doing this is

86 See text above, 41–3.
87 See Chapter 21 below, 376–7.
88 PCIJ, series A, no. 10, 18. See text above, 44–5.
89 On Soviet doctrine in general see Chapter 2 above, 23, 33.
90 *ICJ Rep.* 1950, 266, 277, 293–4, 316. See text above, 41.
91 See Chapter 11 below, 161–72.
92 See Chapter 15 below, 233–40 and Chapter 2 above, 28–30.
93 See Chapter 12 below, 173–97.
94 On regional customary international law see Chapters 1, 2–3 and 2, 30–2 above.
95 B. Simma, Consent: Strains in the Treaty System, in Macdonald/Johnston (eds), *op. cit.*, 485 *et seq.*; D.W. Greig, Reflections on the Role of Consent, *AYIL* 12 (1992), 125–76; A. Pellet, The Normative Dilemma: Will and Consent in International Law-Making, *ibid.*, 22–53.
96 *Asylum* case, *op. cit.*, 276–7; *Rights of Nationals of the United States in Morocco* case, *ICJ Rep.* 1952, 176, at 200.

6396

to show that the defendant state has recognized the rule as state practice (although recognition for this purpose may amount to no more than failure to protest when other states have applied the rule in cases affecting the defendant's interests). But it may not be possible to find any evidence of the defendant's attitude towards the rule, and so there is a second – and more frequently used – way of proving that the rule is binding on the defendant: by showing that the rule is accepted by other states. In these circumstances the rule in question is binding on the defendant state, unless the defendant state can show that it has expressly and consistently rejected the rule since the earliest days of the rule's existence; dissent expressed after the rule has become well established is too late to prevent the rule binding the dissenting state. Thus, in the *Fisheries* case, the International Court of Justice held that a particular rule was not generally recognized, but added: 'In any event, the . . . rule would appear to be inapplicable as against Norway, inasmuch as she has always opposed any attempt to apply it to the Norwegian coast.'[97]

The problem of the 'persistent objector', however, has recently attracted more attention in the literature. Can a disagreeing state ultimately and indefinitely remain outside of new law accepted by the large majority of states? Do emerging rules of *ius cogens*[98] require criteria different to norms of lesser significance? Such questions are far from settled at this point in time.[99] The view of Charney, who dispenses with the 'persistent objector' altogether, however, is an exceptional one.[100]

General principles of law

The third source of international law listed in the Statute of the International Court of Justice is 'the general principles of law recognized by civilized nations'. (All nations are now considered as 'civilized';[101] the new term is 'peace-loving', as stated in Article 4 of the UN Charter as a requirement for admission to the organization.) This phrase was inserted in the Statute of the Permanent Court of International Justice, the forerunner of the International Court of Justice, in order to provide a solution in cases where treaties and custom provided no guidance; otherwise, it was feared, the Court might be unable to decide some cases because of gaps in treaty law and customary law. However, there is little agreement about the meaning of the phrase. Some say it means general principles of international law; others say it means general principles of national law. Actually, there is no reason why it should not mean both; the greater the number of meanings which the phrase possesses, the greater the chance of finding something to fill gaps in treaty law and customary law – which was the reason for listing general principles of law in the Statute of the Court in the first place. Indeed, international tribunals had applied general principles of law in both these senses for many years before the PCIJ was set up in 1920.[102]

According to the first definition (general principles of international law), general principles of law are not so much a source of law as a method of using existing sources – extending existing rules by analogy, inferring the existence of broad principles from more specific rules by means of

97 *Fisheries* case, *op. cit.*, at 131.
98 See text below, 57–8.
99 See Bernhardt (1992), *op. cit.*, 904; O. Elias, Some Remarks on the Persistent Objector Rule in Customary International Law, *Denning LJ* (1991), 37–51; C. Tomuschat, Obligations Arising for States Without or Against Their Will, *RdC* 241 (1993-IV), 195–374.
100 J.I. Charney, Universal International Law, *AJIL* 87 (1993), 529–51, at 538 *et seq.*; see also ILA Committee on the Formation of Customary (General) International Law, *ILA Rep.* 1992, 366 *et seq.*
101 For the historical background see, Chapter 2 above, 12–14.
102 See B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1987; G. Hanessian, 'General Principles of Law' in the Iran–US Claims Tribunal, *Colum. JIL* 27 (1989), 309; M.C. Bassiouni, A Functional Approach to 'General Principles of International Law', *Mich. JIL* 11 (1990), 768–818; J.A. Westberg/B.P. Marchais, General Principles Governing Foreign Investment as Articulated in Recent International Tribunal Awards and Writings of Publicists, *ICSID Rev.* 7 (1992), 453–96; V.-D. Degan, General Principles of Law (A Source of General International Law), *FYIL* 3 (1992), 1–102; L. Ferrari-Bravo, Considérations sur la méthode de recherche des principes généraux du droit international de l'environnement, *Hague YIL* 7 (1994), 3–10; H. Mosler, General Principles of Law, *EPIL* II (1995), 511–27.

inductive reasoning, and so on. According to the second definition of general principles of law (general principles of national law), gaps in international law may be filled by borrowing principles which are common to all or most national systems of law; specific rules of law usually vary from country to country, but the basic principles are often similar.[103]

In reality, the matter is more complicated. Not all general principles applied in international practice stem from domestic legal systems and have been transplanted to the international level by recognition.[104] Some are based on 'natural justice' common to all legal systems (such as the principles of good faith,[105] estoppel[106] and proportionality[107]), others simply apply logic familiar to lawyers (such as the rules *lex specialis derogat legi generali*, *lex posterior derogat legi priori*[108]), and another category is related to 'the specific nature of the international community', as expressed in principles of *ius cogens*.[109] Therefore, a real transplantation of domestic law principles to the international level is limited to a number of procedural rules, such as the right to a fair hearing, in *dubio pro reo*, denial of justice,[110] or the exhaustion of local remedies,[111] and some substantive principles, such as prescription[112] and liability for fault.[113] The mechanism by which such transformation takes place in practice goes through the mind of the international judge or arbitrator who has to decide a particular case. This is known as the 'creative role' of the judge, which is not at all peculiar to the international legal system.

On the other hand, the difficulty of proving that a principle is common to most or all legal systems is not as great as might be imagined. Legal systems are grouped in families; the law in most English-speaking countries is very similar, simply because the settlers took with them the law they knew, just as the law in most Latin American countries is very similar. Once one has proved that a principle exists in English law, one is fairly safe in assuming that it also exists in New Zealand and Australia. The problem is, of course, what do we do about the other systems in the world. In fact, what sometimes happens in practice is that an international judge or arbitrator makes use of principles drawn from the legal system in his own country, without examining whether they are also accepted by other countries. The practice is obviously undesirable, but it is too common to be regarded as illegal. In the election of the judges of the International Court of Justice, the electors are required to bear in mind that 'in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured'.[114]

General principles of law have proved most useful in 'new' areas of international law. When the modern system of international law was beginning to develop in the sixteenth and seventeenth centuries, writers like Grotius drew heavily on Roman law,[115] and a Roman ancestry can still be detected in many of the rules which have now been transformed into customary law (for example, concerning the acquisition of title to territory).[116] In the nineteenth century international arbitration, which had previously been rare, became more common, and the need for rules of judicial procedure was met by borrowing principles from national law (for example, the principle that a tribunal is competent to decide whether or not it has jurisdiction in cases of doubt, and the principle that claims

103 On comparative legal studies see Chapter 1 above, 6. On the relationship between international law and national law see Chapter 4 below, 63–74.

104 See H. Mosler, *The International Society as a Legal Community*, rev. edn 1980, 136 *et seq.*

105 A. D'Amato, Good Faith, *EPIL* II (1995), 599–601; J.F. O'Connor, *Good Faith in International Law*, 1991. In the *Nuclear Tests* case (*Australia v. France*), judgment of 20 December 1974 (*ICJ Rep.* 1974, 268, para. 46), the Court held: 'one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation, in particular in an age when this cooperation in many fields is becoming increasingly essential.' See also Art. 26 of the 1969 Vienna Convention on the Law of Treaties, discussed in Chapter 9 below, 141.

106 See Chapter 10 below, 154–5.

107 See Chapter 1 above, 4 and Chapters 17, 271–2 and 19, 316–17 below.

108 See text below, 56.

109 K.-J. Partsch, International Law and Municipal Law, *EPIL* II (1995), 1188. On *ius cogens* see text below, 57–8.

110 S. Verosta, Denial of Justice, *EPIL* I (1992), 1007–10.

111 See Chapter 17 below, 267–8.

112 See Chapter 10 below, 150–1.

113 See Chapter 17 below, 258.

114 Art. 9, Statute of the ICJ, text in *Brownlie BDIL*, 438. See Chapter 18 below, 282.

115 D.J. Ibbetson, *The Roman Law Tradition*, 1994. On Grotius see Chapter 2 above, 15–16.

116 See Chapter 10 below, 147–58.

6398

brought before a tribunal after an unreasonable delay mu[illegible]sed as inadmissible).[117]

In the present century international law, or something closely resembling international law, has come to regulate certain contracts made by individuals or companies with states or international organizations – for example, contracts of employment in international organizations,[118] and oil concessions.[119] Treaties and customary law contain few rules applicable to such topics, and the gap has been filled by recourse to general principles of commercial and administrative law, borrowed from national legal systems. For instance, international administrative tribunals, which try disputes between international organizations and their staff, have consistently applied the principle, borrowed from national law, that an official must be informed of criticisms made against him and must be given an opportunity to reply to those criticisms before the international organization employing him takes a decision to his detriment on the basis of those criticisms.[120] In the case of 'internationalized contracts' between a state and foreign companies, the purpose of referring to general principles in connection with an arbitration clause is primarily (from the viewpoint of the investing company) to prefer to trust the arbitrator's (s') discretion to discover relevant rules of law creatively, rather than being at the mercy of the contracting state's national legislation.[121]

However, it must be remembered that the environment in which international law operates is very different from the one in which national law operates, and principles of national law can be used to fill gaps in international law only if they are suited to the international environment. As noted by Judge McNair in the *South-West Africa* case:

> The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of 'the general principles of law'.[122]

Finally, it should be pointed out that the issue of whether an international court is obliged to fill in gaps in substantive international law in order to provide for the 'completeness' of the legal system, to render a concrete decision and thus to avoid declaring *non liquet* ('the matter is unclear'), has remained controversial.[123] It is interesting to note that the ICJ in its rather inconclusive Advisory Opinion in the *Legality of Nuclear Weapons* case did not make any use of the general principles of law recognized in all legal systems.[124] In fact, what the Court has done in this decision is that it pronounced a *non liquet* on the central issue on the grounds of uncertainty in the current state of international law, and of the facts.[125] It is submitted that the concept of *non liquet* is an unhealthy one for the judicial function and courts misunderstand their duties if they plead *non liquet* in any given case. In international law one does not always discover a

> clear and specific rule readily applicable to every international situation, but . . . every international situation is capable of being determined as a *matter of law*.[126]

117 See Chapters 2 above, 20 and 17, 269 and 18, 293–8 below.
118 See Chapters 6, 103 and 21, 381 below.
119 See text above, 38–9.
120 See Chapter 18 below, 289.
121 v. Hecke, *op. cit.*, 818.
122 *ICJ Rep.* 1950, 148. See also M. Shahabuddeen, Municipal Law Reasoning in International Law, in Lowe/Fitzmaurice (eds), *op. cit.*, 90–103. On the *South-West Africa* case see Chapters 18, 284 and 19, 328–9 below.
123 See J. Stone, *Non Liquet* and the Function of Law in the International Community, *BYIL* 1959, 145; Fastenrath (1991), *op. cit.*; and compare the Declaration of Judge Vereshchetin in the ICJ's *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, *op. cit.*, 833 with the Dissenting Opinions of Judge Schwebel, *ibid.*, 836, at 840, Judge Shahabuddeen, *ibid.*, 861, at 866, and Judge Koroma, *ibid.*, 925, at 930.
124 See the Separate Opinion of Judge Fleischhauer, *ibid.*, 835.
125 See Dissenting Opinion of Judge Higgins, *ibid.*, 934.
126 R. Jennings/A. Watts (eds), *Oppenheim's International Law*, Vol. I, part 1, 9th edn 1992, 13.

Judicial decisions

Article 38(1)(d) of the Statute of the International Court of Justice directs the Court to apply 'judicial decisions . . . as subsidiary means for the determination of rules of law'. This direction is made 'subject to the provisions of Article 59', which state that 'the decision of the Court has no binding force except between the parties and in respect of that particular case'. In other words, there is no formal *stare decisis* doctrine, as known in common law systems; in international law international courts are not obliged to follow previous decisions, although they almost always take previous decisions into account.[127]

We have already seen that judicial and arbitral decisions can be evidence of customary law.[128] But it is probably true to say that judges can also create new law. The International Court of Justice is particularly important in this respect. Many of its decisions introduced innovations into international law which have subsequently won general acceptance – for instance, the *Reparation for Injuries* case,[129] the *Genocide* case[130] and the *Fisheries* case.[131] There is a very strong probability that the International Court (and other tribunals) will follow such decisions in later cases, since judicial consistency is the most obvious means of avoiding accusations of bias. Thus, it is generally questionable whether at least decisions of the International Court of Justice can in fact still be regarded as only 'subsidiary' means of determining the law.[132]

One aspect which will require more attention in the future arises from the recent proliferation of international tribunals and courts, such as various regional courts, courts on human rights,[133] international criminal courts[134] and the Tribunal for the Law of the Sea.[135] This proliferation is likely to lead to conflicting decisions on international law and there is no ultimate legal authority in the sense of a supreme court to harmonize such conflicts. The ICJ is not in such a position because it lacks any formal relations with other international courts and tribunals.[136]

Judgments of national courts are also covered by Article 38(1)(d); many of the rules of international law on topics such as diplomatic immunity[137] have been developed by judgments of national courts. But judgments of national courts need to be used with caution; the judges may look as if they are applying international law (and may actually believe that they are doing so), when in fact all that they are applying is some peculiar rule of their own national law.[138]

Learned writers

Article 38(1)(d) also directs the Court to apply 'the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'. The word 'publicists' means 'learned writers'. Like judicial decisions, learned writings can be evidence of customary law, but they can also play a subsidiary role in developing new rules of law.

In the past, writers like Grotius exercised influence of a sort which no writer could hope to exercise nowadays. But writers have not entirely lost

127 See V. Röben, Le Précédent dans la jurisprudence de la Cour internationale, *GYIL* 32 (1989), 382–407; M. Shahabuddeen, *Precedent in the World Court*, 1996.
128 See text above, 39.
129 See Chapter 6 below, 93.
130 See Chapter 9 below, 136.
131 See text above, 42 and Chapter 12 below, 181.
132 See Jennings (1984), *op. cit.*, 287; H. Lauterpacht, *The Development of International Law by the International Court*, 1982.
133 See Chapter 14 below, 217–19.
134 See Chapter 20 below, 253–61.
135 See Chapter 18 below, 298–300.
136 See R.Y. Jennings, The International Court of Justice after Fifty Years, *AJIL* 89 (1995), 493–505, at 504.
137 See Chapter 8 below, 123–9.
138 See further K. Doehring, The Participation of International and National Courts in the Law-Creating Process, *SAYIL* 17 (1991/2), 1–11; R.Y. Jennings, The Judiciary, International and National, and the Development of International Law, *ICLQ* 45 (1996), 1–12.

64 00

their influence. They still continue to provide the sor- ...ceptual framework which is necessary for any legal discussion; for instance, states had been claiming limited rights in areas adjacent to their territorial sea long before Gidel started writing about such claims, but it was Gidel who produced the concept of the contiguous zone as a framework for discussing the validity of these claims.[139] Moreover, one finds that states in diplomatic controversies still quote profusely from writers (although the quotations are not always acknowledged), because writers provide a comprehensive, succinct and (with luck) impartial summary of state practice. (A summary which is deliberately made as brief as possible, like the Harvard draft conventions, is particularly useful for purposes of quotation.) In a nutshell, writers quote states and states quote writers, at least when it suits their interests.

Generally speaking, in a multicultural world the problem of identifying those 'teachings' of writers which are the most authoritative is no longer likely to lead to easy universal acceptance of certain propositions. This has become difficult also due to the large quantity of publications that are nowadays produced by writers on international law.[140] While international arbitral tribunals frequently cite textbooks and authors,[141] the International Court of Justice refrains from doing so in its decisions,[142] as distinct from the dissenting or concurring opinions of individual judges.[143]

Other possible sources of international law

Having completed our examination of the list of sources in the Statute of the International Court of Justice, we must now examine whether there are any other sources which have been omitted from that list.

Acts of international organizations

The growth of international organizations since the First World War has been accompanied by suggestions that the acts of international organizations should be recognized as a source of international law.[144] But most of the organs of international organizations are composed of representatives of member states, and very often the acts of such organs are merely the acts of the states represented in those organs. For instance, a resolution of the United Nations General Assembly can be evidence of customary law because it reflects the views of the states voting for it; it would probably have exactly the same value if it had been passed at a conference outside the framework of the United Nations, and, if many states vote against it, its value as evidence of customary law is correspondingly reduced.

However, international organizations usually have at least one organ which is not composed of representatives of member states, and the practice of such organs is capable of constituting a source of law. For instance, the United Nations Secretariat often acts as a depositary of treaties and its practice as depositary has already affected the law of treaties on such topics as reservations.[145]

Sometimes an international organization is authorized to take decisions (often by majority vote) which are binding on member states. Apart from 'internal' questions relating to the budget, the admission and expulsion of

139 See Chapter 12 below, 182–3.
140 A. Oraison, Réflexions sur 'la doctrine des publicistes les plus qualifiés des différentes nations', *RBDI* 24 (1991), 507–80.
141 See C. Gray/B. Kingsbury, Developments in Dispute Settlement: Inter-State Arbitration Since 1945, *BYIL* 63 (1992), 97, 129.
142 S. Rosenne, *The Law and Practice of the International Court of Justice*, 2nd edn 1985, 614–6.
143 See Chapter 18 below, 292, 302.
144 For a discussion see K. Skubiszewski, Resolutions of the U.N. General Assembly and Evidence of Custom, in *Études en l'honneur de R. Ago*, 1987, Vol. I, 503 et seq; B. Sloan, General Assembly Resolutions Revisited (Forty Years After), *BYIL* 58 (1987), 39 *et seq.*; C. Economidès, Les Actes institutionnels internationaux et les sources du droit international, *AFDI* (1988), 142 *et seq.*; J.A. Frowein, The Internal and External Effects of Resolutions by International Organizations, *ZaöRV* 49 (1989), 778–90; B. Sloan, *United Nations General Assembly Resolutions in Our Changing World*, 1991; J.A. Barberis, Les Résolutions des organisations internationales en tant que source du droit de gens, in *FS Bernhardt*, 21–39; H.G. Schermers, International Organizations, Resolutions, *EPIL* II (1995), 1333–36.
145 See Chapter 9 below, 136–7.

members, and so on, the only clear example in the United Nations Charter is in Chapter VII, which empowers the Security Council to give orders to states as part of its action to deal with threats to the peace, breaches of the peace and acts of aggression.[146] In some other organizations powers to take binding decisions can be exercised more frequently; this is particularly true of the European Community.[147] But it is questionable whether such decisions should be treated as a separate source of law, because the power to take such decisions is conferred by the constituent *treaty* of the organization concerned. The same applies to the power of the International Monetary Fund to take binding decisions on the maintenance or alteration of exchange rates or depreciation of currency,[148] or the authority of the International Civil Aviation Authority to adopt binding standards for navigation or qualifications of flight personnel.[149]

Most resolutions have nothing to do with international law; an obvious example would be a resolution recommending research into the causes of cancer. Even when resolutions do touch upon international law, they may simply be recommending changes, and the text of such a resolution clearly cannot be interpreted as representing the existing law; a resolution declaring that X *ought* to be the law is obviously not evidence that X *is* the law. If a resolution declares that X is the law, it can be used as evidence of customary law. But the value of such a resolution varies in proportion to the number of states voting for it; if many states vote against it, its value as evidence of customary law is correspondingly reduced.

It has been said that, in the *Nicaragua* case,[150] the International Court of Justice extensively referred to resolutions of international organizations as a 'source of law',[151] but under the particular circumstances of the case concerning the issue of the jurisdiction of the Court, it is doubtful whether it used these resolutions as sources in the technical sense. A resolution passed at a meeting of an international organization is never conclusive evidence of customary law. It has to be examined in conjunction with all the other available evidence of customary law, and it may thus be possible to prove that the resolution is not a correct statement of customary law.[152] In the end, if there is no corresponding practice, the mere statement on what the law is supposed to be is not sufficient evidence, but nothing more than an attempt on the part of states to clarify their respective positions.[153]

Nevertheless, as stated by the International Court of Justice in its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* with reference to the series of General Assembly resolutions since 1961[154] that affirm the illegality of nuclear weapons:

> General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule.[155]

146 See Chapter 22 below, 387–90.
147 See Chapter 6 below, 95–6.
148 See Chapter 15 below, 225–7.
149 See Chapter 13 below, 200.
150 See text above, 39, 40, 41.
151 Noted by Bernhardt (1992), *op. cit.*, 904.
152 For further discussion of resolutions of international organizations as evidence of customary law, see Akehurst (1974–5), Custom, *op. cit.*, 5–7.
153 See T. Schweisfurth, The Influence of the Third United Nations Conference on the Law of the Sea on International Customary Law, *ZaöRV* 43 (1983), 566–84, 577.
154 UNGA Res. 1653 (XVI) of 24 November 1961.
155 *Legality of Nuclear Weapons Case*, *op. cit.*, at 826, para. 70.

6402

However, in view of the substantial numbers of ne[illegible]es and abstentions with which several of the General Assembly resolutions on the illegality of nuclear weapons have been adopted, the Court held that they still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons.[156]

'Soft' law

The controversy on the status of certain declarations and resolutions of international organizations is connected with the phenomenon of 'soft law'.[157] Without being able to enter into the general discussion here, it may be noted that the term 'soft law', as distinct from 'hard law', is not very helpful from a legal perspective. It is known that 'soft law', in the sense of guidelines of conduct (such as those formulated by the United Nations concerning the operations of transnational companies[158]) which are neither strictly binding norms of law, nor completely irrelevant political maxims, and operate in a grey zone between law and politics, is considered a special characteristic of international economic law and of international environmental law.[159] Such provisions can be found, for example, in treaties not yet in force or in resolutions of international conferences or organizations, which lack legally binding quality.

The emergence of 'soft law' also has to do with the fact that states in agreement frequently do not (yet) wish to bind themselves legally, but nevertheless wish to adopt and test certain rules and principles before they become law. This often facilitates consensus which is more difficult to achieve on 'hard law' instruments. A peculiar example of this practice is the Forest Declaration adopted at the 1992 Rio Conference on Environment and Development, which carries the illuminating title 'A Non-legally binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests'.[160] States may even decide to create international organizations with their own organs and structures to fulfil international tasks without accepting any legally binding obligations, as was done in the case of the Conference on Security and Cooperation in Europe on the basis of the 1975 Helsinki Final Act.[161]

Such guidelines, although explicitly drafted as non-legal ones, may nevertheless in actual practice acquire considerable strength in structuring international conduct.[162] 'Soft law' may also be relevant from a sociological perspective of international law with regard to the process of the formation of customary law or treaty law and the related issue of 'legitimacy' in the international legal system.[163] But the result of this law-making process at any given moment of legal decision is either binding law or not. In essence, under any meaningful concept of law, it remains essential to maintain the distinction between the law *de lege lata* and the law *de lege ferenda*,[164] between the codification of existing law and the progressive development of law, between legal norms and non-legal norms as regards their binding effect, and ultimately between the legal system and the political system. Otherwise, it would become rather difficult to distinguish ideologically or politically motivated claims from the accepted rules and principles of international law. However, certain principles and rules which are

156 *Ibid.*, para. 71. See also the Dissenting Opinion of Judge Schwebel, which is much clearer, *ibid.*, 839.

157 R. Bierzanek, Some Remarks on 'Soft' International Law, *PYIL* 17 (1988), 21–40; C.M. Chinkin, The Challenge of Soft Law: Development and Change in International Law, *ICLQ* 38 (1989), 850–66; P.-M. Dupuy, Soft Law and the International Law of the Environment, *Mich. ILJ* 12 (1991), 420–35; H.E. Chodosh, Neither Treaty Nor Custom: The Emergence of Declarative International Law, *Texas ILJ* 26 (1991), 87–124; W. Heusel, *'Weiches' Völkerrecht: Eine vergleichende Untersuchung typischer Erscheinungsformen*, 1991; F. Francioni, International 'Soft Law': A Contemporary Assessment, in Lowe/Fitzmaurice (eds), *op. cit.*, 167–78.

158 See Chapter 6 below, 102–3.

159 See I. Seidl-Hohenveldern, International Economic 'Soft Law', *RdC* 163 (1979), 165 *et seq.*; W.E. Burhenne (ed.), *International Environmental Soft Law. Collection of Relevant Instruments*, 1993; M.A. Fitzmaurice, International Environmental Law as a Special Field, *NYIL* 25 (1994), 181–226, at 199–201. See Chapters 15, 222–3 and 16, 241–7 below.

160 For the Rio documents see *ILM* 31 (1992), 818 *et seq.* See P. Malanczuk, Sustainable Development: Some Critical Thoughts in the Light of the Rio Conference, in K. Ginther/E. Denters/P.J.I.M.de Waart (eds), *Sustainable Development and Good Governance*, 1995, 23–52. See also Chapter 16 below, 247–8.

161 See T. Schweisfurth, Zur Frage der Rechtsnatur, Verbindlichkeit und völkerrechtlicher Relevanz der KSZE Schlußakte, *ZaöRV* 36 (1976), 681 *et seq.*; For a recent analysis, see I. Seidl-Hohenveldern, Internationale Organisationen aufgrund von soft law, in *FS Bernhardt*, 229–39; T. Schweisfurth, Die juristische Mutation der KSZE – Eine internationale Organisation in statu nascendi, *ibid.*, 213–28; M. Sapiro, Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation, *AJIL* 89 (1995), 631–7. See Chapter 6 below, 94.

162 See also M. Bothe, Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?, *NYIL* 11 (1980), 65–95.

163 See Chapter 2 above, 33.

164 See text above, 35.

emerging as new norms in the process of law-making, without yet having become accepted as legally binding, may nevertheless have limited 'anticipatory' effect in judicial or arbitral decision-making as supporting arguments in interpreting the law as it stands.

Equity

'Equity', in the present context, is used not in the technical sense which the word possesses in Anglo-American legal systems in the distinction between law and equity as separate bodies of law, but as a synonym for 'justice'. Moreover, those who look to equity as a source of international law often appeal to natural law[165] in order to strengthen their arguments and to escape accusations of subjectivism. Thus the three terms – 'equity', 'justice' and 'natural law' – tend to merge into one another.

During the sixteenth and seventeenth centuries natural law was a major source of international law. In the nineteenth and twentieth centuries arbitrators have often been authorized to apply justice and equity as well as international law (such authorizations were more common before 1920 than they are today); even in the absence of such authorization, judges and arbitrators sometimes invoke equitable considerations.[166]

In the *River Meuse* case (*Netherlands v. Belgium*) (1937),[167] for example, the Netherlands claimed that Belgium had violated a treaty by building canals that changed the flow of water in the River Meuse. One of the issues was whether the Netherlands had lost the right to bring the claim because of similar earlier conduct by itself. In this connection the Individual Opinion of Judge Hudson recognized the principle of equity as part of international law. He noticed that there was no express authority in the Statute of the PCIJ to apply equity as distinguished from law. But he pointed to Article 38 of the Statute which allowed the application of general principles and argued that principles of equity are common to all national legal systems.

Thus, a judge or arbitrator can always use equity to interpret or fill gaps in the law, even when he has not been expressly authorized to do so. But he may not give a decision *ex aequo et bono* (a decision in which equity overrides all other rules) unless he has been expressly authorized to do so. Article 38(2) of the Statute of the International Court of Justice provides that the list of sources in Article 38(1) 'shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto'. Article 38(2) has never been applied, but other tribunals have occasionally been authorized to decide *ex aequo et bono*; for instance, two Latin American boundary disputes were decided in this way by arbitrators in the 1930s.[168]

Whatever the position may have been in the past, it is doubtful whether equity forms a source of international law today. It cannot be assumed that a judge is using equity as a source of law every time he describes a rule as equitable or just. Counsel and judges in national courts frequently appeal to considerations of equity and justice when the authorities are divided on a point of law, but that does not lead to equity being regarded as a source of national law; nor should appeals by international lawyers to considerations of equity be interpreted as meaning that equity is a source of international law.

165 See Chapter 2 above, 15–17, 32.

166 See M. Akehurst, Equity and General Principles of Law, *ICLQ* 25 (1976), 801 *et seq.*; V. Lowe, The Role of Equity in International Law, *AYIL* 12 (1988/9), 125–76; C.M. Fombad, Equity in Current International Practice, *REDI* 45 (1989), 1–27; C.R. Rossi, *Equity as a Source of International Law?: A Legal Realist Approach to the Process of International Decision-Making*, 1993; M. Lachs, Equity in Arbitration and in Judicial Settlement of Disputes, *LJIL* 6 (1993), 323–9; T.M. Franck/D.M. Sughrue, The International Role of Equity-as-Fairness, *Geo. LJ* 81 (1993), 563–95; P. Weil, L'Équité dans la jurisprudence de la Cour Internationale de Justice, in Lowe/Fitzmaurice (eds), *op. cit.*, 121–44; Equity in International Law, *EPIL* II (1995), 109–13; T.M. Franck, *Fairness in International Law*, 1995, Chapter 3: Equity as Fairness, 47 *et seq.*

167 PCIJ, series A/B, no. 70, 76–7.

168 *RIAA* II, 1307 and III, 1817.

5404

In recent times the meaning of equity in international law has been discussed in two rather different contexts.[169] The first context is the application of equitable principles by the ICJ in the delimitation of maritime boundaries between states.[170] The other area is the controversial claim of developing countries for a new international economic order which should be based on equitable principles to achieve a fairer distribution of wealth between rich and poor states.[171] One of the problems about equity is that it can often be defined only by reference to a particular ethical system. Consequently, although references to equity are meaningful in a national society which can be presumed to hold common ethical values, the position is entirely different in the international arena, where the most mutually antagonistic philosophies meet in head-on conflict.[172]

The hierarchy of the sources

What happens if a rule derived from one source of international law conflicts with a rule derived from another source?[173] Which prevails over the other? Is there an order of application of the sources listed in Article 38 of the Statute of the ICJ? In the drafting history of this provision the proposal was made that the sources listed should be considered by the Court 'in the undermentioned order' (a–d). This proposal was not accepted and the view was expressed that the Court may, for example, draw on general principles before applying conventions and customs.[174]

The relationship between treaties and custom is particularly difficult.[175] Clearly a treaty, when it first comes into force, overrides customary law as between the parties to the treaty; one of the main reasons why states make treaties is because they regard the relevant rules of customary law as inadequate. Thus, two or more states can derogate from customary law by concluding a treaty with different obligations, the only limit to their freedom of law-making being rules of *ius cogens*, which will be discussed below.[176]

But treaties can come to an end through desuetude – a term used to describe the situation in which the treaty is consistently ignored by one or more parties, with the acquiescence of the other party or parties.[177] Desuetude often takes the form of the emergence of a new rule of customary law, conflicting with the treaty.[178]

Thus, treaties and custom are of equal authority; the later in time prevails. This conforms to the general maxim of *lex posterior derogat priori* (a later law repeals an earlier law). However, in deciding possible conflicts between treaties and custom, two other principles must be observed, namely *lex posterior generalis non derogat priori speciali* (a later law, general in nature, does not repeal an earlier law which is more special in nature) and *lex specialis derogat legi generali* (a special law prevails over a general law).

Since the main function of general principles of law is to fill gaps in treaty law and customary law, it would appear that general principles of law are subordinate to treaties and custom (that is, treaties and custom prevail over general principles of law in the event of conflict).

Judicial decisions and learned writings are described in Article 38(1)(d) as 'subsidiary means for the determination of rules of law',

169 See Janis, *op. cit.*

170 See L.D.M. Nelson, The Roles of Equity in the Delimitation of Maritime Boundaries, *AJIL* 84 (1990), 837–58; M. Miyoshi, *Considerations of Equity in the Settlement of Territorial Boundary Disputes*, 1993; B. Kwiatkowska, Equitable Maritime Boundary Delimitation, in Lowe/Fitzmaurice (eds), *op. cit.*, 264–92. See Chapter 12 below, 135–7.

171 See Chapter 15 below, 233–40.

172 See Akehurst (1976), *op. cit.*, C. Tomuschat, Ethos, Ethics and Morality in International Relations, *EPIL* II (1995), 120–7.

173 M. Akehurst, The Hierarchy of the Sources of International Law, *BYIL* 47 (1974–5), 273 *et seq.*; W. Karl, Treaties, Conflicts between, *EPIL* 7 (1984), 467–73; W. Czapliński/G. Danilenko, Conflicts of Norms in International Law, *NYIL* 21 (1990), 3–42.

174 See *Harris CMIL*, 25.

175 For a good discussion see Schachter, *op. cit.*, 70–6, 335–42; Villiger, *op. cit.*

176 See text below, 57–8.

177 See Chapter 9 below, 141–2.

178 See N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law*, 1994.

which suggests that they are subordinate to the other three sources listed: treaties, custom and general principles of law. Judicial decisions usually carry more weight than learned writings, but there is no hard-and-fast rule; much depends on the quality of the reasoning which the judge or writer employs.

It is doubtful whether equity is a source of international law at all; even if it is, the existence of such doubts would appear to indicate that it is, at most, a very low-ranking source. (However, when a tribunal is authorized to decide *ex aequo et bono*, the tribunal is allowed to substitute its own ideas of equity for any and every rule of international law.)

In sum, the different sources of international law are not arranged in a strict hierarchical order. Supplementing each other, in practice they are often applied side by side. However, if there is a clear conflict, treaties prevail over custom and custom prevails over general principles and the subsidiary sources.[179]

Ius cogens

Some of the early writers on international law said that a treaty would be void if it was contrary to morality or to certain (unspecified) basic principles of international law. The logical basis for this rule was that a treaty could not override natural law. With the decline of the theory of natural law,[180] the rule was largely forgotten, although some writers continued to pay lip-service to it.

Recently there has been a tendency to revive the rule, although it is no longer based on natural law; the state most in favour of the rule was the Soviet Union (which would never have supported the semi-religious theory of natural law). Moreover, the rule is now said to limit the liberty of states to create local custom, as well as their liberty to make treaties; the rule thus acts as a check on the tendency of international law to disintegrate into different regional systems.[181] The technical name now given to the basic principles of international law, which states are not allowed to contract out of, is 'peremptory norms of general international law', otherwise known as *ius cogens*.[182]

Article 53 of the Convention on the Law of Treaties, signed at Vienna in 1969,[183] provides as follows:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

What is said about treaties being void would also probably apply equally to local custom. The reason why local custom is not mentioned is because the purpose of the Convention was to codify the law of treaties only.

Although cautiously expressed to apply only 'for the purposes of the present Convention', the definition of a 'peremptory norm' is probably valid for all purposes. The definition is more skilful than appears at first sight. A rule cannot become a peremptory norm unless it is 'accepted and

179 Bernhardt (1992), *op. cit.*, 899.
180 See Chapter 2 above, 15–17, 32.
181 See Chapter 2 above, 30–2.
182 P. Weil, Towards Relative Normativity in International Law?, *AJIL* 77 (1983), 413–42, is critical of the concept of '*ius cogens*'. See further J.A. Frowein, Jus Cogens, *EPIL* 7 (1984), 327, at 328–9; L. Hannikainen, *Peremptory Norms (jus cogens) in International Law: Historical Development, Criteria, Present Status*, 1988; H.A. Strydom, *Ius Cogens*: Peremptory Norm or Totalitarian Instrument?, *SAYIL* 14 (1988/9), 42–58; A. D'Amato, It's a Bird, It's a Plane, It's jus cogens!, *Conn. JIL* 6 (1990), 1–6; G.M. Danilenko, International jus cogens: Issues of Law-Making, *EJIL* 2 (1991), 42–65; J. Paust, The Reality of jus cogens, *Conn. JIL* 7 (1991), 81–5; S. Kadelbach, *Zwingendes Völkerrecht*, 1992; J. Kasto, *Jus Cogens and Humanitarian Law*, 1994.
183 Text in *ILM* 8 (1969), 679; *AJIL* 63 (1969), 875; *Brownlie BDIL*, 388. See Chapter 9 below, 140–1, 145.

recognized [as such] by the international community of sta[illegible]ie' – a requirement which is too logical and reasonable to be challenged, but which is well worth stating expressly, because there have already been cases of states trying to evade rules of international law which they found to be inconvenient by arguing that those rules were contrary to some exotic examples of *ius cogens*; this danger should, with luck, be averted by requiring such states to prove that the alleged rule of *ius cogens* has been 'accepted and recognized [as such] by the international community of states *as a whole*'. It must find acceptance and recognition by the international community at large and cannot be imposed upon a significant minority of states. Thus, an overwhelming majority of states is required, cutting across cultural and ideological differences.

At present very few rules pass this test. Many rules have been suggested as candidates. Some writers suggest that there is considerable agreement on the prohibition of the use of force, of genocide, slavery, of gross violations of the right of people to self-determination, and of racial discrimination.[184] Others would include the prohibition on torture.[185] In an obscure *obiter dictum* in the *Barcelona Traction* case in 1970, the ICJ referred to 'basic rights of the human person', including the prohibition of slavery and racial discrimination and the prohibition of aggression and genocide, which it considered to be 'the concern of all states', without, however, expressly recognizing the concept of *ius cogens*.[186] But, apart from the 'basic rights of the human person' mentioned in the *Barcelona Traction* case, the only one which at present receives anything approaching general acceptance is the rule against aggression.[187] In its Advisory Opinion in the *Legality of Nuclear Weapons* case, the ICJ did not find a need to address the question whether universally recognized principles of international humanitarian law (applicable in time of armed conflict[188]) are part of *ius cogens* as defined in Article 53 of the Vienna Convention.[189] It should also be noted that in the preparatory work on Article 53 no agreement was possible on which international norms belong to *ius cogens*. France even refused to accept the Convention because of Article 53. The vagueness of *ius cogens* induced Western and Latin-American states to insist on the procedural safeguard in Article 66 lit. a of the same Convention, under which disputes on the application of Article 53 are to be settled by the International Court of Justice or an arbitral tribunal. State practice and international decisions have indeed been cautious in accepting the relevance of the concept.

Although the question is controversial, the better view appears to be that a rule of *ius cogens* can be derived from custom and possibly from treaties, but probably not from other sources.[190]

Obligations *erga omnes* and 'international crimes'

The problem of *ius cogens* is connected with the concept of *erga omnes* obligations and the acceptance of the notion of 'international crimes' by the International Law Commission in its project codifying state responsibility.[191] Under the international law of reprisals,[192] the general rule is that only the directly injured state is entitled to act against the violation of an international obligation by another state. Obligations *erga omnes* are concerned

184 A. Cassese, *International Law in a Divided World*, 1986, 179. The recent study by Hannikainen, *op. cit.*, goes even further.
185 See R. Kühner, Torture, *EPIL* 8 (1985), 510. See Chapter 14 below, 216–17, 220.
186 *Barcelona Traction* case (*Belgium v. Spain*), *ICJ Rep.* 1970, 3, paras. 33 and 34. See Chapter 14 below, 220.
187 See Chapter 19 below, 309–11.
188 See Chapter 20 below, 342–63.
189 *ILM* 35 (1996), 828, para. 83 stating that '[t]he question whether a norm is part of the *jus cogens* relates to the legal character of the norm.'
190 Akehurst (1974–5), Hierarchy, *op. cit.*, 281–5.
191 See Chapter 17 below, 254–6.
192 See Chapter 1 above, 4 and Chapter 17 below, 271–2.

with the enforceability of norms of international law, the violation of which is deemed to be an offence not only against the state directly affected by the breach, but also against all members of the international community.[193]

As noted above, the existence of norms which are 'the concern of all states' was recognized by the ICJ in the *Barcelona Traction* case in 1970. But the decision also contains a remarkable reservation: 'However, on the universal level, the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality.'[194] Thus it offers little clarity on the issue of possible reactions by third states to the violation of such *erga omnes* obligations, the enforceability of which all states have a legal interest in. Although the Court was confronted in a number of other cases with *erga omnes* obligations, it has so far never addressed the legal consequences of the breach of such an obligation. This has been recently noted by Judge Weeramantry in his Dissenting Opinion in the *East Timor* case, in which for jurisdictional reasons the Court dismissed the claim of Portugal against Australia for concluding an agreement with Indonesia affecting the rights of East Timor, but confirmed that the principle of self-determination was an obligation *erga omnes*:

> In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court . . . ; it is one of the essential principles of contemporary international law. However, the Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes*.[195]

With reference to the *Barcelona Traction* case, the International Law Commission (ILC) in its draft on state responsibility has come up with a problematic distinction concerning internationally wrongful acts that can be committed by states: 'international delicts' and 'international crimes'.[196] Article 19 of the Draft Articles on State Responsibility[197] stipulates:

1 An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject matter of the obligation breached.
2 An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.
3 Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

193 See J.A. Frowein, Die Verpflichtungen *erga omnes* im Völkerrecht und ihre Durchsetzung, in R. Bernhardt *et al.* (eds), *Festschrift für Hermann Mosler*, 1983, 241 *et seq.*; P. Malanczuk, Countermeasures and Self-Defence in the ILC's Draft Articles on State Responsibility, in M. Spinedi/B. Simma (eds), *United Nations Codification of State Responsibility*, 1987, 231 *et seq.*; A.J.J. de Hoogh, The Relationship between *jus cogens*, Obligations *erga omnes* and International Crimes: Peremptory Norms in Perspective, *AJPIL* 42 (1991), 183–214; B. Simma, Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations *erga omnes*?, in J. Delbrück (ed.), *The Future of International Law Enforcement: New Scenarios – New Law?*, 1993, 125 *et seq.*; C. Annacker, The Legal Regime of *Erga Omnes* Obligations in International Law, *AJPIL* (1994), 131 *et seq.*; J.A. Frowein, Reactions by Not Directly Affected States to Breaches of Public International Law, *RdC* 248 (1994-IV), 345–437; C. Annacker, *Die Durchsetzung von erga omnes Verpflichtungen vor dem Internationalen Gerichtshof*, 1994; A.J.J. de Hoogh, *Obligations erga omnes and International Crimes: A Theoretical Inquiry into the Implementation and Enforcement of the International Responsibility of States*, 1996.

194 *Barcelona Traction* case, *op. cit.*, at 47, para. 91.

195 *East Timor* case (*Portugal v. Australia*), judgment of 30 June 1995, *ICJ Rep.* 1995, 90; *ILM* 34 (1995), 1581–91, para. 29. See Chapters 18, 286–7 and 19, 331–2 below.

196 See M. Spinedi, *Les Crimes internationaux de l'Etat dans les travaux de codification de la responsabilité des Etats entrepris par les Nations Unies*, 1984; R. Hofmann, Zur Unterscheidung Verbrechen und Delikt im Bereich der Staatenverantwortlichkeit, *ZaöRV* 45 (1985), 195 *et seq.*; M. Mohr, The ILC's Distinction Between 'International Crimes' and 'International Delicts' and its Implications, in Spinedi/Simma (eds), 1987, *op. cit.*, 115; Malanczuk (1987), *op. cit.*, at 230 *et seq.*; J.H.H. Weiler/A. Cassese/M. Spinedi (eds), *International Crimes of States. A Critical Analysis of the ILC's Draft Article 19 on State Responsibility*, 1989; G. Gilbert, The Criminal Responsibility of States, *ICLQ* 39 (1990), 345 et seq; de Hoogh, *op. cit.* On the ILC see text below, 61.

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and *apartheid*;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4 Any international wrongful act which is not an international crime in accordance with paragraph 2 constitutes an international delict.

According to the ILC, while an international crime always constitutes the violation of an *erga omnes* obligation, the breach of an *erga omnes* obligation does not necessarily imply an international crime. The concept of 'international crimes', therefore, is narrower than the notion of *ius cogens*.[198] The precise implications of Article 19 in terms of legal consequences remain to be seen when the work of the Commission should reach a more definite stage.[199] Only two remarks may be added here. First, the terminology is unfortunate because it tends to confuse the international criminal responsibility of individuals[200] with the criminal responsibility of states, which, as such, does not exist in international law. Second, the prohibition of the massive pollution of the environment has not been accepted by state practice even as a *ius cogens* norm.

Codification of international law

Since the end of the nineteenth century there have been public and private attempts to codify customary international law in order to clarify the existing rules and to improve them.[201] The Hague Conventions of 1899 and 1907 dealt with the laws of war and neutrality,[202] the 1930 Codification Conference in The Hague under the League of Nations addressed the law of nationality,[203] territorial waters,[204] and state responsibility.[205] But it was largely unsuccessful; agreement was possible only on the law of nationality. In recent years there has been a stronger tendency to codify customary law. Four conventions on the law of the sea were signed at Geneva in 1958;[206] a convention on diplomatic relations and immunities[207] was signed at Vienna in 1961; a convention on consular relations and immunities was signed at Vienna in 1963; conventions on the law of treaties were signed at Vienna in 1969 and 1986;[208] and conventions on state succession were signed at Vienna in 1978 and 1983.[209] A major enterprise in multilateral conference diplomacy has been the 1982 Law of the Sea Convention which took ten

197 Text in *Brownlie BDIL*, 426. See Chapter 17 below, 255–72.
198 See *ILCYb* 1976, Vol. 2, part 2, 120.
199 See the criticism by B. Simma, Bilateralism and Community Interest in the Law of State Responsibility, in Y. Dinstein/M. Tabory (eds), *International Law at a Time of Perplexity*, 1989, 821. In the ILC, Art. 19 and its legal consequences have remained up to now highly controversial, see ILC 48th Session, Provisional Summary Record of the 2452nd Meeting, UN Doc. A/CN.4/SR. 2452, 22 July 1996. See Chapter 17 below, 271–2.
200 See Chapter 20 below, 353–63.
201 S. Rosenne, Codification of International Law, *EPIL* I (1992), 632–40; M. Schröder, Codification and Progressive Development of International Law within the UN, in *Wolfrum UNLPP I*, 100–9; A. Pellet, La formation du droit international dans le cadre des Nations Unies, *EJIL* 6 (1995), 401–25; H. Torrone, *L'Influence des conventions de codification sur la coutume en droit international public*, 1989.
202 See Chapter 2 above, 21–2 and Chapter 20 below, 344.
203 See Chapter 17 below, 263–6.
204 See Chapter 12 below, 173–4, 176–82.
205 See Chapter 17 below, 255–72.
206 See Chapter 12 below, 173.
207 See Chapter 8 below, 123–7.
208 See Chapter 9 below, 130–1.
209 See Chapter 11 below, 161–2.

years of protracted negotiations to adopt and more than another ten years to enter into force.[210]

There are obvious advantages to be gained from codifying customary law in a treaty. The rules become more precise and more accessible; and new states are more willing to accept rules which they themselves have helped to draft. But, in view of the divergences between the practice of different states, codification often means that a compromise is necessary, and there is a limit to the number of compromises that states are willing to accept at any one time. Consequently, codification will succeed only if it proceeds slowly; acceleration produces the risk of failure, as happened at the codification conference organized by the League of Nations in 1930, and the failure of a codification scheme may cast doubt on customary rules which were previously well established. (This is what happened to the three-mile rule concerning the width of the territorial sea after the failure of the 1930 conference.[211])

The preparatory work for the Geneva and Vienna conventions was carried out by the International Law Commission (ILC), established in 1947 by the United Nations.[212] It is a body of thirty-four (originally fifteen) international lawyers elected by the United Nations General Assembly for a five-year term. The members of the ILC, who serve in their individual capacity, are supposed to represent the world's principal legal systems. The ILC is entrusted not only with the codification of international law, but also with its progressive development (that is, the drafting of rules on topics where customary law is non-existent or insufficiently developed); in practice the distinction between codification and progressive development is often blurred. Special rapporteurs are assigned to propose work programmes and draft articles chosen by the Commission itself or referred to it by the General Assembly.

Sometimes the Commission seeks to codify the law, not by preparing a draft convention, which may be later incorporated into a binding multilateral agreement, but simply by summarizing the law in a report to the General Assembly. Such reports are not binding in the same way as treaties, but they do constitute valuable evidence of customary law; the Commission's members base their work on extensive research and on an attempt to ascertain and reconcile the views of the member states of the United Nations (for example, by circulating questionnaires and by inviting states to comment on their draft reports – the same procedure is followed during the preliminary work on draft conventions). The effectiveness of the work of the ILC has more recently been called into question by some of its own distinguished members,[213] and with regard to the new topics under consideration its working methods may require adjustment to meet acceptance of drafts it produces by the majority of states.[214] However, it is notable that the ILC managed to respond to the request of the General Assembly and complete its draft on the Statute for an International Criminal Court within the short period of 1992 to 1994.[215]

Unofficial bodies have also tried their hand at codification. For instance, Harvard Law School has produced a number of draft conventions; these are not intended to be ratified by states, but are simply used as

210 See Chapter 12 below, 173–5.

211 See Chapter 12 below, 178–80.

212 See S. Goswami, *Politics in Law Making: A Study of the International Law Commission of the UN*, 1986; I. Sinclair, *The International Law Commission*, 1987; S. Vallat, International Law Commission, *EPIL* II (1995), 1208–16.

213 See S. Sucharitkul, The Role of the International Law Commission in the Decade of International Law, *LJIL* 3 (1990), 15–42; B. Graefrath, The International Law Commission Tomorrow: Improving Its Organization and Methods of Work, *AJIL* 85 (1991), 595–612; R. Ago, Some New Thoughts on the Codification of International Law, in E.G. Bello/B.A. Ajibola (eds), *Essays in Honour of Judge Taslim Elias*, 1992, 36–61.

214 See M. Brus, *Third Party Dispute Settlement in an Interdependent World*, 1995, 159–63.

215 See Chapter 20 below, 360–1.

a convenient means of restating the law. They derive their value from the eminence of the professors who have helped to draw them up. Finally, the private organizations of the Institute of International Law and of the International Law Association, both founded in 1873, should be mentioned.[216]

216 See Chapter 2 above, 22.