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UNITED NATIONS

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

Case No.: IT-94-1-A

Date: 15 July 1999

Original: English

IN THE APPEALS CHAMBER

Before: **Judge Mohamed Shahabuddeen, Presiding**
Judge Antonio Cassese
Judge Wang Tieya
Judge Rafael Nieto-Navia
Judge Florence Ndepele Mwachande Mumba

Registrar: **Mrs. Dorothee de Sampayo Garrido-Nijgh**

Judgement of: **15 July 1999**

PROSECUTOR

v.

DUŠKO TADIĆ

JUDGEMENT

The Office of the Prosecutor:

Mr. Upawansa Yapa
Ms. Brenda J. Hollis
Mr. William Fenrick
Mr. Michael Keegan
Ms. Ann Sutherland

Counsel for the Appellant:

Mr. William Clegg
Mr. John Livingston

I. INTRODUCTION

A. Procedural background

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal" or "Tribunal") is seised of three appeals in relation to the Opinion and Judgment rendered by Trial Chamber II[1] on 7 May 1997 in the case of *The Prosecutor v. Duško Tadić,* Case No.: IT-94-1-T ("Judgement")[2] and the subsequent Sentencing Judgment of 14 July 1997 ("Sentencing Judgement").[3] With the exception of the Appeals Chamber's judgement in *The Prosecutor v. Dražen Erdemović*[4] where the accused had entered a plea of guilty, this is the first time that the Appeals Chamber is deciding an appeal from a final judgement of a Trial Chamber.

2. The Indictment (as amended) charged the accused, Duško Tadić, with 34 counts of crimes within the jurisdiction of the International Tribunal. At his initial appearance before the Trial Chamber on 26 April 1995, the accused pleaded not guilty to all counts. Three of the counts were subsequently withdrawn at trial. Of the remaining 31 counts, the Trial Chamber found the accused guilty on nine counts, guilty in part on two counts and not guilty on twenty counts.

3. Both Duško Tadić ("Defence" or "Appellant") and the Prosecutor ("Prosecution" or "Cross-Appellant") now appeal against separate aspects of the Judgement ("Appeal against Judgement" and "Cross-Appeal", respectively).[5] Additionally, the Defence appeals against the Sentencing Judgement ("Appeal against Sentencing Judgement"). Combined, these appeals are referred to as "the Appeals".

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[1] Composed of Judge Gabrielle Kirk McDonald (Presiding), Judge Ninian Stephen and Judge Lal Chand Vohrah.

[2] "Opinion and Judgment", *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997. (For a list of designations and abbreviations used in this Judgement, *see* Annex A – Glossary of Terms).

[3] "Sentencing Judgment", *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, Trial Chamber II, 14 July 1997.

[4] "Judgement", *The Prosecutor v. Dražen Erdemović,* Case No.: IT-96-22-A, Appeals Chamber, 7 October 1997.

[5] It should be observed that Duško Tadić in the present proceedings is appellant and cross-respondent. Conversely, the Prosecutor is respondent and cross-appellant. In the interest of clarity of presentation,

4. Oral argument on the Appeals was heard by the Appeals Chamber on 19, 20 and 21 April 1999. On 21 April 1999, the Appeals Chamber reserved its judgement to a later date.

5. Having considered the written and oral submissions of the Prosecution and the Defence, the Appeals Chamber,

HEREBY RENDERS ITS JUDGEMENT.

1. The Appeals

(a) Notices of Appeal

6. A notice of appeal against the Judgement was filed on behalf of Duško Tadić on 3 June 1997. Subsequently, on 8 January 1999, the Defence filed an amended notice of appeal ("Amended Notice of Appeal against Judgement").[6] Leave to amend the notice of appeal was granted, in part, by the Appeals Chamber in an oral order made on 25 January 1999.[7]

7. On 6 June 1997, the Prosecution filed a notice of appeal against the Judgement ("Notice of Cross-Appeal").[8]

8. After the notices of appeal against the Judgement were filed, proceedings continued before the Trial Chamber in relation to sentencing, and on 14 July 1997 the Trial Chamber delivered its Sentencing Judgement. Sentences were imposed for each of the 11 counts on which the Appellant had been found guilty or guilty in part, to be served concurrently. On 11 August 1997, the Defence filed a notice of appeal against the Sentencing Judgement. The Prosecution has not appealed against the Sentencing Judgement.

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however, the designations "Defence" or "Appellant" and "Prosecution" or "Cross-Appellant" will be employed throughout this Judgement.

[6] "Amended Notice of Appeal", Case No.: IT-94-1-A, 8 January 1999.

[7] Transcript of hearing in *The Prosecutor v Duško Tadić*, Case No.: IT-94-1-A, 25 January 1999, p. 307 (T. 307 (25 January 1999). (All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public).

[8] "Notice of Appeal", Case No.: IT-94-1-A, 6 June 1997.

(b) Filing of Briefs

9. As set out in further detail below, the present proceedings were significantly delayed by repeated applications for extension of time in relation to an application for admission of additional evidence first made by the Defence on 6 October 1997.[9] In January 1998, the Appeals Chamber suspended the timetable for filings in the Appeals until the determination of the Appellant's application.[10] Following the Appeals Chamber's decision of 15 October 1998 on the matter,[11] the normal appeals sequence resumed. In view of the rather complicated pattern formed by the parties' briefs on the Appeals, it is useful to refer to the written submissions filed by the parties.

10. The Defence filed separate briefs for the Appeal against Judgement ("Appellant's Brief on Judgement") and the Appeal against Sentencing Judgement ("Appellant's Brief on Sentencing Judgement"). These briefs were filed on 12 January 1998.[12] The Prosecution responded to the briefs of the Appellant on 16 and 17 November 1998 ("Prosecution's Response to Appellant's Brief on Judgement" and "Prosecution's Response to Appellant's Brief on Sentencing Judgement", respectively).[13]

11. As a consequence of filing an Amended Notice of Appeal against Judgement, the Defence filed an Amended Brief of Argument (with annexes) on 8 January 1999 ("Appellant's Amended Brief on Judgement").[14] This subsequent brief was accepted by order of the Appeals Chamber on 25 January 1999.[15]

12. Alongside the filings in relation to the Appellant's Appeal against Judgement and Appeal against Sentencing Judgement, both parties filed written submissions in relation to the Prosecution's Cross-Appeal. The Prosecution's brief in relation to the Cross-Appeal

[9] "Motion for the Extension of the Time Limit", Case No.: IT-94-1-A, 6 October 1997.
[10] T. 105 (22 January 1998).
[11] "Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence", Case No.: IT-94-1-A, 15 October 1998.
[12] "Appellants Brief on Appeal Against Opinion and Judgement of 7 May 1997", Case No.: IT-94-1-A, 12 January 1998, with accompanying appendices separately filed; "Appellant's Brief on Appeal Against Sentencing Judgement" Case No.: IT-94-1-A, 12 January 1998.
[13] "Cross-Appellant's Response to Appellant's Brief on Appeal against Opinion and Judgement of May 7, 1997, Filed on 12 January 1998", Case No.: IT-94-1-A, 17 November 1998; "Response to Appellant's Brief on Appeal Against Sentencing Judgement filed on 12 January 1998", Case No.: IT-94-1-A, 16 November 1998.
[14] "Amended Brief of Argument on behalf of the Appellant", Case No.: IT-94-1-A, 8 January 1999.
[15] T. 308 (25 January 1999).

was filed on 12 January 1998 ("Cross-Appellant's Brief").[16] A response to the Prosecution's brief was filed by the Defence on 24 July 1998.[17] The Prosecution filed a brief in reply on 1 December 1998 ("Cross-Appellant's Brief in Reply").[18] The Defence subsequently filed a further response to the Cross-Appellant's Brief ("Defence's Substituted Response to Cross-Appellant's Brief").[19] The filing of this further brief was accepted by order of the Appeals Chamber on 4 March 1999.[20]

13. Skeleton arguments consolidating and clarifying the parties' respective positions in relation to the Appeals were filed by both parties on 19 March 1999.[21]

2. Applications for Admission of Additional Evidence under Rule 115

14. A confidential motion for the admission of a significant amount of additional evidence was filed by the Defence on 6 October 1997.[22] In the motion, as supplemented by subsequent submissions, the Defence sought leave under Rule 115 of the Rules of Procedure and Evidence of the International Tribunal ("Rules") to present additional documentary material and to call more than 80 witnesses before the Appeals Chamber.[23] In addition, or in the alternative, the Defence requested that the motion be considered as a

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[16] "Brief of Argument of the Prosecution (Cross-Appellant)", Case No.: IT-94-1-A, 12 January 1998 and accompanying "Book of Authorities", Case No.: IT-94-1-A, 22 January 1998. (*See* also "Corrigendum to Prosecutor's Brief of Argument filed on 12 January 1998 and Book of Authorities filed on 22 January 1998" Case No.: IT-94-1-A, 9 September 1998).

[17] "The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 12, 1998", Case No.: IT-94-1-A, 24 July 1998.

[18] "Prosecution (Cross-Appellant) Brief in Reply", Case No.: IT-94-1-A, 1 December 1998.

[19] "The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 19, 1999", Case No.: IT-94-1-A, 19 January 1999.

[20] "Order Accepting Filing of Substitute Brief", Case IT-94-1-A, 4 March 1999. (*See* also "Opposition to the Appellant's 19 January 1999 filing entitled 'The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of 19 January, 1999 (sic)'", Case No.: IT-94-1-A, 21 January 1999; "Submission in relation to Appellant's 'Substitute Brief' filed on 19 January 1999", Case No.: IT-94-1-A, 24 February 1999).

[21] "Skeleton Argument – Appellant's Appeal Against Conviction", Case No.: IT-94-1-A, 19 March 1999 ("Skeleton Argument – Appellant's Appeal Against Conviction"); "Skeleton Argument – Appeal Against Sentence", Case No.: IT-94-1-A, 19 March 1999; "Skeleton Argument of the Prosecution", Case No.: IT-94-1-A, 19 March 1999 ("Skeleton Argument of the Prosecution"). *See* also "Skeleton Argument – Prosecutor's Cross-Appeal", Case No.: IT-94-1-A, originally filed by the Defence on 19 March 1999 and subsequently re-filed on 20 April 1999 ("Defence's Skeleton Argument on the Cross-Appeal").

[22] "Motion for the Extension of the Time Limit", Case No.: IT-94-1-A, 6 October 1997.

[23] Rule 115 provides:

"(A) A party may apply by motion to present before the Appeals Chamber additional evidence which was not available to it at the trial. Such motion must be served on the other party and filed with the

motion for review of the Judgement on the basis of a "new fact" within the meaning of Rule 119 of the Rules.[24]

15. The proceedings in relation to the motion continued for just under twelve months. A substantial number of extensions of time was sought by both parties.[25]

16. By decision of the Appeals Chamber on 15 October 1998 and for the reasons stated therein, the Defence motion for the admission of additional evidence was dismissed ("Decision on Admissibility of Additional Evidence").[26] Considering the motion under Rule 115 of the Rules, the Appeals Chamber expressed its view that additional evidence should not be admitted lightly at the appellate stage. Construing the standard established by this Rule, it was noted that additional evidence is not admissible in the absence of a reasonable explanation as to why the evidence was not available at trial. The Appeals Chamber held that such unavailability must not result from the lack of due diligence on the part of counsel who undertook the defence of the accused before the Trial Chamber. Commenting further on the second criterion of admissibility under Rule 115, it was considered that for the purposes of the present case, the interests of justice required admission of additional evidence only if (a) the evidence was relevant to a material issue,

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Registrar not less than fifteen days before the date of the hearing. (B) The Appeals Chamber shall authorise the presentation of such evidence if it considers that the interests of justice so require."

[24] Rule 119 provides:

"Where a new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced, the Prosecutor, may make a motion to that Chamber for review of the judgement."

[25] "Motion to Extend the Time Limit", Case No.: IT-94-1-A, 10 September 1997; "Motion for the Extension of the Time Limit" (Confidential), Case No.: IT-94-1-A, 6 October 1997; "The Motion for the Extension of Time", Case No.: IT-94-1-A, 17 March 1998; "Application for Extension of Time to File Additional Evidence on Appeal", Case No.: IT-94-1-A, 1 May 1998; "Motion for Extension of Time to File Reply to Cross-Appellant's Response to Appellant's Submissions since 9th March 1998 on the Motion for the Presentation of Additional Evidence under Rule 115", Case No.: IT-94-1-A, 15 June 1998; "Request for an Extension of Time to File a Reply to the Appellant's Motion Entitled 'Motion for the Extension of the Time Limit'", Case No.: IT-94-1-A, 9 October 1997; "Request for a Modification of the Appeals Chamber Order of 22 January 1998", Case No.: IT-94-1-A, 13 February 1998; "Request for a Modification of the Appeals Chamber Order of 2 February 1998", Case No.: IT-94-1-A, 7 May 1998. The following orders were made in relation to these applications: "Scheduling Order", Case No.: IT-94-1-A, 24 November 1997; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 23 March 1998; "Order Granting Requests for Extension of Time", Case No.: IT-94-1-A, 13 May 1998; "Order Granting Extension of Time", Case No.: IT-94-1-A, 10 June 1998; "Order Granting Extension of Time", Case No.: IT-94-1-A, 17 June 1998; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 9 October 1997; "Order Granting Request for Extension of Time", Case No.: IT-94-1-A, 19 February 1998; "Order Granting requests for Extension of Time", Case No.: IT-94-1-A, 13 May 1998.

[26] "Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence", Case No.: IT-94-1-A, 15 October 1998.

(b) the evidence was credible, and (c) the evidence was such that it would probably show that the conviction was unsafe. Applying these criteria to the evidence sought to be admitted, the Appeals Chamber was not satisfied that the interests of justice required that any material which was not available at trial be presented on appeal.

17. Further motions for the admission of additional evidence pursuant to Rule 115 were made by the Defence on 8 January and 19 April 1999.[27] By oral orders of 25 January and 19 April 1999, the motions were rejected by the Appeals Chamber.[28]

3. Contempt proceedings

18. In the course of the appeal process, proceedings were initiated by the Appeals Chamber against Mr. Milan Vujin, former lead counsel for the Appellant, relating to allegations of contempt of the International Tribunal.[29] These allegations are subject to proceedings separate from the Appeals.

19. A hearing on the contempt proceedings commenced on 26 April 1999. The matter is currently pending before the Appeals Chamber.

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[27] "Appellant's Second Motion to Admit Additional Evidence on Appeal Pursuant to Rule 115 of the Tribunal's Rules", Case No.: IT-94-1-A, 8 January 1999; "Motion (3) to Admit Additional Evidence on Appeal Pursuant to Rule 115 of the Rules of Procedure and Evidence", Case No.: IT-94-1, 19 April 1999.

[28] T. 307-308 (25 January 1999); T. 20 (19 April 1999).

[29] *See* "Scheduling Order Concerning Allegations against Prior Counsel", Case No.: IT-94-1-A, 10 February 1999. At the outset of the appellate process, Mr. Milan Vujin acted as lead counsel for the Defence, with the assistance of Mr. R. J. Livingston. By a decision of the Deputy Registrar on 19 November 1998, Mr. Milan Vujin was withdrawn as counsel for the accused and replaced by Mr. William Clegg as lead counsel (*See* "Decision of Deputy Registrar regarding the Assignment of Counsel and the Withdrawal of Lead Counsel for the Accused", Case No.: IT-94-1-A, 19 November 1998).

B. Grounds of Appeal

1. The Appeal against Judgement

20. As set out in the Appellant's Amended Notice of Appeal against Judgement and Appellant's Amended Brief on Judgement, the Defence advances the following two grounds of appeal against Judgement:

Ground (1): The Appellant's right to a fair trial was prejudiced as there was no "equality of arms" between the Prosecution and the Defence due to the prevailing circumstances in which the trial was conducted.[30]

Ground (3): The Trial Chamber erred at paragraph 397 of the Judgement when it decided that it was satisfied beyond reasonable doubt that the Appellant was guilty of the murders of Osman Didovic and Edin Bešić.[31]

21. The Defence sought leave to amend its Notice of Appeal to include a further ground of appeal ("Ground 2"), alleging that the Appellant's right to a fair trial was gravely prejudiced by the conduct of his former counsel, Mr. Milan Vujin.[32] Leave to amend the Notice of Appeal to include this ground was denied by the Appeals Chamber on 25 January 1999,[33] thus leaving only Grounds 1 and 3 in the Appellant's Appeal against Judgement.

2. The Cross-Appeal

22. The Prosecution raises the following grounds of appeal against the Judgement:

Ground (1): The majority of the Trial Chamber erred when it decided that the victims of the acts ascribed to the accused in Section III of the Judgement did not enjoy the protection of

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[30] Appellant's Amended Notice of Appeal against Judgement, paras. 1.1–1.4; Appellant's Amended Brief on Judgement, paras. 1.1-1.12.
[31] Appellant's Amended Notice of Appeal against Judgement, paras. 3.1–3.6; Appellant's Amended Brief on Judgement, paras. 3.1-3.11.
[32] Amended Notice of Appeal, paras. 2.1-2.4.
[33] T. 307 (25 January 1999).

the grave breaches regime of the Geneva Conventions of 12 August 1949 as recognised by Article 2 of the Statute of the International Tribunal ("Statute").[34]

Ground (2): The Trial Chamber erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had played any part in the killing of any of the five men from the village of Jaskići, as alleged in Counts 29, 30 and 31 of the Indictment.[35]

Ground (3): The Trial Chamber erred when it held that in order to be found guilty of a crime against humanity, the Prosecution must prove beyond reasonable doubt that the accused not only formed the intent to commit the underlying offence but also knew of the context of a widespread or systematic attack on the civilian population and that the act was not taken for purely personal reasons unrelated to the armed conflict.[36]

Ground (4): The Trial Chamber erred when it held that discriminatory intent is an element of all crimes against humanity under Article 5 of the Statute of the International Tribunal.[37]

Ground (5): The majority of the Trial Chamber erred in a decision of 27 November 1996 in which it denied a Prosecution motion for production of defence witness statements ("Witness Statements Decision").[38]

3. The Appeal against Sentencing Judgement

23. The Defence raises the following grounds of appeal against the Sentencing Judgement:

Ground (1): The total sentence of 20 years decided by the Trial Chamber is unfair.[39]

(i) The sentence is unfair as it was longer than the facts of the case required or demanded.[40]

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[34] Notice of Cross-Appeal, p. 2; Cross-Appellant's Brief, paras. 2.1-2.88.
[35] Notice of Cross-Appeal, p. 2; Cross-Appellant's Brief, paras. 3.1-3.33.
[36] Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 4.1-4.23.
[37] Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 5.1-5.28.
[38] Notice of Cross-Appeal, p. 3; Cross-Appellant's Brief, paras. 6.1-6.32 with reference to "Decision on Prosecution Motion for Production of Defence Witness Statements", Case No.: IT-94-1-T, Trial Chamber II, 27 November 1996.
[39] T. 306 (21 April 1999).

(ii) The Trial Chamber erred by failing to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, as required by Article 24 of the Statute of the International Tribunal. Under this practice, a 20-year sentence is the longest sentence that can be imposed, but only as an alternative to the death penalty.[41]

(iii) The Trial Chamber paid insufficient attention to the personal circumstances of Duško Tadić.[42]

Ground (2): The Trial Chamber erred by recommending that the calculation of the minimum sentence should commence "from the date of this Sentencing Judgement or of the final determination of any appeal, whichever is the latter".[43]

Ground (3): The Trial Chamber erred in not giving the Appellant credit for the time spent in confinement in Germany before the International Tribunal requested deferral in this case.[44]

C. Relief Requested

1. The Appeal against Judgement

24. In the Appeal against Judgement the Defence seeks the following relief:[45]

(i) That the decision of the Trial Chamber that the Appellant is guilty of the crimes proved against him be set aside.

(ii) That a re-trial of the Appellant be ordered.

(iii) In the alternative to the relief sought under (i) and (ii) above, that the decision of the Trial Chamber at paragraph 397 of the Judgement that the Appellant is guilty of the murders of Osman Didovic and Edin Bešić be reversed.

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[40] T. 303 (21 April 1999).
[41] Appellant's Brief on Sentencing Judgement, pp. 4–6; T. 304 (21 April 1999).
[42] Appellant's Brief on Sentencing Judgement, pp. 9-10; T. 305 (21 April 1999).
[43] Sentencing Judgement, para. 76. *See* Appellant's Brief on Sentencing Judgement, p. 10.
[44] *Ibid.*, p. 14.
[45] Appellant's Amended Notice of Appeal against Judgement, p. 3.

(iv) That the sentence of the Appellant be reviewed in the light of the relief sought under (iii) above.

2. The Cross-Appeal

25. In the Cross-Appeal the Prosecution seeks the following relief:

(i) That the majority decision of the Trial Chamber at page 227, paragraph 607 of the Judgement, holding that the victims of the acts ascribed to the Appellant in Section III of the Judgement did not enjoy the protection of the prohibitions prescribed by the grave breaches regime applicable to civilians in the hands of a party to an armed conflict of which they are not nationals (which falls under Article 2 of the Statute of the Tribunal), be reversed.[46]

(ii) That the finding of the Trial Chamber at page 132, paragraph 373 of the Judgement, that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant had played any part in the killing of any of the five men from the village of Jaskići, be reversed.[47]

(iii) That the decision of the Trial Chamber at pages 252-253, paragraph 656 of the Judgement, that in order to be found guilty of a crime against humanity the Prosecution must prove beyond reasonable doubt that the Appellant not only formed the intent to commit the underlying offence but also knew of the context of the widespread or systematic attack on the civilian population and that the act was not taken for purely personal reasons unrelated to the armed conflict, be reversed.[48]

(iv) That the decision of the Trial Chamber at page 250, paragraph 652 of the Judgement, that discriminatory intent is an ingredient of all crimes against humanity under Article 5 of the Statute, be reversed.[49]

(v) That the Witness Statements Decision be reviewed.[50]

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[46] Notice of Cross-Appeal, p. 3.
[47] *Ibid.*, p. 4.
[48] *Ibid.*
[49] *Ibid.*

3. The Appeal against Sentencing Judgement

26. By the Appeal against Sentencing Judgement, the Defence would appear to seek the following relief:

(i) That the sentence imposed by the Trial Chamber be reduced.

(ii) That the calculation of the minimum sentence imposed by the Trial Chamber be altered to run from the commencement of the Appellant's detention.

(iii) That the Appellant be given credit for time spent in detention in Germany prior to the request for deferral made by the International Tribunal in this case.

D. Sentencing Procedure

27. The Appeal against Sentencing Judgement was the subject of oral argument by the parties. However, in the view of the Appeals Chamber, that appeal may be conveniently considered in connection with the appeal by the Prosecution relating to certain counts of the Indictment in respect of which the accused was acquitted. Both the Prosecution and the Appellant agreed that, if the Appellant were found guilty on those counts, there should be a separate sentencing procedure relating thereto. As will appear below, the Appellant is found guilty on those counts, with the consequence that there will have to be a separate sentencing procedure in relation to those counts. The Appeals Chamber considers that its decision on the Appeal against Sentencing Judgement should correspondingly be deferred to the stage of a separate sentencing procedure.

28. An earlier procedure provided for a sentencing hearing to take place subsequent to conviction; that procedure was replaced, in July 1998, by Sub-rule 87(C) of the Rules, which provides for sentence to be imposed when conviction is ordered. The earlier procedure was applied when the Appellant was originally sentenced and was in force when the Appeals were brought. In respect of the change, Sub-rule 6(D) provides as follows:

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[50] *Ibid.*

> An amendment shall enter into force seven days after the date of issue of an official Tribunal document containing the amendment, but shall not operate to prejudice the rights of the accused in any pending case.

In the particular circumstances of the case, the Appeals Chamber considers that the rights of the Appellant would be prejudiced if his appeal were to be determined under the new Rule. The Appeals Chamber will therefore follow the previous procedure in respect of the counts on which the Appellant was acquitted by the Trial Chamber but on which he is now found guilty. Correspondingly, the Appeal against Sentencing Judgement will be determined at the separate sentencing stage.

II. FIRST GROUND OF APPEAL BY THE DEFENCE: INEQUALITY OF ARMS LEADING TO DENIAL OF FAIR TRIAL

A. Submissions of the Parties

1. The Defence Case

29. In the first ground of the Appeal against Judgement, the Defence alleges that the Appellant's right to a fair trial was prejudiced by the circumstances in which the trial was conducted. Specifically, it alleges that the lack of cooperation and the obstruction by certain external entities -- the Government of the *Republika Srpska* and the civic authorities in Prijedor -- prevented it from properly presenting its case at trial.[51] The Defence contends that, whilst most Defence witnesses were Serbs still residing in the *Republika Srpska*, the majority of the witnesses appearing for the Prosecution were Muslims residing in countries in Western Europe and North America whose governments cooperated fully. It avers that the lack of cooperation displayed by the authorities in the *Republika Srpska* had a disproportionate impact on the Defence. It is accordingly submitted that there was no "equality of arms" between the Prosecution and the Defence at trial, and that the effect of this lack of cooperation was serious enough to frustrate the Appellant's right to a fair trial.[52] The Defence therefore, requests the Appeals Chamber to set aside the Trial Chamber's findings of guilt and to order a re-trial.[53]

30. Citing cases decided by both the European Commission of Human Rights ("Eur. Commission H. R.") and the European Court of Human Rights ("Eur. Court H. R.") under the provision in the European Convention on Human Rights ("ECHR") corresponding to Article 20(1) of the Statute, the Defence submits that the guarantee of a fair trial under the Statute incorporates the principle of equality of arms.[54] The Defence

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[51] Appellant's Amended Brief on Judgement, paras. 1.1-1.3; T. pp. 35-40 (19 April 1999).
[52] Appellant's Amended Brief on Judgement, para 1.11.
[53] Appellant's Amended Notice of Appeal against Judgement, p. 6.
[54] *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274; *Neumeister v. Austria*, Eur. Court H. R., judgement of 27 June 1968, Series A, no. 8; *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11; *Borgers v. Belgium*, Eur. Court H. R., judgement of 30 October 1991, Series A, no. 214; *Albert and Le Compte v. Belgium*, Eur. Court H. R., judgement of 10 February 1983, Series A, no. 58; *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284; *Kaufman v. Belgium*, Application No. 10938/84, 50 Decisions and

accepts the Prosecution's submission that there is no case law which would support the inclusion of matters outside the control of the Prosecution or the Trial Chamber within the ambit of the principle of equality of arms.[55] However, the Defence argues that this principle ought to embrace not only procedural equality or parity of both parties before the Tribunal, but also substantive equality in the interests of ensuring a fair trial. It is accordingly submitted that the Appeals Chamber, when determining the scope of this principle, should be guided by the overriding right of the accused to a fair trial. [56]

31. Relying on the same cases decided under the ECHR, the Defence further claims that the principle of equality of arms embraces the minimum procedural guarantee, set down in Article 21(4)(b) of the Statute, to have adequate time and facilities for the preparation of the defence. It contends that the uncooperative stance of the authorities in the *Republika Srpska* had the effect of denying the Appellant adequate time and facilities to prepare for trial to which he was entitled under the Statute, resulting in denial of a fair trial.

32. In support of its submissions, the Defence cites paragraph 530 of the Judgement to show that the Trial Chamber was aware that both parties suffered from limited access to evidence in the territory of the former Yugoslavia. The Defence acknowledges that the Trial Chamber, recognising the difficulties faced by both parties in gaining access to evidence, exercised its powers under the Statute and Rules to alleviate the difficulties through a variety of means. However, it contends that the Trial Chamber recognised that its assistance did not resolve these difficulties but merely "alleviated" them. The Defence alleges that the inequality of arms persisted despite the assistance of the Trial Chamber and the exercise of due diligence by trial counsel, as the latter were unable to identify and trace relevant and material Defence witnesses, and potential witnesses that had been identified refused to testify out of fear. It submits that the lack of fault attributable to the Trial Chamber or the Prosecution did not serve to correct the inequality in arms, and that under these circumstances, a fair trial was impossible. [57]

Reports of the European Commission of Human Rights ("DR") 98; *X and Y v. Austria*, Application No. 7909/74, 15 DR 160.

[55] T. 30-31 (19 April 1999).

[56] T. 31 (19 April 1999).

[57] Appellant's Amended Brief on Judgement, paras. 1.4-1.6; T. 29-31, 40, 45-48 (19 April 1999).

33. The Defence contends that the Appeals Chamber should adopt the following two-fold test to determine whether, on the facts, a violation of the principle of equality of arms, broadly construed, has been established.

1) Did the Defence prove on the balance of probabilities that the failure of the civic authorities in Prijedor and the government of the *Republika Srpska* to cooperate with the Tribunal led to relevant and admissible evidence not being presented by trial counsel, despite their having acted with due diligence, because significant witnesses did not appear at trial?

2) If so, was the imbalance created between the parties sufficient to frustrate the Appellant's right to a fair trial?

34. With respect to the first branch of this test, the Defence asserts that the Appeals Chamber in its Decision on Admissibility of Additional Evidence recognised that certain Defence witnesses were intimidated into not appearing before the Trial Chamber. While acknowledging that the Appeals Chamber denied the admission of the evidence in question on the ground that it found that trial counsel did not act with due diligence to secure attendance of those witnesses at trial, it contends that what is important is that the Appeals Chamber accepted the allegations of intimidation. It adds that the Appeals Chamber in this decision also accepted that there were witnesses unknown to trial counsel during trial proceedings, despite counsel having acted with due diligence in looking for witnesses. From this the Defence draws the conclusion that, had there been some measure of cooperation, trial counsel could have called at least some of these witnesses. Thus, it is argued that relevant and admissible evidence helpful to the case for the Defence was not presented to the Trial Chamber. It is further asserted that the reason why so many witnesses could not be found was due to lack of cooperation on the part of the authorities in the *Republika Srpska*.[58]

35. As regards the second branch of the test, the Defence contends that this is a matter of weight and balance. While recognising that not every inability to ensure the production of evidence would render a trial unfair, it submits that, on the facts of the case, the volume

[58] T. 38-41 (19 April 1999).

and content of relevant and admissible evidence that could not be called at trial was such as to create an inequality of arms that served to frustrate a fair trial.[59]

36. Finally, the Defence contends that the fact that trial counsel did not file a motion seeking a stay of trial proceedings should not be held to prevent the Defence from raising the matter of denial of a fair trial on appeal. In this respect, the Defence maintains that trial counsel might have been unaware of the degree of obstruction by the Bosnian Serb authorities in preventing the discovery of witnesses helpful to the Defence case.[60] It is further pointed out that lead trial counsel in his opening statement emphasised that the prevailing conditions might frustrate the fairness of the trial. Defence counsel opined that trial counsel's decision not to seek an adjournment of the proceedings could be attributed to the wish not to prolong the extended period of the Appellant's pre-trial detention.[61]

2. The Prosecution Case

37. The Prosecution argues that equality of arms means procedural equality. According to the Prosecution, this principle entitles both parties to equality before the courts, giving them the same access to the powers of the court and the same right to present their cases. However, in its view, the principle does not call for equalising the material and practical circumstances of the two parties. Accordingly, it is contended that the claim of the Defence that it was unable to secure the attendance of important witnesses at trial does not demonstrate that there has been an inequality of arms, unless that inability was due to a relevant procedural disadvantage suffered by the Defence. It is asserted that while the obligation of the Trial Chamber is to place the parties on an equal footing as regards the presentation of the case, that Chamber cannot be responsible for factors which are beyond its capacity or competence.[62]

38. The Prosecution does not deny that in certain circumstances it could amount to a violation of fundamental fairness or "manifest injustice" to convict an accused who was unable to obtain and present certain significant evidence at trial. In its view, however, this

[59] T. 52-53 (19 April 1999).
[60] T. 50-51 (19 April 1999).
[61] T. 45-49(19 April 1999).
[62] Prosecution's Response to Appellant's Brief on Judgement, paras. 3.8–3.16, 3.30.

is a matter that goes beyond the concept of "equality of arms" as properly understood, and requires examination on a case-by-case basis. It is submitted that on the facts, no such injustice existed in the instant case.[63]

39. In the view of the Prosecution, the issue raised by the present ground of appeal is whether the degree of lack of cooperation and obstruction by the authorities in the *Republika Srpska* was such as to deny the Appellant a fair trial.[64] It submits that the Defence must prove that the result of such non-cooperation was to prevent the Defence from presenting its case at trial, and contends that the Defence has failed to meet this burden. It maintains that the Defence had a reasonable opportunity to defend the Appellant under the same procedural conditions and with the same procedural rights as were accorded to the Prosecution, and that it indeed put forward a vigorous defence by presenting the defences of alibi and mistaken identity.[65] In addition, it is noted that the Defence was helped by the broad disclosure obligation on the Prosecution under the Rules, which extends an obligation upon the Prosecution to disclose all exculpatory evidence of which it is aware. Furthermore, it is submitted that, whereas the Defence received some measure of cooperation from the authorities in the *Republika Srpska*, the Prosecution in fact received no such cooperation at all.[66] Finally, it is alleged that the Defence has not substantiated its claim that any lack of cooperation substantially disadvantaged the Defence as compared to the Prosecution.[67]

40. The Prosecution further argues that the standard which the Defence advocates for establishing a violation of the principle of equality of arms or the right to a fair trial is set too low. It claims that the Defence does not prove a violation of this principle merely by showing that relevant evidence was not presented at trial. In its view, a higher standard is called for, according to which the burden is on the Defence to prove an "abuse of discretion" by the Trial Chamber. The Prosecution maintains that the Defence has not satisfied this burden, as it has not shown that the Trial Chamber acted inappropriately in proceeding with the trial.[68]

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[63] Prosecution's Response to Appellant's Brief on Judgement, paras. 3.21-3.23; T. 88-89 (20 April 1999).
[64] T. 90-91 (20 April 1999).
[65] T. 97 (20 April 1999).
[66] T. 90, 98-99 (20 April 1999).
[67] Skeleton Argument of the Prosecution, para.10; Prosecution's Response to Appellant's Brief on Judgement, paras. 3.29, 6.9.
[68] Skeleton Argument of the Prosecution, para. 6.

41. In contrast to the view put forward by the Defence, the Prosecution denies that the Decision on Admissibility of Additional Evidence supports the position that the Appellant did not receive a fair trial. It notes that the majority of the proposed additional evidence was found by the Appeals Chamber to have been available to the Defence at trial. Furthermore, with respect to that portion of the proposed additional evidence which was found not to have been available at trial, it notes that the Appeals Chamber, after careful consideration, found that the interests of justice did not require it to be admitted on appeal. Thus, in the Prosecution's view, rather than showing a denial of fair trial, this decision is consistent with the view that the rights of the Appellant in this respect were not violated by any lack of cooperation on the part of the authorities of the *Republika Srpska*.[69]

42. The Prosecution further emphasises that Defence counsel failed to make a motion for dismissal of the case on the basis that a fair trial was impossible because of lack of cooperation of the authorities of the *Republika Srpska*. It notes that, by not doing so, the Defence failed to give the Trial Chamber the opportunity to take additional measures to overcome the difficulties faced by the Defence. It is submitted that this omission by the Defence further provides an indication that it did not believe that the Appellant's right to a fair trial had been violated.[70]

B. Discussion

1. Applicability of Articles 20(1) and 21(4)(b) of the Statute

43. Article 20(1) of the Statute provides that "[t]he Trial Chambers shall ensure that a trial is fair and expeditious [...]". This provision mirrors the corresponding guarantee provided for in international and regional human rights instruments: the International Covenant on Civil and Political Rights (1966) ("ICCPR"),[71] the European Convention on

[69] T. 96 (20 April 1999).
[70] T. 100 (20 April 1999).
[71] Article 14(1) of the ICCPR provides in part: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]."

Human Rights (1950),[72] and the American Convention on Human Rights (1969).[73] The right to a fair trial is central to the rule of law: it upholds the due process of law. The Defence submits that due process includes not only formal or procedural due process but also substantive due process.[74]

44. The parties do not dispute that the right to a fair trial guaranteed by the Statute covers the principle of equality of arms. This interpretation accords with findings of the Human Rights Committee ("HRC") under the ICCPR. The HRC stated in *Morael v. France*[75] that a fair hearing under Article 14(1) of the ICCPR must at a minimum include, *inter alia*, equality of arms. Similarly, in *Robinson v. Jamaica*[76] and *Wolf v. Panama*[77] the HRC found that there was inequality of arms in violation of the right to a fair trial under Article 14(1) of the ICCPR. Likewise, the case law under the ECHR cited by the Defence accepts that the principle is implicit in the fundamental right of the accused to a fair trial. The principle of equality of arms between the prosecutor and accused in a criminal trial goes to the heart of the fair trial guarantee. The Appeals Chamber finds that there is no reason to distinguish the notion of fair trial under Article 20(1) of the Statute from its equivalent in the ECHR and ICCPR, as interpreted by the relevant judicial and supervisory treaty bodies under those instruments. Consequently, the Chamber holds that the principle of equality of arms falls within the fair trial guarantee under the Statute.

45. What has to be decided in the present appeal is the scope of application of the principle. The Defence alleges that it should include not only procedural equality, but also substantive equality.[78] In its view, matters outside the control of the Trial Chamber can prejudice equality of arms if their effect is to disadvantage one party disproportionately. The Prosecution rejoins that equality of arms refers to the equality of the parties before the Trial Chamber. It argues that the obligation on the Trial Chamber is to ensure that the

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[72] Article 6(1) of the ECHR provides in part: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[73] Article 8(1) of the American Convention on Human Rights provides in part:
"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal or any other nature."

[74] T. 29-35 (19 April 1999).

[75] *Morael v. France*, Communication No. 207/1986, 28 July 1989, U.N. Doc. CCPR/8/Add/1, 416.

[76] *Robinson v. Jamaica*, Communication No. 223/1987, 30 March 1989, U.N. Doc. CCPR/8/Add.1, 426.

[77] *Wolf v. Panama*, Communication No. 289/1988, 26 March 1992, U.N. Doc. CCPR/11/Add.1, 399.

[78] T. 29-35 (19 April 1999).

parties before it are accorded the same procedural rights and operate under the same procedural conditions in court. According to the Prosecution, the lack of cooperation by the authorities in the *Republika Srpska* could not imperil the equality of arms enjoyed by the Defence at trial because the Trial Chamber had no control over the actions or the lack thereof of those authorities.

46. The Defence contends that the minimum guarantee in Article 21(4)(b) of the Statute to adequate time and facilities for the preparation of defence at trial forms part of the principle of equality of arms, implicit in Article 20(1). It argues that, since the authorities in the *Republika Srpska* failed to cooperate with the Defence, the Appellant did not have adequate facilities for the preparation of his defence, thereby prejudicing his enjoyment of equality of arms.

47. The Appeals Chamber accepts the argument of the Defence that, on this point, the relationship between Article 20(1) and Article 21(4)(b) is of the general to the particular. It also agrees that, as a minimum, a fair trial must entitle the accused to adequate time and facilities for his defence.

48. In deciding on the scope of application of the principle of equality of arms, account must be taken first of the international case law. In *Kaufman v. Belgium*,[79] a civil case, the Eur. Commission H. R. found that equality of arms means that each party must have a reasonable opportunity to defend its interests "under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent".[80] In *Dombo Beheer B.V. v. The Netherlands*,[81] another civil proceeding, the Eur. Court H. R. adopted the view expressed by the Eur. Commission H. R. on equality of arms, holding that "as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case – including his evidence – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent".[82] The Court decided in a criminal proceeding, *Delcourt v. Belgium*,[83] that the principle entitled both parties to full equality of treatment, maintaining that the conditions of trial must not "put the accused

[79] *Kaufman v. Belgium*, 50 DR 98.
[80] *Ibid.*, p. 115.
[81] *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274.
[82] *Ibid.*, para. 40.
[83] *Delcourt v. Belgium*, Eur. Court H. R., judgement of 17 January 1970, Series A, no. 11.

unfairly at a disadvantage."[84] It can safely be concluded from the ECHR jurisprudence, as cited by the Defence, that equality of arms obligates a judicial body to ensure that neither party is put at a disadvantage when presenting its case.

49. There is nothing in the ECHR case law that suggests that the principle is applicable to conditions, outside the control of a court, that prevented a party from securing the attendance of certain witnesses. All the cases considered applications that the judicial body had the power to grant.[85]

50. The HRC has interpreted the principle as designed to provide to a party rights and guarantees that are *procedural* in nature. The HRC observed in *B.d.B. et al. v. The Netherlands,*[86] a civil case, that Article 14 of the ICCPR "guarantees procedural equality" to ensure that the conduct of judicial proceedings is fair. Where applicants were sentenced to lengthy prison terms in judicial proceedings conducted in the absence of procedural guarantees, the HRC has found a violation of the right to fair trial under Article 14(1).[87] The communications decided under the ICCPR are silent as to whether the principle extends to cover a party's inability to secure the attendance at trial of certain witnesses where fault is attributable, not to the court, but to an external, independent entity.

51. The case law mentioned so far relates to civil or criminal proceedings before domestic courts. These courts have the capacity, if not directly, at least through the extensive enforcement powers of the State, to control matters that could materially affect the fairness of a trial. It is a different matter for the International Tribunal. The dilemma faced by this Tribunal is that, to hold trials, it must rely upon the cooperation of States

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[84] *Ibid.*, para. 34.

[85] In *Kaufman v. Belgium*, 50 DR 98, the Eur. Commission H. R. held that equality of arms did not give the applicant a right to lodge a counter-memorial. In *Neumeister v. Austria*, Eur. Court of H. R., judgement of 27 June 1968, Series A, no. 8, the Court decided that the principle did not apply to the examination of the applicant's request for provisional release, despite the prosecutor having been heard *ex parte*. In *Bendenoun v. France*, Eur. Court H. R., judgement of 24 February 1994, Series A, no. 284, the Court ruled that an applicant who did not receive a complete file from the tax authorities was not entitled thereto under the principle of equality of arms because he was aware of its contents and gave no reason for the request. In *Dombo Beheer B.V. v. The Netherlands*, Eur. Court H. R., judgement of 27 October 1993, Series A, no. 274, the Court held that there was a breach of equality of arms where the single first hand witness for the applicant company was barred from testifying whereas the defendant bank's witness was heard.

[86] *B. d. B et al. v. The Netherlands*, Communication No. 273/1989, 30 March 1989, U.N. Doc. A/44/40, 442.

[87] *Nqalula Mpandanjila et al. v. Zaire*, Communication No 138/1983, 26 March 1986, U.N. Doc. A/41/40, 121.

without having the power to compel them to cooperate through enforcement measures.[88] The Tribunal must rely on the cooperation of States because evidence is often in the custody of a State and States can impede efforts made by counsel to find that evidence. Moreover, without a police force, indictees can only be arrested or transferred to the International Tribunal through the cooperation of States or, pursuant to Sub-rule 59*bis*, through action by the Prosecution or the appropriate international bodies. Lacking independent means of enforcement, the ultimate recourse available to the International Tribunal in the event of failure by a State to cooperate, in violation of its obligations under Article 29 of the Statute, is to report the non-compliance to the Security Council.[89]

52. In light of the above considerations, the Appeals Chamber is of the view that under the Statute of the International Tribunal the principle of equality of arms must be given a more liberal interpretation than that normally upheld with regard to proceedings before domestic courts. This principle means that the Prosecution and the Defence must be equal before the Trial Chamber. It follows that the Chamber shall provide every practicable facility it is capable of granting under the Rules and Statute when faced with a request by a party for assistance in presenting its case. The Trial Chambers are mindful of the difficulties encountered by the parties in tracing and gaining access to evidence in the territory of the former Yugoslavia where some States have not been forthcoming in complying with their legal obligation to cooperate with the Tribunal. Provisions under the Statute and the Rules exist to alleviate the difficulties faced by the parties so that each side may have equal access to witnesses. The Chambers are empowered to issue such orders, summonses, subpoenas, warrants and transfer orders as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial. This includes the power to:

(1) adopt witness protection measures, ranging from partial to full protection;

(2) take evidence by video-link or by way of deposition;

(3) summon witnesses and order their attendance;

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[88] *See* "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", *The Prosecutor v. Tihomir Blaškić*, Case No.: IT-95-14-AR108*bis*, Appeals Chamber, 29 October 1997, para. 26.
[89] *Ibid.*, para. 33.

(4) issue binding orders to States for, *inter alia*, the taking and production of evidence; and

(5) issue binding orders to States to assist a party or to summon a witness and order his or her attendance under the Rules.

A further important measure available in such circumstances is:

(6) for the President of the Tribunal to send, at the instance of the Trial Chamber, a request to the State authorities in question for their assistance in securing the attendance of a witness.

In addition, whenever the aforementioned measures have proved to be to no avail, a Chamber may, upon the request of a party or *proprio motu*:

(7) order that proceedings be adjourned or, if the circumstances so require, that they be stayed.

53. Relying on the principle of equality of arms, the Defence is submitting that the Appellant did not receive a fair trial because relevant and admissible evidence was not presented due to lack of cooperation of the authorities in the *Republika Srpska* in securing the attendance of certain witnesses. The Defence is not complaining that the Trial Chamber was negligent in responding to a request for assistance. The Appeals Chamber finds that the Defence has not substantiated its claim that the Appellant was not given a reasonable opportunity to present his case. There is no evidence to show that the Trial Chamber failed to assist him when seised of a request to do so. Indeed, the Defence concedes that the Trial Chamber gave every assistance it could to the Defence when asked to do so, and even allowed a substantial adjournment at the close of the Prosecution's case to help Defence efforts in tracing witnesses.[90] Further, the Appellant acknowledges that the Trial Chamber did not deny the Defence attendance of any witness but, on the contrary, took virtually all steps requested and necessary within its authority to assist the Appellant in presenting witness testimony. Numerous instances of the granting of such motions and orders by the Trial Chamber, on matters such as protective measures for witnesses, approving the giving

[90] T. 47 (19 April 1999); Judgement, para. 32 ("Following a recess of three weeks after the close of the Prosecution case to permit the Defence to make its final preparations, the Defence case opened on 10 September 1996 [...].").

of evidence via video-conference link from Banja Luka in the *Republika Srpska*, and granting confidentiality and safe conduct to several Defence witnesses are set forth in the Judgement of the Trial Chamber.[91] Indeed, the Decision on Admissibility of Additional Evidence, by which the Defence was precluded from presenting additional evidence, was based on the fact that the Defence had failed to establish that it would have been in the interests of justice to admit such evidence. This indicates that the fact that it could not present such evidence did not detract from the fairness of the trial.

54. A further example of a measure of the Trial Chamber which was designed to assist in the preparation and presentation of the Defence case is that the Trial Chamber's Presiding Judge brought to the attention of the President of the International Tribunal certain difficulties concerning the possible attendance of three witnesses who had been summoned by the Defence.[92] She requested the President of the International Tribunal to send a letter to the Acting President of the *Republika Srpska*, Mrs. B. Plavsic, to urge her to assist the Defence in securing the presence and cooperation of these Defence witnesses. Consequently, on 19 September 1996, the President of the Tribunal sent a letter to Mrs. Plavsic. In this letter, he made reference to obstacles encountered by the Defence in securing the cooperation of these witnesses. In view, *inter alia,* of the accused's right to a fair trial, Mrs. Plavsic was therefore enjoined to "take whatever action is necessary immediately to resolve this matter so that the Defence may go forward with its case."[93]

55. The Appeals Chamber can conceive of situations where a fair trial is not possible because witnesses central to the defence case do not appear due to the obstructionist efforts of a State. In such circumstances, the defence, after exhausting all the other measures mentioned above, has the option of submitting a motion for a stay of proceedings. The Defence opined during the oral hearing that the reason why such action was not taken in the present case may have been due to trial counsel's concern regarding the long period of detention on remand. The Appeals Chamber notes that the Rules envision some relief in such a situation, in the form of provisional release, which, pursuant to Sub-rule 65(B), may be granted "in exceptional circumstances". It is not hard to imagine that a stay of proceedings occasioned by the frustration of a fair trial under prevailing trial conditions

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[91] Judgement, paras. 29-35.
[92] T. 59, 60 (20 April 1999).
[93] Letter from President Cassese to Mrs. B. Plavsic of 19 September 1996, referred to by Judge Shahabuddeen during the hearing on 20 April 1999 (*ibid.*).

would amount to exceptional circumstances under this rule. The obligation is on the complaining party to bring the difficulties to the attention of the Trial Chamber forthwith so that the latter can determine whether any assistance could be provided under the Rules or Statute to relieve the situation. The party cannot remain silent on the matter only to return on appeal to seek a trial *de novo*, as the Defence seeks to do in this case.

C. Conclusion

56. The Appeals Chamber finds that the Appellant has failed to show that the protection offered by the principle of equality of arms was not extended to him by the Trial Chamber. This ground of Appeal, accordingly, fails.

III. THIRD GROUND OF APPEAL BY THE DEFENCE: ERROR OF FACT LEADING TO A MISCARRIAGE OF JUSTICE

A. Submissions of the Parties

1. The Defence

57. The Trial Chamber made the factual finding that the Appellant was guilty of the murder of two Muslim policemen, Edin Besić and a man identified at trial by the name of Osman, based on the testimony of only one witness, Nihad Seferović. The Defence contends that the Trial Chamber erred in deciding that it was satisfied beyond reasonable doubt that he was guilty of the two murders because the Chamber relied on the uncorroborated evidence of Mr. Seferović. The Defence maintains that Mr. Seferović is an unreliable witness because he was introduced to the Prosecution by the government of Bosnia and Herzegovina, a source which the Defence alleges the Trial Chamber found to be tainted for having planted another Prosecution witness, Dragan Opacić. The latter was found to be untruthful at trial and, consequently, withdrawn by the Prosecution.

58. The Defence argues that the Trial Chamber erred in relying on the evidence of Mr. Seferović because it is implausible. Mr. Seferović, a Muslim who lived in an area under bombardment by Serbian paramilitary forces, fled to the mountains for safety. He testified at trial that he was so concerned about the welfare of his pet pigeons that he returned to town to feed them while the Serbian paramilitaries were still there. On his return to town, he saw Mr. Tadić kill two policemen. Defence counsel contended at trial that the witness was never in town at the time of the killings.

59. The Defence maintains that the Appeals Chamber, in reviewing the factual finding of the Trial Chamber, is entitled to consider all relevant evidence and can reverse the Chamber's finding if it is satisfied that no reasonable person could conclude that the evidence of Mr. Seferović proved that the Appellant was responsible for the killings.

60. The Defence asks the Appeals Chamber to reverse the Trial Chamber's finding that the Appellant is guilty of the murders of Edic Besić and the man identified by the name of Osman.[94]

2. The Prosecution

61. The Prosecution argues that the Appeals Chamber, being an appellate body, cannot reverse the Trial Chamber's findings of fact unless it were to conclude that the Defence has proved that no reasonable person could have come to the conclusion reached by the Trial Chamber based on the evidence cited by it.[95]

62. The Prosecution claims that the Defence misrepresented the Trial Chamber's findings with respect to Dragan Opacić in order to taint Mr. Seferović by association as an unreliable witness. Having lied about his family situation, Mr. Opacić had clearly aroused the Prosecution's fears about his credibility. Consequently, he was withdrawn as a witness as a precautionary measure. The Trial Chamber asked the Prosecution to investigate this matter and, having examined the situation, the Prosecution found that the investigation did not support the Defence allegation that Mr. Opacić was planted by the Bosnian government.

63. The Prosecution submits that the attempt to taint Mr. Seferović's credibility by assimilating his position to that of Mr. Opacić fails because the Trial Chamber concluded that the circumstances surrounding the testimony of the latter were unique to him. The situation of Mr. Seferović was not similar to that of Mr. Opacić. There was no need to require corroboration of his testimony because the Trial Chamber concluded that he was a reliable witness.

B. Discussion

64. The two parties agree that the standard to be used when determining whether the Trial Chamber's factual finding should stand is that of unreasonableness, that is, a

[94] In its submissions, the Defence refers to the victim identified by the Trial Chamber only as one "Osman", by the name "Osman Didovic". The Appeals Chamber is not here called upon to determine whether the name thus given by the Defence is accurate.

conclusion which no reasonable person could have reached. The task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber. Therefore, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. It is only where the evidence relied on by the Trial Chamber could not reasonably have been accepted by any reasonable person that the Appeals Chamber can substitute its own finding for that of the Trial Chamber. It is important to note that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

65. The Appeals Chamber notes that it has been the practice of this Tribunal and of the International Criminal Tribunal for Rwanda ("ICTR")[96] to accept as evidence the testimony of a single witness on a material fact without need for corroboration. The Defence does not dispute that corroboration is not required by law. As noted above, it submitted that, as a matter of fact, the evidence of Mr. Seferović cannot be relied on in the absence of corroboration because he was introduced to the Prosecution by the same source, the government of Bosnia and Herzegovina, which introduced another witness, Mr. Opacić, who was subsequently withdrawn as a witness by the Prosecution for being untruthful. The Appeals Chamber finds that Mr. Seferović's association with the Bosnian government does not taint him. The circumstances of Mr. Seferović and Mr. Opacić are different. Mr. Opacić was made known to the Prosecution while he was still in the custody of the Bosnian authorities, whereas Mr. Seferović's introduction was made through the Bosnian embassy in Brussels. Mr. Seferović was subjected to strenuous cross-examination by Defence counsel at trial. Defence counsel at trial did not recall him after learning of the withdrawal of Mr. Opacić as a witness. Furthermore, Defence counsel at trial never asked that Mr. Seferović's testimony be disregarded on the ground that he, like Mr. Opacić, was also a tainted witness. Therefore, the Appeals Chamber finds that the Trial Chamber did not err in relying on the uncorroborated testimony of Mr. Seferović.

66. The Defence alleges that the Trial Chamber erred in relying on the evidence of Mr. Seferović because it was implausible. Here, it is claimed that the Trial Chamber did not

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[95] Prosecution's Response to Appellant's Brief on Judgement, para. 2.14.

[96] More fully, the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

act reasonably in concluding from the evidence of Mr. Seferović that the Appellant was responsible for the killing of the two policemen. The Appeals Chamber does not accept as inherently implausible the witness' claim that the reason why he returned to the town where the Serbian paramilitary forces had been attacking, and from which he had escaped, was to feed his pet pigeons. It is conceivable that a person may do such a thing, even though one might think such action to be an irrational risk. The Trial Chamber, after seeing the witness, hearing his testimony, and observing him under cross-examination, chose to accept his testimony as reliable evidence. There is no basis for the Appeals Chamber to consider that the Trial Chamber acted unreasonably in relying on that evidence for its finding that the Appellant killed the two men.

C. Conclusion

67. The Appellant has failed to show that Nihad Seferović's reliability as a witness is suspect, or that his testimony was inherently implausible. Since the Appellant did not establish that the Trial Chamber erred in relying on the evidence of Mr. Seferović for its factual finding that the Appellant killed the two men, the Appeals Chamber sees no reason to overturn the finding.

IV. THE FIRST GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT IT HAD NOT BEEN PROVED THAT THE VICTIMS WERE "PROTECTED PERSONS" UNDER ARTICLE 2 OF THE STATUTE (ON GRAVE BREACHES)

A. Submissions of the Parties

1. The Prosecution Case

68. In the first ground of the Cross-Appeal, the Prosecution challenges the Appellant's acquittal on Counts 8, 9, 12, 15, 21 and 32 of the Indictment which charged the Appellant with grave breaches under Article 2 of the Statute. The Appellant was acquitted on these counts on the ground that the victims referred to in those counts had not been proved to be "protected persons" under the applicable provisions of the Fourth Geneva Convention.[97]

69. The Prosecution maintains that all relevant criteria under Article 2 of the Statute were met. Consequently, the Trial Chamber erred by relying exclusively upon the "effective control" test derived from the *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*[98] in order to determine the applicability of the grave breach provisions of the relevant Geneva Convention. The Prosecution submits that the Chamber should have instead applied the provisions of the Geneva Conventions and the relevant principles and authorities of international humanitarian law which, in its view, apply a "demonstrable link" test.

70. In distinguishing the present situation from the facts in *Nicaragua,* the Prosecution notes that *Nicaragua* was concerned with State responsibility rather than individual criminal responsibility. Further, the Prosecution asserts that the International Court of Justice in *Nicaragua* deliberately avoided dealing with the question of which body of treaty rules was applicable. Instead the Court focused on the minimum yardstick of rules contained in

[97] Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 ("Geneva Convention IV" or "Fourth Geneva Convention").

Common Article 3 of the Geneva Conventions, which in the Court's view applied to all conflicts in Nicaragua, thus obviating the need for the Court to decide which body of law was applicable in that case.

71. The Prosecution submits that the Trial Chamber erred by not applying the provisions of the Geneva Conventions and general principles of international humanitarian law to determine individual criminal responsibility for grave breaches of the Geneva Conventions. In the Prosecution's submission, these sources require that there be a "demonstrable link" between the perpetrator and a Party to an international armed conflict of which the victim is not a national.

72. The Prosecution submits that the "demonstrable link" test is satisfied on the facts of the case at hand. In its view, the Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska ("VRS") had a "demonstrable link" with the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") and the Army of the FRY ("VJ"); it was not a situation of mere logistical support by the FRY to the VRS.

73. In addition, the Prosecution submits that the Trial Chamber erred in finding that the only test relied upon in *Nicaragua* was the "effective control" test. The Court in *Nicaragua* also applied an "agency" test which, the Prosecution submits, is a more appropriate standard for determining the applicability of the grave breach provisions.

74. Were either the "effective control" test or the "agency" test to be adopted by the Appeals Chamber, the Prosecution submits that in any event both tests would be satisfied on the facts of this case. To support this contention, the Prosecution looks to the fact, *inter alia,* that after 19 May 1992, when the Yugoslav People's Army ("JNA") formally withdrew from Bosnia and Herzegovina, VRS soldiers continued to receive their salaries from the government of the FRY which also funded the pensions of retired VJ soldiers who had been serving with the VRS. The Prosecution looks to a number of additional factors in support of its contention that there was more than mere logistical support by the FRY after 19 May 1992. These factors include the structures and ranks of the VRS and VJ being identical, as well as the supervision of the VRS by the FRY after that date. From those

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[98] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* (Merits), Judgment, ICJ Reports (1986), p. 14 ("*Nicaragua*").

facts, the Prosecution draws the inference that the FRY was exercising effective military control over the VRS.

2. The Defence Case

75. The Defence asserts that the Trial Chamber was correct in applying the "effective control" test derived from *Nicaragua* and submits that the "demonstrable link" test is incorrect. The Defence formulates the test which the Appeals Chamber should apply as "were the Bosnian Serbs acting as 'organs' of another State?"[99]

76. The Defence submits that it is misleading to distinguish *Nicaragua* on the basis that the decision is concerned only with State responsibility. The Defence further argues that the Court in *Nicaragua* was concerned with the broader question of which part of international humanitarian law should apply to the relevant conduct.

77. On the facts of the present case there is no evidential basis for concluding that after 19 May 1992, the VRS was either effectively controlled by or could be regarded as an agent of the FRY government. The Defence's submission is that the FRY and the *Republika Srpska* coordinated with each other, solely as allies. For this reason, the VRS was not an organ of the FRY.

78. The Defence submits that the "demonstrable link" test is not the correct test to be applied under Article 2 of the Statute. The Defence argues that the test has no authority in international law and submits that it should also be rejected for policy reasons. If the Appeals Chamber were to accept the "demonstrable link" test, this could result in the undesirable outcome of a State being held responsible for the actions of another State or entity over which the State did not have any effective control. Further, the Defence submits that the test at issue introduces uncertainty into international law as it is unclear what degree of link is necessary in order to satisfy the test.

[99] *See* Defence's Substituted Response to Cross-Appellant's Brief, para. 2.6.

79. The Defence concedes that if the correct test were the "demonstrable link" test, on the facts of this case the test would be satisfied.[100]

B. Discussion

1. The Requirements for the Applicability of Article 2 of the Statute

80. Article 2 of the Statute embraces various disparate classes of offences with their own specific legal ingredients. The general legal ingredients, however, may be categorised as follows.

(i) *The nature of the conflict.* According to the interpretation given by the Appeals Chamber in its decision on a Defence motion for interlocutory appeal on jurisdiction in the present case,[101] the international nature of the conflict is a prerequisite for the applicability of Article 2.

(ii) *The status of the victim.* Grave breaches must be perpetrated against persons or property defined as "protected" by any of the four Geneva Conventions of 1949. To establish whether a person is "protected", reference must clearly be made to the relevant provisions of those Conventions.

81. In the instant case it therefore falls to the Appeals Chamber to establish first of all (i) on what *legal* conditions armed forces fighting in a *prima facie* internal armed conflict may be regarded as acting on behalf of a foreign Power and (ii) whether in the instant case the *factual* conditions which are required by law were satisfied.

82. Only if the Appeals Chamber finds that the conflict was international at all relevant times will it turn to the second question of whether the victims were to be regarded as "protected persons".

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[100] *See* Defence's Substituted Response to Cross-Appellant's Brief, paras. 2.1 – 2.18; T. 219-220 (21 April 1999).

[101] *See* "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-AR72, Appeals Chamber, 2 October 1995 ("Tadić Decision on Jurisdiction"), paras. 79-84 (*Tadić* (1995) I ICTY JR 353).

2. The Nature of the Conflict

83. The requirement that the conflict be international for the grave breaches regime to operate pursuant to Article 2 of the Statute has not been contested by the parties.

84. It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.

85. In the instant case, the Prosecution claims that at all relevant times, the conflict was an international armed conflict between two States, namely Bosnia and Herzegovina ("BH") on the one hand, and the FRY on the other.[102] Judge McDonald, in her dissent, also found the conflict to be international at all relevant times.[103]

86. The Trial Chamber found the conflict to be an international armed conflict between BH and FRY until 19 May 1992, when the JNA formally withdrew from Bosnia and Herzegovina.[104] However, the Trial Chamber did not explicitly state what the nature of the conflict was *after* 19 May 1992. As the Prosecution points out, "[t]he Trial Chamber made no express finding on the classification of the armed conflict between the Bosnian Serb

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[102] *See* para. 2.25 of the Cross-Appellant's Brief:
"[The] SFRY/FRY is a Party to an international armed conflict with [...] BH on the basis that the Trial Chamber found that until 19 May 1992 the JNA was involved in an international armed conflict with the BH, and that thereafter the VJ was directly involved in an armed conflict against the BH. Consequently, *it is submitted that the only conclusion that can be drawn is that an international armed conflict existed between the BH and the FRY during 1992."* (emphasis added).

[103] *See* para. 1 of Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997 ("Separate and Dissenting Opinion of Judge McDonald") where she held: "I find that at all times relevant to the Indictment, the armed conflict in opština Prijedor was international in character [...]".

[104] *See* Judgement, paras. 569-608:
"569. [...] [I]t is clear from the evidence before the Trial Chamber that, from the beginning of 1992 until 19 May 1992, *a state of international armed conflict existed* in at least part of the territory of Bosnia and Herzegovina. *This was an armed conflict between the forces of the Republic of Bosnia and Herzegovina on the one hand and those of the Federal Republic of Yugoslavia (Serbia and Montenegro)*, being the JNA (later the VJ), working with sundry paramilitary and Bosnian Serb forces, on the other. [...].
570. For evidence of this it is enough to refer generally to the evidence presented as to the bombardment of Sarajevo, the seat of government of the Republic of Bosnia and Herzegovina, in April 1992 by Serb forces, their attack on towns along Bosnia and Herzegovina's border with Serbia on the

Army (VRS) and the BH after the VRS was established in May 1992".[105] Nevertheless, it may be held that the Trial Chamber at least implicitly considered that after 19 May 1992 the conflict became internal in nature.[106]

87. In the instant case, there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict prior to 19 May 1992 was international in character.[107] The question whether after 19 May 1992 it continued to be international or became instead exclusively internal turns on the issue of whether Bosnian Serb forces – in whose hands the Bosnian victims in this case found themselves – could be considered as *de iure* or *de facto* organs of a foreign Power, namely the FRY.

3. The Legal Criteria for Establishing When, in an Armed Conflict Which is *Prima Facie* Internal, Armed Forces May Be Regarded as Acting On Behalf of a Foreign Power, Thereby Rendering the Conflict International

(a) International Humanitarian Law

88. The Prosecution maintains that the alleged perpetrator of crimes must be "sufficiently linked to a Party to the conflict" in order to come under the jurisdiction of Article 2 of the Statute.[108] It further contends that "a showing of a demonstrable link between the VRS and the FRY or VJ" is sufficient.[109] According to the Prosecution, "[s]uch a link could, at most, be proven by a showing of a general form of control. This

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Drina River and their invasion of south-eastern Herzegovina from Serbia and Montenegro [...]." (emphasis added).

[105] Cross-Appellant's Brief, para. 2.5.

[106] *See* Judgement, paras. 607-608.

[107] In addition to the evidence referred to in para. 570 of the Judgement, reference may also be made to the facts cited by Judge Li in his Separate Opinion to the *Tadić* Decision on Jurisdiction (paras. 17-19), for example BH's Declaration that it was at war with the FRY and the reports of various expert bodies suggesting that the conflict was international. Moreover, in three Rule 61 Decisions involving the conflict between the Serbs and the BH Government (*Nikolić, Vukovar Hospital,* and *Karadžić and Mladić),* Trial Chambers have found the conflict to have been an international armed conflict. (*See* "Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", *The Prosecutor v. Dragan Nikolić*, Case No.: IT-94-2-R61, Trial Chamber I, 20 October 1995, para 30 (*Nikolić* (1995) II ICTY JR 738); "Review of Indictment Pursuant to Rule 61", *The Prosecutor v. Mile Mrksić et al.*, Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, para. 25; "Review of the Indictments Pursuant to Rule 61 of the Rules Procedure and Evidence", *The Prosecutor v. Radovan Karadžić and Ratko Mladić*, Case No.: IT-95-18-R61, Trial Chamber I, 11 July 1996, para. 88)).

[108] Cross-Appellant's Brief, para. 2.31.

legal standard finds support in the provisions of the Geneva Conventions, the jurisprudence of the trials that followed the Second World War, the Tribunal's decisions, the writings of leading publicists, and other authorities."[110]

89. The Prosecution also contends that the determination of the conditions for considering whether Article 2 of the Statute is applicable must be made in accordance with the provisions of the Geneva Conventions and the relevant principles of international humanitarian law. By contrast, in its opinion the international law of State responsibility has no bearing on the requirements on grave breaches laid down in the relevant Geneva provisions. According to the Prosecution "[i]t would lead to absurd results to apply the rules relating to State responsibility to assist in determining such a question" (i.e. whether certain armed forces are sufficiently related to a High Contracting Party).[111]

90. Admittedly, the legal solution to the question under discussion might be found in the body of law that is more directly relevant to the question, namely, international humanitarian law. This corpus of rules and principles may indeed contain legal criteria for determining when armed forces fighting in an armed conflict which is *prima facie* internal may be regarded as acting on behalf of a foreign Power even if they do not formally possess the status of its organs. These criteria may differ from the standards laid down in general international law, that is in the law of State responsibility, for evaluating acts of individuals not having the status of State officials, but which are performed on behalf of a certain State.

91. The Appeals Chamber will therefore discuss the question at issue first from the viewpoint of international humanitarian law. In particular, the Appeals Chamber will consider the conditions under which armed forces fighting against the central authorities *of the same State* in which they live and operate may be deemed to act on behalf of another State. In other words, the Appeals Chamber will identify the conditions under which those forces may be assimilated to organs of a State other than that on whose territory they live and operate.

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[109] *Ibid.*, para. 2.30.
[110] *Ibid.*
[111] *Ibid.*, paras. 2.21-2.23.

92. A starting point for this discussion is provided by the criteria for lawful combatants laid down in the Third Geneva Convention of 1949.[112] Under this Convention, militias or paramilitary groups or units may be regarded as legitimate combatants if they form "part of [the] armed forces" of a Party to the conflict (Article 4A(1)) or "belong [...]" to a "Party to the conflict" (Article 4A(2)) and satisfy the other four requirements provided for in Article 4A(2).[113] It is clear that this provision is primarily directed toward establishing the requirements for the status of lawful combatants. Nevertheless, one of its logical consequences is that if, in an armed conflict, paramilitary units "belong" to a State other than the one against which they are fighting, the conflict is international and therefore serious violations of the Geneva Conventions may be classified as "grave breaches".

93. The content of the requirement of "belonging to a Party to the conflict" is far from clear or precise. The authoritative ICRC Commentary does not shed much light on the matter, for it too is rather vague.[114] The rationale behind Article 4 was that, in the wake of World War II, it was universally agreed that States should be legally responsible for the conduct of irregular forces they sponsor. As the Israeli military court sitting in Ramallah rightly stated in a decision of 13 April 1969 in *Kassem et al.*:

> In view, however, of the experience of two World Wars, the nations of the world found it necessary to add the fundamental requirement of the total responsibility of Governments

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[112] Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 ("Geneva Convention III" or "Third Geneva Convention").

[113] These four conditions are as follows:

(a) that of being commanded by a person responsible for his subordinates;
(b) that of having a fixed distinctive sign recognisable at a distance;
(c) that of carrying arms openly; and
(d) that of conducting their operations in accordance with the laws and customs of war.

It might be contended that these conditions, which undoubtedly had become part of customary international law, may now be considered to have been replaced by the different conditions set out in Article 44(3) and 43(1) of Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 1977). This contention should of course be premised on the assumption – for which proof is required - that these two Articles have already been transformed into customary international rules.

Be that as it may, the requirement in Article 43(1) of "[being] under a command responsible to [a] party [to the conflict] for the conduct of its subordinates" has not replaced that of "belonging to a Party to the conflict" provided for in Article 4(A)(2) of the Third Geneva Convention. *See* generally the International Committee of the Red Cross ("ICRC") Commentary on the Additional Protocols (Yves Sandoz *et al.* (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva 1987), pp. 506-517, paras. 1659-1681.

[114] Jean Pictet (ed.), Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War, International Committee of the Red Cross, Geneva, 1960, First reprint, Geneva, 1994, p. 57:

> "[T]here should be a *de facto* relationship between the resistance organisation [or militia or volunteer corps] and the party [...] which is in a state of war, but the existence of this relationship is sufficient. It may find expression merely by tacit agreement, if the operations are such as to indicate clearly for which side the resistance organisation [or militia or volunteer corps] is fighting".

> for the operations of irregular corps and thus ensure that there was someone to hold accountable if they did not act in accordance with the laws and customs of war.[115]

94. In other words, States have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars *vis-à-vis* that Party to the conflict. These then may be regarded as the ingredients of the term "belonging to a Party to the conflict".

95. The Appeals Chamber thus considers that the Third Geneva Convention, by providing in Article 4 the requirement of "belonging to a Party to the conflict", implicitly refers to a test of control.

96. This conclusion, based on the letter and the spirit of the Geneva Conventions, is borne out by the entire logic of international humanitarian law. This body of law is not grounded on formalistic postulates. It is not based on the notion that only those who have the formal status of State organs, i.e., are members of the armed forces of a State, are duty bound both to refrain from engaging in violations of humanitarian law as well as - if they are in a position of authority - to prevent or punish the commission of such crimes. Rather, it is a realistic body of law, grounded on the notion of effectiveness and inspired by the aim of deterring deviation from its standards to the maximum extent possible. It follows, amongst other things, that humanitarian law holds accountable not only those having formal positions of authority but also those who wield *de facto* power as well as those who exercise control over perpetrators of serious violations of international humanitarian law. Hence, in

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[115] *Military Prosecutor v. Omar Mahmud Kassem et al.*, 42 *International Law Reports* 1971, p. 470, at p. 477. The court consequently held that the accused, members of the PLO captured by Israeli forces in the territories occupied by Israel, did not belong to any Party to the conflict. As the court put it (*ibid.*, pp. 477-478):

> "In the present case [... n]o Government with which we are in a state of war accepts responsibility for the acts of the Popular Front for the Liberation of Palestine. The Organisation itself, so far as we know, is not prepared to take orders from the Jordan[ian] Government, witness[ed by] the fact that [the Organization] is illegal in Jordan and has been repeatedly harassed by the Jordan[ian] authorities."

cases such as that currently under discussion, what is required for criminal responsibility to arise is some measure of control by a Party to the conflict over the perpetrators.[116]

97. It is nevertheless imperative to *specify* what *degree of authority or control* must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal. Indeed, the legal consequences of the characterisation of the conflict as either internal or international are extremely important. Should the conflict eventually be classified as international, it would *inter alia* follow that a foreign State may in certain circumstances be held responsible for violations of international law perpetrated by the armed groups acting on its behalf.

(b) The Notion of Control: The Need for International Humanitarian Law to Be Supplemented by General International Rules Concerning the Criteria for Considering Individuals to be Acting as *De Facto* State Organs

98. International humanitarian law does not contain any criteria unique to this body of law for establishing when a group of individuals may be regarded as being under the control of a State, that is, as acting as *de facto* State officials.[117] Consequently, it is necessary to

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[116] *See* also the ICRC Commentary to Article 29 of the Fourth Geneva Convention (Jean Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958, First Reprint, 1994, p. 212):

> "It does not matter whether the person guilty of treatment contrary to the Convention is an agent of the Occupying Power or in the service of the occupied State; what is important is to know where the decision leading to the unlawful act was made, where the intention was formed and the order given. If the unlawful act was committed at the instigation of the Occupying Power, then the Occupying Power is responsible; if, on the other hand, it was the result of a truly independent decision on the part of the local authorities, the Occupying Power cannot be held responsible."

[117] The Appeals Chamber is aware of another approach taken to the question of imputability in the area of international humanitarian law. The Appeals Chamber is referring to the view whereby by virtue of Article 3 of the IVth Hague Convention of 1907 and Article 91 of Additional Protocol I, international humanitarian law establishes a special regime of State responsibility; under this *lex specialis* States are responsible for all acts committed by their "armed forces" regardless of whether such forces acted as State officials or private persons. In other words, whether or not in an armed conflict individuals act in a private capacity, their acts are attributed to a State if such individuals are part of the "armed forces" of that State. This opinion was authoritatively set forth by some members of the International Law Commission ("ILC") (Professor Reuter observed that "[i]t was now a principle of codified international law that States were responsible for all acts of their armed forces" (*Yearbook of the International Law Commission*, 1975, vol. I, p. 7, para. 5). Professor Ago stated that the IVth Hague Convention of 1907 "made provision for a veritable guarantee covering all damage that might be caused by armed forces, whether they had acted as organs or as private persons" (*ibid.*, p. 16, para. 4)). This view also has been forcefully advocated in the legal literature.
As is clear from the reasoning the Appeals Chamber sets out further on in the text of this Judgement, even if this approach is adopted, the test of control as delineated by this Chamber remains indispensable for

examine the notion of control by a State over individuals, laid down in general international law, for the purpose of establishing whether those individuals may be regarded as acting as *de facto* State officials. This notion can be found in those general international rules on State responsibility which set out the legal criteria for attributing to a State acts performed by individuals not having the formal status of State officials.

(c) The Notion of Control Set Out By the International Court of Justice in *Nicaragua*

99. In dealing with the question of the legal conditions required for individuals to be considered as acting on behalf of a State, i.e., as *de facto* State officials, a high degree of control has been authoritatively suggested by the International Court of Justice in *Nicaragua*.

100. The issue brought before the International Court of Justice was whether a foreign State, the United States, because of its financing, organising, training, equipping and planning of the operations of organised military and paramilitary groups of Nicaraguan rebels (the so-called *contras*) in Nicaragua, was responsible for violations of international humanitarian law committed by those rebels. The Court held that a high degree of control was necessary for this to be the case. It required that (i) a Party not only be in effective control of a military or paramilitary group, but that (ii) the control be exercised with respect to the specific operation in the course of which breaches may have been committed.[118] The Court went so far as to state that in order to establish that the United States was responsible for "acts contrary to human rights and humanitarian law" allegedly perpetrated by the Nicaraguan *contras,* it was necessary to prove that the United States had specifically "directed or enforced" the perpetration of those acts.[119]

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determining when individuals who, formally speaking, are not military officials of a State may nevertheless be regarded as forming part of the armed forces of such a State.

[118] *Nicaragua,* para. 115. As the Court put it, there must be "effective control of the military or paramilitary operations in the course of which the alleged violations [of international human rights and humanitarian law] were committed".

[119] *Ibid.,* para. 115:

> "All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State."

101. As is apparent, and as was rightly stressed by Trial Chamber II in *Rajić*[120] and restated by the Prosecution in the instant case,[121] the issue brought before the International Court of Justice revolved around *State responsibility*; what was at stake was not the criminal culpability of the *contras* for serious violations of international humanitarian law, but rather the question of whether or not the *contras* had acted as *de facto* organs of the United States on its request, thus generating the international responsibility of that State.

(i) Two Preliminary Issues

102. Before examining whether the *Nicaragua* test is persuasive, the Appeals Chamber must deal with two preliminary matters which are material to our discussion in the instant case.

103. First, with a view to limiting the scope of the test at issue, the Prosecution has contended that the criterion for ascertaining *State responsibility* is different from that necessary for establishing *individual criminal responsibility.* In the former case one would have to decide whether serious violations of international humanitarian law by private individuals may be attributed to a State because those individuals acted as *de facto* State officials. In the latter case, one would have instead to establish whether a private individual may be held criminally responsible for serious violations of international humanitarian law amounting to "grave breaches".[122] Consequently, it has been asserted, the *Nicaragua* test, while valid within the context of State responsibility, is immaterial to the issue of individual criminal responsibility for "grave breaches". The Appeals Chamber, with respect, does not share this view.

104. What is at issue is not the distinction between the two classes of responsibility. What is at issue is a *preliminary question*: that of *the conditions on which under international law an individual may be held to act as a de facto organ of a State.* Logically these conditions must be the same both in the case: (i) where the court's task is to ascertain whether an act performed by an individual may be attributed to a State, thereby generating

[120] *See* "Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", *The Prosecutor v. Ivica Rajić*, Case No.: IT-95-12-R61, Trial Chamber II, 13 September 1996, para. 25.
[121] Cross-Appellant's Brief, paras. 2.14-2.17.
[122] Cross-Appellant's Brief, paras. 2.16-2.17; Cross-Appellant's Brief in Reply, para. 2.19.

the international responsibility of that State; and (ii) where the court must instead determine whether individuals are acting as *de facto* State officials, thereby rendering the conflict international and thus setting the necessary precondition for the "grave breaches" regime to apply. In both cases, what is at issue is not the distinction between State responsibility and individual criminal responsibility. Rather, the question is that of establishing the criteria for the legal imputability to a State of acts performed by individuals not having the status of State officials. In the one case these acts, if they prove to be attributable to a State, will give rise to the international responsibility of that State; in the other case, they will ensure that the armed conflict must be classified as international.

105. As stated above, international humanitarian law does not include legal criteria regarding imputability specific to this body of law. Reliance must therefore be had upon the criteria established by general rules on State responsibility.

106. The second preliminary issue relates to the *interpretation* of the judgement delivered by the International Court of Justice in *Nicaragua*. According to the Prosecution, in that case the Court applied "both an 'agency' test and an 'effective control' test".[123] In the opinion of the Prosecution, the Court first applied the "agency" test when considering whether the *contras* could be equated with United States officials for legal purposes, in order to determine whether the United States could incur responsibility in general for the acts of the *contras*. According to the Prosecution this test was one of dependency, on the one side, and control, on the other.[124] In the opinion of the Prosecution, the Court then applied the "effective control" test to determine whether the United States could be held responsible for particular acts committed by the *contras* in violation of international humanitarian law. This test hinged on the issuance of specific directives or instructions concerning the breaches allegedly committed by the *contras*.[125]

[123] Cross-Appellant's Brief, para. 2.56.
[124] According to the Prosecution (Cross-Appellant's Brief, para. 2.58), the Court applied the "agency" test when considering whether the *contras* engaged the responsibility of the United States. The Prosecution has pointed out that in this regard the Court "did not refer to the need for effective control, but rather" – to quote the words of the Court cited by the Prosecution – "whether or not the relationship [...] was so much one of dependency on the one side and control on the other that it would be right to equate the *contras*, for legal purposes, with an organ of the United States Government, or as acting on behalf of that Government" (*Nicaragua,* para. 109).
[125] Cross-Appellant's Brief, paras. 2.57-2.58.

107. The Appeals Chamber considers that the Prosecution's submissions are based on a misreading of the judgement of the International Court of Justice and a misapprehension of the doctrine of State responsibility on which that judgement is grounded.

108. Clearly, the Court did use two tests, but in any case its tests were conceived in a manner different from what is contended by the Prosecution, and in addition they were to a large extent set out along the lines dictated by customary international law. Admittedly, in its judgement, the Court did not always follow a straight line of reasoning (whereas it would seem that a jurisprudential approach more consonant with customary international law was taken by Judge Ago in his Separate Opinion).[126] In substance, however, the Court first evaluated those acts which, "in the submission of Nicaragua, involved the responsibility of the United States in a more direct manner".[127] To this end it discussed two categories of individuals and their relative acts or transactions. First, the Court established whether the individuals concerned were officials of the United States, in which case their acts were indisputedly imputable to the State. Almost in the same breath the Court then discussed the different question of whether individuals not having the status of United States officials but allegedly paid by and acting under the instructions of United States organs, could legally involve the responsibility of that State. These individuals were Latin American operatives, the so-called UCLAs ("Unilaterally Controlled Latino Assets"). The Court then moved to ascertain whether the responsibility of the United States could arise "in a less direct manner" (to borrow from the phraseology used by the Court). It therefore set out to determine whether other individuals, the so-called *contras*, although not formally officials of the United States, acted in such a way and were so closely linked to that State that their acts could be legally attributed to it.

109. It would therefore seem that in *Nicaragua* the Court distinguished between three categories of individuals. The first comprised those who did have the status of officials: the members of the Government administration or armed forces of the United States. With regard to these individuals, the Court clearly started from a basic assumption, which the same Court recently defined as "a well-established rule of international law",[128] that a State incurs responsibility for acts in breach of international obligations committed by individuals

[126] *See Nicaragua*, pp. 187-190.
[127] *See Nicaragua*, para. 75.
[128] *See* the Advisory Opinion delivered by the ICJ on 29 April 1999 in *Difference Relating to the Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, para. 62.

who enjoy the status of organs under the national law of that State[129] or who at least belong to public entities empowered within the domestic legal system of the State to exercise certain elements of governmental authority.[130] The other two categories embraced individuals who, by contrast, were not formally organs or agents of the State. There were, first, those individuals not having United States nationality (the UCLAs) who acted while being in the pay, and on the direct instructions and under the supervision of United States military or intelligence personnel, to carry out specific tasks such as the mining of Nicaraguan ports or oil installations. The Court held that their acts were imputable to the United States, either on account of the fact that, in addition to being paid by United States agents or officials, they had been given specific instructions by these agents or officials and had acted under their supervision,[131] or because "agents of the United States" had "participated in the planning, direction, support and execution" of specific operations (such as the blowing up of underwater oil pipelines, attacks on oil and storage facilities, etc.).[132] The other category of individuals lacking the status of United States officials comprised the

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[129] Customary international law on the matter is correctly restated in Article 5 of the Draft Articles on State Responsibility adopted in its first reading by the United Nations International Law Commission: "For the purposes of the present articles [of Chapter II: The 'Act of the State' under International Law], conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question" (*Report of the International Law Commission on the work of its Forty-Eighth Session* (6 May-26 July 1996), U.N. Doc. A/51/10, p. 126).

Article 5, as provisionally adopted by the ILC Drafting Committee in 1998, is even clearer. It provides (International Law Commission, Fiftieth Session, 1998, U.N. Doc. A/CN.4/L.569, p. 2):

> "1. For the purposes of the present articles, the conduct of any State organ acting in that capacity shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.
>
> 2. For the purposes of paragraph 1, *an organ includes any person or body which has that status in accordance with the internal law of the State.*" (emphasis added).

[130] *See* Article 7 of the ILC Draft Articles on State Responsibility adopted by the International Law Commission on first reading. It provides:

> "1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.
>
> 2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question".

See the *First Report on State Responsibility by the Special Rapporteur J. Crawford* (22 July 1998), U.N. Doc. A/CN.4/490/ Add.5, pp. 12-16. *See* also the text of the same provision as provisionally adopted by the ILC Drafting Committee in 1998 (U.N. Doc. A/CN.4/L.569, p. 2). The text of Article 7, as provisionally adopted by the ILC Drafting Committee in 1998, provides:

> "The conduct of an entity which is not an organ of the State under article 5 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the entity was acting in that capacity in the case in question". (*ibid.*)

[131] *See Nicaragua*, paras. 75-80.

contras. It was primarily with regard to the *contras* that the Court asked itself on what conditions individuals without the status of State officials could nevertheless engage the responsibility of the United States as having acted as *de facto* State organs. It was with respect to the *contras* that the Court developed the doctrine of "effective control".

110. At one stage in the judgement, when dealing with the *contras*, the Court appeared to lay down a "dependence and control" test:

> What the Court has to determine at this point is whether or not the relationship of the *contras* to the United States government was so much one of *dependence on the one side and control on the other* that it would be right to equate the *contras*, for legal purposes, with an organ of the United States government, or as acting on behalf of that Government.[133]

111. The Prosecution, and Judge McDonald in her dissent, argue that by these words the Court set out an "agency test". According to them, the Court only resorted to the "effective control" standard once it had *found no agency relationship* between the *contras* and the United States to exist, so that the *contras* could not be considered organs of the United States. The Court, according to this argument, then considered whether *specific operations* of the *contras* could be attributed to the United States, and the standard it adopted for this attribution was the "effective control" standard.

112. The Appeals Chamber does not subscribe to this interpretation. Admittedly, in paragraph 115 of the *Nicaragua* judgement, where "effective control" is mentioned, it is unclear whether the Court is propounding "effective control" as an alternative test to that of "dependence and control" set out earlier in paragraph 109, or is instead spelling out the requirements of the same test. The Appeals Chamber believes that the latter is the correct interpretation. In *Nicaragua,* in addition to the "agency" test (properly construed, as shall be seen in the next paragraph, as being designed to ascertain whether or not an individual has the formal status of a State official), the Court propounded only the "effective control" test. This conclusion is supported by the evidently stringent application of the "effective control" test which the Court used in finding that the acts of the *contras* were not imputable to the United States.

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[132] *Ibid.*, para. 86.
[133] *Ibid.*, para. 109 (emphasis added).

113. In contrast with what the Prosecution, in following Judge McDonald's dissent, has termed the "agency" test, the Court's agency test amounts instead to a determination of the status of an individual as an organ or official (or member of a public entity exercising certain elements of governmental authority) within the domestic legal order of a particular State. In this regard, it would seem that the Separate Opinion of Judge Ago relied upon by Judge McDonald[134] and the Prosecution[135] does not actually support their interpretation.[136]

114. On close scrutiny, and although the distinctions made by the Court might at first sight seem somewhat unclear, the contention is warranted that in the event, the Court essentially set out *two tests of State responsibility*: (i) responsibility arising out of unlawful acts of *State officials;* and (ii) responsibility generated by acts performed *by private individuals acting as de facto State organs.* For State responsibility to arise under (ii), the Court required that private individuals not only be paid or financed by a State, and their action be coordinated or supervised by this State, but also that the State should issue specific instructions concerning the commission of the unlawful acts in question. Applying this test, the Court concluded that in the circumstances of the case it was met as far as the UCLAs were concerned (who were paid and supervised by the United States and in addition acted under their specific instructions). By contrast, the test was not met as far as the *contras* were concerned: in their case no specific instructions had been issued by the United States concerning the violations of international humanitarian law which they had allegedly perpetrated.

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[134] Separate and Dissenting Opinion of Judge McDonald, para. 25.
[135] Cross-Appellant's Brief, para. 2.58.
[136] *See* the Separate Opinion of Judge Ago in *Nicaragua*, paras. 14-17. Judge Ago correctly stated that it fell to the Court first to establish whether the individuals at issue had the status of national officials or officials of national public entities and then, where necessary, to consider whether, lacking this status, they acted instead as *de facto* State officials, thereby engaging the responsibility of the State. For the purpose of establishing the international responsibility of a State, he therefore identified two broad classes of individuals: those having the status of officials of the State or of its autonomous bodies, and those lacking such a status. Clearly, for Judge Ago the issue of deciding whether an individual had acted as a *de facto* State organ arose only with respect to the latter category. Furthermore, Judge Ago characterised the CIA and the so-called UCLAs in a manner different from the Court (*see* para. 15).

(ii) The Grounds On Which the *Nicaragua* Test Does Not Seem To Be Persuasive

115. The "effective control" test enunciated by the International Court of Justice was regarded as correct and upheld by Trial Chamber II in the Judgement.[137] The Appeals Chamber, with respect, does not hold the *Nicaragua* test to be persuasive. There are two grounds supporting this conclusion.

a. The *Nicaragua* Test Would Not Seem to Be Consonant With the Logic of the Law of State Responsibility

116. A first ground on which the *Nicaragua* test as such may be held to be unconvincing is based on the very logic of the entire system of international law on State responsibility.

117. The principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. These principles are reflected in Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission and, even more clearly, in the text of the same provisions as provisionally adopted in 1998 by the ILC Drafting Committee.[138] Under this Article, if it is proved that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The rationale behind this rule is to prevent States from escaping international responsibility by having private individuals carry out tasks that may

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[137] Judgement, paras. 584-588.

[138] Article 8 of the Draft provides:

"The conduct of a person or group of persons shall also be considered as an act of the State under international law if:

a) it is established that such person or group of persons was in fact acting on behalf of that State; or

b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority" (U.N. Doc A/35/10, para. 34, in *Yearbook of the International Law Commission*, 1980, vol. II (2)).

See also the *First Report on State Responsibility by the Special Rapporteur J. Crawford* (U.N. Doc. A/CN. 4/490/Add.5, pp. 16-24).

The text of Article 8 as provisionally adopted by the ILC Drafting Committee in 1998 provides:

"The conduct of a person or group of persons shall be considered an act of the State under international law if the person or group of persons was in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct" (A/CN.4/ L.569, p. 3).

not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility. In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other to disassociate themselves from such conduct when these individuals breach international law. The requirement of international law for the attribution to States of acts performed by private individuals is that the State exercises control over the individuals. The *degree of control* may, however, vary according to the factual circumstances of each case. The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control. Rather, various situations may be distinguished.

118. One situation is the case of a private individual who is engaged by a State to perform some specific illegal acts in the territory of another State (for instance, kidnapping a State official, murdering a dignitary or a high-ranking State official, blowing up a power station or, especially in times of war, carrying out acts of sabotage). In such a case, it would be necessary to show that the State issued specific instructions concerning the commission of the breach in order to prove – if only by necessary implication – that the individual acted as a *de facto* State agent. Alternatively it would be necessary to show that the State has publicly given retroactive approval to the action of that individual. A generic authority over the individual would not be sufficient to engage the international responsibility of the State. A similar situation may come about when an unorganised group of individuals commits acts contrary to international law. For these acts to be attributed to the State it would seem necessary to prove not only that the State exercised some measure of authority over those individuals but also that it issued specific instructions to them concerning the performance of the acts at issue, or that it *ex post facto* publicly endorsed those acts.

119. To these situations another one may be added, which arises when a State entrusts a private individual (or group of individuals) with the specific task of performing *lawful* actions on its behalf, but then the individuals, in discharging that task, breach an international obligation of the State (for instance, a private detective is requested by State authorities to protect a senior foreign diplomat but he instead seriously mistreats him while performing that task). In this case, by analogy with the rules concerning State responsibility for acts of State officials acting *ultra vires*, it can be held that the State incurs responsibility on account of its specific request to the private individual or individuals to discharge a task on its behalf.

120. One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up *an organised and hierarchically structured group*, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.

121. This kind of State control over a military group and the fact that the State is held responsible for acts performed by a group independently of any State instructions, or even contrary to instructions, to some extent equates the group with State organs proper. Under the rules of State responsibility, as restated in Article 10 of the Draft on State Responsibility as provisionally adopted by the International Law Commission,[139] a State is internationally accountable for *ultra vires* acts or transactions of its organs. In other words it incurs responsibility even for acts committed by its officials outside their remit or contrary to its behest. The rationale behind this provision is that a State must be held accountable for acts of its organs whether or not these organs complied with instructions, if any, from the higher authorities. Generally speaking, it can be maintained that the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities and aims at ensuring that States entrusting some functions to

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[139] Article 10, as adopted on first reading by the International Law Commission, provides:

"The conduct of an organ of a State, of a territorial governmental entity or of an entity empowered to exercise elements of the governmental authority, such organ having acted in that capacity, shall be considered as an act of the State under international law even if, in the particular case, the organ exceeded its competence according to internal law or contravened instructions concerning its activity". (*Report of the International Law Commission on the work of its thirty-second session* (5 May–25 July 1980), U.N. Doc. A/35/10, p.31).

See also the *First Report on State Responsibility by the Special Rapporteur J. Crawford*, U.N. Doc. A/CN./490/Add.5, pp. 29-31. The text of article 10, as provisionally adopted in 1998 by the ILC Drafting Committee, provides:

"The conduct of an organ of a State or of an entity empowered to exercise elements of the governmental authority, such organ or entity having acted in that capacity, shall be considered an act of the State under international law even if, in the particular case, the organ or entity exceeded its authority or contravened instructions concerning its exercise" (U.N. Doc. A/CN.4/ L.569, p. 3).

individuals or groups of individuals must answer for their actions, even when they act contrary to their directives.[140]

122. The same logic should apply to the situation under discussion. As noted above, the situation of an organised group is different from that of a single private individual performing a specific act on behalf of a State. In the case of an organised group, the group normally engages in a series of activities. If it is under the overall control of a State, it must perforce engage the responsibility of that State for its activities, *whether or not each of them was specifically imposed, requested or directed by the State.* To a large extent the wise words used by the United States-Mexico General Claims Commission in the *Youmans* case with regard to State responsibility for acts of State military officials should hold true for acts of organised groups over which a State exercises overall control.[141]

123. What has just been said should not, of course, blur the necessary distinction between the various legal situations described. In the case envisaged by Article 10 of the Draft on State Responsibility (as well as in the situation envisaged in Article 7 of the same Draft), State responsibility objectively follows from the fact that the individuals who engage in certain internationally wrongful acts possess, under the relevant legislation, the status of State officials or of officials of a State's public entity. In the case under discussion here, that of organised groups, State responsibility is instead the objective corollary of the overall control exercised by the State over the group. Despite these legal differences, the fact

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[140] This sort of "objective" State responsibility also arises in a different case. Under the relevant rules on State responsibility as laid down in Article 7 of the International Law Commission Draft, a State incurs responsibility for acts of organs of its territorial governmental entities (regions, *Länder*, provinces, member States of Federal States, etc.) even if under the national Constitution these organs enjoy broad independence or complete autonomy. (*See* footnote 130 above).

[141] The United States claimed that Mexico was responsible for the killing of United States nationals at the hands of a mob with the participation of Mexican soldiers. Mexico objected that, even if it were assumed that the soldiers were guilty of such participation, Mexico should not be held responsible for the wrongful acts of the soldiers, on the grounds that they had been ordered by the highest official in the locality to protect American citizens. Instead of carrying out these orders, however, they had acted in violation of them, in consequence of which the Americans had been killed. The Mexico/United States General Claims Commission dismissed the Mexican objection and held Mexico responsible. It stated that if international law were not to impute to a State wrongful acts committed by its officials outside their competence or contrary to instructions, "it would follow that no wrongful acts committed by an official could be considered as acts for which his Government could be held liable". It then added that:

> "[s]oldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no [international State] liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts" (*Thomas H. Youmans (U.S.A.) v. United Mexican States,* Decision of 23 November 1926, *Reports of International Arbitral Awards*, vol. IV, p. 116).

nevertheless remains that international law renders any State responsible for acts in breach of international law performed (i) by individuals having the formal status of organs of a State (and this occurs even when these organs act *ultra vires* or *contra legem),* or (ii) by individuals who make up organised groups subject to the State's control. International law does so regardless of whether or not the State has issued *specific instructions* to those individuals. Clearly, the rationale behind this legal regulation is that otherwise, States might easily shelter behind, or use as a pretext, their internal legal system or the lack of any specific instructions in order to disclaim international responsibility.

b. The *Nicaragua* Test is at Variance With Judicial and State Practice

124. There is a second ground – of a similarly general nature as the one just expounded - on which the *Nicaragua* test as such may be held to be unpersuasive. This ground is determinative of the issue. The "effective control" test propounded by the International Court of Justice as an exclusive and all-embracing test is at variance with international judicial and State practice: such practice has envisaged State responsibility in circumstances where a lower degree of control than that demanded by the *Nicaragua* test was exercised. In short, as shall be seen, this practice has upheld the *Nicaragua* test with regard to individuals or unorganised groups of *individuals* acting on behalf of States. By contrast, it has applied a different test with regard to *military or paramilitary groups.*

125. In cases dealing with members of *military or paramilitary groups*, courts have clearly departed from the notion of "effective control" set out by the International Court of Justice (i.e., control that extends to the issuance of specific instructions concerning the various activities of the individuals in question). Thus, for instance, in the *Stephens* case, the Mexico-United States General Claims Commission attributed to Mexico acts committed during a civil war by a member of the Mexican "irregular auxiliary" of the army, which among other things lacked both uniforms and insignia.[142] In this case the Commission did not enquire as to whether or not specific instructions had been issued concerning the killing of the United States national by that guard.

[142] *See United States v. Mexico (Stephens Case), Reports of International Arbitral Awards,* vol. IV, pp. 266-267.

126. Similarly, in the *Kenneth P. Yeager* case,[143] the Iran-United States Claims Tribunal ("Claims Tribunal") held that wrongful acts of the Iranian "revolutionary guards" or "revolutionary Komitehs" *vis-à-vis* American nationals carried out between 13 and 17 February 1979 were attributable to Iran (the Claims Tribunal referred in particular to the fact that two members of the "Guards" had forced the Americans to leave their house in order to depart from Iran, that the Americans had then been kept inside the Hilton Hotel for three days while the "Guards" manned the exits, and had subsequently been searched at the airport by other "Guards" who had taken their money). Iran, the respondent State, had argued that the conduct of those "Guards" was not attributable to it. It had admitted that "revolutionary guards and Komiteh personnel were engaged in the maintenance of law and order from January 1979 to months after February 1979 as government police forces rapidly lost control over the situation." It had asserted, however, that "these revolutionaries did not operate under the name 'Revolutionary Komitehs' or 'Revolutionary Guards', and that they were not affiliated with the Provisional Government".[144] In other words, the "Guards" were "not authentic";[145] hence, their conduct was not attributable to Iran. The Claims Tribunal considered instead that the acts were attributable to Iran because the "Guards" or "Komitehs" had acted as *de facto* State organs of Iran. On this point the Claims Tribunal noted that:

> [m]any of Ayatollah Khomeini's supporters were organised in local revolutionary committees, so-called Komitehs, which often emerged from the 'neighbourhood committees' formed before the victory of the revolution. These Komitehs served as local security forces in the immediate aftermath of the revolution. It is reported that they made arrests, confiscated property, and took people to prisons. [...]
>
> Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary 'Komitehs' or 'Guards' and at the same time deny responsibility for wrongful acts committed by them[146]

127. With specific reference to the action of the "Guards" in the case at issue, the Claims Tribunal emphasised that the two guards who had forced the Americans to leave their house

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[143] *See Kenneth P. Yeager v. Islamic Republic of Iran*, 17 *Iran-U.S. Claims Tribunal Reports*, 1987, vol. IV, p. 92).

[144] *Ibid.*, para. 23.

[145] *Ibid.*, para. 37.

[146] *Ibid.*, paras 39, 45. The Claims Tribunal went on to note that:
"[w]hile there were complaints about a lack of discipline among the numerous Komitehs, *Ayatollah Khomeini stood behind them*, and the Komitehs, in general, *were loyal to him and the clergy*. Soon after the victory of the Revolution, the Komitehs, contrary to other groups, obtained a firm position within the State structure and were eventually conferred a permanent place in the State budget" (*ibid.*, para. 39; emphasis added).

were "dressed in everyday clothes, but [wore] distinctive arm bands indicating association with the new Government, and [were] armed with rifles".[147] With reference to those who had searched the Americans at the airport, the Claims Tribunal stressed that "they were performing the functions of customs, immigration and security officers".[148] Clearly, those "Guards" made up *organised armed groups* performing *de facto* official functions. They were therefore different from the Iranian militants who had stormed the United States Embassy in Tehran on 4 November 1979, with regard to which the International Court of Justice noted that after the invasion of the Embassy they described themselves as "Muslim Student Followers of the Imam's Policy".[149] Be that as it may, what is notable is that the Iran-United States Claims Tribunal did not enquire as to whether *specific instructions* had been issued to the "Guards" with regard to the forced expulsion of Americans.[150] The Claims Tribunal took the same stance in other cases.[151]

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[147] *Ibid.*, paras. 12, 41.

[148] *Ibid.*, para. 61.

[149] *United States Diplomatic and Consular Staff in Tehran,* Judgment, ICJ Reports (1980), p. 13, para. 17.

[150] The Claims Tribunal stated the following:

> "The Tribunal finds sufficient evidence in the record to establish a presumption that revolutionary 'Komitehs' or 'Guards' after 11 February 1979 were acting in fact on behalf of the new government, or at least exercised elements of governmental authority in the absence of official authorities, in operations of which the new Government must have had knowledge and to which it did not specifically object. Under those circumstances, and for the kind of measures involved here, the Respondent has the burden of coming forward with evidence showing that members of 'Komitehs' or 'Guards' were in fact *not* acting on its behalf, or were not exercising elements of government authority, or that it could not control them". (*Kenneth P. Yeager v. Islamic Republic of Iran*, 17 *Iran-U.S. Claims Tribunal Reports,* 1987, vol. IV. p. 92, at para. 43).

The Claims Tribunal went on to say:

> "[...] Rather, the evidence suggests that the new government, despite occasional complaints about a lack of discipline, stood behind them [the Komitehs]. The Tribunal is persuaded, therefore, that the revolutionary 'Komitehs' or 'Guards' involved in this Case, were acting 'for' Iran." (para. 44).

The Tribunal then concluded that:

> "[n]or has the Respondent established that it could not control the revolutionary 'Komitehs' or 'Guards' in this operation [namely, forcing foreigners to leave the country]. Because the new government accepted their activity in principle and their role in the maintenance of public security, calls for more discipline, phrased in general rather than specific terms, do not meet the standard of control required in order to effectively prevent these groups from committing wrongful acts against United States nationals. Under international law Iran cannot, on the one hand, tolerate the exercise of governmental authority by revolutionary 'Komitehs' or 'Guards' and at the same time deny responsibility for wrongful acts committed by them" (para. 45).

[151] *See William L. Pereira Associates, Iran v. Islamic Republic of Iran*, Award No. 116-1-3, 5 *Iran-U.S. Claims Tribunal* 1984, p. 198 at p. 226. *See* also *Arthur Young and Company v. Islamic Republic of Iran, Telecommunications Company of Iran, Social Security Organization of Iran*, Award No. 338-484-1, 17 *Iran-U.S. Claims Tribunal Reports,* 1987, p. 245). Here the Claims Tribunal found that in the circumstances of the case Iran was not responsible because there was no causal link between the action of the revolutionary guards and the alleged breach of international law. However, the Claims Tribunal held that otherwise Iran might have incurred international responsibility for acts of "armed men wearing patches on their pockets identifying them as members of the revolutionary guards" (para. 53). A similar stand was taken in *Schott v. Islamic Republic of Iran,* Award No. 474-268-1, 24 *Iran-U.S. Claims Tribunal Reports*, 1990, p. 203 at para. 59.

128. A similar approach was adopted by the European Court of Human Rights in *Loizidou v. Turkey*[152] (although in this case the question revolved around the possible control of a sovereign State over a State entity, rather than control by a State over armed forces operating in the territory of another State). The Court had to determine whether Turkey was responsible for the continuous denial to the applicant of access to her property in northern Cyprus and the ensuing loss of control over the property. The respondent State, Turkey, denied that the Court had jurisdiction, on the grounds that the act complained of was not committed by one of its authorities but, rather, was attributable to the authorities of the Turkish Republic of Northern Cyprus ("TRNC"). The Court dismissed these arguments and found that Turkey was responsible. In reaching the conclusion that the restrictions on the right to property complained of by the applicant were attributable to Turkey, the Court did not find it necessary to ascertain whether the Turkish authorities had exercised "detailed" control over the specific "policies and actions" of the authorities of the "TRNC". The Court was satisfied by the showing that the local authorities were under the "effective overall control" of Turkey.[153]

129. A substantially similar stand was recently taken in the *Jorgic* case by the *Oberlandesgericht* of Düsseldorf in a decision of 26 September 1997.[154] With regard to crimes committed in Bosnia and Herzegovina by Bosnian Serbs, the Court held that the Bosnian Serbs fighting against the central authorities of Sarajevo had acted on behalf of the FRY. To support this finding, the court emphasised that Belgrade financed, organised and equipped the Bosnian Serb army and paramilitary units and that there existed between the JNA and the Bosnian Serbs "a close personal, organisational and logistical interconnection [*Verflechtung*]", which was considered to be a sufficient basis for regarding the conflict as

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In *Daley,* on the other hand, the Claims Tribunal held Iran responsible for the expropriation of a car, for the five Iranian "Revolutionary Guards" who had taken the car were "in army-type uniforms" at the entrance of a hotel which had come "under the control of Revolutionary Guards" a few days before. (*Daley v. Islamic Republic of Iran*, Award No. 360-1-514-1, 18 *Iran-U.S Claims Tribunal Reports*, 1988, 232 at paras. 19-20).

[152] *Loizidou v. Turkey* (Merits), Eur. Court of H. R., Judgement of 18 December 1996 (40/1993/435/514).

[153] In its judgement, the Court stated the following on the point at issue here:

> "It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus [...] that her army exercises effective overall control over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the 'TRNC' [...]" (*ibid.*, para. 56).

[154] 2 StE 8/96 (unpublished typescript; kindly provided by the German Embassy to the Netherlands and on file with the International Tribunal's Library).

international.[155] The court did not enquire as to whether or not the specific acts committed by the accused or other Bosnian Serbs had been ordered by the authorities of the FRY.[156]

130. Precisely what measure of State control does international law require for organised military groups? Judging from international case law and State practice, it would seem that for such control to come about, it is not sufficient for the group to be financially or even militarily assisted by a State. This proposition is confirmed by the international practice concerning national liberation movements. Although some States provided movements such as the PLO, SWAPO or the ANC with a territorial base or with economic and military assistance (short of sending their own troops to aid them), other States, including those against which these movements were fighting, did not attribute international responsibility for the acts of the movements to the assisting States.[157] *Nicaragua* also supports this

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[155] The Court stated the following:

"The conflict in Bosnia-Herzegovina was an international conflict for the purposes of Article 2 of the Fourth Geneva Convention. Owing to the declaration of independence and the referendum of 29 February and 1 March 1992 and to international recognition on 6 April 1992, Bosnia-Herzegovina had become an autonomous State, independent from Yugoslavia.

The armed conflict that took place on its territory in the following period was not an internal clash (conflict), in which an ethnic group was trying to break with the existing State of Bosnia-Herzegovina and which [as a consequence] had no international character. The expert witness Fischer pointed out that, by using the term international humanitarian law applicable to this conflict, the United Nations Security Council has used the term usual in international terminology to refer to the law applicable to international armed conflicts. This [according to the expert witness] showed that the Security-Council considered the conflict to be international. The expert witness Fischer cited the following circumstances as indicia of an international conflict according to the prevailing view in international law: the participation of organs of a State in a conflict on the territory of another State, e.g. the participation of officers in the clashes, or the financing of and provision of technical equipment to one party to the conflict by another State; the latter at least when it is combined with the aforementioned interconnection [*Verflechtung*] between personnel. According to this Chamber's findings, these criteria are met in the case at hand. The Chamber has found that at the beginning of May officers of the JNA, which at that time was purely Serb, began taking Doboj and the surrounding villages. There can, therefore, be no doubt regarding the existence of an international armed conflict at that point in time. However, this Chamber has further found that after 19 May 1992, when the JNA officially withdrew from Bosnia-Herzegovina, officers of the JNA continued to be employed in Bosnia-Herzegovina and paid by Belgrade, and that at the end of May *matériel*, weapons and vehicles were still being brought from Belgrade to Bosnia-Herzegovina. As a consequence, a close personal, organisational and logistical interconnection [*Verflechtung*] of the Bosnian-Serb army, paramilitary groups and the JNA persisted. The headquarters of the Bosnian-Serb army maintained a liaison office in Belgrade." (*ibid.*, pp. 158-160 of the unpublished typescript; unofficial translation).

[156] The Judgement of the Düsseldorf Court of Appeal was upheld on appeal by the Federal Court of Justice (*Bundesgerichtshof*) by a judgement of 30 April 1999 (unpublished). The appeal was based, *inter alia,* on a misapplication of substantive law. This ground also included the question of whether the conflict was international in character. The *Bundesgerichtshof* did not address the matter specifically, thus implicitly upholding the judgement of the Düsseldorf Court. (*See*, in particular, pp. 19-20 and 23 of the German typescript (3 StR 215/98), on file with the International Tribunal library).

[157] *See* e.g., the debates in the U.N. Security Council in 1976, on the raids of South Africa into Zambia to destroy bases of the SWAPO (*see* in particular the statements of Zambia (SCOR, 1944th Meeting of 27 July 1976, paras. 10-45) and South Africa (*ibid.*, paras. 47-69); *see* also SC resolution no. 393 (1976) of 30 July 1976)); *see* also the debates on the Israeli raids in Lebanon in June 1982 (in particular the statements of

proposition, since the United States, although it aided the *contras* financially, and otherwise, was not held responsible for their acts (whereas on account of this financial and other assistance to the *contras,* the United States was held by the Court to be responsible for breaching the principle of non-intervention as well as "its obligation [...] not to use force against another State."[158] This was clearly a case of responsibility for the acts of its own organs).

131. In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

132. It should be added that courts have taken a different approach with regard to *individuals or groups not organised into military structures.* With regard to such individuals or groups, courts have not considered an overall or general level of control to be sufficient, but have instead insisted upon specific instructions or directives aimed at the commission of specific acts, or have required public approval of those acts following their commission.

133. The Appeals Chamber will mention, first of all, the *United States Diplomatic and Consular Staff in Tehran* case.[159] There, the International Court of Justice rightly found that the Iranian students (who did not comprise an organised armed group) who had stormed the United States embassy and taken hostage 52 United States nationals, had not initially acted

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Ireland (SCOR, 2374th Meeting of 5 June 1982, paras. 35-36) and of Israel (*ibid.,* paras. 74-78 and SCOR, 2375th Meeting of 6 June 1982, paras. 22-67) and in July-August 1982 (*see* the statement of Israel, SCOR, 2385th Meeting of 29 July 1982, paras. 144-169)); *see* also the debates on the South African raid in Lesotho in December 1982 (*see* in particular the statements of France (SCOR, 2407th Meeting of 15 December 1982, paras. 69-80), of Japan (*ibid.,* paras. 98-107), of South Africa (SCOR, 2409th Meeting of 16 December 1982, paras. 126-160) and of Lesotho (*ibid.,* paras. 219-227)).
Although there does not seem to exist any international practice in this area, it may happen that a State simply providing economic and military assistance to a military group (hence not necessarily exercising effective control over the group) directs a member of the group or the whole group to perform a specific internationally wrongful act, e.g. an international crime such as genocide. In this case one would face a situation similar to that described above, in the text, of a State issuing specific instructions to an individual.

[158] *See Nicaragua*, paras. 239-249, 292(3) and 292(4).

on behalf of Iran, for the Iranian authorities had not specifically instructed them to perform those acts.[160] Nevertheless, Iran was held internationally responsible for failing to prevent the attack on the United States' diplomatic premises and subsequently to put an end to that attack.[161] Later on, the Iranian authorities formally approved and endorsed the occupation of the Embassy and the detention of the United States nationals by the militants and even went so far as to order the students not to put an end to that occupation. At this stage, according to the Court, the militants became *de facto* agents of the Iranian State and their acts became internationally attributable to that State.[162]

134. The same approach was adopted in 1986 by the International Court itself in *Nicaragua* with regard to the UCLAs (which the Court defined as "persons of the nationality of unidentified Latin American countries").[163] For specific internationally wrongful acts of these "persons" to be imputable to the United States, it was deemed necessary by the Court that these persons not only be paid by United States organs but also act "on the instructions" of those organs (in addition to their being supervised and receiving logistical support from them).[164]

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[159] *United States Diplomatic and Consular Staff in Tehran*, Judgment, ICJ Reports (1980), pp. 3 *ff.*

[160] The Court stated the following:
"No suggestion has been made that the militants, when they executed their attack on the Embassy, had any form of official status as recognised 'agents' or organs of the Iranian State. Their conduct in mounting the attack, overrunning the Embassy and seizing its inmates as hostages cannot, therefore, be regarded as imputable to that State on that basis. Their conduct might be considered as itself directly imputable to the Iranian State *only if it were established that, in fact, on the occasion in question the militants acted on behalf of the State, having been charged by some competent organ of the Iranian State to carry out a specific operation.* The information before the Court does not, however, suffice to establish with the requisite certainty the existence at that time of such a link between the militants and any competent organ of the State" (*ibid.*, p. 30, para. 58; emphasis added).

[161] *Ibid.*, pp. 30-33 (paras. 60-68).

[162] The Court stated the following:
"The policy thus announced by the Ayatollah Khomeini, of maintaining the occupation of the Embassy and the detention of its inmates as hostages for the purpose of exerting pressure on the United States Government was complied with by other Iranian authorities and endorsed by them repeatedly in statements made in various contexts. The result of that policy was fundamentally to transform the legal nature of the situation created by the occupation of the Embassy and the detention of its diplomatic and consular staff as hostages. The *approval* given to these facts by the Ayatollah Khomeini and other organs of the Iranian State, and the decision to perpetuate them, translated continuing occupation of the Embassy and detention of the hostages into acts of that State. The militants, authors of the invasion and jailers of the hostages, had now become agents of the Iranian State for whose acts the State itself was internationally responsible [...]." (*ibid.*, p. 35, para. 74; emphasis added).

[163] *See Nicaragua*, para. 75.

[164] *Ibid.*, para. 80.

135. Similar views were propounded in 1987 by the Iran-United States Claims Tribunal in *Short.*[165] Iran was not held internationally responsible for the allegedly wrongful expulsion of the claimant. The Claims Tribunal found that the Iranian "revolutionaries" (armed but not comprising an organised group) who ordered the claimant's departure from Iran were not State organs, nor did Ayatollah Khomeini's declarations amount to specific incitement to the "revolutionaries" to expel foreigners.[166]

136. It should be added that State practice also seems to clearly support the approach under discussion.[167]

137. In sum, the Appeals Chamber holds the view that international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a *single* private individual or a *group that is not militarily organised* has acted as a *de facto* State organ when performing a

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[165] *Alfred W. Short v. Islamic Republic of Iran*, Award No. 312-11135-3, 16 *Iran-U.S. Claims Tribunal Reports* 1987, p. 76).

[166] After finding that the acts of the revolutionaries could not be attributed to Iran, the Claims Tribunal noted the following:

> "The Claimant's reliance on the declarations made by the leader of the Revolution, Ayatollah Khomeini, and other spokesmen of the revolutionary movement, also lack the essential ingredient as being the cause for the Claimant's departure in circumstances amounting to an expulsion. While these statements are of anti-foreign and in particular anti-American sentiment, the Tribunal notes that these pronouncements were of a general nature and did not specify that Americans should be expelled *en masse*." (*ibid.*, para. 35).

[167] For examples of State practice apparently adopting this approach to the question of attribution, *see* for instance the relevant documents in the *Cesare Rossi* case (an Italian antifascist staying in Switzerland who was lured by two other Italians acting on behalf of the Italian authorities into crossing the border with Italy, where he was arrested: *see* 1 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1929, pp. 280-294); the *Jacob Salomon* case (a German national was kidnapped by another German national in Switzerland and taken to Germany: *see* the relevant documents mentioned in 29 *American Journal of International Law* 1935, pp. 502-507, 36 *American Journal of International Law* 1936, pp.123-124). *See* further the *Sabotage* cases decided by the United States-Germany Mixed Claims Commission (*Lehigh Valley Railroad Co., Agency of Canadian Can and Foundry Co., Ltd., and various underwriters (United States) v. Germany, Reports of International Arbitral Awards*, vol. VIII, pp. 84 *ff.* (especially pp. 84-87) and pp. 225 *ff.* (especially 457-460). In these cases, in July 1916 some individuals, at the request of the German authorities intent on bringing about sabotage in the United States, had set fire to a terminal in New York harbour and to a plant of a company in New Jersey.

Mention can also be made of the *Eichmann* case (*Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 *International Law Reports* 1968, pp. 277-344): *see* for instance Security Council resolution 4349 of 23 June 1960 and the debates in the Security Council; *see* in particular the statements of Argentina (SCOR, 865th Meeting of 22 June 1960, paras. 25-27), of Israel (SCOR of the 866th Meeting on 22 June 1960, para. 41), of Italy (SCOR of the 867th Meeting of 23 June 1960, paras. 32-34), of Ecuador (*ibid.*, paras. 47-49), of Tunisia (*ibid.*, para. 73) and of Ceylon (SCOR of the 868th Meeting of 23 June 1960, paras. 12-13).

specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

138. Of course, if, as in *Nicaragua*, the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.

139. The same substantial evidence is required when, although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority.

140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to

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In many of these cases, the need for specific instructions by the State concerning the commission of the specific act with which the individual had been charged, or the *ex post facto* public endorsement of that act, can be inferred from the facts of the case.

achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.

141. It should be added that international law does not provide only for a *test of overall control* applying to armed groups and that of *specific instructions* (or subsequent public approval), applying to single individuals or militarily unorganised groups. The Appeals Chamber holds the view that international law also embraces a *third test*. This test is the assimilation of individuals to State organs *on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions)*. Such a test is best illustrated by reference to certain cases that deserve to be mentioned, if only briefly.[168]

142. The first case is *Joseph Kramer et al.* (also called the *Belsen* case), brought before a British military court sitting at Luneburg (Germany).[169] The Defendants comprised not only some German staff members of the Belsen and Auschwitz concentration camps but also a number of camp inmates of Polish nationality and an Austrian Jew "elevated by the camp administrators to positions of authority over the other internees". They were *inter alia* accused of murder and other offences against the camp inmates. According to the official report on this case:

> In meeting the argument that no war crime could be committed by Poles against other Allied nationals, the Prosecutor said that by identifying themselves with the authorities the Polish accused had made themselves as much responsible as the S.S. themselves. Perhaps it could be claimed that by the same process *they could be regarded as having approximated to membership of the armed forces of Germany*.[170]

143. Another case is more recent. This is the judgement handed down by the Dutch Court of Cassation on 29 May 1978 in the *Menten* case.[171] Menten, a Dutch national who was not formally a member of the German forces, had been accused of war crimes and crimes against humanity for having killed a number of civilians, mostly Jews, in Poland, on

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[168] These cases, although they concern war crimes (the notion of "grave breaches" had not yet come into existence at the time), are nevertheless relevant to our discussion. Indeed, they provide useful indications concerning the conditions on which civilians may be assimilated to State officials.

[169] *Trial of Joseph Kramer and 44 Others*, British Military Court, Luneberg, 17th September-17th November, 1945, *Law Reports of Trials of War Criminals, Selected and Prepared by the United Nations War Crimes Commission*, Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London 1947 ("UNWCC"), vol. II, p. 1.

[170] *Ibid.*, p. 152 (emphasis added) (the Austrian civilian, Schlomowicz, was not found guilty). *See* also *ibid.*, p. 109. Most of the accused civilians were found guilty and sentenced to imprisonment. It is clear from this case that according to the court, by acting as *de facto* members of the German apparatus running the Belsen concentration camp, the Polish civilians could be assimilated to German State officials.

behalf of German special forces (SD or *Einsatzkommandos*). The court found[172] that Menten *in fact behaved as a member of the German forces* and consequently was criminally liable for these crimes.[173]

144. Other cases also prove that private individuals acting within the framework of, or in connection with, armed forces, or in collusion with State authorities may be regarded as *de facto* State organs.[174] In these cases it follows that the acts of such individuals are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility.[175]

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[171] *Public Prosecutor v. Menten*, 75 *International Law Reports* 1987, pp. 331 *ff.*

[172] The court stated the following:

"Since Menten, on the orders of the *Befehlshaber* of the *Sicherheitspolizei* in Poland, was dressed in the uniform of an under-officer of this branch of the [German] police when he was *dem Einsatzkommando als Dolmetscher zugeteilt* [assigned to the Special forces as interpreter], the [District] Court [of Amsterdam in its judgement of 14 December 1977] was justified in assuming that his position in the *Einsatzkommando* and his performance in within it of a more or less official character. Thus the relationship to the enemy in which Menten rendered incidental services was of such a nature that he could be regarded as a functionary of the enemy." (*ibid.*, p. 347. The English translation has been slightly corrected by the Appeals Chamber to bring it into line with the Dutch original, which can be found in *Nederlandse Jurisprudentie*, 1978, no. 358, p. 1236).

The court concluded that:

"from the above-mentioned evidence, taken together with the other evidence that in July 1941 Menten, dressed in a German uniform and in company with a number of other persons also so dressed, came to Podhorodce [...] and was present at the killings, [it can be inferred] that he was there with members of the German Staff and that he rendered services to this Staff at the time of and in connection with these killings." (*ibid.*, p. 348).

[173] Menten was sentenced to ten years' imprisonment by the District Court of Rotterdam (Judgement of 9 July 1980, *ibid.*, p. 361). It should be pointed out that the Dutch Court of Cassation had been obliged to investigate whether Menten was "in military, state or public service of or with the enemy" as this was an ingredient of the relevant Dutch law (*ibid.*, p. 346). The Appeals Chamber holds, however, that the *Menten* case is in line with the rules of general international law concerning the assimilation of private individuals to State officials.

[174] *See*, e.g., the *Daley* case, where the Iran U.S. Claims Tribunal attributed international responsibility to Iran for acts of five Iranian "Revolutionary Guards" in "army type uniforms" (18 *Iran-U.S. Claims Tribunal Reports*, 1988, p. 238, at para. 19).

[175] In this connection mention can be made of the *Stocké* case brought before the European Commission of Human Rights. A German national fled from Germany to Switzerland and then to France to avoid arrest in Germany for alleged tax offences. He was then tricked into re-entering Germany by a police informant and was arrested. He then claimed before the European Commission of Human Rights that he had been arrested in violation of Article 5(1) of the ECHR. The Commission held that:

"[i]n the case of collusion between State authorities, i.e. any State official irrespective of his hierarchical position, and a private individual for the purpose of returning against his will a person living abroad, without consent of his State of residence, to the territory where he is prosecuted, the High Contracting Party concerned incurs responsibility for the acts of the private individual who *de facto* acts on its behalf. The Commission considers that such circumstances may render this person's arrest and detention unlawful within the meaning of article 5(1) of the Convention" (*Stocké v. Federal Republic of Germany*, Eur. Court H. R., judgement of 19 March 1991, Series A, no 199, para. 168 (Opinion of the Commission).

145. In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a "military organization", the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control* going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.

4. The Factual Relationship Between the Bosnian Serb Army and the Army of the FRY

146. The Appeals Chamber has concluded that in general international law, three tests may be applied for determining whether an individual is acting as a *de facto* State organ. In the case of individuals forming part of armed forces or military units, as in the case of any other hierarchically organised group, the test is that of overall control by the State.

147. It now falls to the Appeals Chamber to establish whether, in the circumstances of the case, the Yugoslav Army exercised in 1992 the requisite measure of control over the Bosnian Serb Army. The answer must be in the affirmative.

148. The Appeals Chamber does not see any ground for overturning the factual findings made in this case by the Trial Chamber and relies on the facts as stated in the Judgement. The majority and Judge McDonald do not appear to disagree on the facts, which Judge McDonald also takes as stated in the Judgement,[176] but only on the legal interpretation to be given to those facts.

149. Since, however, the Appeals Chamber considers that the Trial Chamber applied an incorrect standard in evaluating the legal consequences of the relationship between the FRY

Although these cases concerned State responsibility, they may be relevant to the question of the criminal responsibility of individuals perpetrating grave breaches of the Geneva Conventions, inasmuch as they set out the conditions necessary for individuals to be considered as *de facto* State organs.

[176] *See* Separate and Dissenting Opinion of Judge McDonald, para. 1: "I completely agree with and share in the Opinion and Judgment with the exception of the determination that Article 2 of the Statute is inapplicable to the charges against the accused."

and Bosnian Serb forces, the Appeals Chamber must now apply its foregoing analysis to the facts and draw the necessary legal conclusions therefrom.

150. The Trial Chamber clearly found that even after 19 May 1992, the command structure of the JNA did not change after it was renamed and redesignated as the VJ. Furthermore, and more importantly, it is apparent from the decision of the Trial Chamber and more particularly from the evidence as evaluated by Judge McDonald in her Separate and Dissenting Opinion, that even after that date the VJ continued to control the Bosnian Serb Army in Bosnia and Herzegovina, that is the VRS. The VJ controlled the political and military objectives, as well as the military operations, of the VRS. Two "factors" emphasised in the Judgement need to be recalled: first, "the transfer to the 1st Krajina Corps, as with other units of the VRS, of former JNA Officers who were not of Bosnian Serb extraction from their equivalent postings in the relevant VRS unit's JNA predecessor"[177] and second, with respect to the VRS, "the continuing payment of salaries, to Bosnian Serb and non-Bosnian Serb officers alike, by the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro)".[178] According to the Trial Chamber, these two factors did not amount to, or were not indicative of, effective control by Belgrade over the Bosnian Serb forces.[179] The Appeals Chamber shares instead the views set out by Judge McDonald in her Separate and Dissenting Opinion, whereby these two factors, in addition to others shown by the Prosecution, did indicate control.[180]

151. What emerges from the facts which are both uncontested by the Trial Chamber and mentioned by Judge McDonald (concerning the command and control structure that

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[177] Judgement, para. 601.
[178] *Ibid.*
[179] *Ibid.*, paras. 601-602.
[180] As Judge McDonald noted:
"[t]he creation of the VRS [after 19 May 1992] was a legal fiction. The only changes made after the 15 May 1992 Security Council resolution were the transfer of troops, the establishment of a Main Staff of the VRS, a change in the name of the military organisation and individual units, and a change in the insignia. There remained the same weapons, the same equipment, the same officers, the same commanders, largely the same troops, the same logistics centres, the same suppliers, the same infrastructure, the same source of payments, the same goals and mission, the same tactics, and the same operations. Importantly, the objective remained the same [...] The VRS clearly continued to operate as an integrated and instrumental part of the Serbian war effort. [...] The VRS Main Staff, the members of which had all been generals in the JNA and many of whom were appointed to their positions by the JNA General Staff, maintained direct communications with the VJ General Staff via a communications link from Belgrade. [...] Moreover, the VRS continued to receive supplies from the same suppliers in the Federal Republic of Yugoslavia (Serbia and Montenegro) who had contracted with the JNA, although the requests after 19 May 1992 went through the Chief of Staff of the VRS who then sent them onto Belgrade." (Separate and Dissenting Opinion of Judge McDonald, paras. 7-8).

persisted after the redesignation of the VRS and the continuous payment of salaries to officers of the Bosnian Serb army by the FRY) is that the VRS and VJ did not, after May 1992, comprise two separate armies in any genuine sense. This is further evidenced by the following factors:

(i) The re-organization of the JNA and the change of name did not point to an alteration of military objectives and strategies. The command structure of the JNA and the re-designation of a part of the JNA as the VRS, while undertaken to create the appearance of compliance with international demands, was in fact designed to ensure that a large number of ethnic Serb armed forces were retained in Bosnia and Herzegovina.[181]

(ii) Over and above the extensive financial, logistical and other assistance and support which were acknowledged to have been provided by the VJ to the VRS, it was also uncontested by the Trial Chamber that as a creation of the FRY/VJ, the structures and ranks of the VJ and VRS were identical, and also that the FRY/VJ directed and supervised the activities and operations of the VRS.[182] As a result, the VRS reflected the strategies and tactics devised by the FRY/JNA/VJ.

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[181] In the light of the demand of the Security Council on 15 May 1992 that all interference from outside Bosnia and Herzegovina by units of the JNA cease immediately, the Trial Chamber characterised the dilemma posed for the JNA by increasing international scrutiny from 1991 onwards in terms of the way in which the JNA could:

> "be converted into an army of what remained of Yugoslavia, namely Serbia and Montenegro, yet continue to retain in Serb hands control of substantial portions of Bosnia and Herzegovina while appearing to comply with international demands that the JNA quit Bosnia and Herzegovina. [...] The solution as far as Serbia was concerned was found by transferring to Bosnia and Herzegovina all Bosnian Serb soldiers serving in JNA units elsewhere while sending all non-Bosnian soldiers out of Bosnia and Herzegovina. This ensured seeming compliance with international demands while effectively retaining large ethnic Serb armed forces in Bosnia and Herzegovina" (Judgement, paras. 113-114).

Additionally, the U.N. Secretary-General, in commenting on its purported withdrawal from Bosnia and Herzegovina, concluded in his report of 3 December 1992 that "[t]hough JNA has withdrawn completely from Bosnia and Herzegovina, former members of Bosnian Serb origin have been left behind with their equipment and constitute the Army of the 'Serb Republic'" *(Report of the Secretary-General concerning the situation in Bosnia and Herzegovina*, U.N. Doc. A/47/747, para. 10).

[182] Judgement, para. 115:

> "[T]he VRS was in effect a product of the dissolution of the old JNA and the withdrawal of its non-Bosnian elements into Serbia. However, most, if not all, of the commanding officers of units of the old JNA who found themselves stationed with their units in Bosnia and Herzegovina on 18 May 1992, nearly all Serbs, remained in command of those units throughout 1992 and 1993 [...]".

See further *ibid.*, para. 590: "The attack on Kozarac was carried out by elements of an army Corps based in Banja Luka. This Corps, previously a Corps of the old JNA, became part of the VRS and was renamed the 'Banja Luka' or '1st Krajina' Corps after 19 May 1992 but retained the same commander." *See* also *ibid.*, paras. 114-116, 118-121, 594.

(iii) Elements of the FRY/VJ continued to directly intervene in the conflict in Bosnia and Herzegovina after 19 May 1992, and were fighting with the VRS and providing critical combat support to the VRS. While an armed conflict of an international character was held to have existed only up until 19 May 1992, the Trial Chamber did nevertheless accept that thereafter "active elements" of the FRY's armed forces, the Yugoslav Army (VJ), continued to be involved in an armed conflict with Bosnia and Herzegovina.[183] Much *de facto* continuity, in terms of the ongoing hostilities,[184] was therefore observable and there seems to have been little factual basis for the Trial Chamber's finding that by 19 May 1992, the FRY/VJ had lost control over the VRS.[185]

(iv) JNA military operations under the command of Belgrade that had already commenced by 19 May 1992 did not cease immediately and, from a purely practical point of view, it is highly unlikely that they would have been able to cease overnight in any event.[186]

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[183] *Ibid.*, para. 118 ("Despite the announced JNA withdrawal from Bosnia and Herzegovina in May 1992, active elements of what had been the JNA, now rechristened as the VJ [...] remained in Bosnia and Herzegovina after the May withdrawal and worked with the VRS throughout 1992 and 1993") and para. 569 ("[...] the forces of the VJ continued to be involved in the armed conflict after that date").

[184] *See* in particular *ibid.*, para. 566:

> "The ongoing conflicts before, during and after the time of the attack on Kozarac on 24 May 1992 were taking place and continued to take place throughout the territory of Bosnia and Herzegovina between the government of the Republic of Bosnia and Herzegovina, on the one hand, and, on the other hand, the Bosnian Serb forces, elements of the VJ operating from time to time in the territory of Bosnia and Herzegovina, and various paramilitary groups, all of which occupied or were proceeding to occupy a significant portion of the territory of that State."

See also para. 579: "[T]he take-over of opština Prijedor began before the JNA withdrawal on 19 May 1992 and was not completed until after that date". *See* also the Dissenting Opinion of Judge McDonald who noted "[t]he continuity between the JNA and the VRS particularly as it relates to the military operations in the Opština Prijedor area [...]." (Separate and Dissenting Opinion of Judge McDonald, para. 15).

[185] Moreover, it is interesting to observe that while concluding that by 19 May 1992 effective control over the VRS had been lost by the JNA/VJ, the Trial Chamber simultaneously observed that such control nevertheless did not appear to have been regained by the Bosnian authorities. In particular, the Trial Chamber found that the "Government of the Republic of Bosnia and Herzegovina [...] faced [...] major problems [...] of defence, *involving control over the mobilization and operations of the armed forces*" (Judgement, para. 124, emphasis added).

[186] In and of itself, the logistical difficulties of disengaging from the conflict and withdrawing such a large force would have been considerable. With regard to the extent and depth of the involvement of the large number of JNA forces engaged in Bosnia and Herzegovina and the ongoing nature of their activities beyond 19 May 1992, *see ibid.*, paras. 124-125: "By early 1992 there were some 100,000 JNA troops in Bosnia and Herzegovina with over 700 tanks, 1,000 armoured personnel carriers, much heavy weaponry, 100 planes and 500 helicopters, all under the command of the General Staff of the JNA in Belgrade. [...] On 19 May 1992 the withdrawal of JNA forces from Bosnia and Herzegovina was announced but the attacks were continued by the VRS."

The creation of the VRS by the FRY/VJ, therefore, did not indicate an intention by Belgrade to relinquish the control held by the FRY/VJ over the Bosnian Serb army. To the contrary, in fact, the establishment of the VRS was undertaken to continue the pursuit of the FRY's own political and military objectives, and the evidence demonstrates that these objectives were implemented by military and political operations that were controlled by Belgrade and the JNA/VJ. There is no evidence to suggest that these objectives changed on 19 May 1992.[187]

152. Taken together, these factors suggest that the relationship between the VJ and VRS cannot be characterised as one of merely coordinating political and military activities. Even if less explicit forms of command over military operations were practised and adopted in response to increased international scrutiny, the link between the VJ and VRS clearly went far beyond mere coordination or cooperation between allies and in effect, the renamed Bosnian Serb army still comprised one army under the command of the General Staff of the VJ in Belgrade.[188] It was apparent that even after 19 May 1992 the Bosnian Serb army continued to act in pursuance of the military goals formulated in Belgrade. In this regard, clear evidence of a chain of military command between Belgrade and Pale was presented to the Trial Chamber and the Trial Chamber accepted that the VRS Main Staff had links and regular communications with Belgrade.[189] In spite of this, and although the Trial Chamber acknowledged the possibility that certain members of the VRS may have been specifically

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[187] *See* in particular *ibid.*, para. 116 (citing the 1993 publication of the former Yugoslav Federal Secretary for Defence, General Veljko Kadijević, entitled *My view of the Break-up: an Army without a State* (Prosecution Exhibit 30)):

> "[T]he units and headquarters of the JNA formed the backbone of the army of the Serb Republic (Republic of Srpska) complete with weaponry and equipment [...] [F]irst the JNA and later the army of the Republic of Srpska, which the JNA put on its feet, helped to liberate Serb territory, protect the Serb nation and create the favourable military preconditions for achieving the interests and rights of the Serb nation in Bosnia and Herzegovina...".

See also para. 590:

> "The occupation of Kozarac and of the surrounding villages was part of a military and political operation, begun before 19 May 1992 with the take-over of the town of Prijedor of 29 April 1992, aimed at establishing control over the opština which formed part of the land corridor of Bosnian territory linking the Federal Republic of Yugoslavia (Serbia and Montenegro) with the so-called Republic of Serbian Krajina in Croatia."

[188] While the relationship between the JNA and VRS may have included coordination and cooperation, it cannot be seen as limited to this. As the Trial Chamber itself noted: "In 1991 and on into 1992 the Bosnian Serb and Croatian Serb paramilitary forces cooperated with and *acted under the command and within the framework of the JNA*."(*ibid.*, para. 593; emphasis added).

[189] *Ibid.*, para. 598:

> "The Trial Chamber has already considered the overwhelming importance of the logistical support provided by the Federal Republic of Yugoslavia (Serbia and Montenegro) to the VRS. [...] [I]n addition to routing all high-level VRS communications through secure links in Belgrade, a

charged by the FRY authorities to commit particular acts or to carry out particular tasks of some kind, it concluded that "without evidence of orders having been received from Belgrade which circumvented or overrode the authority of the Corps Commander, those acts cannot be said to have been carried out 'on behalf of' the Federal Republic of Yugoslavia (Serbia and Montenegro)."[190]

153. The Appeals Chamber holds that to have required proof of specific orders circumventing or overriding superior orders not only applies the wrong test but is also questionable in this context. A distinguishing feature of the VJ and the VRS was that they possessed *shared* military objectives. As a result, it is inherently unlikely that orders from Belgrade circumventing or overriding the authority of local Corps commanders would have ever been necessary as these forces were of the same mind; a point that appears to have been virtually conceded by the Trial Chamber.[191]

154. Furthermore, the Trial Chamber, noting that the pay of all 1st Krajina Corps officers and presumably of all senior VRS Commanders as former JNA officers continued to be received from Belgrade after 19 May 1992, acknowledged that a possible conclusion with regard to individuals, is that payment could well "be equated with control".[192] The Trial Chamber nevertheless dismissed such continuity of command structures, logistical organization, strategy and tactics as being "as much matters of convenience as military

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communications link for everyday use was established and maintained between VRS Main Staff Headquarters and the VJ Main Staff in Belgrade [...]."

[190] *Ibid.*, para. 601.

[191] The Trial Chamber noted that:
"[i]t is clear from the evidence that the military and political objectives of the *Republika Srpska* and of the Federal Republic of Yugoslavia (Serbia and Montenegro) were largely complementary. [...] The [...] political leadership of the *Republika Srpska* and their senior military commanders no doubt considered the success of the overall Serbian war effort as a prerequisite to their stated political aim of joining with Serbia and Montenegro as part of a Greater Serbia. [...] In that sense, there was little need for the VJ and the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) to attempt to exercise any real degree of control over, as distinct from coordination with, the VRS. So long as the *Republika Srpska* and the VRS remained committed to the shared strategic objectives of the war, and the Main Staffs of the two armies could coordinate their activities at the highest levels, it was sufficient for the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ to provide the VRS with logistical supplies and, where necessary, to supplement the Bosnian elements of the VRS officer corps with non-Bosnian VJ or former JNA officers, to ensure that this process was continued" (*ibid.*, paras. 603-604).

[192] *Ibid.*, para. 602. On this point, the Trial Chamber noted, further, that:
"given that the Federal Republic of Yugoslavia (Serbia and Montenegro) had taken responsibility for the financing of the VRS, most of which consisted of former JNA soldiers and officers, it is a fact not to be wondered at that such financing would not only include payments to soldiers and officers but that

necessity" and noted that such evidence "establishes nothing more than the potential for control inherent in the relationship of dependency which such financing produced."[193] In the Appeals Chamber's view, however, and while the evidence may not have disclosed the exact details of how the VRS related to the main command in Belgrade, it is nevertheless important to bear in mind that a clear intention existed to mask the commanding role of the FRY; a point which was amply demonstrated by the Prosecution.[194] In the view of the Appeals Chamber, the finding of the Trial Chamber that the relationship between the FRY/VJ and VRS amounted to cooperation and coordination rather than overall control suffered from having taken largely at face value those features which had been put in place intentionally by Belgrade to make it seem as if their links with Pale were as partners acting only in cooperation with each other. Such an approach is not only flawed in the specific circumstances of this case, but also potentially harmful in the generality of cases. Undue emphasis upon the ostensible structures and overt declarations of the belligerents, as opposed to a nuanced analysis of the reality of their relationship, may tacitly suggest to groups who are in *de facto* control of military forces that responsibility for the acts of such forces can be evaded merely by resort to a superficial restructuring of such forces or by a facile declaration that the reconstituted forces are henceforth independent of their erstwhile sponsors.

155. Finally, it must be noted that the Trial Chamber found the various forms of assistance provided to the armed forces of the *Republika Srpska* by the Government of the FRY to have been "crucial" to the pursuit of their activities and that "those forces were almost completely dependent on the supplies of the VJ to carry out offensive operations."[195] Despite this finding, the Trial Chamber declined to make a finding of overall control. Much was made of the lack of concrete evidence of specific instructions. Proof of "effective" control was also held to be insufficient,[196] on the grounds, once again, that the Trial Chamber lacked explicit evidence of direct instructions having been issued from

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existing administrative mechanisms for financing those soldiers and their operations would be relied on after 19 May 1992[...]." (*ibid.*).

[193] *Ibid.*

[194] *See* in this regard the testimony of the expert witness Dr. James Gow, transcript of hearing in *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-T, 10 May 1996, pp. 308-309; *ibid.*, 13 May 1996, pp. 330-338.

[195] Judgement, para. 605.

[196] It was deemed insufficient by the Trial Chamber that the VJ "'made use of the potential for control inherent in that dependence', *or was otherwise given effective control over those forces* [...]" (*ibid.;* emphasis added).

Belgrade.[197] However, this finding was based upon the Trial Chamber having applied the wrong test.

156. As the Appeals Chamber has already pointed out, international law does not require that the particular acts in question should be the subject of specific instructions or directives by a foreign State to certain armed forces in order for these armed forces to be held to be acting as *de facto* organs of that State. It follows that in the circumstances of the case it was not necessary to show that those specific operations carried out by the Bosnian Serb forces which were the object of the trial (the attacks on Kozarac and more generally within opština Prijedor) had been specifically ordered or planned by the Yugoslav Army. It is sufficient to show that this Army exercised overall control over the Bosnian Serb Forces. This showing has been made by the Prosecution before the Trial Chamber. Such control manifested itself not only in financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities and operations of the VRS. This sort of control is sufficient for the purposes of the legal criteria required by international law.

157. An *ex post facto* confirmation of the fact that over the years (and in any event between 1992 and 1995) the FRY wielded general control over the *Republika Srpska* in the political and military spheres can be found in the process of negotiation and conclusion of the Dayton-Paris Accord of 1995. Of course, the conclusion of the Dayton-Paris Accord in 1995 cannot constitute direct proof of the nature of the link that existed between the Bosnian Serb and FRY armies after May 1992 and hence it is by no means decisive as to the issue of control in this period. Nevertheless, the Dayton-Paris Accord may be seen as the culmination of a long process. This process necessitated a dialogue with all political and military forces wielding actual power on the ground (whether *de facto* or *de iure*) and a continuous response to the shifting military and political fortunes of these forces. The political process leading up to Dayton commenced soon after the outbreak of hostilities and was ongoing during the key period under examination. To the extent that its contours were shaped by, and thus reflect, the actual power structures which persisted in Bosnia and

[197] The Trial Chamber noted that:
"the Federal Republic of Yugoslavia (Serbia and Montenegro), through the dependence of the VRS on the supply of *matériel* by the VJ, had the capability to exercise great influence and perhaps even control over the VRS [...] [However] there is no evidence on which this Trial Chamber can conclude that the Federal Republic of Yugoslavia (Serbia and Montenegro) and the VJ ever directed or, for that matter, ever felt the need to attempt to direct, the actual military operations of the VRS [...]" (*ibid.*).

Herzegovina over the course of the conflict, the Dayton-Paris Accord provides a particular insight into the political, strategic and military realities which prevailed in Bosnia and Herzegovina up to 1995, and including May 1992. The fact that from 4 August 1994 the FRY appeared to cut off its support to the *Republika Srpska* because the leadership of the former had misgivings about the authorities in the latter is not insignificant.[198] Indeed, this "delinking" served to emphasise the high degree of overall control exercised over the *Republika Srpska* by the FRY, for, soon after this cessation of support from the FRY, the *Republika Srpska* realised that it had little choice but to succumb to the authority of the FRY.[199] Thus, the Dayton-Paris Accord may *indirectly* shed light upon the realities of the command and control structure that existed over the Bosnian Serb army at the time the VRS and the VJ were ostensibly delinked, and may also assist the evaluation of whether or not control continued to be exercised over the Bosnian Serb army by the FRY army thereafter.

158. The Appeals Chamber will now turn to examine the specific features of the Dayton Accord that are of relevance to this inquiry.

159. By an agreement concluded on 29 August 1995 between the FRY and the *Republika Srpska* and referred to in the preamble of the Dayton-Paris Accord, it was provided that a unified delegation would negotiate at Dayton. This delegation would consist of six persons, three from the FRY and three from the *Republika Srpska.* The Delegation was to be chaired

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[198] *See Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia on the establishment and commencement of operations of an International Conference on the Former Yugoslavia Mission to the Federal Republic of Yugoslavia (Serbia and Montenegro)*, S/1994/1074, 19 September 1996, p. 3, where it is noted that as of 4 August 1994, the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) ordered, *inter alia*, the breaking off of political and economic relations with the *Republika Srpska* and the closure of the border between the *Republika Srpska* and the FRY to all transport towards the *Republika Srpska*, except food, clothing and medicine. International observers were deployed to monitor compliance with these measures, and it was reported by the Co-Chairmen that the Government of the FRY appeared to be "meeting its commitment to close the border between the Federal Republic of Yugoslavia (Serbia and Montenegro) and the areas of the Republic of Bosnia and Herzegovina under the control of the Bosnian Serb forces." (*Report of the Co-Chairmen of the Steering Committee of the International Conference on the Former Yugoslavia on the state of implementation of the border closure measures taken by the authorities of the Federal Republic of Yugoslavia (Serbia and Montenegro)*, S/1994/1124, 3 October 1994, pp. 2-3).

[199] As outlined below, this process culminated in the agreement of the *Republika Srpska* to be represented at the Dayton conference by the FRY (below, at paragraph 159). This appears to have been in spite of intense opposition, within the *Republika Srpska*, to the peace settlements proposed by the international community, as is evidenced by the overwhelming rejection by the Bosnian Serbs of the international community's peace plan for Bosnia and Herzegovina in a referendum which took place in Bosnian Serb-held territory on 27 – 28 August 1994 (*See Report of the Secretary-General on the Work of the Organization*, UNGAOR, 49th sess., supp. no. 1 (A/49/1), 2 September 1994, p. 95).

by President Milošević, who would have a casting vote in case of divided votes.[200] Later on, when it came to the signing of the various agreements made at Dayton, it emerged again that it was the FRY that in many respects acted as the international subject wielding authority over the *Republika Srpska.* The General Framework Agreement, by which Bosnia and Herzegovina, Croatia and the FRY endorsed the various annexed Agreements and undertook to respect and promote the fulfilment of their provisions, was signed by President Milošević. This signature had the effect of guaranteeing respect for these commitments by the *Republika Srpska.* Furthermore, by a letter of 21 November 1995 addressed to various States (the United States, Russia, Germany, France and the United Kingdom), the FRY pledged to take "all necessary steps, consistent with the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina, to ensure that the *Republika Srpska* fully respects and complies with the provisions" of the Agreement on Military Aspects of the Peace Settlement (Annex 1A to the Dayton-Paris Accord).[201] In addition, the letter by which the *Republika Srpska* undertook to comply with the aforementioned Agreement was signed on 21 November 1995 by the Foreign Minister of the FRY, Mr. Milutinović, for the *Republika Srpska.*[202]

160. All this would seem to bear out the proposition that in actual fact, at least between 1992 and 1995, overall political and military authority over the *Republika Srpska* was held by the FRY (control in this context included participation in the planning and supervision of ongoing military operations). Indeed, the fact that it was the FRY that had the final say regarding the undertaking of international commitments by the *Republika Srpska,* and in addition pledged, at the end of the conflict, to ensure respect for those international commitments by the *Republika Srpska,* confirms that (i) during the armed conflict the FRY exercised control over that entity, and (ii) such control persisted until the end of the conflict.

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[200] This agreement stipulated that the delegation of the *Republika Srpska* was to be "headed by the President of the Republic of Serbia Mr. Slobodan Milošević" (Article 2). Pursuant to this agreement, the leadership of the *Republika Srpska* agreed "to adopt the binding decisions of the delegation, regarding the Peace Plan, in plenary sessions, by simple majority. In the case of divided votes, the vote of the President, Mr. Slobodan Milošević, shall be decisive" (Article 3). That Mr. Milošević was head of the joint delegation was confirmed by Mr. Milošević himself in his letter of 21 November 1995 to President Izetbegović concerning Annex 9 to the Dayton-Paris Accord. (Agreement on file with the International Tribunal's Library).

[201] This letter had been signed by Mr. Milutinovic, Foreign Minister of the FRY, following a request of 20 November 1995 of the three members of the "Delegation of *Republika Srpska*" to Mr. Milošević.

[202] *See* the texts of the Dayton-Paris Accord (General Framework Agreement for Peace in Bosnia and Herzegovina, initialled by the parties on 21 November 1995, U.N. Doc. A/50/790, S/1995/999, 30 November 1995).

161. This would therefore constitute yet another (albeit indirect) indication of the subordinate role played *vis-à-vis* the FRY by the *Republika Srpska* and its officials in the aforementioned period, including 1992.

162. The Appeals Chamber therefore concludes that, for the period material to this case (1992), the armed forces of the *Republika Srpska* were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an *international* armed conflict.

5. The Status of the Victims

163. Having established that in the circumstances of the case the first of the two requirements set out in Article 2 of the Statute for the grave breaches provisions to be applicable, namely, that the armed conflict be international, was fulfilled, the Appeals Chamber now turns to the second requirement, that is, whether the victims of the alleged offences were "protected persons".

(a) The Relevant Rules

164. Article 4(1) of Geneva Convention IV (protection of civilians), applicable to the case at issue, defines "protected persons" - hence possible victims of grave breaches - as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals". In other words, subject to the provisions of Article 4(2),[203] the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work,[204] the

[203] Article 4(2) of Geneva Convention IV provides as follows:
"Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are".

[204] The preparatory works of the Convention suggests an intent on the part of the drafters to extend its application, *inter alia*, to persons having the nationality of a Party to the conflict who have been expelled by that Party or who have fled abroad, acquiring the status of refugees. If these persons subsequently happen to

Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection (consider, for instance, a situation similar to that of German Jews who had fled to France before 1940, and thereafter found themselves in the hands of German forces occupying French territory).

165. Thus already in 1949 the legal bond of nationality was not regarded as crucial and allowance was made for special cases. In the aforementioned case of refugees, the lack of both allegiance to a State and diplomatic protection by this State was regarded as more important than the formal link of nationality.[205] In the cases provided for in Article 4(2), in addition to nationality, account was taken of the existence or non-existence of diplomatic protection: nationals of a neutral State or a co-belligerent State are not treated as "protected persons" unless they are deprived of or do not enjoy diplomatic protection. In other words, those nationals are not "protected persons" as long as they benefit from the normal diplomatic protection of their State; when they lose it or in any event do not enjoy it, the Convention automatically grants them the status of "protected persons".

166. This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts such as that in the former Yugoslavia, new States are often created during the conflict and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected

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find themselves on the territory of the other Party to the conflict occupied by their national State, they nevertheless do not lose the status of "protected persons" (*see Final Record of the Diplomatic Conference of Geneva of 1949*, vol. II, pp. 561-562, 793-796, 813-814).

[205] *See* also Article 44 of Geneva Convention IV:

> "In applying the measures of control mentioned in the present Convention, the Detaining Power shall not treat as enemy aliens exclusively on the basis of their nationality *de jure* of an enemy State, refugees who do not, in fact, enjoy the protection of any government."

In addition, *see* Article 70(2):

> "Nationals of the Occupying Power who, before the outbreak of hostilities, have sought refuge in the territory of the occupied State, shall not be arrested, prosecuted, convicted or deported from the occupied territory, except for the offences committed after the outbreak of hostilities, or for offences under common law committed before the outbreak of hostilities which, according to the law of the occupied State, would have justified extradition in time of peace."

persons. In such conflicts, not only the text and the drafting history of the Convention but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this Party over persons in a given territory, may be regarded as the crucial test.

(b) Factual Findings

167. In the instant case the Bosnian Serbs, including the Appellant, arguably had the same nationality as the victims, that is, they were nationals of Bosnia and Herzegovina. However, it has been shown above that the Bosnian Serb forces acted as *de facto* organs of another State, namely, the FRY. Thus the requirements set out in Article 4 of Geneva Convention IV are met: the victims were "protected persons" as they found themselves in the hands of armed forces of a State of which they were not nationals.

168. It might be argued that before 6 October 1992, when a "Citizenship Act" was passed in Bosnia and Herzegovina, the nationals of the FRY had the same nationality as the citizens of Bosnia and Herzegovina, namely the nationality of the Socialist Federal Republic of Yugoslavia. Even assuming that this proposition is correct, the position would not alter from a legal point of view. As the Appeals Chamber has stated above, Article 4 of Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible. It therefore does not make its applicability dependent on formal bonds and purely legal relations. Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves. In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.

169. Hence, even if in the circumstances of the case the perpetrators and the victims were to be regarded as possessing the same nationality, Article 4 would still be applicable. Indeed, the victims did not owe allegiance to (and did not receive the diplomatic protection of) the State (the FRY) on whose behalf the Bosnian Serb armed forces had been fighting.

C. Conclusion

170. It follows from the above that the Trial Chamber erred in so far as it acquitted the Appellant on the sole ground that the grave breaches regime of the Geneva Conventions of 1949 did not apply.

171. The Appeals Chamber accordingly finds that the Appellant was guilty of grave breaches of the Geneva Conventions on Counts 8, 9, 12, 15, 21 and 32.

V. THE SECOND GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE FINDING OF INSUFFICIENT EVIDENCE OF PARTICIPATION IN THE KILLINGS IN JASKIĆI

A. Submissions of the Parties

1. The Prosecution case

172. The Prosecution's second ground of cross-appeal is:

> The Trial Chamber, at page 132 para 373 [of the Judgement], erred when it decided that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the accused had any part of the killing of the five men or any of them, from the village of Jaskići.[206]

173. The Prosecution fully accepts the findings of fact of the Trial Chamber,[207] but makes two submissions. First, it submits that, on the basis of the said facts, the Trial Chamber has misdirected itself on the application of the law on the standard of proof beyond reasonable doubt. Secondly, it contends that in determining that the Prosecution did not meet the burden of proof, the Trial Chamber misdirected itself on the application of the common purpose doctrine.[208]

174. In relation to the first error, the Prosecution submits that the only reasonable conclusion to be drawn from the facts found by the Trial Chamber is that of guilt.[209] The test for proof beyond reasonable doubt is that "the proof must be such as to exclude not every hypothesis or possibility of innocence, but every fair or rational hypothesis which may be derived from the evidence, except that of guilt."[210] According to the Prosecution, the Trial Chamber's hypothesis that it was a "distinct possibility that the killing of the five victims may have been the act of a quite distinct group of armed men"[211] is not fair or

[206] Cross-Appellant's Brief, para. 3.6.
[207] T. 169 (20 April 1999).
[208] T. 170 (20 April 1999).
[209] T. 176 (20 April 1999).
[210] Cross-Appellant's Brief, para. 3.12.
[211] Judgement, para. 373.

rational.[212] The use of such terms as "bare possibility"[213] and "could suggest"[214] indicates the misapplication of the test of proof beyond reasonable doubt.[215]

175. As to the second error, the Prosecution submits that the gist of the common purpose doctrine is that if a person knowingly participates in a criminal activity with others, he or she will be liable for all illegal acts that are natural and probable consequences of that common purpose.[216] The Trial Chamber found that the Appellant's participation in the attack on Sivci and Jaskići was part of the armed conflict in the territory of Prijedor municipality between May and December 1992. A central aspect of the attack was a policy to rid the region of the non-Serb population by committing inhumane and violent acts against them in order to achieve the creation of a Greater Serbia. According to the Prosecution, the only conclusion reasonably open from all the evidence is that the killing of the five victims was entirely predictable as part of the natural and probable consequences of the attack on the villages of Sivci and Jaskići on 14 June 1992.[217] It is the Prosecution's submission that this policy of ethnic cleansing was carried out throughout opština Prijedor against non-Serbs by various illegal means, including killings.[218] In this regard, the Appellant's actions and presence did directly and substantially assist that policy. It follows that, regardless of which member or members of the Serb forces actually killed the five victims, the Appellant should have been found guilty under Article 7(1) of the Statute.[219]

2. The Defence Case

176. The Defence submits that, in light of its finding that nobody was killed in Sivci on 14 June 1992, the Trial Chamber correctly found that it was a possibility that the five victims in Jaskići were killed by another, distinct group of armed men, especially as nothing

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[212] Skeleton Argument of the Prosecution, para. 42.
[213] Judgement, para. 373: "The bare possibility that the deaths of the Jaskići villagers were the result of encountering a part of that large force would be enough [...] to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths."
[214] *Ibid.*, para. 373: "The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in which the accused took part [...]."
[215] T. 172 (20 April 1999).
[216] Cross-Appellant's Brief, para. 3.19.
[217] *Ibid.*, paras. 3.24, 3.27.
[218] Cross-Appellant's Brief, paras. 3.27-3.29; T. 179-180 (20 April 1999).

is known as to who shot the victims or in what circumstances.[220] Accordingly, the standard of proof beyond reasonable doubt was correctly applied.[221]

177. In relation to the Prosecution's common purpose submission, the Defence contends that it would have to be shown that the common purpose in which the Appellant allegedly took part included killing as opposed to ethnic cleansing by other means.[222] On the basis of the distinction between the operation in Jaskići and the operation in Sivci where nobody was killed, the Trial Chamber was correct in concluding that it was not possible to find beyond reasonable doubt that the Appellant was involved in a criminal enterprise with the design of killing.[223]

B. Discussion

1. The Armed Group to Which the Appellant Belonged Committed the Killings

178. The Trial Chamber found, amongst other facts, that on 14 June 1992, the Appellant, with other armed men, participated in the removal of men, who had been separated from women and children, from the village of Sivci to the Keraterm camp, and also participated in the calling-out of residents, the separation of men from women and children, and the beating and taking away of men in the village of Jaskići.[224] It also found that five men were killed in the latter village.[225]

179. In support of its finding that there was no proof beyond reasonable doubt that the Appellant had any part in the killing of the five men, the Trial Chamber stated:

> The fact that there was no killing at Sivci could suggest that the killing of villagers was not a planned part of this particular episode of ethnic cleansing of the two villages, in

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[219] Cross-Appellant's Brief, para. 3.29.
[220] Defence's Substituted Response to Cross-Appellant's Brief, paras. 3.8-3.10; Defence's Skeleton Argument on the Cross-Appeal, para. 2(c).
[221] T. 251 (21 April 1999).
[222] Defence's Substituted Response to Cross-Appellant's Brief, para. 3.19; Defence's Skeleton Argument on the Cross-Appeal, para. 2(d).
[223] Defence's Substituted Response to Cross-Appellant's Brief, paras. 3.9-3.10; Defence's Skeleton Argument on the Cross-Appeal, para. 2(d).
[224] Judgement, paras. 369, 373.
[225] *Ibid.*, paras. 370-373.

> which the accused took part; it is accordingly a distinct possibility that it may have been the act of a quite distinct group of armed men, or the unauthorized and unforeseen act of one of the force that entered Sivci, for which the accused cannot be held responsible, that caused their death.[226]

180. In relation to the possibility that the killings may have been carried out by another armed group, the Trial Chamber found the following. An armed group of men, including the Appellant, entered Jaskići. The group separated most of the men from the rest of the villagers, beat and then forcibly removed the men to an unknown location. The Appellant played an active role in the activities of this violent group. The group fired shots as they approached and left the village.

181. It has already been pointed out that the Trial Chamber also found that five men were found killed in Jaskići after the armed group had left; four of them were shot in the head. Nothing else as to who might have killed them or in what circumstances was known. The Trial Chamber referred, however, to the large force of Serb soldiers, of which the Appellant was a member, that invaded the nearby village of Sivci on the same day, without any villager there being killed. It then stated that the:

> [b]are possibility that the deaths of the Jaskići villagers were the result of encountering a part of that large force [of Serb soldiers that invaded Sivci] would be enough, in the state of the evidence, or rather, the lack of it, relating to their deaths, to prevent satisfaction beyond reasonable doubt that the accused was involved in those deaths.[227]

182. The Trial Chamber did not allude to any witness suggesting that another group of armed men might have been responsible for the killing of the five men. In fact, none of the witnesses suggested anything to that effect.

183. In the light of the facts found by the Trial Chamber, the Appeals Chamber holds that, in relation to the possibility that another armed group killed the five men, the Trial Chamber misapplied the test of proof beyond reasonable doubt. On the facts found, the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which the Appellant belonged killed the five men in Jaskići.

184. In the light of the above finding, the Appeals Chamber need not consider the second possibility advanced by the Trial Chamber, namely, that the killing of the five men in

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[226] *Ibid.*, para. 373.
[227] *Ibid.*

Jaskići could have been the "unauthorized and unforeseen act of one of the force that entered Sivci".

2. The Individual Criminal Responsibility of the Appellant for the Killings

(a) Article 7(1) of the Statute and the Notion of Common Purpose

185. The question therefore arises whether under international criminal law the Appellant can be held criminally responsible for the killing of the five men from Jaskići even though there is no evidence that he personally killed any of them. The two central issues are:

(i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and

(ii) what degree of *mens rea* is required in such a case.

186. The basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*). In national legal systems this principle is laid down in Constitutions,[228] in laws,[229] or in judicial decisions.[230] In international criminal law the principle is laid down, *inter alia,* in Article 7(1) of the Statute of the International Tribunal which states that:

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

This provision is aptly explained by the Report of the Secretary-General on the establishment of the International Tribunal, which states the following:

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[228] An example is provided by Article 27 para. 1 of the Italian Constitution ("*La responsibilità penale è personale.*" ("Criminal responsibility is personal.") (unofficial translation)).

[229] *See* for instance Article 121-1 of the French *Code pénal* ("*Nul n'est responsable pénalement que de son propre fait*"), para. 4 of the Austrian *Strafgesetzbuch* ("*Strafbar ist nur, wer schuldhaft handelt*" ("Only he who is culpable may be punished") (unofficial translation)).

[230] This rather basic proposition is usually tacitly assumed rather than explicitly acknowledged. For an example of where it was expressly stated, however, *see*, for Great Britain, *R. v. Dalloway* (1847) 3 Cox CC 273. *See* also the various decisions of the German Constitutional Court, e.g., BverfGE 6, 389 (439) and 50, 125 (133), as well as decisions of the German Federal Court of Justice (e.g., BGHSt 2, 194 (200)).

> An important element in relation to the competence *ratione personae* (personal jurisdiction) of the International Tribunal is the *principle of individual criminal responsibility*. As noted above, the Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.[231]

Article 7(1) also sets out the parameters of personal criminal responsibility under the Statute. Any act falling under one of the five categories contained in the provision may entail the criminal responsibility of the perpetrator or whoever has participated in the crime in one of the ways specified in the same provision of the Statute.

187. Bearing in mind the preceding general propositions, it must be ascertained whether criminal responsibility for participating in a common criminal purpose falls within the ambit of Article 7(1) of the Statute.

188. This provision covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law. However, the commission of one of the crimes envisaged in Articles 2, 3, 4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.

189. An interpretation of the Statute based on its object and purpose leads to the conclusion that the Statute intends to extend the jurisdiction of the International Tribunal to *all* those "responsible for serious violations of international humanitarian law" committed in the former Yugoslavia (Article 1). As is apparent from the wording of both Article 7(1) and the provisions setting forth the crimes over which the International Tribunal has jurisdiction (Articles 2 to 5), such responsibility for serious violations of international humanitarian law is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders (see in particular Article 2, which refers to committing or *ordering* to be committed grave breaches of the Geneva Conventions and Article 4 which sets forth various types of offences in relation to genocide, including *conspiracy*, *incitement*, *attempt* and *complicity*).

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[231] *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, 3 May 1993 ("Report of the Secretary-General"), para. 53 (emphasis added).

190. It should be noted that this notion is spelled out in the Secretary General's Report, according to which:

> The Secretary-General believes that *all* persons who *participate* in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.[232]

Thus, all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice. If this is so, it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution. The Statute does not stop there. It does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions, which are specified below.

191. The above interpretation is not only dictated by the object and purpose of the Statute but is also warranted by the very nature of many international crimes which are committed most commonly in wartime situations. Most of the time these crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act (murder, extermination, wanton destruction of cities, towns or villages, etc.), the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question. It follows that the moral gravity of such participation is often no less – or indeed no different – from that of those actually carrying out the acts in question.

192. Under these circumstances, to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all

[232] *Ibid.*, para 54 (emphasis added).

those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.

193. This interpretation, based on the Statute and the inherent characteristics of many crimes perpetrated in wartime, warrants the conclusion that international criminal responsibility embraces actions perpetrated by a collectivity of persons in furtherance of a common criminal design. It may also be noted that – as will be mentioned below – international criminal rules on common purpose are substantially rooted in, and to a large extent reflect, the position taken by many States of the world in their national legal systems.

194. However, the Tribunal's Statute does not specify (either expressly or by implication) the objective and subjective elements (*actus reus* and *mens rea*) of this category of collective criminality. To identify these elements one must turn to customary international law. Customary rules on this matter are discernible on the basis of various elements: chiefly case law and a few instances of international legislation.

195. Many post-World War II cases concerning war crimes proceed upon the principle that when two or more persons act together to further a common criminal purpose, offences perpetrated by any of them may entail the criminal liability of all the members of the group. Close scrutiny of the relevant case law shows that broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.

196. The first such category is represented by cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention; for instance, the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design (and even if each co-perpetrator carries out a different role within it), they nevertheless all possess the intent to kill. The objective and subjective prerequisites for imputing criminal responsibility to a participant who did not, or cannot be proven to have, effected the killing are as follows: (i) the accused must voluntarily participate in one aspect of the common design (for instance, by inflicting non-fatal violence upon the victim, or by providing material assistance to or facilitating the activities of his co-perpetrators); and (ii) the accused, even if not personally effecting the killing, must nevertheless intend this result.

197. With regard to this category, reference can be made to the *Georg Otto Sandrock et al.* case (also known as the *Almelo Trial*).[233] There a British court found that three Germans who had killed a British prisoner of war were guilty under the doctrine of "common enterprise". It was clear that they all had had the intention of killing the British soldier, although each of them played a different role. They therefore were all co-perpetrators of the crime of murder.[234] Similarly, in the *Hoelzer et al.* case, brought before a Canadian military court, in his summing up the Judge Advocate spoke of a "common enterprise" with regard to the murder of a Canadian prisoner of war by three Germans, and emphasised that the three all knew that the purpose of taking the Canadian to a particular area was to kill him.[235]

198. Another instance of co-perpetratorship of this nature is provided by the case of *Jepsen and others*.[236] A British court had to pronounce upon the responsibility of Jepsen (one of several accused) for the deaths of concentration camp internees who, in the few weeks leading up to the capitulation of Germany in 1945, were in transit to another concentration camp. In this regard, the Prosecutor submitted (and this was not rebutted by the Judge Advocate) that:

> [I]f Jepsen was joining in this voluntary slaughter of eighty or so people, helping the others by doing his share of killing, the whole eighty odd deaths can be laid at his door and at the door of any single man who was in any way assisting in that act.[237]

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[233] *Trial of Otto Sandrock and three others*, British Military Court for the Trial of War Criminals, held at the Court House, Almelo, Holland, on 24th-26th November, 1945, UNWCC, vol. I, p. 35).

[234] The accused were German non-commissioned officers who had executed a British prisoner of war and a Dutch civilian in the house of whom the British airman was hiding. On the occasion of each execution one of the Germans had fired the lethal shot, another had given the order and a third had remained by the car used to go to a wood on the outskirts of the Dutch town of Almelo, to prevent people from coming near while the shooting took place. The Prosecutor stated that "the analogy which seemed to him most fitting in this case was that of a gangster crime, every member of the gang being equally responsible with the man who fired the actual shot" (*ibid.*, p. 37). In his summing up the Judge Advocate pointed out that:

> "There is no dispute, as I understand it, that all three [Germans] knew what they were doing and had gone there for the very purpose of having this officer killed; and, as you know, if people are all present together at the same time taking part in a common enterprise which is unlawful, each one in their (*sic*) own way assisting the common purpose of all, they are all equally guilty in point of law" (*see* official transcript, Public Record Office, London, WO 235/8, p. 70; copy on file with the International Tribunal's Library; the report in the UNWCC, vol. I, p. 40 is slightly different).

All the accused were found guilty, but those who had ordered the shooting or carried out the shooting were sentenced to death, whereas the others were sentenced to fifteen years imprisonment (*ibid.*, p. 41).

[235] *Hoelzer et al.*, Canadian Military Court, Aurich, Germany, Record of Proceedings 25 March-6 April 1946, vol. I, pp. 341, 347, 349 (RCAF Binder 181.009 (D2474); copy on file with the International Tribunal's Library).

[236] *Trial of Gustav Alfred Jepsen and others, Proceedings of a War Crimes Trial held at Luneberg, Germany* (13-23 August, 1946), judgement of 24 August 1946 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).

[237] *Ibid.*, p. 241.

In a similar vein, the Judge Advocate noted in *Schonfeld* that:

> if several persons combine for an unlawful purpose or for a lawful purpose to be effected by unlawful means, and one of them in carrying out that purpose, kills a man, it is murder in all who are present [...] provided that the death was caused by a member of the party in the course of his endeavours to effect the common object of the assembly.[238]

199. It can be noted that some cases appear broadly to link the notion of common purpose to that of causation. In this regard, the *Ponzano* case,[239] which concerned the killing of four British prisoners of war in violation of the rules of warfare, can be mentioned. Here, the Judge Advocate adopted the approach suggested by the Prosecutor,[240] and stressed:

> [...] the requirement that an accused, before he can be found guilty, must have been concerned in the offence. [T]o be concerned in the commission of a criminal offence [...] does not only mean that you are the person who in fact inflicted the fatal injury and directly caused death, be it by shooting or by any other violent means; it also means an indirect degree of participation [...]. [I]n other words, he must be the cog in the wheel of events leading up to the result which in fact occurred. He can further that object not only by giving orders for a criminal offence to be committed, but he can further that object by a variety of other means [...].[241]

Further on, the Judge Advocate submitted that while the defendant's involvement in the criminal acts must form a link in the chain of causation, it was not necessary that his participation be a *sine qua non,* or that the offence would not have occurred but for his participation.[242] Consonant with the twin requirements of criminal responsibility under this category, however, the Judge Advocate stressed the necessity of knowledge on the part of the accused as to the intended purpose of the criminal enterprise.[243]

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[238] *Trial of Franz Schonfeld and others,* British Military Court, Essen, June 11th-26th, 1946, UNWCC, vol. XI, p. 68 (summing up of the Judge Advocate).

[239] *Trial of Feurstein and others*, Proceedings of a War Crimes Trial held at Hamburg, Germany (4-24 August, 1948), judgement of 24 August 1948 (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library).

[240] The Prosecutor had stated the following:
"It is an opening principle of English law, and indeed of all law, that a man is responsible for his acts and is taken to intend the natural and normal consequences of his acts and if these men [...] set the machinery in motion by which the four men were shot, then they are guilty of the crime of killing these men. It does not – it never has been essential for any one of these men to have taken those soldiers out themselves and to have personally executed them or personally dispatched them. That is not at all necessary; all that is necessary to make them responsible is that they set the machinery in motion which ended in the volleys that killed the four men we are concerned with" (*ibid.*, p. 4).

[241] *Ibid.*, summing up of the Judge Advocate, p. 7.

[242] In this regard, the Judge Advocate noted that: "[o]f course, it is quite possible that it [the criminal offence] might have taken place in the absence of all these accused here, but that does not mean the same thing as saying [...] that [the accused] could not be a chain in the link of causation [...]" (*ibid.*, pp. 7-8).

[243] In particular, it was held that in order to be "concerned in the commission of a criminal offence," it was necessary to prove:

200. A final case worthy of mention with regard to this first category is the *Einsatzgruppen* case.[244] With regard to common design, a United States Tribunal sitting at Nuremberg noted that:

> the elementary principle must be borne in mind that neither under Control Council Law No. 10 nor under any known system of criminal law is guilt for murder confined to the man who pulls the trigger or buries the corpse. In line with recognized principles common to all civilized legal systems, paragraph 2 of Article II of Control Council Law No. 10 specifies a number of types of connection with crime which are sufficient to establish guilt. Thus, not only are principals guilty but also accessories, those who take a consenting part in the commission of crime or are connected with plans or enterprises involved in its commission, those who order or abet crime, and those who belong to an organization or group engaged in the commission of crime. These provisions embody no harsh or novel principles of criminal responsibility [...].[245]

"that when he did take part in it he knew the intended purpose of it. If any accused were to have given an order for this execution, believing that it was a perfectly legal execution, that these four soldiers had been sentenced to death by a properly constituted court and that therefore an order for the execution was no more than an order to carry out the decision of the court, then that accused would not be guilty because he would not have any guilty knowledge. But where [...] a person was in fact concerned, and [...] he knew the intended purpose of these acts, then that accused is guilty of the offence in the charge" (*ibid.*, p. 8).

The requisite knowledge of each participant, even if deducible only by implication, was also stressed in the *Stalag Luft III* case, *Trial of Max Ernst Friedrich Gustav Wielen and Others,* Proceedings of the Military Court at Hamburg, (1-3 July 1947) (original transcripts in Public Record Office, Kew, Richmond; on file with the International Tribunal's Library), which concerned the killing of fifty officers of the allied air force who had escaped from the Stalag Luft III camp in Silesia. The Prosecutor in his opening remarks stressed that:

"everybody, particularly every policeman of whatever sort it may be, knew quite well that there had been a mass escape of prisoners of war on the 25th March 1944 [...] [such] that every policeman knew that prisoners of war were at large. I think that is important to remember, and particularly with regard to some of the minor members of the Gestapo who are charged before you that is important to remember because they may say they did not know who these people were. They may say they did not know they were escaped prisoners of war but [in fact] they all knew [...]" (*ibid.*, p. 276).

Furthermore, in two cases concerning an accused's participation in the *Kristallnacht* riots, the Supreme Court for the British zone stressed that it was not required that the accused knew about the rioting in the entire *Reich.* It was sufficient that he was aware of the local action, that he approved it, and that he wanted it "as his own" (unofficial translation). The fact that the accused participated consciously in the arbitrary measures directed against the Jews was sufficient to hold him responsible for a crime against humanity (Case no. 66, Strafsenat. Urteil vom 8 Februar 1949 gegen S. StS 120/48, p. 284-290, 286, vol. II). *See* also Case no. 17, vol. I, 94-98, 96, where the Supreme Court held that it was irrelevant that the scale of ill-treatment, deportation and destruction that happened in other parts of the country on that night were not undertaken in this village. It sufficed that the accused participated intentionally in the action and that he was "not unaware of the fact that the local action was a measure designed to instil terror which formed a part of the nation-wide persecution of the Jews" (unofficial translation).

[244] *The United States of America v. Otto Ohlenforf et al., Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10,* United States Government Printing Office, Washington, 1951, vol. IV, p. 3.

[245] The tribunal went on to say:

"Even though these men [Radetsky, Ruehl, Schubert and Graf] were not in command, they cannot escape the fact that *they were members of Einsatz units whose express mission, well known to all the members, was to carry out a large scale program of murder.* Any member who assisted in enabling these units to function, knowing what was afoot, is guilty of the crimes committed by the unit. The cook in the galley of a pirate ship does not escape the yardarm merely because he himself does not

201. It should be noted that in many post-World War II trials held in other countries, courts took the same approach to instances of crimes in which two or more persons participated with a different degree of involvement. However, they did not rely upon the notion of common purpose or common design, preferring to refer instead to the notion of co-perpetration. This applies in particular to Italian[246] and German[247] cases.

202. The second distinct category of cases is in many respects similar to that set forth above, and embraces the so-called "concentration camp" cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps; i.e., by groups of persons acting pursuant to a concerted plan. Cases illustrative of this category are *Dachau Concentration Camp,*[248] decided by a United States court sitting in Germany and *Belsen,*[249] decided by a British military court sitting in Germany. In these cases the accused held some position of authority within the hierarchy of

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brandish a cutlass. The man who stands at the door of a bank and scans the environs may appear to be the most peaceable of citizens, but if his purpose is to warn his robber confederates inside the bank of the approach of the police, his guilt is clear enough. And if we assume, for the purposes of argument, that the defendants such as Schubert and Graf have succeeded in establishing that their role was an auxiliary one, they are still in no better position than the cook or the robbers' watchman" (*ibid.*, p. 373; emphasis added).

In this connection, the tribunal also addressed the contention that certain of the commanders did not participate directly in the crimes committed, noting that:

"[w]ith respect to the defendants such as Jost and Naumann, [...] it is [...] highly probable that these defendants did not, at least very often, participate personally in executions. And it would indeed be strange had they [who were persons in authority] done so. [...] Far from being a defense or even a circumstance in mitigation, the fact that [these defendants] did not personally shoot a great many people, but rather devoted themselves to directing the over-all operations of the *Einsatzgruppen*, only serves to establish their deeper responsibility for the crimes of the men under their command" (*ibid.*).

[246] *See* for instance the following decisions of the Italian Court of Cassation relating to crimes committed by militias or forces of the "*Repubblica Sociale Italiana*" against Italian partisans or armed forces: *Annalberti et al.*, 18 June 1949, in *Giustizia penale* 1949, Part II, col. 732, no. 440; *Rigardo et al.* case, 6 July 1949, *ibid.*, cols. 733 and 735, no. 443; *P.M. v. Castoldi*, 11 July 1949, *ibid.*, no. 444; *Imolesi et al.*, 5 May 1949, *ibid.*, col. 734, no. 445. *See* also *Ballestra,* 6 July 1949, *ibid.*, cols. 732-733, no. 442.

[247] *See* for instance the decision of 10 August 1948 of the German Supreme Court for the British Zone in *K. and A.*, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen*, vol. I, pp. 53-56; the decision of 22 February 1949 in *J. and A.*, *ibid.*, pp. 310-315; the decision of the District Court (*Landgericht*) of Cologne of 22 and 23 January 1946 in *Hessmer et al.*, in *Justiz und NS-Verbrechen,* vol. I, pp. 13-23, at pp. 13, 20; the decision of 21 December 1946 of the District Court (*Landgericht*) of Frankfurt am Main in *M. et al.* (*ibid.*, pp. 135-165, 154) and the judgement of the Court of Appeal (*Oberlandesgericht*) of 12 August 1947 in the same case (*ibid.*, pp. 166-186, 180); as well as the decision of the District Court of Braunschweig of 7 May 1947 in *Affeldt, ibid.*, p. 383-391, 389.

[248] *Trial of Martin Gottfried Weiss and thirty-nine others*, General Military Government Court of the United States Zone, Dachau, Germany, 15th November-13th December, 1945, UNWCC, vol. XI, p. 5.

[249] *Trial of Josef Kramer and 44 others*, British Military Court, Luneberg, 17th September-17th November, 1945, UNWCC, vol. II, p. 1.

the concentration camps. Generally speaking, the charges against them were that they had acted in pursuance of a common design to kill or mistreat prisoners and hence to commit war crimes.[250] In his summing up in the *Belsen* case, the Judge Advocate adopted the three requirements identified by the Prosecution as necessary to establish guilt in each case: (i) the existence of an organised system to ill-treat the detainees and commit the various crimes alleged; (ii) the accused's awareness of the nature of the system; and (iii) the fact that the accused in some way actively participated in enforcing the system, i.e., encouraged, aided and abetted or in any case participated in the realisation of the common criminal design.[251] The convictions of several of the accused appear to have been explicitly based upon these criteria.[252]

203. This category of cases (which obviously is not applicable to the facts of the present case) is really a variant of the first category, considered above. The accused, when they were found guilty, were regarded as co-perpetrators of the crimes of ill-treatment, because of their objective "position of authority" within the concentration camp system and because they had "the power to look after the inmates and make their life satisfactory"[253] but failed to do so.[254] It would seem that in these cases the required *actus reus* was the active

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[250] *See Dachau Concentration Camp* case, UNWCC, vol. XI, p. 14:

> "It seems, therefore, that what runs throughout the whole of this case, like a thread, is this: that there was in the camp a general system of cruelties and murders of the inmates (most of whom were allied nationals) and that this system was practised with the knowledge of the accused, who were members of the staff, and with their active participation. Such a course of conduct, then, was held by the court in this case to constitute 'acting in pursuance of a common design to violate the laws and usages of war'. Everybody who took any part in such common design was held guilty of a war crime, though the nature and extent of the participation may vary".

[251] The Judge Advocate summarised with approval the legal argument of the Prosecutor in the following terms:

> "The case for the Prosecution is that all the accused employed on the staff at Auschwitz knew that a system and a course of conduct was in force, and that, in one way or another in furtherance of a common agreement to run the camp in a brutal way, all those people were taking part in that course of conduct. They asked the Court not to treat the individual acts which might be proved merely as offences committed by themselves, but also as evidence clearly indicating that the particular offender was acting willingly as a party in the furtherance of this system. They suggested that if the Court were satisfied that they were doing so, then they must, each and every one of them, assume responsibility for what happened." (*Belsen* case, UNWCC, vol. II, p. 121.)

[252] In particular, the accused Kramer appears to have been convicted on this basis. (*See ibid.*, p. 121: "The Judge Advocate reminded the Court that when they considered the question of guilt and responsibility, the strongest case must surely be against Kramer, and then down the list of accused *according to the positions they held*." (emphasis added).

[253] *Ibid.*, p.121.

[254] In a similar vein, the *Case against R. Mulka et al.* ("*Auschwitz concentration camp* case") can be mentioned. Although the court reached the same result, it nevertheless did not apply the doctrine of common design but instead tended to treat the defendants as aiders and abettors as long as they remained within the framework provided by their orders and as principal offenders if they acted outside this framework. This meant that if it could not be proved that the accused actually identified himself with the aims of the Nazi

participation in the enforcement of a system of repression, as it could be inferred from the position of authority and the specific functions held by each accused. The *mens rea* element comprised: (i) knowledge of the nature of the system and (ii) the intent to further the common concerted design to ill-treat inmates. It is important to note that, in these cases, the requisite intent could also be inferred from the position of authority held by the camp personnel. Indeed, it was scarcely necessary to prove intent where the individual's high rank or authority would have, in and of itself, indicated an awareness of the common design and an intent to participate therein. All those convicted were found guilty of the war crime of ill-treatment, although of course the penalty varied according to the degree of participation of each accused in the commission of the war crime.

204. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose. An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this

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regime, then the court would treat him as an aider and abettor because he lacked the specific intent to "want the offence as his own" (*see* in particular the *Bundesgerichtshof* in *Justiz und NS-Verbrechen,* vol. XXI, pp. 838 *ff.*, and especially pp. 881 *ff*). The BGH stated, p. 882:

> "[The view] that everybody who had been involved in the destruction program of the [KZ] Auschwitz and acted in any manner whatsoever in connection with this program participated in the murders and is responsible for all that happened is not correct. It would mean that even acts which did not further the main offence in any concrete manner would be punishable. In consequence even the physician who was in charge of taking care of the guard personnel and who restricted himself to doing only that, would be guilty of aiding and abetting murder. The same would even apply to the doctor who treated prisoners in the camp and saved their lives. Not even those who in their place put little obstacles in the

plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.

205. The case-law in this category has concerned first of all cases of mob violence, that is, situations of disorder where multiple offenders act out a common purpose, where each of them commit offences against the victim, but where it is unknown or impossible to ascertain exactly which acts were carried out by which perpetrator, or when the causal link between each act and the eventual harm caused to the victims is similarly indeterminate. Cases illustrative of this category are *Essen Lynching* and *Borkum Island.*

206. As is set forth in more detail below, the requirements which are established by these authorities are two-fold: that of a criminal intention to participate in a common criminal design and the foreseeability that criminal acts other than those envisaged in the common criminal design are likely to be committed by other participants in the common design.

207. The *Essen Lynching* (also called *Essen West*) case was brought before a British military court, although, as was stated by the court, it "was not a trial under English law".[255] Given the importance of this case, it is worth reviewing it at some length. Three British prisoners of war had been lynched by a mob of Germans in the town of Essen-West on 13 December 1944. Seven persons (two servicemen and five civilians) were charged with committing a war crime in that they were concerned in the killing of the three prisoners of war. They included a German captain, Heyer, who had placed the three British airmen under the escort of a German soldier who was to take the prisoners to a *Luftwaffe* unit for interrogation. While the escort with the prisoners was leaving, the captain had ordered that the escort should not interfere if German civilians should molest the prisoners, adding that they ought to be shot, or would be shot. This order had been given to the escort from the steps of the barracks in a loud voice so that the crowd, which had gathered, could hear and would know exactly what was going to take place. According to the summary given by the United Nations War Crimes Commission:

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way of this program of murder, albeit in a subordinate position and without success, would escape punishment. That cannot be right." (unofficial translation).

[255] *Trial of Erich Heyer and six others*, British Military Court for the Trial of War Criminals, Essen, 18th-19th and 21st-22nd December, 1945, UNWCC, vol. I, p. 88, at p. 91.

> [w]hen the prisoners of war were marched through one of the main streets of Essen, the crowd around grew bigger, started hitting them and throwing sticks and stones at them. An unknown German corporal actually fired a revolver at one of the airmen and wounded him in the head. When they reached the bridge, the airmen were eventually thrown over the parapet of the bridge; one of the airmen was killed by the fall; the others were not dead when they landed, but were killed by shots from the bridge and by members of the crowd who beat and kicked them to death.[256]

208. The Defence laid stress on the need to prove that each of the accused had the intent to kill. The Prosecution took a contrary view. Major Tayleur, the Prosecutor, stated the following:

> My friend [the Defence Counsel] has spoken to you about the intent which is necessary and he says that no evidence of intent to kill has been brought before you. In my submission there has been considerable evidence of intent to kill; but even if there were not, in my submission *to prove this charge you do not have to prove an intent to kill*. If you prove an intent to kill you would prove murder; but you can have an unlawful killing, which would be manslaughter, where there is *not an intent to kill but merely the doing of an unlawful act of violence*. A person might slap another's face with no intent to kill at all but if through some misfortune, for example that person having a weak skull, that person died, in my submission the person striking the blow would be guilty of manslaughter and that would be such killing as would come within the words of this charge. In my submission therefore what you have to be satisfied of – and the onus of proof is of course on the prosecution – is that *each and everyone of the accused, before you can convict him, was concerned in the killing* of these three unidentified airmen in circumstances which the British law would have amounted to either murder or manslaughter.[257]

The Prosecutor then went on to add:

> the allegation of the prosecution is that every person who, following the incitement to the crowd to murder these men, voluntarily took aggressive action against any one of these three airmen *is guilty in that he is concerned in the killing*. It is impossible to separate any one of these from another; they all make up what is known as lynching. In my submission from the moment they left those barracks those men were doomed and the crowd knew they were doomed and *every person in that crowd who struck a blow is both morally and criminally responsible for the deaths of those three men*.[258]

Since Heyer was convicted, it may be assumed that the court accepted the Prosecution arguments as to the criminal liability of Heyer (no Judge Advocate had been appointed in this case). As for the soldier escorting the airmen, he had a duty not only to prevent the prisoners from escaping but also of seeing that they were not molested; he was sentenced to imprisonment for five years (even though the Prosecutor had suggested that he was not criminally liable). According to the Report of the United Nations War Crimes Commission,

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[256] *Ibid.*, p. 89.
[257] *See* transcript in Public Record Office, London, WO 235/58, p. 65 (emphasis added; copy on file with the International Tribunal's Library).
[258] *Ibid.*, p. 66 (emphasis added).

three civilians "were found guilty [of murder] because every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims, though against none of the accused had it been exactly proved that they had individually shot nor given the blows which caused the death".[259]

209. It would seem warranted to infer from the arguments of the parties and the verdict that the court upheld the notion that all the accused who were found guilty took part, in various degrees, in the killing; not all of them intended to kill but all intended to participate in the unlawful ill-treatment of the prisoners of war. Nevertheless they were all found guilty of murder, because they were all "concerned in the killing". The inference seems therefore justified that the court assumed that the convicted persons who simply struck a blow or implicitly incited the murder could have foreseen that others would kill the prisoners; hence they too were found guilty of murder.[260]

210. A similar position was taken by a United States military court in *Kurt Goebell et al.* (also called the *Borkum Island* case). On 4 August 1944, a United States Flying Fortress was forced down on the German island of Borkum. Its seven crew members were taken prisoner and then forced to march, under military guard, through the streets of Borkum. They were first made to pass between members of the Reich's Labour Corps, who beat them with shovels, upon the order of a German officer of the *Reichsarbeitsdienst.* They were then struck by civilians on the street. Later on, while passing through another street, the mayor of Borkum shouted at them inciting the mob to kill them "like dogs". They were

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[259] UNWCC, vol. 1, p. 91. In addition to Heyer and the escort (Koenen), three civilians were also convicted. The first of the accused civilians, Boddenberg, admitted to have struck one of the airmen on the bridge, after one of them had already been thrown over the bridge, knowing "that the motives of the crowd against them [the airmen] were deadly, and yet he joined in" (Transcript in Public Record Office, London, WO 235/58, p. 67; copy on file with International Tribunal's Library); the second, Kaufer, was found to have "beaten the airmen" and taken "an active part" in the mob violence against them. Additionally, it was alleged that he tried to pull the rifle away from a subordinate officer to shoot the airmen below the bridge and that he called out words to the effect that the airmen deserved to be shot (*ibid.*, pp. 67-68). The third, Braschoss, was seen hitting one of the airmen on the bridge, descending beneath the bridge to throw the airman, who was still alive, into the stream. He and an accomplice were further alleged to have thrown another of the airmen from the bridge (*ibid.*, p. 68). Two of the accused civilians, Sambol and Hartung, were acquitted; the former because the blows he was alleged to have inflicted were neither particularly severe nor proximate to the airmen's death (comprising one of the earliest to be inflicted) and the latter because it was not proved beyond reasonable doubt that he actually took part in the affray (*ibid.*, pp. 66-67, UNWCC, vol. I, p. 91).

[260] The charge, in a strict legal sense, was the commission of a war crime in violation of the laws and usages of war for being "concerned in the killing" of the airmen rather than murder as this was "not a trial under English law" (*ibid.*, at p. 91). For all intents and purposes, however, the charge appeared to be treated as a murder charge, as it appeared to have been accepted in the course of the proceedings that "as long as everyone realised

then beaten by civilians while the escorting guards, far from protecting them, fostered the assault and took part in the beating. When the airmen reached the city hall one was shot and killed by a German soldier, followed by the others a few minutes later, all shot by German soldiers. The accused included a few senior officers, some privates, the mayor of Borkum, some policemen, a civilian and the leader of the Reich Labour Corps. All were charged with war crimes, in particular both with "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in the killing" of the airmen and with "wilfully, deliberately and wrongfully encourag[ing], aid[ing], abett[ing] and participat[ing] in assaults upon" the airmen.[261] In his opening statement the Prosecutor developed the doctrine of common design. He stated the following:

> [I]t is important, as I see it, to determine the guilt of each of these accused in the light of the particular role that each one played. *They did not all participate in exactly the same manner.* Members of mobs seldom do. One will undertake one special or particular action and another will perform another particular action. It is the composite of the actions of all that results in the commission of the crime. Now, all legal authorities agree that where a common design of a mob exists and the mob has carried out its purpose, then no distinction can be drawn between the finger man and the trigger man *(sic). No distinction is drawn between the one who, by his acts, caused the victims to be subjected to the pleasure of the mob or the one who incited the mob, or the ones who dealt the fatal blows.* This rule of law and common sense must, of necessity, be so. Otherwise, many of the true instigators of crime would never be punished.
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> Who can tell which particular act was the most responsible for the final shooting of these flyers? Can it not be truly said that any one of the acts of any one of these accused may have been the very act that produced the ultimate result? Although the ultimate act might have been something in which the former actor did not directly participate [, e]very time a member of a mob takes any action that is inclined to encourage, that is inclined to give heart to someone else who is present, to participate, then that person has lent his aid to the accomplishment of the final result.[262]

In short, noted the Prosecutor, the accused were "cogs in the wheel of common design, all equally important, each cog doing the part assigned to it. And the wheel of wholesale murder could not turn without all the cogs".[263] As a consequence, according to the Prosecutor, if it were proved beyond a reasonable doubt "that each one of these accused

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what was meant by the word 'murder' for the purposes of this trial, [there ...] was [no] difficulty" (*ibid.*, pp. 91-92).

[261] *See* Charge Sheet, in U.S. National Archives Microfilm Publications, I (on file with the International Tribunal's Library).

[262] *Ibid.*, p. 1186 (emphasis added). *See* also p. 1187.

[263] *Ibid.*, p. 1188. *See*, further note 240 and accompanying text, with regard to the comments made regarding causation in the *Ponzano* case.

played *his part* in mob violence which led to the unlawful killing of the seven American flyers, [...] under the law *each and every one of the accused* [*was*] *guilty of murder*".[264]

211. It bears emphasising that by taking the approach just summarised, the Prosecutor substantially propounded a doctrine of common purpose which presupposes that all the participants in the common purpose shared the same criminal intent, namely, to commit murder. In other words, the Prosecutor adhered to the doctrine of common purpose mentioned above with regard to the first category of cases. It is interesting to note that the various defence counsel denied the applicability of this common design doctrine, not, however, on principle, but merely on the facts of the case. For instance, some denied the existence of a criminal intent to participate in the common design, claiming that mere presence was not sufficient for the determination of the intent to take part in the killings.[265] Other defence counsel claimed that there was no evidence that there was a conspiracy among the German officers,[266] or they argued that, if there had been such a plot, it did not involve the killing of the airmen.[267]

212. In this case too, no Judge Advocate stated the law. However, it may be fairly assumed that in the event, the court upheld the common design doctrine, but in a different form, for it found some defendants guilty of both the killing and assault charges[268] while others were only found guilty of assault.[269]

213. It may be inferred from this case that all the accused found guilty were held responsible for pursuing a criminal common design, the intent being to assault the prisoners of war. However, some of them were also found guilty of murder, even where there was no evidence that they had actually killed the prisoners. Presumably, this was on the basis that the accused, whether by virtue of their status, role or conduct, were in a position to have predicted that the assault would lead to the killing of the victims by some of those participating in the assault.

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[264] *Ibid.*, p. 1190 (emphasis added). *See* also pp. 1191-1194.
[265] *See* e.g. *ibid.*, pp. 1201, 1203-1206.
[266] *See ibid.*, pp. 1234, 1241, 1243.
[267] *See ibid.*, pp. 1268-1270.
[268] The accused Akkerman, Krolikovski, Schmitz, Wentzel, Seiler and Goebbel were all found guilty on both the killing and assault charges and were sentenced to death, with the exception of Krolikovski, who was sentenced to life imprisonment (*ibid.*, pp. 1280-1286).
[269] The accused Pointner, Witzke, Geyer, Albrecht, Weber, Rommel, Mammenga and Heinemann were found guilty only of assault and received terms of imprisonment ranging between 2 and 25 years (*ibid.*).

214. Mention must now be made of some cases brought before Italian courts after World War II concerning war crimes committed either by civilians or by military personnel belonging to the armed forces of the so-called "*Repubblica Sociale Italiana*" ("RSI"), a *de facto* government under German control established by the Fascist leadership in central and northern Italy, following the declaration of war by Italy against Germany on 13 October 1943. After the war several persons were brought to trial for crimes committed between 1943 and 1945 against prisoners of war, Italian partisans or members of the Italian army fighting against the Germans and the RSI. Some of these trials concerned the question of criminal culpability for acts perpetrated by groups of persons where only one member of the group had actually committed the crime.

215. In *D'Ottavio et al.*, on appeal from the Assize Court of Teramo, the Court of Cassation on 12 March 1947 pronounced upon one of these cases. Some armed civilians had given unlawful pursuit to two prisoners of war who had escaped from a concentration camp, in order to capture them. One member of the group had shot at the prisoners without intending to kill them, but one had been wounded and had subsequently died as a result. The trial court held that all the other members of the group were accountable not only for "illegal restraint" (*sequestro di persona*) but also for manslaughter (*omicidio preterintenzionale*). The Court of Cassation upheld this finding. It held that for this type of criminal liability to arise, it was necessary that there exist not only a material but also a psychological "causal nexus" between the result all the members of the group intended to bring about and the different actions carried out by an individual member of that group. The court went on to point out that:

> [i]ndeed the responsibility of the participant (*concorrente*) [...] is not founded on the notion of objective responsibility [...], but on the fundamental principle of the concurrence of interdependent causes [...]; by virtue of this principle all the participants are accountable for the crime both where they directly cause it and where they indirectly cause it, in keeping with the well-known canon *causa causae est causa causati.*[270]

[270] *See* handwritten text of the (unpublished) judgement, p. 6 (unofficial translation; kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). *See* also *Giustizia penale,* 1948, Part II, col. 66, no. 71 (containing a headnote on the judgement).

The court then noted that in the case at issue:

> [t]here existed a nexus of material causality, as all the participants had directly cooperated in the crime of attempted "illegal restraint" [...] by surrounding and pursuing two prisoners of war on the run, armed with a gun and a rifle, with a view to illegally capturing them. This crime was the indirect cause of a subsequent and different event, namely the shooting (by d'Ottavio alone) at one of the fugitives, resulting in wounding followed by death. Furthermore, there existed psychological causality, as all the participants had the intent to perpetrate and knowledge of the actual perpetration of an attempted illegal restraint, *and foresaw the possible commission of a different crime*. This *foresight* (*previsione*) necessarily followed from the use of weapons: it being predictable (*dovendo prevedersi*) that one of the participants might shoot at the fugitives to attain the common purpose (*lo scopo comune*) of capturing them.[271]

216. In another case (*Aratano et al.*) the Court of Cassation dealt with the following circumstances: a group of RSI militiamen had planned to arrest some partisans, without intending to kill them; however, to frighten the partisans, one of the militiamen fired a few shots into the air. As a result the partisans shot back; a shoot-out ensued and in the event one of the partisans was killed by a member of the RSI militia. The court held that the trial court had erred in convicting all members of the militia of murder. In its view, as the trial court had found that the militiamen had not intended to kill the partisans:

> [I]t was clear that [the murder of one of the partisans] was an unintended event (*evento non voluto*) and consequently could not be attributed to all the participants: the crime committed was more serious than that intended and it proves necessary to resort to categories other than that of voluntary homicide. This Supreme Court has already had the opportunity to state the same principle, where it noted that in order to find a person responsible for a homicide perpetrated in the course of a mopping-up operation carried out by many persons, it was necessary to establish that, in participating in this operation, a voluntary activity also concerning homicide had been brought into being (*fosse stata spiegata un'attività volontaria in relazione anche all'omicidio*) (judgement of 27 August 1947 *in re: Beraschi*).[272]

217. Other cases relate to the applicability of the amnesty law passed by the Presidential Decree of 22 June 1946 no. 4. The amnesty applied among other things to crimes of "collaboration with the occupying Germans" but excluded offences involving murder. In *Tossani* the question was whether the law on amnesty covered a person who had taken part in a mopping-up operation against civilians in the course of which a German soldier had killed a partisan. The Court of Cassation found that the amnesty should apply. It emphasised that the appellant participating in the operation had not taken any active part in it and did not carry weapons; in addition, the killing was found to have been "an exceptional and

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[271] *See* handwritten text of the (unpublished) judgement, pp. 6-7 (unofficial translation; emphasis added).
[272] *See* handwritten text of the (unpublished) judgement, pp. 13-14 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). For a headnote on this case *see Archivio penale,* 1949, p. 472.

unforeseen (*imprevisto*) event", for during a search a civilian had escaped to avoid being detained and had been shot at by the German soldier.[273] A similar position was taken by the same court in *Ferrida*. The appellant had participated, "only in his capacity as a nurse," in a mopping-up operation in the course of which some partisans had been killed. The court found that he was not guilty of murder; the law on amnesty was therefore applicable to him.[274] In *Bonati et al.* the appellant argued that the crime of murder, not envisaged by the group of persons concerned, had been perpetrated by another member of that group. The Court of Cassation rejected the appeal, holding that the appellant was also guilty of murder. Although this crime was more grave than that intended by some of the participants (*concorrenti*), it "was in any case a consequence, albeit indirect, of his participation".[275]

218. In these cases courts indisputably applied the notion that a person may be held criminally responsible for a crime committed by another member of a group and not envisaged in the criminal plan. Admittedly, in some of the cases the *mens rea* required for a member of the group to be held responsible for such an action was not clearly spelled out. However, in light of other judgements handed down in the same period on the same matter, although not relating to war crimes, it may nevertheless be assumed that courts required that the event must have been predictable. In this connection it suffices to mention the judgement of the Court of Cassation of 20 July 1949 in *Mannelli,* where the court explained the required causal nexus as follows:

> The relationship of material causality by virtue of which the law makes some of the participants liable for the crime other than that envisaged, must be correctly understood from the viewpoint of logic and law and be strictly differentiated from an incidental relationship (*rapporto di occasionalita'*). Indeed, the cause, whether immediate or mediate, direct or indirect, simultaneous or successive, can never be confused with mere coincidence. For there to be a relationship of material causality between the crime willed by one of the participants and the different crime committed by another, *it is necessary that the latter crime should constitute the logical and predictable development of the former* (*il logico e prevedibile sviluppo del primo*). Instead, where there exists full independence between the two crimes, one may find, depending upon the specific circumstances, a merely incidental relationship (*un rapporto di mera occasionalita'*), but not a causal relationship. In the light of these criteria, he who requests somebody else to wound or kill cannot answer for a robbery perpetrated by the other person, for this crime does not constitute the logical development of

[273] Judgement of 12 September 1946, in *Archivio penale,* 1947, Part II, pp. 88-89.
[274] Judgement of 25 July 1946, in *Archivio penale,* 1947, Part II, p. 88.
[275] *See* handwritten text of the (unpublished) judgement of 5 July 1946, p. 19 (kindly provided by the Italian Public Record Office, Rome; on file with the International Tribunal's Library). *See* also *Giustizia penale,* 1945-46, Part II, cols. 530-532.
For cases where the Court of Cassation concluded that the participant was guilty of the more serious crime not envisaged in the common criminal design, *see Torrazzini*, judgement of 18 August 1946, in *Archivio penale* 1947, Part II, p. 89; *Palmia*, judgement of 20 September 1946, *ibid.*

> the intended offence, but a new fact, having its own causal autonomy, and linked to the conduct willed by the instigator (*mandante*) by a merely incidental relationship (emphasis added).[276]

219. The same notion was enunciated by the same Court of Cassation in many other cases.[277] That this was the basic notion upheld by the court seems to be borne out by the fact that the one instance where the same court adopted a different approach is somewhat conspicuous.[278] Accordingly, it would seem that, with regard to the *mens rea* element required for the criminal responsibility of a person for acts committed within a common purpose but not envisaged in the criminal design, that court either applied the notion of an attenuated form of intent (*dolus eventualis*) or required a high degree of carelessness (*culpa*).

220. In sum, the Appeals Chamber holds the view that the notion of common design as a form of accomplice liability is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal. As for the objective and subjective elements of the crime, the case law shows that the notion has been applied to three distinct categories of cases. First, in cases of co-perpetration, where all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent). Secondly, in the so-called "concentration camp" cases, where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment. Such intent may be proved either directly or as a matter of inference from the nature of the accused's authority within the camp or organisational hierarchy. With regard to the third category of cases, it is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to

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[276] *See Giustizia penale,* 1950, Part II, cols. 696-697 (emphasis added).

[277] *See* e.g. Court of Cassation, 15 March 1948, *Peveri* case, in *Archivio penale,* 1948, pp. 431-432; Court of Cassation, 20 July 1949, *Mannelli* case, in *Giustizia penale,* 1949, Part II, col. 906, no.599; Court of Cassation, 27 October 1949, *P.M. v. Minafò*, in *Giustizia penale,* 1950, Part II, col. 252, no. 202; 24 February 1950, *Montagnino*, *ibid.*, col.821; 19 April 1950, *Solesio et al., ibid.*, col. 822. By contrast, in a judgement of 23 October 1946 the same Court of Cassation, in *Minapò et al.,* held that it was immaterial that the participant in a crime had or had not foreseen the criminal conduct carried out by another member of the criminal group (*Giustizia penale,* 1947, Part II, col. 483, no. 382).

[278] In the *Antonini* case (judgement of the Court of Cassation of 29 March 1949), the trial court had found the accused guilty not only of illegally arresting some civilians but also of their subsequent shooting by the Germans, as a "reprisal" for an attack on German troops in Via Rasella, in Rome. According to the trial court the accused, in arresting the civilians, had not intended to bring about their killing, but knew that he thus brought into being a situation likely to lead to their killing. The Court of Cassation reversed this finding,

take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).

221. In addition to the aforementioned case law, the notion of common plan has been upheld in at least two international treaties. The first of these is the International Convention for the Suppression of Terrorist Bombing, adopted by consensus by the United Nations General Assembly through resolution 52/164 of 15 December 1997 and opened for signature on 9 January 1998. Pursuant to Article 2(3)(c) of the Convention, offences envisaged in the Convention may be committed by any person who:

> [i]n any other way [other than participating as an accomplice, or organising or directing others to commit an offence] contributes to the commission of one or more offences as set forth in paragraphs 1 or 2 of the present article by a group of persons acting with a common purpose; such contribution shall be intentional and either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.

The negotiating process does not shed any light on the reasons behind the adoption of this text.[279] This Convention would seem to be significant because it upholds the notion of a

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holding that for the accused to be found guilty, it was necessary that he had not only foreseen but also willed the killing (*see* text of the judgement in *Giustizia penale,* 1949, Part II, cols. 740-742).

[279] The Report of the Sixth Committee (25 November 1997, A/52/653) and the Official Records of the General Assembly session in which this Convention was adopted made scant reference to Article 2 and did not elaborate upon the doctrine of common purpose (*see* UNGAOR, 72nd plenary meeting, 52nd sess., Mon. 15 December 1997, U.N. Doc. A/52/PV.72). The Japanese delegate during the 33rd meeting of the Sixth Committee nevertheless noted that "some terms used [in the Convention] such as [...] 'such contribution' (Article 2, para. 3(c)) were ambiguous" (33rd Meeting of the Sixth Committee, 2 December 1997, UNGAOR A/C.6/52/SR.33, p. 8, para. 77). He concluded that his Government would therefore "interpret 'such contribution' [...] to mean abetment, assistance or other similar acts as defined by Japanese legislation" (*ibid*).

"common criminal purpose" as distinct from that of aiding and abetting (couched in the terms of "participating as an accomplice [in] an offence"). Although the Convention is not yet in force, one should not underestimate the fact that it was adopted by consensus by all the members of the General Assembly. It may therefore be taken to constitute significant evidence of the legal views of a large number of States.

222. A substantially similar notion was subsequently laid down in Article 25 of the Statute of the International Criminal Court, adopted by a Diplomatic Conference in Rome on 17 July 1998 ("Rome Statute").[280] At paragraph 3(d), this provision upholds the doctrine under discussion as follows:

> [In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person ...]
>
> (d) In any other way [other than aiding and abetting or otherwise assisting in the commission or attempted commission of a crime] contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> i. Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> ii. Be made in the knowledge of the intention of the group to commit the crime.

223. The legal weight to be currently attributed to the provisions of the Rome Statute has been correctly set out by Trial Chamber II in *Furundžija.*[281] There the Trial Chamber pointed out that the Statute is still a non-binding international treaty, for it has not yet entered into force. Nevertheless, it already possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio iuris* of those States. This is consistent

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See also *Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996*, UNGAOR, 52nd sess., 37th supp., A/52/37.

[280] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 17 July 1998.

[281] "Judgement", *Prosecutor v. Anto Furundžija,* Case No.: IT-95-17/1-T, Trial Chamber II, 10 December 1998, para. 227.

with the view that the mode of accomplice liability under discussion is well-established in international law and is distinct from aiding and abetting.[282]

224. As pointed out above, the doctrine of acting in pursuance of a common purpose is rooted in the national law of many States. Some countries act upon the principle that where multiple persons participate in a common purpose or common design, all are responsible for the ensuing criminal conduct, whatever their degree or form of participation, provided all had the intent to perpetrate the crime envisaged in the common purpose. If one of the participants commits a crime not envisaged in the common purpose or common design, he alone will incur criminal responsibility for such a crime. These countries include Germany[283] and the Netherlands.[284] Other countries also uphold the principle whereby if persons take part in a common plan or common design to commit a crime, all of them are criminally responsible for the crime, whatever the role played by each of them. However, in these countries, if one of the persons taking part in a common criminal plan or enterprise perpetrates another offence that was outside the common plan but nevertheless foreseeable, those persons are all fully liable for that offence. These countries include civil law systems, such as that of France[285] and Italy.[286]

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[282] Even should it be argued that the objective and subjective elements of the crime, laid down in Article 25 (3) of the Rome Statute differ to some extent from those required by the case law cited above, the consequences of this departure may only be appreciable in the long run, once the Court is established. This is due to the inapplicability to Article 25(3) of Article 10 of the Statute, which provides that "[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute". This provision does not embrace Article 25, as this Article appears in Part 2 of the Statute, whereas Article 25 is included in Part 3.

[283] *See* Para. 25(2) of the *Strafgesetzbuch: "Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter)*". ("If several persons commit a crime as co-perpetrators, each is liable to punishment as a principal perpetrator." (unofficial translation)). The German case law has clearly established the principle whereby if an offence is perpetrated that had not been envisaged in the common criminal plan, only the author of this offence is criminally responsible for it. *See* BGH GA 85, 270. According to the German Federal Court (in BGH GA 85, 270):

> "*Mittäterschaft ist anzunehmen, wenn und soweit das Zusammenwirken der mehreren Beteiligten auf gegenseitigem Einverständnis beruht, während jede rechtsverletzende Handlung eines Mittäters, die über dieses Einverständnis hinausgeht, nur diesem allein zuzurechnen ist*". ("There is co-perpetration (*Mittäterschaft*) when and to the extent that the joint action of the several participants is founded on a reciprocal agreement (*Einverständnis*), whereas any criminal action of a participant (*Mittäter*) going beyond this agreement can only be attributed to that participant." (unofficial translation)).

[284] In the Netherlands, the term designated for this form of criminal liability is "medeplegen". (*See* HR 6 December 1943, *NJ 1944*, 245; HR 17 May 1943, *NJ 1943*, 576; and HR 6 April 1925, *NJ 1925*, 723, W 11393).

[285] *See* Article 121-7 of the *Code pénal*, which reads:

> "*Est complice d'un crime ou d'un délit la personne qui sciemment, par aide ou assistance, en a facilité la préparation ou la consommation. Est également complice la personne qui par don, promesse, menace, ordre, abus d'autorité ou de pouvoir aura provoqué à une infraction ou donné des instructions pour la commettre*". ("Any person who knowingly has assisted in planning or committing a crime or

They also embrace common law jurisdictions such as England and Wales,[287] Canada,[288] the United States,[289] Australia[290] and Zambia.[291]

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offence, whether by aiding or abetting, is party to it. Furthermore, any person who offers gifts, makes promises, gives orders or abuses his position of authority or power to instigate a criminal act or gives instructions for its commission is equally party to it." (unofficial translation)).

In addition to responsibility for crimes committed by more persons, the Court of Cassation has envisaged criminal responsibility for acts committed by an accomplice going beyond the criminal plan. In this connection the Court has distinguished between crimes bearing no relationship to the crime envisaged (e.g. a person hands a gun to an accomplice in the context of a hold-up, but the accomplice uses the gun to kill one of his relatives), and crimes where the conduct bears some relationship to the planned crime (e.g. theft is carried out in the form of robbery). In the former category of cases French case law does not hold the person concerned responsible, while in the latter it does, under certain conditions (as held in a judgement of 31 December 1947, *Bulletin des arrêts criminels de la Cour de Cassation* 1947, no. 270, the accomplice "*devait prévoir toutes les qualifications dont le fait était susceptible, toutes les circonstances dont il pouvait être accompagné*" ("should expect to be charged on all counts that the law allows for and all consequences that might result from the crime" (unofficial translation)). *See* also the decision of 19 June 1984, *Bulletin, ibid.*, 1984, no. 231.

[286] The principles of common purpose are delineated, in substance, in the following provisions of the *Codice Penale*:

"Article 110: Pena per coloro che concorrono nel reato.- *Quando più persone concorrono nel medesimo reato, ciascuna di esse soggiace alla pena per questo stabilità, salve le disposizioni degli articoli seguenti.*" ("Penalties for those who take part in a crime.- Where multiple persons participate in the same crime, each of them is liable to the penalty established for that crime, subject to the provisions of the following Articles." (unofficial translation)); and

"Article 116: Reato diverso da quello voluto da taluno dei concorrenti.- *Qualora il reato commesso sia diverso da quello voluto da taluno dei concorrenti, anche questi ne risponde, se l'evento e conseguenza della sua azione od omissione.*" ("Crimes other than that intended by some of the participants.- Where the crime committed is different from that intended by one of the participants, he too shall answer for that crime if the event is a consequence of his act or omission." (unofficial translation)).

It should be noted that Italian courts have increasingly interpreted Article 116 as providing for criminal responsibility in cases of foreseeability. *See* in particular the judgement of the Constitutional Court of 13 May 1965, no. 42, *Archivio Penale* 1965, part II, pp. 430 *ff*. In some cases courts require so-called abstract foreseeability (*prevedibilità astratta*) (*see* e.g., instance, Court of Cassation, 3 March 1978, *Cassazione penale,* 1980, pp. 45 *ff*; Court of Cassation, 4 March 1988, *Cassazione penale,* 1990, pp. 35 *ff*); others require concrete (or specific) foreseeability (*prevedibilità concreta*) (*see* e.g., Court of Cassation, 11 October 1985, *Rivista penale,* 1986, p. 421; and Court of Cassation, 18 February 1998, *Rivista penale,* 1988, p. 1200).

[287] *See R. v. Hyde* [1991] 1 QB 134; *R. v. Anderson; R. v. Morris* [1966] 2 QB 110, in which Lord Parker CJ held that "where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, than that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise". However, liability for such unusual consequences is limited to those offences that the accused foresaw that the principal might commit as a possible incident of the common unlawful enterprise, and further, the accused, with such foresight, must have continued to participate in the enterprise (*see Hui Chi-Ming v. R.* [1992] 3 All ER 897 at 910-911).

[288] Criminal Code, Section 21(2) reads that where:

"two or more persons form an intention to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each one of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence."

It should be noted that despite the fact that the section refers to an objective foreseeability requirement, this has been modified by the Supreme Court of Canada which held that: "[i]n those instances where the principal is held to a *mens rea* standard of subjective foresight, the party cannot constitutionally be convicted for the same crime on the basis of an objective foreseeability standard" (*R. v. Logan* [1990] 2 SCR 731 at 735). Hence, a subjective standard is applied in the case of offences such as murder. *See* also *R. v. Rodney* [1990] 2 SCR 687.

225. It should be emphasised that reference to national legislation and case law only serves to show that the notion of common purpose upheld in international criminal law has an underpinning in many national systems. By contrast, in the area under discussion, national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognised by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. Nor can reference to national law have, in this case, the scope and purport adumbrated in general terms by the United Nations Secretary-General in his Report, where it is pointed out that "suggestions have been made that the international tribunal should apply *domestic law* in so far as it *incorporates* customary international humanitarian law".[292] In the area under discussion, domestic law does not originate from the implementation of international law but, rather, to a large extent runs parallel to, and precedes, international regulation.

226. The Appeals Chamber considers that the consistency and cogency of the case law and the treaties referred to above, as well as their consonance with the general principles on criminal responsibility laid down both in the Statute and general international criminal law

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[289] E.g., in Maine (17 Maine Criminal Code § 57 (1997), Minnesota (Minnesota Statutes § 609.05 (1998)), Iowa (Iowa Code § 703.2 (1997)), Kansas (Kansas Statutes § 21-3205 (19997)), Wisconsin (Wisconsin Statutes § 939.05 (West 1995)). Although there is no clearly defined doctrine of common purpose under the United States' Federal common law, similar principles are promulgated by the Pinkerton doctrine. This doctrine imposes criminal liability for acts committed in furtherance of a common criminal purpose, whether the acts are explicitly planned or not, provided that such acts might have been reasonably contemplated as a probable consequence or likely result of the common criminal purpose (*see Pinkerton v. United States,* 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946); *State v. Walton,* 227 Conn. 32; 630 A.2d 990 (1993); *State of Connecticut v. Diaz,* 237 Conn. 518, 679 A. 2d 902 (1996)).

[290] Under Australian law, when two parties embark on a joint criminal enterprise, a party will be liable for an act which he contemplates may be carried out by the other party in the course of the enterprise, even if he has not explicitly or tacitly agreed to the commission of that act (*McAuliffe v. R.* (1995) 183 CLR 108 at 114). The test for determining whether a crime falls within the scope of the relevant joint enterprise is the subjective test of contemplation: "in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one, and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose" (*ibid.*).

[291] Article 22 of the Penal Code states:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

[292] *See* Report of the Secretary-General, para. 36 (emphasis added).

and in national legislation, warrant the conclusion that case law reflects customary rules of international criminal law.

227. In sum, the objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

i. *A plurality of persons.* They need not be organised in a military, political or administrative structure, as is clearly shown by the *Essen Lynching* and the *Kurt Goebell* cases.

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

iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose.

228. By contrast, the *mens rea* element differs according to the category of common design under consideration. With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which, as noted above, is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the

circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk.*

229. In light of the preceding propositions it is now appropriate to distinguish between acting in pursuance of a common purpose or design to commit a crime, and aiding and abetting.

(i) The aider and abettor is always an accessory to a crime perpetrated by another person, the principal.

(ii) In the case of aiding and abetting no proof is required of the existence of a common concerted plan, let alone of the pre-existence of such a plan. No plan or agreement is required: indeed, the principal may not even know about the accomplice's contribution.

(iii) The aider and abettor carries out acts specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime (murder, extermination, rape, torture, wanton destruction of civilian property, etc.), and this support has a substantial effect upon the perpetration of the crime. By contrast, in the case of acting in pursuance of a common purpose or design, it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose.

(iv) In the case of aiding and abetting, the requisite mental element is knowledge that the acts performed by the aider and abettor assist the commission of a specific crime by the principal. By contrast, in the case of common purpose or design more is required (i.e., either intent to perpetrate the crime or intent to pursue the common criminal design plus foresight that those crimes outside the criminal common purpose were likely to be committed), as stated above.

(b) The Culpability of the Appellant in the Present Case

230. In the present case, the Trial Chamber found that the Appellant participated in the armed conflict taking place between May and December 1992 in the Prijedor region. An aspect of this conflict was a policy to commit inhumane acts against the non-Serb civilian population of the territory in the attempt to achieve the creation of a Greater Serbia.[293] It was also found that, in furtherance of this policy, inhumane acts were committed against numerous victims and "pursuant to a recognisable plan".[294] The attacks on Sivci and Jaskići on 14 June 1992 formed part of this armed conflict raging in the Prijedor region.

231. The Appellant actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts. The common criminal purpose was not to kill all non-Serb men; from the evidence adduced and accepted, it is clear that killings frequently occurred in the effort to rid the Prijedor region of the non-Serb population. That the Appellant had been aware of the killings accompanying the commission of inhumane acts against the non-Serb population is beyond doubt. That is the context in which the attack on Jaskići and his participation therein, as found by the Trial Chamber as well as the Appeals Chamber above, should be seen. That nobody was killed in the attack on Sivci on the same day does not represent a change of the common criminal purpose.

232. The Appellant was an armed member of an armed group that, in the context of the conflict in the Prijedor region, attacked Jaskići on 14 June 1992. The Trial Chamber found the following:

> Of the killing of the five men in Jaskići, the witnesses Draguna Jaskić, Zemka Šahbaz and Senija Elkasović saw their five dead bodies lying in the village when the women were able to leave their houses after the armed men had gone; Senija Elkasović saw that four of them had been shot in the head. She had heard shooting after the men from her house were taken away.[295]

The Appellant actively took part in this attack, rounding up and severely beating some of the men from Jaskići. As the Trial Chamber further noted:

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[293] *See* Judgement, paras. 127-179, which outlines the background to the conflict in the opština Prijedor.

> [t]hat the armed men were violent was not in doubt, a number of these witnesses were themselves threatened with death by the armed men as the men of the village were being taken away. Apart from that, their beating of the men from the village, in some cases beating them into insensibility, as they lay on the road, is further evidence of their violence.[296]

Accordingly, the only possible inference to be drawn is that the Appellant had the intention to further the criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts against them. That non-Serbs might be killed in the effecting of this common aim was, in the circumstances of the present case, foreseeable. The Appellant was aware that the actions of the group of which he was a member were likely to lead to such killings, but he nevertheless willingly took that risk.

3. The Finding of the Appeals Chamber

233. The Trial Chamber erred in holding that it could not, on the evidence before it, be satisfied beyond reasonable doubt that the Appellant had any part in the killing of the five men from the village of Jaskići. The Appeals Chamber finds that the Appellant participated in the killings of the five men in Jaskići, which were committed during an armed conflict as part of a widespread or systematic attack on a civilian population. The Appeals Chamber therefore holds that under the provisions of Article 7(1) of the Statute, the Trial Chamber should have found the Appellant guilty.

234. The Appeals Chamber finds that this ground of the Prosecution's Cross-Appeal succeeds.

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[294] Judgement, para. 660.
[295] *Ibid.*, para. 370.
[296] *Ibid.*

C. Conclusion

235. In light of the Appeals Chamber's finding that Article 2 of the Statute is applicable, the Appellant is found guilty on Count 29 (grave breach in terms of Article 2(a) (wilful killing) of the Statute) and Article 7(1) of the Statute.

236. The Trial Chamber's finding on Count 30 is set aside. The Appellant is found guilty on Count 30 (violation of the laws or customs of war in terms of Article 3(1)(a) (murder) of the Statute) and Article 7(1) of the Statute.

237. The Trial Chamber's finding on Count 31 is set aside. The Appellant is found guilty on Count 31 (crime against humanity in terms of Article 5(a) (murder) of the Statute) and Article 7(1) of the Statute.

VI. THE THIRD GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT CRIMES AGAINST HUMANITY CANNOT BE COMMITTED FOR PURELY PERSONAL MOTIVES

238. In the Judgement, the Trial Chamber identified, from among the elements which had to be satisfied before a conviction for crimes against humanity could be recorded, the need to prove the existence of an armed conflict and a nexus between the acts in question and the armed conflict.

239. As to the nature of the nexus required, the Trial Chamber found that, subject to two caveats, it is sufficient for the purposes of crimes against humanity that the act occurred "in the course or duration of an armed conflict".[297] The first caveat was "that the act be linked geographically as well as temporally with the armed conflict".[298] The second caveat was that the act and the conflict must be related or, at least, that the act must "not be unrelated to the armed conflict".[299] The Trial Chamber further held that the requirement that the act must "not be unrelated" to the armed conflict involved two aspects. First, the perpetrator must know of the broader context in which the act occurs.[300] Secondly, the act must not have been carried out for the purely personal motives of the perpetrator.[301]

A. Submissions of the Parties

1. The Prosecution Case

240. The Prosecution submits that there is nothing in Article 5 of the Statute which suggests that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. In the submission of the Prosecution, no such requirement can be inferred from the requirement that the crime must have a nexus to the armed conflict. In

[297] Judgement, para. 633.
[298] *Ibid.*
[299] *Ibid.*, para. 634.
[300] *Ibid.*, paras. 656-657.

fact, to read the armed conflict requirement as requiring that the perpetrator's motives not be purely personal "would [...] transform this merely jurisdictional limitation under Article 5 into a substantive element of the *mens rea* of crimes against humanity".[302]

241. The Prosecution concedes that this finding did not affect the verdict against the Appellant. However, it submits that the finding involves a significant question of law that is of general importance to the Tribunal's jurisprudence and should therefore be corrected on appeal.[303]

242. The Prosecution argues that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons and that the sole authority relied on by the Trial Chamber in support of its finding in fact suggests that, even where perpetrators may have been personally motivated to commit the acts in question, their conduct can still be characterised as a crime against humanity.[304] Subsequent decisions of the United States military tribunals under Control Council Law No.10 and of national courts are also consistent with the view that a perpetrator of crimes against humanity may act out of purely personal motives.[305]

243. Finally, the Prosecution contends that the object and purpose of the Tribunal's Statute support the interpretation that crimes against humanity may be committed for purely personal reasons, arguing that the objective of the Statute in providing a broad scope for humanitarian law would be defeated by a narrow interpretation of the category of offences falling within the ambit of Article 5. Furthermore, if proof of a non-personal motive was required, many perpetrators of crimes against humanity could evade conviction by the International Tribunal simply by invoking purely personal motives in defence of their conduct.[306]

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[301] *Ibid.* paras. 658-659.
[302] Cross-Appellant's Brief, para. 4.9.
[303] Skeleton Argument of the Prosecution, para. 26.
[304] Cross-Appellant's Brief, para. 4.11; T. 150 (20 April 1999).
[305] Cross-Appellant's Brief, paras. 4.15 – 4.18.
[306] *Ibid.* paras. 4.22; T. 152 (20 April 1999).

2. The Defence Case

244. In contrast to the Prosecution's Cross-Appeal, the Defence argues that the Trial Chamber's ruling that a crime against humanity cannot be committed for purely personal reasons is correct. Although it concedes that Article 5 of the Statute does not expressly stipulate that crimes against humanity cannot be committed for purely personal reasons, in its submission, the Trial Chamber nevertheless interpreted Article 5 correctly when it found that crimes against humanity cannot be committed for purely personal motives.[307]

245. The Defence contests the interpretation given to the applicable case law by the Prosecution, arguing that in all the cases cited, the defendants were linked to the system of extermination which formed the underlying predicate of crimes against humanity, and therefore did not commit their crimes for purely personal motives.[308] In other words, the activities of the defendants were linked to the general activities comprising the pogroms against the Jews and thus the Defence submits that the acts of the defendants were not acts committed for purely personal reasons.

246. The Defence also contests the Prosecution's submissions regarding the object and purpose of the Statute of the International Tribunal, arguing, to the contrary, that policy suggests that it would be unjust if a perpetrator of a criminal act guided solely by personal motives was instead to be prosecuted for a crime against humanity.[309]

B. Discussion

247. Neither Party asserts that the Trial Chamber's finding that crimes against humanity cannot be committed for purely personal motives had a bearing on the verdict in terms of Article 25(1) of the Tribunal Statute.[310] Nevertheless this is a matter of general significance for the Tribunal's jurisprudence. It is therefore appropriate for the Appeals Chamber to set forth its views on this matter.

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[307] Appellant's Amended Brief on Judgement, para. 4.9; T. 227 (20 April 1999).
[308] Appellant's Amended Brief on Judgement, para. 4.12; T. 229 (20 April 1999).
[309] Appellant's Amended Brief on Judgement, paras. 4.17 – 4.18.

1. Article 5 of the Statute

248. The Appeals Chamber agrees with the Prosecution that there is nothing in Article 5 to suggest that it contains a requirement that crimes against humanity cannot be committed for purely personal motives. The Appeals Chamber agrees that it may be inferred from the words "directed against any civilian population" in Article 5 of the Statute that the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population[311] and that the accused must have *known* that his acts fit into such a pattern. There is nothing in the Statute, however, which mandates the imposition of a *further* condition that the acts in question must not be committed for purely personal reasons, except to the extent that this condition is a consequence or a re-statement of the other two conditions mentioned.

249. The Appeals Chamber would also agree with the Prosecution that the words "committed in armed conflict" in Article 5 of the Statute require nothing more than the *existence* of an armed conflict at the relevant time and place. The Prosecution is, moreover, correct in asserting that the armed conflict requirement is a *jurisdictional* element, not "a substantive element of the *mens rea* of crimes against humanity"[312] (i.e., not a legal ingredient of the subjective element of the crime).

250. This distinction is important because, as stated above, if the exclusion of "purely personal" behaviour is understood simply as a re-statement of the two-fold requirement that the acts of the accused form part of a context of mass crimes and that the accused be aware of this fact, then there is nothing objectionable about it; indeed it is a correct statement of the law. It is only if this phrase is understood as requiring that the motives of the accused ("personal reasons", in the terminology of the Trial Chamber) *not be unrelated to the armed*

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[310] Article 25(1) of the Statute reads as follows: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice".

[311] This requirement had already been recognised by this Tribunal in the *Vukovar Hospital* Rule 61 Decision: "Crimes against humanity are to be distinguished from war crimes against individuals. In particular, they must be widespread or demonstrate a systematic character. However, as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognised as guilty of a crime against humanity if his acts were part of the specific context identified above."("Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence", *The Prosecutor v. Mile Mrksić et al.*, Case No.: IT-95-13-R61, Trial Chamber I, 3 April 1996, para. 30).

conflict that it is erroneous. Similarly, that phrase is unsound if it is taken to require proof of the accused's *motives*, as distinct from the intent to commit the crime and the knowledge of the context into which the crime fits.

251. As to what the Trial Chamber understood by the phrase "purely personal motives", it is clear that it conflated two interpretations of the phrase: first, that the act is unrelated to the armed conflict, and, secondly, that the act is unrelated to the attack on the civilian population. In this regard, paragraph 659 of the Judgement held:

> 659. Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely *unrelated to the attack on the civilian population*, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons *unrelated to the armed conflict.* (emphasis added)

Thus the "attack on the civilian population" is here equated to "the armed conflict". The two concepts cannot, however, be identical because then crimes against humanity would, by definition, *always take place in armed conflict*, whereas under customary international law these crimes may also be committed in times of peace.[313] So the two – the "attack on the civilian population" and "the armed conflict" – must be separate notions, although of course under Article 5 of the Statute the attack on "any civilian population" may be part of an "armed conflict". A nexus with the accused's acts is required, however, *only* for the attack on "any civilian population". A nexus between the accused's acts and the armed conflict is *not* required, as is instead suggested by the Judgement. The armed conflict requirement is satisfied by proof that *there was* an armed conflict; that is all that the Statute requires, and in so doing, it requires more than does customary international law.

252. The Trial Chamber seems additionally to have conflated the notion of committing an act for purely personal motives and the notion that the act must not be unrelated to the armed conflict. The Trial Chamber appears to have viewed the proposition that "the act must not be unrelated to the armed conflict"[314] as being synonymous with the statement that

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[312] Cross-Appellant's Brief, para. 4.9.
[313] On the issue of whether the Statute exceeds customary international law in requiring that there be an armed conflict, *see* the Tadić Decision on Jurisdiction, para. 141.
[314] Judgement, para. 634.

the act must "not be done for the purely personal motives of the perpetrator".[315] These two concepts, neither of which is a prerequisite for criminal culpability under Article 5 of the Statute, are, in any case, not coextensive. It may be true that if the act is related to the armed conflict, then it is not being committed for purely personal motives. But it does not follow from this that, if the act is unrelated to the armed conflict, it is being committed for purely personal reasons. The act may be intimately related to the attack on a civilian population, that is, it may fit precisely into a context of persecution of a particular group, and yet be unrelated to the armed conflict. It would be wrong to conclude in these circumstances that, since the act is unrelated to the armed conflict, it is being committed for purely personal reasons. The converse is also true; that is, merely because personal motivations can be identified in the defendant's carrying out of an act, it does not necessarily follow that the required nexus with the attack on a civilian population must also inevitably be lacking.

2. The Object and Purpose of the Statute

253. The Prosecution has submitted that "the object and purpose of the Statute support the interpretation that crimes against humanity can be committed for purely personal reasons". The Prosecution cites the Tadić Decision on Jurisdiction, to the effect that "the 'primary purpose' of the establishment of the International Tribunal 'is not to leave unpunished any person guilty of [a] serious violation [of international humanitarian law], whatever the context within which it may have been committed'".[316] This begs the question, however, whether a crime committed for purely personal reasons *is* a crime against humanity, and therefore a serious violation of international humanitarian law under Article 5 of the Statute.

254. The Appeals Chamber would also reject the Prosecution's submission concerning the onerous evidentiary burden which would be imposed on it in having to prove that the accused did not act from personal motives,[317] as equally question-begging and inapposite. It is question-begging because if, *arguendo*, under international criminal law, the fact that

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[315] *Ibid.*
[316] Cross-Appellant's Brief, para. 4.20.
[317] *Ibid.*, para. 4.23.

the accused did not act from purely personal motives was a requirement of crimes against humanity, then the Prosecution would have to prove that element, whether it was onerous for it to do so or not. The question is simply whether or not there is such a requirement under international criminal law.

3. Case-law as Evidence of Customary International Law

255. Turning to the further submission of the Prosecution, the Appeals Chamber agrees that the weight of authority supports the proposition that crimes against humanity can be committed for purely personal reasons, provided it is understood that the two aforementioned conditions – that the crimes must be committed in the context of widespread or systematic crimes directed against a civilian population and that the accused must have *known* that his acts, in the words of the Trial Chamber, "fitted into such a pattern" – are met.

256. In this regard, it is necessary to review the case-law cited by the Trial Chamber and the Prosecution, as well as other relevant case law, to establish whether this case-law is indicative of the emergence of a norm of customary international law on this matter.

257. The Prosecution is correct in stating that the 1948 case cited by the Trial Chamber[318] supports rather than negates the proposition that crimes against humanity may be committed for purely personal motives, provided that the acts in question were knowingly committed as "part and parcel of all the mass crimes committed during the persecution of the Jews". As the Supreme Court for the British Zone stated, "in cases of crimes against humanity taking the form of political denunciations, only the perpetrator's consciousness and intent to

[318] Decision of the Supreme Court for the British Zone (Criminal Chamber) (9 November 1948), S. StS 78/48, in *Justiz und NS-Verbrechen* vol. II, pp. 498-499. The Accused, Mrs. *K. and P.*, had denounced P's Jewish wife to the Gestapo for her anti-Nazi remarks. The defendants' sole purpose was to rid themselves of Mrs. *P.*, who would not agree to a divorce, and the Accused saw no other means of so doing than by delivering Mrs. *P.* to the Gestapo. Upon her denunciation, Mrs. *P.* was arrested and brought to Auschwitz concentration camp where she died after a few months due to malnutrition. The Court of First Instance convicted *K. and P.* of crimes against humanity. (*See* Decision of *Schwurgericht* Hamburg from 11 May 1948, (50). 17/48, in *Justiz und NS-Verbrechen*, vol. II, pp. 491-497). The Accused appealed to the Supreme Court of the British Zone which dismissed their appeal and confirmed their convictions, stating that both the physical and the mental elements of a crime against humanity were met. (*See* Decision of the Supreme Court for the British Zone from 9 November 1948, S. StS 78/48, in *Justiz und NS-Verbrechen*, vol. II, pp. 498-499 at p. 499). According to the Supreme Court, the findings of the Court of First Instance had sufficiently proved that the accused fulfilled this mental requirement.

deliver his victim through denunciation to the forces of arbitrariness or terror are required".[319]

258. The case involving the killing of mentally disturbed patients, decided by the same court and cited by the Prosecution, is also a persuasive authority concerning the irrelevance of personal motives with regard to the constituent elements of crimes against humanity.[320]

259. The Prosecution's submission finds further support in other so-called denunciation cases rendered after the Second World War by the Supreme Court for the British Zone and by German national courts, in which private individuals who denounced others, albeit for personal reasons, were nevertheless convicted of crimes against humanity.

260. In *Sch.*, the accused had denounced her landlord solely "out of revenge and for the purpose of rendering him harmless" after tensions in their tenancy had arisen. The denunciation led to investigation proceedings by the Gestapo which ended with the landlord's conviction and execution. The Court of First Instance convicted *Sch.* and sentenced her to three years' imprisonment for crimes against humanity.[321] The accused appealed against the decision, arguing that "crimes against humanity were limited to participation in mass crimes and ... did not include all those cases in which someone took action against a single person for personal reasons". The Supreme Court dismissed the appeal, holding that neither the Nuremberg Judgement nor the statements of the Prosecutor

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[319] *Ibid.*, p. 499.

[320] OGHBZ, Supreme Court for the British Zone (Criminal Chamber) (5 March 1949), S. StS 19/49, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone* I, 1949, pp. 321-343. The Accused, Dr. P and others, were medical doctors and a jurist working in a hospital for mentally disturbed patients. Pursuant to Hitler's directive which ordered the transferral of mentally ill persons to other institutions (where the patients were secretly killed in gas chambers), the Defendants in a few cases participated in the transfer of patients. In most cases, however, they objected to these instructions and tried to save their patients' lives by releasing them from hospital or by classifying them in categories which were not subject to Hitler's directive. The Defendants, charged with aiding and abetting murder, were acquitted by the Court of First Instance because it could not be proven that they had acted with the requisite *mens rea* with regard to participation in the killing of the patients. The Court of First Instance did not take into consideration whether the Defendants' behaviour could constitute a crime against humanity. This was criticised by the Supreme Court for the British Zone, which ordered the re-opening of the trial before the Court of First Instance to ascertain whether the Accused could be found guilty of a crime against humanity. The Supreme Court stated that a "perpetrator [of a crime against humanity] is indeed also anyone who contributes to the realisation of the elements of the offence, without at the same time wishing to promote National Socialist rule, [...] but who acts perhaps out of fear, indifference, hatred for the victim or to receive some gain. [This is] because even when one acts from these motives ("*Beweggründe*"), the action remains linked to this violent and oppressive system ("*Gewaltherrschaft*")" (*ibid.*, p. 341). The Defendants, ultimately, were not convicted of crimes against humanity for procedural reasons unrelated to the definition of the offence.

[321] Decision of Flensburg District Court dated 30 March 1948 in *Justiz und NS-Verbrechen*, vol. II, pp. 397-402. *See* this decision for the findings of the District Court to the effect that the denunciation was made for personal reasons.

before the International Military Tribunal indicated that Control Council Law No. 10 had to be interpreted in such a restrictive way. The Supreme Court stated:

> [T]he International Military Tribunal and the Supreme Court considered that a crime against humanity as defined in CCL 10 Article II 1 (c) is committed whenever the victim suffers prejudice as a result of the National Socialist rule of violence and tyranny ("*Gewalt- oder Willkürherrschaft*") to such an extent that mankind itself was affected thereby. Such prejudice can also arise from an attack committed against an individual victim for personal reasons. However, this is only the case if the victim was not only harmed by the perpetrator – this would not be a matter which concerned mankind as such – but if the character, duration or extent of the prejudice were determined by the National Socialist rule of violence and tyranny or if a link between them existed. If the victim was harmed in his or her human dignity, the incident was no longer an event that did not concern mankind as such. If an individual's attack against an individual victim for personal reasons is connected to the National Socialist rule of violence and tyranny and if the attack harms the victim in the aforementioned way, it, too, becomes one link in the chain of the measures which under the National Socialist rule were intended to persecute large groups among the population. There is no apparent reason to exonerate the accused only because he acted against an individual victim for personal reasons.[322]

261. This view was upheld in a later decision of the Supreme Court in the case of H. H. denounced his father-in-law, V.F., for listening to a foreign broadcasting station, allegedly because V.F., who was of aristocratic origin, incessantly mocked H. for his low birth and tyrannised the family with his relentlessly scornful behaviour. The family members supposedly considered a denunciation to be the only solution to their family problems. Upon the denunciation, V.F. was sentenced by the Nazi authorities to three years in prison. V.F., who suffered from an intestinal illness, died in prison. Despite the fact that H.'s denunciation was motivated by personal reasons, the Court of First Instance sentenced H. for a crime against humanity, stating that "it can be left open as to whether [...] H. was motivated by political, personal or other reasons". Referring to the established jurisprudence of the Supreme Court for the British Zone,[323] the Court of First Instance held that "the

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[322] Decision of the Supreme Court of the British Zone dated 26 October 1948, S. StS 57/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen,* vol. I., pp. 122-126 at p. 124 (unofficial translation). The essence of this statement was reiterated in the Decision of the Supreme Court dated 8 January 1949 against *G.* (S. StS 109/48, *ibid.,* pp. 246-249). *G.*, a member of the SA (Stormtroopers), had participated in the mistreatment of a political opponent for apparently purely personal motives, namely personal rancour between his family and the family of the victim. Nevertheless, *G.* was found guilty of a crime against humanity. The Supreme Court dismissed *G.*'s appeal against his conviction, stating that the motive for an attack was immaterial and that an attack against a single victim for personal reasons can be considered a crime against humanity if there is a nexus between the attack and the National Socialist rule of violence and tyranny (*ibid.*, p. 247).

[323] The Court of First Instance referred to the Decision of the Supreme Court of the British Zone dated 17 August 1948, S. StS 43/48, *ibid.,* pp. 60-62 and Decision dated 13 November 1948, S. StS 68/48, *ibid.,* pp. 186-190. *See* also Decision of the Supreme Court of the British Zone dated 20 April 1949, S. StS 120/49, *ibid.,* pp. 385–391, at p. 388.

motives ("*Beweggründe*") prompting a denunciation are not decisive (*nicht entscheidend)*".[324]

262. A further example is the V. case. In 1943, Nu. denounced Ste. for her repeated utterances against Hitler, the national-socialist system and the SS, made in Nu.'s house in 1942. Ste. was the natural mother of Nu.'s adoptive son. In fact, Nu. had denounced Ste. in the hope of regaining her son who had become increasingly estranged from his adoptive parents and had developed a closer relationship with his natural mother. Upon the denunciation, a special court sentenced Ste. to two years in prison. This court had envisaged her eventual transfer to a concentration camp, but she was released by the allied occupation forces before the transfer took place. In prison, Ste. suffered serious bodily harm and lost sight in one eye. After the war, a District Court sentenced Nu. to six months' imprisonment for her denunciation of Ste.. Although Nu.'s act of denunciation was motivated by personal reasons, the court considered that her denunciation constituted a crime against humanity.[325]

263. Turning to the decisions of the United States military tribunals under Control Council Law No. 10 cited by the Prosecution,[326] it must be noted that they appear to be less pertinent. These cases involve Nazi officials of various ranks whose acts were, therefore, by that token, already readily identifiable with the Nazi regime of terror. The question whether they acted "for personal reasons" would, therefore, not arise in a direct manner, since their acts were carried out in an official capacity, negating any possible "personal"

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[324] Decision of the Braunschweig District Court dated 22 June 1950, in *Justiz und NS-Verbrechen*, vol. VI, pp. 631-644, at p. 639. Note, in particular, the findings of the District Court to the effect that the denunciation was motivated by personal concerns. Mention can also be made of the Decision of *Schwurgericht* Hannover, dated 30 November 1948, in the *B.* case, S. StS 68/48 (in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen,* vol. I, pp. 186-190). *B.*, an inspector of state church offices, informed his superior that one of his colleagues, *P.*, had repeatedly expressed his doubts about the political situation in Germany and voiced his disapproval of the persecution of the Jews, the official propaganda, cultural policy and anti-clerical attitude of National Socialism. This information reached the Gestapo, who arrested *P.* A special court sentenced *P.* to one year and three months in prison. *B.*, charged with crimes against humanity, was acquitted at first instance because the verdict of the Court of First Instance (*Schwurgericht* Hannover), having extensively examined the accused's motives ("*Beweggründe*"), could not determine whether the denunciation had been motivated by politics or religion. The Supreme Court for the British Zone dismissed the judgement of the District Court, stating that "it was erroneous and in contradiction to the consistent jurisprudence of the [Supreme] Court" to consider the motives of the accused as important. (*ibid.*, p. 189).

[325] Decision of the Supreme Court for the British Zone dated 22 June 1948, S. StS 5/48, in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone, Entscheidungen in Strafsachen,* vol. I, pp. 19-25. The decision of the Supreme Court did not directly concern the accused *Nu.*, but a co-accused of hers. *Nu.* had been sentenced by the District Court of Hamburg for committing a crime against humanity.

[326] *See* Cross-Appellant's Brief, paras. 4.15, 4.16.

defence which has as its premise "non-official acts". The question whether an accused acted for purely personal reasons can only arise where the accused can claim to have acted as a private individual in a private or non-official capacity. This is why the issue arises mainly in denunciation cases, where one neighbour or relative denounces another. This paradigm is, however, inapplicable to trials of Nazi ministers, judges or other officials of the State, particularly where they have not raised such a defence by admitting the acts in question whilst claiming that they acted for personal reasons. Any plea that an act was done for "purely personal" motives and that it therefore cannot constitute a crime against humanity is pre-eminently for the defence to raise and one would not expect the court to rule on the issue *proprio motu* and as *obiter dictum*.

264. The two sections of the *Ministries* case, referred to by the Prosecution,[327] are also not strictly relevant, as those sections re-state the law of *complicity* – "[...] he who participates or plays a consenting part therein is guilty of a crime against humanity" – rather than dealing with the importance or otherwise of whether the accused acted from personal motives. Equally, in the *Justice* case,[328] the defendants do not appear to have raised the defence that they acted for personal motives.

265. The Prosecution also refers to the *Eichmann* and *Finta* cases. The *Eichmann* case is inappropriate as the defendant in that case *specifically denied* that he ever acted from a personal motive, claiming that he did what he did "not of his own volition but as one of numerous links in the chain of command".[329] Moreover the court found Eichmann, who was the Head of the Jewish Affairs and Evacuation Department and one of the persons who attended the infamous Wannsee Conference, to be "no mere 'cog', small or large, in a machine propelled by others; he was, himself, one of those who propelled the machine".[330] Such a senior official would not be one to whom the "purely personal reasons" consideration could conceivably apply.

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[327] *U.S. v. Ernst von Weizsaecker et al.*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol XIV, pp. 611, 470-471, cited in Cross-Appellant's Brief, para. 4.15.
[328] *U.S. v. Altstoetter et al.*, Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10, United States Government Printing Office, Washington, 1951, vol. III.
[329] *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 *International Law Reports* 1968, p. 323.
[330] *Ibid.*, p. 331.

266. The *Finta* case[331] is more on point, not least since the accused was a minor official, a captain in the Royal Hungarian Gendarmerie. He was thus better placed than senior officials to raise an issue as to his exclusively "personal" motives. That case is indeed authority for the proposition that the sole requirements for crimes against humanity in this regard are that:

> [...] there must be an element of subjective knowledge on the part of the accused of the factual conditions which render the actions a crime against humanity. [...] [T]he mental element of a crime against humanity must involve an awareness of the facts or circumstances which would bring the acts within the definition of a crime against humanity.[332]

267. According to *Finta*, nothing more seems to be required beyond this and there is no mention of the relevance or otherwise of the accused's personal motives.

268. One reason why the above cases do not refer to "motives" may be, as the Defence has suggested,[333] that "the issue in these cases was not whether the Defendants committed the acts for purely personal motives". The Appeals Chamber believes, however, that a further reason why this was not in issue is precisely because motive is generally irrelevant in criminal law, as the Prosecution pointed out in the hearing of 20 April 1999:

> For example, it doesn't matter whether or not an accused steals money in order to buy Christmas presents for his poor children or to support a heroin habit. All we're concerned with is that he stole and he intended to steal, and what we're concerned with ... here is the same sort of thing. There's no requirement for non-personal motive beyond knowledge of the context of a widespread or systematic act into which an accused's act fits. The Prosecutor is submitting that, as a general proposition and one which is applicable here, motives are simply irrelevant in criminal law.[334]

269. The Appeals Chamber approves this submission, subject to the *caveat* that motive becomes relevant at the sentencing stage in mitigation or aggravation of the sentence (for example, the above mentioned thief might be dealt with more leniently if he stole to give presents to his children than if he were stealing to support a heroin habit). Indeed the inscrutability of motives in criminal law is revealed by the following *reductio ad absurdum*. Imagine a high-ranking SS official who claims that he participated in the genocide of the Jews and Gypsies for the "purely personal" reason that he had a deep-seated hatred of Jews and Gypsies and wished to exterminate them, and for no other reason. Despite this

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[331] *R. v. Finta*, [1994] 1 SCR 701.
[332] *Ibid.*, at p. 819, majority judgement delivered by Cory J..
[333] Defence's Substituted Response to Cross-Appellant's Brief, para. 4.16.
[334] T. 152-153 (20 April 1999).

quintessentially genocidal frame of mind, the accused would have to be acquitted of crimes against humanity because he acted for "purely personal" reasons. Similarly, if the same man said that he participated in the genocide only for the "purely personal" reason that he feared losing his job, he would also be entitled to an acquittal. Thus, individuals at both ends of the spectrum would be acquitted. In the final analysis, any accused that played a role in mass murder purely out of self-interest would be acquitted. This shows the meaninglessness of any analysis requiring proof of "non-personal" motives. The Appeals Chamber does not believe, however, that the Trial Chamber meant to reach such a conclusion. Rather, the requirement that the accused's acts be part of a context of large-scale crimes, and that the accused knew of this context, was misstated by the Trial Chamber as a negative requirement that the accused not be acting for personal reasons. The Trial Chamber did not, the Appeals Chamber believes, wish to import a "motive" requirement; it simply duplicated the context and *mens rea* requirement, and confused it with the need for a link with an armed conflict, and thereby seemed to have unjustifiably and inadvertently added a new requirement.

270. The conclusion is therefore warranted that the relevant case-law and the spirit of international rules concerning crimes against humanity make it clear that under customary law, "purely personal motives" do not acquire any relevance for establishing whether or not a crime against humanity has been perpetrated.

C. Conclusion

271. The Trial Chamber correctly recognised that crimes which are unrelated to widespread or systematic attacks on a civilian population should not be prosecuted as crimes against humanity. Crimes against humanity are crimes of a special nature to which a greater degree of moral turpitude attaches than to an ordinary crime. Thus to convict an accused of crimes against humanity, it must be proved that the crimes were *related* to the attack on a civilian population (occurring during an armed conflict) and that the accused *knew* that his crimes were so related.

272. For the above reasons, however, the Appeals Chamber does not consider it necessary to further require, as a substantive element of *mens rea,* a nexus between the specific acts allegedly committed by the accused and the armed conflict, or to require proof

of the accused's *motives*. Consequently, in the opinion of the Appeals Chamber, the requirement that an act must not have been carried out for the purely personal motives of the perpetrator does not form part of the prerequisites necessary for conduct to fall within the definition of a crime against humanity under Article 5 of the Tribunal's Statute.

VII. THE FOURTH GROUND OF CROSS-APPEAL BY THE PROSECUTION: THE TRIAL CHAMBER'S FINDING THAT ALL CRIMES AGAINST HUMANITY REQUIRE A DISCRIMINATORY INTENT

A. Submissions of the Parties

1. The Prosecution Case

273. The Prosecution submits that the Trial Chamber erred in finding that all crimes against humanity must be committed with a discriminatory intent. It is the submission of the Prosecution that the requirement of a discriminatory intent applies only to "persecution type" crimes and not to all crimes against humanity. [335]

274. The Prosecution notes that Article 5 of the Statute contains no express requirement of a discriminatory intent for all crimes against humanity. The requirement for such an intent is present in Article 3 of the Statute of the ICTR. The absence of a similar provision in Article 5 of this Tribunal's Statute implies *a contrario* that at the time of drafting the Statute of this Tribunal, there was no intention to include a similar requirement.[336]

275. A requirement of discriminatory intent for all crimes against humanity is also absent from customary international law. The Prosecution notes that the Nuremberg Charter and Control Council Law No. 10, upon which Article 5 is based, distinguish between "murder type" crimes such as murder, extermination, enslavement, etc., and "persecution type" crimes committed on political, racial, or religious grounds. Discriminatory intent need only be shown in relation to "persecution" crimes. The Prosecution submits that the Trial Chamber erred in relying upon a statement in paragraph

[335] Cross-Appellant's Brief, para. 5.5; T. 161 (20 April 1999).
[336] Cross-Appellant's Brief, para. 5.6; T. 162 (20 April 1999).

48 of the Report of the Secretary-General[337] and statements made in the Security Council by three of its fifteen Members to conclude that Article 5 of the Statute was to be interpreted as requiring that all crimes against humanity be committed with a discriminatory intent. In the Prosecution's submission, these sources do not purport to reflect customary international law and thus should not be given undue, authoritative weight in interpreting Article 5.[338] It is the view of the Prosecution that Article 5 does not contain any ambiguity. Thus, to accord weight to these sources to resolve an ambiguity which, in the Prosecution's submission, does not exist, would lead to considerable uncertainty with regard to the scope and content of Article 5 of the Statute.[339]

276. The Prosecution submits that the rules of statutory interpretation also militate against requiring a discriminatory intent for all crimes against humanity. If discriminatory intent were required for all crimes against humanity, the Prosecution submits that this would relegate the crime of "persecutions" under Article 5(h) to a residual provision and make "other inhumane acts" in Article 5(i) redundant. The Prosecution submits that the Statute should be interpreted in order to give proper effect to all of its provisions.[340]

277. Finally, the Prosecution submits that the requirement of discriminatory intent for all crimes against humanity is inconsistent with the humanitarian object and purpose of the Statute and international humanitarian law. The Prosecution argues that requiring a discriminatory intent for all crimes against humanity would create a significant normative *lacuna* by failing to protect civilian populations not encompassed by the listed grounds of discrimination.[341]

2. The Defence Case

278. The Defence submits that the Trial Chamber's decision that all crimes against humanity require a discriminatory intent should be upheld.

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[337] The statement reads as follows: "Crimes against humanity refer to inhumane acts of a very serious nature [...] committed as part of a widespread or systematic attack against any civilian population on national, ethnic, racial or religious grounds."
[338] Cross-Appellant's Brief, paras. 5.7, 5.8; T. 162, 163 (20 April 1999).
[339] Cross-Appellant's Brief, paras. 5.20, 5.22.
[340] Cross-Appellant's Brief, para. 5.24; T. 165 (20 April 1999).
[341] Cross-Appellant's Brief, para. 5.26; T. 165 (20 April 1999).

279. The inclusion of discriminatory intent in the ICTR Statute does not indicate that discriminatory intent need not be shown in order for Article 5 of the Statute of this Tribunal to apply. Rather, the Defence submits that it shows the intention of the Security Council to embrace discriminatory intent as a requirement for crimes against humanity.[342]

280. The Defence submits that the silence in Article 5 as to whether discriminatory intent is required for crimes against humanity creates an uncertainty. To resolve this uncertainty, the Appeals Chamber should look to sources such as the preparatory work of the Statute as it interprets Article 5 of the Statute. Thus, the Defence submits that the Trial Chamber was correct in looking to the Report of the Secretary-General and to statements of members of the Security Council in determining that discriminatory intent must be shown in respect of all crimes under Article 5 of the Statute.[343]

B. Discussion

281. The Prosecution submits that the Trial Chamber erred in finding that all crimes against humanity enumerated under Article 5 require a discriminatory intent. It alleges, further, that because of this finding, the Trial Chamber "restricted the scope of persecutions under subparagraph (h) only to those acts not charged elsewhere in the Indictment rather than imposing additional liability for all acts committed on discriminatory grounds. In doing so, it would appear that the sentence against the accused was significantly reduced."[344] However, the Prosecution does not appeal the sentence imposed by the Trial Chamber in respect of the crimes against humanity counts, or seek to overturn the Trial Chamber's verdict or findings of fact in this regard. Thus, this ground of appeal does not, *prima facie,* appear to fall within the scope of Article 25(1).[345] Nevertheless, and as with the previous ground of appeal, the Appeals Chamber finds that this issue is a matter of general significance for the Tribunal's jurisprudence. It is therefore appropriate for the Apppeals Chamber to set forth its views on this matter.

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[342] T. 231-232 (21 April 1999).
[343] T. 236 – 239 (21 April 1999).
[344] Skeleton Argument of the Prosecution, para. 32.
[345] *See* Cross-Appellant's Brief, para. 7.1(4), where the Prosecution requests the Appeals Chamber to "reverse the decision of the Trial Chamber, at page 250 paragraph 652, that discriminatory intent is an ingredient of all crimes against humanity under Article 5 of the Statute."

1. The Interpretation of the Text of Article 5 of the Statute

282. Notwithstanding the fact that the ICTY Statute is legally a very different instrument from an international treaty, in the interpretation of the Statute it is nonetheless permissible to be guided by the principle applied by the International Court of Justice with regard to treaty interpretation in its Advisory Opinion on *Competence of the General Assembly for the Admission of a State to the United Nations*: "The first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur".[346]

283. The ordinary meaning of Article 5 makes it clear that this provision does not require all crimes against humanity to have been perpetrated with a discriminatory intent. Such intent is only made necessary for one sub-category of those crimes, namely "persecutions" provided for in Article 5 (h).

284. In addition to such textual interpretation, a logical construction of Article 5 also leads to the conclusion that, generally speaking, this requirement is not laid down for all crimes against humanity. Indeed, if it were otherwise, why should Article 5(h) specify that "persecutions" fall under the Tribunal's jurisdiction if carried out "on political, racial and religious grounds"? This specification would be illogical and superfluous. It is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements.

285. As rightly submitted by the Prosecution, the interpretation of Article 5 in the light of its object and purpose bears out the above propositions. The aim of those drafting the Statute was to make all crimes against humanity punishable, including those which, while fulfilling all the conditions required by the notion of such crimes, may not have been perpetrated on political, racial or religious grounds as specified in paragraph (h) of Article 5. In light of the humanitarian goals of the framers of the Statute, one fails to see why they should have seriously restricted the class of offences coming within the purview of "crimes against humanity", thus leaving outside this class all the possible instances of serious and widespread or systematic crimes against civilians on account only of their

lacking a discriminatory intent. For example, a discriminatory intent requirement would prevent the penalization of random and indiscriminate violence intended to spread terror among a civilian population as a crime against humanity. *A fortiori*, the object and purpose of Article 5 would be thwarted were it to be suggested that the discriminatory grounds required are limited to the five grounds put forth by the Secretary-General in his Report and taken up (with the addition, in one case, of the further ground of gender) in the statements made in the Security Council by three of its members.[347] Such an interpretation of Article 5 would create significant *lacunae* by failing to protect victim groups not covered by the listed discriminatory grounds. The experience of Nazi Germany demonstrated that crimes against humanity may be committed on discriminatory grounds other than those enumerated in Article 5 (h), such as physical or mental disability, age or infirmity, or sexual preference. Similarly, the extermination of "class enemies" in the Soviet Union during the 1930s (admittedly, as in the case of Nazi conduct before the Second World War, an occurrence that took place in times of peace, not in times of armed conflict) and the deportation of the urban educated of Cambodia under the Khmer Rouge between 1975-1979, provide other instances which would not fall under the ambit of crimes against humanity based on the strict enumeration of discriminatory grounds suggested by the Secretary-General in his Report.

286. It would be pointless to object that in any case those instances would fall under the category of war crimes or serious "violations of the laws or customs of war" provided for in Article 3 of the Statute. This would fail to explain why the framers of the Statute provided not only for war crimes but also for crimes against humanity. Indeed, those who drafted the Statute deliberately included both classes of crimes, thereby illustrating their intention that those war crimes which, in addition to targeting civilians as victims, present special features such as the fact of being part of a widespread or systematic practice, must be classified as crimes against humanity and deserve to be punished accordingly.

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[346] ICJ Reports (1950), p. 8.
[347] *See* paragraphs 294-300 below.

2. Article 5 and Customary International Law

287. The same conclusion is reached if Article 5 is construed in light of the principle whereby, in case of doubt and whenever the contrary is not apparent from the text of a statutory or treaty provision, such a provision must be interpreted in light of, and in conformity with, customary international law. In the case of the Statute, it must be presumed that the Security Council, where it did not explicitly or implicitly depart from general rules of international law, intended to remain within the confines of such rules.

288. A careful perusal of the relevant practice shows that a discriminatory intent is not required by customary international law for all crimes against humanity.

289. First of all, the basic international instrument on the matter, namely, the London Agreement of 8 August 1945, clearly allows for crimes against humanity which may be unaccompanied by such intent. Article 6 (c) of that Agreement envisages two categories of crimes. One of them is that of "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population", hence a category for which no discriminatory intent is required, while the other category ("persecutions on political, racial, or religious grounds") is patently based on a discriminatory intent. An identical provision can be found in the Statute of the Tokyo International Tribunal (Article 5 (c)).[348] Similar language can also be found in Control Council Law No. 10 (Article II (1) (c)).[349]

290. The letter of these provisions is clear and indisputable. Consequently, had customary international law developed to restrict the scope of those treaty provisions which are at the very origin of the customary process, uncontroverted evidence would be needed. In other words, both judicial practice and possibly evidence of consistent State practice, including national legislation, would be necessary to show that customary law has deviated from treaty law by adopting a narrower notion of crimes against humanity. Such judicial and other practice is lacking. Indeed, the relevant case-law points in the contrary direction.

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[348] Article 5 (c) of the Statute of the International Military Tribunal for the Far East provides:
"*Crimes against Humanity*: Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

[349] Article II (1) (c) of Control Council Law No. 10 provides:
"*Crimes against Humanity*: Atrocities and offences, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any

Generally speaking, customary international law has gradually expanded the notion of crimes against humanity laid down in the London Agreement. With specific reference to the question at issue, it should be noted that, except for a very few isolated cases such as *Finta,*[350] national jurisprudence[351] includes many cases where courts found that in the

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civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated."

[350] The Supreme Court of Canada held that:

"[W]ith respect to crimes against humanity the additional element is that the inhumane acts were based on discrimination against or the persecution of an identifiable group of people." (*R.* v. *Finta*, [1994] 1 SCR 701, at p. 813, majority judgement delivered by Cory J.).

[351] In this regard, mention can be made of some further cases: *Ahlbrecht*, decided by the Dutch Special Court of Cassation on 11 April 1949 (*Nederlandse Jurisprudentie,* 1949, no. 425, pp. 747-751); *J. and R.*, decision of the German Supreme Court for the British Zone, judgement dated 16 November 1948, S. StS 65/48 in *Entscheidungen des Obersten Gerichtshofes für die Britische Zone,* vol. I, pp. 167-171; *Enigster*, decided by the District Court of Tel Aviv. As the District Court of Tel Aviv rightly stressed in the *Enigster* case, some crimes against humanity do not require a persecutory intent. In its Decision of 4 January 1952, the court stated the following:

"As to crimes against humanity, we have no hesitation in rejecting the argument of the Defence that any of the acts detailed in the definition of crime against humanity have to be performed with an intention to persecute the victim on national, religious or political grounds. It is clear that this condition only applies when the constituent element of the crime is persecution itself. The legislator found it necessary to separate persecution from the other types of action by a semi-colon and to precede the word 'persecution' with the words 'and also', thus clearly establishing that persecution stands by itself, and that it alone is subject to that condition." (18 *International Law Reports* 1951, p. 541).

It should be noted, however, that the Court was clearly wrong as far as the question of the famous semi-colon was concerned; it is well known that in actual fact the Protocol of 6 October 1945 replaced the semi-colon with a colon. (For the text of the Protocol *see Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10,* vol. I, pp. XVI-XIX).

Reference can also be made to some cases decided by the German Supreme Court for the British Zone. The Appeals Chamber will briefly mention three of them: *R.*, *P. et al.* and *H.*

In a Decision of 27 July 1948 (S. StS 19/48), the court pronounced on the case of *R.* In 1944, a member of the NSDAP (the German National Socialist Worker's Party) and the NSKK (National Socialist Motor Vehicle Corps) had denounced another member of the NSDAP and of the SA (Stormtroopers) for insulting the leadership of NSDAP; as a result of this denunciation the victim had been brought to trial three times and eventually sentenced to death. (The sentence had not been carried out because the Russians had occupied Germany in the interim). The Court held that the denunciation could constitute a crime against humanity if it could be proved that the agent had intended to hand over the victim to the "uncontrollable power structure of the [Nazi] party and State", knowing that as a consequence of his denunciation the victim was likely to be caught in an arbitrary and violent system (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone,* vol. I, pp. 45-49 at p. 47).

In a Decision of 7 December 1948 (S. StS 111/48), in the *P. et al.* case, the same court gave a very liberal interpretation to the notion of crimes against humanity as laid down in Control Council Law No. 10, extending it among other things to inhumane acts committed against members of the military. During the night after Germany's partial capitulation (5 May 1945) four German marines had tried to escape from Denmark back to Germany. The next day they were caught by Danes and delivered to German troops, who court-martialled and sentenced three of them to death for desertion; on the very day of the general capitulation of Germany, i.e. 10 May 1945, the three were executed. The German Supreme Court found that the five members of the court-martial were guilty of complicity in a crime against humanity. According to the Supreme Court, the glaring discrepancy between the offence and the punishment constituted a clear manifestation of the Nazis' brutal and intimidatory system of justice, which denied the very essence of humanity in blind reference to the allegedly superior exigencies of the Nazi State; there was "an intolerable degradation of the victim[s] to mere means for the pursuit of a goal, hence the depersonalisation and reification of human beings." (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone, ibid.,* vol. I, pp. 217-229 at p. 220). Consequently, by

circumstances of the case crimes against humanity did not necessarily consist of persecutory or discriminatory actions.

291. It is interesting to note that the necessity for discriminatory intent was considered but eventually rejected by the International Law Commission in its Draft Code of Offences Against the Peace and Security of Mankind.[352] Similarly, while the inclusion of a discriminatory intent was mooted in the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom),[353] Article 7 of the Rome Statute embodied the drafters' rejection of discriminatory intent.[354]

292. This warrants the conclusion that customary international law, as it results from the gradual development of international instruments and national case-law into general rules, does not presuppose a discriminatory or persecutory intent for all crimes against humanity.

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sentencing the marines to death the members of the court-martial had inflicted an injury upon humanity as a whole.
The same broad interpretation of Control Council Law No. 10 may be found, finally, in a Decision of 18 October 1949 (S. StS 309/49) in the *H.* case (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone*, vol. II, pp. 231-246). There, the court dealt with a case where a German judge had presided over two trials by a naval court-martial (*Bordkriegsgericht*) against two officers of the German Navy, a submarine commander, charged in 1944 with criticising Hitler, and the other a lieutenant-commander of the German naval forces, charged in 1944 with procuring two foreign identity cards for himself and his wife. The Judge had voted for sentencing both officers to death (the first had been executed, while the sentence against the second had been commuted by Hitler to 10 years' imprisonment). The Supreme Court held that the Judge could be found guilty of crimes against humanity even if he had not acted for political reasons, to the extent that his action was deliberately taken in connection with the Nazi system of violence and terror (*Entscheidungen des Obersten Gerichtshofes für die Britische Zone, ibid.*, vol. II, pp. 233, 238).

[352] *See* for instance ILC 1996 Draft Code of Offences Against the Peace and Security of Mankind, *Report of the International Law Commission on the work of its 48th session May 6-July 26, 1996*, UNGAOR 51st sess., supp. no. 10 (A/51/10), pp. 93-94.

[353] While some delegates argued that a conviction for crimes against humanity required proof that the defendant was motivated by a discriminatory animus, others argued that "the inclusion of such a criterion would complicate the task of the Prosecution by significantly increasing its burden of proof in requiring evidence of this subjective element." These delegates further argued that crimes against humanity could be committed against other groups, including intellectuals, social, cultural or political groups, and that such an element was not required under customary international law as evidenced by the Yugoslav Tribunal's Statute. (*See Summary of the Proceedings of the Preparatory Committee During the Period March 25-April 12, 1996*, U.N. Doc. A/AC.249/1 (May 7, 1996), pp. 16-17).

[354] Article 7(1) of the Rome Statute provides: "For the purposes of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: (a) murder [...]." Article 7(1) of the Statute of the International Criminal Court thus articulates a definition of crimes against humanity based solely upon the interplay between the *mens rea* of the defendant and the existence of a widespread or systematic attack directed against a civilian population.

3. The Report of the Secretary-General

293. The interpretation suggested so far is not in keeping with the Report of the Secretary-General and the statements made by three members of the Security Council before the Tribunal's Statute was adopted by the Council. The Appeals Chamber is nevertheless of the view that these two interpretative sources do not suffice to establish that all crimes against humanity need be committed with a discriminatory intent.

294. We shall consider first the Report of the Secretary-General, which stated that the crimes under discussion are those "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".[355]

295. It should be noted that the Secretary-General's Report has not the same legal standing as the Statute. In particular, it does not have the same binding authority. The Report as a whole was "approved" by the Security Council (see the first operative paragraph of Security Council resolution 827(1993)), while the Statute was "adopt[ed]" (see operative paragraph 2). By "approving" the Report, the Security Council clearly intended to endorse its purpose as an explanatory document to the proposed Statute. Of course, if there appears to be a manifest contradiction between the Statute and the Report, it is beyond doubt that the Statute must prevail. In other cases, the Secretary-General's Report ought to be taken to provide an authoritative interpretation of the Statute.

296. Moreover, the Report of the Secretary-General does not purport to be a statement as to the position under customary international law. As stated above, it is open to the Security Council - subject to respect for peremptory norms of international law (*jus cogens*) - to adopt definitions of crimes in the Statute which deviate from customary international law.[356] Nevertheless, as a general principle, provisions of the Statute defining the crimes within the jurisdiction of the Tribunal should always be interpreted as reflecting customary international law, unless an intention to depart from customary international law is expressed in the terms of the Statute, or from other authoritative sources. The Report of the Secretary-General does not provide sufficient indication that the Security Council did so intend Article 5 to deviate from customary international law by requiring a discriminatory intent for all crimes against humanity. Indeed, in the case under consideration it would

[355] Report of the Secretary-General, para. 48.

seem that, although the discrepancy between the Report and the Statute is conspicuous, the wording of Article 5 is so clear and unambiguous as to render it unnecessary to resort to secondary sources of interpretation such as the Secretary-General's Report. Hence, the literal interpretation of Article 5 of the Statute, outlined above, must necessarily prevail.

297. Furthermore, it may be argued that, in his Report, the Secretary-General was merely *describing* the notion of crimes against humanity in a general way, as opposed to stipulating a technical, legal definition intended to be binding on the Tribunal. In other words, the statement that crimes against humanity are crimes "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds" amounts to the observation that crimes against humanity *as a matter of fact usually are* committed on such discriminatory grounds. It is not, however, a legal *requirement* that such discriminatory grounds be present. That is, at least, another possible interpretation. It is true that in most cases, crimes against humanity are waged against civilian populations which have been specifically targeted for national, political, ethnic, racial or religious reasons.

4. The Statements Made by Some States in the Security Council

298. Let us now turn to the statements made in the Security Council, after the adoption of the Statute, by three States, namely, France, the United States and the Russian Federation.

299. Before considering what the legal meaning of these statements may be, one important point may first be emphasised. Although they were all directed at importing, as it were, into Article 5 the qualification concerning discriminatory intent set out in paragraph 48 of the Secretary-General's Report, these statements varied as to their purport. The statement by the French representative was intended to be part of "a few brief comments" on the Statute.[357] By contrast, the remarks of the United States representative

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[356] For instance, the express requirement in Article 5 of a nexus with an armed conflict creates a narrower sphere of operation than that provided for crimes against humanity under customary international law.

[357] He stated the following: "[W]ith regard to Article 5, that Article applied to all the acts set out therein when committed in violation of the law during a period of armed conflict on the territory of the former Yugoslavia, within the context of a widespread or systematic attack against a civilian population for national, political, ethnic, racial or religious reasons" (U.N. Doc. S/PV. 3217, p.11).

were expressly couched as an "interpretative statement"; furthermore, that representative added a significant comment: "[W]e understand that other members of the Council share our view regarding the following clarifications related to the Statute"[358] including the "clarification" concerning Article 5.[359] With regard to the representative of the Russian Federation, his statement concerning Article 5 was expressly conceived of as an interpretative declaration.[360] Nevertheless, this declaration was made in such terms as to justify the proposition that for the Russian Federation, Article 5 "encompasses" crimes committed with a "discriminatory intent" without, however, being limited to these acts alone.

300. The Appeals Chamber, first of all, rejects the notion that these three statements - at least as regards the issue of discriminatory intent - may be considered as part of the "context" of the Statute, to be taken into account for the purpose of interpretation of the Statute pursuant to the general rule of construction laid down in Article 31 of the Vienna Convention on the Law of the Treaties.[361] In particular, those statements cannot be regarded as an "agreement" relating to the Statute, made between all the parties in connection with the adoption of the Statute. True, the United States representative pointed out that it was her understanding that the other members of the Security Council shared her views regarding the "clarifications" she put forward. However, in light of the wording of the other two statements on the specific point at issue, and taking into account the lack of any comment by the other twelve members of the Security Council, it would seem difficult to conclude that there emerged an agreement in the Security Council designed to qualify the

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[358] *See* U.N. Doc. S/PV. 3217, p. 15.

[359] On Article 5 the United States representative said that: "[I]t is understood that Article 5 applies to all acts listed in that Article, when committed contrary to law during a period of armed conflict in the territory of the former Yugoslavia, as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, gender, or religious grounds" (U.N. Doc. S/PV. 3217, p.16).

[360] He said the following: "While believing that the text of the Statute addresses the tasks that face the Tribunal, and for that reason supporting it, we deem it appropriate to note that, according to our understanding, Article 5 of the Statute encompasses criminal acts committed on the territory of the former Yugoslavia during an armed conflict - acts which were widespread or systematic, were aimed against the civilian population and were motivated by that population's national, political, ethnic, religious or other affiliation" (U.N. Doc. S/PV. 3217, p. 45).

[361] Article 31(1) and (2) provide:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

scope of Article 5 with respect to discriminatory intent. In particular, it must be stressed that the United States representative, in enumerating the discriminatory grounds required, in her view, for crimes against humanity, included one ground ("gender") that was not mentioned in the Secretary-General's Report and which was, more importantly, referred to neither by the French nor the Russian representatives in their declarations on Article 5. This, it may be contended, is further evidence that no agreement emerged within the Security Council as to the qualification concerning discriminatory intent.

301. Arguably, in fact, the main purpose of those statements was to stress that it is the existence of a widespread or systematic practice which constitutes an indispensable ingredient of crimes against humanity. This ingredient, absent in Article 5, had already been mentioned in paragraph 48 of the Secretary-General's Report.[362] In spelling out that this ingredient was indispensable, the States in question took up the relevant passage of the Secretary-General's Report and in the same breath also mentioned the discriminatory intent which may, in practice, frequently accompany such crimes.

302. The contention may also be warranted that the intent of the three States which made these declarations was to stress that in the former Yugoslavia most atrocities had been motivated by ethnic, racial, political or religious hatred. Those States therefore intended to draw the attention of the future Tribunal to the need to take this significant factor into account. One should not, however, confuse what happens most of the time (*quod plerumque accidit*) with the strict requirements of law.

303. Be that as it may, since at least with regard to the issue of discriminatory intent those statements may not be taken to be part of the "context" of the Statute, it may be argued that they comprise a part of the *travaux préparatoires*. Even if this were so, these statements would not be indispensable aids to interpretation, at least insofar as they relate to the particular issue of discriminatory intent under Article 5. Under customary international law, as codified in Article 32 of the Vienna Convention referred to above, the *travaux* constitute

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b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

[362] The Trial Chamber in its Judgement of 7 May 1997 has also correctly emphasised that the phrases "widespread" and "systematic" are disjunctive as opposed to cumulative requirements (*see* Judgement, paras. 645-648). *See* also the *Nikolić* Rule 61 Decision, ("Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, *The Prosecutor v. Dragan Nikolić,* Case No.: IT-94-2-R61, Trial Chamber I, 20 October 1995) (*Nikolić* (1995) II ICTY JR 739).

a supplementary means of interpretation and may only be resorted to when the text of a treaty or any other international norm-creating instrument is *ambiguous or obscure*. As the wording of Article 5 is clear and does not give rise to uncertainty, at least as regards the issue of discriminatory intent, there is no need to rely upon those statements. Excluding from the scope of crimes against humanity widespread or systematic atrocities on the sole ground that they were not motivated by any persecutory or discriminatory intent would be justified neither by the letter nor the spirit of Article 5.

304. The above propositions do not imply that the statements made in the Security Council by the three aforementioned States, or by other States, should not be given interpretative weight. They may shed light on the meaning of a provision that is ambiguous, or which lends itself to differing interpretations. Indeed, in its *Tadić* Decision on Jurisdiction the Appeals Chamber repeatedly made reference to those statements as well as to statements made by other States. It did so, for instance, when interpreting Article 3 of the Statute[363] and when pronouncing on the question whether the International Tribunal could apply international agreements binding upon the parties to the conflict.[364]

C. Conclusion

305. The Prosecution was correct in submitting that the Trial Chamber erred in finding that all crimes against humanity require a discriminatory intent. Such an intent is an indispensable legal ingredient of the offence only with regard to those crimes for which this is expressly required, that is, for Article 5 (h), concerning various types of persecution.

[363] *See Tadić* Decision on Jurisdiction, paras 75, 88 (where reference was also made to the statements of the representatives of the United Kingdom and Hungary).
[364] *See ibid.*, para 143 (where reference was made to the statements of the representatives of the United States, the United Kingdom and France).

VIII. THE FIFTH GROUND OF CROSS-APPEAL BY THE PROSECUTION: DENIAL OF THE PROSECUTION'S MOTION FOR DISCLOSURE OF DEFENCE WITNESS STATEMENTS

A. Submissions of the Parties

1. The Prosecution Case

306. Ground five of the Cross-Appeal by the Prosecution is as follows:

> The majority of the Trial Chamber, composed of Judge Ninian Stephen and Judge Lal Chand Vohrah, erred when it denied the Prosecution motion for production of witness statements[.][365]

This ground of appeal arose out of the Decision on Prosecution Motion for Production of Defence Witness Statements of the Trial Chamber delivered on 27 November 1996. By a majority (Judge McDonald dissenting), the Trial Chamber rejected the Prosecution's motion for disclosure of a prior statement of a Defence witness after he had testified. This decision was reached on the basis that such statements are subject to a legal professional privilege, which protects the Defence from any obligation to disclose them. The Prosecution submits that the Trial Chamber erred in the application of the substantive law in the Witness Statements Decision.[366]

307. The Prosecution submits that a Trial Chamber has the power to order the production of prior statements of Defence witnesses pursuant to Rule 54, unless they are protected by some express or implied privilege in the Statute or Rules.[367] This power ensures that a Trial Chamber, entrusted with the duty of making factual findings on the evidence adduced, is presented with evidence which has been fully tested.[368] It is submitted that a Trial Chamber should have the benefit of weighing any inconsistencies between statements made by witnesses in arriving at its determinations.[369]

308. According to the Prosecution, if regard is had to Article 21(4)(g) of the Statute and to Sub-rules 70(A), 90(F) and 97 of the Rules, no express privilege exempts Defence

[365] Cross-Appellant's Brief, para. 6.3.
[366] *Ibid.*, para. 6.6; T. 190 (20 April 1999).
[367] *Ibid.*, paras. 6.6-6.24.
[368] T. 186 (20 April 1999).

witness statements from disclosure.[370] The privilege adopted by the International Tribunal in Rule 97 of the Rules does not cover third party statements given to Defence counsel, at least not once the Defence decides to present evidence by calling a particular witness.[371] Once the Defence calls a witness, that evidence should be subjected to the same scrutiny as that of the Prosecution.[372]

309. The Prosecution also submits that no implied privilege exempting Defence witness statements from disclosure can be inferred from the Rules (as Judge Stephen found, with Judge Vohrah concurring). In its view, there is no ambiguity in the Rules in this regard, and Judge Stephen's reference to the legal professional privilege found in national jurisdictions is incorrect.[373] The Prosecution submits that, even if an ambiguity exists, it is incorrect to resolve it by referring to the most common practice in adversarial jurisdictions, despite the obvious influence of adversarial systems on the Rules.[374] Sub-rule 89(B) of the Rules expressly requires the application of "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law". In line with this provision, the Trial Chamber should have favoured an interpretation allowing it to order disclosure of Defence witness statements "where it considers that this would enable it to reach a verdict based on all pertinent evidence".[375] The Prosecution relies in particular upon the restrictions set out by the U.S. Supreme Court in *United States v. Nobles.*[376]

310. The Prosecution also submits that the disclosure of prior statements of Defence witnesses is not otherwise inconsistent with the principles of a fair trial.[377] In particular, the principle of equality of arms does not require that the Defence be allowed to call witnesses under conditions more favourable than those afforded to the Prosecution.[378] If the Defence

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[369] T. 186 (20 April 1999).
[370] Cross-Appellant's Brief, paras. 6.7-6.14.
[371] T. 187 (20 April 1999).
[372] T. 187 (20 April 1999).
[373] Cross-Appellant's Brief, paras. 6.15-6.18.
[374] *Ibid.*, para. 6.20.
[375] *Ibid.*, para. 6.21.
[376] 422 U.S. 225 (1975).
[377] Cross-Appellant's Brief, paras. 6.25-6.31.
[378] *Ibid.*, para. 6.31.

decides to call a witness at trial, that witness should in principle be subject to the same scrutiny as Prosecution witnesses.[379]

2. The Defence Case

311. The Defence submits that the Trial Chamber's Witness Statements Decision was correctly decided.

312. The Trial Chamber was correct in holding that the Statute and Rules do not specifically deal with the problem at issue.[380] The Defence also submits that, in light of the essentially adversarial system under which the Tribunal operates, the term "the general principles of law" in Sub-rule 89(B) should be interpreted as meaning "the general principles of law emerging from adversarial systems".[381]

313. The Defence submits that the general principles referred to may be summarised as follows. To begin with, the burden of proving the allegation is on the Prosecution. The Prosecution must inform the accused of the charges and the evidence against him. The accused has the right to remain silent and to require the Prosecution to prove its case. There is no duty similar to that imposed on the Prosecution for the Defence to disclose its evidence, and the privilege attaching to Defence witness statements is not waived when the witness in question gives evidence.[382]

314. It is also submitted that to allow such disclosure would increase the inequality of arms between the parties.[383] Furthermore, the Defence emphasises that because privilege can be claimed for communications between the client and third parties when litigation is ongoing in most adversarial jurisdictions, such disclosure would be incorrect.[384] The Defence also submits that such a disclosure requirement might deter witnesses from

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[379] *Ibid.*
[380] Defence's Substituted Response to Cross-Appellant's Brief, para. 6.3; Skeleton Argument of the Prosecution, para. 5(b).
[381] Defence's Substituted Response to Cross-Appellant's Brief, para. 6.13; Skeleton Argument of the Prosecution, para. 5(d).
[382] Skeleton Argument of the Prosecution, paras. 5(f)-(g).
[383] T. 275 (21 April 1999).
[384] T. 275, 278 (21 April 1999).

testifying because of a loss of confidentiality, which in turn would impact on the right of a defendant to call witnesses.[385]

B. Discussion

1. The Reason for Dealing with this Ground of the Cross-Appeal

315. While neither party asserts that the Witness Statements Decision had a bearing on the verdicts on any of the counts or that an appeal lies under Article 25(1),[386] they both agree that this is a matter of general importance which affects the conduct of trials before the Tribunal and therefore deserves the attention of the Appeals Chamber. The Prosecution further submits that the Witness Statements Decision, as it stands, remains persuasive authority that the Defence cannot be ordered to disclose prior witness statements.[387]

316. The Appeals Chamber has no power under Article 25 of the Statute to pass, one way or another, on the decision of the Trial Chamber as if the decision was itself under appeal. But the point of law which is involved is one of importance and worthy of an expression of opinion by the Appeals Chamber. The question posed as to whether or not a Trial Chamber has the power to order the disclosure of prior Defence witness statements after the witness has testified, must be placed in its proper context. Further, it is the view of the Appeals Chamber that this question impinges upon the ability of a Trial Chamber to meet its obligations in searching for the truth in all proceedings under the jurisdiction of the International Tribunal, with due regard to fairness. The judicial mandate of the International Tribunal is carried out by the Chambers, in this case a Trial Chamber, as this is a matter that arose during the trial process.

317. It is therefore necessary that the Appeals Chamber clarify the context in which the question posed is discussed. This is a matter that touches upon the duty of a Trial Chamber to ascertain facts, deal with credibility of witnesses and determine the innocence or guilt of

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[385] Skeleton Argument of the Prosecution, para. 5(h).
[386] Article 25(1) provides: "The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice."
[387] T. 185 (20 April 1999).

the accused person. However, before answering the question posed, it is desirable to examine the implications of disclosure.

2. The Power to Order the Disclosure of Prior Defence Witness Statements

318. The Appeals Chamber is of the view that the Defence witness statement referred to would be a recorded description of events touching upon the indictment, made and, normally, signed by a person with a view to the preparation of the Defence case.

319. There is no blanket right for the Prosecution to see the witness statement of a Defence witness. The Prosecution has the power only to apply for disclosure of a statement after the witness has testified, with the Chamber retaining the discretion to make a decision based on the particular circumstances in the case at hand.

320. The power of a Trial Chamber to order the disclosure of a prior Defence witness statement relates to an evidentiary question. Strictly speaking, the principle of equality of arms is not relevant to the problem. Also, since the Statute and the Rules do not expressly cover the problem at hand, the broad powers conferred by Sub-rule 89(B) may come into play.[388] The question to be addressed is whether those powers include the power of a Trial Chamber to order the disclosure of a prior Defence witness statement.

321. The mandate of the International Tribunal, as set out in Article 1 of the Statute, is to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia. To fulfil its mandate, a Trial Chamber has to ascertain the credibility of all the evidence brought before it. A Trial Chamber must also take account of the following provisions of the Statute: Article 20(1), concerning the need to ensure a fair and expeditious trial, Article 21 dealing with the rights of the accused, and Article 22, dealing with the protection of victims and witnesses. Further guidance may be taken from Article 14 of the International Covenant on Civil and Political Rights[389] and

[388] Sub-rule 89(B) provides:
"In cases not otherwise provided for in this Section, a Chamber shall apply Rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

[389] Article 14 provides in part:

Article 6 of the European Convention on Human Rights,[390] which are similar to Article 21 of the Statute.

322. With regard to the present case, once a Defence witness has testified, it is for a Trial Chamber to ascertain the credibility of his or her testimony. If he or she has made a prior statement, a Trial Chamber must be able to evaluate the testimony in the light of this statement, in its quest for the truth and for the purpose of ensuring a fair trial. Rather than deriving from the sweeping provisions of Sub-rule 89(B), this power is inherent in the jurisdiction of the International Tribunal, as it is within the jurisdiction of any criminal court, national or international. In other words, this is one of those powers mentioned by the Appeals Chamber in the *Blaškić (Subpoena)* decision which accrue to a judicial body even if not explicitly or implicitly provided for in the statute or rules of procedure of such a body, because they are essential for the carrying out of judicial functions and ensuring the fair administration of justice.[391]

323. It would be erroneous to consider that such disclosure amounts to having the Defence assist the Prosecution in trying the accused. Nor does such disclosure undermine the essentially adversarial nature of the proceedings before the International Tribunal,

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"(1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...].
(2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; [...]; (c) to be tried without undue delay; (d) to be tried in his presence, and to defend himself in person or through legal assistance [...]; (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]; (g) not to be compelled to testify against himself or to confess guilt. [...]."

[390] Article 6 provides in part:
"(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...].
(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
(3) Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; [...]; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; [...]."

[391] *See* "Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997", *The Prosecutor v. Tihomir Blaškić,* Case No.: IT-95-14-AR108*bis*, Appeals Chamber, 29 October 1997, para. 25.

including the basic notion that the Prosecution has to prove its case against the accused. Although this provision was not in force at the time relevant to the present enquiry, it is worth noting that Sub-rule 73*ter*(B) provides that should a Pre-Defence Conference be held:

> [...] the Trial Chamber may order that the defence, before the commencement of its case but after the close of the case for the prosecution, file the following:
> [...];
> (iii) a list of witnesses the defence intends to call with:
> (a) the name or pseudonym of each witness;
> (b) a summary of the facts on which each witness will testify;
> [...]

This Sub-rule does not require that the Defence file its witness statements. But the substance is not far removed: the provision has been designed to assist a Trial Chamber in preparing for hearing the Defence case, and the Prosecution in preparing for cross-examination of the witnesses.

324. As stated above, once the Defence has called a witness to testify, it is for a Trial Chamber to ascertain his or her credibility. If there is a witness statement, in the sense referred to above, it would be subject to disclosure only if so requested by the Prosecution and if the Trial Chamber considers it right in the circumstances to order disclosure. The provisions of Rule 68 are limited to the Prosecution and do not extend to the Defence. Disclosure would follow only once the Prosecution's case has been closed. Even then, Sub-rules 89(C),[392] (D)[393] and (E)[394] would still apply to such a disclosed witness statement, with the consequence that a Trial Chamber might still exclude it. Furthermore, the provisions of Sub-rule 90(F) relating to self-incrimination would of course apply.

325. The Appeals Chamber is also of opinion that no reliance can be placed on a claim to privilege. Rule 97[395] relates to lawyer-client privilege; it does not cover prior Defence witness statements.

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[392] Sub-rule 89(C) provides: "A Chamber may admit any relevant evidence which it deems to have probative value."
[393] Sub-rule 89(D) provides: "A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial."
[394] Sub-rule 89(E) provides: "A Chamber may request verification of the authenticity of evidence obtained out of court."
[395] Rule 97 provides in part: "All communications between lawyer and client shall be regarded as privileged, and consequently not subject to disclosure at trial [...]."

C. Conclusion

326. For the reasons set out above, it is the opinion of the Appeals Chamber that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

IX. DISPOSITION

327. For the foregoing reasons, **THE APPEALS CHAMBER, UNANIMOUSLY**

(1) DENIES the first ground of the Appellant's Appeal against Judgement;

(2) DENIES the third ground of the Appellant's Appeal against Judgement;

(3) RESERVES JUDGEMENT on the Appellant's Appeal against Sentence until such time as the further sentencing proceedings referred to in sub-paragraph (6) below have been completed;

(4) ALLOWS the first ground of the Prosecution's Cross-Appeal, REVERSES the Trial Chamber's verdict in this part, AND FINDS the Appellant guilty on Counts 8, 9, 12, 15, 21 and 32 of the Indictment;

(5) ALLOWS the second ground of the Prosecution's Cross-Appeal, REVERSES the Trial Chamber's verdict in this part, AND FINDS the Appellant guilty on Counts 29, 30 and 31 of the Indictment;

(6) DEFERS sentencing on the Counts mentioned in sub-paragraphs (4) and (5) above to a further stage of sentencing proceedings;

(7) HOLDS that an act carried out for the purely personal motives of the perpetrator can constitute a crime against humanity within the meaning of Article 5 of the Tribunal's Statute relating to such crimes;

(8) FINDS that the Trial Chamber erred in finding that all crimes against humanity require discriminatory intent and HOLDS that such intent is an indispensable legal ingredient of the offence only with regard to those crimes for which it is expressly required, that is, for the types of persecution crimes mentioned in Article 5(h) of the Tribunal's Statute;

(9) HOLDS that a Trial Chamber may order, depending on the circumstances of the case at hand, the disclosure of Defence witness statements after examination-in-chief of the witness.

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

Mohamed Shahabuddeen
Presiding

Antonio Cassese

Wang Tieya

Rafael Nieto-Navia

Florence Ndepele Mwachande Mumba

Dated this fifteenth day of July 1999
At The Hague,
The Netherlands.

Judge Nieto-Navia appends a Declaration to this Judgement.

Judge Shahabuddeen appends a Separate Opinion to this Judgement.

[Seal of the Tribunal]

X. DECLARATION OF JUDGE NIETO-NAVIA

1. I am appending a declaration because it is, in my view, necessary to say a few words about Article 25 of the Statute which provides the Prosecution or a convicted person the right to appeal on an error on a question of law invalidating the decision or an error of fact occasioning a miscarriage of justice. It would appear that the Prosecution's appeals against the acquittals on Counts 8, 9, 12, 15, 21 and 32, constituting ground 1 of the cross-appeal, and on Counts 29, 30 and 31, constituting the second ground of cross-appeal, fall within the ambit of Article 25. The civil law principle of *non bis in idem*, according to Black's Law Dictionary, means that the accused "shall not be twice tried for the same crime". The corresponding common law principle of double jeopardy entitles the accused "not [to] be twice 'put in jeopardy' for the same offence". On the face of it, it would appear that Prosecution appeals against acquittals, though permissible under Article 25, might be in contravention of the legal tenet of *non bis in idem*. My concern is two-fold: (1) is *non bis in idem* a general principle of law; and (2) if so, is Article 25 consistent with the principle?

2. It is notable that the International Tribunal's own Statute recognises the maxim of *non bis in idem*. Article 10 protects a person tried by the Tribunal from subsequent prosecution by a national court. The corollary is also true: a person tried by a national court may not be tried subsequently by the International Tribunal unless the original charge was classified as a common crime, or the national court proceedings did not conform to the fundamental principles of criminal law (that is, the court proceedings were not independent and impartial, or were conducted to shield the accused from international criminal responsibility, or the charge was not prosecuted diligently).

3. Can a general principle of law be discerned from the practice of domestic courts? In the United States, the Supreme Court has interpreted the double jeopardy clause of the Fifth Amendment[1] to mean that the Prosecution cannot appeal against a verdict, whether on an error on a question of law or fact.[2] This finality accorded to criminal judgements is intended to protect the acquitted or convicted person against "prosecution oppression".

[1] The Fifth Amendment of the U.S. Constitution reads: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb".
[2] *See United States v. DiFrancesco*, 449 U.S. 117 (1980); *Kepner v. United States*, 195 U.S. 100 (1904); *Sanabria v. United States*, 437 U.S. 54 (1978); *Green v. United States*, 355 U.S. 184 (1957).

Double jeopardy does not bar the convicted person from appealing because he/she chooses to put himself/herself at risk once more.

4. Similarly, in the United Kingdom, the application of the double jeopardy principle precludes the Prosecution from appealing against acquittals, except where the appeal challenges an acquittal tainted by bribery, threats or other interference with a witness or juror,[3] or where the appeal is from acquittal in the magistrates' court by case stated to the Divisional Court of the Queen's Bench Division on the ground that it was rendered in error of law or in excess of jurisdiction.

5. Thus, it seems that the common law gives special weight to acquittals. In the United Kingdom, the Prosecution does not have the right to appeal although appeals are allowed in certain clearly circumscribed instances. In the United States, there is a complete bar on appeals against acquittals.[4]

6. I turn now to examine the position adopted by countries in the civil law tradition. Civil law generally allows appeals against decisions at first instance. However, decisions rendered by the second-tier courts can be appealed by way of cassation only on errors of law. In France, the Prosecution may lodge a *pourvoi en cassation* to challenge procedural irregularities, which *inter alia*, include an error in law made by the lower court.[5]

7. In Germany, Prosecution appeals against acquittals are not considered to violate *non bis in idem* because the judgement at trial is not seen to constitute the end of the criminal proceeding.[6] It seems that, in the German legal system, jeopardy attaches with the criminal charge and continues through all proceedings that arise from the original charge.[7] Hence, a Prosecution appeal from acquittal is seen as another step in the criminal proceedings.

8. This brief survey of domestic practice, though far from comprehensive, reveals that no general principle of law can be drawn from domestic practice. Unlike the Anglo-

[3] *See* s. 54 of the Criminal Procedure and Investigations Act 1996.
[4] *See supra*, note 2.
[5] *See* Dadomo, Christian and Farran, Susan, *The French Legal System* (2nd ed., Sweet & Maxwell, London, 1996), 220.
[6] *See* ss. 312 and 333 of the German Criminal Code.
[7] Justice Holmes, dissenting in *Kepner v. United States*, advocated the adoption of the concept of "continuing jeopardy". He argued that "a man cannot be said to be more than once in jeopardy on the same cause, however often he may be tried. The jeopardy is one continuing jeopardy from its beginning to the end of the cause." The majority, concluding that the verdict at trial terminated the initial jeopardy, rejected Justice Holmes' argument.

American common law system, the civil law system does not construe Prosecution appeals against acquittals to compromise the principle of *non bis in idem*.

9. From the foregoing, I must conclude that there is no general principle of law that would prohibit Prosecution appeals against acquittals. Therefore, it is unnecessary to analyse whether Article 25 is consistent with *non bis in idem*.

10. It seems to me that this conclusion is buttressed by the fact that the rationale which underpins the common law's vigorous approach is absent in the context of prosecutions before the International Tribunal. The impetus for the special weight given to acquittals is the desire to prevent the government, with its vast superior resources, from abusing its power to prosecute accused persons by re-prosecuting them until it manages to obtain convictions.[8] In the International Tribunal, while the Prosecution prosecutes on behalf of the international community, it is not supported by a governmental apparatus with abundant resources. Like the Defence, it too must rely on the co-operation of external entities. Moreover, Articles 20(1) and 21(4) guarantee to each party equality of arms.

11. I accept that Prosecution appeals against acquittals conform to the requirements of Article 25. However, I think that the Appeals Chamber should analyse, at the sentencing stage, whether a successful Prosecution appeal should put the person in a worse position than that at the end of trial ("*reformatio in pejus*").

12. With respect to the fourth ground of cross-appeal, on the question of whether there exists a crime against humanity where the accused acted out of purely personal motives, I join in the reasoning and conclusion offered by my learned colleague, Judge Shahabuddeen, in his separate opinion. I would add only the following to elaborate my own position. The reason that a crime against humanity under Article 5 cannot be committed for purely personal motives completely unrelated to the attack on a civilian population is that, being a crime under international law, there must be a proximate connection between the underlying act(s) and the surrounding armed conflict. An unlawful act perpetrated in the context of an armed conflict, but unrelated to the hostilities, is a common crime under national law. The fact that such a crime was committed in the context of an armed conflict does not render it subject to international humanitarian law.

[8] *See Green v. United States*, *supra* note 2.

13. On the question of whether the Prosecution has a right to the production of Defence witness statements, constituting the fifth ground of cross-appeal, I agree with the decision of the Appeals Chamber for the reasons set out in Judge Shahabuddeen's separate opinion.

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

Rafael Nieto-Navia

Dated this fifteenth day of July 1999
At The Hague,
The Netherlands.

XI. SEPARATE OPINION OF JUDGE SHAHABUDDEEN

1. Some time ago, yet not far from where the events in this case happened, a "breakdown of law and order" occurred. There "were savage and pitiless actions into which men were carried not so much for the sake of gain as because they were swept away into an internecine struggle by their ungovernable passions". The turmoil saw "the ordinary conventions of civilised life thrown into confusion". Sadly, it seems, people took "it upon themselves to begin the process of repealing those general laws of humanity which are there to give a hope of salvation to all who are in distress, instead of leaving those laws in existence, remembering that there may come a time when they, too, will be in danger and will need their protection".[1]

2. That last reflection of a great thinker of antiquity was later expressed in the saying by Westlake "that the mitigation of war must depend on the parties to it feeling that they belong to a larger whole than their respective tribes or states, a whole in which the enemy too is comprised, so that the duties arising out of that larger citizenship are owed even to him".[2] The development of a sense of that "larger citizenship" has been disappointingly slow. Since the ancient chronicler spoke of the "general laws of humanity", then lacking legal force but still recognisable, it has taken over two thousand years for those "laws" to assume the shape of binding norms applying world-wide. To what extent did they govern in this case? And, with what consequences?

3. I agree with the conclusions reached by the Appeals Chamber, and very largely with its arguments, subject to reservations on some aspects (including the relationship between the Rome Statute and the development of customary international law). I propose to explain my position on some of the points on which my reasoning may not be the same.

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[1] Thucydides, *The Peloponnesian War*, tr. Rex Warner (Middlesex, 1961), p. 211, speaking of the island of Corcyra.

[2] *The Collected Papers of John Westlake on Public International Law,* ed. L. Oppenheim (Cambridge, 1914), p. 274.

A. Whether There Was an International Armed Conflict

4. As is observed in paragraph 83 of the judgement of the Appeals Chamber, the "requirement that the conflict be international for the grave breaches regime to operate pursuant to Article 2 of the Statute has not been contested by the parties". That point is not being considered.

5. As to the points which are being considered, I agree with the Appeals Chamber, and with Judge McDonald, that there was an international armed conflict in this case. I also appreciate the general direction taken by the judgement of the Appeals Chamber, but, so far as this case is concerned, I am unclear about the necessity to challenge *Nicaragua* (*I.C.J Reports 1986*, p. 14). I am not certain whether it is being said that that much debated case does not show that there was an international armed conflict in this case. I think it does, and that on this point it was both right and adequate.

1. The Issue

6. The issue in this branch of the case is whether, after 19 May 1992, there was an "armed conflict" between the Federal Republic of Yugoslavia (Serbia and Montenegro) ("FRY") and Bosnia and Herzegovina ("BH") within the meaning of Article 2, first paragraph, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War ("Fourth Geneva Convention"). The provision states that "... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties ...". There was no state of declared war. If also there was no "armed conflict" as between the FRY and BH (as the majority of the Trial Chamber seemingly thought), the Fourth Geneva Convention did not apply, and the question whether victims were protected persons within the meaning of Article 4, first paragraph, of the Convention did not arise, a question which the majority nevertheless answered. Persons could only be protected by the Convention if the Convention in the first instance applied to the armed conflict by which they were affected.

2. *Nicaragua* Shows That There Was an Armed Conflict Between the FRY, Acting Through the VRS, and BH

7. *Ex hypothesi*, an armed conflict involves a use of force. Thus, the question whether there was an armed conflict between the FRY and BH depended on whether the FRY was using force against BH through the Bosnian Serbian Army of the Republika Srpska ("VRS"). So, I turn to this question.

8. *Nicaragua* is not easy reading. Many issues were involved, and interpretations differ. A general understanding is that the Court said that the United States had no responsibility for delictual acts committed by the *contras* because, in its view, the former lacked the requisite degree of control over the latter. However, the Court was careful to say that this "conclusion ... does not of course suffice to resolve the entire question of the responsibility incurred by the United States through its assistance to the *contras*". (*I.C.J. Reports 1986*, p. 63, para. 110). One part of this unresolved question of responsibility was whether, as claimed by Nicaragua, "the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua". (Ibid., p. 19, para. 15*(c)*). In so far as it was sought to support this part of the claim by reference to funds being supplied by the United States to the *contras*, the Court held that "the mere supply of funds to the *contras,* while undoubtedly an act of intervention in the internal affairs of Nicaragua, ... does not in itself amount to a use of force". (Ibid., p. 119, para. 228).

9. By contrast, the Court considered that, as distinguished from the mere supplying of funds, the United States had committed other acts in relation to the *contras* which amounted to a threat or use of force against Nicaragua. In paragraph 228 of its judgement, the Court put it this way:

> As to the claim that United States activities in relation to the *contras* constitute a breach of the customary international law principle of the non-use of force, the Court finds that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the *contras* in Nicaragua, by 'organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State', and 'participating in acts of civil strife ... in another State', in terms of General Assembly resolution 2625(XXV). According to that resolution, participation of this kind is contrary to the principle of the prohibition of the use of force when the acts of civil strife referred to 'involve a threat or use of force'. In the view of the Court, while the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua, this is not necessarily so in respect of all the assistance given by the United States Government.

The Court then mentioned "the mere supply of funds to the *contras*" as a form of assistance which did not amount to a use of force, although it amounted to intervention. Subject to that kind of exception, the Court considered that the arming and training of the *contras* in the circumstances of the case amounted to a use of force.

10. The Court adhered to this view in its formal disposition of the case. In paragraph 292(3) of its holding, it decided that the United States, by "training, arming, equipping, financing, and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua" intervened in the affairs of Nicaragua. Then, in paragraph 292(4), it held that the United States, "by those acts of intervention referred to in subparagraph (3) hereof which involve the use of force, has acted, against the Republic of Nicaragua, in breach of its obligation under customary international law not to use force against another State". The acts of intervention which involved a use of force included the arming and training of the *contras,* the Court having explicitly held that "the arming and training of the *contras* can certainly be said to involve the threat or use of force against Nicaragua".

11. This is consistent with the Court's statement, in paragraph 238 of its judgement, that the United States, having no legal right to use force in the circumstances of the case, "has violated the principle prohibiting recourse to the threat or use of force ... by its assistance to the contras to the extent that this assistance 'involve[s] a threat or use of force' (paragraph 228 above)". Paragraph 228, to which the Court referred, is set out in relevant part above.

12. The *contras* were not using force exclusively on behalf of the United States; the case makes it clear that they were also using force on their own behalf against the Government of Nicaragua. This must be borne in mind in considering the following statement of the Court:

> The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. (*Ibid.,* p.114, para.219).

I do not think anything in this passage is opposed to the conclusion that the United States was using force through the *contras* against the Government of Nicaragua, a finding which the Court in fact made as, I think, the Appeals Chamber in this case recognises (see para.

130 of the judgement). To judge whether that finding is applicable here, it is necessary to consider the facts of this case.

13. The Trial Chamber accepted that, having been itself in direct armed conflict with BH through the Yugoslav People's Army ("JNA"), the FRY established the VRS, trained it, equipped it, supplied it and maintained it. The establishment was done by the FRY, on 19 May 1992, by leaving in BH part of the JNA to function as the VRS, and doing that just days after the Security Council had called on the FRY to withdraw from BH. Senior military officers from the FRY were members of the staff of the VRS. The FRY paid the salaries (and pensions after retirement) of officers of the VRS who came over from the JNA. The headquarters of the VRS had a link with the headquarters of the Yugoslav Army, or VJ, as the Yugoslav portion of the old JNA was now known. The VRS was engaged in carrying out the FRY's plan of ethnic cleansing and of carving out territory of BH to be ultimately added to that of the FRY so as to realise the FRY's ambition to create a "Greater Serbia".

14. Thus, the FRY did more than provide general funds to the VRS. On the basis of *Nicaragua*, I have no difficulty in concluding that the findings of the Trial Chamber suffice to show that the FRY was using force through the VRS against BH, even if it is supposed that the facts were not sufficient to fix the FRY with responsibility for any delictual acts committed by the VRS. The FRY and BH were therefore in armed conflict within the meaning of Article 2, first paragraph, of the Fourth Geneva Convention, with the consequence that the Convention applied to that armed conflict.

3. The Position Taken by the Majority of the Trial Chamber

15. Citing *Nicaragua*, the majority of the Trial Chamber (Judge Stephen and Judge Vohrah) held that the test as to whether there was an international armed conflict was whether the FRY had effective control over the VRS, which it considered meant command and control. (Judgement of the Trial Chamber, paras. 598 and 600). It found that the FRY did not have command and control over the VRS and so did not have effective control over the VRS; in its opinion, the relationship between them was one of coordination and cooperation as between allies (as to the legal implications of which I reserve my opinion).

Consequently, in the view of the majority, the FRY was not a party to the armed conflict in BH after 19 May 1992. In effect, after that date, that conflict was not international.

16. With respect, it is too high a threshold to insist on proof of command and control for the purpose of determining whether a state was using force through a foreign military entity, as distinguished from whether the state was committing breaches of international humanitarian law through that entity. In *Nicaragua,* the Court held that the United States was using force through the *contras* by reason of the fact that, in the circumstances of that case, it was arming and training the *contras.* The Court did not say that these facts amounted to command and control; if they did, they should have given rise to state responsibility for breaches by the *contras* of international humanitarian law, which the Court said was not the case.

4. The General Question of State Responsibility for the Delictual Acts of Another

17. On the question whether the United States was responsible for the delictual acts of the *contras*, the Appeals Chamber considered that *Nicaragua* was not correct and reviewed the general question of the responsibility of a state for the delictual acts of another. It appears to me, however, that that question does not arise in this case. The question, a distinguishable one, is whether the FRY was using force through the VRS against BH, not whether the FRY was responsible for any breaches of international humanitarian law committed by the VRS.

18. To appreciate the scope of the question actually presented, it is helpful to bear in mind that there is a difference between the mere use of force and any violation of international humanitarian law: it is possible to use force without violating international humanitarian law. Proof of use of force, without more, does not amount to proof of violation of international humanitarian law, although, if unlawful, it could of course give rise to state responsibility. Correspondingly, what needs to be proved in order to establish a violation of international humanitarian law goes beyond what needs to be proved in order to establish a use of force. This is important because, under Article 2, first paragraph, of the Fourth Geneva Convention, all that had to be proved, in this case, was that an "armed conflict" had arisen between BH and the FRY acting through the VRS, not that the FRY committed breaches of international humanitarian law through the VRS.

19. The foregoing may be borne in mind in considering the Court's holding in *Nicaragua* that, by arming and training the *contras* in the circumstances of that case, the United States had used force. The Court did not declare the nature of any underlying theory. I should not be surprised, however, if it applied a test of effective control, but on the flexible basis that control which is effective for one purpose need not be effective for another, and would interpret the decision that way. Thus, in holding that the United States had used force in arming and training the *contras*, the Court did not rely on *specific* instructions, something on which it otherwise laid stress where state responsibility was sought to be founded on the delictual acts of another. In this case, the test of effective control, flexibly applied (as I believe the Court intended it to be), shows that the FRY was using force through the VRS against BH, even if such control did not rise to the level required to fix the FRY with state responsibility for any breaches of international humanitarian law committed by the VRS.

20. On the more general question whether *Nicaragua* was correct in its holding on the subject of the responsibility of a state for the delictual acts of a foreign military force, it may be that there is room for reviewing that case. The case may be interpreted to mean that a state could be using force through a foreign military entity without being responsible for any delictual acts committed by that entity otherwise than on the specific instructions of the state. In opposition to a theory based on the need for proof of specific instructions, it may be useful to consider whether there is merit in the argument that, by deciding to use force through an entity, a state places itself under an obligation of due diligence to ensure that such use does not degenerate into such breaches, as it can. However, I am not persuaded that it is necessary to set out on that inquiry for the purposes of this case, no issue being involved of state responsibility for another's breaches of international humanitarian law.

21. For these reasons, although I appreciate the general tendency of the judgement of the Appeals Chamber, I would respectfully reserve my position on the new test proposed.

5. The Position of the Prosecution on the Applicability of *Nicaragua*

22. The prosecution argues that *Nicaragua* is not relevant. It makes two points. First, it says that *Nicaragua* was concerned with the responsibility of a state for delictual acts of third parties, and not with the criminal responsibility of the individual. I am of the view,

however, that, whatever the context, what constitutes a use of force (a necessary element of an "armed conflict") is so fundamental as to require constancy of principle. The distinction between the responsibility of a state and the criminal responsibility of the individual is interesting; but it is not of assistance on the question what constitutes a use of force. That is a concept of common currency in international law.

23. Second, the prosecution submits that *Nicaragua* did not enquire into whether the conflict was internal or international for the purposes of the Geneva Conventions of 1949. In its view, the Court found it unnecessary to do so, considering that, by virtue of common article 3 of the Geneva Conventions, the issues were determinable by reference to customary international law relating to the applicability of minimum humanitarian principles to the use of force, whether in the course of an international armed conflict or in the course of an internal one. That was so, with the consequence that it was not necessary for the Court to determine whether the Geneva Conventions, as such, were inapplicable by reason of a United States exclusion of multilateral conventions as set out in its acceptance of the compulsory jurisdiction clause of the Statute of the Court. (*I.C.J. Reports 1986*, paras. 217-220 and 255; and see *I.C.J. Reports 1984*, p. 421, para. 67).

24. But this does not mean that the Court did not have to consider whether there was a use of force, for, altogether apart from the question whether there was a breach of the Geneva Conventions, Nicaragua, as has been seen, had claimed that "the United States, in breach of its obligation under general and customary international law, has used and is using force and the threat of force against Nicaragua..." (*I.C.J. Reports 1986,* p. 19, para. 15*(c)*). That is the point involved here. In *Nicaragua*, the Court did not have to determine whether the conflict was internal or international; but it did have to determine whether the United States was using force against Nicaragua through the *contras*, and, on my interpretation, it did decide that there was such a use of force. If there was such a use of force by one state against another, *ex definitione* the conflict was international, whether or not it was necessary for the Court to decide that it was.

6. The Demonstrable Link Test Proposed by the Prosecution

25. As mentioned in paragraph 69 of the judgement of the Appeals Chamber, the prosecution submitted that the answer to the question whether the FRY was in armed

conflict with BH through the VRS hinged on whether the conflict involved a "demonstrable link" between the VRS and the FRY or VJ, meaning, I believe, something less stringent than either of two tests which were discussed, namely, the agency test and the effective control test. The prosecution accepted that there was no authority to support the idea but thought that general jurisprudence would. In aid of the submission, recourse could be had to the character of the reference in Article 2, first paragraph, of the Fourth Geneva Convention to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties...". As it has been often observed, the expression "armed conflict" is a factual one, not intended to become burdened with legal technicalities: one respected commentator refers to it as "a de facto concept".[3]

26. That is true. However, there is a difference between saying that the question whether there is an armed conflict between states is a factual one and saying that, for that reason, it is not necessary to determine whether there is an armed conflict between states. Factual as the criterion may be, it remains necessary to determine whether there is an armed conflict between states. This question is not a generalised one as to whether an armed conflict has become "internationalised" in any broad sense of the term; nor is it to be determined by reference to criteria of unmanageable plasticity. The question is a precise one as to whether there is an "armed conflict ... between two or more of the High Contracting Parties ..." to the Fourth Geneva Convention. Barring a "declared war" between them, it is only if there is such a conflict that the Convention applies. But whether or not there is such a conflict turns, *ex hypothesi*, on whether one state is using force against the other. A demonstrable link test has to result in showing whether or not force was being used by a state. If the test premises that it is not necessary to prove that a state was using force, it is not persuasive.

27. More pertinently, if the proposed test is meant to show whether or not force was being used by a state through a foreign army, it has to have the effect of connecting the state with the use of force by the foreign army; and I do not see how it can do this unless it has a degree of specificity commensurate with the gravity of a finding that one state was using force against another and with the serious implications of such a finding for individual criminal responsibility, for, if the Convention applies, the individual becomes liable to conviction for certain serious crimes to which he would not otherwise be exposed. If the

[3] J.S.Pictet, *Humanitarian Law and the Protection of War Victims* (Leyden, 1975), p. 50.

test has the requisite degree of specificity, I do not see the advantage which it possesses over the other tests concerned. Whatever may be said about the latter, they appear to have that quality. Thus, the proposed test is either unnecessary or inadequate.

7. The Test of Appellate Intervention

28. The Appeals Chamber is intervening in this part of the case because it holds that the Trial Chamber applied the wrong legal criterion. In another part of the case (and, in a sense, in this part also), the question of evaluation of facts is concerned. It may be convenient to say a word on the basis on which, I believe, the Appeals Chamber acts.

29. Assessment of facts is primarily a matter for the Trial Chamber. But appeals to the Appeals Chamber are by way of rehearing, though not involving a hearing *de novo* in the Appeals Chamber. Thus, the Appeals Chamber is also a judge of fact, although it must take account of its disadvantage in that, unlike the Trial Chamber, it cannot assess the witnesses first hand. Further, the Appeals Chamber is in as good a position as the Trial Chamber to decide on the proper inferences to be drawn from undisputed facts, or from facts which, being disputed, are established by the findings of the Trial Chamber.

30. However, where there is a difference in assessments of facts, the Appeals Chamber will not simply substitute its assessment for that of the Trial Chamber. As it was said by Brierly, "different minds, equally competent, may and often do arrive at different and equally reasonable results"[4]. Similarly, it has been remarked that "[t]wo reasonable [persons] can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable ... Not every reasonable exercise of judgment is right, and not every mistaken exercise of judgment is unreasonable"[5]. In these repects, I agree with the corresponding remark made by the Appeals Chamber in paragraph 64 of the judgement.

31. Consequently, the Appeals Chamber will intervene where it can see that no reasonable person would have taken the view taken by the Trial Chamber. But, of course,

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[4] Sir Hersch Lauterpacht and C.H.M.Waldock (eds.), *The Basis of Obligation in International Law and Other Papers by the Late James Leslie Brierly*, 1958, p. 98.
[5] *In re W. (An Infant)*, [1971] AC 682, HL, p. 700, per Lord Hailsham.

the Appeals Chamber can also intervene if the Trial Chamber did not take into account relevant facts, or if it took account of irrelevant ones, or if it applied the wrong legal criterion to the determination of the legal significance of the facts.

32. With respect, I think that, as regards another part of this case (concerning Jaskići), the decision of the Trial Chamber is not sustained by the criterion of reasonableness. More particularly, however, I consider that, as regards the question whether there was an international armed conflict, the wrong legal criterion was used.

B. Whether There is a Crime against Humanity Where the Accused Acted out of Purely Personal Motives

33. Motive is important to punishment. It is always relevant as evidence. In exceptional cases, not including this, it could be an element of the offence charged, as, in some countries, in the case of a prosecution for libel. But, more generally, it is not. Therefore, if the Trial Chamber meant that the existence of personal motives excluded the possibility of a crime against humanity being committed if the elements of the crime were proven, I should have difficulty in supporting that. But I respectfully agree with the Appeals Chamber that the Trial Chamber did not mean to say so. What the Trial Chamber said, in paragraph 659 of its judgement, was this:

> Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict.

34. There are difficulties in the passage, but, read as a whole and in the context in which it occurred, I do not think it meant that, if the accused "knows that his act fits in with the attack", that attack being one "on the civilian population", the mere circumstance that he acted out of personal motives sufficed to exclude the commission of the crime. "Denunciation" type cases, in which the accused sought to avail himself of the arrangements relating to the attack on the civilian population in order to advance his personal motives, are crimes against humanity. And rightly so, for those are cases in which, however personal

were the motives, the act fitted in with the attack on the civilian population, within the contemplation of the phrase used by the Trial Chamber.

35. What, I apprehend, the Trial Chamber had in mind was a distinguishable situation in which, although the accused knew of the attack on the civilian population, he did not in fact intend to link his act to the attack but acted "for *purely* personal motives *completely unrelated* to the attack on the civilian population".[6] Thus, in the period of an attack on a certain civilian population, a jealous husband, being a member of the aggressor group, might kill his wife, being a member of the attacked civilian population, for exactly the same reasons, and no other, for which he would have killed her had she been a member of his own group. It does not appear to me that the mere fact that he knew of the attack on the civilian population could serve to classify his act as a crime against humanity in the absence of proof that he intended that his act should fit in with the arrangements for the attack. That proof is apparent in "denunciation" type cases. It is absent in the example suggested; the arrangements relating to the attack on the civilian population played no part in the commission of the act. Were the law as submitted by the prosecution, whereas the killing of the wife, who was a member of the aggressor group, would always be simple murder, that of the wife, who was a member of the attacked civilian population, would always be a crime against humanity.

36. The hypothesis of the murder of the wife, who was a member of the attacked civilian population, is accommodated by the necessity for the prosecution to prove, as an element of a crime against humanity, that the murder was "directed against any civilian population" as is required by the chapeau of Article 5 of the Statute. Such a murder would not have been directed against the civilian population. Where the evidence is of that kind, the prosecution has failed to prove that element of a crime against humanity.

37. The Trial Chamber seems to have regarded the non-existence of personal reasons as being itself an element of the crime to be proved by the prosecution. With respect, that was a mistake. The prosecution does not have to prove negatively that there were no personal reasons; it has to prove affirmatively that the crime was directed against the civilian

[6] (Emphasis added). "The intent (or motive) of the perpetrator in 'murder'...must be linked to carrying out the 'state action or policy'". See Cherif Bassiouni, *Crimes against Humanity in International Criminal Law* (Dordrecht, 1992), p.292.

population. However, the *evidence* may show that the act was not directed against the civilian population for any of several reasons, and one of these may be that it was done for purely personal reasons completely unrelated to the attack on the civilian population, as discussed above. That possibility may be disclosed either by the evidence for the prosecution or by that for the defence. If that is the evidence, failure by the prosecution to overcome it means that the prosecution has failed to prove a required element of a crime against humanity, namely, that the act was directed against the civilian population.

38. That is a far cry from suggesting, as the Trial Chamber seems to have done, that it is an element of the crime, having to be proved by the prosecution, that the act of the accused was not dictated by purely personal motives. But I do not think that the Trial Chamber was wrong in taking the position that, where the act was dictated by purely personal motives which were completely unrelated to the attack on the civilian population, no crime against humanity was committed, even if the accused was aware of that attack.

C. Whether the Prosecution has a Right to Disclosure of Defence Witness Statements

39. I respectfully agree with the decision of the Appeals Chamber on this point but would add something on the reasoning out of the matter and the scope of the result.

40. The provisions of the Statute of the Tribunal relating to evidence are sparse. That suggests that there is room for fashioning the rest of the needed system under Article 15 of the Statute and Rules 54 and 89(B) of the Rules of Procedure and Evidence. Barring amendment of the Rules, how far can the Chambers now go?

41. Rule 90(E) provides for a privilege against self-incrimination, and Rule 97 provides for a lawyer-client privilege[7]. It may be argued that, by implication, these express provisions exclude what is called a litigation privilege, which would have the effect of denying to the prosecution a right of access to defence witness statements. The exclusion of that privilege would leave a Chamber free to order disclosure of such statements in pursuit

[7] The Rules are referred to as they then stood.

of its search for truth. But the sparsity of the provisions relating to evidence counsels caution in adopting that approach.

42. I do not think that protection from disclosure is provided by Rule 70(A), which states:

> Notwithstanding the provisions of Rules 66 and 67, reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case, are not subject to disclosure or notification under those Rules.

It could be argued that the last phrase contemplated the pre-trial stage only; but I think that a better view is that the provision (as set out in the scheme of the Tribunal's Rules) was seeking, in part, to cancel out the effect of previous provisions which themselves assumed that, to the extent that such previous provisions did not control, "reports, memoranda or other internal documents" would not be subject to disclosure at any stage of the case. It would be odd if the protection afforded by Rule 70(A) was confined to the pre-trial stage, with the material being open to disclosure at any stage thereafter. No doubt, a similar provision is differently understood elsewhere. But it is good to recall that the transposition of a municipal text to the international plane does not necessarily take with it the technical environment in which the original text had its life. Otherwise, one runs into those difficulties which are created "when a rule is removed from the framework in which it was formed, to another of different dimensions, to which it cannot adapt itself as easily as it did to its proper setting"[8]. On balance, I agree with the prosecution that the protection referred to by Rule 70(A), as this provision occurs within the framework of the Tribunal's Rules, is to be regarded as extending throughout the case.

43. The question remains, however, as to what are the categories of material to which the protection provided by Rule 70(A) attaches. The opening words of the provision are not "Save as excepted in the provisions of Rules 66 and 67 ...". The "notwithstanding" formula used means that, "notwithstanding" the provisions of Rules 66 and 67, "reports, memoranda or other internal documents ... are not subject to disclosure ...". If those categories include witness statements, and thus deny the defence access to prosecution witness statements, a conflict exists with Rule 66(A)(ii), under which copies of prosecution witness statements

[8] *Reparation Case, I.C.J. Reports 1949*, p. 215, dissenting opinion of Judge Badawi Pasha.

must be made available to the defence. The particularity of Rule 66(A)(ii) suggests that witness statements are not included in the general reference to "reports, memoranda or other internal documents" in Rule 70(A). In the result, defence witness statements are not protected against disclosure by virtue of Rule 70(A).

44. But what of the arrangements for reciprocal inspection of materials? Under Rule 66(B), at the request of the defence, the Prosecutor is required to

> permit the defence to inspect any books, documents, photographs and tangible objects in his custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused.

If the defence avails itself of this right, the Prosecutor has a reciprocal right under Rule 67(C), reading:

> If the defence makes a request pursuant to Sub-rule 66(B), the Prosecutor shall be entitled to inspect any books, documents, photographs and tangible objects, which are within the custody or control of the defence and which it intends to use as evidence at the trial.

45. These provisions refer to real evidence, not to proofs of testimonial evidence which is expected to be given by a witness. A larger meaning may be suggested by the words "which are material to the preparation of the defence", but those words occur in Rule 66(B) and do not recur in Rule 67(C). Accordingly, even if they bear that larger meaning, those words do not operate to entitle the prosecution to inspect defence witness statements.

46. The prosecution is obliged to furnish the defence with copies of prosecution witness statements and with any exculpatory evidence. Thus, so far as this kind of material is concerned, the defence does not need to invoke reciprocity to gain access to the material.

47. It may seem odd and unbalanced that the defence has a unilateral right to receive copies of prosecution witness statements under Rule 66(A)(ii). But that, I think, is the transmuted equivalent of the right of an accused person, under many legal systems, to be apprised beforehand, in one way or another, of the evidence for the prosecution. Also, it has to be remembered that, altogether apart from the question whether he is guilty or not guilty,

a man has a right not to be charged without just cause.[9] Fairness requires this kind of unilateralism. A man who has been indicted, with the prospect of loss of liberty, has a right to know what is the evidence on the basis of which he is being put through the judicial process. The prosecution does not stand on that ground and has no similar basis for demanding access to the evidence of the defence.

48. In my opinion, the reciprocity provisions of Rule 67(C), read with Rule 66(B), do not enable the prosecution to have access to defence witness statements. More importantly, it appears to me that, *a contrario,* those provisions imply that the prosecution stands excluded from such access: materials to which the prosecution may have access, and then only on a reciprocal basis, are specified, and they do not include defence witness statements.

49. A new Rule 73*ter*(B), not in force at the relevant time, empowers a Trial Chamber to order the defence to file, between the close of the case for the prosecution and the opening of the case for the defence, "a summary of the facts on which each (defence) witness will testify".[10] That goes some way in the direction of the submissions of the prosecution in this case, but not all the way: it implies that the prosecution has no right of access to defence witness statements.

50. That is in keeping with the litigation privilege or the work product doctrine. The right is lost only where it is waived by the defence. It is waived where the defence itself puts a defence witness statement in issue by relying on it for one purpose or another. Such was the case of *Nobles,* 422 U.S. 244. There, defence counsel, in cross-examining two prosecution witnesses, sought to impeach their credit by reference to oral statements which they had allegedly made to a defence investigator as preserved in the latter's "report" to defence counsel - something in the nature of a witness statement. In the view of the United States Supreme Court, the trial judge had power, in those circumstances, to order the defence to make the "report" available to the prosecution after examination-in-chief of the investigator by the defence. That, with respect, was right; for the "report", having been relied on by the defence in cross-examining the two prosecution witnesses, was a factor

[9] See the reference by Lord Parker CJ to the impermissibility of "an accusation of crime without cause" in *R. v. Martin* [1961] 2 All ER 747.

which would obviously enter into the assessment of the truth. The "report" was thus put in issue by the defence itself.

51. On a similarly limited basis, a Trial Chamber has power to order the defence to make a defence witness statement available to the prosecution. I speak of a "limited basis" because I do not support the view that the prosecution has an unlimited right to see a defence witness statement after the witness has testified. The "cards on the table" approach favoured in some thinking on the subject has not reached that point under the Rules of Procedure and Evidence of the Tribunal. Nor, generally speaking, has that point been reached in the global common law system or in the global civil law system as they relate to criminal procedure. The right to protection is not spent at the point at which the witness has testified in chief.

52. I respectfully agree with the Appeals Chamber that a Chamber may order disclosure of a defence witness statement only where it is satisfied that in the particular circumstances disclosure would assist it in determining the truth. Disclosure by way of a fishing expedition is not correct. It is difficult to see how a defence witness statement is to be used by the prosecution otherwise than as a fishing expedition if it were the law that the prosecution has an automatic right to disclosure on completion of the examination-in-chief of each defence witness. At the point of disclosure, the prosecution will have no basis for suspecting that there is any variance between oral testimony and written statement; it will be only "fishing" for a variance.

53. However, it is not clear that this limited and conditional right of access to a defence witness statement is inconsistent with the position taken by the majority of the Trial Chamber in the relevant Decision of 27 November 1996. In the first paragraph of the separate opinion which he appended to that Decision, Judge Vohrah said, "I fully agree with the views expressed by my brother Judge Stephen, for the reasons he has given". In the second paragraph of his own separate opinion, Judge Stephen said:

> The witness statement had not been in any way referred to in the witness' evidence in chief nor had anything emerged in cross-examination regarding it other than that, in

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[10] See Richard May and Marieke Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha", *Col. J. of Trans. L*, Vol. 37, 1999, No. 3, p. 761.

> answer to a question about what the witness had said when he made that statement, which was objected to by Defence counsel but was allowed, the witness said that he had "talked about, how can I put it, the truth and only the truth, how long I have known Duško Tadić".

Clearly, the defence had not sought in any way to place reliance on the particular defence witness statement. Thus, the conclusion reached by the majority that defence witness statements were not accessible to the prosecution was not intended to apply where a defence witness statement had been in some way referred to in the evidence-in-chief of the witness or otherwise relied upon by the defence. The situation with which the majority was dealing was one in which what was being asserted by the prosecution was an unqualified right to see a defence witness statement provided only that the witness had given evidence-in-chief – even if the statement was not referred to in that evidence. It is not so clear to me that the majority intended to deny that special circumstances could warrant disclosure.

54. There is one other matter. The parties were agreed that nothing in the reliefs prayed for by either side turned on a determination of the above-mentioned point. They were nevertheless also agreed that the importance of the point justified a pronouncement by the Appeals Chamber. The position was similar in respect of the issue whether discriminatory intent has to be proved in respect of all crimes against humanity under Article 5 of the Statute.

55. Were the parties right in the position which they took? I think they were. The principle is conveniently stated thus:

> Appellate courts determine only matters actually before them on appeal, and no others, and will not give opinions on controversies or declare principles of law which cannot have any practical effect in settling the rights of the litigants. They consider only those questions that are necessary for the decision of the case and do not attempt further 'to lay down "a rule of guidance or precedent to the bench and bar of the state"'. Questions not directly involved in an appeal, or not necessary or relevant to, or material in, the final determination of the cause, will not be considered or decided by an appellate court, unless, it has been held, they are affected with a public interest or are of moment to the profession, or unless some useful result will follow decision.[11]

56. That approach is consistent with the *Tadić* Decision on Jurisdiction, at paragraph 139. There, the defence had raised an argument before the Trial Chamber concerning an element of a crime against humanity under Article 5 of the Statute of the Tribunal. The defence did not pursue the argument on appeal. Nevertheless, the Appeals

Chamber observed, "Although before the Appeals Chamber the Appellant has forgone the argument ...., in view of the importance of the matter this Chamber deems it fitting to comment briefly on the scope of Article 5".

57. In my view, when the importance of the point in question is regarded, the parties were correct in agreeing that the Appeals Chamber could competently pass on it.

D. Conclusion

58. These remarks concern some elements of the reasoning of the Appeals Chamber. On certain points of law, I hold different views, which I desire to preserve. But I agree with the disposition of the case as set out in today's judgement.

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

Mohamed Shahabuddeen

Dated this fifteenth day of July 1999
At The Hague,
The Netherlands.

[11] *Corpus Juris Secundum* (New York), Vol. 5, pp. 593-608, footnotes omitted.

ANNEX A – GLOSSARY OF TERMS

Additional Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977.
Amended Notice of Appeal against Judgement	Amended Notice of Appeal, Case No.: IT-94-1-A, 8 January 1999.
Appellant	Duško Tadić.
Appellant's Amended Brief on Judgement	Amended Brief of Argument on behalf of the Appellant, Case No.: IT-94-1-A, 8 January 1999.
Appellant's Brief on Judgement	Appellant's Brief on Appeal Against Opinion and Judgement of 7 May 1997, Case No.: IT-94-1-A, 12 January 1998.
Appellant's Brief on Sentencing Judgement	Appellant's Brief on Appeal against Sentencing Judgement, Case No.: IT-94-1-A, 12 January 1998.
BH	Bosnia and Herzegovina.
Claims Tribunal	Iran-United States Claims Tribunal.
Cross-Appellant	Office of the Prosecutor.
Cross-Appellant's Brief	Brief of Argument of the Prosecution (Cross-Appellant), Case No.: IT-94-1-A, 12 January 1998.
Cross-Appellant's Brief in Reply	Prosecution (Cross-Appellant) Brief in Reply, Case No.: IT-94-1-A, 1 December 1998.
Dayton-Paris Accord	General Framework Agreement for Peace in Bosnia and Herzegovina, initialled by the parties on 21 November 1995, U.N. Doc. A/50/790, S/1995/999, 30 November 1995.
Decision on Admissibility of Additional Evidence	Decision on Appellant's Motion for the Extension of the Time-limit and Admission of Additional Evidence", *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A, Appeals Chamber, 15 October 1998.

Defence's Skeleton Argument on the Cross-Appeal	Skeleton Argument – Prosecutor's Cross-Appeal, Case No.: IT-94-1-A, 20 April 1999.
Defence's Substituted Response to Cross-Appellant's Brief	The Respondent's Brief of Argument on the Brief of Argument of the Prosecution (Cross-Appellant) of January 19, 1999", Case No.: IT-94-1-A, 19 January 1999.
DR	European Commission of Human Rights, Decisions and Reports.
ECHR	European Convention on Human Rights.
Eur. Commission H.R.	European Commission of Human Rights.
Eur. Court H.R.	European Court of Human Rights.
FRY	Federal Republic of Yugoslavia (Serbia and Montenegro).
Geneva Convention III (Third Geneva Convention)	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.
Geneva Convention IV (Fourth Geneva Convention)	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.
HRC	Human Rights Committee.
ICCPR	International Covenant on Civil and Political Rights.
ICRC	International Committee of the Red Cross.
ICRC Commentary on Additional Protocols	Yves Sandoz *et al.* (eds.), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1987.
ICRC Commentary on Geneva Convention III	Jean Pictet (ed.), Commentary: III Geneva Convention Relative to Treatment of Prisoners of War, International Committee of the Red Cross, Geneva, 1960, First Reprint, 1994.

ICRC Commentary on Geneva Convention IV	Jean Pictet (ed.), Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War, International Committee of the Red Cross, Geneva, 1958, First Reprint, 1994.
ICTR	International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.
ICTY JR	International Criminal Tribunal for the Former Yugoslavia, Judicial Reports, Kluwer Law International, The Hague.
ILC	International Law Commission.
International Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
JNA	Yugoslav People's Army.
Judgement	Opinion and Judgment, *The Prosecutor v. Duško Tadić*, Case No IT-94-1-T, Trial Chamber II, 7 May 1997.
Nicaragua	Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, Judgement, I.C.J Reports (1986), p. 14.
Notice of Cross-Appeal	Notice of Appeal, Case No.: IT-94-1-A, 6 June 1997.
Prosecution's Response to Appellant's Brief on Judgement	Cross-Appellant's Response to Appellant's Brief on Appeal Against Opinion and Judgement of May 7, 1997 Filed on 12 January 1998, Case No.: IT-94-1-A, 17 November 1998.
Prosecution Response to Appellant's Brief on Sentencing Judgement	Response to Appellant's Brief on Appeal Against Sentencing Judgement filed on 12 January 1998, Case No.: IT-94-1-A, 16 November 1998.

Report of the Secretary-General	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993.
Rome Statute	Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, 17 July 1998.
Rules	Rules of Procedure and Evidence of the International Tribunal.
Sentencing Judgement	Sentencing Judgment, *The Prosecutor v Duško Tadić,* Case No.: IT-94-1-T, Trial Chamber II, 14 July 1997.
Separate and Dissenting Opinion of Judge McDonald	Opinion and Judgment – Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute, *The Prosecutor v. Duško Tadić,* Case No.: IT-94-1-T, Trial Chamber II, 7 May 1997.
Skeleton Argument – Appellant's Appeal Against Conviction	Skeleton Argument – Appellant's Appeal against Conviction, Case No.: IT-94-1-A, 19 March 1999.
Skeleton Argument of the Prosecution	Skeleton Argument of the Prosecution, Case No.: IT-94-1-A, 19 March 1999.
Statute	Statute of the International Tribunal.
T.	Transcript of hearing in *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A. All transcript page numbers referred to in the course of this Judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may exist between the pagination therein and that of the final English transcript released to the public.
Tadić Decision on Jurisdiction	Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *The Prosecutor v. Duško Tadić,* IT-94-1AR72, Appeals Chamber, 2 October 1995 (Tadić (1995) I ICTY JR 353).
Third Geneva Convention	Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

Tribunal	The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991.
TRNC	Turkish Republic of Northern Cyprus.
UNWCC	Law Reports of Trial of War Criminals, Selected and Prepared by the United Nations War Crimes Commission, Published for the United Nations War Crimes Commission by His Majesty's Stationary Office, London 1947.
VJ	Army of the Federal Republic of Yugoslavia.
VRS	Army of the Serbian Republic of Bosnia and Herzegovina/Republika Srpska.
Witness Statements Decision	Decision on Prosecution Motion for Production of Defence Witness Statements, *The Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Trial Chamber II, 27 November 1996.