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-96-21-A

Date: 20 February 2001

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IN THE APPEALS CHAMBER

Before: **Judge David Hunt, Presiding**
Judge Fouad Riad
Judge Rafael Nieto-Navia
Judge Mohamed Bennouna
Judge Fausto Pocar

Registrar: **Mr Hans Holthuis**

Judgement of: **20 February 2001**

PROSECUTOR

V

Zejnil DELALIĆ, Zdravko MUCIĆ (aka "PAVO"), Hazim DELIĆ and Esad LANDŽO (aka "ZENGA")

("*ČELEBIĆI* Case")

JUDGEMENT

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The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("International Tribunal") is seized of appeals against the Judgement rendered by Trial Chamber II on 16 November 1998 in the case of *Prosecutor v Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"* ("Trial Judgement").[1]

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

HEREBY RENDERS ITS JUDGEMENT.

[1] *Prosecutor v Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga"*, Case No: IT-96-21-T, Trial Chamber, 16 Nov 1998 ("Trial Judgement"). (For a list of designations and abbreviations used in this Judgement, *see* Annex B).

I. INTRODUCTION

1. The Indictment against *Zejnil Delalić, Zdravko Mucić, Hazim Delić* and *Esad Landžo*, confirmed on 21 March 1996, alleged serious violations of humanitarian law that occurred in 1992 when Bosnian Muslim and Bosnian Croat forces took control of villages within the Konjic municipality in central Bosnia and Herzegovina. The present appeal concerns events within the Konjic municipality, where persons were detained in a former Yugoslav People's Army ("JNA") facility: the Čelebići camp. The Trial Chamber found that detainees were killed, tortured, sexually assaulted, beaten and otherwise subjected to cruel and inhumane treatment by Mucić, Delić and Landžo.[2] Mucić was found to have been the commander of the Čelebići camp, Delić the deputy commander and Landžo a prison guard.

2. In various forms, Delalić was co-ordinator of Bosnian Muslim and Bosnian Croat forces in the Konjic area between approximately April and September 1992. He was found not guilty of twelve counts of grave breaches of the Geneva Conventions of 1949 and violations of the laws or customs of war. The Trial Chamber concluded that Delalić did not have sufficient command and control over the Čelebići camp or the guards that worked there to entail his criminal responsibility for their actions.[3]

3. Mucić was found guilty of grave breaches of the Geneva Conventions and of violations of the laws or customs of war for crimes including murder, torture, inhuman treatment and unlawful confinement, principally on the basis of his superior responsibility as commander of the Čelebići camp, but also, in respect of certain counts, for his direct participation in the crimes.[4] Mucić was sentenced to seven years imprisonment.[5] Delić was found guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war for his direct participation in crimes including murder, torture, and inhuman treatment.[6] Delić was sentenced to twenty years imprisonment.[7] Landžo was found guilty of grave breaches of the Geneva Conventions and violations of the laws or customs of war, for crimes including murder, torture, and cruel treatment, and sentenced to fifteen years imprisonment.[8]

4. The procedural background of the appeal proceedings is found in Annex A, which also contains a complete list of the grounds of appeal. Certain of the grounds of appeal of the

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2 Trial Judgement, pp 290-394.
3 Trial Judgement, para 721.
4 Trial Judgement, pp 424-428.
5 Trial Judgement, pp 441-443.
6 Trial Judgement, pp 429-434.
7 Trial Judgement, pp 443-446.

individual parties dealt with substantially the same subject matter, and certain grounds of appeal of Landžo were joined by Mucić and Delić. For that reason, this judgement considers the various grounds of appeal grouped by subject matter, which was also the way the different grounds of appeal were dealt with during oral argument.

[8] Trial Judgement, pp 447-449.

II. GROUNDS OF APPEAL RELATING TO ARTICLE 2 OF THE STATUTE

5. Delić, Mucić and Landžo have raised two closely related issues in relation to the findings of the Trial Chamber based on Article 2 of the Statute. The first is the question of the legal test for determining the nature of the conflict, and the second, that of the criteria for establishing whether a person is "protected" under Geneva Convention IV. Delić has raised a third issue as to whether Bosnia and Herzegovina was a party to the Geneva Conventions at the time of the events alleged in the Indictment.

A. Whether the Trial Chamber Erred in Holding that the Armed Conflict in Bosnia and Herzegovina at the Time Relevant to the Indictment was of an International Character

6. Delić,[9] Mucić,[10] and Landžo[11] challenge the Trial Chamber's finding that the armed conflict in Bosnia and Herzegovina was international at all times relevant to the Indictment. Relying upon the reasoning of the majority in the *Tadić* and *Aleksovski* first instance Judgements, the appellants argue that the armed conflict was internal at all times. It is submitted that the Trial Chamber used an incorrect legal test to determine the nature of the conflict and that the test set out by the majority of the *Tadić* Trial Chamber, the "effective control" test, based on *Nicaragua*,[12] is the appropriate test. In the appellants' opinion, applying this correct test, the facts as found by the Trial Chamber do not support a finding that the armed conflict was international. Consequently, the appellants seek a reversal of the verdict of guilty on the counts of the Indictment based upon Article 2 of the Statute.[13]

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[9] Hazim Delić's Ground 8, as set out in the Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, reads: Whether the Trial Chamber erred in holding that the conflict in Bosnia-Herzegovina was an international armed conflict at the times relevant to this indictment. Counsel for Delić presented the arguments in relation to this ground of appeal on behalf of all appellants at the hearing.

[10] Zdravko Mucić's Ground 5, as set out in Appellant Zdravko Mucić's Final Designation of His Grounds of Appeal, 31 May 2000, reads: Whether the Trial Chamber erred in holding that the conflict as described in this case in Bosnia-Herzegovina was an International Armed Conflict at the times relevant to this indictment.

[11] Esad Landžo's Ground 5, as set out in the Landžo Brief, reads: The Trial Chamber erred in law and fact in finding that an international armed conflict existed with reference to the events alleged to have occurred at the Čelebići camp.

[12] Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v U.S.*) (Merits), 1986 ICJ Reports 14 (*"Nicaragua"*).

[13] In addition, Delić argues that the Prosecution included the allegation of international armed conflict in each count of the Indictment. Consequently in his view, all the counts should be dismissed, as this allegation has become an element of each offence charged. Moreover, it is argued that because the Prosecution relied on the allegation of an international conflict to invoke the Tribunal's jurisdiction, the Appeals Chamber should dismiss the entire indictment for lack of subject-matter jurisdiction. Delić Brief, paras 227-248.

7. The Prosecution submits that these grounds of appeal should be dismissed. It submits that the correct legal test for determining whether an armed conflict is international was set forth by the Appeals Chamber in the *Tadić* Appeal Judgement, which rejected the "effective control" test in relation to acts of armed forces or paramilitary units. Relying upon the *Aleksovski* Appeal Judgement, the Prosecution contends that the Appeals Chamber should follow its previous decision.

8. As noted by the Prosecution, the issue of the correct legal test for determining whether an armed conflict is international was addressed by the Appeals Chamber in the *Tadić* Appeal Judgement. In the *Aleksovski* Appeal Judgement, the Appeals Chamber found that "in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice".[14] Elaborating on this principle, the Chamber held:

> Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been "wrongly decided, usually because the judge or judges were ill-informed about the applicable law."
>
> It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law, including the authorities cited, and the facts.
>
> What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.[15]

In light of this finding, the *Aleksovski* Appeals Chamber followed the legal test set out in the *Tadić* Appeal Judgement in relation to internationality.

9. Against this background, the Appeals Chamber will turn to the question of the applicable law for determining whether an armed conflict is international.

1. What is the Applicable Law?

10. The Appeals Chamber now turns to a consideration of the *Tadić* Appeal Judgement, and to the relevant submissions of the parties in this regard, in order to determine whether, applying

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[14] *Aleksovski* Appeal Judgement, para 107.
[15] *Aleksovski* Appeal Judgement, paras 108-110 (footnote omitted).

the principle set forth in the *Aleksovski* Appeal Judgement, there are any cogent reasons in the interests of justice for departing from it.[16]

11. From the outset, the Appeals Chamber notes that the findings of the Trial Chamber majorities in the *Tadić* and *Aleksovski* Judgements, upon which the appellants rely, were overturned on appeal.

12. In the *Tadić* case, the Appeals Chamber was concerned with, *inter alia*, 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.

13. The Appeals Chamber saw the question of internationality as turning on the issue of whether the Bosnian Serb forces "could be considered as *de iure* or *de facto* organs of a foreign power, namely the FRY".[17] The important question was "*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".[18] The Chamber considered, after a review of various cases including *Nicaragua*, that international law does not always require the same degree of control over armed groups or private individuals for the purpose of determining whether they can be regarded as a *de facto* organ of the State. The Appeals Chamber found that there were three different standards of control under which an entity could be considered *de facto* organ of the State, each differing according to the nature of the entity. Using this framework, the Appeals Chamber determined that the situation with which it was concerned fell into the second category it identified,[19] which was that of the acts of armed forces or militias or paramilitary units.

14. The Appeals Chamber determined that the legal test which applies to this category was the "overall control" test:

> 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 co-ordinating or helping in the general planning of its military activity. [...] However, it is not necessary that, in addition, the State should also issue, either to the head or

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[16] Although the appellants' and the Prosecution's Briefs were filed prior to the issue of the *Aleksovski* Appeal Judgement, the appellants and the Prosecution were given an opportunity to present submissions on these issues at the hearing.

[17] *Tadić* Appeal Judgement, para 87.

[18] *Ibid*, para 97 (emphasis in original).

[19] The other categories identified by the Appeals Chamber were (1) acts by a single private individual or a group that is not militarily organised, to which the applicable standard is that of "specific instructions" or public endorsement or approval *ex post facto* by the State, para 137; and (3) acts of individuals assimilated to State organs on account of their actual behaviour within the structure of a State, regardless of the existence of State instructions, paras 141-144.

> to members of the group, instructions for the commission of specific acts contrary to international law.[20]

15. Overall control was defined as consisting of more than "the mere provision of financial assistance or military equipment or training".[21] Further, the Appeals Chamber adopted a flexible definition of this test, which allows it to take into consideration the diversity of situations on the field in present-day conflicts:

> 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.[22]

16. The Appeals Chamber in *Tadić* considered *Nicaragua* in depth, and based on two grounds, held that the "effective control" test enunciated by the ICJ was not persuasive.

17. Firstly, the Appeals Chamber found that the *Nicaragua* "effective control" test did not seem to be consonant with the "very logic of the entire system of international law on State responsibility",[23] which is "not based on rigid and uniform criteria".[24] In the Appeals Chamber's view, "the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities".[25] Thus, regardless of whether or not specific instructions were issued, the international responsibility of the State may be engaged.[26]

18. Secondly, the Appeals Chamber considered that the *Nicaragua* test is at variance with judicial and State practice. Relying on a number of cases from claims tribunals, national and international courts, and State practice, the Chamber found that, although the "effective control" test was upheld by the practice in relation to individuals or unorganised groups of individuals acting on behalf of States, it was not the case in respect of military or paramilitary groups.[27]

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[20] *Tadić* Appeal Judgement, para 131 (emphasis added).
[21] *Tadić* Appeal Judgement, para 137.
[22] *Id* (emphasis in original).
[23] *Tadić* Appeal Judgement, para 116.
[24] *Ibid*, para 117.
[25] *Ibid*, para 121.
[26] *Ibid*, para 123.
[27] *Ibid*, paras 124, and 125-136.

19. The Appeals Chamber found that the armed forces of the Republika Srpska were to be regarded as acting under the overall control of, and on behalf of, the FRY, sharing the same objectives and strategy, thereby rendering the armed conflict international.

20. The Appeals Chamber, after considering in depth the merits of the *Nicaragua* test, thus rejected the "effective control" test, in favour of the less strict "overall control" test. This may be indicative of a trend simply to rely on the international law on the use of force, *jus ad bellum*, when characterising the conflict. The situation in which a State, the FRY, resorted to the indirect use of force against another State, Bosnia and Herzegovina, by supporting one of the parties involved in the conflict, the Bosnian Serb forces, may indeed be also characterised as a proxy war of an international character. In this context, the "overall control" test is utilised to ascertain the foreign intervention, and consequently, to conclude that a conflict which was *prima facie* internal is internationalised.

21. The appellants argue that the findings of the *Tadić* Appeal Judgement which rejected the "correct legal test" set out in *Nicaragua* are erroneous as the Tribunal is bound by the ICJ's precedent.[28] It is submitted that when the ICJ has determined an issue, the Tribunal should follow it, (1) because of the ICJ's position within the United Nations Charter, and (2) because of the value of precedent.[29] Further, even if the ICJ's decisions are not binding on the Tribunal, the appellants submits that it is "undesirable to have two courts (...) having conflicting decisions on the same issue".[30]

22. The Prosecution rebuts this argument with the following submissions: (1) The two courts have different jurisdictions, and in addition, the ICJ Statute does not provide for precedent. It would thus be odd that the decisions of the ICJ which are not strictly binding on itself would be binding on the Tribunal which has a different jurisdiction.[31] (2) The Appeals Chamber in the *Tadić* appeal made specific reference to *Nicaragua* and held it not to be persuasive.[32] (3) Judge Shahabuddeen in a dissenting opinion in an ICTR decision found that the differences between the Tribunal and the ICJ do not prohibit recourse to the relevant

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[28] Delić Reply, para 99; also adopted by Landžo.
[29] At the appeal hearing counsel for Delić submitted that the Tribunal is bound by the ICJ's decisions because the ICJ is the "primary judicial organ of the organisation of the United Nations" (Appeal Transcript, p 375), and "essentially the Supreme Court of the United Nations" (*ibid*, p 376), whereas the Tribunal is "an organ of another principal organ, the Security Council" (*ibid*, p 375).
[30] Appeal Transcript, p 379.
[31] Appeal Transcript, p 379.
[32] Appeal Transcript, p 380.

jurisprudence on relevant matters, and that the Tribunal can draw some persuasive value from the ICJ's decisions, without being bound by them.[33]

23. The Appeals Chamber is not persuaded by the appellants' argument. The Appeals Chamber in *Tadić*, addressing the argument that it should not follow the *Nicaragua* test in relation to the issue at hand as the two courts have different jurisdiction, held:

> What is at issue is not the distinction between 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.[34]

24. The Appeals Chamber agrees that "so far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal. [...] The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern".[35] However, this Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ"[36] within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.

25. An additional argument submitted by Landžo is that the Appeals Chamber in the *Tadić* Jurisdiction Decision accurately decided that the conflict was internal. The Appeals Chamber notes that this argument was previously raised by the appellants at trial. The Trial Chamber then concluded that it is "incorrect to contend that the Appeals Chamber has already settled the matter of the nature of the conflict in Bosnia and Herzegovina. In the *Tadić Jurisdiction Decision* the Chamber found that 'the conflicts in the former Yugoslavia have both internal and international aspects' and deliberately left the question of the nature of particular conflicts open for the Trial Chamber to determine".[37] The Appeals Chamber fully agrees with this conclusion.

26. Applying the principle enunciated in the *Aleksovski* Appeal Judgement, this Appeals Chamber is unable to conclude that the decision in the *Tadić* was arrived at on the basis of the

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[33] Appeal Transcript, p 380. The transcript records the Prosecution as referring to the decision as being made in the case of *Anatole Nsengiyumva v Prosecutor*. No date was provided for the decision but it appears that it was a reference to the Dissenting Opinion of Judge Shahabuddeen in *Anatole Nsengiyumva v Prosecutor*, Case No. ICTR-96-12-A, 3 June 1999. However, the intention appears to have been to refer to the Separate Opinion of Judge Shahabuddeen in *Le Procureur v Laurent Semanza*, ICTR, Case No ICTR-97-20-A, 31 May 2000.

[34] *Tadić* Appeal Judgement, para 104 (emphasis removed).

[35] Separate Opinion of Judge Shahabuddeen, appended to Decision, *Le Procureur v Laurent Semanza*, ICTR, Case No ICTR-97-20-A, App Ch, 31 May 2000, para 25.

[36] Charter of the United Nations, Article 92.

application of a wrong legal principle, or arrived at *per incuriam*. After careful consideration of the arguments put forward by the appellants, this Appeals Chamber is unable to find cogent reasons in the interests of justice to depart from the law as identified in the *Tadić* Appeal Judgement.[38] The "overall control" test set forth in the *Tadić* Appeal Judgement is thus the applicable criteria for determining the existence of an international armed conflict.

27. The Appeals Chamber will now examine the Trial Judgement in order to ascertain what test was applied.

2. Has the Trial Chamber Applied the "Overall Control" Test?

28. The Appeals Chamber first notes that the *Tadić* Appeal Judgement which set forth the "overall control" test had not been issued at the time of the delivery of the Trial Judgement. The Appeals Chamber will thus consider whether the Trial Chamber, although not, from a formal viewpoint, having applied the "overall control" test as enunciated by the Appeals Chamber in *Tadić*, based its conclusions on a legal reasoning consistent with it.

29. The issue before the Trial Chamber was whether the armed forces of the Bosnian Serbs could be regarded as acting on behalf of the FRY, in order to determine whether after its withdrawal in May 1992[39] the conflict continued to be international or instead became internal. More specifically, along the lines of *Tadić*, the relevant issue is whether the Trial Chamber came to the conclusion that the Bosnian Serb armed forces could be regarded as having been under the overall control of the FRY, going beyond the mere financing and equipping of such forces, and involving also participation in the planning and supervision of military operations after 19 May 1992.[40]

30. The Prosecution submits that the test applied by the Trial Chamber is consistent with the "overall control" test.[41] In the Prosecution's submission, the Trial Chamber adopted the "same approach" as subsequently articulated by the Appeals Chamber in *Tadić* and *Aleksovski*. Further, the Trial Judgement goes through the "exact same facts, almost as we found in the

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[37] Trial Judgement, para 229 (footnote omitted).
[38] The same conclusion was reached by the *Aleksovski* Appeals Chamber, at para 134 of the *Aleksovski* Appeal Judgement.
[39] The date commonly accepted as the reference in time is 19 May 1992. *Tadić* Trial Judgement, paras 569 and 571. *Čelebići* Trial Judgement, para 231.
[40] *Tadić* Appeal Judgement, para 145.
[41] Appeal Transcript, p 383.

Tadić decision".[42] The Prosecution contends that the Appeals Chamber has already considered the same issues and facts in the *Tadić* appeal, and found that the same conflict was international after May 1992. In the Prosecution's opinion, the Trial Chamber's conclusion that "the government of the FRY was the [...] controlling force behind the VRS"[43] is consistent with *Tadić*.

3. The Nature of the Conflict Prior to 19 May 1992

31. The Trial Chamber first addressed the question of whether there was an international armed conflict in Bosnia and Herzegovina in May 1992 and whether it continued throughout the rest of that year, *i.e.*, at the time relevant to the charges alleged in the Indictment.[44]

32. The Trial Chamber found that a "significant numbers of [JNA] troops were on the ground when the [BH] government declared the State's independence on 6 March 1992".[45] Further, "there is substantial evidence that the JNA was openly involved in combat activities in Bosnia and Herzegovina from the beginning of March and into April and May of 1992."[46] The Trial Chamber therefore concluded that:

> [...] an international armed conflict existed in Bosnia and Herzegovina at the date of its recognition as an independent State on 6 April 1992. There is no evidence to indicate that the hostilities which occurred in the Konjic municipality at that time were part of a separate armed conflict and, indeed, there is some evidence of the involvement of the JNA in the fighting there.[47]

33. The Trial Chamber's finding as to the nature of the conflict prior to 19 May 1992 is based on a finding of a direct participation of one State on the territory of another State. This constitutes a plain application of the holding of the Appeals Chamber in *Tadić* that it "is indisputable that an armed conflict is international if it takes place between two or more States",[48] which reflects the traditional position of international law. The Appeals Chamber is in no doubt that there is sufficient evidence to justify the Trial Chamber's finding of fact that the conflict was international prior to 19 May 1992.

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[42] Appeal Transcript, pp 383-384.
[43] *Id.*
[44] Trial Judgement, para 211. The Trial Chamber relied upon the ICRC Commentary (GC IV) to hold: "We are not here examining the Konjic municipality and the particular forces involved in the conflict in that area to determine whether it was international or internal. Rather, should the conflict in Bosnia and Herzegovina be international, the relevant norms of international humanitarian law apply throughout its territory until the general cessation of hostilities."
[45] *Ibid*, para 212.
[46] *Ibid*, para 213.
[47] *Ibid*, para 214.
[48] *Tadić* Appeal Judgement, para 84.

4. The Nature of the Conflict After 19 May 1992

34. The Trial Chamber then turned to the issue of the character of the conflict after the alleged withdrawal of the external forces it found to be involved prior to 19 May 1992.[49] Based upon, amongst other matters, an analysis of expert testimony and of Security Council resolutions, it found that after 19 May 1992, the aims and objectives of the conflict remained the same as during the conflict involving the FRY and the JNA prior to that date, *i.e.*, to expand the territory which would form part of the Republic. The Trial Chamber found that "[t]he FRY, at the very least, despite the purported withdrawal of its forces, maintained its support of the Bosnian Serbs and their army and exerted substantial influence over their operations".[50]

35. The Trial Chamber concluded that "[d]espite the formal change in status, the command structure of the new Bosnian Serb army was left largely unaltered from that of the JNA, from which the Bosnian Serbs received their arms and equipment as well as through local SDS organisations".[51]

36. In discussing the nature of the conflict, the Trial Chamber did not rely on *Nicaragua*, noting that, although "this decision of the ICJ constitutes an important source of jurisprudence on various issues of international law", the ICJ is "a very different judicial body concerned with rather different circumstances from the case in hand".[52]

37. The Trial Chamber described its understanding of the factual situation upon which it was required to make a determination as being

> [...] characterised by the breakdown of previous State boundaries and the creation of new ones. Consequently, the question which arises is one of *continuity of control of particular forces*. The date which is consistently raised as the turning point in this matter is that of 19 May 1992, when the JNA apparently withdrew from Bosnia and Herzegovina.[53]

38. It continued:

> The Trial Chamber must keep in mind that the forces constituting the VRS had a prior identity as an actual organ of the SFRY, as the JNA. When the FRY took control of this organ and subsequently severed the formal link between them, by creating the VJ and VRS, the

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[49] Trial Judgement, para 215.
[50] *Ibid*, para 224.
[51] *Ibid*, para 227.
[52] *Ibid*, para 230.
[53] *Ibid*, para 231 (emphasis added).

> *presumption* remains that these forces retained their link with it, unless otherwise demonstrated.[54]

39. Along the lines of Judge McDonald's Dissenting Opinion in the *Tadić* case (which it cited), the Trial Chamber found that:

> [...] the withdrawal of JNA troops who were not of Bosnian citizenship, and the creation of the VRS and VJ, constituted a deliberate attempt to mask the continued involvement of the FRY in the conflict while its Government remained in fact the controlling force behind the Bosnian Serbs. From the level of strategy to that of personnel and logistics the operations of the JNA persisted in all but name. It would be wholly artificial to sever the period before 19 May 1992 from the period thereafter in considering the nature of the conflict and applying international humanitarian law.[55]

40. The appellants submit that the Trial Chamber did not rely on any legal test to classify the conflict, *i.e.*, it failed to pronounce its own test to determine whether an intervening State has sufficient control over insurgents to render an internal conflict international.[56] On the other hand, the Prosecution submits that the Trial Chamber classified the conflict on the basis of whether the Prosecution had proved that the FRY/VJ was the "controlling force behind the Bosnian Serbs".[57]

41. The Appeals Chamber disagrees with the appellants' submission that the Trial Chamber did not rely on any legal test to determine the issue. The Trial Chamber appears to have relied on a "continuity of control" test in considering the evidence before it, in order to determine whether the nature of the conflict in Bosnia and Herzegovina, which was international until a point in May 1992, had subsequently changed. The Trial Chamber thus relied on a "control" test, evidently less strict than the "effective control" test. The Trial Chamber did not focus on the issuance of specific instructions, which underlies the "effective control" test.[58] In assessing the evidence, however, the Trial Chamber clearly had regard to all the elements pointing to the influence and control retained over the VRS by the VJ, as required by the "overall control" test.

42. The method employed by the Trial Chamber was later considered as the correct approach in *Aleksovski*. The *Aleksovski* Appeals Chamber indeed interpreted the "overall control" test as follows:

> The "overall control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control. Bearing in mind that the Appeals Chamber in the *Tadić* Judgement arrived at this test against the background of the "effective control" test set out by the decision of the

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54 *Ibid*, para 232 (footnote omitted and emphasis added).
55 *Ibid*, para 234.
56 Delić Brief, paras 214-220.
57 Prosecution Response, p 44.
58 *See Tadić* Appeal Judgement, para 125.

> ICJ in *Nicaragua*, and the "specific instructions" test used by the Trial Chamber in *Tadić*, the Appeals Chamber considers it appropriate to say that the standard established by the "overall control" test is not as rigorous as those tests. [59]

43. The Appeals Chamber finds that the Trial Chamber's assessment of the effect in reality of the formal withdrawal of the FRY army after 19 May 1992 was based on a careful examination of the evidence before it. That the Trial Chamber indeed relied on this approach is evidenced by the use of phrases such as "despite the attempt at camouflage by the authorities of the FRY",[60] or "despite the formal change in status"[61] in the discussion of the evidence before it.

44. An additional argument submitted by Landžo in support of his contention that the Trial Chamber decided the issue wrongly is based on the agreement concluded under the auspices of the ICRC on 22 May 1992. In Landžo's opinion, this agreement, which was based on common Article 3 of the Geneva Conventions, shows that the conflict was considered by the parties to it to be internal.[62] The Appeals Chamber fully concurs with the Trial Chamber's finding that the *Tadić* Jurisdiction Decision's reference to the agreement "merely demonstrates that some of the norms applicable to international armed conflicts were specifically brought into force by the parties to the conflict in Bosnia and Herzegovina, some of whom may have wished it to be considered internal, and does not show that the conflict must therefore have been internal in nature".[63]

45. The appellants further argue that the Trial Chamber relied on a "presumption" that the FRY/VJ still exerted control over the VRS after 19 May 1992 to determine the nature of the conflict. The Trial Chamber thus used an "incorrect legal test" when it concluded that because of the former existing links between the FRY and the VRS, the FRY/VJ retained control over the VRS.[64] The Prosecution responds that it is unfounded to suggest that the Trial Chamber shifted to the Defence the burden of proving that the conflict did not remain international after the withdrawal of the JNA.

46. The Appeals Chamber is of the view that although the use of the term "presumption" by the Trial Chamber may not be appropriate, the approach it followed, *i.e.*, assessing all of the relevant evidence before it, including that of the previous circumstances, is correct. This approach is clearly in keeping with the Appeals Chamber's holding in *Tadić* that in determining

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[59] *Aleksovski* Appeal Judgement, para 145 (footnote omitted).
[60] Trial Judgement, para 221.
[61] *Ibid*, para 227.
[62] Landžo also relies on the *Tadić* Jurisdiction Decision in support of his contention; Landžo Brief, p 45.
[63] Trial Judgement, para 229.

the issue of the nature of the conflict, structures put in place by the parties should not be taken at face value. There it held:

> 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.[65]

47. The Trial Chamber's finding is also consistent with the holding of the Appeals Chamber in *Tadić* that "[w]here 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 achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold".[66] The "overall control" test could thus be fulfilled even if the armed forces acting on behalf of the "controlling State" had autonomous choices of means and tactics although participating in a common strategy along with the "controlling State".

48. Although the Trial Chamber did not formally apply the "overall control" test set forth by the *Tadić* Appeal Judgement, the Appeals Chamber is of the view that the Trial Chamber's legal reasoning is entirely consistent with the previous jurisprudence of the Tribunal. The Appeals Chamber will now turn to an additional argument of the parties concerning the Trial Chamber's factual findings.

49. Despite submissions in their briefs that suggested that the appellants wished the Appeals Chamber to review the factual findings of the Trial Chamber in addition to reviewing its legal conclusion,[67] the appellants submitted at the hearing that they "just ask the Court to apply the proper legal test to the facts that were found by the Trial Chamber".[68] The Appeals Chamber will thus not embark on a general assessment of the Trial Chamber's factual findings.

50. The Trial Chamber came to the conclusion, as in the *Tadić* case, that the armed conflict taking place in Bosnia and Herzegovina after 19 May 1992 could be regarded as international

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[64] Delić Brief, paras 208-213.
[65] *Tadić* Appeal Judgement, para 154.
[66] *Tadić* Appeal Judgement, para 140.
[67] In the Delić Brief at p 85 it is argued "while the FRY may have supported the Bosnian Serbs and even given general guidance, (it) lacked sufficient control over (them) to impute the actions of the Bosnian Serbs to the FRY." Delić also submits at p 99 that the Appeals Chamber "should conduct a *de novo* review of the Trial Chamber's holding, giving due weight to the historical facts as found by the Trial Chamber and recited in its judgement but determining the legal test itself." At the same time, Delić accepts that, at p 86, "many of the factual findings of the Trial Chamber are not controversial". Landžo submits that the evidence clearly shows that the conflict which resulted in the events at the Čelebići camp was not international, Landžo Brief pp 43-47.

because the FRY remained the controlling force behind the Bosnian Serbs armed forces after 19 May 1992. It is argued by the parties[69] that the facts relied upon in the present case are very similar to those found in the *Tadić* case. As observed previously, however, a general review of the evidence before the Trial Chamber does not fall within the scope of this appeal. It suffices to say that this Appeals Chamber is satisfied that the facts as found by the Trial Chamber fulfil the legal conditions as set forth in the *Tadić* case.

51. The Appeals Chamber therefore finds that Delić's Ground 8, Mucić's Ground 5, and Landžo's Ground 5 must fail.

B. Whether the Bosnian Serbs Detained in the Čelebići Camp were Protected Persons Under Geneva Convention IV

52. Delalić, Mucić, Delić and Landžo[70] submit that the Trial Chamber erred in law in finding that the Bosnian Serbs detainees at the Čelebići camp could be considered not to be nationals of Bosnia and Herzegovina for the purposes of the category of persons protected under Geneva Convention IV. They contend that the Trial Chamber's conclusions are inconsistent with international law and Bosnian law. The appellants request that the Appeals Chamber enter judgements of acquittal on all counts based on Article 2 of the Statute.

53. The Prosecution submits that the appellants' grounds of appeal have no merit and that the Appeals Chamber should follow its previous jurisprudence on the issue, as set out in the *Tadić* Appeal Judgement, and confirmed by the *Aleksovski* Appeal Judgement. It submits that it is now settled in that jurisprudence that in an international conflict victims may be considered as not being nationals of the party in whose hands they find themselves, even if, as a matter of national law, they were nationals of the same State as the persons by whom they are detained.

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[68] Appeal Transcript, p 385.

[69] Prosecution Response, p 46; Delić Brief, p 60; Landžo Brief, pp 44-47.

[70] Delalić's Ground of Contention 3, as set out in the Delalić Brief, reads: The Trial Chamber committed errors of both law and fact in its determination that the Čelebići detainees were persons protected by the Geneva Conventions of 1949. Mucić's Ground 4, as set out in Appellant Zdravko Mucić's Final Designation of His Grounds of Appeal, 31 May 2000, reads: Whether the Trial Chamber erred at [*sic*] holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention IV. Delić's Ground 4, as set out in the Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, reads: Whether the Trial Chamber erred in holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. Landžo's Ground 6, as set out in the Landžo Brief, reads: The Trial Chamber erred in law by finding that the victims of the alleged crimes were "protected persons" for the purpose of the Geneva Conventions.

Further, the Prosecution submits that the test applied by the Trial Chamber is consistent with the *Tadić* Appeal Judgement.

54. As noted by the Prosecution, the Appeals Chamber in *Tadić* has previously addressed the issue of the criteria for establishing whether a person is "protected" under Geneva Convention IV. In accordance with the principle set out in the *Aleksovski* Appeal Judgement, as enunciated in paragraph 8 of this Judgement, the Appeals Chamber will follow the law in relation to protected persons as identified in the *Tadić* Appeal Judgement, unless cogent reasons in the interests of justice exist to depart from it.

55. After considering whether cogent reasons exist to depart from the *Tadić* Appeal Judgement, the Appeals Chamber will turn to an analysis of the Trial Chamber's findings so as to determine whether it applied the correct legal principles to determine the nationality of the victims for the purpose of the application of the grave breaches provisions.

1. What is the Applicable Law?

56. Article 2 of the Statute of the Tribunal provides that it has the power to prosecute persons who committed grave breaches of the Geneva Conventions "against persons or property *protected under the provisions of the relevant Geneva Conventions*".[71] The applicable provision to ascertain whether Bosnian Serbs detained in the *Čelebići* camp can be regarded as victims of grave breaches is Article 4(1) of Geneva Convention IV on the protection of civilians, which defines "protected persons" as "those in the hands of a Party to the conflict or Occupying Power of which they are not nationals." The Appeals Chamber in *Tadić* found that:

> [...] 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, the 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....[72]

57. The Appeals Chamber held that "already in 1949 *the legal bond of nationality was not regarded as crucial* and allowance was made for special cases".[73] Further, relying on a teleological approach, it continued:

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[71] Emphasis added.
[72] *Tadić* Appeal Judgement, para 164 (footnote omitted).
[73] *Tadić* Appeal Judgement, para 165 (emphasis added). In this context, the Appeals Chamber referred to the situation of refugees and nationals of neutral States who do not enjoy diplomatic protection.

> [...] 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. [...] In granting its protection, Article 4 intends to look to the substance of relations, not to their legal characterisation as such.[74]

58. The Appeals Chamber in *Aleksovski* endorsed the *Tadić* reasoning holding that "Article 4 may be given a wider construction so that a person may be accorded protected status, notwithstanding the fact that he is of the same nationality as his captors."[75]

59. The appellants submit that the Appeals Chamber decisions in *Tadić* and *Aleksovski* wrongly interpreted Article 4 of Geneva Convention IV, and that the *Tadić* and *Aleksovski* Trial Chamber Judgements are correct. It is essentially submitted that in order for victims to gain "protected persons" status, Geneva Convention IV requires that the person in question be of a different nationality than the perpetrators of the alleged offence, based on the national law on citizenship of Bosnia and Herzegovina. This interpretation is based on a "strict" interpretation of the Convention which is, in the appellants' view, mandated by the "traditional rules of treaty interpretation".

60. The Prosecution contends that the Appeals Chamber in *Aleksovski* already adopted the approach used in the *Tadić* Appeal Judgement,[76] and that the appellants in this case have not demonstrated any "cogent reasons in the interests of justice" that could justify a departure by the Appeals Chamber from its previous decisions on the issue.

61. Before turning to these arguments, the Appeals Chamber will consider an additional argument submitted by the appellants which goes to the status of the *Tadić* Appeal Judgement statement of the law and may be conveniently addressed as a preliminary matter.

62. The appellants submit that the *Tadić* statements on the meaning of protected persons are *dicta*, as in their view the Appeals Chamber in *Tadić* and *Aleksovski* cases derived the protected persons status of the victims from the finding that the perpetrators were acting on behalf of the FRY or Croatia.[77] The Prosecution on the other hand submits that the Appeals Chamber's statement in *Tadić* was part of the *ratio decidendi*.[78]

63. While the Appeals Chamber in *Tadić* appears to have reached a conclusion as to the status of the victims as protected persons based on the previous finding that the Bosnian Serbs

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[74] *Tadić* Appeal Judgement, para 168.
[75] *Aleksovski* Appeal Judgement, para 151.
[76] Appeal Transcript, p 426.
[77] Appeal Transcript, pp 395-396. The appellants' submission in respect of *Aleksovski* is similar.

acted as *de facto* organs of another State, the FRY,[79] it set forth a clear statement of the law as to the applicable criteria to determine the nationality of the victims for the purposes of the Geneva Conventions. The Appeals Chamber is satisfied that this statement of the applicable law, which was endorsed by the Appeals Chamber in *Aleksovski*, falls within the scope of the *Aleksovski* statement in relation to the practice of following previous decisions of the Appeals Chamber.

64. The Appeals Chamber now turns to the main arguments relied upon by the appellants, namely that the Appeals Chamber's interpretation of the nationality requirement is wrong as it is (1) contrary to the "traditional rules of treaty interpretation"; and (2) inconsistent with the national laws of Bosnia and Herzegovina on citizenship.

65. The appellants submit that "the traditional rules of treaty interpretation" should be applied to interpret strictly the nationality requirement set out in Article 4 of Geneva Convention IV.[80] The word "national" should therefore be interpreted according to its natural and ordinary meaning.[81] The appellants submit in addition that if the Geneva Conventions are now obsolete and need to be updated to take into consideration a "new reality", a diplomatic conference should be convened to revise them.[82]

66. The Prosecution on the other hand contends that the Vienna Convention on the Law of Treaties of 1969[83] provides that the ordinary meaning is the meaning to be given to the terms of the treaty in their context and in the light of their object and purpose.[84] It is submitted that the Appeals Chamber in *Tadić* found that the legal bond of nationality was not regarded as crucial in 1949, *i.e.*, that there was no intention at the time to determine that nationality was the sole criteria.[85] In addition, adopting the appellants' position would result in the removal of protections from the Geneva Conventions contrary to their very object and purpose.[86]

67. The argument of the appellants relates to the interpretative approach to be applied to the concept of nationality in Geneva Convention IV. The appellants and the Prosecution both rely

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78 Prosecution Response to Supplementary Brief, pp 8-9.
79 *Tadić* Appeal Judgement, para 167.
80 Appeal Transcript, p 401. Counsel for Delalić presented the arguments on behalf of all appellants.
81 Appeal Transcript, p 394.
82 Appeal Transcript, p 400.
83 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 United Nations Treaty Series 331 ("the Vienna Convention").
84 Appeal Transcript, p 426.
85 Appeal Transcript, p 427.
86 Appeal Transcript, p 429.

on the Vienna Convention in support of their contentions. The Appeals Chamber agrees with the parties that it is appropriate to refer to the Vienna Convention as the applicable rules of interpretation, and to Article 31 in particular, which sets forth the general rule for the interpretation of treaties. The Appeals Chamber notes that it is generally accepted that these provisions reflect customary rules.[87] The relevant part of Article 31 reads as follows:

> 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.

68. The Vienna Convention in effect adopted a textual, contextual *and* a teleological approach of interpretation, allowing for an interpretation of the natural and ordinary meaning of the terms of a treaty in their context, while having regard to the object and purpose of the treaty.

69. In addition, Article 32 of the Vienna Convention, entitled "Supplementary means of interpretation", provides that:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous and obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

70. Where the interpretative rule set out in Article 31 does not provide a satisfactory conclusion recourse may be had to the *travaux préparatoires* as a subsidiary means of interpretation.

71. In finding that ethnicity may be taken into consideration when determining the nationality of the victims for the purposes of the application of Geneva Convention IV, the Appeals Chamber in *Tadić* concluded:

> Under these conditions, the requirement of nationality is even less adequate to define protected 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.[88]

72. This reasoning was endorsed by the Appeals Chamber in *Aleksovski*:

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[87] The ICJ in the *Case concerning the Territorial Dispute* (Libyan Arab Jamahiriya/Chad), Judgement of 3 February 1994, ICJ Reports (1994), p 21 at para 41, held that Article 31 reflected customary international law. Its statement on the customary status of Article 31 was endorsed in the *Case concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain* (Jurisdiction and Admissibility), Judgement of 15 February 1995, ICJ Reports (1995), p 18 at para 33.

[88] *Tadić* Appeal Judgement, para 166 (emphasis added).

> The Appeals Chamber considers that this extended application of Article 4 *meets the object and purpose of Geneva Convention IV*, and is particularly apposite in the context of present-day inter-ethnic conflicts.[89]

73. The Appeals Chamber finds that this interpretative approach is consistent with the rules of treaty interpretation set out in the Vienna Convention. Further, the Appeals Chamber in *Tadić* only relied on the *travaux préparatoires* to reinforce its conclusion reached upon an examination of the overall context of the Geneva Conventions. The Appeals Chamber is thus unconvinced by the appellants' argument and finds that the interpretation of the nationality requirement of Article 4 in the *Tadić* Appeals Judgement does not constitute a rewriting of Geneva Convention IV or a "re-creation" of the law.[90] The nationality requirement in Article 4 of Geneva Convention IV should therefore be ascertained within the context of the object and purpose of humanitarian law, which "is directed to the protection of civilians to the maximum extent possible".[91] This in turn must be done within the context of the changing nature of the armed conflicts since 1945, and in particular of the development of conflicts based on ethnic or religious grounds.

74. The other set of arguments submitted by the appellants relates to the national laws of Bosnia and Herzegovina on citizenship, and the applicable criteria to ascertain nationality. The appellants contend that the term "national" in Geneva Convention IV refers to nationality as defined by domestic law. It is argued that according to the applicable law of Bosnia and Herzegovina on citizenship at the time relevant to the Indictment, the Bosnian Serbs were of Bosnian nationality. In the appellants' submission, all former citizens of the former Socialist Republic of Bosnia and Herzegovina (including those of Serbian ethnic origin), one of the constituent republics of the SFRY, became Bosnian nationals when the SFRY was dissolved and Bosnia and Herzegovina was recognised as an independent State in April 1992.[92] Further, FRY citizenship was limited to residents in its constituent parts, and the law of Bosnia and Herzegovina did not provide a possibility for its citizens of Serb ethnic background to opt for FRY citizenship.[93] Delalić submits that in addition, the Bosnian Serbs subsequently agreed to the Dayton Agreement, which provides that they are nationals of Bosnia and Herzegovina.[94]

75. The appellants' arguments go to the issue of whether domestic laws are relevant to determining the nationality of the victims for the purpose of applying the Geneva Conventions.

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89 *Aleksovki* Appeal Judgement, para 152 (emphasis added).
90 Delalić Brief, p 59. Delić Brief, p 23.
91 *Tadić* Appeal Judgement, para 168.
92 Appeal Transcript, p 408.
93 Appeal Transcript, p 409.

As observed above, however, the nationality requirement of Article 4 of Geneva Convention IV is to be interpreted within the framework of humanitarian law.

76. It is a settled principle of international law that the effect of domestic laws on the international plane is determined by international law. As noted by the Permanent Court of International Justice in the *Case of Certain German Interests in Polish Upper Silesia*, "[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures".[95] In relation to the admissibility of a claim within the context of the exercise of diplomatic protection based on the nationality granted by a State, the ICJ held in *Nottebohm:*[96]

> But the issue which the Court must decide is not one which pertains to the legal system of Liechtenstein. It does not depend on the law or on the decision of Liechtenstein whether that State is entitled to exercise its protection, in the case under consideration. To exercise protection, to apply to the Court, is to place oneself on the plane of international law. It is international law which determines whether a State is entitled to exercise protection and to seize the Court.[97]

77. The ICJ went on to state that "[i]nternational practice provides many examples of acts performed by States in the exercise of their domestic jurisdiction which do not necessarily or automatically have international effect".[98] To paraphrase the ICJ in *Nottebohm*, the question at issue must thus be decided on the basis of international law; to do so is consistent with the nature of the question and with the nature of the Tribunal's own functions. Consequently, the nationality granted by a State on the basis of its domestic laws is not automatically binding on an international tribunal which is itself entrusted with the task of ascertaining the nationality of the victims for the purposes of the application of international humanitarian law. Article 4 of Geneva Convention IV, when referring to the absence of national link between the victims and the persons in whose hands they find themselves, may therefore be considered as referring to a nationality link defined for the purposes of international humanitarian law, and not as referring to the domestic legislation as such. It thus falls squarely within the competence of this Appeals

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[94] The Prosecution submits that the Trial Chamber did not act unreasonably in not giving due weight to the Defence arguments based on national legislation. Prosecution Response, p 36. Delalić Brief, pp 54-55.

[95] *Case Concerning Certain German Interests in Polish Upper Silesia*, Merits, 25 May 1926, PICJ Reports, Series A, No 7, p 19. *See* also Opinion No 1 of the *Arbitration Commission of the Peace Conference on Yugoslavia,* 29 November 1991, which states that "the form of internal political organisation and the constitutional provisions are mere facts" (para 1 c).

[96] *Nottebohm Case* (Liechtenstein v Guatemala), (Second Phase), Judgement of 6 April 1955, ICJ Reports 1955.

[97] *Nottebohm* at pp 20-21.

[98] *Nottebohm* at p 21.

Chamber to ascertain the effect of the domestic laws of the former Yugoslavia within the international context in which this Tribunal operates.

78. Relying on the ICRC Commentary to Article 4 of Geneva Convention IV, the appellants further argue that international law cannot interfere in a State's relations with its own nationals, except in cases of genocide and crimes against humanity.[99] In the appellants' view, in the situation of an internationalised armed conflict where the victims and the perpetrators are of the same nationality, the victims are only protected by their national laws.[100]

79. The purpose of Geneva Convention IV in providing for universal jurisdiction only in relation to the grave breaches provisions was to avoid interference by domestic courts of other States in situations which concern only the relationship between a State and its own nationals. The ICRC Commentary (GC IV), referred to by the appellants, thus stated that Geneva Convention IV is "faithful to a recognised principle of international law: it does not interfere in a State's relations with its own nationals".[101] The Commentary did not envisage the situation of an internationalised conflict where a foreign State supports one of the parties to the conflict, and where the victims are detained because of their ethnicity, and because they are regarded by their captors as operating on behalf of the enemy. In these circumstances, the formal national link with Bosnia and Herzegovina cannot be raised before an international tribunal to deny the victims the protection of humanitarian law. It may be added that the government of Bosnia and Herzegovina itself did not oppose the prosecution of Bosnian nationals for acts of violence against other Bosnians based upon the grave breaches regime.[102]

80. It is noteworthy that, although the appellants emphasised that the "nationality" referred to in Geneva Convention IV is to be understood as referring to the legal citizenship under domestic law, they accepted at the hearing that in the former Yugoslavia "nationality", in everyday conversation, refers to ethnicity.[103]

81. The Appeals Chamber agrees with the Prosecution that depriving victims, who arguably are of the same nationality under domestic law as their captors, of the protection of the Geneva Conventions solely based on that national law would not be consistent with the object and purpose of the Conventions. Their very object could indeed be defeated if undue emphasis were

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[99] Appeal Transcript, pp 397-398.
[100] Appeal Transcript p 415.
[101] ICRC Commentary (GC IV), p 46.
[102] *See* Tribunal's Second Annual Report, para 132; Third Annual Report, para 167 and Fourth Annual Report, para 183.
[103] Appeal Transcript, pp 545-546.

placed on formal legal bonds, which could also be altered by governments to shield their nationals from prosecution based on the grave breaches provisions of the Geneva Conventions. A more purposive and realistic approach is particularly apposite in circumstances of the dissolution of Yugoslavia, and in the emerging State of Bosnia and Herzegovina where various parties were engaged in fighting, and the government was opposed to a partition based on ethnicity, which would have resulted in movements of population, and where, ultimately, the issue at stake was the final shape of the State and of the new emerging entities.

82. In *Tadić*, the Appeals Chamber, relying on a teleological approach, concluded that formal nationality may not be regarded as determinative in this context, whereas ethnicity may reflect more appropriately the reality of the bonds:

> 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.[104]

83. As found in previous Appeals Chamber jurisprudence, Article 4 of Geneva Convention IV is to be interpreted as intending to protect civilians who find themselves in the midst of an international, or internationalised, conflict to the maximum extent possible. The nationality requirement of Article 4 should therefore be ascertained upon a review of "the substance of relations"[105] and not based on the legal characterisation under domestic legislation. In today's ethnic conflicts, the victims may be "assimilated" to the external State involved in the conflict, even if they formally have the same nationality as their captors, for the purposes of the application of humanitarian law, and of Article 4 of Geneva Convention IV specifically. The Appeals Chamber thus agrees with the *Tadić* Appeal Judgement that "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".[106]

84. Applying the principle enunciated in *Aleksovski*, the Appeals Chamber sees no cogent reasons in the interests of justice to depart from the *Tadić* Appeal Judgement. The nationality of the victims for the purpose of the application of Geneva Convention IV should not be determined on the basis of formal national characterisations, but rather upon an analysis of the substantial relations, taking into consideration the different ethnicity of the victims and the perpetrators, and their bonds with the foreign intervening State.

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[104] *Tadić* Appeal Judgement, para 166.

85. It is therefore necessary to consider the findings of the Trial Chamber to ascertain whether it applied these principles correctly.

2. Did the Trial Chamber Apply the Correct Legal Principles?

86. As in the section relating to the nature of the conflict, the Appeals Chamber first notes that the *Tadić* Appeal Judgement, which set forth the law applicable to the determination of protected person status, had not been issued at the time of the issue of the Trial Judgement. The Appeals Chamber will thus consider whether the Trial Chamber, although having not, from a formal viewpoint, applied the reasoning of the Appeals Chamber in the *Tadić* Appeal Judgement, based its conclusions on legal reasoning consistent with it.

87. The issue before the Trial Chamber was whether the Bosnian Serb victims in the hands of Bosnian Muslims and Bosnian Croats could be regarded as protected persons, *i.e.*, as having a different nationality from that of their captors.

88. The appellants argue that the Bosnian Serb victims detained in the Čelebići camp were clearly nationals of Bosnia and Herzegovina, and cannot be considered as FRY nationals. Thus, the victims could not be considered as "protected persons". The Prosecution on the other hand contends that the test applied by the Trial Chamber was consistent with the *Tadić* Appeal Judgement.

89. It is first necessary to address a particular argument before turning to an examination of the Trial Chamber's findings. Delalić submits, contrary to the Prosecution's assertions, the *Tadić* Appeal Judgement does not govern the protected persons issue in this case, because the facts of the two cases are dramatically different.[107] The Appeals Chamber in *Aleksovski* observed that the principle that the Appeals Chamber will follow its previous decisions "only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision".[108]

90. In *Tadić* and *Aleksovski* the perpetrators were regarded as acting on behalf of an external party, the FRY and Croatia respectively, and the Bosnian Muslim victims were considered as

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[105] *Tadić* Appeal Judgement, para 168.
[106] *Tadić* Appeal Judgement, para 169.
[107] Delalić's Reply, p 4.
[108] *Aleksovski* Appeal Judgement, para 110.

protected persons by virtue of the fact that they did not have the nationality of the party in whose hands they found themselves. By contrast, in this case, where the accused are Bosnian Muslim or Bosnian Croat, no finding was made that they were acting on behalf of a foreign State, whereas the Bosnian Serb victims could be regarded as having links with the party (the Bosnian Serb armed forces) acting on behalf of a foreign State (the FRY). However, although the factual circumstances of these cases are different, the legal principle which is applicable to the facts is identical. The Appeals Chamber therefore finds the appellant's argument unconvincing.

91. The Trial Chamber found that the Bosnian Serb victims could be regarded "as having been in the hands of a party to the conflict of which they were not nationals, being Bosnian Serbs detained during an international armed conflict by a party to that conflict, the State of Bosnia and Herzegovina".[109] The Trial Chamber essentially relied on a broad and purposive approach to reach its conclusion, rejecting the proposition that a determination of the nationality of the victims should be based on the domestic laws on citizenship.

92. The Trial Chamber first emphasised the role played by international law in relation to nationality,[110] holding that "the International Tribunal may choose to refuse to recognise (or give effect to) a State's grant of its nationality to individuals for the purposes of applying international law".[111] It then nevertheless found that "[a]n analysis of the relevant laws on nationality in Bosnia and Herzegovina in 1992 does not, however, reveal a clear picture. At that time, as we have discussed, the State was struggling to achieve its independence and all the previous structures of the SFRY were dissolving. In addition, an international armed conflict was tearing Bosnia and Herzegovina apart and the very issue which was being fought over concerned the desire of certain groups within its population to separate themselves from that State and join with another".[112] The Trial Chamber also noted that "the Bosnian Serbs, in their purported constitution of the SRBH, proclaimed that citizens of the Serb Republic were citizens of Yugoslavia".[113]

93. The Trial Chamber also declined to rely upon the argument presented by the Prosecution's expert Professor Economides that there is an emerging doctrine in international law of the right to the nationality of one's own choosing. Finding that the principle of a right of

[109] Trial Judgement, para 274.
[110] Trial Judgement, para 248.
[111] Trial Judgement, para 258 (footnote omitted).
[112] Trial Judgement, para 251.
[113] Trial Judgement, para 253.

option was not a settled rule of international law, the Trial Chamber held that this principle could not be, of itself, determinative in viewing the Bosnian Serbs to be non-nationals of Bosnia and Herzegovina.[114]

94. The Trial Chamber discussed the nationality link in the light of the *Nottebohm* case and concluded:

> Assuming that Bosnia and Herzegovina had granted its nationality to the Bosnian Serbs, Croats and Muslims in 1992, there may be an insufficient link between the Bosnian Serbs and that State for them to be considered Bosnian nationals by this Trial Chamber in the adjudication of the present case. The granting of nationality occurred within the context of the dissolution of a State and a consequent armed conflict. Furthermore, the Bosnian Serbs had clearly expressed their wish not to be nationals of Bosnia and Herzegovina by proclaiming a constitution rendering them part of Yugoslavia and engaging in this armed conflict in order to achieve that aim. Such finding would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose. It would also be in the spirit of that law by rendering it as widely applicable as possible.[115]

95. In the light of its finding on the international character of the conflict, the Trial Chamber held that it is "possible to regard the Bosnian Serbs as acting on behalf of the FRY in its continuing armed conflict against the authorities of Bosnia and Herzegovina".[116] The Bosnian Serb victims could thus be considered as having a different nationality from that of their captors.

96. That the Trial Chamber relied upon a broad and purposive, and ultimately realistic, approach[117] is indicated by the following references which concluded its reasoning:

> [T]his Trial Chamber wishes to emphasise the necessity of considering the requirements of article 4 of the Fourth Geneva Convention in a more flexible manner. The provisions of domestic legislation on citizenship in a situation of violent State succession cannot be determinative of the protected status of persons caught up in conflicts which ensue from such events. The Commentary to the Fourth Geneva Convention charges us not to forget that "the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests" and thus it is the view of this Trial Chamber that their protections should be applied to as broad a category of persons as possible. It would indeed be contrary to the intention of the Security Council, which was concerned with effectively addressing a situation that it had determined to be a threat to international peace and security, and with ending the suffering of all those caught up in the conflict, for the International Tribunal to deny the application of the Fourth Geneva Convention to any particular group of persons solely on the basis of their citizenship status under domestic law.[118]

97. The Appeals Chamber finds that the legal reasoning adopted by the Trial Chamber is consistent with the *Tadić* reasoning. The Trial Chamber rejected an approach based upon formal national bonds in favour of an approach which accords due emphasis to the object and

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[114] Trial Judgement, para 256.
[115] Trial Judgement, para 259.
[116] Trial Judgement, para 262.
[117] The Trial Chamber characterised its approach as "broad and principled" (para 275).

purpose of the Geneva Conventions.[119] At the same time, the Trial Chamber took into consideration the realities of the circumstances of the conflict in Bosnia and Herzegovina, holding that "(t)he law must be applied to the reality of the situation".[120] Although in some respects the legal reasoning of the Trial Chamber may appear to be broader than the reasoning adopted by the Appeals Chamber, this Appeals Chamber is satisfied that the conclusions reached fall within the scope of the *Tadić* reasoning. As submitted by the Prosecution,[121] the Trial Chamber correctly sought to establish whether the victims could be regarded as belonging to the opposing side of the conflict.

98. The Appeals Chamber particularly agrees with the Trial Chamber's finding that the Bosnian Serb victims should be regarded as protected persons for the purposes of Geneva Convention IV because they "were arrested and detained mainly on the basis of their Serb identity" and "they were clearly regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict and as posing a threat to the Bosnian State".[122]

99. The Trial Chamber's holding that its finding "would naturally be limited to the issue of the application of international humanitarian law and would be for no wider purpose"[123] also follows closely the Appeals Chamber's position that the legal test to ascertain the nationality of the victims is applicable within the limited context of humanitarian law, and for the specific purposes of the application of Geneva Convention IV in cases before the Tribunal. Landžo submitted in his brief that the Trial Chamber's finding suggests that a person can have one nationality for the purposes of national law, and another for purposes of international law, which, in his opinion, is contrary to international law. He also contended that the Trial Chamber's holding involuntarily deprives all Bosnian Serbs of their nationality. The argument that the Trial Chamber's findings have the consequence of regulating the nationality of the victims in the national sphere is unmeritorious. It should be made clear that the conclusions reached by international judges in the performance of their duties do not have the effect of regulating the nationality of these persons *vis à vis* the State within the national sphere. Nor do they purport to pronounce on the internal validity of the laws of Bosnia and Herzegovina. The Appeals Chamber agrees with the Prosecution that the Trial Chamber did not act unreasonably

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[118] Trial Judgement, para 263.
[119] *See* for instance: "In order to retain the relevance and effectiveness of the norms of the Geneva Conventions, it is necessary to adopt the approach here taken", Trial Judgement, para 266.
[120] Trial Judgement, para 264.
[121] Prosecution Response, p 36.
[122] Trial Judgement, para 265.
[123] Trial Judgement, para 259.

in not giving weight to the evidence led by the Defence concerning the nationality of the particular victims under domestic law.

100. The appellants submit arguments based upon the "effective link" test derived from the ICJ case *Nottebohm.*[124] In their view, the following indicia should be taken into consideration when assessing the nationality link of the victims with the FRY: place of birth, of education, of marriage, of vote, and habitual residence; the latter being, they submit, the most important criterion.

101. The *Nottebohm* case was concerned with ascertaining the effects of the national link for the purposes of the exercise of diplomatic protection, whereas in the instant case, the Appeals Chamber is faced with the task of determining whether the victims could be considered as having the nationality of a foreign State involved in the conflict, for the purposes of their protection under humanitarian law. It is thus irrelevant to demonstrate, as argued by the appellants, that the victims and their families had their habitual residence in Bosnia and Herzegovina, or that they exercised their activities there. Rather, the issue at hand, in a situation of internationalised armed conflict, is whether the victims can be regarded as not sharing the same nationality as their captors, for the purposes of the Geneva Conventions, even if arguably they were of the same nationality from a domestic legal point of view.

102. Although the Trial Chamber referred to the *Nottebohm* "effective link" test in the course of its legal reasoning, its conclusion as to the nationality of the victims for the purposes of the Geneva Conventions did not depend on that test. The Trial Chamber emphasised that "operating on the international plane, the International Tribunal may choose to refuse to recognise (or give effect to) a State's grant of its nationality to individuals for the purposes of applying international law".[125] Further, the Trial Chamber when assessing the nationality requirement clearly referred to the specific circumstances of the case and to the specific purposes of the application of humanitarian law.

103. Delalić further submitted that the Trial Chamber altered international law in relying upon the "secessionist activities" of the Bosnian Serbs to reach its conclusion, as the right to self-determination is not recognised in international law.[126]

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[124] Delalić Brief, p 55. Delić Brief, pp 36-39. Landžo Brief, pp 62-64.
[125] Trial Judgement, para 258.
[126] Delalić in his Brief made reference to the proclamation of Serbian autonomous regions and the establishment of the Republika Sprska in 1992, pp 52-54.

104. It is irrelevant to determine whether the activities with which the Bosnian Serbs were associated were in conformity with the right to self-determination or not. As previously stated, the question at issue is not whether this activity was lawful or whether it is in compliance with the right to self-determination. Rather, the issue relevant to humanitarian law is whether the civilians detained in the Čelebići camp were protected persons in accordance with Geneva Convention IV.

105. Delić also submits that the Trial Chamber's finding that the Bosnian Serb victims were not Bosnian nationals is at odds with its factual conclusions that Bosnian Serbs were Bosnian citizens for the purpose of determining the existence of an international armed conflict.[127] This argument has no merit. Contrary to the Appellant's contention, the findings of the Trial Chamber are not contradictory. In finding that the conflict which took place in Bosnia and Herzegovina was of an international character, the Trial Chamber merely concluded that a foreign State was involved and was supporting one of the parties in a conflict that was *prima facie* internal. This finding did not purport to make a determination as to the nationality of the party engaged in fighting with the support of the foreign State.

3. Conclusion

106. The Appeals Chamber finds that the legal reasoning applied by the Trial Chamber is consistent with the applicable legal principles identified in the *Tadić* Appeal Judgement. For the purposes of the application of Article 2 of the Statute to the present case, the Bosnian Serb victims detained in the Čelebići camp must be regarded as having been in the hands of a party to the conflict, Bosnia and Herzegovina, of which they were not nationals. The appellants' grounds of appeal therefore fail.

[127] Delić Brief, pp 48-49.

C. Whether Bosnia and Herzegovina was a Party to the Geneva Conventions at the Time of the Events Alleged in the Indictment

107. Delić challenges the Trial Chamber's findings of guilt based on Article 2 of the Statute, which vests the Tribunal with the jurisdiction to prosecute grave breaches of the 1949 Geneva Conventions. Delić contends that because Bosnia and Herzegovina did not "accede" to the Geneva Conventions until 31 December 1992, *i.e.,* after the events alleged in the Indictment, his acts committed before that date cannot be prosecuted under the treaty regime of grave breaches.[128] Delić also argues that the Geneva Conventions do not constitute customary law. Therefore, in his opinion, the application of the Geneva Conventions to acts which occurred before the date of Bosnia and Herzegovina's "accession" to them would violate the principle of legality or *nullem crimen sine lege.*[129] All counts based on Article 2 of the Statute in the Indictment should, he argues, thus be dismissed.

108. The Prosecution contends that regardless of whether or not Bosnia and Herzegovina was bound by the Geneva Conventions *qua* treaty obligations at the relevant time, the grave breaches provisions of the Geneva Conventions reflected customary international law at all material times.[130] Further, Bosnia and Herzegovina was bound by the Geneva Conventions as a result of their instrument of succession deposited on 31 December 1992, which took effect on the date on which Bosnia and Herzegovina became independent, 6 March 1992.[131]

109. The Appeals Chamber first takes note of the "declaration of succession" deposited by Bosnia and Herzegovina on 31 December 1992 with the Swiss Federal Council in its capacity as depositary of the 1949 Geneva Conventions.

110. Bosnia and Herzegovina's declaration of succession may be regarded as a "notification of succession" which is now defined by the 1978 Vienna Convention on Succession of States in Respect of Treaties as "any notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty".[132] Thus, in the case of the

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[128] Delić's Issue 3 as set out in the Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, reads: Whether Delić can be convicted of grave breaches of the Geneva Conventions of 12 August 1949 in that at the time of the acts alleged in the indictment the Republic of Bosnia and Herzegovina was not a party to the Geneva Conventions of 12 August 1949.

[129] Delić Brief, pp 19-21. Appeal Transcript, pp 338-345.

[130] Prosecution Response, pp 37-40.

[131] Appeal Transcript pp 367–370.

[132] 17 ILM 1488. The Vienna Convention on Succession of States in Respect of Treaties was adopted on 22 August 1978 and entered into force on 6 November 1996. Bosnia and Herzegovina succeeded as a party to the

replacement of a State by several others, "a newly independent State which makes a notification of succession [...] shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.[133] The date of 6 March 1992 is generally accepted as the official date of Bosnia and Herzegovina's independence (when it became a sovereign State) and it may be considered that it became an official party to the Geneva Conventions from this date.[134] Indeed, the Swiss Federal Council subsequently notified the State parties to the Geneva Conventions that Bosnia and Herzegovina "became a party to the Conventions [...] at the date of its independence, i.e. on 6 March 1992".[135] In this regard, the argument put forward by the appellants appears to confuse the concepts of "accession" and "succession".

111. Although Article 23(2) of the Convention also provides that pending notification of succession, the operation of the treaty in question shall be considered "suspended" between the new State and other parties to the treaty, the Appeals Chamber finds that in the case of this type of treaty, this provision is not applicable. This is because, for the following reasons, the Appeals Chamber confirms that the provisions applicable are binding on a State from creation. The Appeals Chamber is of the view that irrespective of any findings as to formal succession, Bosnia and Herzegovina would in any event have succeeded to the Geneva Conventions under customary law, as this type of convention entails automatic succession, *i.e.*, without the need for any formal confirmation of adherence by the successor State. It may be now considered in international law that there is automatic State succession to multilateral humanitarian treaties in the broad sense, *i.e.*, treaties of universal character which express fundamental human rights.[136] It is noteworthy that Bosnia and Herzegovina itself recognised this principle before the ICJ.[137]

Convention on 23 July 1993. Although the Convention was not in force at the time relevant to the issue at hand, the provisions of relevance to the issue before the Appeals Chamber codify rules of customary international law, as has been recognised by State. *See, e.g.*, Declaration of Tanganyika, 1961, and the subsequent declarations made by new States since then (United Nations Legislative Series, ST/LEG/SER.B/14 p 177). The Appeals Chamber notes that the practice of international organisations (UN, ILO, ICRC) and States shows that there was a customary norm on succession *de jure* of States to general treaties, which applies automatically to human rights treaties.

[133] Article 23(1) of the Vienna Convention.

[134] Opinion 11, dated 16 July 1993, of the Arbitration Commission of the Peace Conference on Yugoslavia (Badinter Commission) concludes that following the official promulgation of the result of the referendum on independence on 6 March 1992, "6 March 1992 must be considered the date on which Bosnia and Herzegovina succeeded the Socialist Federal Republic of Yugoslavia".

[135] Swiss Federal Department of Foreign Affairs, Notification to the Governments of the State parties to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, 17 February 1993.

[136] In relation to international human rights instruments, *see* UN Human Rights Commission resolutions 1993/23, 1994/16 and 1995/18; E/CN4/1995/80 p 4; Human Rights Committee General Comment 26(61) CCPR/C/21/Rev. 1/Add.8/Rev. 1. *See* also in relation to Bosnia and Herzegovina's succession to the ICCPR, Decision adopted by the Human Rights Committee on 7 October 1992 and discussion thereto, in Official

112. It is indisputable that the Geneva Conventions fall within this category of universal multilateral treaties which reflect rules accepted and recognised by the international community as a whole. The Geneva Conventions enjoy nearly universal participation.[138]

113. In light of the object and purpose of the Geneva Conventions, which is to guarantee the protection of certain fundamental values common to mankind in times of armed conflict, and of the customary nature of their provisions,[139] the Appeals Chamber is in no doubt that State succession has no impact on obligations arising out from these fundamental humanitarian conventions. In this regard, reference should be made to the Secretary-General's Report submitted at the time of the establishment of the Tribunal, which specifically lists the Geneva Conventions among the international humanitarian instruments which are "beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise".[140] The Appeals Chamber finds further support for this position in the *Tadić* Jurisdiction Decision.[141]

114. For these reasons the Appeals Chamber finds that there was no gap in the protection afforded by the Geneva Conventions, as they, and the obligations arising therefrom, were in force for Bosnia and Herzegovina at the time of the acts alleged in the Indictment.

115. The Appeals Chamber dismisses this ground of appeal.

Records of the Human Rights Committee 1992/93, Vol 1, p 15. *See* also Separate Opinion of Judge Weeramantry, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement*, ICJ Reports 1996.

[137] In the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgement*, ICJ Reports 1996, the ICJ noted that Bosnia and Herzegovina "contended that the Genocide Convention falls within the category of instruments for the protection of human rights, and that consequently, the rule of 'automatic succession' necessarily applies", para 21.

[138] As of Sept 2000, 189 States are parties to the Geneva Conventions. Only two United Nations members are not party to them (Marshall and Nauru).

[139] Article 158, para 4, of Geneva Convention IV provides that the denunciation of the Convention "shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience". Further, Article 43 of the 1969 Vienna Convention on the Law of Treaties entitled "Obligations imposed by international law independently of a treaty" provides: "The invalidity, termination, or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation [...] shall not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty".

[140] Secretary-General's Report, para 34.

[141] *Tadić* Jurisdiction Decision, paras 79-85.

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

116. Delalić,[142] Mucić[143] and Delić[144] challenge the Trial Chamber's findings that (1) offences within common Article 3 of the Geneva Conventions of 1949 are encompassed within Article 3 of the Statute; (2) common Article 3 imposes individual criminal responsibility; and (3) that common Article 3 is applicable to international armed conflicts. The appellants argue that the Appeals Chamber should not follow its previous conclusions in the *Tadić* Jurisdiction Decision, which, it is submitted, was wrongly decided. That Decision determined that violations of common Article 3 were subjected to the Tribunal's jurisdiction under Article 3 of its Statute, and that, as a matter of customary law, common Article 3 was applicable to both internal and international conflicts and entailed individual criminal responsibility. The Prosecution submits that the appellants' grounds should be rejected because they are not consistent with the *Tadić* Jurisdiction Decision, which the Appeals Chamber should follow. The Prosecution contends that the grounds raised by the appellants for reopening the Appeals Chamber's previous reasoning are neither founded nor sufficient.

117. As noted by the parties, the issues raised in this appeal were previously addressed by the Appeals Chamber in the *Tadić* Jurisdiction Decision. In accordance with the principle set out in the *Aleksovski* Appeal Judgement, as enunciated in paragraph 8 of this Judgement, the Appeals Chamber will follow its *Tadić* jurisprudence on the issues, unless there exist cogent reasons in the interests of justice to depart from it.

118. The grounds presented by the appellants raise three different issues in relation to common Article 3 of the Geneva Conventions: (1) whether common Article 3 falls within the

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[142] Delalić's Grounds of Contention as set out in his Brief read: "Whether the Security Council intended to incorporate common article 3 into Article 3 of the Statute" and "Whether Common Article 3 is customary international law in respect of its application to natural persons". At the hearing, Delalić's counsel presented the arguments in relation to these grounds on behalf of all other appellants.

[143] Mucić's Ground 6 reads: Whether at the time of the acts alleged in the indictment customary international law provided for individual criminal responsibility for violations of Common Article 3 of the Geneva Conventions (Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, 31 May 2000, p 2). Mucić adopts the arguments of Delalić.

[144] Delić's Grounds read: "Issue Number Five: Whether, at the time of the acts alleged in the indictment, customary international law provided for individual criminal responsibility for violations of Common Article 3"; "Issue Number Six: Whether the Security Council vested the Tribunal with jurisdiction to impose individual criminal sanctions for violations of common Article 3"; "Issue Number Seven: Whether Common Article 3 constitutes customary international law in international armed conflicts to the extent that it imposes criminal sanctions on individuals who violate its terms" (Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, pp 2-3).

scope of Article 3 of the Tribunal's Statute; (2) whether common Article 3 is applicable to international armed conflicts; (3) whether common Article 3 imposes individual criminal responsibility. After reviewing the *Tadić* Jurisdiction Decision in respect of each of these issues to determine whether there exist cogent reasons to depart from it, the Appeals Chamber will turn to an analysis of the Trial Judgement to ascertain whether it applied the correct legal principles in disposing of the issues before it.

119. As a preliminary issue, the Appeals Chamber will consider one of the appellants' submissions concerning the status of the *Tadić* Jurisdiction Decision, which is relevant to the discussion of all three issues.

120. In their grounds of appeal, the appellants invite the Appeals Chamber to reverse the position it took in the *Tadić* Jurisdiction Decision concerning the applicability of common Article 3 of the Geneva Conventions under Article 3 of the Statute, and thus to revisit the issues raised. Delalić *inter alia* submits that the Appeals Chamber did not conduct a rigorous analysis at the time (suggesting also that there is a difference in nature between interlocutory appeals and post-judgement appeals) and that many of the issues raised now were not briefed or considered in the *Tadić* Jurisdiction Decision.[145] In the appellants' view, the Decision was rendered *per incuriam*.[146] Such a reason affecting a judgement was envisaged in the *Aleksovski* Appeal Judgement as providing a basis for departing from an earlier decision.[147]

121. As to the contention that the arguments which the appellants make now were not before the Appeals Chamber in *Tadić*, the Prosecution submits that it is not the case that they were not considered in the *Tadić* Jurisdiction Decision: the essence of most of the arguments now submitted by the appellants was addressed and decided by the Appeals Chamber in that Decision. In relation to the argument that the *Tadić* Jurisdiction Decision was not based on a rigorous analysis, the Prosecution submits that that Decision contains detailed reasoning and that issues decided in an interlocutory appeal should not be regarded as having any lesser status than a decision of the Appeals Chamber given after the Trial Chamber's judgement. Further, the Decision was not given *per incuriam*, as the Appeals Chamber focused specifically on this

[145] Delalić Brief, p 6. Delalić does not point to any specific issue.
[146] Appeal Transcript p 320. "There is no indication that that issue was properly and fully briefed for that court [...]. It was really only decided in an interlocutory fashion to guide the Trial Chamber in *Tadić* through the *Tadić* trial" (Appeal Transcript pp 321-322).
[147] *Aleksovki* Appeal Judgement, para 108 (footnote omitted).

issue, the arguments were extensive and many authorities were referred to.[148] In the Prosecution's submission, there are therefore no reasons to depart from it.

122. This Appeals Chamber is of the view that there is no reason why interlocutory decisions of the Appeals Chamber should be considered, as a matter of principle, as having any lesser status than a final decision on appeal. The purpose of an appeal, whether on an interlocutory or on a final basis, is to determine the issues raised with finality.[149] There is therefore no basis in the interlocutory status of the *Tadić* Jurisdiction Decision to consider it as having been made *per incuriam.*

A. Whether Common Article 3 of the Geneva Conventions Falls Within the Scope of Article 3 of the Statute

1. What is the Applicable Law?

123. Article 3 of the Statute entitled "Violations of the Laws or Customs of War" reads:

> The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:
>
> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
>
> (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
>
> (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;
>
> (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and science, historic monuments and works of art and science;
>
> (e) plunder of public or private property.

124. Common Article 3 of the Geneva Conventions provides in relevant parts that:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> > (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without

[148] Appeal Transcript pp 323-24.
[149] It is noted that the Appeals Chamber in *Aleksovski* did not draw any distinction between the authoritative nature of its interlocutory and final decisions.

> any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.
>
> (2) The wounded and the sick shall be collected and cared for.

125. In relation to the scope of Article 3 of the Statute, the Appeals Chamber in the *Tadić* Jurisdiction Decision held that Article 3 "is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 and 5".[150] It went on:

> Article 3 thus confers on the International Tribunal jurisdiction over any serious offence against international humanitarian law not covered by Articles 2, 4 or 5. Article 3 is a fundamental provision laying down that any "serious violation of international humanitarian law" must be prosecuted by the International Tribunal. In other words, Article 3 functions as a residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal. Article 3 aims to make such jurisdiction watertight and inescapable.[151]

126. The conclusion of the Appeals Chamber was based on a careful analysis of the Secretary-General's Report. The Appeals Chamber *inter alia* emphasised that the Secretary-General acknowledged that the Hague Regulations, annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, which served as a basis for Article 3 of the Statute, "have a broader scope than the Geneva Conventions, in that they cover not only the protection of victims of armed violence (civilians) or of those who no longer take part in the hostilities (prisoners of war), but also the conduct of hostilities".[152] The Appeals Chamber noted that, although the Secretary-General's Report subsequently indicated "that the violations explicitly listed in Article 3 relate to Hague law not contained in the Geneva Conventions", Article 3 contains the phrase "shall include but not be limited to".[153] The Appeals Chamber concluded: "Considering this list in the general context of the Secretary-General's discussion of

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[150] *Tadić* Jurisdiction Decision, para 89.
[151] *Ibid*, para 91 (underlining in original).
[152] *Ibid*, para 87.
[153] *Ibid.*

the Hague Regulations and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law."[154]

127. In support of its conclusion, the Appeals Chamber also relied on statements made by States in the Security Council at the time of the adoption of the Statute of the Tribunal, which "can be regarded as providing an authoritative interpretation of Article 3 to the effect that its scope is much broader than the enumerated violations of Hague law".[155] The Appeals Chamber also relied on a teleological approach in its analysis of the provisions of the Statute. Reference was also made to the context and purpose of the Statute as a whole, and in particular to the fact that the Tribunal was established to prosecute "serious violations of international humanitarian law".[156] It continued: "Thus, if correctly interpreted, Article 3 fully realises the primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed".[157] The Appeals Chamber concluded that Article 3 is intended to incorporate violations of both Hague (conduct of war) and Geneva (protection of victims) law[158] provided that certain conditions, *inter alia* relating to the customary status of the rule, are met.[159]

128. The Appeals Chamber then went on to specify four requirements that must be met in order for a violation of international humanitarian law to be subject to Article 3 of the Statute.[160] The Appeals Chamber then considered the question of which such violations, when committed in internal conflicts, met these requirements. It discussed in depth the existence of customary international humanitarian rules applicable to internal conflicts, and found that State practice had developed since the 1930s, to the effect that customary rules exist applicable to non-international conflicts. These rules include common Article 3 but also go beyond it to include rules relating to the methods of warfare.[161]

129. The Appeals Chamber will now turn to the arguments of the appellants which discuss the *Tadić* Jurisdiction Decision conclusions in order to determine whether there exist cogent reasons in the interests of justice to depart from them.

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[154] *Ibid.*
[155] *Ibid*, para 88.
[156] *Ibid*, para 90.
[157] *Ibid*, para 92.
[158] *Ibid*, para 89.
[159] *Ibid*, para 94.
[160] *Ibid.*
[161] *Tadić* Jurisdiction Decision, paras 119-125.

130. In support of their submission that violations of common Article 3 are not within the jurisdiction of the Tribunal, the appellants argue that in adopting Article 3 of the Statute, the Security Council never intended to permit prosecutions under this Article for violations of common Article 3,[162] and, had the Security Council intended to include common Article 3 within the ambit of Article 3, it would have expressly included it in Article 2 of the Statute, which deals with the law related to the protection of victims. In their opinion, an analysis of Article 3 of the Statute shows that it is limited to Hague law. A related argument presented by the appellants is that Article 3 can only be expanded to include offences which are comparable and lesser offences than those already listed, and not to include offences of much greater magnitude and of a completely different character. In support of their argument, the appellants also rely on a comparison of the ICTY and ICTR Statutes, as Article 4 of the ICTR Statute *explicitly* includes common Article 3.[163] The appellants further argue that the Security Council viewed the conflict taking place in the former Yugoslavia as international, and accordingly provided for the prosecution of serious violations of humanitarian law in the context of an international conflict only.[164] The Prosecution submits that the Appeals Chamber should follow its previous conclusion in the *Tadić* Jurisdiction Decision.

131. As to the appellants' argument based on the intention of the Security Council, the Appeals Chamber is of the view that the Secretary-General's Report and the statements made by State representatives in the Security Council at the time of the adoption of the Statute, as analysed in *Tadić*, clearly support a conclusion that the list of offences listed in Article 3 was meant to cover violations of *all* of the laws or customs of war, understood broadly, in addition to those mentioned in the Article by way of example. Recourse to interpretative statements made by States at the time of the adoption of a resolution may be appropriately made by an international court when ascertaining the meaning of the text adopted, as they constitute an important part of the legislative history of the Statute.[165] These statements may shed light on some aspects of the drafting and adoption of the Statute as well as on its object and purpose, when no State contradicts that interpretation, as noted in *Tadić*.[166] This is consistent with the accepted rules of treaty interpretation.[167]

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[162] Appeal Transcript p 319.
[163] Appeal Transcript p 320.
[164] *See* Delalić Brief, pp 8-20.
[165] *See* for instance *Ngeze and Nahimana* v *Prosecutor*, ICTR Appeals Chamber, 5 Sept 2000, Joint Separate Opinion, Judge Vohrah and Judge Nieto-Navia, paras 12-17.
[166] *Tadić* Jurisdiction Decision, para 75.
[167] Article 32 of the Vienna Convention on the Law of Treaties provides that the preparatory work of a treaty may be used as a supplementary means of interpretation to interpret the provisions of a treaty.

132. The Appeals Chamber is similarly unconvinced by the appellants' submission that it is illogical to incorporate violations of common Article 3 which are "Geneva law" rules, within Article 3 which covers "Hague law" rules. The Appeals Chamber in *Tadić* discussed the evolution of the meaning of the expression "war crimes". It found that war crimes have come to be understood as covering both Geneva and Hague law, and that violations of the laws or customs of war cover both types of rules. The traditional law of warfare concerning the protection of persons (both taking part and not taking part in hostilities) and property is now more correctly termed "international humanitarian law" and has a broader scope, including, for example, the Geneva Conventions.[168] The ICRC Commentary (GC IV) indeed stated that "the Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are commonly called war crimes".[169] Further, Additional Protocol I contains rules of both Geneva and Hague origin.[170]

133. Recent confirmation that a strict separation between Hague and Geneva law in contemporary international humanitarian law based on the "type" of rules is no longer warranted may be found in Article 8 of the ICC Statute. This Article covers "War crimes" generally, namely grave breaches and "other serious violations of the laws and customs of war applicable in international armed conflict"; violations of common Article 3 in non-international armed conflicts; and "other serious violations of the laws and customs of war applicable in non-international armed conflict". The Appeals Chamber thus confirms the view expressed in the *Tadić* Appeal Judgement that the expression "laws and customs of war" has evolved to encompass violations of Geneva law at the time the alleged offences were committed, and that consequently, Article 3 of the Statute may be interpreted as intending the incorporation of Geneva law rules. It follows that the appellants' argument that violations of common Article 3 cannot be included in Article 3 as they are of a different fails.

134. Turning next to the appellants' argument that common Article 3 would more logically be incorporated in Article 2 of the Statute, the Appeals Chamber observes that the Geneva Conventions themselves make a distinction between the grave breaches and other violations of

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[168] *Tadić* Jurisdiction Decision, para 87.
[169] ICRC Commentary (GC IV), p 583.
[170] The draft Statute of an International Criminal Court prepared by the ILC also followed this approach in its Article 20 entitled "Crimes within the jurisdiction of the Court", which listed among the offences subject to the jurisdiction of the Court "serious violations of the laws and customs of war applicable in armed conflicts", including both Geneva and Hague law. ILC Report 1994, p 70. *See* also the ILC Draft Code against the Peace and Security of Mankind adopted in 1996. The Commission stated in its Report that the expressions "war crimes", "violations of laws and customs of war" and "violations of the rules of humanitarian law applicable in armed conflicts" are used in the report interchangeably. ILC Report 1996, p 113. Further, Article 20 entitled "War crimes" included violations of Hague law, as well as Geneva law under a common heading.

their provisions. The offences enumerated in common Article 3 may be considered as falling into the category of other serious violations of the Geneva Conventions, and are thus included within the general clause of Article 3. There is thus no apparent inconsistency in not including them in the scope of Article 2 of the Statute. This approach based on a distinction between the grave breaches of the Geneva Conventions and other serious violations of the Conventions, has also later been followed in the ICC Statute.[171]

135. As will be discussed below, the appellants' argument that the Security Council viewed the conflict as international, even if correct, would not be determinative of the issue, as the prohibitions listed under common Article 3 are also applicable to international conflicts. It is, however, appropriate to note here that the Appeals Chamber does not share the view of the appellants that the Security Council and the Secretary-General determined that the conflict in the former Yugoslavia at the time of the creation of the Tribunal was international. In the Appeals Chamber's view, the Secretary-General's Report does not take a position as to whether the various conflicts within the former Yugoslavia were international in character for purposes of the applicable law as of a particular date. The Statute was worded neutrally. Article 1 of the Statute entitled "Competence of the International Tribunal" vests the Tribunal with the power to prosecute "serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991", making no reference to the nature of the conflict.[172] This supports the interpretation that the Security Council in adopting the Statute was of the view that the question of the nature of the conflict should be judicially determined by the Tribunal itself, the issue involving factual and legal questions.

136. The Appeals Chamber thus finds no cogent reasons in the interests of justice to depart from its previous jurisprudence concerning the question of whether common Article 3 of the Geneva Conventions is included in the scope of Article 3 of the Statute.

2. Did the Trial Chamber Follow the *Tadić* Jurisdiction Decision?

137. The Trial Chamber generally relied on the *Tadić* Jurisdiction Decision as it found "no reason to depart" from it.[173] That the Trial Chamber accepted that common Article 3 is incorporated in Article 3 of the Statute appears clearly from the following findings. The Trial Chamber referred to paragraphs 87 and 91 of the *Tadić* Jurisdiction Decision to describe the

[171] ICC Statute, Article 8.

[172] Article 8 of the Statute sets out, in relation to the temporal jurisdiction of the Tribunal, the neutral date of 1 January 1991. Article 5 of the Statute, which, in relation to crimes against humanity, vests the Tribunal with the power to prosecute them in internal as well as international conflicts.

"division of labour between Articles 2 and 3 of the Statute".[174] The Trial Chamber went on to hold that "this Trial Chamber is in no doubt that the intention of the Security Council was to ensure that all serious violations of international humanitarian law, committed within the relevant geographical and temporal limits, were brought within the jurisdiction of the International Tribunal."[175]

138. In respect of the customary status of common Article 3, the Trial Chamber found:

> While in 1949 the insertion of a provision concerning internal armed conflicts into the Geneva Conventions may have been innovative, there can be no question that the protections and prohibitions enunciated in that provision have come to form part of customary international law. As discussed at length by the Appeals Chamber, a corpus of law concerning the regulation of hostilities and protection of victims in internal armed conflicts is now widely recognised.[176]

139. The Appeals Chamber therefore finds that the Trial Chamber correctly adopted the Appeals Chamber's statement of the law in disposing of this issue.

B. Whether Common Article 3 is Applicable to International Armed Conflicts

1. What is the Applicable Law?

140. In the course of its discussion of the existence of customary rules of international humanitarian law governing internal armed conflicts, the Appeals Chamber in the *Tadić* Jurisdiction Decision observed a tendency towards the blurring of the distinction between interstate and civil wars as far as human beings are concerned.[177] It then found that some treaty rules, and common Article 3 in particular, which constitutes a mandatory minimum code applicable to internal conflicts, had gradually become part of customary law. In support of its position that violations of common Article 3 are applicable regardless of the nature of the conflict, the Appeals Chamber referred to the ICJ holding in *Nicaragua* that the rules set out in common Article 3 reflect "elementary considerations of humanity" applicable under customary international law to any conflict.[178] The ICJ in *Nicaragua* discussed the customary status of common Article 3 to the Geneva Conventions and held:

> Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt

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[173] Trial Judgement, para 280.
[174] Trial Judgement, para 297.
[175] Trial Judgement, para 299.
[176] Trial Judgement, para 301 (footnote omitted).
[177] *Tadić* Jurisdiction Decision, para 97.
[178] *Nicaragua*, para 218.

> that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity" (Corfu Channel, Merits, I.C.J. Reports 1949, p. 22; paragraph 215).[179]

Thus, relying on *Nicaragua*, the Appeals Chamber concluded:

> Therefore at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant.[180]

141. The Appeals Chamber also considered that the procedural mechanism, provided for in common Article 3,[181] inviting parties to internal conflicts to agree to abide by the rest of the Conventions, "reflect an understanding that certain fundamental rules should apply regardless of the nature of the conflict."[182] The Appeals Chamber also found that General Assembly resolutions corroborated the existence of certain rules of war concerning the protection of civilians and property applicable in both internal and international armed conflicts.[183]

142. Referring to the *Tadić* Jurisdiction Decision, which the Trial Chamber followed, Delalić argues that the Appeals Chamber failed to properly consider the status of common Article 3, and in particular failed to analyse state practice and *opinio juris*, in support of its conclusion that it was, as a matter of customary international law, applicable to international armed conflicts. Further, in his opinion, the findings of the ICJ on the customary status of common Article 3 and its applicability to both internal and international conflicts are *dicta*.[184] The Prosecution is of the view that, as stated by the ICJ in *Nicaragua*, it is because common Article 3 gives

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[179] *Nicaragua,* para 218. The ICJ considers that the Geneva Conventions in general are customary international law. Paragraph 219 reads in relevant parts: "Because the minimum rules applicable to international and to non-international conflicts are identical, there is no need to address the question whether those actions must be looked at in the context of the rules which operate for one or for the other category of conflict". In the *Corfu Channel* case, the ICJ regarded the provisions of the Hague Convention as a special application of a much more general principle of universal applicability. Its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,* the ICJ reiterated the principle that certain minimum rules are applicable regardless of the nature of the conflict: "It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgement of 9 April 1949 in the *Corfu Channel* case (I.C.J. Reports 1949, p. 22), that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law". *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports (1996), para 79.

[180] *Tadić* Jurisdiction Decision, para 102.

[181] Common Article 3 provides: "The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention".

[182] *Tadić* Jurisdiction Decision, para 103. In this context, the Appeals Chamber specifically referred to the 1967 conflict in Yemen.

[183] *Tadić* Jurisdiction Decision, paras 110-112 referring to resolutions 2444 (1968) and 2675 (1970).

[184] Delalić also submits that the ICJ findings are not based on state practice and *opinio juris*; Delalić Brief, pp 32-34.

expression to elementary considerations of humanity, which are applicable irrespective of the nature of the conflict, that common Article 3 is applicable to international conflicts.[185]

143. It is indisputable that common Article 3, which sets forth a minimum core of mandatory rules, reflects the fundamental humanitarian principles which underlie international humanitarian law as a whole, and upon which the Geneva Conventions in their entirety are based. These principles, the object of which is the respect for the dignity of the human person, developed as a result of centuries of warfare and had already become customary law at the time of the adoption of the Geneva Conventions because they reflect the most universally recognised humanitarian principles.[186] These principles were codified in common Article 3 to constitute the minimum core applicable to internal conflicts, but are so fundamental that they are regarded as governing both internal and international conflicts.[187] In the words of the ICRC, the purpose of common Article 3 was to "ensur(e) respect for the few essential rules of humanity which all civilised nations consider as valid everywhere and under all circumstances and as being above and outside war itself".[188] These rules may thus be considered as the "quintessence" of the humanitarian rules found in the Geneva Conventions as a whole.

144. It is these very principles that the ICJ considered as giving expression to fundamental standards of humanity applicable in *all* circumstances.

145. That these standards were considered as reflecting the principles applicable to the Conventions in their entirety and as constituting substantially similar core norms applicable to both types of conflict is clearly supported by the ICRC Commentary (GC IV):

> This minimum requirement in the case of non-international conflict, is *a fortiori* applicable in international armed conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built.[189]

146. This is entirely consistent with the logic and spirit of the Geneva Conventions; it is a "logical application of its fundamental principle".[190] Specifically, in relation to the substantive

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[185] Appeal Transcript, pp 350-51.

[186] The rules of common Article 3 setting out standards of basic humanitarian protection were originally intended to serve as a general statement of the object of the Geneva Conventions as a whole. The ICRC Commentary (GC IV) provides that the wording of common Article 3 is largely based on general ideas contained in various draft preambles which were eventually omitted, pp 26-34.

[187] This interpretation is supported by the Preamble of Additional Protocol II which provides that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience". This statement is founded on the Martens clause, which was set out in the preamble of the 1899 and 1907 Hague Conventions.

[188] ICRC Commentary (GC IV), p 44.

[189] ICRC Commentary (GC IV), p 14.

[190] ICRC Commentary (GC IV), p 26.

rules set out in subparagraphs (1) (a)-(d) of common Article 3, the ICRC Commentary continues:

> The value of the provision is not limited to the field dealt with in Article 3. Representing, as it does, the minimum which must be applied in the least determinate of conflicts, its terms must *a fortiori* be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For "the greater obligation includes the lesser", as one might say.[191]

147. Common Article 3 may thus be considered as the "minimum yardstick"[192] of rules of international humanitarian law of similar substance applicable to both internal and international conflicts. It should be noted that the rules applicable to international conflicts are not limited to the minimum rules set out in common Article 3, as international conflicts are governed by more detailed rules. The rules contained in common Article 3 are considered as applicable to international conflicts because they constitute the core of the rules applicable to such conflicts. There can be no doubt that the acts enumerated in *inter alia* subparagraphs (a), violence to life, and (c), outrages upon personal dignity, are heinous acts "which the world public opinion finds particularly revolting".[193] These acts are also prohibited in the grave breaches provisions of Geneva Convention IV, such as Article 147. Article 75 of Additional Protocol I, applicable to international conflicts, also provides a minimum of protection to any person unable to claim a particular status. Its paragraph 75(2) is directly inspired by the text of common Article 3.

148. This interpretation is further confirmed by a consideration of other branches of international law, and more particularly of human rights law.

149. Both human rights and humanitarian law focus on respect for human values and the dignity of the human person. Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity. The ICRC Commentary on the Additional Protocols refers to their common ground in the following terms: "This irreducible core of human rights, also known as 'non-derogable rights' corresponds to the lowest level of protection which can be claimed by anyone at anytime [...]".[194] The universal and regional human rights instruments[195] and the Geneva Conventions share a common "core" of fundamental standards which are applicable at all times, in all circumstances and to all parties, and from which no derogation is permitted. The object of the

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[191] ICRC Commentary (GC IV), p 14.
[192] *Nicaragua,* para 218.
[193] ICRC Commentary (GC IV), p 38.
[194] ICRC Commentary on the Additional Protocols, p 1340.
[195] The Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; European Convention on Human Rights; and Inter American Convention on Human Rights.

fundamental standards appearing in both bodies of law is the protection of the human person from certain heinous acts considered as unacceptable by all civilised nations in all circumstances.[196]

150. It is both legally and morally untenable that the rules contained in common Article 3, which constitute mandatory minimum rules applicable to internal conflicts, in which rules are less developed than in respect of international conflicts, would not be applicable to conflicts of an international character. The rules of common Article 3 are encompassed and further developed in the body of rules applicable to international conflicts. It is logical that this minimum be applicable to international conflicts as the substance of these core rules is identical. In the Appeals Chamber's view, something which is prohibited in internal conflicts is necessarily outlawed in an international conflict where the scope of the rules is broader. The Appeals Chamber is thus not convinced by the arguments raised by the appellants and finds no cogent reasons to depart from its previous conclusions.

2. Did the Trial Chamber Follow the *Tadić* Jurisdiction Decision?

151. The Trial Chamber found:

> While common Article 3 of the Geneva Conventions was formulated to apply to internal armed conflicts, it is also clear from the above discussion that its substantive prohibitions apply equally in situations of international armed conflicts. Similarly, and as stated by the Appeals Chamber, the crimes falling under Article 3 of the Statute of the International Tribunal may be committed in either kind of conflicts. The Trial Chamber's finding that the conflict in Bosnia and Herzegovina in 1992 was of an international nature does not, therefore, impact upon the application of Article 3.[197]

152. The Trial Chamber therefore clearly followed the Appeals Chamber jurisprudence.

C. Whether Common Article 3 Imposes Individual Criminal Responsibility

1. What is the Applicable Law?

153. The Appeals Chamber in the *Tadić* Jurisdiction Decision, in analysing whether common Article 3 attracts individual criminal responsibility first noted that "common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions".[198] Referring however to the findings of the International Military Tribunal at

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[196] The UN Human Rights Commission is currently conducting a study to identify certain minimum humanitarian standards applicable at all times, which draw from both bodies of law. *See* UN documents E/C.N. 4/1998/87, E/C.N. 4/1999/92, E/C.N. 4/2000/94, and E/C.N. 4/2000/145.

[197] Trial Judgement, para 314.

[198] *Tadić* Jurisdiction Decision, para 128.

Nuremberg[199] that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches, provided certain conditions are fulfilled, it found:

> Applying the foregoing criteria to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognised as the mandatory minimum for conduct in armed conflict of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.[200]

154. In the Appeals Chamber's opinion, this conclusion was also supported by "many elements of international practice (which) show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts".[201] Specific reference was made to prosecutions before Nigerian courts,[202] national military manuals,[203] national legislation (including the law of the former Yugoslavia adopted by Bosnia and Herzegovina after its independence),[204] and resolutions adopted unanimously by the Security Council.[205]

155. The Appeals Chamber found further support for its conclusion in the law of the former Yugoslavia as it stood at the time of the offences alleged in the Indictment:

> Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.[206]

156. Reliance was also placed by the Appeals Chamber on the agreement reached under the auspices of the ICRC on 22 May 1992, in order to conclude that the breaches of international law occurring within the context of the conflict, regarded as internal by the agreement, could be criminally sanctioned.[207]

157. The appellants contend that the evidence presented in the *Tadić* Jurisdiction Decision does not establish that common Article 3 is customary international law that creates individual criminal responsibility because there is no showing of State practice and *opinio juris*.[208] Additionally, the appellants submit that at the time of the adoption of the Geneva Conventions in 1949, common Article 3 was excluded from the grave breaches system and thus did not fall

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[199] The Appeals Chamber further referred to the IMT's holding that crimes against international law are committed by individuals. *Tadić* Jurisdiction Decision, para 128.
[200] *Ibid*, para 129.
[201] *Ibid*, para 130.
[202] *Ibid*, at para 130, referring to paras 106 and 125.
[203] *Ibid*, para 131.
[204] *Ibid*, para 132.
[205] *Ibid*, para 133.
[206] *Ibid*, para 135.
[207] *Ibid*, para 136.
[208] Delalić Brief, pp 20-40.

within the scheme providing for individual criminal responsibility.[209] In their view, the position had not changed at the time of the adoption of Additional Protocol II in 1977. It is further argued that common Article 3 imposes duties on States only and is meant to be enforced by domestic legal systems.[210]

158. In addition, the appellants argue that solid evidence exists which demonstrates that common Article 3 is *not* a rule of customary law which imposes liability on natural persons.[211] Particular emphasis is placed on the ICTR Statute and the Secretary-General's Report which states that common Article 3 was criminalised for the first time in the ICTR Statute.[212]

159. The Prosecution argues that the *Tadić* Jurisdiction Decision previously disposed of the issue and should be followed. The Prosecution submits that, if violations of the international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why once those laws came to be extended to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of clear indications to the contrary.[213] It is further submitted that since 1949, customary law and international humanitarian law have developed to such an extent that today universal jurisdiction does not only exist in relation to the grave breaches of the Geneva Conventions but also in relation to other types of serious violations of international humanitarian law.[214] The Prosecution contends that this conclusion is not contrary to the principle of legality, which does not preclude development of criminal law, so long as those developments do not criminalise conduct which at the time it was committed could reasonably have been regarded as legitimate.[215]

160. Whereas, as a matter of strict treaty law, provision is made only for the prosecution of grave breaches committed within the context of an international conflict, the Appeals Chamber in *Tadić* found that as a matter of customary law, breaches of international humanitarian law

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[209] The appellants emphasise that violations of common Article 3 were thus not subjected to the universal jurisdiction provisions, Delalić Brief, p 28.
[210] Delić Brief, p 80.
[211] The appellants rely on the ICRC practice; *Nicaragua*; the conclusions of the UN Expert Commission; the ILC draft codes; comments made in the Security Council; the ICC Statute. In relation to *Nicaragua*, Delalić submits that the finding that common Article 3 constitute customary international law is *dicta* and therefore not an authoritative holding. It is also argued that the ICC Statute constitutes evidence that common Article 3 does not reflect customary law: Delalić Brief, pp 32-40.
[212] The report stated that Article 4 "for the first time criminalizes common article 3 of the four Geneva Conventions". Report of the Secretary-General pursuant to Paragraph 5 of Security Council resolution 955 (1994), S/1995/134, 13 February 1995, para 12.
[213] Appeal Transcript pp 351-352.
[214] Appeal Transcript pp 355-356.
[215] Appeal Transcript p 352.

committed in internal conflicts, including violations of common Article 3, could also attract individual criminal responsibility.

161. Following the appellants' argument, two different regimes of criminal responsibility would exist based on the different legal characterisation of an armed conflict. As a consequence, the same horrendous conduct committed in an internal conflict could not be punished. The Appeals Chamber finds that the arguments put forward by the appellants do not withstand scrutiny.

162. As concluded by the Appeals Chamber in *Tadić*, the fact that common Article 3 does not contain an explicit reference to individual criminal liability does not necessarily bear the consequence that there is no possibility to sanction criminally a violation of this rule. The IMT indeed followed a similar approach, as recalled in the *Tadić* Jurisdiction Decision when the Appeals Chamber found that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.[216] The Nuremberg Tribunal clearly established that individual acts prohibited by international law constitute criminal offences even though there was no provision regarding the jurisdiction to try violations: "Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced".[217]

163. The appellants argue that the exclusion of common Article 3 from the Geneva Conventions grave breaches system, which provides for universal jurisdiction, has the necessary consequence that common Article 3 attracts no individual criminal responsibility. This is misconceived. In the Appeals Chamber's view, the appellants' argument fails to make a distinction between two separate issues, the issue of criminalisation on the one hand, and the issue of jurisdiction on the other. Criminalisation may be defined as the act of outlawing or making illegal certain behaviour.[218] Jurisdiction relates more to the judicial authority to prosecute those criminal acts. These two concepts do not necessarily always correspond. The Appeals Chamber is in no doubt that the acts enumerated in common Article 3 were intended to be criminalised in 1949, as they were clearly intended to be illegal within the international legal order. The language of common Article 3 clearly prohibits fundamental offences such as murder and torture. However, no jurisdictional or enforcement mechanism was provided for in the Geneva Conventions at the time.

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[216] *Tadić* Jurisdiction Decision, para 128. The IMT prosecuted violations of Hague Convention IV and Geneva Convention of 1929 even though they did not provide for the punishment of their breaches.
[217] As referred to in para 128 of *Tadić* Jurisdiction Decision.
[218] Black's Law Dictionary, 6th ed (1990).

164. This interpretation is supported by the provisions of the Geneva Conventions themselves, which impose on State parties the duty "to respect and ensure respect for the present Conventions in all circumstances".[219] Common Article 1 thus imposes upon State parties, upon ratification, an obligation to implement the provisions of the Geneva Conventions in their domestic legislation. This obligation clearly covers the Conventions in their entirety and this obligation thus includes common Article 3. The ICJ in the *Nicaragua* case found that common Article 1 also applies to internal conflicts.[220]

165. In addition, the third paragraph of Article 146 of Geneva Convention IV, after setting out the universal jurisdiction mechanism applicable to grave breaches, provides:

> Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

166. The ICRC Commentary (GC IV) stated in relation to this provision that "there is no doubt that what is primarily meant is the repression of breaches other than the grave breaches listed and only in the second place administrative measures to ensure respect for the provisions of the Convention".[221] It then concluded:

> This shows that all breaches of the Convention should be repressed by national legislation. The Contracting Parties who have taken measures to repress the various grave breaches of the Convention and have fixed an appropriate penalty in each case should at least insert in their legislation a general clause providing for the punishment of other breaches. Furthermore, under the terms of this paragraph, the authorities of the Contracting Parties should give all those subordinate to them instructions in conformity with the Convention and should institute judicial or disciplinary punishment for breaches of the Convention.[222]

167. This, in the Appeals Chamber's view, clearly demonstrates that, as these provisions do not provide for exceptions, the Geneva Conventions envisaged that violations of common Article 3 could entail individual criminal responsibility under domestic law, which is accepted by the appellants. The absence of such legislation providing for the repression of such violations would, arguably, be inconsistent with the general obligation contained in common Article 1 of the Conventions.

168. As referred to by the Appeals Chamber in the *Tadić* Jurisdiction Decision, States have adopted domestic legislation providing for the prosecution of violations of common Article 3. Since 1995, several more States have adopted legislation criminalising violations of common

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[219] Article 1 common to the Geneva Conventions ("Common Article 1").
[220] *Nicaragua*, para 220.
[221] ICRC Commentary (GC IV), p 594.
[222] *Ibid.*

Article 3,[223] thus further confirming the conclusion that States regard violations of common Article 3 as constituting crimes. Prosecutions based on common Article 3 under domestic legislation have also taken place.[224]

169. The Appeals Chamber is also not convinced by the appellants' submission that sanctions for violations of common Article 3 are intended to be enforced at the national level only. In this regard, the Appeals Chambers refers to its previous conclusion on the customary nature of common Article 3 and its incorporation in Article 3 of the Statute.

170. The argument that the ICTR Statute, which is concerned with an internal conflict, made violations of common Article 3 subject to prosecution at the international level, in the Appeals Chamber's opinion, reinforces this interpretation. The Secretary-General's statement that violations of common Article 3 of the Geneva Conventions were criminalised for the first time, meant that provisions for international jurisdiction over such violations were *expressly* made for the first time. This is so because the Security Council when it established the ICTR was not creating new law but was *inter alia* codifying existing customary rules for the purposes of the jurisdiction of the ICTR. In the Appeals Chamber's view, in establishing this Tribunal, the Security Council simply created an international mechanism for the prosecution of crimes which were already the subject of individual criminal responsibility.

171. The Appeals Chamber is unable to find any reason of principle why, once the application of rules of international humanitarian law came to be extended (albeit in an attenuated form) to the context of internal armed conflicts, their violation in that context could not be criminally enforced at the international level. This is especially true in relation to prosecution conducted by an international tribunal created by the UN Security Council, in a situation where it specifically called for the prosecution of persons responsible for violations of humanitarian law in an armed conflict regarded as constituting a threat to international peace and security pursuant to Chapter VII of the UN Charter.

172. In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the

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[223] *See* for instance the United States War Crimes Act 1996 extended by the Expanded War Crimes Act of 1997 to include violations of common Article 3.

[224] *See* for instance in Switzerland, *Jugement en la cause Fulgence Niyonteze*, Tribunal de division 2, 3 septembre 1999, and Tribunal militaire d'appel 1, 26 mai 2000.

conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.[225]

173. The Appeals Chamber is similarly unconvinced by the appellants' argument that such an interpretation of common Article 3 violates the principle of legality. The scope of this principle was discussed in the *Aleksovski* Appeal Judgement, which held that the principle of *nullem crimen sine lege* does not prevent a court from interpreting and clarifying the elements of a particular crime.[226] It is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilised people, and thus are, in the language of Article 15(2) of the ICCPR, "criminal according to the general principles of law recognised by civilised nations."

174. The Appeals Chamber is unable to find any cogent reasons in the interests of justice to depart from the conclusions on this issue in the *Tadić* Jurisdiction Decision.

2. Did the Trial Chamber Apply the Correct Legal Principles?

175. The Appeals Chamber notes that the appellants raised before the Trial Chamber the same arguments now raised in this appeal. The Trial Chamber held:

> Once again, this is a matter which has been addressed by the Appeals Chamber in the *Tadić Jurisdiction Decision* and the Trial Chamber sees no reason to depart from its findings. In its Decision, the Appeals Chamber examines various national laws as well as practice, to illustrate that there are many instances of penal provisions for violations of the laws applicable in internal armed conflicts. From these sources, the Appeals Chamber extrapolates that there is nothing inherently contrary to the concept of individual criminal responsibility for violations of common Article 3 of the Geneva Conventions and that, indeed, such responsibility does ensue.[227]

176. It then concluded:

> The fact that the Geneva Conventions themselves do not expressly mention that there shall be criminal liability for violations of common Article 3 clearly does not in itself preclude such liability. Furthermore, identification of the violation of certain provisions of the Conventions as constituting "grave breaches" and thus subject to mandatory universal jurisdiction, certainly cannot be interpreted as rendering all of the remaining provisions of the Conventions as without criminal sanction. While "grave breaches" *must* be prosecuted and punished by all States, "other" breaches of the Geneva Conventions *may* be so. Consequently, an international tribunal such as this must also be permitted to prosecute and punish such violations of the Conventions.[228]

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[225] The Appeals Chamber also notes that in human rights law the violation of rights which have reached the level of *jus cogens*, such as torture, may constitute international crimes.
[226] *Aleksovski* Appeal Judgement, para 126.
[227] Trial Judgement, para 307.
[228] Trial Judgement, para 308.

177. In support of this conclusion, which fully accords with the position taken by the Appeals Chamber, the Trial Chamber went on to refer to the ILC Draft Code of Crimes against the Peace and Security of Mankind and the ICC Statute.[229] The Trial Chamber was careful to emphasise that although "these instruments were all drawn up after the acts alleged in the Indictment, they serve to illustrate the widespread conviction that the provisions of common Article 3 are not incompatible with the attribution of individual criminal responsibility".[230]

178. In relation to the ICTR Statute and the Secretary-General's statement in his ICTR report that common Article 3 was criminalised for the first time, the Trial Chamber held: "the United Nations cannot 'criminalise' any of the provisions of international humanitarian law by the simple act of granting subject-matter jurisdiction to an international tribunal. The International Tribunal merely identifies and applies existing customary international law and, as stated above, this is not dependent upon an express recognition in the Statute of the content of that custom, although express reference may be made, as in the Statute of the ICTR".[231] This statement is fully consistent with the Appeals Chamber's finding that the lack of explicit reference to common Article 3 in the Tribunal's Statute does not warrant a conclusion that violations of common Article 3 may not attract individual criminal responsibility.

179. The Trial Chamber's holding in respect of the principle of legality is also consonant with the Appeals Chamber's position. The Trial Chamber made reference to Article 15 of the ICCPR,[232] and to the Criminal Code of the SFRY, adopted by Bosnia and Herzegovina,[233] before concluding:

> It is undeniable that acts such as murder, torture, rape and inhuman treatment are criminal according to "general principles of law" recognised by all legal systems. Hence the caveat contained in Article 15, paragraph 2, of the ICCPR should be taken into account when considering the application of the principle of *nullum crimen sine lege* in the present case. The purpose of this principle is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognise the criminal nature of the acts alleged in the Indictment. The fact that they could not foresee the creation of an International Tribunal which would be the forum for prosecution is of no consequence.[234]

180. The Appeals Chamber fully agrees with this statement and finds that the Trial Chamber applied the correct legal principles in disposing of the issues before it.

181. It follows that the appellants' grounds of appeal fail.

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[229] Trial Judgement, para 309.
[230] *Ibid.*
[231] *Ibid*, para 310.
[232] *Ibid*, para 311.

IV. GROUNDS OF APPEAL CONCERNING COMMAND RESPONSIBILITY

182. In the present appeal, Mucić and the Prosecution have filed grounds of appeal which relate to the principles of command responsibility. Article 7(3) of the Statute, "Individual criminal responsibility", provides that:

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

A. The Ninth Ground of Appeal of Mucić

183. The ninth ground of Mucić's appeal alleges both a legal and factual error on the part of the Trial Chamber in finding that Mucić had, at the time when the crimes concerned in this case were being committed, the *de facto* authority of a commander in the Čelebići camp.[235] Most of the arguments presented by Mucić are concerned with the Trial Chamber's factual findings.[236] The Prosecution argues that Mucić's ground be denied.

184. The Appeals Chamber understands that the remedy desired by the appellant in this ground of appeal is an acquittal of those convictions based on his command responsibility.[237]

185. The Appeals Chamber will first consider the issue of whether a superior may be held liable for the acts of subordinates on the basis of *de facto* authority, before turning to the arguments relating to alleged errors of fact.

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[233] *Ibid*, para 312.
[234] *Ibid*, para 313.
[235] Mucić's ground 9 reads: "Whether the Trial Chamber made the proper legal and factual determinations in convicting Mr Mucić of command responsibility pursuant to Article 7(3)", Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, 31 May 2000, at p 2. This document serves to clarify the previous documents setting out Mucić's grounds.
[236] While the appellant made some submissions in his Brief on matters of law, it is difficult to identify the precise errors that are alleged to have been committed by the Trial Chamber. Matters were not further clarified at the hearing. Counsel for the appellant however asked the Appeals Chamber to consider the issue of superior responsibility arising out of a *de facto* position of authority, Appeal Transcript, pp 253-254.
[237] Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić dated the 2nd July 1999, 26 July 1999, Registry p 1800. Mucić submits that the convictions entered by the Trial Chamber pursuant to Article 7(3) of the Statute are "nullified" as a result of its reasoning.

1. *De Facto* Authority as a Basis for a Finding of Superior Responsibility in International Law

186. In his brief, Mucić appeared to contest the issue of whether a *de facto* status is sufficient for the purpose of ascribing criminal responsibility under Article 7(3) of the Statute. It is submitted that *de facto* status must be equivalent to *de jure* status in order for a superior to be held responsible for the acts of subordinates.[238] He submits that a person in a position of *de facto* authority must be shown to wield the same kind of control over subordinates as *de jure* superiors.[239] In the appellant's view, the approach taken by the Trial Chamber that the absence of formal legal authority, in relation to civilian and military structures, does not preclude a finding of superior responsibility, "comes too close to the concept of strict responsibility".[240] Further, Mucić interprets Article 28 of the ICC Statute as limiting the application of the doctrine of command responsibility to "commanders or those effectively acting as commanders".[241] He submits that "the law relating to *de jure/de facto* command responsibility is far from certain" and that the Appeals Chamber should address the issue.[242]

187. The Prosecution argues that Mucić has failed to adduce authorities to support his argument that the Trial Chamber erred in finding Mucić to be a *de facto* superior.[243] In its view, the finding of the *de facto* responsibility does not amount to a form of strict liability, and *de facto* authority does not have to possess certain features of *de jure* authority. It is submitted that Mucić has not identified any legal basis for alleging that the Trial Chamber has erred in holding that the doctrine of command responsibility applies to civilian superiors.

188. The Trial Chamber found:

> [...] a *position of command is indeed a necessary precondition* for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position *cannot be determined by reference to formal status alone.* Instead, the factor that determines liability for this type of criminal responsibility is the *actual possession, or non-possession, of powers of control over the actions of subordinates.* Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's *de facto*, as well as *de jure*, position as a commander.[244]

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[238] Mucić Brief, Section 3, p 1.
[239] Mucić Brief, Section 3, p 7.
[240] Mucić Brief, Section 3, p 6.
[241] Mucić Brief, Section 3, p 18.
[242] Appeal Transcript, p 252. When replying to the Prosecution, Mucić did not object to the Prosecution's submissions, Appeal Transcript, p 302, that he did not take issue with the Trial Chamber's legal finding that a person can be found liable under Article 7(3) on the basis of *de facto* authority, Appeal Transcript, pp 316-317.
[243] Prosecution Response, section 10.
[244] Trial Judgement, para 370 (emphasis added).

189. It is necessary to consider first the notion of command or superior authority within the meaning of Article 7(3) of the Statute before examining the specific issue of *de facto* authority. Article 87(3) of Additional Protocol I to the 1949 Geneva Conventions provides:

> The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons *under his control* are going to commit or have committed a breach of the Conventions or of his Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.[245]

190. The *Blaskić* Judgement, referring to the Trial Judgement and to Additional Protocol I, construed control in terms of the material ability of a commander to punish:

> What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.[246]

191. In respect of the meaning of a commander or superior as laid down in Article 7(3) of the Statute, the Appeals Chamber held in *Aleksovski*:

> Article 7(3) provides the legal criteria for command responsibility, thus giving the word "commander" a juridical meaning, in that the provision becomes applicable only where a superior with the required mental element failed to exercise his powers to prevent subordinates from committing offences or to punish them afterwards. This necessarily implies that a superior must have such powers prior to his failure to exercise them. If the facts of a case meet the criteria for the authority of a superior as laid down in Article 7(3), the legal finding would be that an accused is a superior within the meaning of that provision.[247]

192. Under Article 7(3), a commander or superior is thus the one who possesses the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed.

193. The power or authority to prevent or to punish does not solely arise from *de jure* authority conferred through official appointment. In many contemporary conflicts, there may be only *de facto*, self-proclaimed governments and therefore *de facto* armies and paramilitary groups subordinate thereto. Command structure, organised hastily, may well be in disorder and primitive. To enforce the law in these circumstances requires a determination of accountability not only of individual offenders but of their commanders or other superiors who were, based on evidence, in control of them without, however, a formal commission or appointment. A tribunal could find itself powerless to enforce humanitarian law against *de facto* superiors if it only accepted as proof of command authority a formal letter of authority, despite the fact that the

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[245] (Emphasis added).
[246] *Blaškić* Judgement, para 302.
[247] *Aleksovski* Appeal Judgement, para 76.

superiors acted at the relevant time with all the powers that would attach to an officially appointed superior or commander.

194. In relation to Mucić's responsibility, the Trial Chamber held:

> [...] whereas formal appointment is an important aspect of the exercise of command authority or superior authority, the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility. Accordingly, the factor critical to the exercise of command responsibility is the actual possession, or non-possession, of powers of control over the actions of the subordinates.[248]

195. The Trial Chamber, prior to making this statement in relation to the case of Mucić, had already considered the origin and meaning of *de facto* authority with reference to existing practice.[249] Based on an analysis of World War II jurisprudence, the Trial Chamber also concluded that the principle of superior responsibility reflected in Article 7(3) of the Statute encompasses political leaders and other civilian superiors in positions of authority.[250] The Appeals Chamber finds no reason to disagree with the Trial Chamber's analysis of this jurisprudence. The principle that military and other superiors may be held criminally responsible for the acts of their subordinates is well-established in conventional and customary law. The standard of control reflected in Article 87(3) of Additional Protocol I may be considered as customary in nature.[251] In relying upon the wording of Articles 86 and 87 of Additional Protocol I to conclude that "it is clear that the term 'superior' is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control", the Trial Chamber properly considered the issue in finding the applicable law.[252]

196. "Command", a term which does not seem to present particular controversy in interpretation, normally means powers that attach to a military superior, whilst the term "control", which has a wider meaning, may encompass powers wielded by civilian leaders. In this respect, the Appeals Chamber does not consider that the rule is controversial that civilian leaders may incur responsibility in relation to acts committed by their subordinates or other persons under their effective control.[253] Effective control has been accepted, including in the jurisprudence of the Tribunal, as a standard for the purposes of determining superior responsibility. The *Blaškić* Trial Chamber for instance endorsed the finding of the Trial

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[248] Trial Judgement, para 736.
[249] Trial Judgement, paras 364-378.
[250] Trial Judgement, paras 356-363.
[251] By the end of 1992, 119 States had ratified Additional Protocol I, *International Review of the Red Cross* (1993), No. 293, at p 182.
[252] Trial Judgement, para 371.
[253] Trial Judgement, paras 355-363. *See* also Secretary-General's Report, paras 55-56.

Judgement to this effect.[254] The showing of effective control is required in cases involving both *de jure* and *de facto* superiors. This standard has more recently been reaffirmed in the ICC Statute, Article 28 of which reads in relevant parts:

> In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court;
>
> (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces,
>
> [...]
>
> (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates [...][255]

197. In determining questions of responsibility it is necessary to look to effective exercise of power or control and not to formal titles.[256] This would equally apply in the context of criminal responsibility. In general, the possession of *de jure* power in itself may not suffice for the finding of command responsibility if it does not manifest in effective control, although a court may presume that possession of such power *prima facie* results in effective control unless proof to the contrary is produced. The Appeals Chamber considers that the ability to exercise effective control is necessary for the establishment of *de facto* command or superior responsibility[257] and thus agrees with the Trial Chamber that the absence of formal appointment is not fatal to a finding of criminal responsibility, provided certain conditions are met. Mucić's argument that *de facto* status must be equivalent to *de jure* status for the purposes of superior responsibility is misplaced. Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts. The Appeals Chamber therefore agrees with the Trial Chamber's conclusion:

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[254] *Blaškić* Judgement, paras 300-301 referring to *Čelebići* Trial Judgement, para 378.

[255] *Tadić* Appeal Judgement, para 223, which states that the text of the ICC Statute "may be taken to express the legal position *i.e., opinio juris*" of those States that adopted the Statute, at the time it was adopted. Mucić's reliance on the ICC Statute in support of his arguments is thus not helpful in relation to the determination of the law as it stood at the time of the offences alleged in the Indictment.

[256] In relation to State responsibility *see* ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ Reports, 1971, p 16 at para 118.

[257] At the hearing, Mucić referred with approval to the *Aleksovski* Judgement's finding that "[A]nyone, including a civilian may be held responsible, pursuant to Article 7(3) of the Statute, if it is proved that the individual had effective authority over the perpetrators of the crimes. This authority can be inferred from the accused's ability to give them orders and to punish them in the event of violations." Appeal Transcript, p 238, referring to para 70 of the *Aleksovski* Appeal Judgement, quoting para 103 of the *Aleksovski* Judgement.

> While it is, therefore, the Trial Chamber's conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. *The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates.* A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. *It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their "superiors" within the meaning of Article 7(3) of the Statute.* While the Trial Chamber must at all times be alive to the realities of any given situation and be prepared to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility for heinous acts, *great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.*
>
> Accordingly, it is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, *it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences.* With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.[258]

198. As long as a superior has effective control over subordinates, to the extent that he can prevent them from committing crimes or punish them after they committed the crimes, he would be held responsible for the commission of the crimes if he failed to exercise such abilities of control.[259]

199. The remainder of Mucić's ground of appeal concerns the sufficiency of the evidence regarding the existence of his *de facto* authority. This poses a question of fact, which the Appeals Chamber will now consider.

2. The Trial Chamber's Factual Findings

200. At the appeal hearing, Mucić argued that the Trial Chamber's reliance on the evidence cited in the Trial Judgement in support of the finding that he exercised superior authority was unreasonable. He made a number of arguments which were ultimately directed to his central contention that the evidence was insufficient to support a conclusion that he was a *de facto*

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[258] Trial Judgement, paras 377-378 (emphasis added; footnote omitted). In relation to the case of Delalić, the Trial Chamber further held that a *de facto* position of authority may be sufficient for a finding of criminal responsibility, "provided the exercise of *de facto* authority is accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means the perpetrator of the underlying offence must be the subordinate of the person of higher rank and under his direct or indirect control." Trial Judgement, para 646. The Appeals Chamber does not understand this as a reference to any need for a formal appointment.

[259] The Appeals Chamber thus agrees with the Prosecution that reliance on *de facto* control to establish superior responsibility does not amount to a form of strict liability.

commander for the entire period of time set forth in the Indictment.[260] His submissions particularly emphasised that he had no authority in the camp during the months of May, June, or July of 1992.[261]

201. At the hearing, the Prosecution submitted that it was open to a reasonable Trial Chamber to conclude from the evidence as a whole that Mucić was commander of the Čelebići camp throughout the period referred to in the Indictment.[262] It was argued that Mucić has not shown that the Trial Chamber has been unreasonable in its evaluation of evidence, and that it is a reasonable inference of the Trial Chamber that Mucić wielded a degree of control and authority in the Čelebići camp, drawn from the fact that he had the ability to assist detainees.[263]

3. Discussion

202. In respect of a factual error alleged on appeal, the *Tadić* Appeal Judgement provides the test that:

> 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.[264]

203. In the appeal of *Furundžija*, the Appeals Chamber declined to conduct an independent assessment of the evidence admitted at trial, as requested by the appellants, understood as a request for *de novo* review, and took the view that "[t]his Chamber does not operate as a second Trial Chamber."[265]

204. In paragraphs 737-767 of the Trial Judgement, a thorough analysis of evidence led the Trial Chamber to conclude that Mucić "had all the powers of a commander" in the camp.[266] The conclusion was also based on Mucić's own admission that he had "necessary disciplinary powers".[267] Mucić, who disputes this conclusion on appeal, must persuade the Appeals Chamber that the conclusion is one which could not have reasonably been made by a reasonable tribunal of fact, so that a miscarriage of justice has occurred.[268]

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[260] Appeal Transcript, p 236.
[261] Appeal Transcript, pp 236-237. Counsel for the appellant referred to the testimony of a number of witnesses in support of his contention.
[262] Appeal Transcript, p 314.
[263] Prosecution Response, Section 10, pp 61-63.
[264] *Tadić* Appeal Judgement, para 64. *See* also *Aleksovski* Appeal Judgement, para 63.
[265] *Furundžija* Appeal Judgement, paras 38 and 40.
[266] Trial Judgement, para 767.
[267] *Ibid.*
[268] *See* also paras 434 and 435 *infra*.

205. The Appeals Chamber notes that Mucić argued at trial to the effect that, in the absence of any document formally appointing him to the position of commander or warden of the camp, it was not shown what authority he had over the camp personnel.[269] On appeal, he repeats this argument,[270] and reiterates some of his objections made at trial in respect of the Prosecution evidence which was accepted by the Trial Chamber as showing that he had *de facto* authority in the camp in the period alleged in the Indictment.[271]

206. Having concluded that "the actual exercise of authority in the absence of a formal appointment is sufficient for the purpose of incurring criminal responsibility" provided that the *de facto* superior exercises actual powers of control,[272] the Trial Chamber considered the argument of Mucić that he had no "formal authority".[273] It looked at the following factors to establish that Mucić had *de facto* authority: Mucić's acknowledgement of his having authority over the Čelebići camp since 27 July 1992,[274] the submission in the defence closing brief that Mucić used his "limited" authority to prevent crimes and to order that the detainees not be mistreated and that the offenders tried to conceal offences from him,[275] the defence statement that when Mucić was at the camp, there was "far greater" discipline than when he was absent,[276] the evidence that co-defendant Delić told the detainees that Mucić was commander,[277] the evidence that he arranged for the transfer of detainees,[278] his classifying of detainees for the purpose of continued detention or release,[279] his control of guards,[280] and the evidence that he had the authority to release prisoners.[281] At trial, the Trial Chamber accepted this body of evidence. The Appeals Chamber considers that it has not been shown that the Trial Chamber erred in accepting the evidence which led to the finding that Mucić was commander of the camp and as such exercised command responsibility.

207. Mucić argues that the Trial Chamber failed to explain on what date he became commander of the camp. The Trial Chamber found:

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[269] Trial Judgement, para 731.
[270] Appeal Transcript, pp 239-241.
[271] Appeal Transcript pp 242-249.
[272] Trial Judgement, para 736.
[273] *Ibid*, para 741.
[274] *Ibid*, para 737.
[275] *Ibid*, para 740.
[276] *Ibid*, para 743.
[277] *Ibid*, para 746.
[278] *Ibid*, para 747.
[279] *Ibid*, para 748.
[280] *Ibid*, paras 765-66.
[281] *Ibid*, para 764.

> The Defence is not disputing that there is a considerable body of evidence [...] that Zdravko Mucić was the acknowledged commander of the prison-camp. Instead, the Defence submits that the Prosecution has to provide evidence which proves beyond a reasonable doubt the dates during which Mucić is alleged to have exercised authority in the Čelebići prison-camp [...]. The Trial Chamber agrees that the Prosecution has the burden of proving that Mucić was the commander of the Čelebići prison-camp and that the standard of proof in this respect is beyond reasonable doubt. However, the issue of the actual date on which Mucić became a commander is not a necessary element in the discharge of this burden of proof. Instead, the issue is whether he was, during the relevant period as set forth in the Indictment, the commander of the prison-camp.[282]

208. The Appeals Chamber can see no reason why the Trial Chamber's conclusion that it was unnecessary to make a finding as to the exact date of his appointment – as opposed to his status during the relevant period – was unreasonable.

209. Mucić claims that he had no authority of whatever nature during the months of May, June and July of 1992. The Indictment defined the relevant period in which Mucić was commander of the camp to be "from approximately May 1992 to November 1992". The offences of subordinates upon which the relevant charges against Mucić were based took place during that period. The Appeals Chamber notes that the Trial Judgement considered the objection of Mucić to the evidence which was adduced to show that he was present in the camp in May 1992.[283] The objection was made through the presentation of defence evidence, which was rejected by the Trial Chamber as being inconclusive.[284] On this point, the Appeals Chamber observes that Mucić did not challenge the testimony of certain witnesses which was adduced to show that Mucić was not only present in the camp but in a position of authority in the months of May, June and July of 1992. Reference is made to the evidence given by Witness D, who was a member of the Military Investigative Commission in the camp and worked closely with Mucić in the classification of the detainees.[285] The Trial Chamber was "completely satisfied" with this evidence.[286] The witness testified that Mucić was present at the meeting of the Military Investigative Commission held in early June 1992 to discuss the classification and continued detention or release of the detainees.[287] It is also noteworthy that, in relation to a finding in the case of Delić, it was found that the Military Investigative Commission only conducted interviews with detainees after informing Mucić, or Delić when the former was absent, and that only Mucić and Delić had access to the files of the Commission.[288] Further, Mucić conceded in his interview with the Prosecution that he went to the camp as early as 20

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[282] *Ibid*, para 745.
[283] *Ibid*, para 754.
[284] *Ibid*, para 754.
[285] *Ibid*, para 748.
[286] *Ibid*, para 762.
[287] *Ibid*, para 748.
[288] *Ibid*, para 807.

May 1992.[289] Moreover, Grozdana Ćećez, a former detainee at the camp, was interrogated by Mucić in late May or early June 1992.[290] The Appeals Chamber is satisfied that the evidence relied upon by the Trial Chamber constitutes adequate support for its findings.

210. The Appeals Chamber is satisfied that it was open to the Trial Chamber to find that from "before the end of May 1992" Mucić was exercising *de facto* authority over the camp and its personnel.[291]

211. In addition, Mucić submitted:[292]

> (i) The Trial Chamber failed to consider the causal implications of the acquittal of the co-defendant Delalić from whom the Prosecution alleged Mucić obtained his necessary authority; and
>
> (ii) The Trial Chamber gave wrongful and/or undue weight to the acts of benefice [*sic*] attributed to Mucić at, *inter alia*, paragraph 1247 of the Trial Judgement, to found command responsibility, instead of treating them as acts of compassion coupled with the strength of personal character which constitute some other species of authority.[293]

212. The first argument appears to be based on an assumption that Mucić's authority rested in some formal way on that of Delalić. This argument has no merit. It is clear that the Trial Chamber found that, regardless of the way Mucić was appointed, he in fact exercised *de facto* authority, irrespective of Delalić's role in relation to the camp.

213. The second point lacks merit in that the acts related to in paragraph 1247 of the Trial Judgement were considered by the Trial Chamber for the purpose of sentencing, rather than conviction; and that acts beneficial to detainees done by Mucić referred to by the Trial Chamber may reasonably be regarded as strengthening its view that Mucić was in a position of authority to effect "greater discipline" in the camp than when he was absent.[294] Although potentially compassionate in nature, these acts are nevertheless evidence of the powers which Mucić exercised and thus of his authority.

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[289] *Ibid*, para 737.
[290] *Ibid*, para 747.
[291] *Ibid*, para 761.
[292] Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić dated the 2nd July 1999, 26 July 1999, Registry page 1799. This document serves to clarify section 3 of the Mucić Brief.
[293] Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić dated the 2nd July 1999, 26 July 1999, Registry page 1799.
[294] Trial Judgement, para 743.

4. Conclusion

214. For the foregoing reasons, the Appeals Chamber dismisses this ground of appeal and upholds the finding of the Trial Chamber that Mucić was the *de facto* commander of the Čelebići camp during the relevant period indicated in the Indictment.

B. The Prosecution Grounds of Appeal

215. The Prosecution has filed three grounds of appeal relating to command responsibility.[295]

1. Mental Element – "Knew or had Reason to Know"

216. The Prosecution's first ground of appeal is that the Trial Chamber has erred in law by its interpretation of the standard of "knew or had reason to know" as laid down in Article 7(3) of the Statute.[296]

217. Delalić argues that the Trial Chamber's interpretation of "had reason to know" is *obiter dicta* and does not affect the finding concerning Delalić that he never had a superior-subordinate relationship with Delić, Mucić, and Landžo.[297] He submits that the Trial Chamber did not determine the matter of the mental element of command responsibility in terms of customary law. The ground should therefore not be considered. He argues that if the Appeals Chamber proceeds to deal with this ground, Delalić will agree with the interpretation given by the Trial Chamber in this regard.[298]

218. Acknowledging Delalić's submission, the Prosecution asks the Appeals Chamber to deal with the mental element as a matter of general significance to the Tribunal's jurisprudence.[299] The Trial Chamber, it contends, determined the matter in terms of the customary law applicable at the time of the offences.[300] The Prosecution does not argue for a mental standard based on strict liability.[301]

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[295] Ground one: "The Trial Chamber erred in paragraphs 379-393 when it defined the mental element 'knew or had reasons to know' for the purposes of Superior Responsibility";
Ground two: "The Trial Chamber's finding that Zejnil Delalić did not exercise superior responsibility";
Ground five: "The Trial Chamber erred when it decided in paragraphs 776–810 that Hazim Delić was not a 'superior' in the Čelebići Prison Camp for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute".
[296] Prosecution Brief, para 2.7.
[297] Delalić Response, p 155. Appeal Transcript, p 257.
[298] Delalić Response, p 156.
[299] Prosecution Reply, para 2.3.
[300] *Ibid*, para 2.5.
[301] *Ibid*, para 2.6.

219. Delić agrees with the Prosecution's position that Articles 86 and 87 of Additional Protocol I reflect customary law as established through the post Second World War cases. A commander has a duty to be informed, but not every failure in this duty gives rise to command responsibility.[302]

220. The issues raised by this ground of appeal of the Prosecution include:

(i) whether in international law, the duty of a superior to control his subordinates includes a duty to be apprised of their action, i.e. a duty to know of their action and whether neglect of such duty will always result in criminal liability;

(ii) whether the standard of "had reason to know" means either the commander had information indicating that subordinates were about to commit or had committed offences or he did not have this information due to dereliction of his duty; and

(iii) whether international law acknowledges any distinction between military and civil leaders in relation to the duty to be informed.

221. The Appeals Chamber takes note of the fact that this ground of appeal is raised by the Prosecution for its general importance to the "jurisprudence of the Tribunal".[303] Considering that this ground concerns an important element of command responsibility, that the Prosecution alleges an error on the part of the Trial Chamber in respect of a finding as to the applicable law,[304] that the parties have made extensive submissions on it, and that it is indeed an issue of general importance to the proceedings before the Tribunal,[305] the Appeals Chamber will consider it by reference to Article 7(3) of the Statute and customary law at the time of the offences alleged in the Indictment.[306]

(i) The Mental Element Articulated by the Statute

222. Article 7(3) of the Statute provides that a superior may incur criminal responsibility for criminal acts of subordinates "if he knew or had reason to know that the subordinate was about to commit such acts or had done so" but fails to prevent such acts or punish those subordinates.

223. The Trial Chamber held that a superior:

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[302] Delić Response, para 212.
[303] Prosecution Reply, para 2.3; Appeal Transcript pp 147-148.
[304] Trial Judgement, para 393.
[305] *See Tadić* Appeal Judgement, paras 247 and 281.
[306] Secretary-General's Report, para 34.

> [...] may possess the *mens rea* for command responsibility where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Articles 2 through 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[307]

224. The Prosecution position is essentially that the reference to "had reason to know" in Article 7(3) of the Statute, refers to two possible situations. First, a superior had information which put him on notice or which suggested to him that subordinates were about to commit or had committed crimes. Secondly, a superior lacked such information as a result of a serious dereliction of his duty to obtain the information within his reasonable access.[308] As acknowledged by the Prosecution, only the second situation is not encompassed by the Trial Chamber's findings.[309] Delalić argues to the effect that the Trial Chamber was correct in its statement of the law in this regard, and that the second situation envisaged by the Prosecution was in effect an argument based on strict liability.[310] Delić agrees with the Prosecution's assessment of customary law that "the commander has an international duty to be informed", but argues that the Statute was designed by the UN Security Council in such a way that the jurisdiction of the Tribunal was limited to cases where the commander had actual knowledge or such knowledge that it gave him reason to know of subordinate offences, which was a rule inconsistent with customary law laid down in the military trials conducted after the Second World War.[311]

225. The literal meaning of Article 7(3) is not difficult to ascertain. A commander may be held criminally liable in respect of the acts of his subordinates in violation of Articles 2 to 5 of the Statute. Both the subordinates and the commander are individually responsible in relation to the impugned acts. The commander would be tried for failure to act in respect of the offences of his subordinates in the perpetration of which he did not directly participate.

226. Article 7(3) of the Statute is concerned with superior liability arising from failure to act in spite of knowledge. Neglect of a duty to acquire such knowledge, however, does not feature in the provision as a separate offence, and a superior is not therefore liable under the provision for such failures but only for failing to take necessary and reasonable measures to prevent or to punish. The Appeals Chamber takes it that the Prosecution seeks a finding that "reason to

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[307] Trial Judgement, para 383.
[308] Prosecution Brief, para 2.7; Appeal Transcript p 121.
[309] Appeal Transcript, p 121.
[310] Delalić Response, p 157.
[311] Delić Response, para 215.

know" exists on the part of a commander if the latter is seriously negligent in his duty to obtain the relevant information. The point here should not be that knowledge may be presumed if a person fails in his *duty* to obtain the relevant information of a crime, but that it may be presumed if he had the *means* to obtain the knowledge but deliberately refrained from doing so. The Prosecution's argument that a breach of the duty of a superior to remain constantly informed of his subordinates actions will necessarily result in *criminal* liability comes close to the imposition of criminal liability on a strict or negligence basis. It is however noted that although a commander's failure to remain apprised of his subordinates' action, or to set up a monitoring system may constitute a neglect of duty which results in liability within the military disciplinary framework, it will not necessarily result in criminal liability.

227. As the Tribunal is charged with the application of customary law,[312] the Appeals Chamber will briefly consider the case-law in relation to whether there is a duty in customary law to know of all subordinate activity, breach of which will give rise to criminal responsibility in the context of command or superior responsibility.

(ii) Duty to Know In Customary Law

228. In the *Yamashita* case, the United States Military Commission found that:

> Clearly, assignment to command military troops is accompanied by broad authority and heavy responsibility [...]. It is absurd, however, to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[313]

The Military Commission concluded that proof of widespread offences, and secondly of the failure of the commander to act in spite of the offences, may give rise to liability. The second factor suggests that the commander needs to discover and control. But it is the first factor that is of primary importance, in that it gives the commander a reason or a basis to discover the scope of the offences. In the *Yamashita* case, the fact stood out that the atrocities took place between 9 October 1944 to 3 September 1945, during which General Yamashita was the commander-in-chief of the 14th Army Group including the Military Police.[314] This length of time begs the question as to how the commander and his staff could be ignorant of large-scale atrocities spreading over this long period. The statement of the commission implied that it had

[312] Secretary–General's Report, para 34.
[313] Law Reports of Trials of War Criminals, Vol IV, p 35.
[314] *Ibid*, p 19.

found that the circumstances demonstrated that he had enough notice of the atrocities to require him to proceed to investigate further and control the offences. The fact that widespread offences were committed over a long period of time should have put him on notice that crimes were being or had been committed by his subordinates.

229. On the same case, the United Nations War Crimes Commission commented:

> [...] the crimes which were shown to have been committed by Yamashita's troops were so widespread, both in space and in time, that they could be regarded as providing either prima facie evidence that the accused *knew* of their perpetration, or evidence that he must have failed to fulfil a duty to *discover* the standard of conduct of his troops. [315]

This last sentence deserves attention. However, having considered several cases decided by other military tribunals, it went on to qualify the above statement:

> Short of maintaining that a Commander has a duty to *discover* the state of discipline prevailing among his troops, Courts dealing with cases such as those at present under discussion may in suitable instances have regarded *means of knowledge* as being the same as knowledge itself.[316]

In summary, it pointedly stated that "the law on this point awaits further elucidation and consolidation".[317] Contrary to the Trial Chamber's conclusion, other cases discussed in the Judgement do not show a consistent trend in the decisions that emerged out of the military trials conducted after the Second World War.[318] The citation from the Judgement in the case of *United States v Wilhelm List*[319] ("*Hostage case*") indicates that List failed to acquire "supplementary reports to apprise him of all the pertinent facts".[320] The tribunal in the case found that if a commander of occupied territory "fails to require and obtain *complete* information" he is guilty of a dereliction of his duty.[321] List was found to be charged with notice of the relevant crimes because of reports which had been made to him.[322] Therefore, List had in his possession information that should have prompted him to investigate further the situation under his command. The Trial Chamber also quoted from the *Pohl* case.[323] The phrase quoted is also meant to state a different point than that suggested by the Trial Chamber. In that case, the accused Mummenthey pleaded ignorance of fact in respect of certain aspects of the running

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[315] *Ibid*, p 94.
[316] *Ibid*, p 94.
[317] *Ibid*, p 95.
[318] The Trial Chamber held that "the jurisprudence from the period immediately following the Second World War affirmed the existence of a duty of commanders to remain informed about the activities of their subordinates." Trial Judgement, para 388.
[319] *United States v Wilhelm List et al,* Vol XI, TWC, 1230.
[320] *Ibid*, p 1271, cited in Trial Judgement, para 389.
[321] *Ibid* (emphasis added).
[322] *United States v Wilhelm List et al,* Vol XI, TWC, at pp 1271-1272.
[323] Trial Judgement, para 389.

of his business which employed concentration camp prisoners.[324] Having refuted this plea by invoking evidence showing that the accused knew fully of those aspects, the tribunal stated:

> Mummenthey's assertions that he did not know what was happening in the labor camps and enterprises under his jurisdiction does not exonerate him. It was his duty to know.[325]

That statement, when read in the context of that part of the judgement, means that the accused was under a duty arising from his position as an SS officer and business manager in charge of a war-time enterprise to know what was happening in his business, including the conditions of the labour force who worked in that business. Any suggestion that the tribunal used that statement to express that the accused had a duty under international law to know would be *obiter* in light of the finding that he had knowledge. In the *Roechling* case, which was also referred to by the Trial Chamber, the court concluded that Roechling had a "duty to keep himself informed about the treatment of the deportees."[326] However, it also noted that "Roechling [...] had repeated opportunities during the inspection of his concerns to ascertain the fate meted out to his personnel, since he could not fail to notice the prisoner's uniform on those occasions".[327] This was information which would put him on notice. It is to be noted that the courts which referred to the existence of a "duty to know" at the same time found that the accused were put on notice of subordinates' acts.

230. Further, the Field Manual of the US Department of Army 1956 (No. 27-10, Law of Land Warfare) provides:

> The commander is...responsible, if he had actual knowledge, or *should have had knowledge, through reports received by him or through other means*, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to use the means at his disposal to insure compliance with the law of war.[328]

The italicised clause is clear that the commander should be presumed to have had knowledge if he had reports or other means of communication; in other words, he *had already information* as contained in reports or through other means, which put him on notice. On the basis of this analysis, the Appeals Chamber must conclude, in the same way as did the United Nations War Crimes Commission,[329] that the then customary law did not impose in the criminal context a general duty to know upon commanders or superiors, breach of which would be sufficient to render him responsible for subordinates' crimes.

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[324] *United States v Oswald Pohl et al.*, TWC, Vol. V, p 1055.
[325] *Ibid.*
[326] TWC, Vol XIV, Appendix B, p 1136.
[327] TWC, Vol XIV, Appendix B, p 1136-37.
[328] Emphasis added.
[329] Law Reports of Trials of War Criminals, Vol IV, p 94.

231. The anticipated elucidation and consolidation of the law on the question as to whether there was a duty under customary law for the commander to obtain the necessary information came with Additional Protocol I. Article 86(2) of the protocol provides:

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or *had information which should have enabled them to conclude in the circumstances at the time*, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.[330]

232. The phrase, "had reason to know", is not as clear in meaning as that of "had information enabling them to conclude", although it may be taken as effectively having a similar meaning. The latter standard is more explicit, and its rationale is plain: failure to conclude, or conduct additional inquiry, in spite of alarming information constitutes knowledge of subordinate offences. Failure to act when required to act with such knowledge is the basis for attributing liability in this category of case.

233. The phrase "had information", as used in Article 86(2) of Additional Protocol I, presents little difficulty for interpretation. It means that, at the critical time, the commander had in his possession such information that should have put him on notice of the fact that an unlawful act was being, or about to be, committed by a subordinate. As observed by the Trial Chamber, the apparent discrepancy between the French version, which reads *"des informations leur permettant de conclure"* (literally: information enabling them to conclude), and the English version of Article 86(2) does not undermine this interpretation.[331] This is a reference to information, which, if at hand, would oblige the commander to obtain *more* information (i.e. conduct further inquiry), and he therefore "had reason to know".

234. As noted by the Trial Chamber, the formulation of the principle of superior responsibility in the ILC Draft Code is very similar to that in Article 7(3) of the Statute.[332] Further, as the ILC comments on the draft articles drew from existing practice, they deserve close attention.[333] The ILC comments on the *mens rea* for command responsibility run as follows:

> Article 6 provides two criteria for determining whether a superior is to be held criminally responsible for the wrongful conduct of a subordinate. First, a superior must have known or

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[330] Emphasis added.

[331] Trial Judgement, para 392. The two commentaries on Additional Protocol I appear to agree that the French text, which is broader, should be preferred. *See* Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, Michael Bothe, Karl Joseph Partsch, Waldemar A Solf, (Martinus Nijhoff: The Hague 1982), pp 525-526; ICRC Commentary para 3545.

[332] Trial Judgement, para 342.

[333] ILC Report, pp 34 ff.

> had reason to know *in the circumstances at the time* that a subordinate was committing or was going to commit a crime. This criterion indicates that a superior may have the *mens rea* required to incur criminal responsibility in two different situations. In the first situation, a superior has actual knowledge that his subordinate is committing or is about to commit a crime...In the second situation, he has *sufficient relevant information to enable him to conclude under the circumstances at the time* that his subordinates are committing or are about to commit a crime.[334]

The ILC further explains that "[t]he phrase 'had reason to know' is taken from the statutes of the ad hoc tribunals and should be understood as having the same meaning as the phrase 'had information enabling them to conclude' which is used in the Additional Protocol I. The Commission decided to use the former phrase to ensure an objective rather than a subjective interpretation of this element of the first criterion."[335]

235. The consistency in the language used by Article 86(2) of Additional Protocol I, and the ILC Report and the attendant commentary, is evidence of a consensus as to the standard of the *mens rea* of command responsibility. If "had reason to know" is interpreted to mean that a commander has a duty to inquire further, on the basis of information of a general nature he has in hand, there is no material difference between the standard of Article 86(2) of Additional Protocol I and the standard of "should have known" as upheld by certain cases decided after the Second World War.[336]

236. After surveying customary law and especially the drafting history of Article 86 of Additional Protocol I,[337] the Trial Chamber concluded that:

> An interpretation of the terms of this provision [Article 86 of Additional Protocol I] in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the *travaux préparatoires*, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3). The Trial Chamber thus makes no finding as to the present content of customary law on this point.[338]

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[334] *Ibid*, pp 37-38 (emphasis added).

[335] *Ibid*, p 38. Article 28(a) of the ICC Statute provides for the responsibility of a military commander or a person effectively acting as a military commander. To establish the responsibility, proof is required that the commander or person "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes".

[336] Trial Judgement, para 389, where the trial of Admiral Toyoda was cited. Also, the *Tokyo Trial* Judgement, International Military Tribunal for the Far East (29 April 1946-12 November 1948), Vol.1, p 30, cited in the Prosecution Brief, para 2.9.

[337] The Trial Chamber, in particular, correctly observed to the effect that an overly broad "should have known" standard was rejected at the conference which adopted Additional Protocol I. Trial Judgement, para 391.

[338] *Ibid*, para 393.

237. The Prosecution contends that the Trial Chamber relied improperly upon reference to the object and purpose of Additional Protocol I.[339] The ordinary meaning of the language of Article 86(2) regarding the knowledge element of command responsibility is clear. Though adding little to the interpretation of the language of the provision, the context of the provision as provided by Additional Protocol I simply confirms an interpretation based on the natural meaning of its provisions. Article 87 requires parties to a conflict to impose certain duties on commanders, including the duty in Article 87(3) to "initiate disciplinary or penal action" against subordinates or other persons under their control who have committed a breach of the Geneva Conventions or of the Protocol. That duty is limited by the terms of Article 87(3) to circumstances where the commander "is aware" that his subordinates are going to commit or have committed such breaches. Article 87 therefore interprets Article 86(2) as far as the duties of the commander or superior are concerned, but the criminal offence based on command responsibility is defined in Article 86(2) only.

238. Contrary to the Prosecution's submission, the Trial Chamber did not hold that a superior needs to have information on subordinate offences in his actual possession for the purpose of ascribing criminal liability under the principle of command responsibility. A showing that a superior had some general information in his possession, which would put him on notice of possible unlawful acts by his subordinates would be sufficient to prove that he "had reason to know". The ICRC Commentary (Additional Protocol I) refers to "reports addressed to (the superior), [...] the tactical situation, the level of training and instruction of subordinate officers and their troops, and their character traits" as potentially constituting the information referred to in Article 86(2) of Additional Protocol I.[340] As to the form of the information available to him, it may be written or oral, and does not need to have the form of specific reports submitted pursuant to a monitoring system. This information does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.

239. Finally, the relevant information only needs to have been provided or available to the superior, or in the Trial Chamber's words, "in the possession of". It is not required that he actually acquainted himself with the information. In the Appeals Chamber's view, an

[339] *See* Prosecution argument in Prosecution Brief, paras 2.15-2.19. Reference is made to Article 31 of the Vienna Convention on the Law of Treaties of 1969.
[340] ICRC Commentary (Additional Protocol I), para 3545.

assessment of the mental element required by Article 7(3) of the Statute should be conducted in the specific circumstances of each case, taking into account the specific situation of the superior concerned at the time in question. Thus, as correctly held by the Trial Chamber,[341] as the element of knowledge has to be proved in this type of cases, command responsibility is not a form of strict liability. A superior may only be held liable for the acts of his subordinates if it is shown that he "knew or had reason to know" about them. The Appeals Chamber would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of *strict* imputed liability.

(iii) Civilian Superiors

240. The Prosecution submits that civilian superiors are under the same duty to know as military commanders.[342] If, as found by the Appeals Chamber, there is no such "duty" to know in customary law as far as military commanders are concerned, this submission lacks the necessary premise. Civilian superiors undoubtedly bear responsibility for subordinate offences under certain conditions, but whether their responsibility contains identical elements to that of military commanders is not clear in customary law. As the Trial Chamber made a factual determination that Delalić was not in a position of superior authority over the Čelebići camp in any capacity, there is no need for the Appeals Chamber to resolve this question.

(iv) Conclusion

241. For the foregoing reasons, this ground of appeal is dismissed. The Appeals Chamber upholds the interpretation given by the Trial Chamber to the standard "had reason to know", that is, a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates.[343] This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment.

2. Whether Delalić Exercised Superior Responsibility

242. The Prosecution's second ground of appeal alleges an error of law in the Trial Chamber's interpretation of the nature of the superior-subordinate relationship which must be established to prove liability under Article 7(3) of the Statute. The Prosecution contends that the Trial Chamber wrongly "held that the doctrine of superior responsibility requires the

[341] Trial Judgement, para 383.
[342] Prosecution Brief, para 2.11.

perpetrator to be part of a subordinate unit in a direct chain of command under the superior."[344] This legal error, it is said, led to the erroneous finding that Delalić did not exercise superior responsibility over the Čelebići camp and thus was not responsible for the offences of the camp staff.[345]

243. The Prosecution argues that, contrary to the finding of the Trial Chamber, the doctrine of command responsibility does not require the existence of a direct chain of command under the superior, and that other forms of *de jure* and *de facto* control, including forms of influence, may suffice for ascribing liability under the doctrine.[346] The criterion for superior responsibility is actual control, which entails the ability to prevent violations, rather than direct subordination.[347] Delalić was in a special position in that the facts found by the Trial Chamber established that he "act[ed] on behalf of the War Presidency, he act[ed] on behalf of the supreme command in Sarajevo, he act[ed] on behalf of the investigating commission with respect to prisoners, he issued orders with respect to the functioning of the Čelebići prison".[348] It concludes that, as the Trial Chamber found him to have knowledge of the ill-treatment in the camp,[349] and yet failed to prevent or punish the violations,[350] the Appeals Chamber may substitute verdicts of guilty on those counts under which command responsibility was charged.[351]

244. The Prosecution submits that, if the Appeals Chamber applies the correct test to all of the facts found by the Trial Chamber, the *only* conclusion it could reach is that Delalić was a superior and was guilty of the crimes charged, which would permit it to reverse the verdict of acquittal.[352] If the Appeals Chamber finds that the facts found by the Trial Chamber do not permit it to reach that conclusion, it should remit the case to a newly constituted Trial Chamber to determine the relevant counts.[353]

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[343] Trial Judgement, para 393.
[344] Prosecution Brief, para 3.6.
[345] *Ibid,* para 3.6.
[346] *Ibid*, paras 3.17, 3.22.
[347] *Ibid*, para 3.27.
[348] Appeal Transcript, p 163; Prosecution Brief, para 3.36.
[349] Prosecution Brief, para 3.60.
[350] *Ibid*, para 3.66.
[351] Counts 13, 14, 33-35, 38, 39, 44, 45, 46, 47 and 48. *Ibid*, para 3.79.
[352] Appeal Transcript, p 165; *See* also Appeal Transcript at pp 156-158, noting the decisions in the *Tadić* Appeal Judgement and *Aleksovski* Appeal Judgement dealing with the Appeals Chambers powers to intervene on factual matters.
[353] Appeal Transcript, p 166.

245. In the alternative, the Prosecution requests leave to be granted to present additional evidence which had been "wrongly excluded by the Trial Chamber", being evidence that it sought to call in rebuttal.[354] The documentary evidence which had not been admitted was annexed to the Prosecution Brief. The submission in relation to admission of wrongfully excluded evidence as expressed in the Prosecution Brief initially suggested that this course was proposed as an alternative *remedy* which would fall for consideration only should the Appeals Chamber accept the argument that the Trial Chamber made an error of law in its statement of the nature of the superior-subordinate relationship.[355] However, it was also stated that the Prosecution alleges that the Trial Chamber's exclusion of the evidence constituted a distinct error of law, and in subsequent written and oral submissions it was made apparent that, although not expressed as a separate ground of appeal, the submissions as to erroneous exclusion of evidence constitute an independent basis for challenging the Trial Chamber's finding that Delalić was not a superior.[356] As Delalić in fact answered this Prosecution argument, no prejudice will result if the Appeals Chamber deals with this alternative submission as an independent allegation of error of law.

246. Delalić contends that in any event the evidence of the position of Delalić in relation to the Čelebići camp demonstrates that he had no superior authority there,[357] and that the Prosecution's theory of "influence responsibility" is not supported by customary law.[358] He argues that a revision of the judgement by the Appeals Chamber can only concern errors of law, and that, where there is a mix of factual and legal errors, the appropriate remedy is that a new trial be ordered.[359] Delalić submits that the Trial Chamber was correct in refusing the to allow the proposed Prosecution witnesses to testify as rebuttal witnesses and in rejecting the Prosecution motion to re-open the proceedings.[360]

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[354] Prosecution Brief, para 3.80.

[355] *Ibid*, para 3.80: "In the alternative, should the Appeals Chamber determine that the facts as found by the Trial Chamber are not of themselves sufficient to support a reversal of the acquittals of Delalić, the Prosecution submits that it should be granted leave by the Appeals Chamber to present additional evidence that was wrongly excluded by the Trial Chamber." Cf para 3.84: "[...] the Prosecution now seeks an appellate remedy against these decisions of the Trial Chamber [not to admit the evidence]".

[356] Prosecution Reply, para 3.16; para 3.23; Appeal Transcript p 16: "The issue is an issue of error of law. The issue is whether or not the Trial Chamber applied the correct test for the admission of fresh or rebuttal evidence. If they applied the incorrect test and it's an error of law, then the Trial Chamber erred" and at p 171, where the Prosecution agreed that their submission was "[...] that there was an error of law, the documents which are attached to the submissions will demonstrate that it was an error of law which caused harm to the Prosecution's case, and therefore, you want a new trial."

[357] Appeal Transcript, pp 30-97.

[358] Delalić Response, pp 119, 122.

[359] Delalić Response, pp 9-10.

[360] Delalić Response, p 129.

247. The Prosecution's argument relating to the Trial Chamber's findings as to the nature of the superior-subordinate relationship is considered first before turning to the second argument relating to the exclusion of evidence which was sought to be admitted as rebuttal or fresh evidence.

(i) The Superior-Subordinate Relationship in the Doctrine of Command Responsibility

248. The Prosecution interprets the Trial Chamber to have held that, in cases involving command or superior responsibility, the perpetrator must be "part of a subordinate unit in a direct chain of command under the superior" for the superior to be held responsible.[361] The Prosecution submissions do not refer to any specific express statement of the Trial Chamber to this effect but appear to consider that this was the overall effect of the Trial Chamber's findings. The Prosecution first refers to, and apparently accepts, the finding of the Trial Chamber that:

> [...] in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences [...] such authority can have a *de facto* or *de jure* character.[362]

249. The Prosecution then refers to certain subsequent conclusions of the Trial Chamber which it apparently regards as supporting its interpretation that the Trial Chamber held that the doctrine of superior responsibility requires the perpetrator to be part of a subordinate unit in a direct chain of command under the superior. First, the Prosecution refers to the Trial Chamber's statement that, in the case of the exercise of *de facto* authority, it must be

> [...] accompanied by the trappings of the exercise of *de jure* authority. By this, the Trial Chamber means that the perpetrator of the underlying offence must be the subordinate of the person of higher rank *and under his direct or indirect control.*[363]

The section of the judgement cited and relied upon in the Prosecution Brief, however, omits the italicised portion of the passage. This qualification expressly conveys the Trial Chamber's view that the relationship of subordination required by the doctrine of command responsibility may be direct *or indirect.*

250. The Trial Chamber also referred to the ICRC Commentary (Additional Protocols), where it is stated that the superior-subordinate relationship should be seen "in terms of a

[361] Prosecution Brief, para 3.6.
[362] Trial Judgement, para 378, cited in Prosecution Brief at para 3.2.
[363] Trial Judgement, para 646, cited in Prosecution Brief at para 3.3.

hierarchy encompassing the concept of control".[364] Noting that Article 87 of Additional Protocol I establishes that the duty of a military commander to prevent violations of the Geneva Conventions extends not only to his subordinates but also to "other persons under his control", the Trial Chamber stated that:

> This type of superior-subordinate relationship is described in the Commentary to the Additional Protocols by reference to the concept of "indirect subordination", in contrast to the link of "direct subordination" which is said to relate the tactical commander to his troops.[365]

251. Two points are clear from the Trial Chamber's consideration of the issue. First, the Trial Chamber found that a *de facto* position of authority suffices for the purpose of ascribing command responsibility. Secondly, it found that the superior-subordinate relationship is based on the notion of control within a hierarchy and that this control can be exercised in a direct or indirect manner, with the result that the superior-subordinate relationship itself may be both direct and indirect. Neither these findings, nor anything else expressed within the Trial Judgement, demonstrates that the Trial Chamber considered that, for the necessary superior-subordinate relationship to exist, the perpetrator must be in a *direct* chain of command under the superior.

252. Examining the actual findings of the Trial Chamber on the issue, it is therefore far from apparent that it found that the doctrine of superior responsibility requires the perpetrator to be part of a subordinate unit in a *direct* chain of command under the superior; nor is such a result a necessary implication of its findings. This seems to have been implicitly recognised by the Prosecution in its oral submissions on this ground of appeal at the hearing.[366] The Appeals Chamber regards the Trial Chamber as having recognised the possibility of both indirect as well as direct relationships subordination and agrees that this may be the case, with the proviso that effective control must always be established.

253. However, the argument of the Prosecution goes further than challenging the perceived requirement of *direct* subordination. The key focus of the Prosecution argument appears to be the Trial Chamber's rejection of the Prosecution theory that persons who can exert "substantial influence" over a perpetrator who is not necessarily a subordinate may, by virtue of that influence, be held responsible under the principles of command responsibility.[367] The

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[364] Trial Judgement, para 354, quoting from the ICRC Commentary (Additional Protocols), para 3544.
[365] Trial Judgement, para 371.
[366] The Prosecution submitted that the Trial Chamber "*appeared* to focus on the necessity of a chain of command. It *appeared to focus* on the necessity of that there has to be a command structure..." and referred to "...the Trial Chamber's reliance on the need for a chain of command, and specifically some – *what appears to be* some direct link or direct chain of command ...", Appeal Transcript, pp 152 and 153.
[367] *See* Trial Judgement, para 648.

Prosecution does not argue that *anyone* of influence may be held responsible in the context of superior responsibility, but that a superior encompasses someone who "may exercise a substantial degree of influence over the perpetrator or over the entity to which the perpetrator belongs."[368]

254. The Trial Chamber understood the Prosecution at trial to be seeking "to extend the concept of the exercise of superior authority to persons over whom the accused can exert substantial influence in a given situation, who are clearly not subordinates",[369] which is essentially the approach taken by the Prosecution on appeal. The Trial Chamber also rejected the idea, which it apparently regarded as being implicit in the Prosecution view, that a superior-subordinate relationship could exist in the absence of a subordinate:

> The view of the Prosecution that a person may, in the absence of a subordinate unit through which authority is exercised, incur responsibility for the exercise of a superior authority seems to the Trial Chamber a novel proposition clearly at variance with the principle of command responsibility. The law does not know of a universal superior without a corresponding subordinate. The doctrine of command responsibility is clearly articulated and anchored on the relationship between superior and subordinate, and the responsibility of the commander for actions of members of his troops. It is a species of vicarious responsibility through which military discipline is regulated and ensured. This is why a subordinate unit of the superior or commander is a *sine qua non* for superior responsibility.[370]

The Trial Chamber thus unambiguously required that the perpetrator be subordinated to the superior. While it referred to hierarchy and chain of command, it was clear that it took a wide view of these concepts:

> The requirement of the existence of a "superior-subordinate relationship" which, in the words of the Commentary to Additional Protocol I, should be seen "in terms of a hierarchy encompassing the concept of control", is particularly problematic in situations such as that of the former Yugoslavia during the period relevant to the present case – situations where previously existing formal structures have broken down and where, during an interim period, the new, possibly improvised, control and command structures may be ambiguous and ill-defined. It is the Trial Chamber's conclusion ... that persons effectively in command of such more informal structures, with power to prevent and punish the crimes of persons who are in fact under their control, may under certain circumstances be held responsible for their failure to do so.[371]

The Trial Chamber's references to concepts of subordination, hierarchy and chains of command must be read in this context, which makes it apparent that they need not be established in the sense of formal organisational structures so long as the fundamental requirement of an effective power to control the subordinate, in the sense of preventing or punishing criminal conduct, is satisfied.

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[368] Appeal Transcript, pp 116-118.
[369] Trial Judgement, para 648.
[370] Trial Judgement, para 647, cited in the Prosecution Brief at para 3.4.
[371] Trial Judgement, para 354.

255. It is clear that the Trial Chamber drew a considerable measure of assistance from the ICRC Commentary (Additional Protocols) on Article 86 of Additional Protocol I (which refers to the circumstances in which a superior will be responsible for breaches of the Conventions or the Protocol committed by his subordinate) in finding that actual control of the subordinate is a necessary requirement of the superior-subordinate relationship.[372] The Commentary on Article 86 of Additional Protocol I states that:

> [...] we are concerned only with the superior who has a personal responsibility with regard to the perpetrator of the acts concerned because the latter, *being his subordinate, is under his control.* The direct link which must exist between the superior and the subordinate clearly follows from the duty to act laid down in paragraph 1 [of Article 86]. Furthermore only that superior is normally in the position of having information enabling him to conclude in the circumstances at the time that the subordinate has committed or is going to commit a breach. However it should not be concluded from this that the provision only concerns the commander under whose direct orders the subordinate is placed. The concept of the superior is broader and should be seen in terms of a hierarchy encompassing the concept of control.[373]

The point which the commentary emphasises is the concept of control, which results in a relationship of superior and subordinate.

256. The Appeals Chamber agrees that this supports the Trial Chamber's interpretation of the law on this point. The concept of effective *control* over a subordinate - in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised - is the threshold to be reached in establishing a superior-subordinate relationship for the purpose of Article 7(3) of the Statute.[374]

257. In considering the Prosecution submissions relating to "substantial influence", it can be noted that they are not easily reconcilable with other Prosecution submissions in relation to command responsibility. The Prosecution expressly endorses the requirement that the superior have effective *control* over the perpetrator,[375] but then espouses, apparently as a matter of general application, a theory that in fact "substantial influence" alone may suffice, in that "where a person's powers of influence amount to a *sufficient* degree of authority or control in the circumstances to put that person in a position to take preventative action, a failure to do so

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[372] Trial Judgement, paras 354, 371 and 647, referring to para 3544 of the ICRC Commentary (Additional Protocols). Article 86(2) provides: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

[373] ICRC Commentary (Additional Protocols), para 3544.

[374] It has been elsewhere accepted in the jurisprudence of the Tribunal that, where there is no effective control, there is no superior responsibility: *Aleksovski* Trial Judgement, para 108 (HVO soldiers with arms forced their way into the prison without the guards being able to stop them) and para 111 (no finding was made on any existence of control by Aleksovski over the HVO soldiers).

may result in criminal liability."[376] This latter standard appears to envisage a lower threshold of control than an effective control threshold; indeed, it is unclear that in its natural sense the concept of "substantial *influence*" entails any necessary notion of control at all. Indeed, certain of the Prosecution submissions at the appeal hearing suggest that the substantial influence standard it proposes is not intended to pose any different standard than that of control in the sense of the ability to prevent or punish:

> But we would submit that if there is the substantial influence, which we concede is something which has got to be determined essentially on a case-by-case basis, if this superior does have *the material ability to prevent or punish*, he or she should be within the confines of this doctrine of command responsibility as set forth in Article 7(3).[377]

The Appeals Chamber will consider whether substantial influence has ever been recognised as a foundation of superior responsibility in customary law.

258. The Prosecution relied at trial and on appeal on the *Hostage case* in support of its position that the perpetrators of the crimes for which the superior is to be held responsible need not be subordinates, and that substantial influence is a sufficient degree of control.[378] The Appeals Chamber concurs with the view of the Trial Chamber that the *Hostage case* is based on a distinction in international law between the duties of a commander for occupied territory and commanders in general. That case was concerned with a commander in occupied territory. The authority of such a commander is to a large extent territorial, and the duties applying in occupied territory are more onerous and far-reaching than those applying to commanders generally. Article 42 of the Regulations Respecting the Laws and Customs of War on Land, annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907, provides:

> Territory is considered occupied when it is actually placed under the authority of the hostile army.
>
> The occupation extends only to the territory where such authority has been established and can be exercised.

Article 43 provides:

> The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public

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[375] Prosecution Brief para 3.7; Appeal Transcript p 115.
[376] Prosecution Brief, para 3.15 (emphasis added).
[377] Appeal Transcript, p 119.
[378] The *Hostage case*, TWC, Vol. XI, p 1260.

> order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

This clearly does not apply to commanders in general. It was not then alleged, nor could it now be, that Delalić was a commander in occupied territory, and the Trial Chamber found expressly that he was not.[379]

259. The Prosecution emphasises however that it did not rely on the *Hostage case* alone.[380] At trial, and on appeal, the Prosecution relied on the judgement in the *Muto* case before the International Military Tribunal for the Far East.[381] The Appeals Chamber regards the *Muto* case as providing limited assistance for the present purpose. Considering Muto's liability as Chief-of-Staff to General Yamashita, the Tokyo Tribunal found him to be in a position "to influence policy", and for this reason he was held responsible for atrocities by Japanese troops in the Philippines. It is difficult to ascertain from the judgement in that case whether his conviction on Count 55 for his failure to take adequate steps to ensure the observance of the laws of war reflected his participation in the making of that policy or was linked to his conviction on Count 54 which alleged that he "ordered, authorized and permitted" the commission of conventional war crimes.[382] It is possible that the conviction on Count 54 led to that on Count 55.

260. On the other hand, the Military Tribunal V in *United States v Wilhelm von Leeb et al*, states clearly that:

> In the absence of participation in criminal orders or their execution within a command, a Chief of Staff does not become criminally responsible for criminal acts occurring therein. He has no command authority over subordinate units. All he can do in such cases is call those matters to the attention of his commanding general. Command authority and responsibility for its exercise rest definitively upon his commander.[383]

This suggests that a Chief-of-Staff would be found guilty only if he were involved in the execution of criminal policies by writing them into orders that were subsequently signed and issued by the commanding officer. In that case, he could be *directly* liable for aiding and abetting or another form of participation in the offences that resulted from the orders drafted by him. The Appeals Chamber therefore confines itself to stating that the case-law relied on by the

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[379] Trial Judgement, para 649.
[380] Prosecution Brief, para 3.20.
[381] Trial Judgement, paras 368-369; Appeal Transcript, p 117, Tokyo War Crimes Trial, The International Military Tribunal for the Far East, Judgement, Official Transcript reprinted in R John Pritchard and Sonia Magbanna Zaide (eds.) The Toyko War Crimes Trial, Vol. 20 (1981).
[382] J Pritchard et al (eds), *The Tokyo War Crimes Trial* (Garland Publishing Inc, New York and London, 1981) (complete transcripts), vol 20 (Judgement and Annexes), pp 49,772.
[383] *United States v Wilhelm von Leeb et al*, TWC, Vol. XI, pp 513-514, quoted in the Trial Judgement, para 367.

Prosecution was not uniform on this point. No force of precedent can be ascribed to a proposition that is interpreted differently by equally competent courts.

261. The Prosecution also relies on the *Hirota* and *Roechling* cases.[384] In the *Hirota* case, the Tokyo Tribunal found that Hirota, the Japanese Foreign Minister at the time of the atrocities committed by Japanese forces during the Rape of Nanking, "was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result."[385] The Trial Chamber found this to be "language indicating powers of persuasion rather than formal authority to order action to be taken".[386]

262. In the *Roechling* case,[387] a number of civilian industrialists were found guilty in respect of the ill-treatment of deportees employed in forced labour, not on the basis that they ordered the treatment but because they "permitted it; and indeed supported it, and in addition, for not having done their utmost to put an end to the abuses".[388] The Trial Chamber referred specifically to the findings in relation to von Gemmingen-Hornberg, who was the president of the Directorate and works manager of the Roechling steel plants. The tribunal at first instance had found that "the high position which he occupied in the corporation, as well as the fact that he was Herman Roechling's son-in-law, gave him certainly sufficient authority to obtain an alleviation in the treatment of these workers", and that this constituted "cause under the circumstances" to find him guilty of inhuman treatment of the workers. The reference to "sufficient authority" was interpreted by the Trial Chamber as indicating "powers of persuasion rather than formal authority", partly because of the tribunal's reference to the fact that the accused was Roechling's son-in-law,[389] and it is upon this interpretation that the Prosecution appears to rely.[390]

263. The Appeals Chamber does not interpret the reference to "sufficient authority" as entailing an acceptance of powers of persuasion or influence alone as being a sufficient basis on

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[384] Appeal Transcript, p 117; Prosecution Brief, para 3.16.

[385] *The Tokyo Judgment*, The International Military Tribunal for the Far East, 29 April 1946-12 November 1948, Vol I, (ed B V A Röling and C F Rüter, 1977, APA University Press, Amsterdam) pp 447-448.

[386] Trial Judgement, para 376.

[387] *The Government Commissioner of the General Tribunal of the Military Government for the French Zone of Occupation in Germany v Directors of the Roechling Enterprises,* XIV Trials of War Criminals Before the Nuremberg Military Tribunals, p 1061("*Roechling* case") at pp 1092-3.

[388] *Roechling* case, judgement on appeal at p 1136.

[389] Trial Judgement, para 376.

[390] The Prosecution does not cite the relevant parts of the judgement on which it relies but refers to the Trial Chamber's references to the case. Prosecution Brief para 3.17. *See* also Appeal Transcript at p 117. The Trial Chamber was, as is apparent from the reference in footnote 404 of the Trial Judgement, referring to the accused von Gemmingen-Hornberg.

which to found command responsibility. The *Roechling* judgement on appeal does not refer to the fact that the accused was Roechling's son-in-law, but it emphasises his senior position as president of the Directorate and his position as works manager, "that is, as the works representative in negotiations with the authorities specially competent to deal with matters relating to labor. His sphere of competence also included contact with the Gestapo in regard to the works police".[391] The judgements suggest that he was found to have powers of control over the conditions of the workers which, although not involving any formal ability to give orders to the works police, exceeded mere powers of persuasion or influence. Thus the Appeals Chamber considers the Trial Chamber's initial characterisation of the case as being "best construed as an example of the imposition of superior responsibility on the basis of *de facto* powers of control possessed by civilian industrial leaders" as being the more accurate one.[392]

264. The Appeals Chamber also considers that the *Pohl* case does not support the proposition of the Prosecution that the substantial influence alone of a superior may suffice for the purpose of command responsibility.[393] The person in question, Karl Mummenthey, an SS officer and a business manager, not only possessed "military power of command" but, more importantly in this case, "control" over the industries where mistreatment of concentration camp labourers occurred.[394] This is apparent even from the passage of the judgement cited by the Prosecution in its Appeal Brief:[395]

> Mummenthey was a definite integral and important figure in the whole concentration camp set-up, and, as an SS officer, *wielded military power of command.* If excesses occurred in the industries *under his control* he was in a position not only to know about them, but to do something.[396]

265. In the context of relevant jurisprudence on the question, it should also be noted that the Prosecution also relies on the fact that a Trial Chamber of the International Criminal Tribunal for Rwanda, in *Prosecutor v Kayishema and Ruzindana,*[397] relied on these World War II authorities, and on the references to them in the judgement of the Trial Chamber in *Čelebići*, to

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[391] *Roechling* Case, judgement on appeal, p 1136; *See* also p 1140. The Superior Military Government Court also referred specifically to the fact that the chief of the works police (Werkschutz) was an SS officer called Rassner who was appointed by the accused von Gemmingen-Hornberg: p 1135.
[392] Trial Judgement, para 376.
[393] *United States v Oswald Pohl et al*, TWC, Vol. V, p 958. Relied on in the Prosecution Brief at 3.14 and 3.20.
[394] *Ibid*, pp 1052-1053.
[395] Prosecution Brief, para 3.14, citing the *Pohl* case as referred to in the Trial Judgement, para 374.
[396] *United States v Oswald Pohl et al*, Vol V, TWC, p 958 (emphasis added).
[397] *Prosecution* v *Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgement, 21 May 1999.

find that powers of influence are sufficient to impose superior responsibility.[398] The ICTR Trial Chamber stated:

> [...] having examined the *Hostage* and *High Command* cases the Chamber in *Čelebići* concluded that they authoritatively asserted the principle that, "powers of influence not amounting to formal powers of command provide a sufficient basis for the imposition of command responsibility." This Trial Chamber concurs.[399]

No weight can be afforded to this statement of the ICTR Trial Chamber, as it is based on a misstatement of what the Trial Chamber in *Čelebići* actually held. The quoted statement was *not* a conclusion of the Trial Chamber, nor its interpretation of the *Hostage* and *High Command* cases, but the ICTR Trial Chamber's interpretation of the decision of the Tokyo Tribunal in the *Muto* case.[400] The Trial Chamber in *Čelebići* ultimately regarded any "influence" principle which may have been established by *Muto* case as being outweighed by other authorities which suggested that a position of command in the sense of effective control was necessary.

266. The Appeals Chamber considers, therefore, that customary law has specified a standard of *effective* control, although it does not define precisely the means by which the control must be exercised. It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed.

267. The Appeals Chamber therefore finds that the Trial Chamber has applied the correct legal test in the case of Delalić. There is, therefore, no basis for any further application of that test to the Trial Chamber's findings, whether by the Appeals Chamber or by a reconstituted Trial Chamber.[401]

268. The Prosecution's argument dealt with here is limited to the submission that it was the Trial Chamber's alleged error of law in the legal test which led it to an erroneous conclusion that Delalić did not exercise superior authority. There was no independent allegation in the

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[398] Prosecution Brief, para 3.18.
[399] *Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-T, Judgement, 21 May 1999, para 220.
[400] Trial Judgement, para 375.
[401] Prosecution Brief, para 3.33; Appeal Transcript pp 158 and 166.

Prosecution Brief that the Trial Chamber made errors of fact in its factual findings which should be overturned by the Appeals Chamber, although certain submissions at the hearing of the appeal suggest that the Prosecution submits that, even under the standard of effective control (which was in fact applied by the Trial Chamber), the Trial Chamber should have found Delalić to have exercised superior authority.[402] However, nothing raised by the Prosecution would support a finding by the Appeals Chamber that the Trial Chamber's findings, and its ultimate conclusion from those facts that Delalić did not exercise the requisite degree of control, was so unreasonable that no reasonable tribunal of fact could have reached them.[403]

(ii) Whether the Trial Chamber erred in excluding rebuttal or fresh evidence

269. As discussed above, the Prosecution submitted "in the alternative" that the Appeals Chamber should grant leave to the Prosecution to present "additional" evidence that was wrongly excluded by the Trial Chamber.[404] The nature of the "alternative" was described as follows:

> The issue is an issue of an error of law. The issue is whether or not the Trial Chamber applied the correct test for the admission of rebuttal or fresh evidence. If they applied the incorrect test and it's an error of law, then the Trial Chamber erred.[405]

270. As noted above, the Appeals Chamber deals with this argument as an independent allegation of an error of law on behalf of the Trial Chamber.

271. At the request of the Trial Chamber during the case of the last of the accused to present his defence, the Prosecution filed a notification of witnesses proposed to testify in rebuttal. It proposed to call four witnesses, one relating to the case against Landžo and the others relating to the case against Delalić, one of whom was a Prosecution investigator being called essentially to tender a number of documents "not previously available to the prosecution".[406] Oral submissions on the proposal were heard by the Trial Chamber on 24 July 1998,[407] and the Trial Chamber ruled that, with the exception of the witness relating to the case against Landžo, the proposed evidence was not rebuttal evidence, but fresh evidence, and that the Prosecution had

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[402] Appeal Transcript, p 164: after referring to various facts found by the Trial Chamber, it was submitted that: "As a result of this specific position and someone who is granted authority by the higher command, it is the Prosecution's position that those facts demonstrate he had *control*."

[403] *Tadić* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63; *Furundžija* Appeal Judgement, para 37 and *infra* paras 434-436.

[404] Prosecution Brief, para 3.80.

[405] Appeal Transcript, p 168.

[406] Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, 22 July 1998, ("Notification"), 5th unnumbered page.

[407] Trial Transcript, pp 14934-14974.

not put forward anything which would support an application to admit fresh evidence.[408] This decision was reflected in a written Order which noted that "rebuttal evidence is limited to matters that arise directly and specifically out of defence evidence".[409]

272. The evidence which was not admitted by the Trial Chamber related to Delić, Mucić and Delalić, but the Prosecution submission that the exclusion constituted an error invalidating the decision is limited in application to the effect of this evidence on its case against Delalić. Its overall purpose was to show that Delalić had the requisite degree of control over the Čelebići camp. The three proposed witnesses, and the documents they sought to adduce, were as follows:

(i) Rajko Đorđic, Sr, to testify as to his release from the Čelebići camp pursuant to a release form signed by Delalić and dated 3 July 1992. It was proposed that the witness produce and authenticate the document. This was intended to rebut the evidence of defence witnesses that Delalić was authorised to sign release documents only in exceptional circumstances when the members of the Investigative Commission were not present in Čelebići.

(ii) Stephen Chambers, an investigator of the Office of the Prosecutor, to present "documentary evidence not previously available to the Prosecutor" which had been seized from the State Commission for the Search for the Missing in Sarajevo and from the home and work premises of an official of the State Commission for Gathering Facts on War Crimes in Konjić. This was said to rebut the testimony of witnesses that Delalić, as commander of Tactical Group 1, had no authority over the Čelebići camp.[410]

(iii) Professor Andrea Stegnar, a handwriting expert, to give expert testimony in relation to a number of the recently obtained documents alleged to bear the signature of the accused. This was not argued to have any independent rebuttal basis.[411]

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[408] Trial Transcript, pp 14943, 14972, 14975.

[409] Order on the Prosecution's Notification of Witnesses Anticipated to Testify in Rebuttal, 30 July 1998, p 2.

[410] Notification, 4th and 5th unnumbered pages. It was put by the Prosecution on appeal that one item of documentary evidence would also more specifically rebut defence evidence as to the reliability of Prosecution Exhibit 214, a document signed by the President of the Konjic State Commission for the Exchange of War Prisoners which was described as "indicat[ing] that the overseeing and guarding of the prisoners had been taken over by the Tactical Group", as the new document in question was an authenticated copy of the document. *See* Prosecution Brief, para 3.81(2)(c) and fn 160.

[411] Notification, 6th unnumbered page. There were originally two categories of documents in relation to which the Prosecution sought Professor Stegnar's testimony. The Prosecution only appeals against the decision not to admit one of these categories (the new documents). Prosecution Brief, para 3.81(4) and fn 162.

273. The Trial Chamber characterised the nature of rebuttal evidence as "evidence to refute a particular piece of evidence which has been adduced by the defence", with the result that it is "limited to matters that arise directly and specifically out of defence evidence."[412] This standard is essentially consistent with that used previously and subsequently by other Trial Chambers.[413] The Appeals Chamber agrees that this standard – that rebuttal evidence must relate to a significant issue arising directly out of defence evidence which could not reasonably have been anticipated – is correct. It is in this context that the Appeals Chamber understands the Trial Chamber's statement, made later in its Decision on Request to Reopen, that "evidence available to the Prosecution *ab initio*, the relevance of which does not arise *ex improviso,* and which remedies a defect in the case of the Prosecution, is generally not admissible."[414] Although the Appeals Chamber would not itself use that particular terminology, it sees, contrary to the Prosecution submission,[415] no error in that statement when read in context.

274. The Trial Chamber's particular reasons for rejecting the evidence as rebuttal evidence, as expressed in the oral hearing on 24 July, were, in relation to category (i), that the other evidence heard by the Trial Chamber was that Delalić had signed such documents only on behalf of the Investigating Commission and not in his own capacity. As the relevant release document also was acknowledged to state that Delalić was signing "for" the Commission,[416] the Trial Chamber queried how it could be considered to rebut what had already been put in evidence.[417] The Trial Chamber appeared to assess the document as having such low probative value in relation to the fundamental matter that the Prosecution was trying to prove – namely, Delalić's authority to release prisoners in his own capacity – that it could not be considered to

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[412] Decision on the Prosecution's Alternative Request to Reopen the Prosecution's Case, 19 August 1998, ("Decision on Request to Reopen"), para 23.

[413] *Prosecutor v Tadić*, Case No IT-94-1, Trial Transcript, 29 May 1998: p 3676, Judge McDonald refusing the admission in rebuttal of those parts of testimony which were "evidence that [the Prosecutor] could have adduced during [her] case in chief. Our concern is that this not be a practice of offering additional evidence that you would have an opportunity to offer on the case in chief." *Prosecutor v Furundžija*, Case No IT-95-17/2, Confidential Decision on Prosecutor's Motion in Respect of Rebuttal Witness and Witness Protection Issued Pertaining to Disclosure and Testimony by the Witness, 19 June 1998. The right of rebuttal is "to be used to challenge Defence evidence that could not have reasonably been foreseen, and that it would be a misuse of this right to permit it to be used to adduce evidence that should properly have been proved as part of the Prosecution case against an accused". (Nothing referred to here from that decision is confidential material). In *Prosecutor v Kordić*, Case No IT-95-14/2, Transcript 18 Oct 2000. The Trial Chamber endorsed the practice of the Trial Chambers in *Čelebići* and *Furundžija* of limiting rebuttal evidence strictly to matters arising in the defence case which were not already covered in the Prosecution case. It described the relevant standard to be the "only highly probative evidence on a significant issue in response to Defence evidence and not merely reinforcing the Prosecution case in chief will be permitted." *See* p 26647.

[414] Decision on Request to Reopen, para 23.

[415] Prosecution Brief, para 3.104.

[416] Trial Transcript, p 14936.

[417] Trial Transcript, p 14938.

rebut the defence evidence identified by the Prosecution. This assessment was reasonably open to the Trial Chamber.

275. In relation to category (ii), the Trial Chamber rejected the characterisation of the evidence as rebuttal evidence on the basis that it was better characterised as fresh evidence. While it may have been desirable for the Trial Chamber to state more specifically its view as to why the evidence did not refute a particular matters arising directly and specifically out of defence evidence, the Appeals Chamber agrees that it was open to regard the evidence as not being evidence in rebuttal. It is first noteworthy that the Prosecution, in applying to adduce the evidence, described it first as "fresh evidence, not previously available to the prosecution"[418] and gave only a fairly cursory description of how in its view the evidence rebutted defence evidence. It said that the evidence would rebut the evidence of witnesses "who all stated that Zejnil Delalić as Commander of Tactical Group 1 had no *de facto* authority, or any other authority whatsoever" over the Čelebići camp.[419] Thus the evidence was intended to establish that Delalić did in fact exercise such authority. As such, it went to a matter which was a fundamental part of the case the Prosecution was required to prove in relation to its counts under Article 7(3). Such evidence should be brought as part of the Prosecution case in chief and not in rebuttal. As the Trial Chamber correctly observed, where the evidence which "is itself evidence probative of the guilt of the accused, and where it is reasonably foreseeable by the Prosecution that some gap in the proof of guilt needs to be filled by the evidence called by it", it is inappropriate to admit it in rebuttal, and the Prosecution "cannot call additional evidence merely because its case has been met by certain evidence to contradict it." [420]

276. Where such evidence could not have been brought as part of the Prosecution case in chief because it was not in the hands of the Prosecution at the time, this does not render it admissible as rebuttal evidence. The fact that evidence is newly obtained, if that evidence does not meet the standard for admission of rebuttal evidence, will not render it admissible as rebuttal evidence. It merely puts it into the category of fresh evidence, to which a different basis of admissibility applies. This is essentially what the Trial Chamber found. There is therefore no merit in the Prosecution's submission that the evidence should have been admitted as "the reason for not adducing it during the Prosecution's case [was] not due to the failure to foresee

[418] Notification, para A, 4th unnumbered page.
[419] *Ibid.*
[420] Decision on Request to Reopen, para 23.

the issues that may arise during the Defence case." [421] The issue as to whether the evidence should have been admitted as fresh evidence is considered below.

277. The admission of the testimony of the handwriting expert referred to in category (iii) essentially relied on the admission of the category (ii) evidence, so it need not be further considered.

278. Following the Trial Chamber's rejection of the evidence as rebuttal evidence, the Prosecution filed an alternative request to re-open the Prosecution case.[422] The Trial Chamber rejected this alternative orally,[423] issuing its written reasons on 19 August 1998.[424] The Prosecution filed applications under Rule 73 for leave to appeal the Order of 30 July and the Decision of 4 August, on 6 August and 17 August, respectively. A Bench of the Appeals Chamber denied leave to appeal in respect of both applications on the basis that it saw no issue that would cause such prejudice to the case of the Prosecution as could not be cured by the final disposal of the trial including post-judgement appeal, or which assumed general importance to the proceedings of the Tribunal or in international law generally, these being the two tests established by Rule 73(B) regarding the granting or withholding of leave to appeal.[425]

279. In its Decision on Request to Reopen the Trial Chamber, after considering the basis on which evidence could be admitted as rebuttal evidence, acknowledged the possibility that the Prosecution "may further be granted leave to re-open its case in order to present new evidence not previously available to it." It stated:

> Such fresh evidence is properly defined not merely as evidence that was not in fact in the possession of the Prosecution at the time of the conclusion of its case, but as evidence which by the exercise of reasonable diligence could not have been obtained by the Prosecution at that time. The burden of establishing that the evidence sought to be adduced is of this character rests squarely on the Prosecution.[426]

280. The Trial Chamber also identified the factors which it considered relevant to the exercise of its discretion to admit the fresh evidence. These were described as:

> (i) the "advanced stage of the trial"; i.e., the later in the trial that the application is made, the less likely the evidence will be admitted;

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[421] Prosecution Brief, para 3.94.
[422] Prosecution Brief, para 3.83.
[423] Trial Transcript, 4 Aug 1998, pp 15518-15520.
[424] Decision on Request to Reopen.
[425] Decision on Prosecutor's Applications for Leave to Appeal the Order of 30 July 1998 and Decision of 4 August 1998 of Trial Chamber II *Quater*, Case No. IT-96-21-AR73.6 and AR73.7, 29 Aug 1998.
[426] Decision on Request to Reopen, para 26.

(ii) the delay likely to be caused by a re-opening of the Prosecution case, and the suitability of an adjournment in the overall context of the trial; and

(iii) the probative value of the evidence to be presented.[427]

281. Taking these considerations into account the Trial Chamber assessed both the evidence and the Prosecution's explanation for its late application to adduce it and concluded that the Prosecution had not discharged its burden of proving that the evidence could not have been found earlier with the exercise of reasonable diligence.[428] In addition, it found that the admission of the evidence would result in the undue protraction of the trial for up to three months, as the testimony of further witnesses to authenticate the relevant documents could be required as well as the evidence of any witnesses that the defence should be permitted to bring in response.[429] Finally, the Trial Chamber assessed the evidence to be of minimal probative value, consisting of "circumstantial evidence of doubtful validity", with the result that its exclusion would not cause the Prosecution injustice.[430] It concluded generally that "the justice of the case and the fair and expeditious conduct of the proceedings enjoins a rejection of the application."[431]

282. The Prosecution does not challenge the Trial Chamber's definition of fresh evidence as evidence which was not in the possession of the party at the time and which by the exercise of all reasonable diligence could not have been obtained by the relevant party at the conclusion of its case. Nor does it challenge the "general principle of admissibility" used by the Trial Chamber.[432]

283. The Appeals Chamber agrees that the primary consideration in determining an application for reopening a case to allow for the admission of fresh evidence is the question of whether, with reasonable diligence, the evidence could have been identified and presented in the case in chief of the party making the application. If it is shown that the evidence could *not* have been found with the exercise of reasonable diligence before the close of the case, the Trial Chamber should exercise its discretion as to whether to admit the evidence by reference to the probative value of the evidence and the fairness to the accused of admitting it late in the proceedings. These latter factors can be regarded as falling under the general discretion, reflected in Rule 89 (D) of the Rules, to exclude evidence where its probative value is

[427] Decision on Request to Reopen, para 27.
[428] Decision on Request to Reopen, para 29-30.
[429] Decision on Request to Reopen, para 36.
[430] Decision on Request to Reopen, para 34.
[431] Decision on Request to Reopen, para 37.
[432] Prosecution Brief, para 3.98.

substantially outweighed by the need to ensure a fair trial. Although this second aspect of the question of admissibility was less clearly stated by the Trial Chamber, the Appeals Chamber, for the reasons discussed below, considers that it applied the correct principles in this respect.

284. The Prosecution contends that although the Trial Chamber was correct in requiring proof of the exercise of reasonable diligence, it should have found that it had exercised such diligence.[433] The Trial Chamber took the view, having considered the reasons put forward by the Prosecution, that the Prosecution had not discharged its burden of demonstrating that even with reasonable diligence the proposed evidence could not have been previously obtained and presented as part of its case in chief. It implicitly expressed its opinion that the Prosecution had not pursued the relevant evidence vigorously until after the close of the Defence case.[434] The Prosecution submits that this finding was "factually incorrect" and represented "a misapprehension of the facts in relation to the efforts of the Prosecution to obtain this evidence", but does not more than reiterate the description of the efforts to obtain the evidence which it had already provided to the Trial Chamber.[435] It does not identify how, in its view, the Trial Chamber's conclusion on the facts were so unreasonable that no reasonable Trial Chamber could have reached it. It is not suggested that the Trial Chamber did not consider the Prosecution's explanation. No such suggestion could be made in light of the obvious demonstrations both in the hearing of the oral submissions on the issue[436] and the Decision on the Request to Reopen[437] that the Trial Chamber did consider the explanations the Prosecution was putting to it. In the Appeals Chamber's view, even making considerable allowances to the Prosecution in relation to the "complexities involved in obtaining the evidence",[438] it is apparent that there were failures to pursue diligently the investigations for which no adequate attempt to provide an explanation was made.

285. Two examples demonstrate this problem. A number of the documents which were sought to be admitted had been seized in June 1998 from the office and home of Jasminka Džumhur, a former official of the State Commission for Exchange in Konjić and the Army of Bosnia and Herzegovina 4th Corps Military Investigative Commission.[439] The material provided by the Prosecution in its Request to Reopen to explain its prior effort to obtain documents and information from Ms Džumhur includes the statement that:

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[433] Prosecution Brief, paras 3.110-3.113.
[434] Decision on Request to Reopen, para 29.
[435] Prosecution Brief, para 3.111.
[436] Trial Transcript, 24 July 1998, pp 14946-14949; 14968-14971.
[437] Decision on Request to Reopen, para 28.
[438] Prosecution Brief, para 3.109.
[439] Request to Reopen, para 28.

> Between late 1996 and early 1997, the Prosecution contacted Jasminka Džumhur three times. She consistently refused to provide a statement, but on one occasion, *briefly showed an investigator an untranslated document concerning the transfer of duties in Čelebići prison in November 1996*, signed by Zdravko Mucić and Zejnil Delalić. *She said she had other documents, but none of the documents were provided to the Prosecution.*[440]

With this knowledge, obtained in November 1996, that Ms Džumhur held documents which they considered would be relevant to their case, the next step apparently taken by the Prosecution was four to five months later in mid-April 1997, when it made a formal request for assistance to the Government of Bosnia and Herzegovina.[441] The Prosecution received a response on 23 July 1997, following a reminder in June 1997. On the material provided by the Prosecution, it was almost five months later that it took the next step of issuing a second request to the Government of Bosnia and Herzegovina, which received a relatively rapid response in early January, by providing certain documents.[442] Given that the trial had opened in March 1997, it was open to the Trial Chamber to regard the lapse of these periods of time between the taking of active steps to pursue the documents during after the trial had actually commenced as an indication that reasonable diligence was not being exercised.

286. Secondly, in a case such as the present where the evidence is sought to be presented not only after the close of the case of the Prosecution but long after the close of the case of the relevant accused, it was necessary for the Prosecution to establish that the evidence could not have been obtained, even if after the close of its case, at an earlier stage in the trial. The application to have the new evidence admitted was made many months after the Prosecution gained actual knowledge of the location at which the relevant documents were likely to be held. The information provided by the Prosecution, in its "Alternative Request to Reopen the Prosecution's Case", indicated that the Prosecution gained possession of certain documents from the State Commission for the Search for the Missing on 27 March 1998, which indicated that the relevant documents were in the possession of Jasminka Džumhur. It was not until 5 May 1998 that the Prosecution took any further step in trying to obtain the documents, when it "informed the authorities that various requests concerning the contacting of officials and former officials of Konjić Municipality, including Jasminka Džumhur remained outstanding". An application for a search warrant was made to a Judge of the Tribunal on 10 June 1998, after Delalić's defence case had closed. Even making allowances for the complexities of such investigations, allowing a period of over five weeks to elapse between becoming aware of the location of the documents and taking any further active step to obtain them, in light of the

[440] Request to Reopen, para 27.
[441] Request to Reopen, para 28
[442] Request to Reopen, para 29-31.

advanced state of the defence case, cannot be considered to be the exercise of reasonable diligence. If the Prosecution was in fact taking steps to obtain the information at that time, it did not disclose them to the Trial Chamber and cannot now complain at the assessment that it did not exercise "reasonable diligence" in obtaining and presenting the evidence earlier. Given that the burden of proving that reasonable diligence was exercised in obtaining the evidence lies on the Prosecution, it was open to the Trial Chamber to decide on the information provided to it by the Prosecution that it has not discharged that burden.

287. The Prosecution further submits that the Trial Chamber erred in the exercise of its discretion in certain of the matters it took into account. As the Trial Chamber's finding that reasonable diligence had not been exercised was a sufficient basis on which to dispose of the application, it is not strictly necessary to determine this issue, but as the Trial Chamber expressed its views on this aspect of the application, the Appeals Chamber will consider it here. The Prosecution argues that relevant and probative evidence is only excluded when its admission is substantially outweighed by the need to ensure a fair trial, and cites the provisions of certain national systems in support of this. In relation to these provisions which the Prosecution has selectively drawn from only three national jurisdictions, it can be observed that even if they were to be accepted as a guide to the principles applicable to this issue in the Tribunal, two of them simply confer a discretion on the Trial Chamber *exceptionally* to admit new evidence. The provision cited from the Costa Rican Code of Criminal Procedure states that:

> *Exceptionally*, the court *may* order [...] that new evidence be introduced if, during the trial proceedings new facts or circumstances have arisen that *need to be established.*[443]

The provision relied on from the German Code provides for the admission of new evidence "if this is absolutely necessary".[444]

288. The Trial Chamber stated the principle as being that:

> While it is axiomatic that all evidence must fulfil the requirements of admissibility, for the Trial Chamber to grant the Prosecution permission to reopen its case, the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused. Great caution must be exercised by the Trial Chamber lest injustice be done to the accused, and it is therefore only in exceptional circumstances where the justice of the case so demands

[443] Code of Criminal Procedure, Costa Rica, Article 355, unofficial Prosecution translation, Prosecution Brief, para 3.88.

[444] Code of Criminal Procedure (*Strafprozeßordnung*) Article 244(2), unofficial Prosecution translation, Prosecution Brief, para 3.88.

> that the Trial Chamber will exercise its discretion to allow the Prosecution to adduce new evidence after the parties to a criminal trial have closed their case.[445]

The Prosecution argues that the statement of the Trial Chamber that "the probative value of the proposed evidence must be such that it outweighs any prejudice caused to the accused" incorrectly states the applicable principle, which is that stated in Rule 89(D), namely that the need to ensure a fair trial substantially outweighs the probative value of the evidence.[446] The reference by the Trial Chamber to the potential "prejudice caused to the accused" was not, in the view of the Appeals Chamber, the appropriate one in the context. However it is apparent from a reading of the rest of the Decision on Request to Reopen that the Trial Chamber, in referring to prejudice to the accused was turning its mind to matters which may affect the fairness of the accused's trial. This is apparent both from the reference, in the passage cited above, to the need to avoid "injustice to the accused" and the concluding statement in the decision:

> In our view, the justice of the case and the fair and expeditious conduct of the proceedings enjoins a rejection of the application.[447]

289. The Prosecution also argues that the Trial Chamber erred in its assessment of the probative value of the evidence. It contends that the Trial Chamber erred in finding that the evidence was inferential and equivocal.[448] The Prosecution relies on a statement by the Trial Chamber that the documents "cannot be probative".[449] Although this was perhaps unfortunate terminology, it is apparent from the Trial Chamber's decision that after considering the evidence it was of the view not that it could not be probative but that the documents "contain circumstantial evidence of doubtful validity".[450] This was an assessment not that the documents were incapable, as a matter of law, of having probative value, but that, having regard to their contents which did not disclose direct evidence of the matters in dispute but, at best, gave rise to "mere inferences",[451] the documents had a low probative value. This assessment, and more specifically the exercise of balancing the particular degree of probative value disclosed by the documents against the unfairness which would result if the evidence were admitted, is a matter for the Trial Chamber which will not be interfered with on appeal in the absence of convincing demonstration of error. No such demonstration has been made.

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[445] Decision on Request to Reopen, para 27.
[446] Prosecution Brief, para 3.107.
[447] Decision on Request to Reopen, para 37.
[448] Prosecution Brief, para 3.120.
[449] Decision on Request to Reopen, para 32, referred to in Prosecution Brief at para 3.115, 3.121.
[450] Decision on Request to Reopen, para 32.
[451] *Ibid,* para 32.

290. The Prosecution also specifically challenged the Trial Chamber's conclusion that the trial had reached such a stage that the evidence should not be admitted.[452] The stage in the trial at which the evidence is sought to be adduced and the potential delay that will be caused to the trial are matters highly relevant to the fairness to the accused of admission of fresh evidence. This consideration extends not only to Delalić as the accused against whom the evidence was sought to be admitted, but also the three co-accused whose trial would be equally delayed for reasons unrelated to themselves. The Appeals Chamber does not understand the Trial Chamber to have taken the stage of the trial into account in any sense other than its impact on the fairness of the trial of the accused, and, in the circumstances, the Appeals Chamber regards the Trial Chamber as having been fully justified in taking the very late stage of the trial into account. The Prosecution sought to have this evidence admitted not only after the close of its own case, but well after the close of the defence case of Delalić and only very shortly before the close of the case of the last accused. The Prosecution contends that "none of the accused objected to the potential presentation of the evidence of Mr Chambers."[453] This assertion is clearly incorrect. At the hearing of oral submissions on whether the evidence could be admitted as rebuttal or fresh evidence, counsel for Delalić stated:

> His Honour Karibi-Whyte has said what I was thinking and that is that we're in the second year of this trial, and, perhaps, the third or fourth year of investigations concerning these matters. And the Prosecution, despite what they say, despite what reasons they may offer, I think is a matter of law. *It's unfair at this point to produce documents in June, 1998.*[454]

The defence for Delalić also expressed its opposition to the presentation of the fresh evidence in its written response to the request to reopen.[455]

291. The Prosecution also argued that the Trial Chamber was wrong in its finding that the admission of the evidence would cause three months' delay:

> The Prosecutor calculated that the three remaining proposed witnesses would take, on direct examination, less than four hours. It is respectfully submitted that the Trial Chamber's estimation that this would likely postpone the trial for three months is not borne out, given that there were only three witnesses and approximately 22 documents, some only supporting documents for the search warrant.[456]

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[452] Prosecution Brief, para 3.101.
[453] Prosecution Brief, para 3.126
[454] Trial Transcript, p 14971 (emphasis added).
[455] Response of the Defendant Delalić Opposing the Prosecution's Alternative Request to Open the Prosecution's Case, 31 July 1998, pp 1; 10, 11. At p 10 the response states: "the Trial Chamber should consider whether it is in the interests of justice to permit the Prosecution to adduce the evidence at this late stage and whether to allow it would breach the Defendant's right to a fair trial as set out in Articles 20 and 21 of the Statute."
[456] Prosecution Brief, para 3.127.

This submission is disingenuous. The time which the Trial Chamber needed to take into account in determining the effect on the accused was not limited to the time which it may take to examine the three witnesses. The Trial Chamber found that, given the nature of the documents, it was likely that the testimony of further witnesses would be required to authenticate the relevant documents. It would also be necessary to allow for the defence to call appropriate witnesses in response.[457] Further, as noted by the Trial Chamber, the Prosecution had stated in its Request to Reopen, after acknowledging that the defence may need to call witnesses:

> In addition, the Prosecution would seek leave to call witnesses to rebut the testimony of those brought by the Defence.[458]

292. In light of these considerations, it was open to the Trial Chamber – which, having presided over the trial which had already taken over eighteen months, was well-placed to assess the time required taking into account practical considerations such as temporary witness unavailability – to conclude that the likely delay would be up to three months. In light of this finding, it is apparent that the Trial Chamber considered that the admission of the evidence would create a sufficiently adverse effect on the fairness of the trial of all of the accused, that it outweighed the limited probative value of the evidence. As a secondary matter, it is also apparent that the Trial Chamber was concerned to fulfil its obligation under Article 20 of the Statute to ensure the trial was expeditious.[459] In light of these considerations, the decision not to exercise its discretion to grant the application was open to the Trial Chamber.

293. For the above reasons, the Appeals Chamber finds that the Prosecution has not demonstrated that the Trial Chamber committed any error in the exercise of its discretion. This aspect of this ground of appeal relating to the exclusion of evidence by the Trial Chamber is therefore also dismissed, and with it this ground of appeal in its entirety.

3. Delić's Acquittal under Article 7(3)

294. The Prosecution's fifth ground of appeal alleges that the Trial Chamber "erred when it decided ... that Hazim Delić was not a 'superior' in the Čelebići Prison Camp for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute."[460] The Prosecution submits that the Trial Chamber applied the wrong legal test when it held that "the perpetrator of the underlying offence must be the *subordinate* of the person of higher rank" and that "a

[457] Decision on Request to Reopen, para 36.
[458] Request to Reopen, para 70.
[459] Decision on Request to Reopen, para 37.

subordinate unit of the superior or commander is a *sine qua non* for superior responsibility."[461] The Prosecution also submits, apparently in the alternative, that, even if the test formulated by the Trial Chamber for determining who is a superior for the purposes of Article 7(3) was correct, it misapplied the test in this case.[462] The Prosecution refers to the Trial Chamber's findings, including its finding that Delić was the "deputy commander" of the camp,[463] to say that he should have been found to be a superior. Because, it is said, the Trial Chamber's findings also establish that he was aware of the offences of subordinates,[464] and that he failed to prevent or punish them, the Appeals Chamber should find Delić guilty under Article 7(3) on counts 13, 14, 33, 34, 38, 39, 44, 45, 46 and 47.[465]

295. In support of this ground, the Prosecution reiterates its theory that command responsibility entails a superior-subordinate relationship in which the superior effectively controls the subordinate, in the sense that the superior possesses the material ability to prevent or punish the offences and that "[s]uch control can be manifest in powers of influence which permit the superior to intervene".[466] It also argues that the Trial Chamber erred in requiring Delić to be part of the chain of command, as the correct test is whether he has sufficient control, influence, or authority to prevent or punish.[467] If, as the Trial Chamber found, *de facto* control is sufficient in this context, it should assess in each case whether an accused has *de facto* powers or control to prevent or punish.[468]

296. Delić responds that among the elements required for finding a person liable under the doctrine of command responsibility are the requirement of "a hierarchy in which superiors are authorized to control their subordinates to a degree that the superior is responsible for the actions of his subordinates" and that the superior must be "vested with authority to control his subordinates."[469] In the military, the chain of command is a hierarchy of commanders, with deputy commanders being outside this chain of command.[470]

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[460] Prosecution Brief, para 6.1.
[461] *Ibid*, para 6.7.
[462] *Ibid*, para 6.16.
[463] *Ibid*, para 6.12.
[464] *Ibid*, para 6.18.
[465] *Ibid*, para 6.23.
[466] Prosecution Brief, para 6.10; Prosecution Reply, para 6.2.
[467] Prosecution Reply, para 6.5.
[468] *Ibid*, para 6.11.
[469] *Delić* Response, para 239.
[470] *Ibid*, para 247.

297. Turning to the Trial Chamber's findings on the question of Delić's liability under Article 7(3), it clearly found that Delić held the position of "deputy commander" of the Čelebići camp.[471] However, it also found that this was "not dispositive of Delić's status" as the real issue before the Trial Chamber was:

> [w]hether the accused had the power to issue orders to subordinates and to prevent or punish the criminal acts of his subordinates, thus placing him within the chain of command. In order to do so the Trial Chamber must look to the actual authority of Hazim Delić as evidenced by his acts in the Čelebići prison camp.[472]

298. The Chamber proceeded to consider evidence of the degree of actual authority wielded by Delić in the camp, and concluded that:

> [...] this evidence is indicative of *a degree of influence* Hazim Delić had in the Čelebići prison-camp on some occasions, in the criminal mistreatment of detainees. However, this influence could be attributable to the guards' fear of an intimidating and morally delinquent individual who was the instigator of and a participant in the mistreatment of detainees, and *is not, on the facts before the Trial Chamber, of itself indicative of the superior authority of Delić sufficient to attribute superior responsibility to him.*[473]

Having examined more evidence, it further found:

> This evidence indicates that Hazim Delić was tasked with assisting Zradvko Mucić by organising and arranging for the daily activities in the Čelebići prison-camp. However, it cannot be said to indicate that he had actual command authority in the sense that he could issue orders and punish and prevent the criminal acts of subordinates.[474]

299. The Trial Chamber therefore concluded that, despite Delić's position of deputy commander of the camp, he did not exercise actual authority in the sense of having powers to prevent or punish and therefore was not a superior or commander of the perpetrators of the relevant offences in the sense required by Article 7(3).

300. The Appeals Chamber has already rejected, in its discussion of the Prosecution's second ground of appeal, the Prosecution argument that "substantial influence" is a sufficient measure of "control" for the imposition of liability under Article 7(3). It need only therefore confirm that the Trial Chamber's finding that Delić had powers of influence was not of itself a sufficient basis on which to find him a superior if it was not established beyond reasonable doubt by the evidence that he actually had the ability to exercise effective control over the relevant perpetrators.

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[471] Trial Judgement, paras 739 and 1268.
[472] Trial Judgement, para 800.
[473] *Ibid*, para 806.
[474] *Ibid*, para 809 (emphasis added).

301. The remaining issue as to the applicable law raised by the Prosecution in relation to this ground which has not previously been considered is its contention that the Trial Chamber erred because it required Delić to be part of the chain of command and, more generally, it required the perpetrators of the underlying offences to be his "subordinates" before liability under Article 7(3) could be imposed.

302. It is beyond question that the Trial Chamber considered Article 7(3) to impose a requirement that there be a superior with a corresponding subordinate.[475] The Prosecution itself submits that one of the three requirements under Article 7(3) is that of a superior-subordinate relationship. There is therefore a certain difficulty in comprehending the Prosecution submission that the Trial Chamber erred in law in requiring the perpetrator of the underlying offence to be a subordinate of the person of higher rank.[476] The Trial Chamber clearly did understand the relationship of subordination to encompass indirect and informal relationships, as is apparent from its acceptance of the concepts of civilian superiors and *de* facto authority, to which the Appeals Chamber has referred in its discussion of the issue in relation to the Prosecution's second ground of appeal.

303. The Appeals Chamber understands the necessity to prove that the perpetrator was the "subordinate" of the accused, not to import a requirement of *direct* or *formal* subordination but to mean that the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator. The ability to exercise effective control in the sense of a material power to prevent or punish, which the Appeals Chamber considers to be a minimum requirement for the recognition of the superior-subordinate relationship, will almost invariably not be satisfied unless such a relationship of subordination exists. However, it is possible to imagine scenarios in which one of two persons of equal status or rank – such as two soldiers or two civilian prison guards – could in fact exercise "effective control" over the other at least in the sense of a purely practical ability to prevent the conduct of the other by, for example, force of personality or physical strength. The Appeals Chamber does not consider the doctrine of command responsibility – which developed with an emphasis on persons who, by virtue of the position which they occupy, have authority over others – as having been intended to impose criminal liability on persons for the acts of other persons of completely equal status.[477]

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[475] Trial Judgement, paras 646-647.
[476] Prosecution Brief, para 6.7.
[477] In any event, concepts of accessory criminal liability such as aiding and abetting will potentially apply to persons of moral or personal authority who, by failing to act in such scenarios, have the effect in the

304. The Appeals Chamber acknowledges that the Trial Chamber's references to the absence of evidence that Delić "lay within" or was "part of" the chain of command[478] may, if taken in isolation, be open to the interpretation that the Trial Chamber believed Article 7(3) to require the accused to have a formal position in a formal hierarchy which directly links him to a subordinate who also holds a formal position within that hierarchy. Given that it has been accepted that the law relating to command responsibility recognises not only civilian superiors, who may not be in any such formal chain of command, and *de facto* authority, for which no formal appointment is required, the law does not allow for such an interpretation. However, when read in the context of the rest of the Trial Chamber's Judgement, the Appeals Chamber is satisfied that the Trial Chamber was *not* in fact imposing the requirement of such a formalised position in a formal chain of command, as opposed to requiring that there be proof that Delić was a superior in the sense of having the material ability to prevent or punish the acts of persons subordinate to him. This is apparent from, for example, the Trial Chamber's references to the sufficiency of *indirect* control (where it amounts to effective control)[479] and its acceptance of *de facto* authority,[480] to which reference has already been made by the Appeals Chamber in the context of the Prosecution's second ground of appeal.

305. However, the Prosecution has also submitted that, "even on the Trial Chamber's test for the superior-subordinate relationship, Delić should have been convicted as the Trial Chamber misapplied this test to its own findings of fact".[481] The Prosecution, based on its understanding that the Trial Chamber required proof that Delić was exercising authority within a formal chain of command, contends that the facts found by the Trial Chamber establish this. As indicated above, the Appeals Chamber considers that the Trial Chamber essentially applied the correct test – whether Delić exercised effective control in having the material ability to prevent or punish crimes committed by subordinates – and did not require him to have a formalised position in a direct chain of command over the subordinates. However, the Appeals Chamber will consider the Trial Chamber findings which are relied on by the Prosecution to determine whether those findings must have compelled a conclusion that either standard was satisfied. As this aspect of the appeal involves an allegation that the Trial Chamber erred in its findings of fact, the Prosecution must establish that the conclusion reached by the Trial Chamber (that

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circumstances of encouraging the commission of offences. *See Furundžija* Trial Judgement at para 209; *Aleksovski* Judgement, para 62.

[478] Trial Judgement, paras 796 and 810.

[479] Trial Judgement, paras 371 and 646.

[480] Trial Judgement, para 378.

[481] Prosecution Brief para 6.16; Prosecution Reply, para 6.13.

Delić did not exercise superior authority) was one which *no* reasonable tribunal of fact could have reached.[482] In order to succeed on its submission that the Appeals Chamber should substitute its own finding for that of the Trial Chamber – that is, that Delić did in fact exercise command responsibility and enter convictions accordingly – it is necessary for the Prosecution to establish that this finding is the *only reasonable* finding available on the evidence.[483] This standard was acknowledged by the Prosecution.[484]

306. The Prosecution first relies on the Trial Chamber's finding that Delić was deputy commander of the camp.[485] The Appeals Chamber accepts the Trial Chamber's view that this title or position is not dispositive of the issue and that it is necessary to look to whether there was evidence of *actual* authority or control exercised by Delić. For the same reason, the fact that the detainees regarded him as the deputy commander, and as a person with influence over the guards,[486] is not conclusive evidence of his *actual* authority.

307. The Prosecution identifies four other findings of the Trial Chamber which it says demonstrate such actual control.[487] The Appeals Chamber considers them in turn.

308. The Trial Chamber referred to testimony of four witnesses to the effect that the guards feared Delić and that he occasionally criticised them severely.[488] This evidence appeared to be accepted by the Trial Chamber, but it was interpreted by the Trial Chamber as showing a "degree of influence" which could be "attributable to the guards' fear of an intimidating and morally delinquent individual" rather than as unambiguous evidence of superior authority.[489] The Appeals Chamber considers that this interpretation of this piece of evidence was open to the Trial Chamber, who, it must be remembered, heard the witnesses and the totality of the evidence itself. There was certainly nothing submitted by the Prosecution which would demonstrate that this conclusion was so unreasonable that no reasonable tribunal of fact could have reached it.

309. The Prosecution also referred to evidence that Delić had ordered the beating of detainees on certain occasions.[490] As the Prosecution itself acknowledges, the Trial Chamber

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[482] *See infra* paras 434-436.
[483] *Aleksovski* Appeal Judgement, para 74.
[484] Appeal Transcript, p 198.
[485] Prosecution Brief, paras 6.12-6.15.
[486] A matter also relied on by the Prosecution as evidence of authority: Prosecution Brief, para 6.11; Appeal Transcript, pp 193-194.
[487] Appeal Transcript at pp 193-194.
[488] Trial Judgement, para 803, referred to in Prosecution Brief at para 6.11(3) and Appeal Transcript at p 194.
[489] Trial Judgement, para 806.
[490] *Ibid*, paras 804 and 805.

did not find beyond reasonable doubt that Delić did in fact order guards to conduct the series of beatings which was the subject of the evidence referred to in paragraph 804 of the Trial Judgement. The Trial Chamber referred to the evidence of certain witnesses and concluded that the evidence "*suggests* that Mr Delić conducted a vindictive beating of the people from Bradina on one particular day and then told at least one other guard, Mr Landžo to continue this beating. However, it is *not proven* that the beatings that followed from that day or [*sic*] were 'ordered' by Mr Delić".[491] In relation to the second occasion referred to in paragraph 805 of the Judgement, the Trial Chamber only referred to the Prosecution allegation of Delić ordering a beating and stated:

> Witness F and Mirko Đordić testified to this incident and indicated that Delić "ordered" or was "commanding" the guards in this collective beating.

The Trial Chamber did not state whether it accepted this evidence, and it made *no* finding as to whether Delić actually ordered the beating or not. Despite the Prosecution's apparent suggestion that it is enough that "the Trial Chamber made no finding that this evidence was unreliable",[492] this is not a sufficient basis for the Appeals Chamber to take it as a finding by the Trial Chamber that the ordering of the beating was proved beyond reasonable doubt. The Appeals Chamber therefore cannot identify from the matters referred to by the Prosecution any unambiguous findings that it was proven beyond reasonable doubt that Delić ordered guards to mistreat detainees.

310. The Prosecution also refers to the finding that Delić "was tasked with assisting Zdravko Mucić by organising and arranging for the daily activities in the camp."[493] A finding as to such a responsibility for organising and arranging *activities* in the camp, while potentially demonstrating that Delić had some seniority within the camp, actually provides no information at all as to whether he had authority or effective control over the guards within the camp who were the perpetrators of the offences for which it is sought to make Delić responsible. The Appeals Chamber therefore agrees with the Trial Chamber that it was open to regard this evidence as inconclusive.

311. Finally, the Prosecution refers to evidence given by Delić's co-accused Landžo that he "carried out all of [Delić's] orders out of fear and also because I believed I had to carry [*sic*] execute them".[494] While the Trial Chamber certainly considered this evidence, it did not accept

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[491] Emphasis added.
[492] Appeal Transcript, p 194.
[493] Trial Judgement, para 809.
[494] Appeal Transcript, p 194, referring to evidence cited at para 801 of Trial Judgement.

it, as it found that Landžo was not a credible witness and that his evidence could not be relied on unless supported by other evidence.[495] It did not identify any other evidence which it regarded as constituting such support.

312. There were therefore a number of problems with the relevance of the findings or the quality of the underlying evidence relied on by the Prosecution. The weakness of such evidence as the foundation of any finding *beyond reasonable doubt* that Delić exercised superior authority was recognised by the Trial Chamber, which concluded that all this evidence was "indicative of a degree of influence Hazim Delić had in the Čelebići prison-camp on some occasions, in the criminal mistreatment of detainees", but that it "is not, on the facts before this Trial Chamber, of itself indicative of the superior authority of Delić sufficient to attribute superior responsibility to him".[496] The Appeals Chamber does not see anything in this conclusion which suggests it is unreasonable, and certainly not that it is so unreasonable that no reasonable tribunal of fact could reach it.

313. Although this conclusion effectively disposes of this ground of appeal, it is necessary to make an observation in relation to one final issue. The Prosecution submitted that, should it be accepted that the Trial Chamber should have found that Delić did in fact exercise superior authority over the guards in the camp, it would then be possible to reverse his acquittals on the basis of the findings in the Trial Judgement. In particular, it submits that it is established that Delić knew or had reason to know on the following basis:

> It cannot seriously be disputed that Delić knew of the crimes being committed in the camp generally. The Trial Chamber said that "The crimes committed in the Čelebići prison-camp were so frequent and notorious that there is no way that *Mr Mucić* could not have known or heard about them." There is also no way that Delić could not have known about them, given that he was himself convicted for directly participating in them, and was involved in the operation of the camp on a daily basis.[497]

It must first be observed that, contrary to this submission, there was *no* finding that Delić directly participated in all of the crimes for which he is sought to be made responsible. Secondly, it cannot be accepted that a finding by the Trial Chamber that a co-accused who was commander of the camp must have known of the crimes committed in the camp can be taken, by some kind of imputation, as a finding beyond reasonable doubt that *Delić* knew or had reason to know of the crimes for which the Prosecution seeks to have convictions entered. The Trial Judgement contains no findings as to Delić's state of knowledge in relation to many of the

[495] Trial Judgement, para 802. This was acknowledged by the Prosecution: Appeal Transcript, p 194.
[496] *Ibid*, para 806.
[497] Prosecution Brief, para 6.18. (Emphasis added).

crimes for which the Prosecution seek a reversal of the acquittal. It is undisputed that command responsibility does not impose strict liability on a superior for the offences of subordinates. Thus, had the Appeals Chamber accepted that the only reasonable conclusion on the evidence was that Delić was a superior, the question of whether he knew or had reason to know of the relevant offences would have remained unresolved, and it would in theory have been necessary to remit the matter to a Trial Chamber for consideration.

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

V. UNLAWFUL CONFINEMENT OF CIVILIANS

A. Introduction

315. Count 48 of the Indictment charged Mucić, Delić and Delalić with individual participation in, and superior responsibility for, the unlawful confinement of numerous civilians in the Čelebići camp. The offence of unlawful confinement of civilians is punishable under Article 2(g) of the Statute as a grave breach of the Geneva Conventions. Count 48 provided:

> Between May and October 1992, Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ participated in the unlawful confinement of numerous civilians at Čelebići camp. Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the unlawful confinement of civilians, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ are responsible for:
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> Count 48. A Grave Breach punishable under Article 2(g) (unlawful confinement of civilians) of the Statute of the Tribunal.

316. The Trial Chamber found Mucić guilty of unlawful confinement of civilians as charged in count 48 under both Articles 7(1) and 7(3) of the Statute. It found Delalić and Delić not guilty under this count. The Prosecution appeals against these acquittals. The Prosecution contends in its third ground of appeal that:

> The Trial Chamber erred when it decided in paragraphs 1124-1144 that Zejnil Delalić was not guilty of the unlawful confinement of civilians as charged in count 48 of the Indictment.[498]

The Prosecution's sixth ground of appeal is that:

> The Trial Chamber erred when it decided in paragraphs 1125-1144 that Hazim Delić was not guilty of the unlawful confinement of civilians as charged in count 48 of the Indictment.[499]

317. The Prosecution contends that the Trial Chamber applied the wrong legal principle to determine the responsibility of Delalić and Delić for the unlawful confinement of the civilians in the Čelebići camp. In the case of Delalić, the Prosecution contends that the Trial Chamber also failed to apply correctly the law relating to aiding and abetting.

318. Mucić appeals against his conviction. He contends in his twelfth ground of appeal that:

> The Trial Chamber erred in fact and law in finding that the detainees, or any of them, within the Čelebići camp were unlawfully detained [...][500]

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[498] Prosecution Brief, p 68.
[499] Prosecution Brief, p 117.

Mucić also challenges the Trial Chamber's findings that he had the requisite *mens rea* for the offence and that any acts or omissions by him were sufficient to constitute the *actus reus* for the offence.[501]

319. These grounds of appeal, although dealing with different matters, touch on a number of issues which are common to each ground. It is convenient to discuss two of these common legal issues before turning to the specific issues raised discretely by each ground of appeal:

(i) the legal standard for determining what constitutes the *unlawful* confinement of civilians; and
(ii) whether the Trial Chamber was correct in its conclusion that some of the civilians in the Čelebići camp were unlawfully detained.

(i) The unlawful confinement of civilians

320. The offence of unlawful confinement of a civilian, a grave breach of the Geneva Conventions which is recognised under Article 2(g) of the Statute of the Tribunal, is not further defined in the Statute. As found by the Trial Chamber, however, clear guidance can be found in the provisions of Geneva Convention IV. The Trial Chamber found that the confinement of civilians during armed conflict may be permissible in limited cases, but will be unlawful if the detaining party does not comply with the provisions of Article 42 of Geneva Convention IV, which states:

> The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.
>
> If any person, acting through the representatives of the Protecting Power, voluntarily demands internment, and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Thus the involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful. Further, an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of

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[500] Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić Dated the 2nd July 1999, 26 July 1999, RP 1795. In the document Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, 31 May 2000, this ground of appeal was omitted but it was confirmed by counsel at the appeal hearing that this omission was unintentional and that the ground of appeal was being maintained. Appeal Transcript, p 459.

[501] Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić Dated the 2nd July 1999, 26 July 1999, RP 1795.

the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.[502] That article provides:

> Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.
>
> Unless the protected persons concerned object, the Detaining Power shall, as rapidly as possible, give the Protecting Power the names of any protected persons who have been interned or subjected to assigned residence, or have been released from internment or assigned residence. The decisions of the courts or boards mentioned in the first paragraph of the present Article shall also, subject to the same conditions, be notified as rapidly as possible to the Protecting Power.

321. In its consideration of the law relating to the offence of unlawful confinement, the Trial Chamber also referred to Article 5 of Geneva Convention IV, which imposes certain restrictions on the protections which may be enjoyed by certain individuals under the Convention.[503] It provides, in relevant part:

> Where, in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is *definitely suspected of or engaged in activities hostile to the security of the State*, such individual person shall not be entitled to claim such rights and privileges under the present Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.
>
> [...]
>
> In each case, such persons shall nevertheless be treated with humanity, and, in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention. They shall also be granted the full rights and privileges of a protected person under the present Convention at the earliest date consistent with the security of the State or Occupying Power, as the case may be.[504]

This provision reinforces the principle behind Article 42, that restrictions on the rights of civilian protected persons, such as deprivation of their liberty by confinement, are permissible only where there are reasonable grounds to believe that the security of the State is at risk.

322. The Appeals Chamber agrees with the Trial Chamber that the exceptional measure of confinement of a civilian will be lawful only in the conditions prescribed by Article 42, and

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[502] Trial Judgement, para 583.
[503] Trial Judgement, paras 566-567.
[504] Emphasis added.

where the provisions of Article 43 are complied with.[505] Thus the detention or confinement of civilians will be unlawful in the following two circumstances:

(i) when a civilian or civilians have been detained in contravention of Article 42 of Geneva Convention IV, *ie* they are detained without reasonable grounds to believe that the security of the Detaining Power makes it absolutely necessary; and

(ii) where the procedural safeguards required by Article 43 of Geneva Convention IV are not complied with in respect of detained civilians, even where their initial detention may have been justified.

(ii) Was the confinement of the Čelebići camp detainees unlawful?

323. As stated above, the Trial Chamber found that the persons detained in the Čelebići camp were civilian protected persons for the purposes of Article 4 of Geneva Convention IV.[506] The Trial Chamber accepted evidence that indicated that a number of the civilians in the camp were in possession of weapons at the time of their capture, but refrained from making any finding as to whether the detaining power could legitimately have formed the view that the detention of this category of persons was necessary for the security of that power.[507] However, the Trial Chamber also found that the confinement of a significant number of civilians in the camp could not be justified by any means. Even taking into account the measure of discretion which should be afforded to the detaining power in assessing what may be detrimental to its own security, several of the detained civilians could not reasonably have been considered to pose any sufficiently serious danger as to warrant their detention.[508] The Trial Chamber specifically accepted the evidence of a number of witnesses who had testified that they had not participated in any military activity or even been politically active, including a 42-year old mother of two children.[509] It concluded that at least this category of people were detained in the camp although there existed no serious and legitimate reason to conclude that they seriously prejudiced the security of the detaining party, which indicated that the detention was a

[505] This does not preclude the existence of other circumstances which may render confinement of a civilian unlawful, but that question does not now arise for determination by the Appeals Chamber.
[506] *See* above, Chapter II, Section B.
[507] Trial Judgement, para 1131.
[508] Trial Judgement, para 1132.
[509] Trial Judgement, para 1133.

collective measure aimed at a specific group of persons, based mainly on their ethnic background.[510]

324. Mucić argues in relation to his ground of appeal,[511] and Delić and Delalić argue in response to the Prosecution's ground of appeal, that the Prosecution failed to prove beyond reasonable doubt that the persons confined in the Čelebići camp were unlawfully detained. They reiterate their submission that the detainees were not in fact protected persons, a submission which the Appeals Chamber is rejecting in relation to the ground of appeal based on that argument.[512]

325. The Prosecution responds that the findings of the Trial Chamber that the victims were unlawfully detained must stand unless the accused show that those findings were unreasonable in the sense that no reasonable person could have reached them.[513]

326. Delalić contends that since "the Trial Chamber, in determining that they [the civilians] were protected persons, found that they were not loyal to [...] Bosnia and Herzegovina, then they are virtually *ipso facto* security risks to the Government in that they are supporting the rebel forces".[514] He explains the detention of persons who may not have borne arms on the basis that "if not engaged in actual fighting, then they are certainly in a position to provide food, clothing, shelter and information to those who are".[515]

327. In the Appeals Chamber's view, there is no necessary inconsistency between the Trial Chamber's finding that the Bosnian Serbs were regarded by the Bosnian authorities as belonging to the opposing party in an armed conflict[516] and the finding that some of them could not reasonably be regarded as presenting a threat to the detaining power's security. To hold the contrary would suggest that, whenever the armed forces of a State are engaged in armed conflict, the *entire* civilian population of that State is necessarily a threat to security and therefore may be detained. It is perfectly clear from the provisions of Geneva Convention IV referred to above that there is no such blanket power to detain the entire civilian population of a

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[510] Trial Judgement, para 1134.
[511] Most of the submissions of Mucić on this issue are drawn from the closing submissions made on behalf of Delalić at trial. *See* Motion to Amend by Substitution the Appeal Brief of Zdravko Mucić Filed on 2 July 1999, 15 July 1999, para 4: "The Appellant adopts as a substantive appeal against conviction on Count 48 the arguments and reasoning contained in the Final Written Submissions of Zejnil Delalić dated the 28th of August 1998 and set out at paragraph R, pages 337-343 inclusive of that document [...]."
[512] *Supra*, para 106.
[513] Prosecution Response, pp 50-51.
[514] Delalić Response, p 146.
[515] Delalić Response, p 146.
[516] Trial Judgement, para 265.

party to the conflict in such circumstances, but that there must be an assessment that each civilian taken into detention poses a *particular risk* to the security of the State. This is reflected in the ICRC Commentary to Article 42 of Geneva Convention IV:

> [...] the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence.[517]

Thus the Appeals Chamber agrees with the conclusion reached by the Trial Chamber that "the mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living, and is not, therefore, a valid reason for interning him."[518]

328. It was contended by Delić that detention in the present case was justified under international law because "[t]he government is clearly entitled to some reasonable time to determine which of the detainees is a danger to the State's security".[519] Although the Appeals Chamber accepts this proposition, it does not share the view apparently taken by Delić as to what is a "reasonable time" for this purpose. The reasonableness of this period is *not* a matter solely to be assessed by the detaining power. The Appeals Chamber recalls that Article 43 of Geneva Convention IV provides that the decision to take measures of detention against civilians must be "reconsidered *as soon as possible* by an appropriate court or administrative board."[520] Read in this light, the reasonable time which is to be afforded to a detaining power to ascertain whether detained civilians pose a security risk must be the *minimum* time necessary to make enquiries to determine whether a view that they pose a security risk has any objective foundation such that it would found a "definite suspicion" of the nature referred to in Article 5 of Geneva Convention IV. Although the Trial Chamber made no express finding upon this issue, the Appeals Chamber is satisfied that the only reasonable finding upon the evidence is that the civilians detained in the Čelebići camp had been detained for longer than such a minimum time.

329. The Trial Chamber found that a Military Investigative Commission for the crimes allegedly committed by the persons confined in the Čelebići camp was established,[521] but that this Commission did not meet the requirements of Article 43 of Geneva Convention IV as it did not have the necessary power to decide finally on the release of prisoners whose detention could

[517] ICRC Commentary (GC IV) p 258.
[518] Trial Judgement, para 1134.
[519] Delić Response, para 262, p 218.
[520] Emphasis added.
[521] *See infra* para 382.

not be considered as justified for any serious reason.[522] There is therefore nothing in the activities of the Commission which could justify the continued detention of detainees in respect of whom there was no reason to categorise as a security risk. Indeed, it appears to have recommended the release of several of the Čelebići camp detainees, albeit without result.[523] Delić submits that "the government had the right to continue the confinement until it determined that the State's security would not be harmed by release of the detainees."[524] This submission, which carries the implication that civilian detainees may be considered a risk to security which makes their detention absolutely necessary until proved otherwise, completely reverses the onus of justifying detention of civilians. It is upon the detaining power to establish that the particular civilian does pose such a risk to its security that he must be detained, and the obligation lies on it to release the civilian if there is inadequate foundation for such a view.

330. The Trial Chamber, as the trier of facts, is in the best position to assess and weigh the evidence before it, and the Appeals Chamber gives a margin of deference to a Trial Chamber's evaluation of the evidence and findings of facts.[525] Nothing put to the Appeals Chamber indicates that there is anything unreasonable in the relevant sense in the Trial Chamber's findings as to the unlawful nature of the confinement of a number of civilians in the Čelebići camp. As observed in the ICRC Commentary, the measure of confinement of civilians is an "exceptionally severe" measure, and it is for that reason that the threshold for its imposition is high – it must, on the express terms of Article 42, be "absolutely necessary".[526] It was open to the Trial Chamber to accept the evidence of a number of witnesses that they had not borne arms, nor been active in political or any other activity which would give rise to a legitimate concern that they posed a security risk. The Appeals Chamber is also not satisfied that the Trial Chamber erred in its conclusion that, even if it were to accept that the initial confinement of the individuals detained in the Čelebići prison-camp was lawful, the continuing confinement of these civilians was in violation of international humanitarian law, as the detainees were not granted the procedural rights required by article 43 of Geneva Convention IV.

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[522] Trial Judgement, paras 1138-1140.
[523] Trial Judgement, paras 1137-1138.
[524] Delić Response, para 262, p 218.
[525] *See Aleksovski* Appeal Judgement, para 63.
[526] ICRC Commentary (GCIV) p 261: "the Convention describes internment and placing in assigned residence as exceptionally severe measures which may be applied only if they are absolutely necessary for the security of the State."

B. The Prosecution appeals

331. As stated above, the Prosecution claims that the Trial Chamber erred in acquitting Delalić of both direct responsibility under Article 7(1) and superior responsibility under Article 7(3) for the offence of unlawful confinement.

332. The Prosecution requests the Appeals Chamber to reverse the Trial Chamber's acquittal of Delalić and Mucić on count 48, and substitute a verdict of guilty for this count. Delalić and Delić respond that their acquittals on this count were correct in law and should not be disturbed.

1. Article 7(3) Liability

333. The Prosecution argues as part of the third ground of appeal that the Trial Chamber erred in finding that it was not proved that Delalić had superior authority in connection with the unlawful confinement of civilians, and relies for support on its arguments submitted in relation to its second ground of appeal, without more.[527] In relation to the sixth ground of appeal, the Prosecution contends that the Trial Chamber erred in finding that Delić did not have superior responsibility for the unlawful confinement of civilians.[528]

334. The Trial Chamber found that:

> Zejnil Delalić and Hazim Delić have respectively been found not to have exercised superior authority over the Čelebići prison-camp. For this reason, the Trial Chamber finds that these two accused cannot be held criminally liable as superiors, pursuant to Article 7(3) of the Statute, for the unlawful confinement of civilians in the Čelebići prison-camp.[529]

The resolution of this aspect of these grounds therefore rests upon the resolution of the Prosecution's second and fifth grounds of appeal, which challenged the Trial Chamber's finding that Delalić and Delić did not exercise superior authority under Article 7(3) of the Statute. The Appeals Chamber has dismissed those grounds of appeal,[530] with the result that the Trial Chamber's determination that Delalić and Delić were not superiors for the purposes of Article 7(3) of the Statute remains. The present grounds of appeal therefore cannot succeed insofar as they relate to Delalić and Delić's liability for the unlawful confinement of civilians pursuant to Article 7(3) of the Statute.

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[527] Prosecution Brief, para 4.5. The Second Ground of Appeal is that the Trial Chamber erred in finding that Delalić did not exercise superior responsibility.
[528] *Ibid*, para 7.19.
[529] Trial Judgement, para 1144.
[530] *Supra*, Chapter IV, Section B.

2. Article 7(1) Liability

335. The Prosecution contends that the Trial Chamber erred in law in the principles it applied in considering when an accused can be held responsible under Article 7 (1) for unlawful confinement of civilians.[531] The Prosecution argues that, had the Trial Chamber applied the correct legal principles in regard to Article 7(1) to the facts it had found, Delalić and Delić would have been liable under Article 7(1) for aiding and abetting in the commission of the unlawful confinement of civilians. It is submitted that the Trial Chamber's findings demonstrate that Delalić and Delić knew that civilians were unlawfully confined in the camp and consciously participated in their continued detention, and that this is sufficient to found their personal liability for the offence.[532]

336. As discussed above, the Trial Chamber found that civilians are unlawfully confined where they are detained in contravention of Articles 42 and 43 of Geneva Convention IV. In relation to the nature of the individual participation in the unlawful confinement which will render an individual personally liable for the offence of unlawful confinement of civilians under Article 2(g) of the Statute, the Trial Chamber, having found that Delalić and Delić did not exercise superior responsibility over the camp, held:

> *Furthermore, on the basis of these findings, the Trial Chamber must conclude that the Prosecution has failed to demonstrate that Zejnil Delalić and Hazim Delić were in a position to affect the continued detention of civilians in the Čelebići prison-camp.* In these circumstances, Zejnil Delalić and Hazim Delić cannot be deemed to have participated in this offence. Accordingly, the Trial Chamber finds that Zejnil Delalić and Hazim Delić are not guilty of the unlawful confinement of civilians, as charged in count 48 of the Indictment.[533]

337. On the basis of the italicised portion of the above passage, the Prosecution interprets the Trial Chamber as having applied a test which requires proof of the exercise of superior authority under Article 7(3) of the Statute before an individual could be held responsible under Article 7(1) of the Statute for the offence of unlawful confinement.[534] More generally, the Prosecution submits that the Trial Chamber erred in finding that, as a matter of law, an accused cannot be criminally liable under Article 7(1) for the unlawful confinement of civilians unless that person was "in a position to affect the continued detention of civilians".[535] The Prosecution observes

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[531] Prosecution Brief, para 7.7.
[532] Prosecution Brief, paras 7.13 and 7.16.
[533] Trial Judgement, para 1144, (emphasis added).
[534] Prosecution Brief, para 4.10.
[535] Prosecution Brief, para 4.11.

that individual criminal liability extends to any person who committed an offence in the terms of Article 7(1).[536]

338. In relation to the contention that the Trial Chamber found that an accused can be liable under Article 7(1) for the offence of unlawful confinement only if it is proved that he exercises superior authority under Article 7(3), there is some question as to whether the Trial Chamber in fact made such a legal finding. The Trial Chamber's statement that, "on the basis of" its findings that Delalić and Delić could not be held criminally liable under Article 7(3) of the Statute, it "must conclude" that there had been a failure to prove that they had been in a position to affect the continued detention of the civilians in the camp could be interpreted as suggesting that the Trial Chamber believed that, as a *legal* matter, there could be no liability for unlawful confinement under Article 7(1) without superior responsibility under Article 7(3) being established. Such a legal interpretation is clearly incorrect, as it entwines two types of liability, liability under Article 7(1) and liability under Article 7(3). As emphasised by the Secretary-General's Report,[537] the two liabilities are different in nature. Liability under Article 7(1) applies to direct perpetrators of crimes and to accomplices. Article 7(3) applies to persons exercising command or superior responsibility. As has already been acknowledged by the Appeals Chamber in another context, these principles are quite separate and neither is dependent in law upon the other. In the *Aleksovski* Appeal Judgement, the Appeals Chamber rejected a Trial Chamber statement, made in relation to the offence of outrages of personal dignity consisting of the use of detainees for forced labour and as human shields, that the accused "cannot be held responsible under Article 7(1) in circumstances where he does not have direct authority over the main perpetrators of the crimes".[538] There is no reason to believe that, in the context of the offence of unlawful confinement, there would be any special requirement that a position of superior authority be proved before liability under Article 7(1) could be recognised.

339. However, the Appeals Chamber is not satisfied that this is what the Trial Chamber in fact held. The reference to its findings on the issue of superior authority when concluding that, "[i]n these circumstances, Zejnil Delalić and Hazim Delić cannot be deemed to have participated in this offence" suggests that the Trial Chamber was referring not to its *legal* conclusion that the two accused were not superiors for the purposes of Article 7(3), but to the previous *factual findings* that it had made in that context, which were also relevant to the issue

[536] Prosecution Brief, paras 7.8-7.9.
[537] Secretary-General's Report, paras 56-58.
[538] *Aleksovski* Appeal Judgement, para 170.

of their individual responsibility for the offence of unlawful confinement. Whether the Trial Chamber was unreasonable in relying on those findings to conclude that Delalić and Delić should be acquitted of the offence under Article 7(1) is a separate issue which is discussed below.

340. The Prosecution also challenges the Trial Chamber's apparent conclusion that, to be responsible for this offence under Article 7(1), the perpetrator must be "in a position to affect the continued detention" of the relevant civilians. Responsibility may be attributed if the accused falls within the terms of Article 7(1) of the Statute, which provides that:

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

341. It is submitted that an accused can be liable under Article 7(1) for committing the crime of unlawful confinement of civilians even if the accused was not the person who could determine which victim would be detained, and whether particular victims would be released.[539] The Prosecution proposes that, in order to establish criminal responsibility for *committing* the offence of unlawful confinement of civilians it is sufficient to prove (i) that civilians were unlawfully confined, (ii) knowledge that the civilians were being unlawfully confined and (iii) participation in the confinement of those persons.[540] The Prosecution submits that, in relation to guards in a prison, the third matter "will be satisfied by showing that the duties of the guard were in themselves in execution or administration of the illegal system."[541]

342. The Appeals Chamber is of the view that to establish that an individual has *committed* the offence of unlawful confinement, something more must be proved than mere knowing "participation" in a general system or operation pursuant to which civilians are confined. In the Appeals Chamber's view, the fact alone of a role in some capacity, however junior, in maintaining a prison in which civilians are unlawfully detained is an inadequate basis on which to find primary criminal responsibility of the nature which is denoted by a finding that someone has *committed* a crime. Such responsibility is more properly allocated to those who are responsible for the detention in a more direct or complete sense, such as those who actually place an accused in detention without reasonable grounds to believe that he constitutes a security risk; or who, having some powers over the place of detention, accepts a civilian into detention without knowing that such grounds exist; or who, having power or authority to release

[539] Prosecution Brief, para 7.9.
[540] Prosecution Brief, para 7.13.
[541] Prosecution Brief, para 7.13

detainees, fails to do so despite knowledge that no reasonable grounds for their detention exist, or that any such reasons have ceased to exist. In the case of prison guards who are employed or conscripted to supervise detainees, and have no role in the determination of who is detained or released, the Prosecution submits that the presence alone of the camp guards was the "most immediate obstacle to each detainee's liberty"[542] and that the guard's presence in the camp in that capacity alone would therefore constitute commission by them of the crime of unlawful confinement. This, however, poses the question of what such a guard is expected to do under such circumstances. The implication from the Prosecution submissions is that such a guard must release the prisoners. The Appeals Chamber, however, does not accept that a guard's omission to take unauthorised steps to release prisoners will suffice to constitute the commission of the crime of unlawful confinement. The Appeals Chamber also finds it difficult to accept that such a guard must cease to supervise those detained in the camp to avoid such liability, particularly in light of the fact that among the detainees there may be persons who are lawfully confined because they genuinely do pose a threat to the security of the State.

343. It is not necessary for present purposes for the Appeals Chamber to attempt an exhaustive definition of the circumstances which will establish that the offence is *committed*, but it suffices to observe that such liability is reserved for persons responsible in a more direct or complete sense for the civilian's unlawful detention. Lesser degrees of directness of participation obviously remain relevant to liability as an accomplice or a participant in a joint criminal enterprise, which concepts are best understood by reference first to what will establish primary liability for an offence.

344. In relation to accomplice liability, the Prosecution contends that, "[i]n the case of the crime of unlawful confinement of civilians under Article 2(g) of the Statute, a person who, for instance, *instigates* or *aids and abets* may not ever be in a position to affect the continued detention of the civilians concerned."[543] The Prosecution also observes that many of the crimes within the Tribunal's jurisdiction may in practice be committed jointly by a number of persons if they have the requisite *mens rea* and that the crime of unlawful confinement is a clear example of this as "it was the various camp guards and administrators, acting jointly, who collectively ran the camp and kept the victims confined within it."[544]

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[542] Prosecution Brief, para 7.12.
[543] Prosecution Brief, para 7.8, (emphasis in the original).
[544] Prosecution Brief, para 7.11.

345. Although it did not explicitly discuss as a discrete legal matter the exact principles by which individuals will be held individually criminally responsible for the unlawful confinement of civilians, the Trial Chamber did, earlier in its Judgement, discuss the general principles relating to criminal responsibility under Article 7(1) of the Statute. It cited the following statement from the Trial Chamber in the *Tadić* Judgement which the *Čelebići* Trial Chamber considered to state accurately "the scope of individual criminal responsibility under Article 7(1)":[545]

> [...] the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.

This statement, from its context in the *Tadić* Trial Judgement, although broadly expressed, appears to have been intended to refer to liability for aiding and abetting or all forms of accomplice liability rather than all forms of individual criminal responsibility under Article 7(1) including primary or direct responsibility.[546] In the case of primary or direct responsibility, where the accused himself commits the relevant act or omission, the qualification that his participation must "directly and substantially affect the commission of the offence" is an unnecessary one. The Trial Chamber, in referring to the ability to "affect the continued detention" of the civilians, appears to have been providing a criterion to enable the identification of the person who could have a "direct and substantial effect" on the commission of unlawful confinement of civilians in the sense of the *Tadić* statement.

346. It may have been clearer had the Trial Chamber set out expressly its understanding of the relevant principles in relation to the establishment of primary or direct responsibility for the offence of unlawful confinement of civilians, in relation to which the general principles of accomplice liability set out earlier in its Judgement would also be applied. However, the Appeals Chamber does not consider that these submissions establish that the Trial Chamber erred in stating that an accused must be in a position to affect the continued detention of the civilians if this is understood, as the Appeals Chamber does, to mean that they must have participated in some significant way in the continued detention of the civilians, whether to a

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[545] Trial Judgement para 329, citing *Tadić* Trial Judgement, para 692.

[546] *See Tadić* Trial Judgement, at *e.g.*, para 688, where the opposition is drawn between culpability where the accused "intentionally commits" a crime or where he "knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime". (The underlining is in the original). The reference to "directly and substantially" is made only in relation to the latter category. *See* also the following paras 689-691 which appear to be concerned with aiding and abetting only.

degree which would establish primary responsibility, or to a degree necessary to establish liability as an accomplice or pursuant to a common plan. The particular submissions the Prosecution makes in support of its contention that Delalić and Delić should have been convicted under Article 7(1) for the offence are now considered.

(a) Delalić

347. The Prosecution alleges that Delalić should have been found guilty for aiding and abetting the offence of unlawful confinement. Delalić argues that the Indictment did not charge him with aiding and abetting in Count 48 and that, even if it were to be accepted that he was so charged, the evidence did not show beyond a reasonable doubt that he was guilty as an aider and abettor.[547]

348. The Prosecution responds that Delalić was charged with aiding and abetting in Count 48 of the Indictment by the use of the word "participation".[548] Delalić contends however that "when the Prosecutor intends to charge aiding and abetting it is done so specifically",[549] and he advances some examples of other indictments before the Tribunal that charge aiding and abetting for the offence of unlawful confinement.[550] Delalić refers to Articles 18(4) and 21(4)(a) of the Statute which require that the indictment contain "a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute" and that an accused must be informed of the nature and cause of the charge against him.[551]

349. The Appeals Chamber notes that the alleged offence of unlawful confinement is charged in count 48 of the Indictment[552] as follows:

> Between May and October 1992, Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ *participated in* the unlawful confinement of numerous civilians at Čelebići camp. Zejnil DELALIĆ, Zrdavko MUCIĆ, and Hazim DELIĆ also knew or had reason to know that persons in positions of subordinate authority to them were about to commit those acts resulting in the unlawful confinement of civilians, or had already committed those acts, and failed either to take the necessary and reasonable steps to prevent those acts or to punish the perpetrators after the acts had been committed. By their acts and omissions, Zejnil DELALIĆ, Zdravko MUCIĆ, and Hazim DELIĆ are responsible for:
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> Count 48. A Grave Breach punishable under Article 2(g) (unlawful confinement of civilians) of the Statute of the Tribunal.

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[547] Delalić Response, p 149.
[548] Prosecution Reply paras 4.17-4.19.
[549] Delalić Response, p 148.
[550] *See* Counts 3 and 4 and paragraph 35 of the indictment filed against Radovan Karadzić and Ratko Mladić in July 1995 and *see* Count 22 and paragraph 44 of the amended indictment filed against Dario Kordić in Sept 1998. Delalić Response, p 148.
[551] Delalić Response, pp 147-149.
[552] Indictment, para 36, (emphasis added).

Article 7 (1) does not contain the wording used in the Indictment of "participating", but the Prosecution contends that it is evident that a person can participate in a crime through any of the types of conduct referred to in that provision.

350. The Appeals Chamber notes that the language used in Count 48 could (and should) have been expressed with greater precision. Although the accused are clearly charged under both Article 7(1) and Article 7(3) of the Statute, no particular head of Article 7(1) is indicated. The Appeals Chamber has already referred to the difficulties which arise from the failure of the Prosecution to identify exactly the type of responsibility alleged against an accused, and has recommended that the Prosecution "indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged".[553] However, it was also accepted in that case that the general reference to the terms of Article 7(1) was, in that context, an adequate basis on which to find that the accused had been charged with aiding and abetting.

351. In relation to use of the word "participate" to describe forms of responsibility, the Appeals Chamber notes that the Report of the Secretary-General mentions the word "participate" in the context of individual criminal responsibility:

> 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 contribute to the commission of the violation and are, therefore, individually responsible.[554]

It is clear that Article 7 (1) of the Statute encompasses various modes of participation, some more direct than other. The word "participation" here is a broad enough term to encompass all forms of responsibility which are included within Article 7(1) of the Statute. Although greater specificity in drafting indictments is desirable, failure to identify expressly the exact mode of participation is not necessarily fatal to an indictment if it nevertheless makes clear to the accused the "nature and cause of the charge against him".[555] There has been no suggestion that a complaint was made prior to the trial that Delalić did not know the case that he had to meet. It is too late to make the complaint now on appeal that the Indictment was inadequate to advise the accused that all such forms of responsibility were alleged. The use of the word "participate" is poor drafting, but it should have been understood here as including all forms of participation referred to in Article 7(1) given that superior responsibility was expressed to be an additional form of responsibility.

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[553] *Aleksovski* Appeal Judgement para 171, fn 319. *See* also the *Furundžija* Judgement, para 189.
[554] Secretary-General's Report, para 54.
[555] Article 21(4)(a) of the Statute of the Tribunal.

352. The Trial Chamber therefore correctly interpreted Count 48 of the Indictment and the supporting paragraph as charging the three accused generally with participation in the unlawful confinement of civilians pursuant to Article 7(1) of the Statute, as well as with responsibility as superiors pursuant to Article 7(3) of the Statute.[556] The Trial Chamber had earlier defined aiding and abetting as:

> [including] all acts of assistance that lend encouragement or support to the perpetration of an offence and which are accompanied by the requisite *mens rea*. Subject to the caveat that it be found to have contributed to, or have had an effect on, the commission of the crime, the relevant act of assistance may be removed both in time and place from the actual commission of the offence.[557]

The Prosecution does not challenge that definition. Subject to the observation that the acts of assistance, encouragement or support must have a substantial effect on the perpetration of the crime, the Appeals Chamber also accepts the statement as accurate.[558]

353. As noted above, in its conclusions in relation to the liability of Delalić and Delić under Article 7(1) for the offence of unlawful confinement, the Trial Chamber referred to its earlier findings made in the context of its consideration of their liability as superiors pursuant to Article 7(3) of the Statute. Although those findings were being made for the primary purpose of determining whether superior responsibility was being exercised, it is clear that they involved a broad consideration by the Trial Chamber of the nature of the involvement of the two accused in the affairs of the Čelebići camp. The Prosecution indeed contends that the findings made by the Trial Chamber provided an adequate basis on which to determine Delalić's liability for aiding and abetting.

354. The Trial Chamber considered the evidence in relation to the placing of civilians in detention at the camp, but it made no finding that Delalić participated in their arrest or in placing them in detention in the camp.[559] The Prosecution advances no argument that the Trial Chamber erred in this respect.

355. However, the Prosecution argues that Delalić participated in the continued detention of civilians as an aider and abettor. The Trial Chamber found that there was "no evidence that the Čelebići prison-camp came under Delalić's authority by virtue of his appointment as co-ordinator".[560] The Trial Chamber found that the primary responsibility of Delalić in his position

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[556] Trial Judgement, para 1125.
[557] Trial Judgement, para 327.
[558] *Tadić* Appeal Judgement, para 229.
[559] Trial Judgement, para 1131.
[560] Trial Judgement, para 669.

as co-ordinator was to provide logistical support for the various formations of the armed forces; that these consisted of, *inter alia*, supplies of material, equipment, food, communications equipment, railroad access, transportation of refugees and the linking up of electricity grids.[561] These findings as to the scope of Delalić's role obviously supported its later conclusion that he was not in a position to affect the continued detention of the civilians at the Čelebići camp.

356. The Prosecution, however, refers to two specific matters which it says constituted aiding and abetting by Delalić: his role in "publicly justifying and defending the purpose and legality of the camp",[562] and his "participation in the classification and releasing of prisoners".[563]

357. The Prosecution contends that the evidence before the Trial Chamber showed that Delalić was involved in the release of Doctor Grubač and Witness P in July 1992,[564] and that he signed orders on 24 and 28 August 1992[565] for the classification of detainees and their release. However, the Trial Chamber explicitly found that:

> As co-ordinator, Zejnil Delalić had no authority to release prisoners.[566]

The Trial Chamber found that the orders referred to by the Prosecution were not signed in Delalić's capacity as "co-ordinator", as all documents were signed "for" the Head of the Investigating Body of the War Presidency.[567] He had no independent authority to do so.[568]

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[561] Trial Judgement, para 664.
[562] Prosecution Brief, para 4.18.
[563] Prosecution Brief, para 4.21.
[564] Trial Judgement, para 684.
[565] Trial Judgement, para 692. *See* Prosecution Exhibits 99-7/10 and 99-7/11.
[566] Trial Judgement, para 684.
[567] Trial Judgement, para 684.
[568] Trial Judgement, para 685. It should be noted that, in the week prior to the hearing of the Appeal, the Prosecution filed a motion for the adjournment of the hearing of the appeal on the basis that it had recently received new documents from the archives of the Croatian government which related to the Čelebići camp: Prosecution Motion for Adjournment of Oral Argument of Argument of Appeal or Alternatively for Adjournment of Oral Argument of Certain Grounds of Appeal, 31 May 2000. The Prosecution believed at that stage the there were "certain documents which appear to relate to the responsibilities of Zejnil Delalić as a commander in the region and his role in relation to the Čelebići prison camp during the relevant time period" and sought time to have the documents translated and properly assessed. A brief description of certain of these documents was annexed to the motion and indicated that there may be documents which related in some way to Delalić's relationship with the Čelebići camp. This motion for adjournment was refused on the basis that the material referred to in the motion did not adequately indicate that they were relevant to the allegations of errors of law in the relevant grounds of appeal, but the Appeals Chamber reserved the question of the use to which the material in the documents could be put to the hearing of the appeal. The Prosecution then made an oral motion at the hearing of the appeal that the appeal proceedings not be closed for a period of time after the hearing to enable the filing of written submissions in relation to the documents (*see* Appeal Transcript pp 79-82). This motion was supported by certain translated documents (Confidential Exhibits for Prosecution Oral Motion to File Supplementary Materials after the Conclusion of the Hearing of the Appeal, 5 June 2000), including a document which was described as being relevant to the capacity in which Delalić signed the orders for release referred to in the above text (Appeal Transcript pp 87-88). The Prosecution was given until the final day of the hearing of the appeal to determine whether it wished to bring an application for the use of the documents in

358. The Appeals Chamber considers that this conclusion has not been shown to be so unreasonable that no reasonable trier of fact could have reached it. The Trial Chamber interpreted those orders explicitly as not constituting evidence that he exercised superior responsibility in relation to the camp.[569] The Trial Chamber appears to have interpreted the orders as being, although indicative of some degree of involvement in the continuing detention or release of detainees, inadequate to establish a degree of participation that would be sufficient to constitute a substantial effect on the continuing detention which would be adequate for the purposes of aiding and abetting. The Appeals Chamber considers that this interpretation of the significance of the orders was open to the Trial Chamber.

359. The Prosecution's submission that the Trial Chamber erred in failing to find that Delalić aided and abetted the commission of the offence of unlawful confinement by publicly justifying and defending the purpose of the camp must be rejected for similar reasons.[570] The Trial Chamber referred to the evidence that Delalić had contacts with the ICRC, and that he had been interviewed by journalists in relation to the camp.[571] Even if it could be accepted that this reference alone constituted a finding by the Trial Chamber that these contacts and interviews occurred, it was open to the Trial Chamber to find that any supportive effect that this had in relation to the detention of civilians in the camp was inadequate to be characterised as having a substantial effect on the commission of the crime.

360. The Prosecution has not referred to any other evidence before the Trial Chamber which would indicate that a finding of guilt for Delalić on this count was the *only reasonable* conclusion to be drawn, a matter which must be established before an acquittal would be overturned on appeal.[572] The Prosecution's third ground of appeal must therefore be dismissed in its entirety.

(b) Delić

361. The Prosecution submits that Delić should have been found guilty under Article 7(1), although its written or oral submissions again emphasise the concept of "participation" and do

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some capacity but ultimately advised the Appeals Chamber that it would not do so (Appeal Transcript p 636). The Prosecution therefore closed its case without seeking to rely on those documents.

569 Trial Judgement, para 685.

570 Prosecution Brief, para 4.19. *See* also Trial Judgement, para 700.

571 Trial Judgement, para 700.

572 *Aleksovski* Appeal Judgement, para 172.

not clearly identify exactly what mode of participation it contends the Trial Chamber should have found had been established.

362. The Trial Chamber found no evidence which demonstrated beyond reasonable doubt that Delić had any role in the creation of the camp, in the arrest and placing in detention of the civilians. Delić argues that it has not been established that he exercised any role in the decision to detain or release prisoners.[573]

363. Although Delić belonged to the military police of the joint command of the TO and HVO,[574] which the Trial Chamber found had been involved in the creation of the camp, there was no finding by the Trial Chamber that Delić in his position had authority to detain or release civilians or even that as a practical matter he could affect who should be detained or released. The Prosecution does not refer to any evidence which would have established such a finding beyond reasonable doubt. The Trial Chamber did find that the evidence established that Delić was "tasked with assisting Zdravko Mucić by organising and arranging for the daily activities in the Čelebići prison-camp."[575]

364. Although the Prosecution appears to contend that the evidence established Delić's primary responsibility for commission of the offence of unlawful confinement of civilians, it does not refer to any evidence which establishes more than that he was aware of the unlawfulness of the detention of at least some of the detainees, and that he, as a guard and deputy commander of the camp, thereby participated in the detention of the civilians held there.[576] The Prosecution makes the general submission that:

> Clearly, any detainee who had attempted to leave the Čelebići camp would have been physically prevented from so doing, not by the person in command of the camp, but by one of the camp guards. The most immediate cause of each detainee's confinement, and the most immediate obstacle to each detainee's liberty, was thus the camp guards. Provided that he or she had the requisite *mens rea,* each camp guard who participated in the confinement of civilians in the camp, and prevented them from leaving it, will thus be criminally liable on the basis of Article 7(1) for the unlawful confinement of civilians, whether or not the particular guard, under the regime in force in the camp, had any responsibility for determining who would be detained and who would be released.[577]

Insofar as this may suggest that any prison guard who is aware that there are detainees within the camp who were detained without reasonable grounds to suspect that they were a security risk is, without more, responsible for the crime of unlawful confinement, the Appeals Chamber

[573] Delić Response, para 267.
[574] *Ibid*, para 797.
[575] Trial Judgement, para 809.
[576] Prosecution Brief, para 7.16.
[577] Prosecution Brief, para 7.12.

does not accept this submission. As already indicated above, the Appeals Chamber has concluded that a greater degree of involvement in the confinement of an individual is required to establish primary responsibility, and that, even in relation to aiding and abetting, it must be established that the accused's assistance to the principal must have a substantial effect on the commission of the crime. What will satisfy these requirements will depend on the circumstances of the particular case, but the Appeals Chamber would not accept that the circumstance alone of holding a position as a guard somewhere within a camp in which civilians are unlawfully detained suffices to render that guard responsible for the crime of unlawful confinement of civilians. The Prosecution has not referred to particular evidence which would place Delić's involvement in the confinement of the civilians at the Čelebići camp at a level higher than the holding of the offices of guard and deputy-commander.

365. It appears from certain other submissions of the Prosecution that, although is does not put its case in this way, it in fact considers that the doctrine of common criminal purpose or joint criminal enterprise is the most apposite form of responsibility to apply to Delić.[578] However it does not identify any findings of the Trial Chamber on the evidence which would establish the necessary elements of criminal liability through participation in a joint criminal enterprise.

366. Although it may be accepted that the only reasonable finding on the evidence, particularly in relation to the nature of some of the detainees at the camp, including elderly persons,[579] must have been that Delić was aware that, in respect of at least some of the detainees, there existed no reasonable grounds to believe that they constituted a security risk, this is not the only matter which must be established in relation to an allegation of participation in a common criminal design. The existence of a common concerted plan, design or purpose between the various participants in the enterprise (including the accused) must also be proved.[580] It is also necessary to establish a specific *mens rea*, being a shared intent to further the planned crime, an intent to further the common concerted system of ill-treatment, or an intention to participate in and further the joint criminal enterprise, depending on the circumstances of the case.[581] The Prosecution has not pointed to any evidence before the Trial Chamber which would have made the conclusion that these elements had been proved beyond reasonable doubt the *only reasonable* conclusion on the evidence.

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[578] Prosecution Brief, paras 7.11 and 7.13.
[579] *See infra* at para 385.
[580] *Tadić* Appeal Judgement, para 227.
[581] *Tadić* Appeal Judgement, para 228.

367. As to Delić's relationship to the work of the Military Investigative Commission in charge of granting procedural guarantees to detainees, the Trial Chamber concluded that the role of Delić was to assist Mucić by organising and arranging for detainees to be brought to interrogations.[582] The Trial Chamber made no finding that Delić had participated in the work of the Commission. It also made no finding that Delić himself had either responsibility for ensuring that the procedural review was conducted, or authority or power to release detainees, a power which should have been exercised when the appropriate reviews were not conducted.

368. The Appeals Chamber is satisfied that it was open to the Trial Chamber to assess the evidence before it as not proving beyond reasonable doubt that Delić's acts and omissions constituted any adequate form of "participation" in the offence of unlawful confinement for the purpose of ascribing criminal responsibility under Article 7(1).

369. The Appeals Chamber therefore finds that the Prosecution has not established that the Trial Chamber's conclusion that Delić was not guilty under Article 7 (1) for the offence of unlawful confinement was unreasonable.

C. Mucić's Appeal

370. Mucić, in support of this ground of appeal, adopted "as a substantive appeal against conviction on Count 48" the closing submissions made on behalf of Delalić at trial and made only a limited number of his own submissions on this ground.[583] The Prosecution submits that, as these "incorporated" arguments were filed before the Trial Chamber's Judgement was rendered, they should not be considered.

371. The task of the Appeals Chamber, as defined by Article 25 of the Statute, is to hear appeals from the decisions of Trial Chambers on the grounds of an error on a question of law invalidating the decision or of an error of fact which has occasioned a miscarriage of justice. An appellant must show how the Trial Chamber erred in law or in fact, and the Appeals Chamber expects their submissions to be directed to that end. The submissions "incorporated"

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[582] Trial Judgement, para 807; the finding was made essentially on the evidence on Witness D (a member of the Commission) that the Commission would receive a list of detainees in the prison-camp from Mucić and that the Commission would write out a list of people to be "interviewed". Witness D testified that they would give the list of detainees to Mucić, and if he was not there to Delić, and that Delić (alone with Mucić) had access to Commission files.

[583] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucić Filed on 2 July 1999, 15 July 1999, para 4: "The Appellant adopts as a substantive appeal against conviction on Count 48 the arguments and reasoning contained in the Final Written Submissions of Zejnil Delalić dated the 28th of August 1998 and set out at paragraph R, pages 337-343 inclusive of that document [...]." These submissions will be referred to as the "Incorporated Submissions".

by Mucić provide no assistance on the aspects of his ground of appeal which allege an error of fact. However, to the extent that the submissions are relevant to the questions of law raised by Mucić's ground of appeal, the Appeals Chamber has considered them in addition to the submissions made by counsel for Mucić at the hearing of the appeal.

372. Mucić challenges his conviction for the offence of illegal detention or unlawful confinement first with the argument that the detainees of the camp were *lawfully* confined because of suspicion of inciting armed rebellion against the State of Bosnia and Herzegovina.[584] The Appeals Chamber has already considered the submission that the Trial Chamber erred in finding that at least some of the detainees were unlawfully confined, and has rejected it.[585]

373. Mucić then submits that it was not proved that he had the requisite *mens rea* because:

> Given that it is not remotely suggested that the Appellant has, or had, any expert or other knowledge of International Law, it would be a counsel of impossible perfection to conclude that in 1992 he could have known, or did know, that there was a possibility that the confinement of persons at Čelebići could, or would be, construed as illegal under an interpretation of an admixture of the Geneva Conventions and Article 2(g) of the Statute of the Tribunal, a Statute not then in existence.[586]

374. The Prosecution notes that it is unclear whether Mucić contends that the knowledge of the law is an element of the crime or whether Mucić is raising a defence of error of law.[587] In either of those cases, the Prosecution argues that there is no general principle of criminal law that knowledge of the law is an element of the *mens rea* of a crime and that no defence of mistake of law is available under international humanitarian law. These submissions miss the real issue raised by Mucić's submission – that he could not have been expected to know that the detention of the Čelebići detainees would become illegal at some future time. Mucić's submission has no merit because it is clear from the provisions cited above from Geneva Convention IV that the detention of those persons was illegal at the very time of their detention.

375. Mucić also argued that it was not his function as "prison administrator" to know whether the detention of the victims was unlawful.[588] At the hearing of the appeal, counsel for Mucić placed greater emphasis on the argument that Mucić did not in fact have the requisite *mens rea* for a conviction under Article 7(1) of the Statute, and that the Trial Chamber relied upon evidence which established only that he "had reason to know" as a basis for a positive finding that he did in fact have the requisite knowledge that the detainees were unlawfully

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[584] *See* Incorporated Submissions at pp 339-342.
[585] *See* above, para 330.
[586] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucić Filed on 2 July 1999, p 2.
[587] Prosecution Response, paras 8.14-8.15.

detained.[589] The Prosecution argues that, because Mucić knew of the types of people detained in the camp and the circumstances of their arrest, he had the *mens rea* for the commission of the offence.[590]

376. The Trial Chamber found that Mucić, by virtue of his position of command, was the individual with primary responsibility for, and had the ability to affect, the continued detention of civilians in the camp.[591] Mucić submits in this regard that the determination of the legality of the detention is not a function or duty of prison administrators but rather of those who authorize arrests and the placing of arrestees into detention.[592] The Appeals Chamber accepts that it is not open simply to conclude that, because of a position of superior authority somewhere in relation to a prison camp, an accused is also *directly* responsible under Article 7(1) for the offence of unlawful confinement committed anywhere in that camp. The particular circumstances entailing liability under Article 7 (1) have to be specifically established before liability could be imposed. This depends on the particular organisation of duties within a camp, and it is a matter to be determined on the evidence.

377. The Trial Chamber found that some detainees were possibly legally detained *ab initio* but found that some other detainees were not.[593] The Trial Chamber made no finding that Mucić ordered, instigated, planned or otherwise aided and abetted the process of the arrest and placement of civilians in detention in the camp. However, as observed above, there is a second means by which the offence of unlawful confinement can be committed. The detention of detainees without granting the procedural guarantees required by Article 43 of Geneva Convention IV also constitutes the offence of unlawful confinement, whether the civilians were originally lawfully detained or not. It was this aspect of the offence that the Trial Chamber was relying on when it held:

> Specifically, Zdravko Mucić, in this position, [*ie* of superior authority over the camp] had the authority to release detainees. By omitting to ensure that a proper enquiry was undertaken into the status of the detainees, and that those civilians who could not lawfully be detained were immediately released, Zdravko Mucić participated in the unlawful confinement of civilians in the Čelebići prison-camp.[594]

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[588] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucić Filed on 2 July 1999, p 2.
[589] Appeal Transcript, pp 468-470.
[590] Prosecution Response, para 8.20.
[591] Trial Judgement, para 1145.
[592] Motion to Amend by Substitution the Appeal Brief of Zdravko Mucić Filed on 2 July 1999, p 2.
[593] Trial Judgement, para 1131.
[594] This finding of the Trial Chamber is not challenged by Mucić. Mucić Response, p 5.

Thus the Trial Chamber appears to have found Mucić guilty on the basis of the denial of procedural guarantees under the second "category" of this offence, and the Appeals Chamber's consideration will be limited to his liability in that context. The Appeals Chamber first notes that, although Mucić contests whether it was his responsibility as camp commander to know whether the detainees were lawfully detained or not, he does not contest on appeal the Trial Chamber's finding that he had the authority to release prisoners. In any case, the Appeals Chamber notes that the Trial Chamber made reference to a variety of evidence in support of this finding.[595] The Appeals Chamber therefore proceeds on the basis that this finding was open to the Trial Chamber and that it is the relevant one.

378. As is evident from the earlier discussion of the law relating to unlawful confinement, the Appeals Chamber considers that a person in the position of Mucić commits the offence of unlawful confinement of civilians where he has the authority to release civilian detainees and fails to exercise that power, where

(i) he has no reasonable grounds to believe that the detainees do not pose a real risk to the security of the state;[596] or

(ii) he knows that they have not been afforded the requisite procedural guarantees (or is reckless as to whether those guarantees have been afforded or not).[597]

379. Where a person who has authority to release detainees knows that persons in continued detention have a right to review of their detention[598] and that they have not been afforded that right, he has a duty to release them. Therefore, failure by a person with such authority to exercise the power to release detainees, whom he knows have not been afforded the procedural rights to which they are entitled, commits the offence of unlawful confinement of civilians, even if he is not responsible himself for the failure to have their procedural rights respected.

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[595] Trial Judgement, para 1145. The Trial Chamber found that from May until December 1992, individuals and groups were released from the Čelebići prison-camp at various times, some to continued detention at Musala, some for exchange, others under the auspices of the International Red Cross, which visited the camp on two occasions in the first half of August 1992 (Trial Judgement, para 157). It also found that there was evidence of the control by Mucić of the detainees who would leave or be transferred from the Čelebići prison-camp to another detention facility: (Trial Judgement, para 764; *See* also Trial Transcript, p 1331 and Exhibit 75, signed by Mucić, a release document in respect of the detention of Branko Gotovac. There is also Exhibit 84, signed by Mucić for Mirko Kuljanin and Exhibit 91, signed by Mr. Mucić, which is the release document for Milojka Antić. Mucić also signed Exhibit 158, a release document for Witness B, and Exhibit 159, which is the release document for Zoran Ninković. Witness F testified that Mucić released detainees, sick and elderly people, late June, early July and on 8 October 1992: Trial Transcript, p 1331).

[596] This relates to the first "category" of the offence.

[597] This relates to the second "category".

[598] It is unnecessary that he is aware of the legal source of this right.

380. The Trial Chamber expressly found that the detainees were not afforded the necessary procedural guarantees. It also found that Mucić did in fact have the power to release detainees at the camp. The only remaining question raised by Mucić's ground of appeal is therefore whether the Trial Chamber had found (although it did not refer to it explicitly) that Mucić had the relevant *mens rea*, *i.e.*,he knew that the detainees had a right to review of their detention but had not been afforded this review or was reckless as to whether they had been afforded it or not. It is not strictly necessary, in relation to an allegation that the offence of unlawful confinement has been committed through non-compliance with the obligation to afford procedural guarantees, to establish that there was also knowledge that the initial detention of the relevant detainees had been unlawful. This is because the obligation to afford procedural guarantees applies to all detainees whether initially lawfully detained or not. However, as is apparent from the discussion below, the Trial Chamber's findings also suggest that it had concluded that Mucić was also aware that no reasonable ground existed for the detention of at least some of the detainees.

381. The Trial Chamber concluded in relation to Mucić that "[b]y *omitting to ensure that a proper enquiry was undertaken into the status of the detainees* and that those civilians who could not lawfully be detained were immediately released, Zdravko Mucić participated in the unlawful confinement of civilians in the Čelebići prison-camp."[599] It is implicit in this finding that Mucić knew that a review of the detainees' detention was required but had not been conducted.[600] There are a number of findings of the Trial Chamber on the evidence before it which support this conclusion.

382. Relevant to Mucić's knowledge of the unlawful nature of the confinement of certain of the detainees (both because of absence of review of detention and, in some cases, of the absence of grounds for the initial detention) is his knowledge of the work of the Military Investigative Commission. As noted above, the Trial Chamber found that a Military Investigative Commission was established by the Konjić Joint Command following a decision by the War Presidency of Konjić to investigate crimes allegedly committed by the detainees prior to their

[599] Trial Judgement, para 1145 (emphasis added).

[600] This conclusion is not affected by the fact that Mucić could not ultimately be held responsible for failure to ensure such a review, or that (given that it was the detention practices of Mucić as person having authority over the camp, which were to be the subject of review) this responsibility appears to have lain with authorities outside the camp such as the Military Investigative Commission or the entities who were ultimately responsible for the creation of the camp.

arrival at the Čelebići camp,[601] and that the Commission did not have the power to finally decide on the release of wrongfully detained prisoners.[602]

383. The Trial Chamber found that the Commission consisted of five members, one of which was Witness D. The Trial Chamber referred to Witness D's testimony that he worked closely with Mucić in the classification of the detainees in the Čelebići camp, and that Mucić had a complete list of the detainees which he brought out for members of the Commission.[603] It is apparent from the context of the Trial Chamber's reference that it accepted that evidence. Witness D also testified that Mucić was present early in June when members of the Commission met to discuss how they would go about their work of the classification of the detainees and consideration for their continued detention or release.[604] It is implicit in these findings as to Mucić's awareness of the work of the Commission, and even of its existence as an independent body with a review function over the camp, that Mucić must have known that such a review was legally required.

384. The Trial Chamber also found that the Commission had prepared a report in June 1992 detailing the "conditions in the prison-camp, including the mistreatment of detainees and the continued incarceration of persons who were peaceful civilians", and the fact that they were unable to correct them. The Trial Chamber cited from the report, which stated, *inter alia*:

> Detainees were maltreated and physically abused by certain guards from the moment they were brought in until the time their statement was taken i.e. until their interview was conducted. Under such circumstances, Commission members were unable to learn from a large number of detainees all the facts relevant for each detainee and the area from which he had been brought in and where he had been captured. [...] Commission members also interviewed persons arrested outside the combat zone; the Commission did not ascertain the reason for these arrests, but these detainees were subjected to the same treatment [...] Persons who had been arrested under such circumstances stayed in detention even after it had been established that they had been detained for no reason and received the same treatment as persons captured in the combat zone [...] Because self-appointed judges have appeared, any further investigation is pointless until these problems are solved.[605]

385. It is obvious from this report, which the Trial Chamber accepted, that there were persons in the camp in respect of whom no reasons existed to justify their detention and that the Commission was not able to perform the necessary review of the detention of the Čelebići camp detainees. The Trial Chamber found that, after working for about one month at the prison-camp, the Commission was in fact disbanded at the instigation of its members as early as the end of

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[601] Trial Judgement, para 1136.
[602] Trial Judgement, para 1137.
[603] Trial Judgement, para 748.
[604] Trial Transcript, pp 5175-5176, pp 5189-5190.
[605] Trial Judgement, para 1138.

June 1992.[606] Although the Trial Chamber made no finding that Mucić had read the Commission's report, in view of its findings that Mucić worked closely with the Commission, it is implicit in the findings taken as a whole that Mucić was aware of the matters that the Commission discussed in the report, including the fact that there were civilians there who had been detained without justification, and that the detainees generally had not had their detention properly reviewed. This knowledge can only have been reinforced by the presence in the camp, of which Mucić must have been aware, of detainees of a kind which would have appeared so unlikely to pose a security risk that it must have raised doubts as to whether any reasonable grounds had ever existed for their initial detention. This included elderly persons[607] and persons such as Grozdana Ćećez, a 42 year old mother of two children.[608]

386. The Appeals Chamber finds that it was open to the Trial Chamber, from its primary findings (which have not been shown to be unreasonable), to conclude that Mucić, by not using his authority to release detainees whom he knew had not had their detention reviewed and had therefore not received the necessary procedural guarantees, committed the offence of unlawful confinement of civilians and was therefore guilty of the offence pursuant to Article 7(1) of the Statute.

387. The Appeals Chamber therefore dismisses this ground of appeal.

D. Conclusion

388. For the foregoing reasons, the Appeals Chamber dismisses the twelfth ground of appeal of Mucić, and the third and sixth grounds of appeal of the Prosecution.

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[606] Trial Judgement, para 1136.
[607] Such as Šćepo Gotovac, the man of about 70 years of age who was the victim of the wilful killing/murder charged in Counts 1 and 2 of the Indictment. *See* Trial Judgement, para 823.
[608] Trial Judgement, para 1133.

VI. MULTIPLE CONVICTIONS BASED ON THE SAME ACTS

389. The Trial Chamber found Mucić, Delić, and Landžo guilty both of grave breaches of the Geneva Conventions and of violations of the laws or customs of war based on the same acts. The counts containing convictions under both Articles 2 and 3 of the Statute are as follows:

Mucić:	Counts 13 and 14; 33 and 34; 38 and 39; 44 and 45; 46 and 47.
Delić:	Counts 1 and 2; 3 and 4; 11 and 12; 18 and 19; 21 and 22; 42 and 43; 46 and 47.
Landžo:	Counts 1 and 2; 5 and 6; 7 and 8; 11 and 12; 15 and 16; 24 and 25; 30 and 31; 36 and 37; 46 and 47.

390. Mucić and Delić have appealed against the judgement of the Trial Chamber, stating in the Delić/Mucić Supplementary Brief that these convictions violate the *Blockburger* standard, established by the U.S. Supreme Court in 1932. In *Blockburger v United States*, the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of a fact which the other does not."[609]

391. Although Landžo was also convicted under both Articles 2 and 3 based on the same acts, he did not lodge an appeal on this issue.

392. The crux of the appellants' arguments is as follows:

> Setting aside the question of the applicability of Common Article 3 to international armed conflict and whether Common Article 3 imposes international individual criminal liability, to obtain a conviction under Common Article 3, the elements are identical with one exception. An element of grave breaches of the Geneva Conventions is that the complainant was a person protected by one of the Conventions. Absent such proof, there can be no conviction under the Tribunal's jurisdiction to try allegations of grave breaches of the Geneva Conventions.
>
> Thus, judgements of conviction for both grave breaches of the Geneva Convention and violations of the laws and customs of war would violate the *Blockburger* standard.[610]

The appellants concede that Articles 2 and 3 differ. Beyond that, however, they provide very little analysis of this issue, merely concluding that the *Blockburger* standard is violated. Their argument appears to hinge on the fact that the requisite proof of protected person status under the grave breaches charge is lacking.

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[609] *Blockburger v. United States*, 284 U.S. 299, 304 (1932) ("*Blockburger*").
[610] Appellants-Cross Appellees Hazim Delić's and Zdravko "Pavo" Mucić's Motion for Leave to File Supplemental Brief and Supplemental Brief, 14 Feb 2000, p 13, (footnotes omitted).

393. In their 7 April 2000 Response to the Prosecutor's Supplementary Brief, the appellants restate that the *Blockburger* standard is the appropriate test for double jeopardy.[611] They further claim that under the reasoning of the *Kupreskić* Judgement and of *Ball v United States*, a 1985 U.S. Supreme Court case which applied the *Blockburger* test, multiple convictions based on the same acts are not allowed.[612]

394. In their respective designations of the issues on appeal, Mucić and Delić reiterate the issue as follows:

> Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches for the Geneva Conventions and for violations of the Laws and Customs of War based on the same acts.[613]

The relief sought by the appellants is dismissal of one of the counts; they do not indicate which one.

395. According to the Prosecution, the *Kupreskić* Judgement represents an unwarranted departure from the prior practice of both the Tribunal and the ICTR.[614] In *Kupreskić*, the Trial Chamber held that the primary applicable test is whether each offence contains an element not required by the other.[615] An additional test, which ascertains whether the various provisions at issue protect different values, can be used in conjunction with and in support of the primary test.[616] The Trial Chamber in *Kupreskić* found that an individual cannot be convicted of both murder as a crime against humanity and murder as a war crime, because murder as a war crime does not require proof of elements that murder as a crime against humanity requires.[617]

396. The Prosecution maintains that the solution should be sought in the practice of the International Tribunals, rather than in particular national systems, although the latter contain useful terminology that can be employed in an analysis of the issues.[618] After discussing the terminology found in various national systems, the Prosecution examines in detail the practice

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[611] Appellant-Cross Appellees Zdravko Mucić and Hazim Delić's Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 7 Apr. 2000, para 21.
[612] *Ibid* at para 24.
[613] Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, p 4; Appellant Zdravko Mucić's Final Designation of His Grounds of Appeal, 31 May 2000, para 7.
[614] Prosecution Response to the Appellants' Supplementary Brief, 25 Apr. 2000, para 4.5.
[615] *Kupreskić* Judgement, para 682.
[616] *Ibid* at para 693-695.
[617] *Ibid* at para 700-701.
[618] Prosecution Response to Supplementary Brief, para 4.7.

of this Tribunal and the ICTR, and concludes that the "*Tadić-Akayesu* test is consistent with the weight of precedent in both Tribunals, and consistent with international standards of justice."[619]

397. In *Tadić*, the Prosecution states, the Trial Chamber rejected the challenge to the cumulative charges in the indictment and convicted the accused cumulatively of a number of crimes.[620] The Trial Chamber imposed concurrent sentences upon the accused.[621] The Prosecution appealed on various grounds, and the *Tadić* Appeal Judgment resulted in the accused being convicted cumulatively under two or three articles of the Statute.[622] Under the *Tadić* test, according to the Prosecution, the "accused can be charged with and convicted of as many crimes as the facts of the case disclose"[623] if there is "ideal concurrence." Ideal concurrence describes the situation "where a single act of an accused contravenes more than one provision of the criminal law."[624]

398. Further, the Prosecution explains that the ICTR Trial Chamber in *Akayesu*[625] held that cumulative convictions are acceptable:

> 1. where the offences have different elements;
> 2. where the provisions creating the offences protect different interests; or
> 3. where it is necessary to record a conviction for both offences in order to fully describe what the accused did.[626]

399. The Prosecution finally states that the *Tadić* and *Akayesu* tests can be reconciled if "the *Akayesu* test is considered as a test for distinguishing between cases of ideal concurrence and cases of apparent concurrence."[627]

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619 *Ibid* at para 4.94.
620 *Ibid* at paras 4.9, 4.10.
621 *Id.*
622 *Ibid* at paras 4.11-4.12.
623 *Ibid* at para 4.78(1).
624 *Ibid* at para 4.8.
625 *Prosecutor v. Akayesu*, Judgement, Case No. ICTR-96-4-T, 2 Sept. 1998.
626 Prosecution Response to Supplementary Brief, para 4.50.
627 *Ibid* at para 4.83. According to the Prosecution, the relevant principles under a combined "*Tadić-Akayesu*" test would be as follows: (1) In cases of ideal concurrence [...], the accused can be charged with and convicted of as many crimes as the facts of the case disclose. The fact that multiple counts relate to the same conduct is considered relevant only at the post-conviction stage, in relation to sentencing. (*Tadić* test). (2) Two crimes will stand in a relationship of ideal concurrence [...] (1) where the offences have different elements; or (2) where the provisions creating the offences protect different interests; or (3) where it is necessary to record a conviction for both offences in order fully to describe what the accused did. (*Akayesu* test.). *Id.*

A. Discussion

1. Cumulative Charging

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

2. Cumulative Convictions

401. Before examining the relevant provisions of the Statute of the International Tribunal, the jurisprudence of the Tribunal and of national jurisdictions may be considered for guidance on this issue.

402. During the proceedings in the present case, a bench of the Appeals Chamber had to decide whether the accused Delić's complaint, that he was being charged on multiple occasions throughout the indictment with two different crimes arising from one act or omission, justified the granting of leave to appeal.[628] The bench quoted the reasoning of the Trial Chamber in *Tadić*,[629] and stated that it did not consider that the reasoning in *Tadić* revealed an error, much less a grave one, justifying the granting of leave to appeal.[630]

403. Based upon the Prosecution's appeal from the Trial Chamber judgment in *Tadić*, the Appeals Chamber overturned the acquittal of Tadić on all relevant Article 2 counts and on four cumulatively charged counts relating to the killing of five victims from the village of Jaskici.[631] The Appeals Chamber did so even though all of the Article 2 counts related to conduct for which the accused had already been convicted under other provisions of the Statute, namely Articles 3 and 5. As a result, Tadić was cumulatively convicted with respect to the same

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[628] *Prosecutor v Delalić et al.*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, paras 35-6, 6 Dec. 1996.

[629] The Trial Chamber in *Tadić* stated: "In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon technicalities of pleading." *Prosecutor v Dusko Tadić*, Decision on the Defence Motion on the Form of the Indictment, Case No. IT-94-1-T, 14 Nov. 1995, p. 10.

[630] *Prosecutor v Delalić et al.*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), Case No. IT-96-21-AR72.5, paras 35-6, 6 Dec. 1996.

[631] *Tadić* Appeal Judgement, p 144.

conduct, based on numerous different groups of counts.[632] The problem of multiple convictions was not addressed as such by the Chamber. The multiple convictions were however taken into account in the *Tadić* Sentencing Appeal Judgement, where the Appeals Chamber imposed concurrent sentences on the accused.[633]

404. During the *Aleksovski* Appeal, the Appeals Chamber briefly addressed the issue of multiple convictions for the same acts, in connection with sentencing.[634] The Trial Chamber in that case had acquitted the accused on Counts 8 and 9 of grave breaches of the Geneva Conventions but convicted him on Count 10 of a violation of the laws or customs of war.[635] The Appeals Chamber stated:

> The material acts of the Appellant underlying the charges are the same in respect of Counts 8 and 9, as in respect of Count 10, for which the Appellant has been convicted. Thus, even if the verdict of acquittal were to be reversed by a finding of guilt on these counts, it would not be appropriate to increase the Appellant's sentence. Moreover, any sentence imposed in respect of Counts 8 and 9 would have to run concurrently with the sentence on Count 10.[636]

405. This analysis of the Tribunal's jurisprudence reveals that multiple convictions based on the same acts have sometimes been upheld, with potential issues of unfairness to the accused being addressed at the sentencing phase. The Appeals Chamber of the ICTR has not made any pronouncements on the issue of multiple convictions as yet.

406. National approaches vary with respect to cumulative convictions. Some countries allow such convictions, letting the record reflect fully each violation that occurred, and preferring to address any allegations of unfairness in the manner of sentencing. Other countries reserve such convictions for acts resulting in the most severe of crimes, whereas still others require differing

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[632] The counts and convictions were as follows:
(1) Counts 8, 9, 10, and 11: Various beatings of prisoners; Convictions: Article 2(b) (inhuman treatment); Article 2(c) (wilfully causing great suffering or serious injury); Article 3 (common Article 3(1)(a) cruel treatment); and Article 5(i) (inhumane acts).
(2) Counts 12, 13, and 14; Counts 15, 16, and 17; Counts 21, 22 and 23; Counts 32, 33, and 34; Convictions: Article 2(c) (wilfully causing great suffering or serious injury); Article 3 (common Article 3(1)(a) cruel treatment); and Article 5(i) (inhumane acts).
(3) Counts 29, 30, and 31; Convictions: Article 2(a) (wilful killing); Article 3 (common Article 3(1)(a) (murder); Article 5(a) (murder).

[633] *Prosecutor v Tadić*, Case No. IT-94-1A and IT-94-1-Abis, Judgement in Sentencing Appeals, p 33, 26 Jan. 2000.

[634] *Aleksovski* Appeal Judgement, pp 59-60, 24 Mar. 2000.

[635] *Id.* at 59. The counts are as follows.
Count 8: a grave breach as recognised by Articles 2(b) (inhuman treatment), 7(1) and 7(3);
Count 9: a grave breach as recognised by Articles 2(c) (wilfully causing great suffering or serious injury to body or health), 7(1) and 7(3);
Count 10: a violation of the laws or customs of war (outrages upon personal dignity) as recognised by Articles 3, 7(1) and 7(3).

[636] *Aleksovski* Appeal Judgement, at 60.

statutory elements before cumulative criminal convictions may be imposed. A few examples will demonstrate these different approaches.

407. Under German law, for example, the judgment of the court details every crime that has been perpetrated as a result of a single act. In cases of ideal concurrence:

> the perpetrator receives only one sentence, but because he is convicted of all crimes committed by him, or of the multiple commissions of a crime, the judgement documents which crimes have been fulfilled or how often the perpetrator has fulfilled a crime.[637]

408. In Zambia, on the other hand, multiple convictions based on the same act can only be imposed for capital crimes. Under the Zambian Penal Code:

> [a] person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.[638]

409. In the United States, by contrast, the *Blockburger* ruling establishes that multiple convictions can be imposed under different statutory provisions if each statutory provision requires proof of a fact which the other does not.[639] This test has been more recently affirmed in the *Rutledge* case decided by the U.S. Supreme Court in 1996.[640]

410. Another approach, that of a United States military tribunal established at the end of World War II to prosecute persons charged with crimes against peace, war crimes, and crimes against humanity, is also instructive. According to the Law Reports of Trials of War Criminals, the United States Military Tribunal established pursuant to Allied Control Council Law No. 10 was of the opinion that:

> war crimes may also constitute crimes against humanity; the same offences may amount to both types of crime. If war crimes are shown to have been committed in a widespread, systematic manner, on political, racial or religious grounds, they may also amount to crimes against humanity.[641]

411. The Law Reports note that it seemed as if the tribunal "was willing to agree that acts taken in pursuance of the *Nacht und Nebel Plan* constituted crimes against humanity as well as

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[637] Prosecution Response to Supplementary Brief, para 4.92 (citing A. Schönke/H. Schröder, *Strafgesetzbuch: Kommentar* 697 (25th ed. Munich: 1997) (counsel's translation)).
[638] Republic of Zambia Penal Code Act, Ch. 87 of the Laws of Zambia, p 28.
[639] *Blockburger* at 304.
[640] *Rutledge v. U.S.*, 517 U.S. 292, 297 (1996).
[641] Law Reports of Trials of War Criminals, U.N. War Crimes Commission VI, p 79 (London: 1948).

war crimes."[642] In the *Trial of Josef Altstötter and Others (The Justice Trial),* the tribunal found numerous defendants guilty of war crimes as well as crimes against humanity based on exactly the same acts,[643] thus appearing to uphold the possibility of cumulative convictions, at least when war crimes and crimes against humanity are involved.

412. Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other.

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

414. In this case, defendants Mucić and Delić have been convicted of numerous crimes under Articles 2 and 3 of the Statute, which crimes arise out of the same acts. The chart below summarises their convictions.

Article 2 (Grave Breaches of Geneva Convention No. IV	Article 3 (Violations of the Laws or Customs of War—Common Article 3)
1. wilful killings	1. murders
2. wilfully causing great suffering or serious injury to body or health	2. cruel treatment
3. torture	3. torture
4. inhuman treatment	4. cruel treatment

[642] *Id.*

[643] *Ibid* at 75-76. *See also* Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), U.N. Doc S/25274 ("The Commission notes that fundamental rules of human rights law often are materially identical to rules of the law of armed conflict. It is therefore possible for the same act to be a war crime and a crime against humanity."). However, the Report does not indicate whether *convictions* based on the same acts are possible under provisions for war crimes and crimes against humanity.

Landžo was cumulatively convicted under Articles 2 and 3, as to categories 1, 2, and 3 above (see chart). Although he did not file an appeal on this issue, the Appeals Chamber finds that reasons of fairness and the consideration that only distinct crimes may justify multiple convictions, merit the application of the same principles to his convictions as well.

415. Under Article 2 of the Statute,

> The International Tribunal shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
>
> a. wilful killing;
>
> b. torture or inhuman treatment, including biological experiments;
>
> c. wilfully causing great suffering or serious injury to body or health;
>
> d. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
>
> e. compelling a prisoner of war or a civilian to serve in the forces of a hostile power;
>
> f. wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;
>
> g. unlawful deportation or transfer or unlawful confinement of a civilian;
>
> h. taking civilians as hostages.

416. The appellants have been convicted under Geneva Convention IV. Article 147 of this Convention proscribes grave breaches such as wilful killing, torture or inhuman treatment, and wilfully causing great suffering or serious injury to body or health, if committed against persons or property protected by the Convention. The Convention defines "protected persons" as those who "at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."[644] The ICRC Commentary (GC IV) explains that the term "in the hands of"

> is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or hands' of the Occupying Power.... In other words, the expression in the hands of' need not necessarily be understood in the physical sense; it simply means that the person *is in territory which is under the control of the Power in question.*[645]

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[644] Article 4, Geneva Convention IV.

[645] ICRC Commentary (GC IV), p. 47 (emphasis provided). At page 46, the ICRC Commentary lists further limitations to the granting of protected person status. On the territory of belligerent States, protection is accorded under Article 4 to "all persons of foreign nationality and to persons without any nationality," but the following are excluded:

417. The definition of "protected person" under Geneva Convention IV is further limited by the fact that "persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, shall *not be considered as protected persons within the meaning of the present Convention.*"[646]

418. However, it should be noted that this Tribunal's jurisprudence has held that "protected persons" may encompass victims possessing the same nationality as the perpetrators of crimes, if, for example, these perpetrators are acting on behalf of a State which does not extend these victims diplomatic protection or to which the victims do not owe allegiance.[647]

419. Under Article 3 of the Statute, "[t]he International Tribunal shall have the power to prosecute persons violating the laws or customs of war."[648] The origins of the convictions at issue—murder, cruel treatment, and torture—lie in common Article 3 of the Geneva Conventions, which states in the pertinent part:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

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(1) Nationals of a State which is not bound by the Convention;
(2) Nationals of a neutral or co-belligerent State, so long as the State in question has normal diplomatic representation in the State in whose territory they are;
(3) Persons covered by the definition given above [...] who enjoy protection under one of the other three Geneva Conventions of August 12, 1949.
In occupied territories, protection is accorded to "all persons who are not of the nationality of the occupying State," but the following are excluded:
(1) Nationals of a State which is not party to the Convention;
(2) Nationals of a co-belligerent State, so long as the State in question has normal diplomatic representation in the occupying State;
(3) Persons covered by the definition given above [...] who enjoy protection under one of the three other Geneva Conventions of August 12, 1949.

646 Article 4, Geneva Convention IV (emphasis provided).

647 *See Tadić* Appeal Judgement, paras 168-169. *See also Aleksovski* Appeal Judgement, paras 151-2 ("In the *Tadić* Judgement, the Appeals Chamber, after considering the nationality criterion in Article 4, concluded that 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.").

648 Article 3, Statute.

> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) taking of hostages;
>
> (c) outrages upon personal dignity, in particular humiliating and degrading treatment; [...].[649]

420. Common Article 3 of the Geneva Conventions is intended to provide minimum guarantees of protection to persons who are in the middle of an armed conflict but are not taking any active part in the hostilities. Its coverage extends to *any* individual not taking part in hostilities and is therefore broader than that envisioned by Geneva Convention IV incorporated into Article 2 of the Statute, under which "protected person" status is accorded only in specially defined and limited circumstances, such as the presence of the individual in territory which is under the control of the Power in question, and the exclusion of wounded and sick members of the armed forces from protected person status; while protected person status under Article 2 therefore involves not taking an active part in hostilities, it also comprises further requirements. As a result, Article 2 of the Statute is more specific than common Article 3. This conclusion is further confirmed by the fact that the Appeals Chamber has also stated that Article 3 of the Statute functions as a "residual clause designed to ensure that no serious violation of international humanitarian law is taken away from the jurisdiction of the International Tribunal."[650] Finally, common Article 3 is present in all four Geneva Conventions, and as a rule of customary international law, its substantive provisions are applicable to internal and international conflicts alike.[651]

421. Applying the provisions of the test articulated above, the first issue is whether each applicable provision contains a materially distinct legal element not present in the other, bearing in mind that an element is materially distinct from another if it requires proof of a fact not required by the other.[652]

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[649] Article 3, Geneva Conventions of 1949.

[650] *Tadić* Jurisdiction Decision, para 91.

[651] *See Nicaragua*, para 218 ("Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called elementary considerations of humanity").

[652] It should also be borne in mind that Article 2 applies to international conflicts, while Article 3 applies to both internal and international conflicts. However, this potentially distinguishing element does not come into play here, because the conflict at issue has been characterised as international as well. *See* discussion above, at para

422. The first pair of double convictions concerned are "wilful killing" under Article 2 and "murder" under Article 3. Wilful killing as a grave breach of the Geneva Conventions (Article 2) consists of the following elements:

a. death of the victim as the result of the action(s) of the accused,
b. who intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death,[653]
c. and which he committed against a protected person.

423. Murder as a violation of the laws or customs of war (Article 3) consists of the following elements:

a. death of the victim as a result of an act of the accused
b. committed with the intention to cause death[654]
c. and against a person taking no active part in the hostilities.

The definition of wilful killing under Article 2 contains a materially distinct element not present in the definition of murder under Article 3: the requirement that the victim be a protected person. This requirement necessitates proof of a fact not required by the elements of murder, because the definition of a protected person includes, yet goes beyond what is meant by an individual taking no active part in the hostilities. However, the definition of murder under Article 3 does not contain an element requiring proof of a fact not required by the elements of wilful killing under Article 2. Therefore, the first prong of the test is not satisfied, and it is necessary to apply the second prong. Because wilful killing under Article 2 contains an additional element and therefore more specifically applies to the situation at hand, the Article 2 conviction must be upheld, and the Article 3 conviction dismissed.

424. The second pair of double convictions at issue are "wilfully causing great suffering or serious injury to body or health" under Article 2, and "cruel treatment" under Article 3. The former is defined as

a. an intentional act or omission consisting of causing great suffering or serious injury to body or health, including mental health,[655]

50, on this point. In addition, both Articles 2 and 3 require a nexus between the crimes alleged and the armed conflict.

[653] *Blaskić* Judgement, para 153.
[654] *Jelisić* Judgement, para 35; *Blaskić* Judgement, para 181.
[655] *Blaskić* Judgement, para 156.

b. committed against a protected person.

Cruel treatment as a violation of the laws or customs of war is

a. an intentional act or omission [...] which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity,[656]

b. committed against a person taking no active part in the hostilities.

The offence of wilfully causing great suffering under Article 2 contains an element not present in the offence of cruel treatment under Article 3: the protected person status of the victim. Because protected persons necessarily constitute individuals who are not taking an active part in the hostilities, the definition of cruel treatment does not contain a materially distinct element—that is, it does not *require* proof of a fact that is not required by its counterpart. As a result, the first prong of the test is not satisfied, and it thus becomes necessary to apply the second prong of the test. Because wilfully causing great suffering under Article 2 contains an additional element and more specifically applies to the situation at hand, that conviction must be upheld, and the Article 3 conviction must be dismissed.

425. The third pair of double convictions at issue are torture under Article 2 and torture under Article 3. Because the term itself is identical under both provisions, the sole distinguishing element stems from the protected person requirement under Article 2. As a result, torture under Article 2 contains an element requiring proof of a fact not required by torture under Article 3, but the reverse is not the case, and so the first prong of the test is not satisfied. Again, it becomes necessary to apply the second prong of the test. Because torture under Article 2 contains an additional element that is required for a conviction to be entered, that conviction must be upheld, and the Article 3 conviction must be dismissed.

426. The final pair of double convictions at issue are "inhuman treatment" under Article 2 and "cruel treatment" under Article 3. Cruel treatment is defined above.[657] Inhuman treatment is

a. an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity,[658]

b. committed against a protected person.

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[656] *Jelisić* Judgement, para 41; Trial Judgement, para 552; *Blaskić* Judgement, para 186.
[657] *See* para 424 above.
[658] *Blaskić* Judgement, para 154; *see* also Trial Judgement, para 543.

Again, the sole distinguishing element stems from the protected person requirement under Article 2. By contrast, cruel treatment under Article 3 does not require proof of a fact not required by its counterpart. Hence the first prong of the test is not satisfied, and applying the second prong, the Article 3 conviction must be dismissed.

B. Conclusion

427. For these reasons, the Appeals Chamber finds that, of the double convictions entered by the Trial Chamber, only the Article 2 convictions must be upheld, and the Article 3 convictions must be dismissed.

Mucić: Count 13: upheld

Count 14: dismissed

Count 33: upheld

Count 34: dismissed

Count 38: upheld

Count 39: dismissed

Count 44: upheld

Count 45: dismissed

Count 46: upheld

Count 47: dismissed.

Delić: Count 1: dismissed--see section on Delić factual grounds

Count 2: dismissed--see section on Delić factual grounds

Count 3: upheld

Count 4: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld[659]

[659] Delić was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

Count 18: upheld

Count 19: dismissed

Count 21: upheld

Count 22: dismissed

Count 42: upheld

Count 43: dismissed

Count 46: upheld

Count 47: dismissed.

Landžo: Count 1: upheld

Count 2: dismissed

Count 5: upheld

Count 6: dismissed

Count 7: upheld

Count 8: dismissed

Count 11 (wilfully causing great suffering or serious injury to body or health under Article 2 of the Statute): upheld[660]

Count 12 (cruel treatment under Article 3 of the Statute): dismissed

Count 15: upheld

Count 16: dismissed

Count 24: upheld

Count 25: dismissed

Count 30: upheld

Count 31: dismissed

Count 36: upheld

[660] Landžo was found not guilty of the original charges under Counts 11 and 12 (as printed in the Amended Indictment), namely, a grave breach of the Geneva Conventions of 1949 (wilful killing) and a violation of the laws or customs of war (murder). He was, however, found guilty under these same counts for the crimes of a grave breach of Geneva Convention IV (wilfully causing great suffering or serious injury to body or health) and a violation of the laws or customs of war (cruel treatment).

Count 37: dismissed

Count 46: upheld

Count 47: dismissed

C. Impact on Sentencing

428. If, on application of the first prong of the above test, a decision is reached to cumulatively convict for the same conduct, a Trial Chamber must consider the impact that this will have on sentencing. In the past, before both this Tribunal and the ICTR, convictions for multiple offences have resulted in the imposition of distinct terms of imprisonment, ordered to run concurrently.[661]

429. It is within a Trial Chamber's discretion to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive.[662] In terms of the final sentence imposed, however, the governing criteria is that it should reflect the totality of the culpable conduct (the 'totality' principle),[663] or generally, that it should reflect the gravity of the offences and the culpability of the offender so that it is both just and appropriate.

430. Therefore, the overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of the offender. This can be achieved through either the imposition of one sentence in respect of all offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.

431. Of the double convictions imposed on the accused in this case, only the Article 2 convictions have been upheld; the Article 3 convictions have been dismissed. The Appeals

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[661] Such sentences have been confirmed by the Appeals Chamber in the *Tadić* Sentencing Appeal Judgement and the *Furundžija* Appeal Judgement.

[662] *See* also Rule 101(C) of the Rules: "The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently."

[663] "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate.' (footnote omitted) D.A. Thomas, *Principles of Sentencing* (Heinemann: London, 1980), p 56; *See also R v Bocskei* (1970) 54 Cr. App. R. 519, at 521: "[...] when consecutive sentences are imposed the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive." Section 28(2)(b) Criminal Justice Act 1991 preserves this principle. It applies in all cases where consecutive sentences are imposed, *e.g., R v Reeves,* 2 Cr. App. R (S) 35, CA; *R v Jones,* [1996] 1 Ar. App.R (S) 153; In Canada *see e.g., R v M (CA),* [1996] 1 SCR 500: "the global sentence imposed should reflect the overall culpability of the offender and the circumstances of the offence"; In Australia: *Postiglione v R,* 145 A.L.R. 408; *Mill v R* (1988) 166 CLR 59 at 63; *R v Michael Arthur Watts,* [2000] NSWCCA 167 (the court should look at the individual offences, determine the sentences for each of them and look at the total sentence and structure a sentence reflecting that totality); *R v Mathews,* Supreme Court of New South Wales, 16 July 1991.

Chamber acknowledges that if the Trial Chamber had not imposed double convictions, a different outcome in terms of the length and manner of sentencing, might have resulted. Because this is a matter that lies within the discretion of the Trial Chamber, this Chamber remits the issue of sentencing to a Trial Chamber to be designated by the President of the Tribunal.

432. Judge Hunt and Judge Bennouna append a separate and dissenting opinion in relation to the issues arising in this chapter.

VII. DELIĆ GROUNDS OF APPEAL ALLEGING ERRORS OF FACT

A. Introduction

433. Delić has filed two grounds of appeal in relation to each of the convictions which he has challenged. The first is that the evidence was not what was described as *legally* sufficient to sustain the convictions; the second is that the evidence was not what was described as *factually* sufficient to sustain the convictions.

434. The issue as to whether there is a *legal* basis to sustain a conviction usually arises at the close of the Prosecution case at trial, a situation now covered by Rule 98*bis*(B),[664] following the earlier practice of seeking a judgement of acquittal upon the basis that, in relation to one or more charges, there is no case to answer. The test applied is whether there is evidence (if accepted) upon which a reasonable tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question.[665] In the present case, the Trial Chamber ruled that there was a case to answer,[666] and there was no appeal from that decision. The test to be applied in relation to the issue as to whether the evidence is *factually* sufficient to sustain a conviction is whether the conclusion of guilt beyond reasonable doubt is one which *no* reasonable tribunal of fact *could* have reached.[667]

435. If an appellant is *not* able to establish that the Trial Chamber's conclusion of guilt beyond reasonable doubt was one which no reasonable tribunal of fact could have reached, it follows that there must have been evidence upon which such a tribunal could have been satisfied beyond reasonable doubt of that guilt. Under those circumstances, the latter test of legal sufficiency is therefore redundant, and the appeal must be dismissed. Similarly, if an appellant *is* able to establish that no reasonable tribunal of fact could have reached a conclusion of guilt upon the evidence before it, the appeal against conviction must be allowed and a judgement of acquittal entered. In such a situation it is unnecessary for an appellate court to

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[664] Rule 98*bis*(B) provides: "The Trial Chamber shall order the entry of judgement of acquittal on motion of an accused or *proprio motu* if it finds that the evidence is insufficient to sustain a conviction on that or those charges".

[665] The jurisprudence of the Tribunal in relation to Rule 98*bis*(B) and the earlier practice was recently reviewed in *Prosecutor v Kunarac*, Case No IT-96-23-T, Decision on Motion for Acquittal, 3 July 2000, at paras 2-10.

[666] *Prosecutor v Delalić et al*, Order on the Motions to Dismiss the Indictment at the Close of the Prosecutor's Case, 18 Mar 1998.

[667] *Tadić* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.

determine whether there was evidence (if accepted) upon which such a tribunal could have reached such a conclusion.

436. The Appeals Chamber intends, therefore, to consider only the issue as to whether the evidence was *factually* sufficient to sustain the conviction, in the sense already stated.

437. Delić also argues in relation to a number of these grounds that the Prosecution has failed to show (1) that the victim was a protected person under the Geneva Conventions and (2) that common Article 3 provides for individual international criminal liability as a matter of customary international law.[668] These two matters, which raise questions of whether the Trial Chamber committed an error of law, have been addressed by the Appeals Chamber elsewhere in this Judgement. The present consideration is limited to whether the Trial Chamber committed any error of fact.

B. Issues 9 and 10: Convictions under Counts 1 and 2

438. Counts 1 and 2 related to killing of one Šćepo Gotovac ("Gotovac") in the Čelebići prison camp late in June 1992. The appellants Delić and Landžo were alleged, with others, to have beaten Gotovac for an extended period of time and to have nailed an SDA badge to his forehead. Gotovac is said to have died soon after from the resulting injuries. Count 1 charged the two accused with a grave breach of the Geneva Conventions (wilful killing); Count 2 charged them with a violation of the laws or customs of war (murder).

439. The Trial Chamber found that Delić and Landžo approached Gotovac, who sat near to the door inside hangar 6, and that Delić accused him of having killed two Muslims in 1942. He also referred to some old enmity between their families, and he told Gotovac that he should not hope to remain alive. When Gotovac denied these allegations, Delić started to beat him. Gotovac was taken outside the hangar, and the sound of blows and his moaning could be heard inside the hangar. After some time, he was dragged into the hangar.[669] All of these findings were clearly open to the Trial Chamber on the evidence.

440. The Trial Chamber also found that Gotovac was again taken out of the hangar a few hours later, and that both Delić and Landžo again administered a severe beating. A metal badge was pinned to his head, and Landžo threatened the rest of the detainees in the hangar that he

[668] Delić Brief, para 303.
[669] Trial Judgement, para 817.

would kill anyone who dared to remove it. As a consequence of this *second* beating, the Trial Chamber found, Gotovac died in the hangar some time later.[670]

441. The limitation of the finding that Gotovac's death resulted from the *second* of those beatings is vital to the resolution of these grounds of appeal, the issue being whether a reasonable tribunal of fact could have concluded that Delić participated in the second beating. It was very properly conceded by the Prosecution that there was no finding by the Trial Chamber that there was any causal connection between Gotovac's death and the first beating, and that the evidence was not such as to establish such a connection as the only reasonable conclusion available.[671]

442. No witness gave evidence of having actually seen Delić involved in this second beating, but the Trial Chamber effectively concluded that he was involved, its finding being based on circumstantial evidence. The Trial Chamber stated that, in view of what the witnesses had seen and heard inside the hangar, it could reasonably be said that they were in a position to know what was happening outside.[672] The Trial Chamber went on to say that, when everything which had been seen and heard inside the hangar was considered together, there was no room for doubt that Delić and Landžo "participated" in the beating which resulted in the death of the victim.[673]

443. The only circumstance upon which the Trial Chamber explicitly relied which specifically identified Delić was the threat which he made before the earlier beating that Gotovac should not hope to remain alive, and his involvement in that earlier beating. Those findings which were clearly open to the Trial Chamber on the evidence. The remaining circumstances upon which the Trial Chamber explicitly relied were that Gotovac was brought back into the hangar in a poor condition, he was taken out again later the same day, the sounds of blows and the moans and cries of Gotovac could be heard, he was carried back into the hangar after a short time with the metal badge stuck on his forehead, Landžo's threat that anyone who removed the badge would be similarly treated, and the discovery the next morning that Gotovac had died.[674] None of these additional circumstances were disputed in Delić's appeal.

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[670] *Ibid*, para 818.
[671] Appeal Transcript, pp 523-524.
[672] Trial Judgement, para 820.
[673] *Ibid*, para 821.
[674] *Ibid*, para 820.

444. There was also evidence from Landžo that he had been asked by Delić (and by Mucić) to kill Gotovac, but this evidence was rejected by the Trial Chamber on the basis that Landžo was an unreliable witness.[675] The evidence which Landžo gave was that others were involved with him in the second beating, but he did not suggest that Delić was ever present at the second beating.[676]

445. A number of detainees called by the Prosecution gave evidence of the circumstances surrounding the beatings of Šćepo Gotovac, and this evidence must be examined briefly to see whether it provides any basis for a finding that Delić had participated in the second beating.

446. Branko Gotovac (no relation) gave evidence of having seen Šćepo Gotovac taken outside the hangar and beaten "several times".[677] However, when the witness was asked to give details of what he saw, he was able to describe no more than what (by reference to all the other evidence) could only have been the first beating.[678] During cross-examination,[679] he said that he saw Šćepo Gotovac –

> [...] when two of them brought him in. He was like dead [...] and soon thereafter he was dead.

This may have been a reference to the second beating, but this was never made clear. Nor was the witness asked to identify the "two of them" were who brought Šćepo Gotovac in.

447. Witness F gave evidence that he did not know who called Gotovac out on the second occasion, and he was not asked who brought him back.[680] He did not suggest that Delić was present on this second occasion, and he was not asked whether he was. Stevan Gligorević described Gotovac being beaten twice, but he was able to identify only Landžo as having called him out on both occasions. He also made no reference to any participation by Delić in the beatings.[681] Witness N said that Delić had beaten Gotovac "several times" *inside* the hangar, but he then goes on to describe the events surrounding what (by reference to all the other evidence) could only have been what has been called the second beating *outside* the hangar, and he identified only Landžo as having been involved in those circumstances.[682] When asked who

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675 Trial Judgement, para 822.
676 Trial Transcript, pp 15045–15047.
677 *Ibid*, p 985.
678 *Ibid*, pp 986, 1103.
679 *Ibid*, pp 1098-1099.
680 *Ibid*, p 1322.
681 *Ibid*, pp 1469-1470.
682 *Ibid*, pp 1916-1917.

else was in the area who could have seen Gotovac being taken out and beaten, he did not suggest that Delić had been there.[683]

448. Dragan Kuljanin gave evidence of Gotovac being called out several times by the guards, but he said that he did not know the names of the guards who did so.[684] He did not see the beating himself.[685] He made no reference to any participation by Delić in the second beating. Mirko Đorđić said that it was Landžo who called Gotovac out of the hangar on the second occasion, and that it was Landžo who ordered some prisoners to carry Gotovac out.[686] He did not suggest that Delić had participated in the second beating.

449. Branko Sudar gave evidence in relation to both beatings. He firmly identified Delić as having participated in the first of them.[687] He said that it was Landžo who took Gotovac out for the second beating.[688] In cross-examination, he repeated the evidence which he had given, apparently in relation to the first beating without nominating the occasion as such,[689] but the Prosecution asked no questions which may have led to a change in the only reasonable conclusion from his evidence, that he was in fact still speaking of the first occasion only. Risto Vukalo described both beatings. Of the second beating, he identified only Landžo as being involved – as having called Gotovac out and as having ordered two of the detainees to bring him back inside the hangar.[690] Witness R described the threat made by Delić as having occurred on a quite separate occasion from any beating. In relation to the one beating which he saw, which (by reference to all the other evidence) could only have been the second, Witness R identified only Landžo as having been involved.[691]

450. None of the detainees so far discussed supported the Prosecution case that Delić participated in the second beating which caused the death of Gotovac. There were three other detainees upon whose evidence some reliance was placed in the appeal.

451. Witness B gave evidence of the threat made by Delić to Gotovac, that he should not hope to leave alive.[692] He referred to the first beating as having occurred the same evening,

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[683] *Ibid*, p 1999.
[684] *Ibid*, p 2346.
[685] *Ibid*, p 2411.
[686] *Ibid*, p 4782.
[687] *Ibid*, p 5766.
[688] *Ibid*, p 5767.
[689] *Ibid*, p 5945.
[690] *Ibid*, pp 6280-6281.
[691] *Ibid*, p 7795.
[692] *Ibid*, p 5055.

without identifying who was involved in it.[693] He said that he thought that the second beating occurred the next evening, and said:

> He was called out again outside, at night fall. I remember Zenga, Esad Landžo. He came in. He came into the hangar. I think that Delić was near the door, outside. He didn't want to go out. He was – and then two other prisoners were ordered to help him get up and push him out, outside the door. This was right next to me in the hangar. They started beating him and by the number of blows, the movements and everything we could hear, there must have been a large group of people, several people.[694]

The "he" who did not want to go out was clearly Gotovac. Witness B was not asked to identify who "they" were who started beating Gotovac. He later described the threat by Landžo concerning the badge on Gotovac's forehead.[695]

452. The Prosecution argued that the sentence "I think that Delić was near the door, outside" should be interpreted as expressing doubt not as to whether Delić was there at the time of the second beating, but only as to where he was standing.[696] Such an argument would have greater force if Witness B had elsewhere in his evidence identified Delić as having been present, but he did not do so. The presence of Delić during the second beating was a vital piece of evidence linking him to that beating. It is the obligation of the Prosecution to ensure that its vital evidence is clear and unambiguous. An accused person should not be convicted upon the basis of a verbal ambiguity in that vital evidence. This sentence of Witness B's evidence, read literally, expresses some doubt as to whether Delić was present, not merely as to where he was standing. Where a Prosecution witness whose evidence is vital is able to clarify any ambiguity in that evidence, and where the Prosecution does not seek to have the witness do so, the inference is available that it did not do so because the evidence would not have assisted the Prosecution case. That is not to say that such an inference ought always to be drawn against the Prosecution, but its mere availability tends to render unsafe any resolution of the ambiguity in favour of the Prosecution.

453. Rajko Draganić described Delić and Landžo as beating Gotovac on the first occasion.[697] In relation to what may have been either the first or the second beating (the evidence is ambiguous), he said:[698]

> [...] and that Delić said, Zenga [Landžo], I do not know exactly, he said two people should come and carry him inside.

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[693] *Ibid*, p 5056.
[694] *Ibid*, p 5056.
[695] *Ibid*, p 5057.
[696] Appeal Transcript, pp 519-520.
[697] Trial Transcript, p 6929.
[698] *Ibid*, p 6930.

It is clear from this evidence that the witness was unable to say which of the two accused had requested the assistance upon whichever occasion it was. Insofar as this uncertainty may suggest that Delić was present at the second beating, and that the only uncertainty related to *which* of the accused had requested assistance, the same ambiguity exists as in relation to the last witness. It is perhaps significant that, when the Trial Chamber identified the details of the circumstantial case upon which it relied to find beyond reasonable doubt that Delić participated in the second beating, it did not include any *direct* evidence that Delić was present in the area when the second beating took place.[699]

454. Mirko Babić gave evidence that Delić had come to the door of the hangar with Landžo, that he had threatened Gotovac that he would be killed and that Delić was one of three men who had taken Gotovac out of the hangar for the first beating.[700] He then said that, an hour or so later, Delić again came to the door of the hangar, with Landžo, that Gotovac was "told the same thing as the first time", and that Delić had put a knife "next" to Gotovac when they took him out and beat him again.[701] In cross-examination, Babić asserted that he had been an eyewitness to these events.[702] This was the only evidence in the case which unambiguously involved Delić in the events leading to and following the second beating. If accepted, it would lead to the inevitable conclusion that Delić had participated in that beating – either as one of those who inflicted the beating personally, or as an accessory aiding and abetting it.

455. On appeal, Delić pointed out that, in relation to charges of torture and cruel treatment of Mirko Babić by Landžo and himself,[703] the Trial Chamber did not consider the unsupported evidence of Babić of the mistreatment which he alleged that he had received to be "wholly reliable".[704] Delić argued, therefore, that the evidence which Babić gave in support of the counts presently under consideration was "also insufficient to support a factual finding that [he] participated in the fatal beating" alleged in those counts, particularly as no one else gave evidence of having seen him there.[705] The Prosecution responded that a finding that Babić's evidence in relation to another incident was not "wholly reliable" does not amount to a

[699] Trial Judgement, para 820.
[700] Trial Transcript, pp 284-285.
[701] *Ibid*, p 285.
[702] *Ibid*, p 413.
[703] Counts 27, 28 and 29.
[704] Trial Judgement, para 988.
[705] Delić Brief, para 282b.

conclusion that Babić was a completely unreliable witness who could not be believed in all circumstances.[706]

456. In the circumstances of this case, the Appeals Chamber does not accept the "fine distinction" which the Prosecution sought to draw between not being satisfied beyond reasonable doubt as to the reliability of a witness's evidence and a finding that the witness was lying.[707] The nature of the evidence which Babić gave in support of the torture and cruel treatment charges was of such a nature that, if true, it established those charges beyond reasonable doubt. It was not just the absence of supporting evidence which led to the acquittal on those charges. There was a wealth of evidence which demonstrated that Babić was lying in relation to them, including evidence that the injuries which he alleged had resulted from the mistreatment (which included having his leg doused in petrol and set alight) had occurred sometime prior to his detention at the Čelebići prison camp.[708]

457. But this debate concerning the evidence of Babić does not need to be resolved in this appeal, as it is apparent from the judgement itself that the Trial Chamber did not rely upon it. As already stated, the Trial Chamber did not include in the circumstantial case upon which it relied in finding beyond reasonable doubt that Delić participated in the second beating any direct evidence that Delić was present in the area when the second beating took place. If the evidence of Babić that Delić was present *had* been accepted, it was of such a vital nature that it would inevitably have been included in the statement of the circumstances relied on. Its absence from that statement demonstrates that the Trial Chamber did *not* accept that evidence, and that it did not interpret the evidence of either Witness B or Rajko Dragonić as demonstrating that Delić was present on the occasion of the second beating.

458. A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the guilt of the accused person because they would usually exist in combination only because the accused did what is alleged against him – here that he participated in the second beating of Gotovac. Such a conclusion must be established beyond reasonable doubt. It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the *only* reasonable conclusion available. If there is another conclusion which is also reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted.

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[706] Appeal Transcript, pp 517.
[707] *Ibid*, p 518.
[708] Trial Judgement, paras 986-987.

459. The Appeals Chamber is satisfied that, without some acceptable evidence that Delić *was* present at the time of the second beating, no reasonable tribunal of fact could be satisfied beyond reasonable doubt that Delić participated in the second beating from the circumstances identified by the Trial Chamber in this case. The enmity between Delić and Gotovac, his threat to Gotovac that he would be killed, and his participation in the earlier (and separate) beating do not, even in combination, eliminate the reasonable possibility that he was not there at the time. Such a possibility arises from the absence of any acceptable evidence from any of the many witnesses who were present that Delić was also present. No finding that he participated in the second beating was therefore available.

460. The conviction of Delić on Counts 1 and 2 must accordingly be quashed, and a judgement of acquittal entered on both counts.

C. Issues 11 and 12: Convictions Under Counts 3 and 4

461. Delić was convicted under Counts 3 and 4 of the Indictment for a grave breach of the Geneva Convention (wilful killing) and with a violation of the laws or customs of war (murder) in respect of the death of Željko Milošević ("Milošević"). It was alleged that Delić selected Milošević from Tunnel 9 where he was detained and brought him outside where Delić and others severely beat him, and that, by the following morning, Milošević had died from his injuries.

462. The Trial Chamber found that Delić had inflicted numerous beatings on Milošević while he was detained in the camp. Prior to his death, journalists had visited the camp and Milošević had been taken out by Delić to make "confessions" in front of them, which Milošević refused to do. After that incident, Delić called Milošević out of the tunnel at night, and then beat him severely for a period of at least an hour, such that his screaming and moaning could be heard by the detainees inside the tunnel. The dead body of Milošević was seen outside the tunnel the next morning. The Trial Chamber found that the beating inflicted on this occasion caused the death of Milošević.[709]

463. In challenging his conviction under these counts, Delić contends that only two witnesses, Milenko Kuljanin and Novica Đorđić, testified to direct knowledge of Delić's involvement in the beating to death of Milošević, that their testimony is incredible as their

[709] Trial Judgement, paras 832 and 833.

versions of the incident are inconsistent and that their testimony as to events leading up to the death of Milošević conflicts with the testimony of other Prosecution witnesses.[710]

464. The Prosecution argues that the fact that the witnesses did not see the beating which occasioned the victim's death is not of itself a basis for concluding that there was an error of fact. It is contended that the Trial Chamber found that the witnesses were able to confirm that Delić administered the fatal beating and that none of the inconsistencies referred to by Delić establish that this finding was unreasonable.[711]

465. Regarding its findings as to the events leading up to the death of Milošević, the Trial Chamber relied upon the testimony of two witnesses, Milenko Kuljanin and Novica Đorđić. The Trial Chamber described Novica Đorđić as having testified that he was situated only a very short distance from the door of Tunnel 9, from where he was in a position to see and hear what was going on outside the door when it was open. He conceded that he did not see the final beating as the door of Tunnel 9 was closed, but that he heard Delić calling Milošević out of the tunnel, a discussion, beatings and finally a shot. Milošević did not return to Tunnel 9 that night.[712]

466. The Trial Chamber held that the testimony of Novica Đorđić was supported by that of Milenko Kuljanin. It described Milenko Kuljanin as testifying that Delić called Milošević and personally took him out of Tunnel 9. He then heard the victim screaming, moaning and crying out for over an hour, indicating the severity of the beating inflicted upon him.

467. The Trial Chamber stated that the following morning the motionless body of Milošević was observed by a number of Prosecution witnesses, including Novica Đorđić, Milenko Kuljanin and Witness J, lying "near the place where [the prisoners] were taken to urinate".[713] The Trial Chamber found that, although there were "some variations between the testimony provided by the witnesses to these events, the fundamental features of this testimony, as it relates to Željko Milošević's last evening of life, are consistent and credible".[714]

468. Delić submits that the inconsistencies between the testimony of Milenko Kuljanin and Novica Đorđić were "so great that they are unreliable and they cannot be used to establish the

[710] Delić Brief, pp 128-132.
[711] Prosecution Response, paras 11.9-11.11.
[712] Trial Judgement, paras 831-832.
[713] Trial Judgement, para 832.
[714] Trial Judgement, para 832.

facts and reach a judgement".[715] As indicated above, the Trial Chamber did accept that there were some variations in the witnesses' testimony but did not identify specifically what these were. The Appeals Chamber will consider whether the matters referred to by Delić were in fact inconsistencies in the evidence and then consider whether any effect they may have had on the evidence on these counts referred to the Trial Chamber when taken as a whole was such as to make it unreasonable to find that the "fundamental features" of the testimony were sufficiently consistent and credible to justify a finding of guilt beyond reasonable doubt.

469. The first inconsistency identified by Delić relates to the manner in which Milošević was removed from Tunnel 9. Milenko Kuljanin testified that Delić called Milošević and personally took him out of Tunnel 9 but that, according to Novica Đorđić, Milošević left the tunnel upon the call of Delić's voice; he made no mention of Delić taking Milošević out personally.

470. Milenko Kuljanin testified that prior to Milošević's death, journalists had visited the prison-camp and Milošević was taken out of Tunnel 9 by Delić and asked to make "confessions" in front of these journalists, which he refused to do.[716] Milenko Kuljanin's evidence as to what followed was that:

> Delić returned [Milošević and another detainee Rajko Đorđić] to tunnel number nine, from which they had come, and when the journalists had left, he entered the tunnel again and said that they would remember him well. Zeljko [Milošević], however, remained for another couple of days in the tunnel. Delić then came and told him to get ready around 1 pm. Then Delić came and called Milošević. I cannot say exactly when he came. It was night. It was perhaps midnight or 2 o'clock am. It was pitch dark. He took Zeljko out personally. He called him to come out and took him out. After they had gone out, we heard Zeljko screaming and moaning and crying out. In the morning when they took us out to go to the toilet, Zeljko Milošević was behind the door lying there dead.[717]

Novica Đorđić testified that:

> And indeed, as Hazim had said, that night -- I don't know what time it was -- his voice could be heard outside building Number 9 and he called out Zjelko Milošević. Zjelko went out. The door was closed behind him. We heard talk, but this time it was a bit further away from the entrance, so we couldn't understand as well as the previous days when it was just outside the door, but we heard the discussion, later beatings and finally a bullet.[718]

471. There is a difference in the accounts: Novica Đorđić testified only that Delić's voice could be heard outside the tunnel and that he "called out" Milošević, who "went out", and Kuljanin stating that Delić "took him [Milošević] out personally." It is not possible to understand this as a loose way of saying that he *called* Milošević out personally in light of his further evidence: "He called him to come out *and took him out.* After *they* had gone out [...]".

[715] Appeal Transcript, p 498.
[716] Trial Transcript, pp 5480-81.
[717] Trial Transcript, p 5481.

There is thus a difference in the evidence as to whether Delić came into the tunnel or simply called Milošević from outside. It is apparent that the Trial Chamber found only that Delić had called Milošević out, relying on the fact that the two witnesses had recognised his voice, and did not rely on Milenko Kuljanin's evidence relating to Delić having also personally taken him out. The only relevance of the inconsistency would therefore be as to Kuljanin's credit, which the Appeals Chamber will consider in the context of the other inconsistencies alleged by Delić.

472. The second inconsistency referred to is that, following the sound of beating and screaming, to which the witnesses testified, Novica Đorđić heard a "bullet".[719] Milenko Kuljanin did not testify to hearing any shot. Again, the Trial Chamber, having found Milošević died from the *beating* inflicted upon him (to which both witnesses testified), did not rely on the evidence as to the sound of a shot and the only relevance of the matter could be to the credibility of the witnesses.

473. Delić submits that the evidence of Kuljanin and Delić as to the location of Milošević's body on the day following the beating was inconsistent with that of Witness J. Kuljanin gave evidence that:

> In the morning when they took us out to go to the toilet, Zeljko Milošević was behind the door lying there dead.[720]

And then, in response to questioning:

> Q. You say that in the morning, going to the toilet outside you saw the body outside of the tunnel entrance. Did you see the body, both going to the toilet and coming back from the toilet?
>
> A. Yes, it was there on our way and when we were coming back to the tunnel, both times.[721]

Novica Đorđić testified that:

> In the morning – I think it was very early – we were taken out in groups of five or six to the toilet or rather the hole, and when I went out right next to the hole on the northern side of the hole was Zjelko Milošević's corpse covered with some kind of rag or tee-shirt over his forehead with a large blood stain.[722]

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[718] Trial Transcript, p 4179.
[719] Trial Transcript p 4179.
[720] Trial Transcript, p 5481.
[721] Trial Transcript, p 5483.
[722] Trial Transcript, p 4179.

474. Delić points out that the Trial Chamber erred when saying that Milenko Kuljanin saw the dead body "near the place where they were taken to urinate"[723] as the witness testified that he saw the body behind or outside the door of Tunnel 9. Although the Trial Chamber's description of Milenko Kuljanin's testimony appears on its face to be slightly inaccurate, as he testified that he saw the body lying behind the door of Tunnel 9,[724] this inaccuracy, and the alleged inconsistency between the witnesses' testimony as to the location at which the body was found are more apparent than real, when the evidence is taken in context. It appears from the evidence that the hole where the prisoners were taken to urinate was in fairly close proximity to Tunnel 9 and that the area outside the tunnel entrance or door was close enough to where the prisoners were taken to urinate that witnesses referring to the locations by the different descriptions could reasonably be referring to essentially the same place. When asked to describe where the hole was and where the body of Milošević had been found, Novica Đorđić responded that:

> The hole was just here, somewhere in the middle of Tunnel Number 9. You pass this small concrete wall and it was just here. The body was right next to the hole.[725]

And in cross-examination, when asked again about the location of the body, the following interchange took place:

> Q. Point again where you saw the corpse?
>
> A. (Indicating) Here *next to a hole that was dug in as a toilet.* He was right next to it in the middle here.
>
> Q. So all of that occurred *behind Tunnel 9*?
>
> A. *Somewhere behind the entrance*, yes.[726]

This witness therefore considered that the relevant location could be described as both "next to the hole" and "behind the entrance" to Tunnel 9.

475. This understanding appears to have been shared by Witness J, who described the location at which he saw Milošević's body as being:

> [...] close to this local [*sic*] which we used to relieve ourselves, we were taken out there. When we were taken there to urinate, we all saw him lying there next to the hole, lying dead and all of us could see him, all the detainees could see him.[727]

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[723] Trial Judgement, para 832.
[724] Trial Transcript, p 5481.
[725] Trial Transcript, p 4181.
[726] Trial Transcript, p 4232 (emphasis added).
[727] Trial Transcript p 7497.

When asked again where he had seen Milošević's body, he later elaborated, making indications on a plan of the camp, that it was behind Tunnel 9:

> This was the pit where we went to the toilet and his body was lying next to it. This is also behind number 9. If this is number 9, it would be up here, around this area. I know that it was not far.[728]

The Appeals Chamber therefore regards the evidence as to the location of Milošević's body on the morning following his beating as fully supporting the Trial Chamber's finding.

476. Delić also argues that the testimony of Witness J that the body of Milošević was all yellow is inconsistent with that of the two other witnesses who said that his head was covered with some kind of garment stained with blood.[729] The Appeals Chamber considers that there is no necessary inconsistency between these accounts, as it is quite plausible that the skin on those parts of Milošević's *body* which were visible, was yellow perhaps from ill health, but that he also had a *head* injury which was indicated by the fact that his head was fully or partly covered with a blood stained cloth.

477. Delić alleges that there is an inconsistency in the evidence as to when the incident occurred, as Novica Đorđić and Milenko Kuljanin "did not agree on the date that the alleged events occurred".[730] Although Milenko Kuljanin was not able to recall precisely the time of the killing in terms of dates in time,[731] he was able to situate it by reference to other events. His evidence, that it followed shortly after the visit of the journalists,[732] is in no way contradicted by Novica Đorđić and Witness J, who did not give specific evidence as to the date on which the fatal beating occurred.

478. Delić contends further that Milenko Kuljanin and Novica Đorđić's testimony relating to the death of another detainee, Slavko Šusić, which is similar to that given in relation to the death of Milošević, was rejected by the Trial Chamber. In relation to the evidence of Novica Đorđić, it is not apparent from the Trial Judgement that the Trial Chamber rejected his evidence. It referred to his evidence that he had seen Delić and Landžo take Slavko Šusić out of Tunnel 9, that he had seen Šusić pushed back in a long time later, and that he had died shortly

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[728] Trial Transcript, p 7510.
[729] Delić Brief, para 293.
[730] Delić Brief, para 293.
[731] *See* Trial Transcript, p 5482: "I spent around 110 days in the tunnel. All this took place during this 110 days which I spent there. Whether it was the beginning of July or the end of June, I cannot really tell. I do not orient myself really quite well, because we really, at least as far as I myself am concerned, cannot remember these more important dates because I could not orient myself in the space of time there. So I cannot say exactly. Possibly, it was the end of June or July, but his killing took place after Šlavko Susić's incident".
[732] Trial Transcript, p 5481.

afterwards. The Trial Chamber appeared to accept, rather than to reject it.[733] The fact that the Trial Chamber did not find that Delić and Landžo were responsible for the death of Šusić was not because it disbelieved the witnesses, but because none of them gave sufficient evidence to establish that by the beating Delić and Landžo were responsible for his death. The Trial Chamber did accept that the evidence established that Delić and Landžo had severely beaten Šusić, and on that basis entered convictions for wilfully causing great suffering or serious injury to body or health and cruel treatment.[734]

479. Milenko Kuljanin's testimony in regard to the killing of Slavko Šusić was that, from his position in the Tunnel, he had been able to see Šusić being mistreated in various ways outside the tunnel door, which was open. This was not accepted by the Trial Chamber, on the basis that it "was not convinced that from this location he would have been able to have a clear sight of the mistreatment meted out to Slavko Šusić".[735] It also observed that not all of his evidence was consistent with other witnesses' testimony, but not because of any inherent problem with his credibility which would affect his evidence in relation to all other matters on which he gave evidence.[736] The Appeals Chamber is of the view that it was open to the Trial Chamber, having examined Milenko Kuljanin's testimony in the context of the whole of the evidence in relation to the counts relating to Milošević, to accept that evidence even though it did not rely on his evidence in relation to other matters for reasons specific to those matters.

480. The Trial Chamber also relied upon evidence as to beatings to which Delić had subjected Milošević during his detention at the camp which, in combination with evidence as to certain statements made by Delić shortly before the fatal beating of Milošević, demonstrated Delić's intention at least to inflict serious bodily injury upon him. Upon the evidence presented by numerous Prosecution witnesses,[737] the Trial Chamber found that Milošević was subjected by Delić and sometimes Landžo to a series of beatings and other abuses prior to the fatal incident. All were either inside Tunnel 9 or outside its entrance and could in general be seen as well as heard by the prisoners in the tunnel.[738]

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[733] Trial Judgement, para 863.
[734] Trial Judgement para 866.
[735] Trial Judgement, para 862.
[736] Trial Judgement, para 863.
[737] Among the number of Prosecution witnesses relied upon by the Trial Chamber were Miro Golubović, Novica Đordić, Milenko Kuljanin, Witness P, Risto Vukalo and Witness J. Trial Judgement para 830.
[738] Trial Judgement, para 830. Novica Đordić testified in relation to the occasion on which Milošević was taken out in front of the journalists that "Zjelko Milošević was taken out in front of Tunnel Number 9. That means just in front of the door of Tunnel 9, so you can hear very well and see what's happening outside, if we were allowed to look. [...] In his case I remember a piece of cable was used, electrical cable which was about 2 cms thick and it had a steel wire inside this cable, and every time he was taken out, he was beaten very severely, and later led

481. Delić argues that there is an inconsistency in the evidence in relation to these beatings as the Prosecution witness Assa'ad Harraz, one of the journalists who came that day to the camp, denied that detainees were beaten in the presence of the journalists as Milenko Kuljanin and Novica Đorđić testified. The Trial Chamber did not refer to the testimony of Assa'ad Harraz in the Judgement in reaching its findings on this issue, but there is no indication that the Trial Chamber did not weigh all the evidence that was presented to it. A Trial Chamber is not required to articulate in its judgement every step of its reasoning in reaching particular findings. The Appeals Chamber is satisfied that it was open to the Trial Chamber, which saw the witnesses give their testimony, to prefer the evidence of Milenko Kuljanin and Novica Đorđić insofar as any inconsistency arose with the testimony of Assa'ad Harraz.

482. More specifically, there was compelling evidence before the Trial Chamber that Delić had made specific threats to Milošević warning him that he would be coming for him on the evening on which he was killed. The Trial Chamber referred[739] to the testimony of Milenko Kuljanin that:

> Delić returned [Milošević and another detainee Rajko Đorđić] to tunnel number nine, from which they had come, and when the journalists had left, he entered the tunnel again and said that they would remember him well. Zeljko, however, remained for another couple of days in the tunnel. Delić then came and told him to get ready around 1 pm. Then Delic came and called Milošević. I cannot say exactly when he came. It was night. It was perhaps midnight or 2 o'clock am.[740]

He reiterated later in his evidence that Delić "...had actually forewarned him [Milošević] of what was to come and told him to be ready at one, and that was what happened".[741]

483. Although not specifically referred to by the Trial Chamber, Novica Đorđić also gave evidence of Delić's specific threats to Milošević:

> [...] the day before this night [of Milošević's death], Hazim Delić told him that that night at 1.00 am he would "go to the toilet". I beg your pardon for using the word "to piss".
>
> [...] And indeed, as Hazim had said, that night – I don't know what time it was – his voice could be heard outside building number 9 and he called out Zjelko Milošević.[742]

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back in." Trial Transcript, pp 4173-4174. He stated at 4174-4175 that it was Delić who would call Milošević out. He confirmed at 4176 that the door to the tunnel was mostly open.

739 Trial Judgement, para 832.

740 Trial Transcript, p 5481.

741 Trial Transcript, p 5483.

742 Trial Transcript, pp 4177 and 4179.

It is reasonable to assume that the Trial Chamber was taking this evidence into account when making its findings as to the threats made by Delić to the victim which demonstrated an intent to cause at least very serious bodily injury to him.[743]

484. As to the inconsistencies in the evidence of the witnesses which Delić has alleged, the only two which the Appeals Chamber can regard as demonstrating genuine differences related to whether Delić called Milošević out of the tunnel or whether he also personally came in to take him out, and to whether there was a final gunshot. These must be considered in light of the significance of the matters on which the witnesses gave consistent evidence:

- During Milošević's detention in the prison-camp, he was singled out by Delić for frequent interrogation and was repeatedly beaten or otherwise mistreated by him, including outside the doors of Tunnel 9.
- Shortly prior to his death, Milošević was taken out of Tunnel 9 by Delić and, with another detainee, was asked to make confessions to visiting journalists which he refused to do. On this occasion too he was beaten.
- Some time after this incident, Delić threatened Milošević and told him specifically that he would come for him at one o'clock at night.
- At a time late at night, Delić came to Tunnel 9 and called out Milošević, spoke to him outside the door of Tunnel 9 and then the sounds of beating and the screams, cries and moans of Milošević could be heard for over an hour.
- The dead body of the victim was seen the following morning near the hole where the prisoners were taken to urinate, behind Tunnel 9.

In the face of this body of evidence, the Appeals Chamber does not believe it was unreasonable for the Trial Chamber to regard these inconsistencies as being of inadequate significance to undermine the fundamental features of the evidence.

485. As is clear from the above discussion, the other matters raised by Delić as undermining the credibility of the witnesses are not, in the view of the Appeals Chamber, of such a character as would require a reasonable Trial Chamber to reject their evidence. The Appeals Chamber is satisfied that on the evidence before the Trial Chamber it was open to accept what it described as the "fundamental features" of the testimony.

486. Having made the findings set out above, it was reasonable to find that Delić had subjected Milošević to a prolonged and serious beating, that this beating had caused his death, and that it was inflicted with an intention to kill or at least to cause serious bodily injury. It was

[743] Trial Judgement, para 833.

therefore not unreasonable for the Trial Chamber to regard the totality of the evidence, when taken as a whole, as establishing beyond reasonable doubt Delić's guilt.

487. Delić's grounds of appeal relating to Counts 3 and 4 must accordingly be dismissed.

D. Issues 13 and 14: Convictions Under Counts 18 and 19

488. In Counts 18 and 19, Delić was found guilty of torture for the rape of Grozdana Ćećez (for the purposes of this section, "the victim").[744] It was found that the victim was taken to the Čelebići camp on 27 May 1992 and on her arrival was brought to a room in which Delić was waiting. She was interrogated by Delić, during the course of which he slapped her. She was then taken to another room with three men including Delić. Delić subsequently raped her.[745] It was found that these rapes constituted the offence of torture.[746]

489. Delić's principal argument centres on the victim's testimony, submitting that it was so weak and contradicted, that the Trial Chamber's conclusions were clearly wrong.[747] In particular, he refers to elements of her testimony which illustrate her unreliability because: (1) she failed to identify Delić properly;[748] (2) her own evidence was weak and contradictory when given in relation to certain issues;[749] (3) her evidence contradicted evidence given by other witnesses, in particular Milojka Antić;[750] and (4) she was unable to recall certain events,[751] illustrating what he describes as her "selective memory".[752]

490. As to the reliability of the testimony presented in relation to these counts, the Trial Chamber in general found:

> the testimony of Ms. Ćećez, and the supporting testimony of Witness D and Dr. Grubač, credible and compelling, and thus concludes that Ms. Ćećez was raped by Delić, and others, in the Čelebići prison-camp.[753]

491. The argument made under these grounds attacks the credibility and reliability of the main witness on whom the Trial Chamber relied to convict. The Appeals Chamber recalls that

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[744] Specifically, Delić was found guilty of torture as a Grave Breach of Geneva Convention IV (Article 2(b) of the Statute) and as a Violation of the Laws or Customs of War (Article 3 of the Statute): Trial Judgement para 943.
[745] Trial Judgement, para 937.
[746] Trial Judgement, para 941.
[747] Delić Brief, para 304; Appeal Transcript, p 499.
[748] Delić submits that although she later identified him by name, she was unable to identify him in a photograph array prepared by the Prosecution and she was not asked to identify him in court. Delić Brief, para 305.
[749] Appeal Transcript, p 501.
[750] Delić Brief, para 302.
[751] Appeal Transcript, p 500.
[752] Delić Brief, para 306.
[753] Trial Judgement, para 936.

the Trial Chamber was in the best position to hear, assess and weigh this testimony. It was accordingly for the Trial Chamber to consider whether the witness was reliable and her evidence credible. In such circumstances, the Appeals Chamber must always give a margin of deference to a Trial Chamber's evaluation of the evidence and findings of fact.[754] It is for Delić in these circumstances to demonstrate that this evidence could not reasonably have been accepted by any reasonable person, that the Trial Chamber's evaluation was wholly erroneous and that therefore the Appeals Chamber should substitute its own finding for that of the Trial Chamber.[755]

492. Delić does not dispute the fact that the Rules do not require corroboration of a victim's testimony.[756] However, although the Trial Chamber also relied on additional testimony to support the principal account, the only direct evidence (and that disputed) in relation to the rapes carried out by Delić was that of the victim. Delić states that this testimony was not worthy of belief, due primarily to inconsistencies in the evidence which he claims illustrate its unreliability.

493. As to these alleged inconsistencies, Delić firstly alleges that the victim's identification of him as the person who raped him was suspect, as she could not identify him in a photograph array and was not asked to identify him directly in court.[757] The Trial Chamber found that: "Upon her arrival at the prison-camp she was taken [...] to a room where a man with a crutch was waiting, whom she subsequently identified as Delić".[758] The Appeals Chamber notes that the victim, having identified Delić at the start of her testimony as "the man with a crutch", confirmed this identification throughout her testimony,[759] while also referring to him by name.[760] The Appeals Chamber sees no reason to question the evaluation of this identification by the Trial Chamber.

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[754] *Tadić* Appeal Judgement, para 65; *Aleksovski* Appeal Judgement, para 63.
[755] *Aleksovski* Appeal Judgement, para 63.
[756] Rule 96(i) of the Rules provides that in cases of sexual assault, "no corroboration of the victim's testimony shall be required".
[757] Delić Brief, paras 297 and 305.
[758] Trial Judgement, para 937.
[759] In testimony, she stated: "When I entered that room, it was a very small room. I saw a man with a crutch. There was a crutch next to him. His leg was bandaged". Trial Transcript p 491. She continued to refer to him as the "the man with the crutch", (*e.g.*, Trial Transcript p 492, when asked who slapped her) and "[t]he one with the crutch" (*e.g.*, Trial Transcript p 494, when asked who raped her). She then stated: "At that time I still did not know who he was but later I found out. Soon after that I found out who and what he was Hazim Delić" (Trial Transcript p 494).
[760] In particular, when asked again to confirm the identification, Grozdana Ćećez stated that although she did not know who Delić was when he raped her, she "learned shortly [after]. [ ] The women from Bradina had come, and somebody from the entrance was looking for Hazim Delić and he appeared, so I realised that he was the man. He was carrying a crutch and he was limping, so I knew straight away who he was". She further testified

494. Delić specifically points to the fact that the victim failed to identify Delić from a photograph array. The Appeals Chamber notes that when questioned as to her inability to identify Delić from the photographs, the victim replied: "I am not sure. All those pictures were of bald-ish men. So I didn't dare say which one. Maybe the man has changed. After all, I haven't seen him for five years. So I was not sure".[761]

495. The Appeals Chamber determines that it has no reason to find that the Trial Chamber erred in its findings as to the victim's identification of Delić. The Appeals Chamber notes that the victim identified Delić by name on several occasions throughout her testimony and continued to refer to him as such throughout.[762] In addition, although not a necessary requirement, the Appeals Chamber notes that there were corroborating accounts before the Trial Chamber of the fact that Delić was identified as using a crutch.[763] The simple fact that the victim failed to identify him in a photograph array (or rather, as it appears to the Appeals Chamber, was too cautious to try to identify him), several years after the incident took place, does not suffice to illustrate fault on behalf of the Trial Chamber's overall appreciation of the evidence and treatment of identification.[764]

496. Delić also refers to certain inconsistencies in the victim's testimony, which he states illustrate that it was unreliable.[765] The Appeals Chamber notes that as an introduction to its consideration of the factual and legal findings, the Trial Chamber specifically discussed the

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that she "saw him quite frequently", that he was there all the time and that she heard his name frequently (Trial Transcript pp 513-514, 517).

761 Trial Transcript, p 516.

762 *See* Trial Transcript, p 510-511.

763 Corroboration is not *required* either in general (*see* for example: *Aleksovski* Appeal Judgement, para 62: "the testimony of a single witness on a material fact does not require, as a matter of law, any corroboration"); *Tadić*, Appeal Judgement, para 65, or in particular, in relation to testimony by victims of sexual assault. In any event, the testimony of other witnesses, although not expressly referred to by the Trial Chamber, did refer to the identifying feature that Delić used a crutch. For example, Dr Grubač (Trial Transcript pp 5998-5999), whose testimony was relied upon by the Trial Chamber to convict on these counts, finding it also to be credible and compelling (Trial Judgement, para 939). He testified that: "A day after my arrival to Čelebići I met Hazim Delić.[...]. Knowing him I thought I could address him and I did, and I told him, 'here I am' [...]. At that time he was carrying a crutch under his armpit. He said his leg had been injured; he was limping a little bit and using this crutch". *See* also the testimony of Mirko Dordič (Trial Transcript p 4718) and Dr Jusufbegović (Trial Transcript p 11963).

764 *See Furundžija* Appeal Judgement, paras 103-107, where the Appeals Chamber agreed with the Trial Chamber finding that the identification of the accused by the victim in that case was satisfactory, because despite minor and reasonable inconsistencies in her identification, there was "in any event [...] other evidence of the Appellant's identity on the basis of which it would be reasonable for the Trial Chamber to be satisfied with the identification of the Appellant" (para 107).

765 In particular, he refers to: her failure to recollect when she made corrections to a statement made to investigating magistrates in Yugoslavia; her failure to recall being interviewed on television; the fact that her testimony contradicted that of another witness, Milojka Antić, when she stated that she had given her contraceptive pills and that of her physician who stated that he did not recommend for her contraceptive pills.

nature of the evidence before it.[766] It found that often the testimony of witnesses who appear before it, consists of a "recounting of horrific acts"[767] and that often "recollection and articulation of such traumatic events is likely to invoke strong psychological and emotional reactions [...]. This may impair the ability of such witnesses to express themselves clearly or present a full account of their experiences in a judicial context".[768] In addition, it recognised the time which had lapsed since the events in question took place and the "difficulties in recollecting precise details several years after the fact, and the near impossibility of being able to recount them in exactly the same detail and manner on every occasion [...]."[769] The Trial Chamber further noted that inconsistency is a relevant factor "in judging weight but need not be, of [itself], a basis to find the whole of a witness' testimony unreliable".[770]

497. Accordingly, it acknowledged, as it was entitled to do, that the fact that a witness may forget or mix up small details is often as a result of trauma suffered and does not necessarily impugn his or her evidence given in relation to the central facts relating to the crime. With regard to these counts, the Trial Chamber, after seeing the victim, hearing her testimony (and that of the other witnesses) and observing her under cross-examination chose to accept her testimony as reliable. Clearly it did so bearing in mind its overall evaluation of the nature of the testimony being heard. Although the Trial Chamber made no reference in its findings to the alleged inconsistencies in the victim's testimony, which had been pointed out by Delić, it may nevertheless be assumed that it regarded them as immaterial to determining the primary question of Delić's perpetration of the rapes.[771] The Appeals Chamber can see no reason to find that in doing so it erred.

498. The Trial Chamber is not obliged in its Judgement to recount and justify its findings in relation to every submission made during trial. It was within its discretion to evaluate the inconsistencies highlighted and to consider whether the witness, when the testimony is taken as a whole, was reliable and whether the evidence was credible. Small inconsistencies cannot suffice to render the whole testimony unreliable. Delić has failed to show that the Trial Chamber erred in disregarding the alleged inconsistencies in its overall evaluation of the

[766] Trial Judgement, paras 594-598.
[767] Trial Judgement, para 595.
[768] Trial Judgement, para 595.
[769] Trial Judgement, para 596.
[770] Trial Judgement, para 597.
[771] *See* also Prosecution Response, para 11.14.

evidence as being compelling and credible, and in accepting the totality of the evidence as being sufficient to enter a finding of guilt beyond a reasonable doubt on these grounds.[772]

499. Accordingly, these grounds of appeal must fail.

E. Issues 15 and 16: Convictions under Counts 21 and 22

500. Counts 21 and 22 related to repeated incidents of forcible sexual intercourse and rape of Witness A (Ms Antić)[773] over six weeks by Delić. Count 21 charged Delić with a grave breach of the Geneva Conventions (torture) under Article 2 of the Statute. Count 22 charged him with a violation of the laws or customs of war, based on common Article 3 of the Geneva Conventions (torture), under Article 3 of the Statute.

501. Based upon the testimony of Ms Antić, the Trial Chamber identified and discussed in the Judgement three occasions when Ms Antić was raped by Delić. The first time was on the night of her arrival in the Čelebići camp, in Building B, when Delić interrogated her and threatened to shoot her or transfer her to another camp if she did not comply with his orders.[774] The second time occurred in Building A, after Delić had ordered Ms Antić to wash herself in Building B. On that occasion Delić was found to have penetrated her both anally and vaginally.[775] The third rape occurred in Building A during the day.[776] The Trial Chamber noted that on the three occasions Delić was in uniform and armed and threatened her.[777] The Trial Chamber also observed that the victim was constantly crying and had to be treated with tranquilizers, and concluded that "there can be no question that these rapes caused severe mental and physical pain and suffering to Ms Antić".[778] The Trial Chamber found that the rape and severe emotional and psychological suffering of Ms Antić was corroborated by the testimony of Ms Ćećez and Dr Grubač.[779] It also concluded that the purpose of the first rape was to obtain some information and that the rapes were perpetrated by Delić with a

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[772] *Aleksovski* Appeal Judgement, para 64.
[773] The witness referred to as Witness A in the Indictment did not seek protective measures at trial and was subsequently referred to as Ms Milojka Antić in the Judgement; *See* para 945, Trial Judgement.
[774] Trial Judgement, para 958.
[775] *Ibid*, para 960.
[776] *Ibid*, para 961.
[777] *Ibid*, para 963.
[778] *Ibid*, para 964.
[779] *Ibid*, para 959.

discriminatory intent.[780] The Trial Chamber accordingly found Delić guilty of torture under Counts 21 and 22 of the Indictment.[781]

502. Delić contends that the Trial Chamber erred in relying on the testimony of the victim only, which was not consistent and not credible. He further argues that the Trial Chamber wrongly relied on a "presumption of reliability" in favour of the rape victim who gave testimony in court, thus shifting the burden of proof to the defence to rebut that presumption. He submits that Rule 96(i) of the Rules merely removes a presumption of unreliability of victims of sexual offence but does not create a legal presumption that victims are reliable witnesses, which would be contrary to Article 21(2) of the Statute. Delić submits that acquittals should be substituted on these counts or that a new trial should be ordered.[782]

503. The Prosecution submits that the testimony of a single witness on a material fact may be sufficient to establish guilt beyond reasonable doubt. Contrary to Delić's contention, the Trial Chamber's reference to a presumption of reliability in relation to victims of sexual assault does not imply that the accused is presumed guilty. In the Prosecution's submission, Delić's arguments as to unreliability do not demonstrate that the Trial Chamber's findings were unreasonable.[783]

504. The arguments put forward by Delić are primarily concerned with the standard used by the Trial Chamber to assess the testimony of the victim of the sexual assaults perpetrated by him. The relevant paragraph of the Judgement reads:

> The Trial Chamber notes that sub-Rule 96(i) of the Rules, provides that no corroboration of the victim's testimony shall be required. It agrees with the view of the Trial Chamber in the *Tadić Judgement*, quoted in the *Akayesu Judgement*, that this sub-Rule:
>
> > accords to the testimony of a victim of sexual assault the same presumption of reliability as the testimony of other crimes, something long been denied to victims of sexual assault by the common law.[784]

505. The Trial Chamber in this paragraph was expressing its agreement with the holding of another Trial Chamber that victims of sexual assault should be considered as reliable as victims of other crimes. The use of the term "presumption of reliability" was inappropriate as there is no such presumption. However, the Appeal Chamber interprets that holding as simply affirming that the purpose of Rule 96(i) is to set forth clearly that, contrary to the position taken

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[780] *Ibid*, para 963.
[781] The Trial Chamber dismissed Count 23, a violation of the laws or customs of war, with which Delić was charged in the alternative; *See* para 965.
[782] Delić Brief, paras 308-319; Delić Reply, paras 124-128, and Appeal Transcript, pp 502-503.
[783] Prosecution Response, paras 11.15-11.17, and Appeal Transcript, pp 535-538.

in some domestic jurisdictions, the testimony of victims of sexual assault is not, as a general rule, less reliable than the testimony of any other witness. The appellant's argument that the Trial Chamber shifted the burden of proof to the Defence is thus misconceived, as the Trial Chamber did not rely on any "presumption of reliability" to assess the evidence before it. In the paragraph following the one just quoted the Trial Chamber assessed the evidence of Ms Antić as follows:

> Despite the contentions of the Defence, the Trial Chamber accepts Ms. Antić's testimony, and finds, on this basis, and the supporting evidence of Ms. Ćećez, Witness P and Dr. Petko Grubač, that she was subjected to three rapes by Hazim Delić. *The Trial Chamber finds Ms. Antić's testimony as a whole compelling and truthful, particularly in light of her detailed recollection of the circumstances of each rape and her demeanour in the court room in general and, particularly, under cross-examination.* The alleged inconsistencies between her evidence at trial and prior statements are immaterial and were sufficiently explained by Ms. Antić. She consistently stated under cross-examination that, when she made those prior statements, she was experiencing the shock of reliving the rapes that she had "kept inside for so many years". Further, the probative value of these prior statements is considerably less than that of direct sworn testimony which has been subjected to cross-examination.[785]

506. As already stated, there is no legal requirement that the testimony of a single witness on a material fact be corroborated before it can be accepted as evidence.[786] What matters is the reliability and credibility accorded to the testimony. Contrary to Delić's assertion, the Trial Chamber did not presume that the testimony of Ms Antić was reliable and credible as it discussed it carefully, and identified particular reasons why it considered her credible. Clearly, the testimony of Ms Antić was ascertained on its individual merit, and treated as the testimony of any other witness, and the Trial Chamber was careful to discuss the inconsistencies between prior and live testimony.[787] Moreover, as held above and also in this Judgment, the hearing, assessing and weighing of the evidence presented at trial is primarily vested with the Trial Chamber, which is best placed to ascertain whether a witness is reliable in the circumstances of the case.[788]

507. The Appeals Chamber is of the view that the appellant has failed to demonstrate that the Trial Chamber erred in its evaluation of the evidence, and reached a conclusion that no reasonable tribunal could have reached. Accordingly, these grounds of appeal must fail.

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[784] Trial Judgement, para 956 (footnote omitted).
[785] Trial Judgement, para 957 (emphasis added).
[786] *See* above para 492.
[787] Trial Judgement, para 957.
[788] *Tadić* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.

F. Issues 17 and 18: Convictions Under Counts 46 and 47

508. The final convictions against which Delić appeals on the grounds of error of fact are Counts 46 and 47 of the Indictment, which contained the following charges:

> Count 46. A Grave Breach punishable under Article 2(c) (wilfully causing great suffering) of the Statute of the Tribunal; and
>
> Count 47. A Violation of the Laws or Customs of War punishable under Article 3 of the Statute of the Tribunal and recognised by Article 3(1)(a) (cruel treatment) of the Geneva Conventions.[789]

These charges are based on paragraph 35 of the Indictment, which alleges that:

> [b]etween May and October 1992, the detainees at Čelebići camp were subjected to an atmosphere of terror created by the killing and abuse of other detainees and to inhumane living conditions by being deprived of adequate food, water, medical care, as well as sleeping and toilet facilities. These conditions caused the detainees to suffer severe psychological and physical trauma...

The Indictment charged Delić under Article 7(1) of the Statute with having directly participated in creating these conditions, and with responsibility as a superior under Article 7(3).

509. The Trial Chamber found that because Delić could not be held responsible as a superior under Article 7(3), he could not be held responsible for the inhumane conditions which prevailed in the camp generally. However, it found that:

> [...] by virtue of his direct participation in those specific acts of violence with which he is charged in the Indictment and which the Trial Chamber has found proven above, Hazim Delić was a direct participant in the creation and maintenance of an atmosphere of terror in the Čelebići prison camp.[790]

It therefore found Delić guilty of Counts 46 and 47 under Article 7(1).

510. The Trial Chamber had found Delić guilty of specific acts of violence under Counts 3 and 4 (killing of Željko Milošević), 11 and 12 (wilfully causing great suffering or serious injury to and cruel treatment of Slavko Šušic), 18 and 19 (torture and rape of Ms Ćećez), 21 and 22 (torture and rape of Ms Antić), and 42 and 43 (inhumane acts involving use of electrical device).[791] Although the Appeals Chamber has found that the Trial Chamber erred in finding Delić guilty of Counts 1 and 2 (killing of Šćepo Gotovac), it notes that in overturning the finding that Delić was responsible for the death of Gotovac it did not disturb the Trial Chamber's finding that Delić had participated in the first beating of the victim.

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[789] Indictment, 19 Mar 1996, para 35.
[790] Trial Judgement, para 1121.
[791] *Ibid* at para,1285.

511. The Appeals Chamber observes that in imposing these convictions, the Trial Chamber made a number of findings of specific acts of violence inflicted by Delić, based on the testimony of witnesses who testified as to Delić's direct participation in promoting the atmosphere of terror created by the killings, abuse and inhumane living conditions at the Čelebići camp.

512. The Trial Chamber found that it was proved beyond reasonable doubt that Delić had raped Ms Antić on three occasions in threatening and coercive circumstances.[792] In her testimony, Milojka Antić described in great detail the three occasions on which she had been raped by Delić.[793] As noted above in relation to the grounds of appeal relating to Delić's convictions for the rape of Ms Antić under Counts 21 and 22, the Trial Chamber accepted Ms Antić's testimony as being overall "compelling and truthful"[794] and the Appeals Chamber has accepted that the Trial Chamber acted reasonably in arriving at that conclusion. The Trial Chamber also found that Delić raped Ms Ćećez.[795] Again, the Appeals Chamber has considered this finding in relation to Delić's appeal against his conviction under Counts 18 and 19 of the Indictment and has found that the Trial Chamber considered the testimony of Ms Ćećez, after a discussion of the nature of such evidence, and was not unreasonable in accepting her evidence and convicting him under those counts.

513. The Trial Chamber found that Delić had participated in the beating of a group of detainees and had ordered at least one guard to do the same.[796] In relation to that incident, a number of witnesses testified that, following the burning of the village of Bradina, Delić ordered as a vindictive measure that all detainees from Bradina be beaten. Evidence as to this and other collective beatings was given by Witness R,[797] Witness F,[798] Witness M,[799] Mirko Đorđić[800] and Hristo Vukalo.[801] This evidence was adduced largely for the purpose of indicating Delić's superior authority, but was not accepted by the Trial Chamber as proving that status. However, it was accepted by the Trial Chamber as being "indicative of a degree of

[792] Trial Judgement, paras 958-965.
[793] Trial Transcript, pp 1779-1800.
[794] Trial Judgement, para 957.
[795] Trial Judgement, para 936.
[796] Trial Judgement, para 804
[797] Trial Transcript, p 7801.
[798] Trial Transcript pp 1323, 1337.
[799] *Ibid* at pp 5048, p 5050.
[800] *Ibid* at pp 4760-4761.
[801] *Ibid* at p 6269.

influence Hazim Delić had in the Čelebići prison-camp on some occasions, in the criminal mistreatment of detainees".[802]

514. Delić was also convicted of inhuman treatment and cruel treatment under Counts 42 and 43 of the Indictment for the use of a device emitting electrical current on Milenko Kuljanin and Novica Đorđić.[803] The Trial Chamber found that:

> [...] Hazim Delić deliberately used an electric shock device on numerous prisoners in the Čelebići prison-camp during the months of July and August 1992. The use of this device by Delić caused pain, burns, convulsions, twitching and scaring [*sic*]. Moreover, it frightened the victims and reduced them to begging for mercy from Delić, a man who derived sadistic pleasure from the suffering and humiliation that he caused.[804]

This finding was based on the testimony of at least six witnesses, explicitly identified in the Trial Judgement.[805] Delić's conviction under these counts was not the subject of appeal.

515. The Appeals Chamber has also reviewed the Trial Chamber's findings in relation to Delić's participation in the incidents relating to Šćepo Gotovac. Although the Appeals Chamber has found that the Trial Chamber's finding that Delić was responsible for the death of Šćepo Gotovac and therefore his conviction under Counts 1 and 2 of the Indictment cannot stand, it has accepted that the Trial Chamber's finding that Delić was involved in at least one violent beating of Gotovac was clearly open on the evidence.

516. In relation to Counts 11 and 12 which charged the wilful killing and murder of Slavko Šušić, the Trial Chamber found that despite there being a "strong suspicion" that Šušić died as a result of the severe beating and mistreatment inflicted upon him by Delić and Landžo, it was not absolutely clear who inflicted the fatal injuries. As a result the Trial Chamber found Delić and Landžo not guilty of wilful killing and murder but did convict them both of wilfully causing great suffering or serious injury to and cruel treatment on the basis that it was "clear that Delić and Landžo were, at the very least, the perpetrators of heinous acts which caused great physical suffering to the victim".[806] In reaching that finding the Trial Chamber referred to the evidence of four witnesses who had witnessed Delić personally beating Šušić.[807]

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[802] Trial Judgement, para 806.
[803] Trial Judgement, para 1059.
[804] Trial Judgement, para 1058.
[805] Witness P, Witness B, Witness R, Novica Đorđić, Milenko Kuljanin and Stevan Gligorević. *See* Trial Judgement, paras 1053-1056; based on testimony at Trial Transcript at pp 4560 (Witness P), 5047 (Witness B), 7782 (Witness R) 4197 (Novica Đorđić), 5453 (Milenko Kuljanin) and 1455 (Stevan Gligorević).
[806] Trial Judgement, para 866.
[807] Trial Judgement, para 864. The transcripts confirm that this was in fact the evidence of the identified witnesses: Grozdana Ćećez (Trial Transcript pp 547-548), Miljoka Antić (pp 1804-1806), Miro Golubović (pp 2132-2134), Witness P (pp 4544-4554).

517. Although the Trial Chamber did not rely on Delić's involvement in the creation of the prevailing inhumane living conditions at the camp, it did refer in its findings under this count to the testimony of certain witnesses as to Delić's direct participation in creating those conditions. The Trial Chamber described as "compelling" the evidence of Witness R that access to water became increasingly restricted until it reached a stage where "under threat of heavy beatings and even death, not a drop of water could be brought in without the knowledge and permission of the deputy commander Hazim Delic".[808] With regard to the provision of medical care, the Trial Chamber referred specifically to the testimony of Witness R who stated that "when confronted with a request for medical care by a detainee, Hazim Delić would respond "sit down, you have to die anyway, whether you are given medical assistance or not".[809] The Trial Chamber also referred specifically to the testimony of Mirko Dordić as to Delić's participation in creating severely restricted access to toilet facilities:

> Hazim Delic would force us to go to urinate in a group of 30-40 people. We had to run there. Upon his command he would say: 'Take it out. Stop.' This was very short, the time we had. We just ran out and had to run back, so that there were people who just didn't have enough time to finish.[810]

The Trial Chamber referred to the testimony of four other witnesses which confirmed this account.[811]

518. The above evidence, consisting of testimony stating that Delić perpetrated acts of rape and cruelty in the Čelebići camp, led the Trial Chamber to the conclusion that Hazim Delić was very much involved in the abuse and ill-treatment of the detainees at the camp. In particular, the Trial Chamber observed that testimony of the witnesses suggested that on many occasions, he was a direct participant and primary actor in acts of inherent cruelty.

519. However, Delić presents three specific arguments in support of his claim that the convictions under Counts 46 and 47 were not based on factually sufficient evidence. In particular, Delić submits that the Trial Chamber ignored the testimony of Dr Bellas, a forensic pathologist, according to whom there would have been evidence of widespread infectious diseases, deaths or injuries due to heat stroke, or evidence of more injuries, greater severity of

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[808] Trial Judgement at para 1097, referring to Trial Transcript at p 7706-7707.
[809] Trial Judgement at para 1089, referring to Trial Transcript at p 7774. Other evidence given by Witness R in relation to specific persons supports this account: Trial Transcript at pp 7706-7 as did the evidence of other witnesses, *see e.g.*, Nedeljko Draganić who testified that he was injured and that "whenever [he] would ask to go [to the infirmary] so that they could clean the wound, very often Delić would not allow [him] to go". Trial Transcript, p 1631.
[810] *Ibid* at p 4726, referred to by the Trial Chamber in the Trial Judgement at para 1109.
[811] Trial Judgement, para 1109.

injuries and more complications, if the Prosecution's witnesses were truthful.[812] Delić also submits that an Egyptian journalist, Mr Harraz, visited the camp and saw no signs of mistreatment or cruel treatment of the prisoners.[813] Finally, Delić submits that the Trial Chamber should have considered the defence of necessity, which "generally allows a person to break the law—so long as it does not involve the intentional killing of an innocent—so long as the benefit of violating the law is greater than the danger the law is designed to prevent".[814]

520. These arguments could be rejected by reference alone to the fact that they misconceive the basis upon which the Trial Chamber found Delić guilty under Counts 46 and 47 of the Indictment. These arguments focus on the evidence relating to the general conditions in which the detainees were kept. However, as noted above, the Trial Chamber did not find that Delić was responsible generally for the living conditions within the camp. Delić was found guilty under Counts 46 and 47 for having been "a direct participant in the creation and maintenance of an atmosphere of terror in the Čelebići prison-camp" by virtue of each of the specific acts of violence with which he had been charged in the Indictment and which the Trial Chamber had found to be proved.[815] As already observed, it was clearly open to the Trial Chamber to make those findings on the basis of the evidence before it. The Appeals Chamber will nevertheless consider the specific objections raised by each of the arguments.

521. An examination of the testimony of Dr Bellas reveals that, contrary to Delić's submissions, it is not inconsistent with the witnesses' testimony detailed above. When asked whether, given the conditions in the Čelebići camp, he would have expected to see numerous cases of heat stroke, Dr Bellas replied: "Well, if not numerous, I could expect to have some people with real, real problems about the environmental temperature".[816] This indicates that *numerous* cases of heat stroke need not have resulted. With regard to infectious diseases, Dr Bellas admitted that he was not stating that one would expect to a reasonable medical probability that there would be a cholera epidemic in the camp.[817] He stated that diarrhoea was also an infectious disease, and that some prisoners did in fact suffer from it.[818] He agreed that there are many open wounds that do not develop gangrene,[819] and that some infections remain localized, without spreading to other parts of the body.[820] In addition, he maintained that

[812] Delić Brief, para 329 (g).
[813] *Ibid* at para 330.
[814] *Ibid* at para 337.
[815] Trial Judgement at para 1121.
[816] Trial Transcript at p 13954.
[817] *Ibid* at p 14024.
[818] *Ibid.*
[819] *Ibid* at p 14025.
[820] *Ibid* at pp 13994-13995.

portions of the transcript indicating that persons lost consciousness and died as a result of beatings were not inconsistent with his medical opinion.[821] He also indicated that rib fractures "can heal spontaneously with time".[822]

522. It is also apparent from the testimony of Dr Bellas that it was difficult for him to be statistically precise about injuries and illnesses, because he was relying on transcripts, not on medical examinations of the victims following these incidents, and a more precise evaluation of each incident depended on crucial factors unknown to him – namely, the degree of force used, the positioning of instruments of force, and the individual resistance of a person. As a result, the Appeals Chamber concludes that it is completely open to a reasonable tribunal of fact to find that this evidence in no way undermines the strength of the evidence concerning Delić's acts of abuse and cruelty.

523. In evaluating Mr Harraz's testimony as to its capacity to undermine the testimony of the witnesses discussed above, it should be noted at the outset that Mr Harraz stated that he believed the visit took forty-five minutes to an hour, and that when he talked to a few of the prisoners, officials from the camp were also present.[823] He was not allowed to visit the area reserved for "hard cases".[824] In the large ward, he only "*quickly* scanned the faces of the prisoners".[825] The combination of these factors make it unlikely that Mr Harraz would have been able to perceive evidence of abuse. In addition, the following exchange contained in the transcript is significant:

> Mr Moran (In cross examination): So if someone were to come and say that people were beaten for an hour in front of you and your cameraman, those people would either be mistaken or they would be lying, would they not?
>
> Mr Harraz: I do not know, perhaps they are talking about what happened in front of other reporters. I can only say what happened before me in that place and I think even if any torture, beating or humiliations happened, *I do not think that would happen before cameras.*[826]

524. Mr Harraz also admitted that while the general impression he received was that the camp was not a place where acts of torture were carried out, "of course, the persons in charge of the camp knew that [they] were coming on the next day to visit the camp".[827] These statements reveal that Mr Harraz himself acknowledged that acts of abuse could have been carried out in

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[821] *Ibid* at p 14026.
[822] *Ibid* at p 13963.
[823] *Ibid* at p 5820.
[824] *Ibid* at p 5830.
[825] *Ibid* at p 5831 (emphasis added).
[826] *Ibid* at p 5895 (emphasis added).
[827] *Ibid* at p 5831.

the camp. Therefore, a reasonable tribunal of fact could not conclude that Mr Harraz's testimony disproves the testimony of the witnesses concerning Delić's acts of violence and mistreatment.

525. Finally, the defence of necessity, also raised by Delić in relation to his convictions under Counts 46 and 47, is simply inapposite. Such a defence could not be used to justify the acts of cruel treatment upon which the Trial Chamber founded these convictions. The Trial Chamber disposed of this argument, correctly, on the basis that the legal standards regulating the treatment of the detainees were "absolute, not relative.[828] They delineate a minimum standard of treatment, from which no derogation can be permitted". Further, as previously observed by the Appeals Chamber, even assuming the existence of a defence of necessity under international law, it is simply not possible to raise such a defence in relation to an allegation of *active* mistreatment of detainees for which no justification could exist.[829]

526. Having considered the evidence provided by the above witnesses, the Appeals Chamber can arrive at only one conclusion: the evidence was factually sufficient to support Delić's convictions under Counts 46 and 47 of the Indictment. The evidence overwhelmingly indicates that Delić wilfully caused great suffering to the prisoners (Count 46) and treated them cruelly (Count 47). No reasonable tribunal of fact would conclude merely on the basis of Dr Bellas' and Mr Harraz's testimony that Delić did not commit these acts. As a result, this Chamber cannot hold that the conclusion of guilt beyond a reasonable doubt is one that *no* reasonable tribunal of fact could have reached.

527. For the foregoing reasons, the Appeals Chamber therefore rejects these grounds of appeal and upholds the convictions against Hazim Delić under Counts 46 and 47.

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[828] Trial Judgement, para 1117; *see* also para 1118.
[829] *Aleksovski* Appeal Judgement, para 54.

VIII. THE PROSECUTION INTERVIEWS WITH MUCIĆ

528. Mucić has appealed against (1) a decision by the Trial Chamber admitting into evidence interviews conducted with him following his arrest and (2) a decision by the Trial Chamber refusing to issue a subpoena to an interpreter.[830] Although these decisions were confirmed in the Trial Judgement,[831] the original interlocutory decisions were issued by the Trial Chamber on 2 September 1997 ("the Exclusion Decision")[832] and 8 July 1997 ("the Subpoena Decision")[833] respectively. The Appeals Chamber notes that although Mucić has separated his submissions in relation to each decision, in fact both relate to the same issue, that is whether or not Mucić voluntarily waived the right to have counsel present during certain of his interviews. Mucić's ultimate submission is that the Trial Chamber erred in finding that this waiver was voluntary and as a result, evidence of all of the interviews should have been excluded from the trial proceedings.

(i) Background

529. On 8 May 1997, Mucić filed a motion seeking to exclude from evidence interviews conducted with him following his arrest.[834] Between 2 June and 11 June 1997, the Trial Chamber heard testimony from the Prosecution witnesses through whom these interviews would be admitted. On 2 June 1997, Mucić filed an *ex parte* motion seeking an order compelling an interpreter present throughout the interviews to give evidence. On 12 June 1997, the Trial Chamber heard oral arguments from the parties on the motion to exclude evidence following which it made an oral ruling on the same day. On 8 July 1997, the Trial Chamber issued the Subpoena Decision and on 2 September 1997 it issued the Exclusion Decision.

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[830] Although Mucić filed his Notice of Appeal on 27 November 1998, on 26 July 1999 he filed the Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić Dated The 2nd July 1999. In this document, he separated this issue into two grounds of appeal, labelled ground 5 (concerning the admission into evidence of Mucić's interviews held from 19 – 21 March 1996) and ground 6 (concerning the refusal of the Trial Chamber to issue a subpoena to an interpreter). By Order dated 31 March 2000 (Order on Motion of Appellants Hazim Delić and Zdravko Mucić for leave to file supplementary brief and on Motion of Prosecution for leave to file supplementary brief), Mucić was ordered *inter alia* to file a document identifying his amended grounds of appeal. On 31 May 2000 this document was filed (Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal) and in doing so he renumbered and re-organised the issues, filing this issue as one ground of appeal (concerning the admission into evidence of the prosecution interviews). The Appeals Chamber will however consider the two separate issues raised by this ground of appeal, noting that in any event they are clearly related.

[831] Trial Judgement, paras 59 and 63.

[832] Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 Sept 1997. The Trial Chamber initially ruled orally on this motion on 12 June 1997 (Transcript, pp 4093 – 4098).

[833] Decision on the Motion *ex parte* by the Defence of Zdravko Mucić Concerning the Issue of a Subpoena to an Interpreter, 8 July 1997.

[834] Motion to Exclude Evidence, 8 May 1997.

530. In the Exclusion Decision, the Trial Chamber found that statements made by Mucić to the Austrian Police Force on 18 March 1996 ("the First Interviews") should be excluded from evidence as having been obtained in breach of his right to counsel under Article 18 of the Statute and Rule 42 of the Rules. It reached this decision on the basis that Mucić was denied the right to counsel during the First Interviews because the Austrian procedural rules did not recognise the right of a suspect to have counsel present during questioning. However, statements made to Prosecution investigators on 19, 20 and 21 March 1996 ("the Second Interviews") were ruled admissible, on the basis that Mucić was clearly informed of his right under the Rules to have counsel present and he voluntarily waived it.[835]

531. Mucić points out that it is clear that the Trial Chamber relied upon the Second Interviews in the course of its Judgement and consequent conviction of him. However, he submits that as the interviews as a whole[836] amounted "to a course of interviewing conduct which was irrevocably tainted, at least in the mind or consciousness of [Mucić...]; all of the interviews should have been thereby excluded."[837] He submits that the overall objective in considering what is said in interviews is that the Trial Chamber should be fair and that the decision by the Trial Chamber breaches this objective.[838]

(ii) Discussion

532. The Appeals Chamber notes that Mucić does not dispute the overall factual findings of the Trial Chamber with regard to the conduct of both the First Interviews and the Second Interviews.[839] However, as a matter of law, he alleges for several reasons that the Trial Chamber erred in the exercise of its discretion in admitting the Second Interviews, having excluded the First Interviews. The Appeals Chamber recalls that for such a ground of appeal to succeed, although an appellant must discharge an initial burden of raising arguments in support of an alleged error of law with the Appeals Chamber, the Appeals Chamber may proceed to examine whether or not the alleged error is such that it invalidates the Trial Chamber's decision.[840]

533. As to the Trial Chamber's decision, the Appeals Chamber notes that a Trial Chamber exercises considerable discretion in deciding on issues of admissibility of evidence. As a result,

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[835] Exclusion Decision, para 63.
[836] That is, including the First Interviews.
[837] Mucić Brief, Section 2, p 1 (underlining in original).
[838] Appeal Transcript, p 462.
[839] As pointed out by the Prosecution with regard to the Second Interviews in the Prosecution Response, para 16.8.
[840] Article 25(1)(a) of the Statute. *See Furundžija* Appeal Judgement, paras 35-36.

a Trial Chamber should be afforded a certain degree of deference in making decisions based on the circumstances of the case before it. To this extent the Appeals Chamber agrees with the Prosecution submissions on this point during the hearing on appeal.[841] Nevertheless, the Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it. Indeed the Appeals Chamber has intervened in the past to do so.[842] In these decisions, the Appeals Chamber confirmed that a pre-requisite for admission of evidence must be compliance by the moving party with any relevant safeguards and procedural protections and that it must be shown that the relevant evidence is reliable. If evidence is admitted and an appellant can subsequently show that prejudice has been caused by a failure by the Trial Chamber to properly apply such protections, then it may be found that the Trial Chamber has erred and exceeded its discretion. This is when Rule 89(D) and Rule 95 of the Rules may come into play and in these circumstances a ground of appeal may succeed.

534. In its oral ruling on the Exclusion Decision, the Trial Chamber found that the Second Interviews were "reliable and admissible [...]. The weight to be attached and the probative value will be determined by considering all the other circumstances in these proceedings."[843] Mucić submits that "it is plain that the Trial Chamber relied upon the second interview in the course of [its] judgement."[844] This cannot be disputed. The Trial Chamber, in convicting Mucić under Article 7(3) of the Statute[845] found:

> In his interview with the Prosecution, Mucić admitted he had authority over the camp, at least from 27 July 1992. However, in the same interview he admitted that he went to the prison-camp daily from 20 May 1992 onwards.[846]

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[841] Appeal Transcript, pp 475–476. The Prosecution submits that "[...] in making [...] determination of this final matter, the Trial Chamber is required to weigh all the facts in evidence before it, and in some cases involving issues of this kind, it may be required to receive evidence and hear witnesses, and so in accordance with general principles, it would be necessary to afford a considerable margin of deference to the finding of the Trial Chamber, and it would only be where the decision of the Trial Chamber could be shown to be an abuse of discretion that there would be justification in the Appeals Chamber intervening on appeal."

[842] *See* for example: *Prosecuto v Kordić and Čerkez,* Decision on Appeal Regarding Statement of a Deceased Witness, Case No IT-95-14/2-AR73.5, 21 July 2000; *Prosecutor v Kordić and Čerkez,* Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Case No IT-95-14/2-AR73.6, 18 Sept 2000; *The Prosecutor v Kupreškić et al,* Decision on Appeal by Dragan Papić Against Ruling to Proceed by Deposition, Case No IT-95-16-AR73.3, 15 July 1999.

[843] Trial Transcript, p 4098.

[844] Mucić Brief, Section 2, p 1.

[845] Trial Judgement, para 775.

[846] Trial Judgement, para 737. *See* also, para 767: "Zdravko Mucić had all the powers of a commander to discipline camp guards and to take every appropriate measure to ensure the maintenance of order. Mucić himself admits he had all such necessary disciplinary powers. He could confine guards to barracks as a form of punishment and for serious offences he could make official reports to his superior authority at military headquarters. Further, he could remove guards, as evidenced by his removal of Esad Landžo in October 1992." (Footnotes referring to Trial Exhibit 101-1 – (record of interview with Prosecution) omitted).

535. In addition, it noted that:

> Mucić admitted in his interview with the Prosecution that he was aware that crimes were being committed in the prison-camp at Čelebići in June and July 1992 and that he had personally witnessed detainees being abused during this period.[847]

536. Mucić's argument is that the Trial Chamber erred in the admission of the Second Interviews into evidence. However, as a result of this decision and in its findings in the Trial Judgement, the Trial Chamber relied *inter alia* on this evidence to convict. Accordingly, it is logical to conclude that Mucić's argument must include an allegation that the Trial Chamber also erred in subsequently relying in part on the Second Interviews in this conviction.

537. Mucić's arguments may be summarised as follows. He submits that contrary to the Trial Chamber's findings, the First Interviews and the Second Interviews should have been considered as one continuing event.[848] If they had been, he submits that the Trial Chamber would have found that the Second Interviews should be excluded. As noted above, the First Interviews were excluded because the Trial Chamber found them to be in breach of Mucić's right to counsel during questioning, guaranteed by Article 18 of the Statute[849] and Rule 42 of the Rules.[850] Mucić submits that as he was informed that he had no right to counsel during the First Interviews, it was not unreasonable to expect that he would believe this prohibition to continue to apply in the Second Interviews, despite the fact that he had been informed to the contrary. Such expectation arose from the fact that the interviews were conducted very close together. He was in a foreign country and should not have been expected to perform "the necessary intellectual gymnastics to give informed consent" to the Second Interviews, when he had been informed he was not entitled to be represented by counsel in the First Interviews.[851] He submits that although he may have stated that he did not want counsel present in the Second Interviews, this waiver was neither informed nor voluntary. He argues that in considering whether or not he voluntarily waived the right to counsel in the Second Interviews, the Trial Chamber should have applied a subjective test and found that in the circumstances, his consent was not voluntary.

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847 Trial Judgement, para 769.

848 Mucić Brief, Section 2, pp 1, 7-8.

849 Article 18(3) of the Statute provides: "If questioned, the suspect shall be entitled to be assisted by counsel of his own choice, including the right to have legal assistance assigned to him without payment by him in any such case if he does not have sufficient means to pay for it, as well as to necessary translation into and from a language he speaks and understands."

850 Rule 42(A)(i) of the Rules provides that a suspect shall have "the right to be assisted by counsel of the suspect's choice or to be assigned legal assistance without payment if the suspect does not have sufficient means to pay for it." Rule 42(B) provides that "[q]uestioning of a suspect shall not proceed without the presence of counsel unless the suspect has voluntarily waived the right to counsel. In case of waiver, if the suspect subsequently expresses a desire to have counsel, questioning shall thereupon cease, and shall only resume when the suspect has obtained or has been assigned counsel."

851 Mucić Brief, Section 2, p 11.

538. Several issues arise. Initially, the Appeals Chamber notes that Mucić relies considerably on precedent drawn from the United Kingdom. The Appeals Chamber recalls that reference to principles applied in national jurisdictions can be of assistance to both Trial Chambers and the Appeals Chamber in interpreting provisions of the Statute and the Rules.[852] However, Rule 89(A) of the Rules expressly provides that the Chambers "shall not be bound by national rules of evidence." What is of primary importance is that a Trial Chamber "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."[853] The Appeals Chamber notes that the Trial Chamber found that implicit in this principle was "the application of national rules of evidence by the Trial Chamber."[854] On the contrary, the Appeals Chamber confirms that rules of evidence as expressly provided in the Rules should be primarily applied, with the assistance of national principles only if necessary for guidance in the interpretation of these Rules.

539. The particular precedent relied upon by Mucić concerns generally the exclusion of evidence of interviews obtained by oppression, in circumstances likely to render them unreliable or which would render it unfair to the accused to admit it. In particular he refers to Section 76(2) and Section 78(1) of the Police and Criminal Evidence Act 1984 ("PACE") applicable in the United Kingdom.[855] Although the principles drawn therefrom may arguably be of some assistance, the Appeals Chamber turns primarily to Rule 89(D) and Rule 95 of the Rules, which expressly apply to this issue.

> **Rule 89(D)**
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> A Chamber may exclude evidence if its probative value is substantially outweighed by the need to ensure a fair trial.

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[852] *See* for example, *Furundžija* Appeal Judgement, paras 183-188; *Aleksovski* Appeal Judgement, para 186.

[853] Rule 89(B) of the Rules. Although strictly speaking this relates to "cases not otherwise provided for" in Section 3 of the Rules (the title being "Rules of Evidence") nevertheless, the general principle is important. *See Prosecutor v Kordić and Čerkez,* Decision on Appeal Regarding the Admission into Evidence of Seven Affidavits and One Formal Statement, Case No IT-95-14/2-AR73.6, 18 Sept 2000, para 22. *See* also Prosecution Brief, paras 12.11 and 16.11.

[854] Exclusion Decision, para 34.

[855] Section 76(2) PACE provides: "If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained – (a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as aforesaid." Section 78(1) PACE provides: "In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

Rule 95

> No evidence shall be admissible if obtained by methods which cast substantial doubt on its reliability or if its admission is antiethical to, and would seriously damage, the integrity of the proceedings.

540. The Appeals Chamber notes that the Trial Chamber correctly referred to these Rules in its consideration of the interviews. It found that:

> where the probative value of [...] evidence is substantially outweighed by the need to ensure a fair trial, it ought to be excluded – Sub-rule 89(D). Also to be excluded by Rule 95, is evidence obtained by means contrary to internationally protected human rights.[856]

It further found that Rule 95 of the Rules in particular enables "the exclusion of evidence antiethical to and damaging, and thereby protecting the integrity of the proceedings."[857] The Appeals Chamber can see no reason why the Trial Chamber should be required to look elsewhere for the applicable legal principles.

541. During the hearing on appeal, the Appeals Chamber questioned the parties as to whether or not it would have been appropriate for the Trial Chamber to hold a *voir dire* to resolve this issue. It was stated that "the very issue of whether or not something is voluntary is the prime example of where a voir dire is often taken"[858] so that for example in this case, Mucić could have been provided with the opportunity to "explain what was affecting his mind."[859] The Appeals Chamber notes that although there is no express provision in the Rules for such a procedure, it is generally available in, *inter alia*, common law jurisdictions. It allows for arguments and evidence to be brought before the court solely on a defined issue and would provide an accused with the opportunity to give evidence on a limited basis, prohibiting questions beyond the issues raised. It would ensure in general that arguments and evidence led be confined to the issue in dispute and not extend to discussion of the facts of the case itself.[860]

542. The Appeals Chamber notes that during proceedings at first instance, the possibility of resolving this issue by way of *voir dire* was in fact raised.[861] In Mucić's motion to exclude the First Interviews and Second Interviews from evidence[862] he submitted that "the appropriate way of dealing with [this issue of admissibility] is that there should be a hearing by way of *voire*

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856 Exclusion Decision, para 35.
857 Exclusion Decision, para 44.
858 Appeal Transcript, p 482.
859 Appeal Transcript, p 483.
860 *See* for example, Archbold 2000 (Sweet and Maxwell Limited, 2000), paras 15-360 – 15-365.
861 The Appeals Chamber also notes that during the hearing on appeal, both parties appeared unaware of the fact that this issue had been specifically raised at first instance.
862 Motion to Exclude Evidence, 8 May 1997.

[*sic*] *dire* (or 'trial-within-a-trial')".[863] However, he did not submit specifically that in doing so, he wished to have the opportunity to give evidence personally. On the contrary, he submitted generally that this procedure would allow both parties to "call evidence and have witnesses examined, cross-examined and re-examined in the normal way."[864] At that point, he submitted that it would "be apparent that further oral argument [...would] then be appropriate."[865]

543. As stated, this procedure is not expressly provided for in the Rules. However, this does not mean that it would be unsuitable for a Trial Chamber to utilise it if in a particular case it thought it appropriate. In this case, relevant evidence on the issue could be obtained through the testimony of the investigators, including the Prosecution investigators, the interpreter (see below) and Mucić. The Appeals Chamber notes that three witnesses gave evidence on behalf of the Prosecution regarding the circumstances leading up to the Second Interviews, including two of the Prosecution investigators who questioned Mucić during the Second Interviews.[866] The Appeals Chamber has been directed to no record of any occasion when Mucić suggested that he himself wished to give evidence. Indeed during the hearing on appeal, his counsel submitted that in the circumstances of proceedings before the Tribunal such a procedure in general was inappropriate as both the finders of fact and law are the same tribunal.[867]

544. Nevertheless, although the Appeals Chamber does not agree with the latter assertion and notes that this procedure could in theory have been employed by the Trial Chamber to resolve the matter, the Appeals Chamber makes no finding that the Trial Chamber erred in failing to do so. Nor does it find that Mucić should have specifically requested that he be permitted to give evidence on this limited basis.[868] It does however point out that in any event, evidence in relation to the issue in dispute was heard by the Trial Chamber in the course of the Trial and relied upon by it in both decisions.

545. As stated above, Mucić submits that the Trial Chamber should have considered the First Interviews and the Second Interviews as one continuing event and that because Mucić must have done so, the reasons for excluding the First Interviews applied to the Second Interviews. He submits that the interviews as a whole amounted to a course of interviewing conduct which

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863 Motion to Exclude Evidence, 8 May 1997, para 18.
864 Motion to Exclude Evidence, 8 May 1997, para 18.
865 Motion to Exclude Evidence, 8 May 1997, para 18. *See* also Trial Transcript, pp 2770-2771.
866 Lieutenant Geschwendt (an officer with the Austrian police), gave evidence on 4 and 5 June 1997. Mr Aribat, a Prosecution investigator gave evidence on 2 June 1997 and Mr d'Hooge, another Prosecution investigator gave evidence on 3 and 11 June 1997. A second Austrian Police Officer, Moerbauer also gave evidence on 5, 9 and 10 June 1997.
867 Appeal Transcript, p 488.

was irrevocably tainted, at least in his mind, and that therefore both sets of interviews should have been excluded. During the hearing on appeal Mucić supplements his arguments by stressing that the issue should have been approached, taking "as the base point complete fairness."[869]

546. On the contrary, the Prosecution submits that the First Interviews do not affect the Second Interviews because before the Austrian authorities the accused had no "right" to have counsel present. The Trial Chamber recognised this and ruled that the First Interviews should be excluded. However, Mucić did have a right to have counsel present in the Second Interviews as they were conducted for the purposes of proceedings before the Tribunal. The Prosecution submits that he was clearly informed of this right and that it is clear that he voluntarily waived it.[870] Accordingly, the Trial Chamber did not abuse its discretion in the Exclusion Decision.

547. The Trial Chamber found:

> It is clear on the evidence before the Trial Chamber that there were two interviews of the suspect. [...] There is evidence that the Austrian Police conducted their investigation and gave the caution and rights of the suspect under Austrian law. The interview with the Prosecution was conducted in accordance with the Rules. There is no doubt [...] that different teams conducted each interview. [...] The contiguity of time and the environment around which they took place should not obscure the fact that there were two independent and separate interviews of the suspect. The interview by the Prosecution cannot be regarded as a continuation of the interview of the Austrian Police. The interview of the Austrian Police was directed towards the extradition of the Accused. That of the Prosecution towards establishing substantive offences within the jurisdiction of the International Tribunal. The purposes are distinct and different.[871]

548. The Appeals Chamber can find no error in these findings and finds that the contention that Mucić could subjectively have regarded the First Interviews and the Second Interviews as one continuous event cannot be borne out. The Trial Chamber found that the First Interviews were conducted by the Austrian police over one day, specifically in relation to extradition proceedings. The Second Interviews were conducted by different investigators, in the absence of the Austrian police officers, over the next three days, for a different purpose and at different times. At the start of the Second Interviews Mucić was informed that it was being conducted by investigators from the Office of the Prosecutor of the Tribunal. It is clear to the Appeals Chamber that as found by the Trial Chamber, the interviews were at all times conducted separately and distinctly. Accordingly there can be no reason to find that Mucić could have

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868 As stated elsewhere in this Judgement, an accused before the Tribunal has an absolute right to remain silent during his or her trial (Rule 85(C)).
869 Appeal Transcript, p 466.
870 Prosecution Brief, paras 16.7-16.19.

been led to believe that they were one continuing interview. The Appeals Chamber can find no error in the Trial Chamber's analysis.

549. Mucić submits that the Trial Chamber erred in rejecting any argument that his cultural background and the fact that he was under arrest in a foreign country should be considered in determining if he voluntarily waived the right to remain silent.[872] He submits that the Trial Chamber should have applied a subjective test in considering the admissibility of the Second Interviews and that it erred in solely applying an objective test in interpreting the Rules.[873] "The fact that somebody is being interviewed in a language other than his, probably in a jurisdiction or a place [of] which he has no cultural or personal knowledge, and the fact that he is being interviewed about matters which have arisen from an extraordinary and extra-national set of circumstances [...] is very germane."[874] He submits further that this impacted on his decision making and because the First Interviews were excluded, the logical consequence should be that he would have considered the same rules to apply in the Second Interviews.[875] He also submits that although Rule 42 of the Rules may have been read to him, it is not the words that matter in a legal context but the full implication of the effect of the words.[876]

550. The Trial Chamber found:

> [...] the cultural argument difficult to accept as a basis for considering the interpretation of the application of the human rights provisions. The suspect had the facility of interpretation of the rights involved in a language which he understands. Hence, whether he was familiar with some other systems will not concern the new rights interpreted to him. If we were to accept the cultural argument, it would be tantamount to every person interpreting the rights read to him subject to his personal or contemporary cultural environment. The provision should be objectively construed.[877]

551. The Appeals Chamber again finds that Mucić has failed to satisfy the Appeals Chamber that the Trial Chamber erred in this reasoning. Rule 42 of the Rules provides that a suspect must be informed prior to questioning of various rights, including the right to be assisted during questioning by counsel of the suspect's choice.[878] It further provides that questioning must not continue in the absence of counsel unless a suspect has voluntarily waived the right to have

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871 Exclusion Decision, para 40.
872 Mucić Brief, Section 2, p 9; Appeal Transcript, pp 464-466.
873 Mucić Brief, Section 2, p 7.
874 Appeal Transcript, p 465.
875 Mucić Brief, Section 2, p 10.
876 Mucić Brief, Section 2, p 10.
877 Exclusion Decision, para 59.
878 Rule 42(A)(i) of the Rules.

counsel present.[879] This right is neither ambiguous nor difficult to understand. As long as a suspect is clearly informed of it in a language he or she understands, the Prosecution fulfils its obligations. Contrary to Mucić's submissions,[880] an investigator is not obliged to go further.

552. In this regard, the Trial Chamber expressly found that there is no duty incumbent on an investigator to explain in greater depth the implications of Rule 42, "the duty is only to interpret to the suspect the rules in a language he or she understands."[881] As pointed out by the Prosecution, "[p]rovided that the suspect's rights are explained in a language that the suspect understands, it shouldn't matter in what country the suspect is at the time, particularly in the case of an international tribunal which may interview suspects in many different countries and which has a legal system that's different to that in any particular national jurisdiction."[882]

553. The Appeals Chamber agrees with the interpretation by the Trial Chamber that the Rule should be construed objectively. However, it also notes that even if it were to consider the admissibility of the Second Interviews on the basis of a "subjective standard of informed consent" (which it has found is not the appropriate test), nevertheless, a submission that Mucić suffered from cultural and linguistic problems resulting in involuntary waiver has no foundation. Mucić did not dispute that he had been living in Austria for several years prior to his arrest. This was conceded on his behalf before the Trial Chamber, together with the fact that as a result he "was no doubt familiar with the street-wise ways of that country."[883] In addition, he was provided with the assistance of an interpreter throughout the course of the interviews, while also speaking with a lawyer on one occasion (see below). In these circumstances, there can be no basis for an argument that based on a subjective test, he may have had difficulty in understanding the fact that he had a right to counsel in the Second Interviews.

554. The Appeals Chamber finds that it has no reason to doubt that Mucić was fully aware of the fact that although he did not have a right to counsel in the First Interviews, he did have such a right in the Second Interviews. Accordingly, it finds no error in the Trial Chamber's findings that there is clear evidence that Mucić expressed a wish to be interviewed without counsel. The Appeals Chamber finds most persuasive the fact that the record shows that Mucić was informed on numerous occasions that he had a right to have counsel present while being interviewed and

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[879] Rule 42(B).
[880] Mucić Brief, Section 2, pp 10-11.
[881] Exclusion Decision, para 58.
[882] Appeal Transcript, p 480.
[883] Transcript, p 4026. Counsel proceeds to state:" [...] but the fact of the matter is that over a period of four days he was subjected to two quite different cultures. [...]. Within a space of four days he was subjected to those

on each occasion declined. The Trial Chamber found that there was evidence that "several times during the interview, the suspect was asked whether he was prepared to carry on without counsel, and on each occasion he unequivocally answered in the affirmative.[884] Even when counsel [...] assigned to him appeared to assist him, the Accused indicated he did not need his assistance, and he left."[885] As submitted by the Prosecution, Mucić "manifested all the indicia of understanding and of voluntarily waiving his rights."[886] Mucić has failed to establish that the evidence illustrates that he could have been confused regarding his right to have counsel present and the Appeals Chamber can find no error in the same conclusion reached by the Trial Chamber.

555. Finally, as to Mucić's argument that fairness should be the base point in considering the admissibility of the interviews, the Appeals Chamber does not dispute such a contention. However, it also finds no reason to hold that the Trial Chamber failed to apply this principle. It is not disputed that a Trial Chamber should not admit relevant evidence if in doing so, an accused's right to a fair trial is violated. If admission of evidence is outweighed by the need to have a fair trial, then Rule 89(D) and Rule 95 of the Rules provide a mechanism for exclusion. As seen above, these provisions were specifically applied by the Trial Chamber in its consideration of both the First Interviews and the Second Interviews. In particular, the Trial Chamber pointed out that "[t]here is no doubt statements obtained from suspects which are not voluntary, or which seem to be voluntary but are obtained by oppressive conduct, cannot pass the test under Rule 95."[887] However it also found for the reasons set out above, that there was no reason to conclude in this case that the Second Interviews fell within the provisions of either Rule violating Mucić's right to a fair trial such that they should have been excluded. The Appeals Chamber can find no error in the Trial Chamber's decision.

(iii) Rejection of the request to issue a subpoena

556. Mucić submits that the Trial Chamber erred in refusing to issue a subpoena to the interpreter, Alexandra Pal. It was recorded that at 15:10 on 19 May 1996, Mucić expressed a

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two quite distinct systems, which, in my respectful submission, are pretty well opposed to one another in the terms of the kinds of rights that they afford." Transcript, pp 4026-4027.

884 In particular, the Appeals Chamber notes Trial Exhibit 101-1, pp 1, 14, 33, 52. The Appeals Chamber notes the following exchange on pp 51-52 as being exemplary of Mucić's attitude to the Second Interviews: "Investigator (interpreted): [...]. Do you agree to continue the interview tomorrow? Mucić: By all means. Investigator (interpreted): You have a choice. Mucić: I want to continue it. Investigator (interpreted): So, you agree to continue the interview tomorrow morning? Mucić: Yes."

885 Exclusion Decision, para 62.

886 Prosecution Brief, para 16.19.

desire to have counsel present during the Second Interviews. At 15:30 on the same day, the Second Interviews began and it was recorded that contrary to his previously expressed wish, he was in fact happy to be interviewed un-represented. In reading Mucić his rights at the start of the Second Interviews, the Prosecution investigators asked, *inter alia*: "do you agree to answer our questions without the presence of an attorney, *in accordance with our previous conversation*?"[888] Mucić submits that this remark refers to a previous conversation which he alleges must have taken place during the twenty minute gap immediately before the Second Interviews began, during which an unrecorded exchange took place between the Prosecution investigators and Mucić while the investigators were setting up their equipment. It is alleged that because Mucić changed his mind during this short period of time, "something was said and/or done to persuade him to" do so.[889] It is submitted that the interpreter present in this interval could have testified as to the contents of any such conversation and consequently the reason for Mucić's sudden change of mind and decision finally to proceed without counsel.[890] It is ultimately alleged that whatever was said resulted in Mucić involuntarily waiving the right to counsel.[891]

(iv) Discussion

557. These arguments were brought before the Trial Chamber in an *ex parte* motion,[892] and on 8 July 1997 it decided that it would not issue this subpoena. It determined that:

> [...] [t]he Trial Chamber is not satisfied that the Defence has established that there is indeed an omission in the record of proceedings of the interview of Mucić. The Defence has alleged an unrecorded interrogation and founded its allegation on suppositions of what might have been said or done therein. This is clearly not a satisfactory ground on which to base the application. There is no undisputed evidence of the "previous conversation" alleged to have taken place.[893]

558. The Appeals Chamber agrees. As pointed out by the Trial Chamber, an application to issue a subpoena may be granted under Rule 54 of the Rules if an applicant shows "that the order is necessary for the purposes of investigation. Alternatively, it must be shown that it is

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[887] Exclusion Decision, para 41.
[888] Mucić Brief, Section 2, p 12 (emphasis added).
[889] Mucić Brief, Section 2, p 13.
[890] Mucić Brief, Section 2 p 13.
[891] Mucić Brief, Section 2 p 13.
[892] *See* "Background" Section above.
[893] Subpoena Decision, para 16.

necessary for the preparation or conduct of the trial."[894] The Trial Chamber found that it was "not persuaded by the contention [...] that the only way to fill the [alleged] gap [...] is through testimony of the interpreter."[895] It found that based on the evidence before it, it could not be satisfied that "an order is necessary for investigation into the evidence of whether there was a previous conversation and the context of such a conversation."[896] In fact, the Appeals Chamber notes that as also found by the Trial Chamber, Mucić had "founded [his] allegation on supposition of what might have been said or done therein",[897] and simply speculated as to what may have occurred.[898] The Appeals Chamber agrees that there could be no error in a finding that such speculation cannot discharge the burden under Rule 54 of the Rules to persuade a Trial Chamber to issue a subpoena.

559. However, the Appeals Chamber also notes that this allegation was in any event not left unchallenged. Although as noted above, it appears that Mucić did not request that he should be provided with the chance to testify before the Trial Chamber on this sole issue in the context of a *voir dire* and in fact he could not be required to have done so, nevertheless, he was provided with the opportunity to challenge the Prosecution investigators present at the time as to whether or not this alleged conversation took place. During their testimony the allegation was denied and it was stated that any conversation with Mucić was simply to inform him in general terms of his rights during interview.[899] The Trial Chamber was entitled to assess this evidence and find that it was reliable and credible.[900] The Appeals Chamber cannot accept a general allegation by Mucić that simply because they work for the Prosecution, "the investigators who gave evidence...would have a motive to conceal what had caused this sudden change of mind."[901]

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[894] Subpoena Decision, para 12. Rule 54 of the Rules provides in full: "At the request of either party, or *proprio motu,* a Judge or a Trial Chamber may 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."

[895] Subpoena Decision, para 15.

[896] Subpoena Decision, para 16.

[897] Subpoena Decision, para 16.

[898] *See* also, later in the Exclusion Decision where the Trial Chamber found that "[t]he challenge by the Defence of the waiver of the right to counsel is based on speculation of what might have transpired [...]". Exclusion Decision, para 62.

[899] *See* Trial Transcript, pp 3211-3305 (testimony of Mr Aribat in which he denies that the alleged conversation took place). Mucić submits that because Mr Aribat knew at the start of the interviews that Mucić did not want a lawyer, he must have had a conversation with Mucić regarding this in the twenty minute period before the interview began. At trial his counsel submitted that "something did happen in those twenty minutes, something which Mr Aribat has concealed [...] and that the only possible and proper inference to draw [...] is that something did take place, and it was oppressive, and it was designed to get him to agree not to have a lawyer." (Transcript, pp 4037-4039).

[900] *Tadić* Appeal Judgement, para 64; *Aleksovski* Appeal Judgement, para 63.

[901] Mucić Brief, Section 2, pp 14-15. The Appeals Chamber notes that such a finding would mean that all Prosecution employees must be viewed as being *prima facie* unreliable, simply by virtue of their job.

560. However, it is clear to the Appeals Chamber that the allegation that Mucić was improperly persuaded by the Prosecution investigators to refuse the assistance of counsel, is primarily rebutted by the fact that throughout the Second Interviews it is recorded that he repeatedly asserted that he was happy to be interviewed un-represented.[902] Ultimately, this satisfied the Trial Chamber that his consent was voluntary and refuted any allegation or speculation to the contrary. The Trial Chamber found in the Exclusion Decision:

> There is no doubt the Accused understood that he had a right to counsel during the interview. It was obvious also that he was aware of his right to waive the exercise of the right to Counsel. It appears to us obvious that the suspect voluntarily waived the exercise of the right to counsel. The Defence has not established to the satisfaction of the Trial Chamber that the discussion of the unrecorded portion of the interview was responsible for the exercise by the suspect of his right to waive the exercise of his right to counsel. It would be dangerous to act on the several ingenious speculations of Defence Counsel as to what could have transpired.[903]

561. The Appeals Chamber agrees and finds that Mucić has failed to put forward any reason as to why the Trial Chamber erred in making this finding. Save for the so-called "ingenious speculations", he has failed to establish how the evidence of the interpreter could refute these findings and was necessary for the investigation or conduct of the trial, such that the Trial Chamber would be justified in issuing a subpoena under Rule 54 of the Rules.

562. Mucić also challenges the finding of the Trial Chamber that in principle an interpreter should not be called to give evidence as it could compromise his or her integrity or independence.[904] This independence is guaranteed by the requirement under Rule 76 of the Rules for an interpreter to solemnly declare to act independently and impartially.[905] The Appeals Chamber notes that in the Trial Judgement the Subpoena Decision was summarised as finding that:

> (1) the interpreter cannot be relied upon to testify on the evanescent words of the interpretation in the proceedings between the parties; and (2) it is an important consideration in the administration of justice to insulate the interpreter from constant apprehension of the possibility of being personally involved in the arena of conflict, on either side, in respect of matters arising from the discharge of their duties.[906]

Although the findings are summarised as being two-fold, the Appeals Chamber concludes that in fact the Trial Chamber's primary reason for refusing to issue the subpoena rested on its determination discussed above. That is, that save for a vague speculative assertion, Mucić had

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[902] This wish is also illustrated by the fact (referred to in paragraph 554 above) that although he was provided with the assistance of counsel, Mucić still preferred to continue un-represented.
[903] Exclusion Decision, para 63.
[904] Mucić Brief, Section 2, p 13.
[905] Rule 76 of the Rules provides in full: "Before performing any duties, an interpreter or a translator shall solemnly declare to do so faithfully, independently, impartially and with full respect for the duty of confidentiality."
[906] Trial Judgement, para 59.

failed to put forward any reason as to why further investigation into the alleged previous conversation "was necessary to the proceedings," justifying the issuance of a subpoena to the interpreter.[907] It did however proceed to examine the circumstances in which an interpreter could in theory be called to give evidence. In doing so, it stated that although it was not the case that an interpreter could never be called to give evidence,

> [...] this would depend on one of the following factors. First, there should be a legal duty on [... the interpreter] to make a record of the interpretation between the parties; secondly, in the interest of justice, there should be no other way of obtaining the evidence sought other than through the testimony of the interpreter; or thirdly, the determination of the issue should depend entirely on the evidence to be given by the interpreter.[908]

563. The Appeals Chamber sees no reasons to dispute this finding. As pointed out by the Trial Chamber:

> [i]t would not only be undesirable but also invidious to compel an interpreter into the arena of conflict on behalf of either party to the proceedings, for the determination of an issue arising from such proceedings. It should not be encouraged where other ways exist for the determination of the issue.[909]

Although these findings may have contributed to the Trial Chamber's ultimate decision, they were secondary considerations. In view of the aforementioned primary reason for refusing to issue the subpoena, the Appeals Chamber finds that it is not necessary to discuss in detail Mucić's further submissions on this issue.

564. For these reasons, the Appeals Chamber can see no reason to find that the Trial Chamber abused its discretion in admitting into evidence the Second Interviews and in refusing to issue a subpoena to the interpreter. Further, it can find no error in the Trial Chamber subsequently relying *inter alia* on the Second Interviews to convict Mucić. The Appeals Chamber agrees with the overall finding by the Trial Chamber that the evidence illustrates that Mucić was fully informed of his right to have counsel present in the Second Interviews and that he voluntarily waived it. The Trial Chamber did not err in refusing to issue a subpoena to the interpreter and in admitting the Second Interviews. This ground of appeal is therefore dismissed.

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[907] Subpoena Decision, para 16.
[908] Subpoena Decision, para 17.
[909] Subpoena Decision, para 20.

IX. DIMINISHED MENTAL RESPONSIBILITY

A. Background

565. Landžo was found guilty of grave breaches of the Geneva Conventions by reason of his wilful killing of three detainees in the Čelebići prison camp – Šćepo Gotovac,[910] Simo Jovanović,[911] and Boško Samouković[912] – and of violations of the laws or customs of war by reason of their murders.[913] The Trial Chamber made findings that the death of each of these three detainees resulted from severe or brutal beatings.[914] The beating of Gotovac by Landžo himself was accompanied by the act of pinning a metal badge to the victim's head, and it was so merciless that the victim was unable to walk, and he died a few hours later as a result of his injuries.[915] Landžo was found guilty as an accessory to the "prolonged and vicious" beating of Jovanović which caused his death, an accessory who had knowingly facilitated the beating inflicted by others.[916] The beating of Samouković by Landžo himself was carried out with a wooden plank about a metre long and five or six centimetres thick, and it lasted for about twenty minutes until Samouković fell down.[917] The beating caused broken ribs and the death of the victim shortly thereafter.[918] It was described by the Trial Chamber as merciless as well as brutal.[919]

566. Landžo was also found guilty of grave breaches of the Geneva Conventions by reason of his torture of Momir Kuljanin,[920] Spasoje Miljević,[921] and Mirko Đorđić,[922] and of violations of the laws and customs of war by reason of that torture.[923] The Trial Chamber made findings that Landžo had forced Kuljanin to hold a heated knife in his hand, causing a serious burn to his palm, and that he then cut the victim's hand with the knife twice, for the purposes of punishing and intimidating him.[924] Landžo put a gas mask on the head of Miljević (apparently to prevent his cries being heard by others), tightening the screws to such an extent that the victim felt suffocated, and then he repeatedly heated a knife and burnt the victim's hands, left leg and

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[910] Count 1.
[911] Count 5.
[912] Count 7.
[913] Counts 2, 6 and 8.
[914] Trial Judgement, paras 818, 841, 855.
[915] *Ibid,* paras 823, 1273.
[916] *Ibid*, paras 842, 845.
[917] *Ibid*, paras 851-852.
[918] *Ibid,* para 852.
[919] *Ibid*, para 855.
[920] Count 15.
[921] Count 24.
[922] Count 30.
[923] Counts 16, 25 and 31.

thighs. He next kicked and hit Miljević, and then he forced him to eat grass, as well as filling his mouth with clover and forcing him to drink water.[925] The Trial Chamber said that it was appalled by the cruel nature of Landžo's conduct.[926] Landžo forced open Đorđić's mouth and inserted a pair of heated pincers, burning the victim's mouth, lips and tongue.[927] He also forced Đorđić on a number of occasions to do push-ups, usually ten at a time but sometimes as many as fifty,[928] as well as subjecting him to more general mistreatment.[929]

567. Landžo was found guilty of grave breaches of the Geneva Conventions as well by reason of great suffering or serious injury to body or health caused to Slavko Šušić[930] and Nedeljko Draganić,[931] and of violations of the laws or customs of war by reason of their cruel treatment.[932] The Trial Chamber found that Landžo had taken part in the serious mistreatment of Šušić over a continuous period during the course of one day,[933] and that he had perpetrated "heinous acts which caused great physical suffering" to Šušić,[934] but it did not make clear precisely which acts of those alleged that it had accepted. Some of the evidence given in relation to the treatment of Šušić was criticised by the Trial Chamber, but it did not criticise evidence that Landžo pulled out Šušić's tongue with some kind of implement and that he beat him.[935] Landžo had been charged in relation to the death of Šušić, but the Trial Chamber was not satisfied that his death had resulted from the beatings and mistreatment of Landžo. These verdicts were entered in lieu of convictions upon the charges laid in the Indictment alleging wilful killing and murder, upon the basis that these lesser offences were included within those charged.[936] The Trial Chamber also found that on one occasion Landžo, with others, tied Draganić's hands to a beam in the ceiling of a hangar, and that the victim was hit with wooden planks and rifle butts. Thereafter, Draganić was beaten by Landžo almost every day, usually with a baseball bat, and he was forced, with other detainees, to drink urine. On another

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924 Trial Judgement, paras 918, 921, 923.
925 *Ibid,* paras 971, 974.
926 *Ibid,* para 976.
927 *Ibid,* para 995, 996.
928 *Ibid,* para 995, 997.
929 *Ibid,* para 998.
930 Count 11.
931 Count 36.
932 Counts 12 and 37.
933 Trial Judgement, para 861.
934 *Ibid,* para 866.
935 *Ibid,* paras 863-864.
936 *Ibid,* para 866.

occasion, Landžo poured gasoline on Draganić's trousers when the victim was in a seated position, and he set the trousers alight. Draganić's legs were badly burnt.[937]

568. Finally, Landžo was also found guilty of grave breaches of the Geneva Conventions by reason of great suffering or serious injury to body or health caused to other detainees in the Čelebići prison camp,[938] and of violations of the laws or customs of war by reason of their cruel treatment.[939] These counts were expressed in general terms, alleging that the detainees at the Čelebići prison camp had been subjected to an atmosphere of terror created by the killing and abuse of a number of them.[940] In finding Landžo guilty of these charges, the Trial Chamber relied upon the findings which it had made against him in relation to the specific counts.[941] The Trial Chamber found that the other detainees had continuously witnessed the most severe physical abuse being inflicted on defenceless victims, and that they had been obliged to observe helplessly the horrific injuries and suffering caused by the mistreatment.[942] By their exposure to these conditions, the Trial Chamber found, the detainees were compelled to live with the ever-present fear of being killed or subjected to physical abuse themselves.[943] Their sense of physical insecurity and fear was aggravated by threats made by the guards (including Landžo).[944] The Trial Chamber found that, through the frequent cruel and violent deeds which were committed, aggravated by the random nature of those acts and the threats made by guards, the detainees had been subjected to an immense psychological pressure which could accurately be characterised as "an atmosphere of terror".[945]

569. Landžo admitted having committed some of the acts which formed the basis of his convictions; he was unable to recall some others, and some acts he denied. These findings by the Trial Chamber leading to Landžo's convictions were not challenged by him on appeal.

570. The findings were repeated in substance when the Trial Chamber considered Landžo's sentence. It went on to describe the charges upon which he was convicted as being "clearly of the most serious nature".[946] Reference was made to the "savagery" of Landžo's killing of Gotovac, and the "sustained and ferocious" nature of his fatal attack upon Samouković.[947] In

[937] *Ibid,* paras 1016-1018.
[938] Count 46.
[939] Count 47.
[940] Indictment, para 35.
[941] Trial Judgment, paras 1086-1087.
[942] *Ibid,* para 1086.
[943] *Ibid,* para 1087.
[944] *Ibid,* para 1089.
[945] *Ibid,* para 1091.
[946] *Ibid,* para 1272.
[947] *Ibid,* para 1273.

addition to the specific acts referred to in these findings, the Trial Chamber noted that Landžo also contributed substantially towards the atmosphere of terror prevailing in the Čelebići camp through his brutal treatment of the detainees. The beatings and other forms of mistreatment, the Trial Chamber said, were inflicted "in a manner exhibiting some imaginative cruelty as well as substantial ferocity".[948] Many of the victims of, and witnesses to, his conduct bore permanent physical and psychological scars of Landžo's cruelty.[949] The Trial Chamber commented that Landžo's apparent preference for inflicting burns upon detainees exhibited sadistic tendencies and clearly required premeditation,[950] and that he took some perverse pleasure in the infliction of great pain and humiliation.[951]

571. Landžo was sentenced to imprisonment for various periods, to be served concurrently.[952] His effective sentence is imprisonment for fifteen years.

B. The Issues on Appeal

572. Landžo's principal defence to the charges was what has been described as the "special defence of diminished mental responsibility". Both Landžo and the Trial Chamber appear to have assumed the existence of such a defence in international law by reason of Rule 67(A)(ii)(b), an issue to which the Appeals Chamber will return.

C. The Trial Chamber's Refusal to Define Diminished Mental Responsibility

573. Landžo filed two grounds of appeal directed to the issue of diminished mental responsibility. The first was in these terms:[953]

> The Trial Chamber Erred in Law, Violated the Rules of Natural Justice, and the Principle of Certainty in Criminal Law, and Denied Appellant a Fair Trial, When It Refused to Define the Special Defence of Diminished Mental Responsibility Which the Appellant Specifically Raised.

574. During the trial, Landžo moved before the Trial Chamber for rulings as to the definition of this "special defence", where the onus lay and the burden (or standard) of proof involved.[954]

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[948] *Ibid,* para 1272.
[949] *Ibid,* para 1273.
[950] *Ibid,* para 1274.
[951] *Ibid,* para 1281.
[952] *Ibid,* para 1286.
[953] Landžo Brief, p 4, Ground of Appeal 7.
[954] Esad Landžo's Submissions Regarding Diminished or Lack of Mental Capacity, 8 June 1998 ("Trial Submission").

He argued that "diminished capacity"[955] was a "prolific defence relied upon in many jurisdictions", and that it was "best known as having been derived from the Homicide Act of 1957 from England".[956] Then, having referred to a number of decisions in England concerning the Homicide Act, Landžo submitted that the English definition of diminished responsibility, its burden of proof and its standard of proof should be adopted by the Trial Chamber when considering the evidence proffered by him.[957] In his summary, he submitted:

> The special defence of diminished capacity as envisioned by the framers of the Statute and Rules of this Tribunal should be as follows: where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omission in doing or being a party to the killing.[958]

575. The Trial Chamber, noting that the "special defence" was, by reason of Rule 67(A)(ii), "a plea offered by the Defence", ruled (in accordance with Landžo's submission) that a defendant offering such a plea carried the burden of proving it on the balance of probabilities,[959] but it reserved its decision as to the appropriate definition of that defence.[960]

576. This refusal by the Trial Chamber is said by Landžo to have violated the principles of certainty in the criminal law,[961] and of *nullum crimen sine lege*,[962] or *ex post facto* law (as it was described by counsel for Landžo).[963] These objections are misconceived. The law to be applied must be that which existed at the time the acts upon which the charges are based took place. However, the subsequent identification or interpretation of that law by the Tribunal, whenever that takes place, does not alter the law so as to offend either of those principles.[964]

577. Landžo also submitted that the refusal by the Trial Chamber to define the "special defence" in advance of evidence being given in relation to it denied him a fair trial.[965] It is, however, no part of a Trial Chamber's obligation to define such issues *in advance*. Its obligation is to rule upon issues at the appropriate time, after all of the relevant material has

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[955] He considered that the terms "diminished mental capacity" and "diminished mental responsibility" were interchangeable: Trial Submission, footnote 2.
[956] *Ibid,* p 4.
[957] *Ibid,* p 13.
[958] *Ibid*, p 13.
[959] Order on Esad Landžo's Submission Regarding Diminished or Lack of Mental Capacity, 18 June 1998, p 2.
[960] *Ibid,* p 3.
[961] Landžo Brief, pp 88-89.
[962] Restated in Article 15 of the International Covenant on Civil and Political Rights, 1966: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed".
[963] Appeal Transcript, pp 590, 595, 627.
[964] *Aleksovski* Appeal Judgement, paras 126-127, 135.
[965] Landžo Brief, p 89.

been placed before it and after hearing the arguments put forward by the parties. It may well be considered to be appropriate or convenient in the particular case to give a ruling of this type upon an assumed or agreed basis, but whether it is appropriate or convenient to do so in any case is a matter for the Trial Chamber in that case to determine in the exercise of its discretion. There is no basis for suggesting that the exercise of the Trial Chamber's discretion in the present case miscarried in its refusal to give in advance a definition of the "special defence".

578. Nor has any prejudice been demonstrated, as a result of that refusal, to show that Landžo's trial was unfair. First, the Trial Chamber substantially adopted the submission made by him as to the definition of the "special defence". After quoting Section 2(1) of the Homicide Act of 1957 of England and Wales the Trial Chamber said:

> Thus, the accused must be suffering from an abnormality of mind which has substantially impaired his mental responsibility for his acts or omissions. The abnormality of mind must have arisen from a condition of arrested or retarded development of the mind, or inherent causes induced by disease or injury.

And, later (after referring to an English authority):[966]

> It is, however, an essential requirement of the defence of diminished responsibility that the accused's abnormality of mind should substantially impair his ability to control his actions.[967]

Secondly, Landžo was not denied the opportunity of producing any evidence or making any submissions in relation to the "special defence". His counsel told the Appeals Chamber that, in effect, she had produced everything she had.[968] Thirdly, as will be seen when Ground 8 is considered, the "special defence" failed not through lack of evidence but because the Trial Chamber did not accept as true Landžo's evidence as to the facts upon which the psychiatric opinions were expressed.

579. This ground of appeal 7 is rejected.

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[966] *Ibid*, para 1169.
[967] Trial Judgement, para 1166.
[968] Counsel for Landžo said: "We have a saying back home that, when you are not given the parameters like that, you throw everything against the wall and see what sticks" (Appeal Transcript, p 589); and: "But they didn't give us any guidance. They didn't tell us which law to use at that point. So I had to just throw everything out there [...]" (Appeal Transcript, p 600).

D. Does Diminished Responsibility Constitute a Defence?

580. As stated earlier, both Landžo and the Trial Chamber appear to have assumed the existence of such a defence in international law by reason of Rule 67(A)(ii).[969] That sub-Rule is in the following terms:

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

The Rule is not happily phrased.

581. It is a common misuse of the word to describe an alibi as a "defence". If a defendant raises an alibi, he is merely denying that he was in a position to commit the crime with which he is charged. That is not a *defence* in its true sense at all. By raising that issue, the defendant does no more than require the Prosecution to eliminate the reasonable possibility that the alibi is true.

582. On the other hand, if the defendant raises the issue of *lack* of mental capacity, he is challenging the presumption of sanity by a plea of insanity. That is a defence in the true sense, in that the defendant bears the onus of establishing it – that, more probably than not, at the time of the offence he was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that what he was doing was wrong.[970] Such a plea, if successful, is a complete defence to a charge and it leads to an acquittal. It is submitted by Landžo that Rule 67(A)(ii) has also made *diminished* mental responsibility a complete defence to any charge (or has perhaps recognised it as such),[971] an argument which the Trial Chamber had accepted.[972]

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[969] The Trial Chamber referred to "the special defence provided for in sub-Rule 67(A)(ii)(b)" in the Trial Judgement, para 1163. Landžo also referred to the special defence as having been provided for in the Rules of Procedure and Evidence, in the Landžo Brief, p 85, and Appeal Transcript, p 590.

[970] *M'Naghten's Case* (1843) 10 Cl & Fin 200 at 210-211; 4 St Tr (NS) 847 at 930-931.

[971] Landžo Brief, pp 85, 102; Appeal Transcript, p 590.

[972] Trial Judgement, para 1164.

583. Notwithstanding a claim by Landžo to the contrary,[973] there is no reference to any defence of diminished mental responsibility in the Tribunal's Statute. The description of diminished mental responsibility as a "special defence" in Rule 67(A)(ii) is insufficient to constitute it as such. The rule-making powers of the judges are defined by Article 15 of the Tribunal's Statute, which gives power to the judges to adopt only –

> [...] *rules of procedure and evidence* for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters.[974]

The Appeals Chamber has held that this power does not permit rules to be adopted which constitute new *offences*, but only *rules of procedure and evidence* for the conduct of matters falling within the jurisdiction of the Tribunal.[975] It follows that there is, therefore, no power to adopt rules which constitute new *defences*. If there is a "special defence" of diminished responsibility known to international law, it must be found in the usual sources of international law – in this case, in the absence of reference to such a defence in established customary or conventional law, in the general principles of law recognised by all nations.[976]

584. Landžo has submitted that such a "special defence" based upon the English model, with modifications, should be available in international law because it is "generally accepted as providing a fair and balanced defence",[977] it has been recognised in the domestic laws of many countries[978] and by the statute of the International Criminal Court adopted in 1998 ("ICC Statute").[979] An examination of the domestic laws referred to by the parties and of the ICC Statute does not support that submission.

585. The English *Homicide Act* 1957 provides that a person who kills or who is a party to the killing of another shall not be convicted of murder if he establishes that he was suffering from such an abnormality of mind (as defined) as substantially impaired his mental responsibility for his acts or omissions in doing so or being a party to the killing.[980] The section provides that, instead, he is liable to be convicted of manslaughter.[981] It is thus a partial defence, not a complete defence, to a charge of murder.

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[973] Landžo Brief, p 85.
[974] The emphasis has been added.
[975] *Prosecutor v Tadić*, Case IT-94-1-A-R77, Judgment on Allegations of Contempt Against Prior Counsel, Milan Vujin, 31 Jan 2000, para 24.
[976] Secretary-General's Report, para 58.
[977] Landžo Brief, p 96.
[978] *Ibid*, pp 102-107.
[979] *Ibid*, p 107.
[980] Section 2(1).
[981] Section 2(3).

586. The partial defence of diminished responsibility originated in Scotland in the 19th century. It was developed there by the courts as a means of avoiding murder convictions for those offenders who were otherwise liable for murder but who did not satisfy the restrictive test for the defence of insanity, but whose mental state was nevertheless impaired.[982] The subsequent English statute, enacted in 1957, provided the model for largely identical legislation in some common law countries.[983] In most (if not all) such countries, the legislation, by reducing the crime from murder to manslaughter, permitted the sentencing judge to impose a sentence other than the relevant mandatory sentence for murder, which was either death or penal servitude for life. The partial defence is in effect, then, a matter which primarily provides for mitigation of sentence by reason of the diminished mental responsibility of the defendant. A recent review of the partial defence of diminished responsibility in Australia concluded that, notwithstanding the abolition of mandatory sentences for murder, the partial defence should be maintained in order to assist in the sentencing process.[984]

587. The ICC Statute provides that a defendant shall not be criminally responsible if, at the relevant time, he or she –

> [...] suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law.[985]

This is not the same as any partial defence of diminished mental responsibility, as it requires the *destruction* of (and not merely the *impairment* to) the defendant's capacity, and it leads to an acquittal. It is akin to the defence of insanity. There is no express provision in the ICC Statute which is concerned with the consequences of an impairment to such a capacity.

588. On the other hand, in many other countries where the defendant's total mental incapacity to control his actions or to understand that they are wrong constitutes a complete

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[982] *See HM Advocate v Dingwall* (1867) 5 Irvine 466, as discussed in N Walker, *Crime and Insanity in England* (Edinburgh University Press, Edinburgh, 1968) Vol 1, chapter 8. *See* also Glanville Williams, *Textbook of Criminal Law* (2nd edition, Steven & Sons, London, 1983) at 685; Smith & Hogan, *Criminal Law* (9th edition, Butterworths, London, 1999) at 211; NSW Law Reform Commission, Partial Defences to Murder: Diminished Responsibility, LRC 82 (1997) ("LRC 82"), para 3.2.

[983] In Australia: *Crimes Act* 1900 (New South Wales), s 23A; *Criminal Code* 1899 (Queensland), s 304A; *Crimes Act* 1900 (Australian Capital Territory), s 14; *Criminal Code* 1983 (Northern Territory), s 37. Hong Kong: *Homicide Ordinance*, Cap 339, Section 3. Singapore: *Penal Code* Cap 224, section 300, Exception 7. Barbados: *Offences Against the Person Act* 1868, section 3A. The Bahamas: *Homicide Act* 1957, section 2(1). Landžo argued (Landžo Brief, pp 105-106) that it exists also in the United States. He relied upon Section 4.02 of the Model Penal Code (1962) which makes admissible, in relation to the defendant's state of mind where it is an element of the offence, evidence that the defendant suffered from a mental disease or defect. However, that does not constitute diminished responsibility as a defence to the offence, it simply denies one of the elements of that offence.

[984] LRC 82, paras 2.17-2.24.

[985] ICC Statute, Article 31(1)(a).

defence, his diminished mental responsibility does not constitute either a partial or a complete defence, but it is relevant in mitigation of sentence.[986]

589. The Prosecution has submitted that both the Tribunal's full name[987] and the terms of its Statute[988] oblige it to deal with the persons "*responsible* for serious violations of international humanitarian law"[989] according to the degree of their responsibility, so that there would be a complete defence arising out of the defendant's mental state only where he could not be held legally responsible at all for his actions.[990] The defendant's mental state would otherwise be relevant in mitigation of sentence, in accordance with Article 24.2 of the Tribunal's Statute, as one of "the individual circumstances" of the convicted person.[991]

590. The Appeals Chamber recognises that the rationale for the partial defence provided for the offence of murder by the English *Homicide Act* 1957 is inapplicable to proceedings before the Tribunal. There are no mandatory sentences. Nor is there any appropriate lesser offence available under the Tribunal's Statute for which the sentence would be lower and which could be substituted for any of the offences it has to try.[992] The Appeals Chamber accepts that the relevant general principle of law upon which, in effect, both the common law and the civil law systems have acted is that the defendant's diminished mental responsibility is relevant to the sentence to be imposed and is not a defence leading to an acquittal in the true sense. This is the appropriate general legal principle representing the international law to be applied in the Tribunal. Rule 67(A)(ii)(b) must therefore be interpreted as referring to diminished mental responsibility where it is to be raised by the defendant as a matter in mitigation of sentence. As a defendant bears the onus of establishing matters in mitigation of sentence, where he relies

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[986] In France: *Penal Code* (1992), Article 122-1. In Germany: *Penal Code*, Sections 20-21. In Italy: *Penal Code* (1930), Articles 88-89. In the Russian Federation: *Criminal Code* (1996) (translated by W Butler, *Criminal Code of the Russian Federation*, Simmonds and Hill Publishing, London, 1997), Articles 21-22. In Turkey: *Penal Code* (International Encyclopaedia of Law, ed Prof Blancpain, Kluwer, vol 3), Articles 46-47. In Japan: *Penal Code* (1907), Article 39(2). In South Africa: *Criminal Procedure Act*, 1977, Section 78(7). Notwithstanding the submission of Landžo to the contrary (Landžo Brief, p 107), the position in the former Yugoslavia is the same: *Criminal Code* (1976) of the SFRY, Article 12. *See* also Articles 40 and 42 of the Croatian *Penal Code* (1997).

[987] 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.

[988] Articles 1 and 5 ("the power to prosecute persons responsible for" various violations), and 7.1 ("shall be individually responsible for the crime").

[989] The emphasis has been added.

[990] Prosecution Response, para 12.16.

[991] *Ibid*, para 12.21, relying upon *Prosecutor v Erdemović*, Case IT-96-22-T, Sentencing Judgement, 29 Nov 1996, ("First *Erdemović* Sentencing Judgement") p 20. Article 24.2 provides: "In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person".

[992] There is a discussion of these complexities in an article upon which both Landžo and the Prosecution relied in relation to different issues, "The Emerging Mental Incapacity Defense in International Criminal Law:

upon diminished mental responsibility in mitigation, he must establish that condition on the balance of probabilities – that more probably than not such a condition existed at the relevant time.

E. The Trial Chamber's Rejection of Diminished Mental Responsibility

591. The second ground of appeal filed by Landžo relating to diminished mental responsibility was in these terms:

> The Trial Chamber erred in law and made findings of fact inconsistent with the great weight of the evidence when it rejected clear evidence of diminished mental responsibility.[993]

This ground of appeal remains relevant, because Landžo also relied upon diminished mental responsibility in mitigation of sentence.

592. Five psychiatrists gave evidence in relation to Landžo's mental condition. Four of them concluded that he suffered from a personality disorder (albeit described in different terms) and, in essence, that there was a substantial impairment of his mental responsibility for his actions in the Čelebići prison camp.[994] Their view was that his capacity to exercise his own free will when given orders was diminished.[995] Only one psychiatrist (who was called by the Prosecution) rejected the existence of a relevant personality disorder.[996] It was accordingly submitted by Landžo that the Trial Chamber's rejection of the evidence of the four psychiatrists in favour of the one dissentient called by the Prosecution (who had spent less time with the accused than had the others) was an arbitrary and capricious exercise of its discretion and an unreasonable one.[997]

Some Initial Questions of Implementation", Peter Krug, 94 the American Journal of International Law (2000) 317, at 331-333.

[993] Landžo Brief, Ground of Appeal 8.

[994] Although the Trial Chamber purported (at para 1169) to follow the common law authorities relating to the partial defence of diminished mental responsibility, it nevertheless permitted the psychiatrists, contrary to authority, to express their own opinions as to whether there was a substantial diminution of Landžo's mental responsibility. The issue as to whether the impairment of the defendant's mental responsibility for his act was substantial has been held to involve questions of degree, and thus that it is essentially one for the tribunal of fact: *Regina v Byrne* [1960] 2 QB 396 at 403-404. As that is not merely a medical issue of whether there was an impairment but also whether that impairment can "properly" be called substantial, whether the diminution of a person's mental responsibility for an act is not a matter within the expertise of the medical profession; it involves a value judgement by the tribunal of fact representing the community, not a finding of medical fact or opinion: *Regina v Byrne* (at 404); *Walton v The Queen* [1978] AC 788 at 793; *Regina v Ryan* (1995) 90 A Crim R 191 at 196. However, no objection was taken to the psychiatrists expressing their opinions upon the issue.

[995] Their evidence is summarised in the Landžo Brief, pp 109-132.

[996] His evidence is partly summarised in the Landžo Brief, pp 132-138.

[997] Landžo Brief, pp 138-140.

593. This submission misconceives what the Trial Chamber concluded. It rejected the views of the four psychiatrists not because it preferred the views of the one psychiatrist called by the Prosecution, but because it did not accept the truth of the factual history given by Landžo upon which the four psychiatrists had based their opinions.[998] Specifically, it accepted the evidence that Landžo had admitted to one of the psychiatrists that he never had any difficulty inflicting pain and suffering on the prisoners and that he had enjoyed doing so.[999] The Trial Chamber rejected Landžo's evidence that he had committed the criminal acts with which he was charged on the direction of his co-accused Delić.[1000] The Trial Chamber was not persuaded that those criminal acts by Landžo were not the product of his own free will.[1001] Although the Trial Chamber accepted the evidence of the psychiatrists that Landžo suffered from a personality disorder, it considered that the evidence relating to his inability to control his physical acts on account of an abnormality of mind was not at all satisfactory, and it concluded that, despite his personality disorder, Landžo was quite capable of controlling his actions.[1002]

594. All of these findings were clearly open to the Trial Chamber upon the evidence before it. An expert opinion is relevant only if the facts upon which it is based are true. It was nevertheless argued by Landžo that, as the psychiatrists have given evidence that they were trained to detect malingering by a patient, they were able to identify by the psychological testing they performed whether or not the patient was telling the truth,[1003] and that the contrary findings of the Trial Chamber were therefore unreasonable. This argument is rejected. It is for the Trial Chamber, and not for the medical experts, to determine whether the factual basis for an expert opinion is truthful. That determination is made in the light of all the evidence given. Notwithstanding their expertise, medical experts do not have the advantage of that evidence.

595. It has not been demonstrated that the rejection of the "special defence" of diminished mental responsibility was a conclusion which no reasonable tribunal of fact could have been reached. Ground of Appeal 8 is therefore rejected. Although it rejected the "special defence", the Trial Chamber did take into account Landžo's "personality traits" revealed by the psychiatrists when imposing sentence.[1004]

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[998] Trial Judgement, paras 1181-1185.
[999] *Ibid,* para 1185. Trial Transcript, p 15230, lines 10-18.
[1000] Trial Judgement, para 1185. Landžo admitted in his evidence that he had mistreated prisoners on his own initiative just because he was angry, and without orders to do so (Trial Transcript, pp 15055-15057, 15349-15351).
[1001] Trial Judgement, para 1185.
[1002] *Ibid,* para 1186.
[1003] Appeal Transcript, pp 597-598, 603-604.
[1004] Trial Judgement, para 1283.

X. SELECTIVE PROSECUTION

596. Landžo alleges that he was the subject of a selective prosecution policy conducted by the Prosecution.[1005] He defines a selective prosecution as one "in which the criteria for selecting persons for prosecution are based, not on considerations of apparent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience."[1006] Specifically, he alleges that he, a young Muslim camp guard, was selected for prosecution, while indictments "against all other Defendants without military rank", who were all "non-Muslims of Serbian ethnicity", were withdrawn by the Prosecution on the ground of changed prosecutorial strategies.[1007]

597. The factual background to this contention is that the Prosecutor decided in 1998 to seek the withdrawal of the indictments against fourteen accused who at that stage had neither been arrested nor surrendered to the Tribunal. This application was granted by Judges of the Tribunal in early May 1998. At that stage, the trial in the present proceedings had been underway for a period of over twelve months. The Prosecutor's decision and the grant of leave to withdraw the indictment was announced in a Press Release, which explained the motivation for the decision in the following terms:

> Over recent months there has been a steady increase in the number of accused who have either been arrested or who have surrendered voluntarily to the jurisdiction of the Tribunal. [...].
>
> The arrest and surrender process has been unavoidably piecemeal and sporadic and it appears that this is likely to continue. One result of this situation is that accused, who have been jointly indicted, must be tried separately, thereby committing the Tribunal to a much larger than anticipated number of trials.
>
> In light of that situation, I have re-evaluated all outstanding indictments *vis-à-vis* the overall investigative and prosecutorial strategies of my Office. Consistent with those strategies, which involve maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the [*sic*] exceptionally brutal or otherwise extremely serious offences, I decided that it was appropriate to withdraw the charges against a number of accused in what have become known as the Omarska and Keraterm indictments, which were confirmed in February 1995 and July 1995 respectively.[1008]

[1005] This ground of appeal states: "The Prosecutor's practice of selective prosecution violated Article 21 of the Statute of the ICTY, the rules of natural justice and of international law." Landžo Brief, p 13.

[1006] Landžo Brief, p 13.

[1007] Landžo Brief, p 15. The Prosecutor stated this change of strategy in an ICTY press release dated 8 May 1998, CC/PIU/314-E ("Press Release"). The Press Release is quoted in part in the Landžo Brief, p 16. The full statement was admitted into evidence by the Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, pp 5-6. The Press Release refers to fourteen accused named in the "Omarska" and "Keraterm" indictments (*Prosecutor v Sikirica*, IT-95-4 and *Prosecutor v Meakić*, IT-95-8). Press Release, pp 1-2.

[1008] Press Release, p 1.

Although counsel for Landžo submitted that the Prosecution sought and obtained the withdrawal of indictments against *sixteen* accused, "some of whom were already in custody" of the Tribunal at the relevant time,[1009] this was not the case. Although three people[1010] were released from the custody of the Tribunal on 19 December 1997 pursuant to a decision granting the Prosecutor's request to withdraw their indictment,[1011] the withdrawal of those indictments was based on the quite different consideration of insufficiency of evidence. Landžo does not appear to have intended to refer to the withdrawal of any indictments other than those referred to in the Press Release, and the submissions proceeded upon that basis.

598. Landžo accordingly submitted, first at trial and now on appeal, that, because the indictment against him was not also withdrawn, he was singled out for prosecution for an impermissible motive and that this selective prosecution contravened his right to a fair trial as guaranteed by Article 21 of the Statute. Citing a decision of the United States of America's Supreme Court, *Yick Wo v Hopkins*,[1012] and Article 21(3) of the Rome Statute of the International Criminal Court, Landžo submits that the guarantee of a fair trial under Article 21(1) of the Statute incorporates the principle of equality and that prohibition of selective prosecution is a general principle of customary international criminal law.[1013]

599. The Trial Chamber, in its sentencing considerations, referred to Landžo's argument that, because he was an ordinary soldier rather than a person of authority, he should not be subject to the Tribunal's jurisdiction, and then stated:

> [The Trial Chamber] does, however, note that the statement issued in May this year (1998) by the Tribunal Prosecutor concerning the withdrawal of charges against several indicted persons, quoted by the Defence, indicates that an exception to the new policy of maintaining the investigation and indictment only of persons in positions of some military or political authority, is made for those responsible for exceptionally brutal or otherwise extremely serious offences. From the facts established and the findings of guilt made in the present case, the conduct of Esad Landžo would appear to fall within this exception.[1014]

600. The Prosecution argues that the Prosecutor has a broad discretion in deciding which cases should be investigated and which persons should be indicted.[1015] In exercising this discretion, the Prosecutor may have regard to a wide range of criteria. It is impossible, it is said, to prosecute all persons placed in the same position and, because of this, the jurisdiction of the

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[1009] Appeal Transcript, p 551.
[1010] Marinko Katava (*see* indictment in *Prosecutor v Kupreškić et al*, Case IT-95-16); Ivan Santić and Pero Skopljak (*see* Indictment in *Prosecutor v Kordić et al*, Case IT-95-14/2).
[1011] *Prosecutor v Kupreškić et al, Prosecutor v Kordić et al*, Decision to Withdraw Indictment, 19 Dec 1997.
[1012] 118 U.S. 356, 6 S.Ct.1064 (1886).
[1013] Landžo Brief, pp 13-14.
[1014] Trial Judgement, para 1280, footnote referring to Press Release omitted.
[1015] Prosecution Response, p 111.

International Tribunal is made concurrent with the jurisdiction of national courts by Article 9 of the Statute.[1016]

601. Article 16 of the Statute entrusts the responsibility for the conduct of investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 to the Prosecutor. Once a decision has been made to prosecute, subject to the requirement that the Prosecutor be satisfied that a prima facie case exists, Article 18 and 19 of the Statute require that an indictment be prepared and transmitted to a Judge of a Trial Chamber for review and confirmation if satisfied that a prima facie case has been established by the Prosecutor. Once an indictment is confirmed, the Prosecutor can withdraw it prior to the initial appearance of the accused only with the leave of the Judge who confirmed it, and after the initial appearance only with the leave of the Trial Chamber.[1017]

602. In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments. This is acknowledged in Article 18(1) of the Statute, which provides:

> The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and *decide whether there is sufficient basis to proceed.*

It is also clear that a discretion of this nature is not unlimited. A number of limitations on the discretion entrusted to the Prosecutor are evident in the Tribunal's Statute and Rules of Procedure and Evidence.

603. The Prosecutor is required by Article 16(2) of the Statute to "act independently as a separate organ of the International Tribunal", and is prevented from seeking or receiving instructions from any government or any other source. Prosecutorial discretion must therefore be exercised entirely independently, within the limitations imposed by the Tribunal's Statute

[1016] Article 9(1) of the Statute reads: "The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991."
[1017] Rule 51(A).

and Rules. Rule 37(A) provides that the Prosecutor "shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by the Prosecutor."

604. The discretion of the Prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law. In this regard, the Secretary-General's Report stressed that the Tribunal, which encompasses all of its organs, including the Office of the Prosecutor, must abide by the recognised principles of human rights.[1018]

605. One such principle is explicitly referred to in Article 21(1) of the Statute, which provides:

> All persons shall be equal before the International Tribunal.

This provision reflects the corresponding guarantee of equality before the law found in many international instruments, including the 1948 Universal Declaration of Human Rights,[1019] the 1966 International Covenant on Civil and Political Rights,[1020] the Additional Protocol I to the Geneva Conventions,[1021] and the Rome Statute of the International Criminal Court.[1022] All these instruments provide for a right to equality before the law, which is central to the principle of the due process of law. The provisions reflect a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law. Thus Article 21 and the principle it embodies prohibits discrimination in the application of the law based on impermissible motives

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[1018] Secretary-General's Report, para 106.

[1019] Article 7 provides: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination."

[1020] Article 14 provides: "[a]ll persons shall be equal before the courts and tribunals [...]." Article 26 provides explicitly that "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[1021] Article 75 (fundamental guarantees) provides in para 1: "Insofar as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria."

[1022] Article 21(3) provides "[t]he application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status."

such as, *inter alia*, race, colour, religion, opinion, national or ethnic origin. The Prosecutor, in exercising her discretion under the Statute in the investigation and indictment of accused before the Tribunal, is subject to the principle of equality before the law and to this requirement of non-discrimination.

606. This reflects principles which apply to prosecutorial discretion in certain national systems. In the United Kingdom, the limits on prosecutorial discretion arise from the more general principle, applying to the exercise of administrative discretion generally, that the discretion is to be exercised in good faith for the purpose for which it was conferred and not for some ulterior, extraneous or improper purpose.[1023] In the United States, where the guarantee of equal protection under the law is a constitutional one, the court may intervene where the accused demonstrates that the administration of a criminal law is "directed so exclusively against a particular class of persons [...] with a mind so unequal and oppressive" that the prosecutorial system amounts to "a practical denial" of the equal protection of the law.[1024]

607. The burden of the proof rests on Landžo, as an appellant alleging that the Prosecutor has improperly exercised prosecutorial discretion, to demonstrate that the discretion was improperly exercised in relation to him. Landžo must therefore demonstrate that the decision to prosecute him or to continue his prosecution was based on impermissible motives, such as race or religion, and that the Prosecution failed to prosecute similarly situated defendants.

608. The Prosecution submits that, in order to demonstrate a selective prosecution, Landžo must show that he had been singled out for an impermissible motive, so that the mere existence of similar unprosecuted acts is not enough to meet the required threshold.[1025]

609. Landžo submits that a test drawn from United States case-law, and in particular the case *United States of America v Armstrong*,[1026] provides the required threshold for selective prosecution claims. Pursuant to this test, the complainant must prove first that he was singled out for prosecution for an improper motive, and secondly, that the Prosecutor elected not to prosecute other similarly situated defendants. There is therefore no significant difference between the applicable standards identified by Landžo and by the Prosecution.

[1023] *R v Inland Revenue Commissioners, ex parte Mead and Cook*, [1993] 1 All ER 772. It has also been accepted in Australia that there may be a principle pursuant to which proof of a selective prosecution may give rise to some relief, including, for example, the exclusion of evidence: *Hutton v Kneipp* [1995] QCA 203.
[1024] *Yick Wo v Hopkins* 118 US 356, 373 (1886); *United States v Armstrong* 517 US 456, 464-465 (1996).
[1025] Prosecution Response, p 111.
[1026] *United States v Armstrong* 517 US 456, 463-465 (1996) . *See* also *United States of America v Irish People, Inc.*, 684 F 2d 928, 932-3, 946 (DC Circuit 1983).

610. As observed by the Prosecution, the test relied on by Landžo in *United States of America v Armstrong,* puts a heavy burden on an appellant.[1027] To satisfy this test, Landžo must demonstrate clear evidence of the intent of the Prosecutor to discriminate on improper motives, and that other similarly situated persons were not prosecuted. Other jurisdictions which recognise an ability for judicial review of a prosecutorial discretion also indicate that the threshhold is a very high one.[1028]

611. It is unnecessary to select between such domestic standards, as it is not appropriate for the Appeals Chamber simply to rely on the jurisprudence of any one jurisdiction in determining the applicable legal principles. The provisions of the Statute referred to above and the relevant principles of international law provide adequate guidance in the present case. The breadth of the discretion of the Prosecutor, and the fact of her statutory independence, imply a presumption that the prosecutorial functions under the Statute are exercised regularly. This presumption may be rebutted by an appellant who can bring evidence to establish that the discretion has in fact not been exercised in accordance with the Statute; here, for example, in contravention of the principle of equality before the law in Article 21. This would require evidence from which a clear inference can be drawn that the Prosecutor was motivated in that case by a factor inconsistent with that principle. Because the principle is one of *equality* of persons before the law, it involves a comparison with the legal treatment of other persons who must be similarly situated for such a comparison to be a meaningful one. This essentially reflects the two-pronged test advocated by Landžo and by the Prosecution of (i) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (ii) establishing that other similarly situated persons were not prosecuted.

612. Landžo argues that he was the only Bosnian Muslim accused without military rank or command responsibility held by the Tribunal, and he contends that he was singled out for prosecution "simply because he was the only person the Prosecutor's office could find to 'represent' the Bosnian Muslims". He was, it is said, prosecuted to give an appearance of "evenhandedness" to the Prosecutor's policy.[1029] Landžo alleges that the Prosecutor's decision to seek the withdrawal of indictments against the accused identified in the Press Release, without seeking the discontinuation of the proceedings against Landžo, was evidence of a discriminatory purpose. Landžo rejects the justification given by the Prosecutor in the Press Release of a revaluation of indictments according to changed strategies "in light of the decision

[1027] Prosecution Response, p 113.
[1028] *Chief Constable of Kent and Crown Prosecution Service, ex parte GL,* (1991) Crim App R 416; *R v Inland Revenue Commissioners, ex parte Mead and Cook,* [1993] 1 All ER 772; *R v Power* [1994] 1 SCR 601.

to except the one Muslim defendant without military rank or command responsibility from the otherwise complete dismissal of charges against Defendants having that status."[1030]

613. The Prosecution argues that a change of prosecutorial tactics, in view of the need to reassign available resources of the Prosecution, cannot be considered as being significative of discriminatory intent. Furthermore, the evidence of discriminatory intent must be coupled with the evidence that the Prosecutor's policy had a discriminatory effect, so that other *similarly situated* individuals of other ethnic or religious backgrounds were not prosecuted. The Prosecution observes that those against whom charges were withdrawn had not yet been arrested or surrendered to the Tribunal, whereas Landžo was in custody and his case already mid-trial.[1031] The Prosecution adds that even if it was to be considered that the continuation of Landžo's trial resulted in him being singled out, it was in any event for the commission of exceptionally brutal or otherwise serious offences.[1032]

614. The crimes of which Landžo was convicted are described both in the Trial Judgement and in the present judgement at paragraphs 565-570. The Appeals Chamber considers that, in light of the unquestionably violent and extreme nature of these crimes, it is quite clear that the decision to continue the trial against Landžo was consistent with the stated policy of the Prosecutor to "focus on persons holding higher levels of responsibility, or on those who have been *personally responsible for the exceptionally brutal or otherwise extremely serious offences.*"[1033] A decision, made in the context of a need to concentrate prosecutorial resources, to identify a person for prosecution on the basis that they are believed to have committed *exceptionally* brutal offences can in no way be described as a discriminatory or otherwise impermissible motive.

615. Given the failure of Landžo to adduce any evidence to establish that the Prosecution had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute him, it is not strictly necessary to have reference to the additional question of whether there were other similarly situated persons who were not prosecuted or against whom prosecutions were discontinued. However, the facts in relation to this question support the conclusion already drawn that Landžo was not the subject of a discriminatory selective prosecution.

[1029] Landžo Brief, p 17.
[1030] Landžo Brief, p 16.
[1031] Prosecution Response, p 113.

616. All of the fourteen accused against whom charges were withdrawn pursuant to the Prosecutor's change of policy, unlike Landžo, had not been arrested and were not in the custody of the Tribunal. None of the fourteen persons identified in the Press Release as the subject of the withdrawn indictments had been arrested or surrendered to the Tribunal so were not in the Tribunal's custody.

617. At the time at which the decision was taken to withdraw the indictments on the basis of changed prosecutorial strategy, the trial of Landžo and his co-accused had been underway for over twelve months. None of the persons in respect of whom the indictments were withdrawn were facing trial at the time. These practical considerations alone, which demonstrate an important difference in the situation of Landžo and the persons against whom indictments were withdrawn, also provide the rational justification for the Prosecutor's decisions at the time. The Appeals Chamber notes that the Prosecutor explicitly stated that accused against whom charges were withdrawn could still be tried at a later stage by the Tribunal or by national courts by virtue of the principle of concurrent jurisdiction.[1034] Had Landžo been released with the leave of the Trial Chamber, he would have been subject to trial upon the same or similar charges in Bosnia and Herzegovina.

618. Finally, even if in the hypothetical case that those against whom the indictments were withdrawn were identically situated to Landžo, the Appeals Chamber cannot accept that the appropriate remedy would be to reverse the convictions of Landžo for the serious offences with which he had been found guilty. Such a remedy would be an entirely disproportionate response to such a procedural breach. As noted by the Trial Chamber, it cannot be accepted that "unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial".[1035]

619. This ground of appeal is therefore dismissed.

[1032] Prosecution Response, p 114.
[1033] Press Release, p 1 (emphasis added).
[1034] Press Release.
[1035] Trial Judgement, para 180.

XI. JUDGE KARIBI-WHYTE

620. Landžo filed a ground of appeal based on an allegation that the Presiding Judge at trial, Judge Karibi-Whyte, "was asleep during substantial portions of the trial".[1036] This ground of appeal was subsequently adopted by Mucić and Delić,[1037] but it was agreed that counsel for Landžo carried the burden of argument on this ground.[1038] The grounds of appeal are stated as follows:

> Landžo Ground 4
>
> The Participation, As Presiding Judge Of The Trial Chamber, Of A Judge Who Was Asleep During Substantial Portions Of The Trial, Denied Appellants The Right To the Full And Competent Judicial Decision Of Questions of Law, Fact, And Evidence, and Improperly Denied Appellants A Fair Trial, And The Appearance Of A Fair Trial.[1039]
>
> Mucić Ground 3, Delić Issue 20
>
> Whether Mucić and Delić were deprived of a fair trial due to the fact that the Presiding Judge at the Trial Chamber slept during substantial portions of the trial.[1040]

621. Landžo tendered a variety of material in relation to the issue of whether Judge Karibi-Whyte was asleep during the trial, including the audio-visual recordings taken by courtroom cameras during the proceedings, newspaper reports, and affidavits of persons who observed part of the proceedings.

622. The audio-visual records already formed part of the trial record, and thus were not admitted into evidence as such.[1041] However, the Appeals Chamber granted leave for tapes to be made, containing copies of those portions of the audio-visual recordings produced by the courtroom cameras generally focussed on the judges' bench nominated by Landžo and by the Prosecution ("Extracts Tapes"), for use by the Appeals Chamber as a convenient method of viewing the material relevant to this ground of appeal.[1042] The Appeals Chamber declined to admit the other material tendered by Landžo on the grounds that it was not admissible, or that it

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[1036] Landžo Brief, Ground of Appeal 4, pp 1-2.
[1037] Notice to the Chamber Related to Landžo's Issue on the Presiding Judge Sleeping During Trial, 17 Feb 2000. Leave was granted to add this ground of appeal by the order on Appellants Hazim Delić and Zdravko Mucić's 'Notice' Related to Appellant Esad Landžo's Fourth Ground of Appeal, 30 Mar 2000.
[1038] Transcript of Pre-Appeal Conference, 12 May 2000, pp 29, 43.
[1039] Landžo Supplementary Brief, p 1.
[1040] Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, 31 May 2000; Appellant-Cross-Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, p 4.
[1041] Order, 12 Feb 1999, p 3.
[1042] Order on the Second Motion to Preserve and Provide Evidence, 15 June 1999; Order on Esad Landžo's Motion (1) to Vary in Part Order on Motion to Preserve and Provide Evidence, (2) to be Permitted to Prepare and Present Further Evidence, and (3) that the Appeals Chamber Take Judicial Notice of Certain Facts, and on his Second Motion for Expedited Consideration of the Above Motion, 4 Oct 1999, pp 3-5.

was not relevant, or that it had no probative value in relation to the issues raised by the ground of appeal, or that it was repetitive as it would not advance Landžo's case beyond what was already shown in the Extracts Tapes.[1043]

623. Landžo also made an extremely late application for the Extracts Tapes to be viewed by an expert to see whether he could give an opinion as to –

> [...] Judge Karibi-Whyte's ability or inability to perform his duties as Presiding Judge in the manner necessary to afford Appellants and the other accused a fair trial.[1044]

The application was opposed by the Prosecution upon the bases that it was untimely, that a grant of the relief sought would cause delay, that the proposed expert witness testimony would be of uncertain value and that the Prosecution would not have the opportunity to call its own expert witness without delaying the hearing of the appeal.[1045] The application was refused by the Appeals Chamber upon the grounds that, even assuming Landžo's expert could give his opinion without delay, the absence of any reasonable opportunity for the Prosecution to respond with its own expert's evidence without further delaying the hearing of the appeal would be prejudicial to the Prosecution in the exercise of its prosecutorial role which it performs on behalf of the international community. The Appeals Chamber noted also that any further delay in the hearing would be contrary to the interests of justice, that Landžo, who could in the exercise of due diligence have sought relief at an earlier time, could not at that late stage complain of unfairness, and that, as the medical expert would not have access to any medical records relating to Judge Karibi-Whyte or the opportunity to medically examine him, the weight to be afforded to his evidence would not be such as to justify the prejudice to the Prosecution and the other appellants which would be caused by delaying the hearing of the appeal.[1046]

A. The Allegations as to the Presiding Judge's Conduct

624. Based upon what was said to be demonstrated by the Extracts Tapes, a number of allegations as to the conduct of Judge Karibi-Whyte during the trial were made in the

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[1043] Order on Motion of the Appellant, Esad Landžo, for Permission to Obtain and Adduce Further Evidence on Appeal, 7 Dec 1999, p 5; Order in Relation to Witnesses on Appeal, 19 May 2000, pp 2-3; Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000, pp 2-4 and 8-9.

[1044] Motion for Permission to Allow Expert Witness to View Extracts Tapes and to Admit Expert Opinion as to Sleep Disorders (Landžo's Fourth Ground of Appeal), 27 Apr 2000, paras 3-4.

[1045] Prosecution Response to Esad Landžo's Motion for Permission to Allow Expert Witness to View Extracts Tapes and to Admit Expert Opinion as to Sleep Disorders, and Prosecution Motion for Clarification, 3 May 2000.

[1046] Order on Motion for Permission to Allow Expert Witness to View Extracts Tapes and to Admit Expert Opinion as to Sleep Disorders, 9 May 2000, pp 4-6.

Supplementary Brief filed on behalf of Landžo in relation to this ground of appeal. These allegations included the following:

> These portions [of the Extracts Tapes] clearly and unambiguously paint a disturbing picture of a Judge prone to fall asleep during all phases of the trial, at almost any time when he was not speaking, examining a document, or otherwise being actively engaged.[1047]
>
> This is a question of a Judge sleeping deeply, as if in his own bed, at all hours of the day, and regardless of the nature of the events unfolding around him.[1048]
>
> [...] the particulars [i.e. the portions of the audio-visual record in the Extracts Tapes] paint such a clear and unambiguous pattern of continuous sleep, it is not only a reasonable inference, but an almost irresistible one, that the Judge's sleeping in the courtroom continued while the relevant cameras were not trained on him [...].[1049]
>
> [...] the clear evidence provided by the relevant cameras of Judge Karibi-Whyte being deeply asleep [...].[1050]
>
> It was frequently necessary for members of the Registrar's office, and another member of the Trial Chamber, Judge Jan, to awaken the Presiding Judge.[1051]

B. Applicable Legal Principles

625. No precedent in the international context was cited in relation to the specific issue raised by this ground of appeal, and none has been discovered by the Appeals Chamber's own research. Guidance as to the legal principles relevant to an allegation that a trial judge was not always fully conscious of the trial proceedings may therefore be sought from the jurisprudence and experience of national legal systems. The national jurisprudence considered by the Appeals Chamber discloses that proof that a judge slept through, or was otherwise not completely attentive to, part of proceedings is a matter which, if it causes actual prejudice to a party, may affect the fairness of the proceedings to a such degree as to give rise to a right to a new trial or other adequate remedy.[1052] The parties essentially agreed that these are the principles which apply to the issue before the Appeals Chamber.[1053]

626. The jurisprudence of national jurisdictions indicates that it must be proved by clear evidence that the judge was actually asleep or otherwise not fully conscious of the proceedings, rather than that he or she merely gave the appearance of being asleep.[1054] Landžo accepted that

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[1047] Landžo Supplementary Brief, p 3.
[1048] *Ibid*, p 4.
[1049] *Ibid*, p 4
[1050] *Ibid*, p 5.
[1051] *Ibid*, p 2.
[1052] Cases relating to jurors alleged to have been asleep during a trial are included in the present consideration.
[1053] Landžo Supplementary Brief, pp 7-8; Prosecution Response to Landžo Supplementary Brief, para 3.3.
[1054] *R v Caley* [1997] WCBJ 1714 (British Columbia Supreme Court), at para 25 (to grant relief on the basis of the inattention of the judge there must be "clear and overwhelming evidence"); *Sanborn v Commonwealth*

it was necessary to prove by evidence the allegation upon which this ground of appeal is based.[1055]

C. Was the Allegation Proved?

627. The Extracts Tapes were viewed by the Appeals Chamber prior to the hearing of the appeal. Even accepting that the cameras nominated by Landžo were not *always* focussed on the judges' bench, and thus that there is not a complete record of Judge Karibi-Whyte's conduct throughout the trial, the Appeals Chamber is satisfied that the descriptions quoted above are both highly coloured and gravely exaggerated. The descriptions given in the particulars in Exhibit B to Landžo's Supplementary Brief, which identify what is to be seen in each portion of the Extracts Tapes upon which reliance is placed, are similarly coloured and exaggerated, and they appear to have been given with a reckless indifference as to the truth.

628. The appellants have manifestly failed to establish the allegation in the ground of appeal, that Judge Karibi-Whyte "was asleep during substantial portions of the trial". The Extracts Tapes do, however, demonstrate a recurring pattern of behaviour where Judge Karibi-Whyte appears not to have been fully conscious of the proceedings for short periods at a time. Such periods were usually of five to ten seconds only, but this pattern is repeated over extended periods of ten to fifteen minutes on a number of occasions. On very few occasions, this loss of attention lasted up to thirty seconds. On one occasion only, during the course of an excessively lengthy examination of a medical witness by counsel for Landžo, the judge appeared to be asleep for approximately thirty minutes. On a different occasion, Judge Jan leant over to touch Judge Karibi-Whyte when his head had dropped. Judge Karibi-Whyte can also be heard to be breathing very noisily at times, but such times include occasions where he is obviously very fully conscious of the proceedings.

629. Such behaviour revealed by the Extracts Tapes warrants an examination as to whether, notwithstanding their failure to establish the factual basis of these grounds of appeal, the appellants nevertheless have a valid cause for complaint as to the fairness of the trial. It must be

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975 SW 2d 905 (1998), at 911 (Supreme Court of Kentucky); *Commonwealth v Keaton*, 36 Mass App Ct 81 (1994), at 87; *Bundesgerichtshof*, Vol 11, p 74, Judgement of 22 November 1957 (German Federal Supreme Court of Justice); *Bundesverwaltungsgericht*, Judgement of Supreme Administrative Court, 24 Jan 1986 at para 12; [1986] Neue Juristiche Wochenschrift 2721, at 2721; *Illinois v McCraven* 97 Ill App 3d 1075 (1981) (Appellate Court of Illinois), at 1076; *People v Thurmond* 175 Cal App 3d 865 (1985) (Court of Appeal, 2d District), at 874; *Commonwealth Bank of Australia v Falzon* [1998] VSCA 79, para 10 (Supreme Court of Victoria, Court of Appeal).

[1055] Landžo Supplementary Brief, p 7.

said, firmly, that Judge Karibi-Whyte's conduct cannot be accepted as appropriate conduct for a judge. Even if, as may well be the position, he had no control over his loss of attention, litigants are in general entitled to the full attention of the judges who have to decide their case. The charges being tried in this case were extremely serious, and the consequences of conviction for the accused were equally serious. If a judge suffers from some condition which prevents him or her from giving full attention during the trial, then it is the duty of that judge to seek medical assistance and, if that does not help, to withdraw from the case.

D. Absence of Identifiable Prejudice

630. Such conclusions do not, however, automatically lead to the quashing of the judgement which was given in this case. As stated earlier, the national jurisprudence indicates that, before a remedy will be granted on the basis that a judge has been asleep or otherwise inattentive, it must be proved that some identifiable prejudice was caused thereby to the complaining party.[1056] In some continental systems where the sleeping or inattention of a judge may form the basis for a ground of appeal or revision of a judgement – for example, because the court was thereby not properly constituted[1057] – no separate reference is made to the necessity to demonstrate prejudice before such a ground would succeed. However, in order to establish a violation in those cases, a party must prove that the judge in question was unable to perceive "essential" or "crucial" events in the hearing.[1058] If such a standard of judicial inattention has been proved, some actual prejudice must necessarily have been incurred, or at least the proceedings must necessarily have been defective in a material way. The complaining party must prove the relevant prejudice by clear evidence.[1059] Indeed, it has been held that to grant a new trial on the basis of the inattention of a juror without clear proof of any prejudice caused thereby constitutes "a clear abuse of discretion".[1060]

[1056] *R v Moringiello* [1997] Crim LR 902; *R v Edworthy* [1961] Crim LR 325; *R v Tancred* 14 April 1997, Court of Appeal (Criminal Division); *Kozlowski v City of Chicago* 13 Ill App 513 (the fact that a juror fell asleep during proceedings, absent an affirmative showing of prejudice to the complainant, is not a ground for a new trial); *State of Ohio v Dean*, Ohio App Lexis 3873, Judgement of 20 Sept 1988 (Court of Appeals of Ohio) (must be a showing of "material prejudice").

[1057] *See*, in Germany, the *Strafprozeßordnung*, which provides by Article 338 (1) that an absolute ground for revision of a judgement is that the trial court was not constituted as provided. Article 338 (1) may be violated where a judge or lay assessor is asleep or otherwise "absent".

[1058] *Bundesverwaltungsgericht* (Supreme Administrative Court) Judgement of 24 January 1986, [1986] *Neue Juristiche Wochenschrift* 2721, at 2721; *Bundesgerichtshof* (Federal Supreme Court of Justice) Vol 2, p 14, Judgement of 23 November 1951.

[1059] *State of Ohio v Dean*, Ohio App Lexis 3873, Judgement of 20 Sept 1988 (Court of Appeals of Ohio); *United States of America v White and Keno* 589 F 2^{d} 1283 (1979) (Court of Appeals, 5th Circuit), at 1289.

[1060] *Ferman v Estwing Manufacturing Company*, 31 Ill App 3^{d} 229, at 233.

631. The prejudice which must be proved may be manifested where the judge fails in some identifiable way to assess the evidence properly or expresses an incorrect understanding of the evidence which was given or the submissions which were put.[1061] Elsewhere, it has been held that what must be proved is that the judge is completely inattentive to such a substantial or significant part of the proceedings that there has been a "significant defect" in the proceedings.[1062] The failure of counsel to object or to call attention to a judge's sleeping or inattention during the proceedings is relevant to the question as to whether prejudice has been established. Failure of counsel to object will usually indicate that counsel formed the view at the time that the matters to which the judge was inattentive were not of such significance to his case that the proceedings could not continue without attention being called thereto.[1063]

632. The necessity that an appellant establish that some prejudice has actually been caused by a judge's inattention before a remedy will be granted is simply a matter of common sense. It is clear that there are a number of legitimate reasons why a judge's attention may briefly be drawn away from the court proceedings before him or her, including taking a note of the evidence or of a particular submission or looking up the transcript to check evidence previously given. It has been recognised in national jurisprudence that instances of inattention of that nature do not cause prejudice or undermine the fairness of the trial, but are an integral part of a judge's task in assessing the case before him or her.[1064]

633. Moreover, where a judge of this Tribunal misses any evidence, there is not only a transcript to be read but also a video-tape to be viewed if the demeanour of the witness needs to be checked, and there are the observations of the other two judges to assist. Indeed, for these reasons it has been recognised in the Rules of Procedure and Evidence of the Tribunal that the short absence of a judge from trial proceedings need not necessarily prevent the continuation of the proceedings in the presence of the remaining two judges. Rule 15*bis*(A) states:

> If (i) a Judge is, for illness or other urgent personal reasons, or for reasons of authorised Tribunal business unable to continue sitting in a part-heard case for a period which is likely to be of short duration, and (ii) the remaining Judges of the Trial Chamber are satisfied that it is in the interests of justice to do so, those remaining Judges of the Chamber may order that the hearing of the case continue in the absence of that Judge for a period of not more than three days.

[1061] *See, e.g., Espinoza v The State of Texas,* Tex App Lexis 5343, Judgement of 21 July 1999.
[1062] *Stathooles v Mount Isa Mines Ltd* [1997] 2 Qd R 106 (Queensland Court of Appeal), at 113.
[1063] *The Chicago City Railway Company v John Anderson* 193 Ill 9 (1901), at 13.
[1064] *Bundesgerichtshof* (Federal Supreme Court of Justice) Vol 11 p 74, 22 November 1957, at 77: "There are numerous matters of behaviour and other circumstances by which a judge may give the impression to participants, especially to a defendant who is a layman in law, that he did not pay attention to a part of the events of the proceedings. Such an impression can even be made by actions to which the judge is legally obliged [*sic*]".

Although this rule was not in force at the time of the *Čelebići* trial proceedings,[1065] the fact of its adoption is a clear demonstration that the judges of the Tribunal meeting in plenary considered it to be consistent with the principles of a fair trial and with the Statute of the Tribunal to permit proceedings to be conducted in the temporary absence of one judge.

634. Again, the necessity of establishing some prejudice in order to be entitled to any remedy in relation to this ground of appeal is accepted by Landžo.[1066] However, no specific prejudice has been established by him. The only matter to which reference needs to be made is the fact that Judge Karibi-Whyte slept through thirty minutes of the evidence in chief of one of Landžo's medical witnesses – a psychiatrist who gave evidence upon the issue of diminished mental responsibility. If the Trial Chamber's rejection of the psychiatric evidence given on behalf of Landžo had depended upon a preference for the views of the psychiatrist called by the Prosecution over the views of the four psychiatrists called by Landžo, this fact could possibly have demonstrated a substantial prejudice to his case. However, as stated earlier, this was not the basis upon which the Trial Chamber rejected their views. The Trial Chamber rejected their views because it did not accept the truth of the factual history given by Landžo upon which the four psychiatrists had based their opinions.[1067]

635. Landžo nevertheless relied by way of analogy upon certain domestic cases which, he contended, established that prejudice is *inherent* in a party's counsel sleeping during trial.[1068] However, it is apparent from a reading of these cases that the view that a counsel's sleeping during trial is *inherently* prejudicial has been taken by only one appeals court, other courts having found it necessary to look at the record and the evidence to establish whether the client's interests were in fact "at stake" at the relevant times and therefore prejudiced by the counsel's inattention.[1069] Further, the fact of a *counsel* sleeping or being seriously inattentive to his or her client's case – and thereby providing ineffective assistance – during a trial differs from the issue of judicial inattention, in that defence counsel, who alone truly knows the interests of his or her client, is necessarily obliged to safeguard those interests at every moment during the trial, in order to avoid prejudice which cannot be remedied.

[1065] It was adopted at the Twenty-first Plenary Session, 15-17 Nov 1999, (Revision 17 of the Rules) and entered into force on 7 Dec 1999. The words "or for reasons of authorised Tribunal business" were inserted by Revision 19 of the Rules, with effect from 19 Jan 2001.
[1066] Landžo Supplementary Brief, p 7.
[1067] Trial Judgement, paras 1181-1185. *See* para 593 above.
[1068] *Javor v United States of America*, 724 F 2d 831 (1981) (Court of Appeals, 9th Circuit); *Tippins v Walker* 77 F 3d 682 (1996) (Court of Appeals, 2d Circuit).
[1069] *Tippins v Walker*, cited above, at 685 and 689.

636. Landžo argued that he has proved "necessary and irreversible prejudice" because, as it was Judge Karibi-Whyte's duty to play a full part in the decision of all questions of fact, law and evidence, he had been "deprived of the right to have Judge Karibi-Whyte bring his independent judgment to bear on the conferences in which all three Judges participated [...]".[1070] Landžo and the other appellants were, however, unable to point to any evidence which supports this allegation or which indicates that Judge Karibi-Whyte did not in fact participate in all relevant deliberations during and after the trial. It was in fact acknowledged during oral submissions that the appellants did not know and could not now establish what participation Judge Karibi-Whyte would have had in deliberations with the other judges in relation to the proceedings.[1071] From the conclusions drawn by the Appeals Chamber on the basis of its review of the Extracts Tapes, it rejects the submission that the content of the tapes gives rise to "an almost irresistible inference that the Judge missed much of the evidence and argument".[1072]

637. Reliance was also placed by Landžo on the principle that there must be the appearance of a fair trial,[1073] with the implication that even proof of an *appearance* that a judge was sleeping during proceedings is an adequate foundation for relief without proof of prejudice. An English case, *R v Weston-Super-Mare Justices, ex parte Taylor*, was cited in support of this contention.[1074] There, the Queen's Bench Divisional Court set aside a defendant's conviction on the basis that the chairperson of a bench of magistrates had appeared to be asleep for part of the trial. The defendant's solicitor, believing that the chairperson had been asleep, suggested to her through the clerk of the court that she retire and leave the remaining two magistrates to determine the case. The Divisional Court, having referred to evidence before it as to the magistrate's conduct, found that she had not in fact been asleep. However, it held that the magistrate should have withdrawn in response to the request because it was clear that the defendant's solicitor had formed a genuine view that she had been asleep, and that "the administration of justice required not only that justice was in fact done, but also that justice was seen to be done".[1075]

638. The conclusion in that case turned on the views formed, albeit genuinely, by a single observer, even though they were contradicted by the evidence of other observers which was

[1070] Landžo Supplementary Brief, p 15.
[1071] Appeal Transcript, p 691.
[1072] Landžo Supplementary Brief, p 14.
[1073] Appeal Transcript, p 692.
[1074] [1981] Crim LR 179, cited in Landžo Supplementary Brief, pp 9-10.
[1075] [1981] Crim LR 179.

ultimately preferred by the review court in its finding.[1076] The Appeals Chamber does not accept that this was the correct approach. In relation generally to the right to a fair trial under Article 6 of the European Convention on Human Rights, the European Court of Human Rights has held that, despite

> [...] the importance of appearances in the administration of justice, [...] the standpoint of the persons concerned is not in itself decisive. The misgivings of the individuals before the courts, for instance with regard to the fairness of the proceedings, must in addition be capable of being held to be objectively justified [...].[1077]

639. Further, the proposition on which *ex parte Taylor* turned – that the perceived *appearance* of sleep means that justice is not being seen to be done, and therefore affects the fairness of the trial – is inconsistent both with other English jurisprudence on the issue of judicial inattention and with the other domestic jurisprudence referred to in paragraphs 625 and 626 above.[1078]

E. Obligation to Raise the Issue at Trial

640. It was submitted by the Prosecution that the principle of "waiver" prevents the appellants from raising the subject matter of this ground of appeal. It contends that the appellants, not having raised the allegations that the Presiding Judge was sleeping during the trial, are now precluded from advancing them for the first time on appeal.[1079] The Appeals Chamber accepts that, as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party. This principle, established in many national jurisdictions, has been recognised in previous decisions of the Appeals Chamber.[1080]

[1076] In other cases in which counsel for a party gave evidence that they had formed the opinion that the trial judge was sleeping, this was dealt with by the review court as being one part of the relevant evidence on the issue, rather than as proof that, because one observer had formed the opinion that the judge was sleeping, justice was not being seen to be done. *See, e.g., R v Langham and Langham* [1972] Crim LR 457 (Court of Appeal, Criminal Division); *Stathooles v Mount Isa Mines Ltd* [1997] 2 Qd R 106, at 110 (Queensland Court of Appeal).

[1077] *Kraska v Switzerland*, Case No 90/1991/342/415, Judgement of 19 April 1993, para 32.

[1078] *See, e.g., R v Langham and Langham* [1972] Crim LR 457 (Court of Appeal, Criminal Division): "The complaint that the judge appeared to be asleep which if true was a matter which the court would certainly deplore but was not a sufficient ground for saying that justice was not seen to be done". *See* also *R v George*, 12 June 1984, Court of Appeal (Criminal Division), where it is said that the appearance of sleep "[...] proves no basis for an appeal unless it can be shown that the learned judge may have been asleep or at any rate that his conduct during the trial had a bearing on the outcome of the trial".

[1079] Prosecution Response to Landžo Supplementary Brief, para 1.5.

[1080] *Furundžija* Appeal Judgement, para 174: "[The Appellant] could have raised the matter, if he considered it relevant, before the Trial Chamber, either pre-trial or during trial. On that basis, the Appeals Chamber could find that the Appellant has waived his right to raise the matter now and could dismiss his ground of appeal".

641. In cases where it is alleged that a trial judge was sleeping or otherwise inattentive during proceedings, the jurisprudence in national systems demonstrates that there is another significant, and more important, reason for the requirement that the complaining party must raise the issue during the proceedings at the time of the judge's sleeping or inattention. The matter must be raised with the court at the time the problem is perceived in order to enable the problem to be remedied, first by ensuring that the judge's attention is restored to the relevant testimony or submissions, and secondly by having the relevant testimony or submissions repeated. Even if this is not possible, it enables the court or a subsequent review court to identify what portion of the proceedings have not received the attention of the trial judge in order to determine whether any significance should be attached to such inattention.[1081] Thus the requirement that the issue must have been raised during the proceedings is not simply an application of a formal doctrine of waiver, but a matter indispensable to the grant of fair and appropriate relief.

642. No attempt was made to raise the issue formally before the Trial Chamber. Counsel for Landžo sought to explain her failure to do so by saying that she had approached "this sensitive issue in the most diplomatic way possible", by raising it with the Registrar and the then President of the Tribunal (Judge Cassese) rather than in court.[1082] She went on to say:

> Judge Karibi-White along with the other two Judges was the fact finder in the trial. He would be determining the guilt and/or innocence, and he would be determining the amount of sentence to be imposed. Direct confrontation with the fact finder at this point in the trial would not have benefited my client. Approaching the Registry and the President of the Tribunal regarding these issues was the direction that I considered most prudent at this juncture in the trial.

643. In another affidavit, counsel for Landžo said that, between August and November 1997, she had "informally" discussed the problem with the Trial Chamber's Senior Legal Officer, who

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Tadić Appeal Judgement, para 55: In the context of a complaint on appeal that the Defence had not been able to call witnesses essential to the Defence case, the Appeals Chamber stated: "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". *See* also *Prosecutor v Aleksovski*, IT-95-14/1-AR73, Decision on Prosecutor's Appeal on Admissibility of Evidence, 16 Feb 1999, par 20: "[...] no such complaint was made to the Trial Chamber [...] and it should not be permitted to be made for the first time on appeal".

[1081] *Chicago City Railway Company v Anderson* 193 Ill 9 (1901) (Supreme Court of Illinois), at 12-13; *Stathooles v Mount Isa Mines Ltd* [1997] 2 Qd R 106, at 113; *R v Grant* [1964] SASR 331, at 338; *R v Moringiello* [1997] Crim LR 902; *R v Tancred* 14 Apr 1997, Court of Appeal (Criminal Division).

[1082] Affidavit of Cynthia McMurrey Sinatra, sworn 25 Sept 1999, p 2, filed with Motion of Appellant, Esad Landžo, for Permission to Obtain and Adduce Further Evidence on Appeal, 27 Sept 1999 ("Motion to Obtain Evidence"), which is Exhibit C to Landžo Supplementary Brief.

had responded that "the matter was being addressed by the Tribunal".[1083] In August 1997, she had prepared a "Motion for Mistrial" and her "Resignation under Protest", "because of the sleeping of the Judge and the total disrespect by the Presiding Judge for all those attempting to perform their duties during the trial".[1084] She says that she met with the Registrar, who persuaded her not to resign and who arranged a meeting with President Cassese. President Cassese had assured her that he "would attend to the matter". She had thereafter continued to discuss the "continuing problem" with the Senior Legal Officer of the Trial Chamber.[1085]

644. To have made a complaint to the Trial Chamber itself, it is said, would have been "inappropriate and futile", because it "would necessarily have alienated one of the three triers of fact, causing potentially irreparable harm to Landžo's case".[1086] In pursuing the alternative course, it is said, she "acted in the highest traditions of the Bar".[1087]

645. The Appeals Chamber does not agree. Such an approach fails to recognise that raising the issue before the Trial Chamber is indispensable to the grant of fair and appropriate relief. Moreover, it clearly could be anticipated that, by taking her complaint to the President, it would necessarily be made known to Judge Karibi-Whyte. The issue was, indeed, made known to him.[1088] The "highest traditions of the Bar" require counsel to be considerably more robust on behalf of their client in such circumstances as these than counsel for Landžo was in this case. Co-counsel for Landžo on the appeal referred – for a somewhat different purpose – to his need in the present case to make his submissions on this and other grounds of appeal "in a somewhat more direct manner to the court – respectful, but direct", which he proceeded to do in a robust, but entirely appropriate, manner.[1089] Any counsel of experience will have had the embarrassing duty at some stage of his or her career of saying something unpleasant to a judge.[1090] Counsel for Landžo herself did not flinch from making very serious (although completely baseless)

[1083] Affidavit of Cynthia McMurrey Sinatra, sworn 20 Apr 2000, p 1, annexure to Appellant Esad Landžo's List of Witnesses on Appeal, Submission of Witness Statements and Motion for Issuance of *Subpoena Ad Testificandum*, 15 May 2000 ("Affidavit of 20 April 2000").
Affidavit of 20 April 2000, pp 1-2. The document in fact entitled "Resignation Under Protest" is described in the affidavit as a Motion for Withdrawal.

[1085] *Ibid*, pp 1-2.

[1086] Motion to Obtain Evidence, p 6.

[1087] Landžo Supplementary Brief, p 17.

[1088] A letter written by Landžo to President Cassese concerning Judge Karibi-White's conduct was treated by him as an application under Rule 15 ("Disqualification of Judges"), and it was communicated to the judge and then referred to the Bureau, which requested the judge to state his views on the matter. All this was disclosed to Landžo: Letter dated 3 Sept 1997, annexed to Motion to Obtain Evidence.

[1089] Appeal Transcript, p 641.

[1090] *Stathooles v Mt Isa Mines Ltd* [1997] Qd R 106 at 113.

allegations of impropriety against the Appeals Chamber concerning the compilation of the Extracts Tapes in a filing prior to the hearing of the appeal.[1091]

646. In interlocutory proceedings, the Appeals Chamber held that the discussion between counsel for Landžo and both President Cassese and the Senior Legal Officer of the Trial Chamber fell within the scope of an adjudicative privilege or judicial immunity from compulsion to testify and that, as the evidence could be given by counsel herself, it was inappropriate to request either of them to waive that immunity and give evidence.[1092] It was also held that the discussions counsel for Landžo had with the Registrar were the subject of a qualified privilege, so that the Registrar's evidence could not be compelled if the evidence could be given by counsel herself.[1093] The assertions by counsel for Landžo in her affidavits were therefore uncontradicted. The Prosecution said that it had no knowledge of the facts asserted, and that it was willing to proceed on the basis that they are correct.[1094] It did not seek to cross-examine her upon them. Her evidence was admitted into evidence by the Appeals Chamber "without prejudice to the weight it would ultimately be afforded".[1095]

647. The Appeals Chamber does not place any particular weight upon the assertions of counsel as to what the Senior Legal Officer of the Trial Chamber said to her. It accepts that she complained to him about the judge's conduct (including his sleeping), but no more. There are no contemporaneous records to support the version which she now gives. The Appeals Chamber has not been impressed by her standards of accuracy in other documents filed with the Tribunal. The assertions she made in the particulars as to what is to be seen in each portion of the Extract Tapes upon which reliance is placed,[1096] when compared with what is in fact seen on the tapes themselves, are so coloured and exaggerated in nature and inaccurate in content that the Appeals Chamber does not accept that her assertions concerning the Senior Legal Officer are true.

[1091] Request of Appellant, Esad Landžo, for Information Regarding Certain Portions of the Extracts Tape Produced for Consideration by Appeals Chamber, 7 Apr 2000. The allegations were refuted by the Pre-Appeal Judge in his Decision on Request by Esad Landžo for Information Regarding Extracts Tape, 20 Apr 2000, at pp 3-4.

[1092] Order on Motion of the Appellant, Esad Landžo, for Permission to Obtain and Adduce Evidence on Appeal, 7 Dec 1999, pp 4-6.

[1093] *Ibid,* pp 5-6.

[1094] Prosecution Response to the Motion of Esad Landžo to Admit Evidence on Appeal and for Taking of Judicial Notice, 29 May 2000, para 10.

[1095] Order on Motion of Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice", 31 May 2000 ("Order on Evidence on Appeal"), p 4.

[1096] Exhibit B to Landžo Supplementary Brief.

648. When the documents prepared by counsel for Landžo for the purposes of her approach to the Registrar and President Cassese are examined,[1097] as well as the other relevant documents to which reference has been made, it is clear that the primary concern motivating counsel for Landžo was the manner in which she had been treated by Judge Karibi-Whyte, and that his sleeping was only of secondary concern. Allegations are made that Judge Karibi-Whyte made personal attacks on counsel, that he did not respect them and that he was spiteful; even in the secondary complaint that he had slept during the proceedings, reference is made to his "lack of judicial temperament, self restraint and common decency".[1098]

649. Such conduct towards counsel alleged against Judge Karibi-Whyte has not been made the subject of any ground of appeal, and it is not relevant to any issue which the Appeals Chamber must decide. The allegations are referred to only for the purpose of demonstrating that they were the primary source of counsel's complaints to the Registrar and to President Cassese, and that the allegations that the judge slept through the proceedings were only secondary. There is no suggestion that any complaints concerning the judge's alleged sleeping were made following November 1997, notwithstanding that, according to the particulars supplied by Landžo,[1099] his sleeping continued throughout the trial (the last entry being 12 October 1998). For the reasons already given, the Appeals Chamber does not accept the explanation by counsel for Landžo for her failure to raise the issue before the Trial Chamber itself.

F. Conclusion

650. The Appeals Chamber is satisfied that the use now of the secondary complaint concerning the judge's inattention during the trial to found Landžo's fourth ground of appeal is opportunistic. The absence of any actual prejudice caused by the judge's inattention requires that this ground of appeal and the corresponding grounds of appeal by Mucić and Delić be dismissed.

[1097] (Draft) Esad Landžo's Motion for Mistrial, 26 Aug 1997 ("Draft Motion for Mistrial"); (Draft) Cynthia McMurrey's Resignation Under Protest, 26 Aug 1997; Exhibit C to Motion to Obtain Evidence.

[1098] Draft Motion for Mistrial, pp 3-4. The same is true of the letter written by Landžo to President Cassese (*see* footnote 1089). Reference is made to Judge Karibi-Whyte's "arrogant behaviour towards my defence counsel", whose conduct had been "subject to constant humiliation" and that she appeared to have been singled out for unfair treatment. This reference to the judge falling asleep is referred to only briefly and as a secondary concern.

[1099] Exhibit B to Landžo Supplementary Brief.

XII. JUDGE ODIO BENITO AND VICE-PRESIDENCY OF COSTA RICA

651. Three of the appellants – Delić, Mucić and Landžo – filed grounds of appeal based upon the facts that, whilst still a judge of the Tribunal and engaged in hearing this case, Judge Odio Benito was elected as a Vice-President of Costa Rica and took an oath of office as such. The grounds were in the following terms:

> Delić Issue 1
>
> Whether the Trial Chamber was properly constituted after 8 May 1998 in that Judge Elizabeth Odio Benito was no longer qualified to serve as a judge of the Tribunal in that she did not meet the qualifications in Article 13(1) of the Statute of the Tribunal.[1100]
>
> Mucić Ground 1
>
> Whether Judge Odio Benito was disqualified as a judge of the Tribunal by reason of her election as Vice-President of the Republic of Costa Rica.[1101]
>
> Landžo Ground 2
>
> The Participation at Trial as a Member of the Trial Chamber of a Judge Ineligible to Sit as a Judge of the Tribunal Violated Articles 13 and 21 of the Statute of the ICTY, the Rules of Natural Justice and International Law and Rendered the Trial a Nullity.[1102]

These grounds raise two distinct issues:

(1) Was Judge Odio Benito no longer qualified as a judge of the Tribunal by reason of those facts?

(2) Should Judge Odio Benito have disqualified herself as a judge by reason of those facts because she was no longer independent?

A. Background

652. Judge Odio Benito was elected as a judge of the Tribunal in September 1993, and she was installed as such on 17 November 1993 for a term of four years.[1103] In the elections held on 20 May 1997, neither she nor the other two judges hearing this case were re-elected. On 27 August 1997, the UN Security Council passed a resolution endorsing a recommendation by

[1100] Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, p 2.
[1101] Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, p 1.
[1102] Landžo Brief, p 2.
[1103] Statute of the Tribunal, Article 13.4.

the Secretary-General that these three judges, "once replaced as members of the Tribunal, finish the *Čelebići* case which they have begun before expiry of their terms of office [...]".[1104]

653. On 1 February 1998, and during the course of the trial in this case, Judge Odio Benito was elected as the Second Vice-President of the Republic of Costa Rica, and she took an oath of office as such on 8 May 1998. On 25 May 1998, the four accused jointly filed a "Motion on Judicial Independence", addressed to Judge Karibi-White, the Presiding Judge of the Trial Chamber. The four accused submitted that Judge Odio Benito should cease to take any further part in the trial, upon the grounds that, by having taken that oath of office and thereby become a member of the executive branch of the Government of Costa Rica:

(1) she had ceased to meet (a) the qualifications for a judge of the Tribunal, and (b) the criteria required for an independent judge in international law, and

(2) she had acquired an association which may affect her impartiality.[1105]

Pursuant to Rule 15(B) of the Tribunal's Rules, Judge Karibi-White conferred with Judge Odio Benito and then referred the Motion to the Bureau for its determination.[1106]

654. On 4 September 1998, the Bureau determined that Judge Odio Benito was not disqualified from sitting in the trial on the grounds referred to in Rule 15(A).[1107] Although the Bureau acknowledged that its competence conferred by the Rules did not extend to those aspects of the Motion on Judicial Independence which went beyond the scope of Rule 15(A),[1108] it did consider, and it rejected, the claim that Judge Odio Benito had ceased to possess the qualifications required for appointment to the highest judicial offices of her country (and therefore to be a judge of the Tribunal).[1109] There was no challenge at the time to either of these determinations.[1110]

[1104] Security Council Resolution S/RES/1126, 27 Aug 1997 ("Resolution 1126").
[1105] Motion on Judicial Independence, 25 May 1998, p 1.
[1106] Decision of the Bureau on Motion for Judicial Independence, 4 Sept 1998 ("Bureau Decision"), p 4. The four accused, apparently in ignorance of that referral, subsequently filed a request for a hearing of their joint motion or, alternatively, a request that the Presiding Judge refer the matter to the Bureau. This application was disposed of informally (Trial Transcript, pp 14930-14933).
[1107] Bureau Decision, p 11. Rule 15(A) provides: "A judge may not sit on a trial or appeal in any case in which the judge has a personal interest or concerning which the judge has or has had any association which might affect his or her impartiality".
[1108] Bureau Decision, p 11.
[1109] *Ibid*, p 6.
[1110] It was suggested during the hearing of the appeal that this was because the Bureau Decision of Sept 1998 "was not rendered until after the trial had been concluded" (Appeal Transcript, p 724). That is not so. The final submissions concluded on 15 October 1998 (Trial Transcript, p 16372), and Judgement in the trial was delivered on 16 November 1998.

B. Was Judge Odio Benito No Longer Qualified as a Judge of the Tribunal?

655. The qualifications for judges of the Tribunal are stated in Article 13 of the Tribunal's Statute:

> **Article 13**
>
> **Qualifications and election of judges**
>
> The judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.[1111]

This provision is not stated in terms of qualification for *election* as judges, but rather in terms of continuous application ("The judges shall be [...]"). If, for example, a judge of the Tribunal were to be found guilty of some offence committed during his or her term of office which demonstrated a lack of high moral character or integrity, it could hardly be suggested that such a judge remained qualified within the terms of Article 13 simply because he or she was qualified at the time of election. The Appeals Chamber accepts that a judge must *remain* qualified within the meaning of Article 13 throughout his or her term of office.

656. The appellants have directed their arguments to the requirement of Article 13 that the judges of the Tribunal "possess the qualifications required in their respective countries for appointment to the highest judicial offices". Judge Odio Benito was elected as a judge of the Tribunal on the nomination of her country, the Republic of Costa Rica. The highest judicial office in that country is that of a magistrate of the Supreme Court of Justice of Costa Rica.[1112] The appellants argue that, by reason of her assumption of office as Vice-President of Costa Rica, Judge Odio Benito was constitutionally rendered disqualified for election as such a magistrate and therefore lost her qualifications as a judge of the Tribunal.

[1111] This was the form of Article 13(1) of the Statute at the relevant time. It has since been amended by Security Council Resolution 1329, 30 Nov 2000, so that the opening sentence commences: "The permanent and ad litem judges shall be persons of high moral character [...]".

[1112] Constitution of the Republic of Costa Rica ("Constitution"), Article 156. The Constitution was adopted in 1949. The parties (the Prosecution and Landžo, representing all three convicted appellants) have agreed upon an accurate English language translation of the Constitution (which is written in the Spanish language) as it was in force between 17 Nov 1997 (the date upon which Judge Odio Benito's original term expired) and 16 Nov 1998 (the date upon which the Judgement was delivered): Agreement Between the Prosecution and Appellant, Esad Landžo, Regarding the Constitution of Costa Rica, 28 Jul 2000, para 7. Article 156 provides: "The Supreme Court of Justice is the highest court of the judicial branch [...]".

657. On the other hand, the Prosecution, in addition to disputing the appellants' interpretation of Article 13,[1113] argues that, by reason of the Security Council's resolution permitting Judge Odio Benito (and the other two members of the Trial Chamber) to finish this case notwithstanding that they had been replaced as members of the Tribunal, the provisions of Article 13 no longer applied to them.[1114]

658. For reasons which will be given later in this Judgement, the Appeals Chamber does not accept either of these arguments, but it believes that it is important to state first its interpretation of Article 13 of the Tribunal's Statute.

659. In the opinion of the Appeals Chamber, any interpretation of Article 13 must take into account the restriction imposed by Article 12 of the Statute, that no two judges may be nationals of the same State. The Statute envisages that judges from a wide variety of legal systems would be elected to the Tribunal, and that the qualifications for appointment to the highest judicial offices in those systems would similarly be widely varied. The intention of Article 13 must therefore be to ensure, so far as possible, that the *essential* qualifications do not differ from judge to judge. Those *essential* qualifications are character (encompassing impartiality and integrity), *legal* qualifications (as required for appointment to the highest judicial office) and experience (in criminal law, international law, including international humanitarian law and human rights law). Article 13 was *not* intended to include every local qualification for the highest judicial office such as nationality by birth or religion, or disqualification for such high judicial office such as age. Nor was Article 13 intended to include constitutional disqualifications peculiar to any particular country for reasons unrelated to those essential qualifications.

660. This is certainly the way the Security Council has interpreted Article 13 to date. Article 13(2) provides that, before the judges of the Tribunal are elected by the UN General Assembly, the Security Council must submit for consideration by the General Assembly a list of candidates reducing those nominated by the States to a lesser number which takes into due account the need for adequate representation of the principal legal systems of the world. It may safely be assumed that the Security Council would not include within that reduced list any candidate who did not satisfy the requirements of Article 13. Indeed there are concrete examples where the Security Council has interpreted Article 13 in the way set forth by this Chamber.

[1113] Prosecution Response, para 13.42.
[1114] Prosecution Supplementary Brief, para 4.

661. When Judge Odio Benito was included in the list of candidates for election in 1993, she was still (according to her *curriculum vitae* which accompanied her nomination)[1115] the Minister of Justice of the Republic of Costa Rica – which, if the appellants's argument were to be accepted, would have constitutionally rendered her disqualified for election as a magistrate of the Supreme Court of Justice and as a judge of this Tribunal.[1116] Judge Sir Ninian Stephen was already seventy years of age when elected as a judge of the Tribunal in 1993,[1117] and thus was to be seventy four years of age at the conclusion of his term. The highest compulsory retirement age for any high judicial office in his country (Australia) is seventy-two – being for the Supreme Court of New South Wales. In neither of these cases was the judge thought by the Security Council not to be qualified as a judge of the Tribunal for a four year term.

662. It was accepted by the appellants that Judge Odio Benito at all times remained qualified as a judge of the Tribunal in relation to her character, legal qualifications and experience. The Appeals Chamber is accordingly satisfied that Judge Odio Benito did not lose her qualifications as a judge of the Tribunal by reason of her assumption of office as Vice-President of Costa Rica.

663. In any event, the Appeals Chamber does not accept the argument of the appellants that her assumption of office as a Vice-President of Costa Rica rendered Judge Odio Benito constitutionally disqualified for election as a magistrate of the Supreme Court of Justice under the Constitution of that country. It expresses this opinion as a matter of interpretation of the Constitution of Costa Rica, consistently with the jurisprudence of that country as identified by expert evidence during the appeal.

664. The Constitution states:

> The government of the Republic [...] is exercised by three distinct and independent branches: legislative, executive and judicial.[1118]

665. The Constitution has separate sections dealing with the legislative power,[1119] the executive power[1120] and the judicial power.[1121] It makes separate provisions as to the

[1115] General Assembly Document A/47/1006, 1 Sept 1993, p 57.
[1116] According to Judge Odio Benito's *curriculum vitae* which accompanied her nomination for election in 1997, she did not resign as Minister of Justice until 1994: General Assembly Document A/51/878, 22 Apr 1997, p 58.
[1117] ICTY 1994 Year Book, p 201.
[1118] Constitution, Article 9.
[1119] *Ibid*, Title IX.
[1120] *Ibid*, Title X.
[1121] *Ibid*, Title XI.

qualifications and disqualifications for election to a position within each of these three branches (or powers):

(1) Those *qualified* for election as deputies to the Legislative Assembly must be citizens of Costa Rica, Costa Rican by birth (or naturalised with ten years' residence after naturalisation), and twenty one years of age.[1122] Those *disqualified* as candidates for election as deputies include anyone occupying within six months prior to the date of the election the positions of President of the Republic, or a cabinet minister or a magistrate of the Supreme Court of Justice, or relatives of the existing President to the second degree of consanguinity or affinity inclusive.[1123]

(2) Those *qualified* for election as the President or a Vice-President must be citizens of Costa Rica, Costa Rican by birth, laymen and over thirty years of age.[1124] Those *disqualified* for election as President or Vice-President include anyone occupying within twelve months prior to the date for election the positions of President, or a Vice-President, or magistrate of the Supreme Court of Justice or a cabinet minister, or certain relatives of the existing President by consanguinity or affinity.[1125]

(3) Those *qualified* for election as a magistrate of the Supreme Court of Justice must be citizens of Costa Rica, Costa Rican by birth (or naturalised with ten years' residence after naturalisation), laymen, over thirty five years of age and legally qualified as defined.[1126] The only persons *disqualified* for election as a magistrate are persons who are related by consanguinity or affinity to the third degree inclusive to a member of the Supreme Court of Justice.[1127]

666. It is significant that, whilst persons holding positions in both the administrative and the judicial supreme powers at the time of the election (or within six months prior thereto) are expressly disqualified as a candidate for election as a deputy to the Legislative Assembly, and persons holding positions in the judicial supreme power at the time of the election (or within twelve months prior thereto) are expressly disqualified as a candidate for election as the President or a Vice-President, *no* person holding positions with either the executive or the

[1122] *Ibid*, Article 108.
[1123] *Ibid*, Article 109.
[1124] *Ibid*, Article 131.
[1125] *Ibid*, Article 132.
[1126] *Ibid*, Article 159. The Article defines the legal qualification as: "Holder of a lawyer's degree issued or legally recognised in Costa Rica, and must have engaged in the profession for at least ten years, except in the case of judicial [officials] with not less than five years of judicial experience". (The Spanish translator retained by the Tribunal's Conference and Languages Section prefers the word "officers" to "officials").

administrative supreme powers at the time of the election is expressly disqualified as a candidate for election as a magistrate. In particular, a Vice-President at the time of the election is not expressly disqualified for election as a magistrate of the Supreme Court.

667. In support of their argument, however, the appellants rely upon Article 161 which provides:

> The position of magistrate is incompatible with that of an official of the other supreme powers.

The expression "supreme powers" is not defined in the Constitution, but it may be accepted that the reference is to the three "distinct and independent branches" which exercise the government of the Republic through the "powers" already identified.

668. Article 161 is one of similar but not identical provisions which relate to each of the three supreme powers:

> [Legislative power]
>
> Article 111 After taking the oath of office no deputy may accept a position or employment with the other powers of the State or the autonomous institutions, under penalty of losing his credentials, except as a cabinet minister. In the latter event, he will be reinstated in the Assembly when the position terminates. [...]
>
> Article 112 The legislative function is also incompatible with the holding of any other elective public office. [...]
>
> [Executive power]
>
> Article 143 The position of minister is incompatible with the exercise of any other public [charge, elective] or otherwise, except where special laws confer functions upon them. [...].[1128]
>
> The vice-presidents of the Republic may hold the position of minister.
>
> [Judicial power]
>
> Article 161 The position of magistrate is incompatible with that of an official of the other supreme powers.

The object of these provisions appears clearly to be to prevent the one person holding more than one of these positions at the one time. If a Vice-President at the time of the election of magistrates, who is otherwise qualified in accordance with Article 159 but not disqualified by

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[1127] *Ibid*, Article 160.

Article 160, wishes to stand for that election, he or she is permitted to do so, but must, if elected as a magistrate, resign as Vice-President. Such an interpretation of the Constitution itself is consistent with the jurisprudence revealed in the expert opinion of Mr Alejandro Batalla,[1129] although it would appear to be inconsistent with his final conclusion.

669. Citing as authority a decision of the Costa Rican Constitutional Court,[1130] Mr Batalla says:

> [...] the intention of the Constitutional Assembly was to provide the Magistrates with a special level of independence from the other branches to prevent any mixing of their political activity with the justice in order to guarantee impartiality. [1131]
>
> The Constitutional Court argues that holding both positions simultaneously might subordinate the Magistrate psychologically to a certain ideology that can affect and reduce his criteria in such a way.
>
> The body of laws of Costa Rica stipulates, in general terms, the incompatibility of the positions of magistrate and judge[1132] with those positions elected by popular vote such as the position of Vice-President, and the justification lies on the demand of the independence of the judge. In other of its precedents, the Constitutional Court has stated that:
>
> "The position of Judge or Magistrate is incompatible with any other position elected by popular vote or political designation. What is intended is to keep the officials administering justice away from the passions inherent to the political activity which, due to its nature, is very polemical. In this way, this prevents the possibility of establishing a link of psychological subordination of the judge, offering said circumstance, the temptation of adjusting his behaviour to a certain ideology or way of thinking detached from his self, since the freedom of opinion of the judge may be reduced by the influence of an ideological tendency. The system of incompatibilities and the system of prohibitions are guarantees that tend to prevent the creation of links – either of public or private nature – that may lead to the union of two simultaneous qualities in one person; that is, that the status of the Judge may be joined by another quality that may place him, in a submission relationship of any kind. It is possible to prevent the judge from performing any paid job in order to prevent him from establishing links that may restrict his independence". [1133]

670. Mr Batalla then concludes:

> In conclusion, the position of Magistrate of the Supreme Court of Justice has an express restriction on a Constitutional level to be *elected* if he holds another position in any other Supreme Power of Costa Rica.[1134]

[1128] The Spanish translator retained by the Tribunal's Conference and Languages Section prefers the phrase "post, publicly elected" to "charge, elective".
[1129] A Professor of Administrative Law in the Master and Doctoral Program of the Institute of Education and Research of Universidad Autónoma de Centro América.
[1130] Constitutional Court, Decision N 2621-95, quoted in Mr Batalla's opinion at pp 2-3.
[1131] Opinion, pp 3-4.
[1132] [Mr Batalla's footnote] The Judge and the Magistrate are the only officials that may administer justice.
[1133] [Mr Batalla's footnote] Constitutional Court, Decision N 2883-96.
[1134] The emphasis has been added.

If Mr Batalla's ultimate conclusion be correct, the Constitution would have expressed the disqualifications upon candidates for election as a magistrate in substantially different terms. Article 160 would have disqualified as candidates for such election those persons holding positions in both the executive and the administrative supreme powers, in the same way as Articles 109 and 132 have disqualified magistrates as candidates for election, respectively, as deputy of the Legislative Assembly and as President or Vice-President. Significantly, the Constitution has not done so. [1135]

671. Article 161 does not therefore *disqualify* a Vice-President as a candidate for election as a magistrate of the Supreme Court of Costa Rica. It merely requires that such a Vice-President resign that position if *elected* as a magistrate and before assuming office as such.

672. The Prosecution's argument which the Appeals Chamber has not accepted was that the requirements of Article 13(1) of the Statute apply by their terms only to "the judges" of the Tribunal, which means the judges referred to in Article 12 who are elected pursuant to Article 13(2) or appointed pursuant to Article 13(3).[1136] The Prosecution contended that, when the term of office of Judge Odio Benito expired on 17 November 1997, she ceased to be one of "the judges" of the Tribunal, and that the Security Council Resolution 1126 which enabled the judges of the *Čelebići* Trial Chamber to finish hearing the case did not affect this.[1137] The terms of Resolution 1126, which authorised the three judges "once replaced as members of the Tribunal, to finish the *Čelebići* case which had begun before the expiry of their terms of office", was interpreted by the Prosecution as emphasising that the judges' terms of office had *expired* and that they had been replaced. Although the judges continued to exercise the functions of a judge, it was said, they no longer held the office of judges of the Tribunal.[1138] The source of Judge Odio Benito's authority after 17 November 1997 was not the Statute, but Resolution 1126. The resolution was said to prevail over the Statute in the event of inconsistency, as the Statute itself derives from a Security Council resolution and can be expressly or impliedly amended by a subsequent resolution.[1139]

[1135] An expert opinion by Francisco Villalobos Brenes (a member of the Bar of Costa Rica and Adjunct Professor in the Faculty of Law of the University of Costa Rica) was also tendered. None of the interpretative resources relied upon by Mr Brenes suggest a contrary interpretation of Article 161. Indeed, he expressly concludes (at para 5C) that Article 161 is one of various rules which specifically prohibit the possibility of a person *exercising* the judicial function at the same time as holding a post in the Executive or Legislative Branches (the emphasis has been added).

[1136] Prosecution Supplementary Brief, para 4.

[1137] *Ibid*, paras 6-9.

[1138] *Ibid*, paras 10-12.

[1139] *Ibid*, paras 13-16.

673. However, if the submission that Judge Odio Benito was no longer a "judge" within the meaning of Article 13(1) after the expiry of her initial term of office be correct, it would follow that she was also not a "judge" for the purposes of other articles of the Statute. In that case, since Article 12 provides that the Trial Chambers consist of three "judges", the Trial Chamber would not have been validly composed. Moreover, since it is the "Trial Chambers" which are to pronounce judgements and impose sentences and penalties,[1140] it would follow that the Trial Judgement in this case was not delivered by the body authorised by the Statute to do so. The Appeals Chamber does not accept that this was the intention of the Security Council in adopting Resolution 1126. The Prosecution indeed denied that its interpretation of the resolution has the result that the Trial Chamber was not properly constituted,[1141] and it submitted at the oral hearing that the three judges continued to be judges of the Tribunal with limited functions but that Resolution 1126 nevertheless had the effect that the requirements of Article 13(1) did not apply to them.[1142] This submission is entirely without merit.

674. The words from Resolution 1126 relied upon by the Prosecution must be read in the context of the circumstances in which the resolution was passed. The then President of the Tribunal had written to the Secretary-General seeking from him "an extension of the three judges sitting in the *Čelebići* case", and had requested him to submit his letter to the members of the Security Council "for their consideration and approval of the extension of tenure of the three aforementioned judges for 12 months as from 17 November 1997".[1143] The Secretary-General had submitted the letter as requested, describing it in his letters to the Presidents of the Security Council and the General Assembly as requesting "an extension of the terms of office of the non-elected judges of the International Tribunal in order to allow them to dispose of ongoing cases".[1144] His letters continued:

> [...] in the absence of an explicit statutory provision providing for the extension of the term of office of Tribunal judges to complete ongoing cases, an approval of the Security Council, as the parent organ, and of the General Assembly, as the electing organ, would be desirable to preclude any question about the legality of such an extension.

[1140] Statute, Article 23.
[1141] Prosecution Supplementary Brief, para 19.
[1142] Counsel for the Prosecution told the Appeals Chamber that the judges had a "qualified qualification" (Appeal Transcript, p 714). The meaning of that phrase was not explained.
[1143] Letter of 18 June 1997, annexed to Document A/51/958 S/1997/605.
[1144] Letter of 1 Aug 1997, annexed to Document A/51/958 S/1997/605.

Resolution 1126, having noted this correspondence, endorsed the recommendation of the Secretary-General in the terms already partly quoted.[1145]

675. A reading of Resolution 1126 in this context necessarily indicates that its effect was to extend the terms of the judges for the particular purpose of concluding the *Čelebići* trial. The terms of office of the judges as extended, although limited in their defined purpose, were otherwise left subject to the relevant provisions of the Statute. Any implied effect on the Statute was not to render Article 13(1) and those other provisions which refer to "judges" of the Tribunal inapplicable to the three judges, as argued by the Prosecution. It was limited to making a narrowly qualified exception to the four year term of office referred to in Article 13(4). The resolution indicates no intention to amend, modify or suspend any other provisions of the Statute, including Article 13(1), in any way.

676. The challenge to Judge Odio Benito's qualifications under Article 13 accordingly fails.

C. Should Judge Odio Benito Have Disqualified Herself as a Judge of the Tribunal?

677. The second issue raised by the appellants based upon the election of Judge Odio Benito as a Vice-President of Costa Rica and her assumption of that office was whether she was thereby disqualified as a judge of the Tribunal because she no longer possessed the necessary judicial independence required by international law.[1146] The appellants relied upon additional material and arguments in relation to this issue.

678. *Appointment as Minister of Environment and Energy:* After she took the oath of office as Second Vice-President, Judge Odio Benito was also appointed as Minister of Environment and Energy in the Government of Costa Rica.[1147]

679. *Membership of Board of Mediators:* A decree issued by the President of Costa Rica on 15 June 1998, dealing with a "Process of National Consensus", provided for a Board of Mediators to be composed of, *inter alia*, the two Vice-Presidents of the Republic. The functions and powers of that Board were to "judge, mediate and propose alternative solutions in those cases where the members of the Consensus Forum [another of the bodies in the Process of

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[1145] "Endorses the recommendation of the Secretary-General that Judges Karibi-Whyte, Odio Benito and Jan, once replaced as members of the Tribunal, finish the *Čelebići* case which they have begun before expiry of their terms of office [...]".

[1146] Landžo Reply, para 6.18 (which incorporates the arguments in the Motion on Judicial Independence, 25 May 1998); Mucić Brief, para 3.

[1147] Agreement Between the Prosecution and Appellant, Esad Landžo, Regarding Evidence for the Purposes of the Appeal, 19 May 2000 ("Agreement on Evidence"), p 1.

National Consensus] have such disagreements that they are unable to reach decisions by consensus".[1148]

680. *Exercise of Executive Functions:* Reliance was placed upon two media reports, the accuracy of which was not disputed,[1149] to claim that Judge Odio Benito exercised executive functions in Costa Rica whilst still a judge of the Tribunal:

(i) Meeting in April 1998

The first report, dated 28 April 1998, referred to a meeting of the President-elect of Costa Rica and "a group of former Costa Rican legal representatives and high officials" which had been held in order "to evaluate the process of a united national effort before the change in power the following week". The report focused on the release by the group of a communiqué which expressed "profound consternation" at the recent assassination of the Auxiliary Bishop of Guatemala.[1150] The report observed that "Vice-Presidents-elect, Astrid Fischel and Elizabeth Odio, who will assume office this coming May 8", also participated in the meeting.

(ii) Letter of protest

The second report, dated 1 June 1998, stated that an environmental and humanitarian organisation, Foro Emaus, had written to "the vice president of Costa Rica [...] who is furthermore the head of the Department of Environment and Energy" to protest at the deficient labour conditions in which women worked in banana packing plants.[1151]

681. *Separation of Powers:* The appellants assert that Judge Odio Benito exercised an executive function merely by holding the position of Second Vice-President as required by the Constitution of Costa Rica.[1152] They rely upon the doctrine of separation of powers, which is said to prevent a judge of the Tribunal from holding an executive position in a domestic government.[1153] The appellants rely upon the status of Costa Rica as a non-permanent member of the Security Council for a two year period from 1 January 1997 to submit that Costa Rica had

[1148] Landžo Reply, para 6.13; Agreement on Evidence, p 1, and annexed extract from the official gazette.
[1149] The Prosecution denied, however, that the events reported constituted the exercise by Judge Odio Benito of executive functions: Agreement on Evidence, p 2; Prosecution Response, para 13.45.
[1150] "President Elect of Costa Rica Condemns the Assassination of Bishop Gerardi", 28 Apr 1998, translation filed by counsel for Landžo, 5 June 2000.
[1151] "Denunciation of Deficient Labor Conditions in Banana Packing Plants", 1 June 1998.
[1152] Appeal Transcript, p 721.
[1153] *Ibid*, p 654. The submissions made by the appellants in relation to Judge Odio Benito and her position as Vice-President did not always make a clear distinction between the first and second of these issues. This particular submission was described as being relevant to her qualification under Article 13 (the first issue),

"direct political and administrative control over the affairs of this Tribunal",[1154] and that Judge Odio Benito, as a Vice-President of Costa Rica, had the power to give instructions to Costa Rica's representative on the Security Council, placing her "in an executive capacity *vis-à-vis* this very Tribunal".[1155]

682. *Impartiality:* The requirement of a judge's impartiality is stated in Article 13 of the Tribunal's Statute, which has already been quoted. That requirement is reflected in Rule 15(A), which is in these terms:

> A Judge may not sit on a trial or appeal in any case in which the Judge has a personal interest or concerning which the Judge has or has had any association which might affect his or her impartiality. The Judge shall in any such circumstance withdraw, and the President shall assign another Judge to the case.

This Rule has been interpreted by the Tribunal as encompassing circumstances establishing both actual bias and an appearance or a reasonable apprehension of bias.[1156] No suggestion of actual bias has been made in the present case; the suggestion made is that the contemporaneous holding by Judge Odio Benito of the offices of a judge of the Tribunal and of Vice-President and government minister of Costa Rica carried the appearance of a lack of impartiality.[1157]

683. The relevant question to be determined by the Appeals Chamber is whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case.[1158] The apprehension of bias must be a reasonable one.[1159] Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold.[1160] A judge of the Tribunal makes a solemn declaration that he or she will perform the duties and exercise the powers of such an office "honourably, faithfully, impartially and conscientiously".[1161]

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but the Appeals Chamber regards it as logically more relevant to her disqualification under Rule 15(A) (the second issue), and it has considered the submission upon that basis.

[1154] Appeal Transcript, p 672.
[1155] *Ibid*, p 681.
[1156] *Furundžija* Appeal Judgement, para 189.
[1157] Mucić Brief, para 7; Landžo Reply, para 6.18.
[1158] *Furundžija* Appeal Judgement, para 189.
[1159] *Furundžija* Appeal Judgement, para 189.
[1160] *Ibid,* para 190.
[1161] Rule 14 of the Rules.

684. The fair-minded observer would also know of the circumstances surrounding Judge Odio Benito's election as Vice-President of Costa Rica. Prior to accepting a nomination as Vice-President, Judge Odio Benito wrote to the then President of the Tribunal (Judge Cassese) undertaking that, if elected, she would not assume any Vice-Presidential functions until the completion of her duties as a member of the Trial Chamber hearing the *Čelebići* case ("the Undertaking"). President Cassese submitted that letter to the judges in a Plenary meeting, who unanimously determined, upon the basis of the Undertaking, that her proposed action would not be incompatible with her judicial duties. When she was elected as Vice-President, Judge Odio Benito informed the then President of the Tribunal (Judge McDonald), who submitted the matter again to the judges in a Plenary meeting, where approval was given for her to take the oath of office. The Undertaking given by Judge Odio Benito to the Tribunal was supported by the President of Costa Rica, who wrote to President McDonald to confirm that Judge Odio Benito would continue to discharge her functions as a judge of the Tribunal until the completion of the *Čelebići* case[1162] and that she would not assume any functions in the government of Costa Rica before 17 November 1998.[1163] These facts were set out by the Bureau in its decision of 4 September 1998,[1164] and their substance has not been contested by the appellants.[1165]

D. Conclusion

685. The Appeals Chamber does not accept that Judge Odio Benito exercised any executive functions in Costa Rica during the time she was also a judge of the Tribunal. Taking the matters upon which reliance was placed by the appellants by reference to the categories already referred to:

686. *Appointment as Minister of Environment and Energy:* At the same time as Judge Odio Benito was appointed as Minister of Environment and Energy, a substitute minister was appointed to be in charge of that ministry during her absence.[1166] No evidence was produced by

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[1162] Letter from His Excellency Miguel Angel Rodriguez E, President-Elect of the Republic of Costa Rica, to the President of the Tribunal, 9 Mar 1998.

[1163] Letter from His Excellency Miguel Angel Rodriguez E, President of the Republic of Costa Rica, to the President of the Tribunal, 7 July 1998.

[1164] Bureau Decision, p 3.

[1165] Appeal Transcript, p 653. The Prosecution relied on the Bureau Decision and the facts found therein: Prosecution Response, para 13.45. The Appeals Chamber has not dealt with this matter as an appeal from the decision of the Bureau. The question whether a judge should have been disqualified from hearing a case is relevant to the fairness of the trial: *Prosecutor v Furundžija*, IT-95-17/1, Decision on Post-Trial Application by Anto Furundžija to the Bureau of the Tribunal for the Disqualification of Presiding Judge Mumba, Motion to Vacate Conviction and Sentence, and Motion for a New Trial, 11 Mar 1999, p 2; and it is therefore a valid ground of appeal from a conviction. The *Furundžija* Appeal Judgement proceeded upon the basis that this was a valid ground.

[1166] Agreement on Evidence, para 1.

the appellants that Judge Odio Benito had exercised any of the powers or functions as such minister during the relevant period.

687. *Membership of Board of Mediators:* No evidence was produced by the appellants to suggest that Judge Odio Benito had exercised any of the powers or functions of the Board of Mediators, nor even that the Board as an entity had been called upon to exercise its powers in the relevant period. Given the absence of any such evidence, it must be assumed that the Undertaking of Judge Odio Benito and the formal assurances of the President of Costa Rica, that she would not be assuming any functions of the government of Costa Rica (including those of Vice-President), were adhered to and that her membership of the Board of Mediators remained only a formal one during the relevant period.

688. *Exercise of executive functions*:

(i) Meeting in April 1998

This meeting took place before Judge Odio-Benito had assumed the office of Vice-President, and before she had any executive functions to perform. There is no suggestion that anyone else at the meeting was in a position to perform any such functions either. The "former" Costa Rican legal representatives and high officials could not have been there in any executive capacity. The purpose of the meeting – to evaluate "the process of a united national effort before the change in power the following week" – necessarily excluded any suggestion that the participants could have exercised any executive functions of government at that time. The only action which appears to have been taken by the group was the release of the communiqué, a gesture of the sort which is frequently made by public figures in the circumstances referred to. Judge Odio Benito was a prominent legal figure in Costa Rica – if for no other reason because she was a former Minister of Justice – and her participation in such a communiqué was perfectly natural. It was not an executive function.

(ii) Letter of protest

No evidence was produced by the appellants to suggest that Judge Odio Benito responded in any way to the letter or even that she had personally received it.[1167]

689. *Separation of powers:* It is beyond question that the principles of judicial independence and impartiality are of a fundamental nature which underpin international as well

[1167] Counsel for Landžo appeared to acknowledge the weaknesses in this material when he stated "I don't place much weight on those [two newspaper reports]": Appeal Transcript, p 673.

as national law. They are represented not only in numerous international and regional instruments – including the Universal Declaration of Human Rights[1168] and the International Covenant on Civil and Political Rights[1169] – but also in the Statute of the Tribunal itself, which requires by Article 12 that the Chambers be composed of independent judges and by Article 13 that the judges be impartial. The fundamental importance of the independence of the judiciary has been emphasised in the jurisprudence of the Appeals Chamber.[1170] This jurisprudence has also recognised that the principle of judicial independence in domestic and international systems generally demands that those persons or bodies exercising judicial powers do not also exercise powers of the executive or legislative branches of those systems.[1171]

690. The application of the principle of separation of powers to the factual situation underlying this ground of appeal is nevertheless misconceived. The doctrine applies principally to ensure the separate and independent exercise of the different powers within the same sphere or political system. The purpose of requiring a separation of judicial from other powers is to avoid any conflict of interest. Where the relevant powers arise in separate systems or on different planes – such as the national and the international – the potential for there to be any convergence in the subject matter of the powers, and therefore for a conflict of interest to arise, is greatly reduced.

691. The only basis upon which it is suggested that such a convergence has occurred in the present case relates to Costa Rica's membership of the Security Council at the relevant time. The assumptions necessarily involved in the proposition that, because of that fact, Judge Odio Benito was in an executive capacity *vis-à-vis* the Tribunal itself are, in the opinion of the Appeals Chamber, so remote as to be fanciful. Those assumptions are:

(a) that the Security Council would exercise its administrative functions in relation to the Tribunal in order to affect the judicial decisions of the Tribunal, contrary to the Statute which the Security Council itself had adopted by which the judges were required to be both independent and impartial;

(b) that Costa Rica, as one of the fifteen members of the Security Council,[1172] would be capable of influencing the Security Council in the exercise of such

[1168] Article 10: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him."
[1169] Article 14 provides, in part: "In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, every person shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."
[1170] *Tadić Jurisdiction Decision,* para 45; *Barayagwiza v The Prosecutor*, ICTR-97-19-AR72, Decision (On Prosecutor's Request for Review or Reconsideration), 31 Mar 2000, Declaration of Judge Rafael Nieto-Navia ("*Barayagwiza* Declaration"), paras 10-14.
[1171] *Barayagwiza* Declaration, para 9.
[1172] Charter of the United Nations, Article 23(1).

functions – notwithstanding the veto power of the five permanent members in relation to non-procedural matters[1173] – to such a degree that it would exercise direct political or administrative control over the affairs of this Tribunal; and

(c) that a Vice-President of Costa Rica has the power to *instruct* that country's representative in the Security Council how to exercise such control over the affairs of this Tribunal, and that Judge Odio Benito would exercise that power, notwithstanding the undertaking which she gave to the Tribunal and the confirmation by the President of Costa Rica, that she would not assume any functions as Vice-President until after her term of office as a judge of the Tribunal had concluded.

It should be noted that no suggestion has been made that the Republic of Costa Rica had any direct interest in the outcome of the present case.

692. The Appeals Chamber is not satisfied that the fair-minded observer would in all those circumstances consider that Judge Odio Benito had placed herself in a position of conflict of interest with her position as a judge of this Tribunal, and that she might therefore not bring an impartial and unprejudiced mind to the issues arising in the *Čelebići* case. It follows that no reasonable apprehension of bias has been established, and that there was no basis upon which Judge Odio Benito should have disqualified herself pursuant to Rule 15(A). The challenge to her independence accordingly also fails.

693. Delić Issue 1, Mucić Ground 1 and Landžo Ground 2 are therefore dismissed.

[1173] *Ibid*, Article 27(3).

XIII. JUDGE ODIO BENITO AND THE VICTIMS OF TORTURE FUND

694. Delić, Mucić and Landžo also filed grounds of appeal asserting that, because Judge Odio Benito was, while a judge of the Tribunal and engaged in hearing this case, a member of the Board of Trustees of the United Nations Voluntary Fund for Victims of Torture ("Victims of Torture Fund"), she was automatically disqualified from sitting as a judge in this case. The grounds were in the following terms:

> Delić Issue 2
>
> Whether Judge Elizabeth Odio Benito was disqualified in that she had an undisclosed affiliation which could have cast doubt on her impartiality and which might affect her impartiality.[1174]
>
> Mucić Ground 2
>
> Whether Judge Odio-Benito was disqualified as a member of the Trial Chamber by reason of her membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture.[1175]
>
> Landžo Ground 3
>
> The Participation as a Member of the Trial Chamber of a Judge Who Had an Actual or Apparent Conflict of Interest Affecting the Judge's Impartiality as a Member of the Trial Chamber Violated the Rules of Natural Justice and International Law, and, as a Matter of Law, Absent Disclosure by the Judge, and Informed Consent by the Defence, Automatically Disqualified the Judge From Sitting as a Member of the Trial Chamber.[1176]

695. The Victims of Torture Fund was established in 1981 by a resolution of the United Nations General Assembly to extend the mandate of an already existing fund, the United Nations Trust Fund for Chile, and it redesignated the fund by its present name. The mandate of the Victims of Torture Fund, as set out in that resolution, was:

> [...] receiving voluntary contributions for distribution, through established channels of assistance, as humanitarian, legal and financial aid to individuals whose human rights have been severely violated as a result of torture and to relatives of such victims, priority being given to aid to victims of violations by States in which the human rights situation has been the subject of resolutions or decisions adopted by either the Assembly, the Economic and Social Council or the Commission on Human Rights.[1177]

The resolution also determined that the Victims of Torture Fund would be administered in accordance with Financial Regulations of the United Nations by the Secretary-General, with the advice of a Board of Trustees "composed of a chairman and four members with wide

[1174] Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, p 2.
[1175] Appellant Zdravko Mucić's Final Designation of His Grounds of Appeal, 31 May 2000, p 2.
[1176] Landžo Brief, p 1.
[1177] General Assembly Resolution 36/151 of 16 December 1981.

experience in the field of human rights, acting in their personal capacity [...]." It was agreed between the parties that Judge Odio Benito was a member of the Board of Trustees of the Victims of Torture Fund throughout the *Čelebići* trial.[1178]

696. The appellants contend that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund gave rise to a reasonable apprehension of bias. The appellants argue that, by virtue of her membership of the Board, Judge Odio Benito had undertaken an obligation to further the goals of the Victims of Torture Fund. Since the Indictment in the *Čelebići* trial included allegations of torture, there was, it is said, a strong appearance of bias against those accused who were the subject of those allegations. (Landžo's earlier submission, that it was likely that Judge Odio Benito was *actually* biased against him as a person charged with torture,[1179] was abandoned during the oral submissions.)[1180] The appellants argued that Judge Odio Benito should therefore have disqualified herself pursuant to Rule 15(A) of the Rules or made a full disclosure of the association to the accused and their counsel and obtained their informed consent to proceed.[1181]

697. The relevant question to be determined by the Appeals Chamber is thus the same as that already stated in the previous Chapter: whether the reaction of the hypothetical fair-minded observer (with sufficient knowledge of the circumstances to make a reasonable judgement) would be that Judge Odio Benito might not bring an impartial and unprejudiced mind to the issues arising in the case. The apprehension of bias must be a reasonable one. Such circumstances within the knowledge of the fair-minded observer would include the traditions of integrity and impartiality which a judge undertakes to uphold in the solemn declaration made when assuming office, that he or she will perform the duties and exercise the powers of such an office "honourably, faithfully, impartially and conscientiously".[1182]

698. The Appeals Chamber agrees that, by accepting a position on the Board of Trustees, Judge Odio Benito undertook in her personal capacity to further the mandate of the Victims of Torture Fund. However, given that the objects of the fund as expressed in its mandate are solely focussed on fundraising to enable material assistance to the victims of torture – through the receipt and redistribution of donations for humanitarian, legal and financial aid to victims of

[1178] Agreement on Evidence, para 1.
[1179] Landžo Brief, p 26: "[...] it is at least possible, and in reality very likely, that Judge Odio-Benito had an actual partiality against Appellant Landžo".
[1180] Appeal Transcript, p 685: "We do not for a moment suggest that there is evidence that Judge Odio Benito displayed actual bias towards Landžo or the other appellants".
[1181] Delić Brief paras 48 and 57; Landžo Brief, pp 35-36; Appeal Transcript, pp 645-646.
[1182] *See supra* para 683.

torture and their relatives – the Appeals Chamber does not accept that a commitment by Judge Odio Benito to the objects and the activities of the Fund could reasonably be regarded as in any way inconsistent with the fair and impartial adjudication of charges of torture in her different capacity as a judge of the Tribunal.

699. As noted in the *Furundžija* Appeal Judgement, personal convictions and opinions of judges are not in themselves a basis for inferring a lack of impartiality.[1183] In relation to the particular subject of torture, it is difficult to accept that any judge eligible for appointment to the Tribunal – and thus a person of "high moral character, impartiality and integrity", as required by Article 13 of the Tribunal's Statute – would not be opposed to acts of torture. A reasonable and informed observer, knowing that torture is a crime under international and national laws, would not expect judges to be morally neutral about torture. Rather, such an observer would expect judges to hold the view that persons responsible for torture should be prosecuted.

700. It was nevertheless submitted that Judge Odio Benito, by reason of her membership of the Board of Trustees of the Victims of Torture Fund, "[...] had a clear identification with the victims of the alleged offences, and therefore, by an inescapable process of logic, against the alleged perpetrators of those offences".[1184] But, while an objective observer may reasonably infer from such membership that Judge Odio Benito sympathises with victims of torture, it is far from "inescapable logic" that she would therefore be biased against persons *alleged* to be perpetrators of torture. A person opposed to torture may be expected to hold the view that those *responsible* for committing that offence should be punished, but this is fundamentally different to bias against any person *accused* of torture. This is particularly so in the case of judges who, as discussed above, are presumed to be impartial,[1185] and are professionally equipped, by virtue of their training and experience, for the task of fairly determining the issues before them by applying their minds to the evidence in the particular case.[1186]

701. The appellants submitted that, even though the activities of the Victims of Torture Fund are praiseworthy, they are nevertheless incompatible with judicial office because "[j]udges ... have an obligation to set themselves apart from the political fray and the activism on behalf of

[1183] *Furundžija* Appeal Judgement, para 203.
[1184] Landžo Brief, p 26. *See* also Mucić Brief, para 5, p 5: "[...] it can reasonably be assumed that, by agreeing to be a trustee of the fund, Judge Odio Benito was sympathetic to its objectives and thus hostile to acts of torture and to those who were, or alleged to have been, engaged in those acts".
[1185] *Supra*, para 683, *see* also *Furundžija* Appeal Judgement, paras 196-197.
[1186] *Prosecutor v Brđanin and Talić*, Case No. IT-99-36-PT, Decision on Application by Momir Talić for the Disqualification and Withdrawal of a Judge, 18 May 2000, para 17.

causes".[1187] Such a submission is wholly inapposite to the present case. The purposes of the Victims of Torture Fund are not even remotely political, and Judge Odio Benito's membership of its Board of Trustees, with its overseeing role in the receipt and redistribution of donations for victims of torture, cannot be characterised as activism on behalf of a cause in any natural sense of the term.

702. It is clear that the Statute of the Tribunal, by requiring that the "experience of the judges in criminal law, international law, including humanitarian law and human rights law" be taken into account in composing the Chambers,[1188] anticipated that a number of the judges of the Tribunal would have been members of human rights bodies or would have worked in the human rights field. As Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was included on her curriculum vitae submitted by the Secretary-General to the General Assembly prior to the election of judges of the Tribunal in 1993 and 1997,[1189] it was no doubt considered to be relevant to her experience in the field of human rights law and therefore to the judicial qualification requirements. As noted in the *Furundžija* Appeal Judgement, it would be an odd result if the fulfilment of the qualification requirements of Article 13 were to operate as a disqualifying factor on the basis that it gives rise to an inference of bias.[1190] Counsel for Landžo was obliged to argue that such membership was both a qualification and a disqualification at the same time and that, given the prevalence of allegations of torture in cases to be tried by the Tribunal, Judge Odio Benito should accordingly have spent four years as a judge of the Tribunal doing absolutely nothing.[1191]

703. The appellants placed heavy reliance in their submissions upon the decision of the United Kingdom House of Lords decision in the *Pinochet* case, in which it was determined that a member of the House of Lords (Lord Hoffman) was disqualified from hearing an earlier case because he was a director and chairperson of a charitable organisation which was controlled by Amnesty International, an intervenor in the case.[1192] It was submitted that the facts of the two cases were "almost exactly the same",[1193] and that the result in both cases should be the same.[1194] The Appeals Chamber observes that a single decision from a national court does not (contrary to what was suggested by certain of the appellants' submissions) constitute any kind

[1187] Appeal Transcript, p 686.
[1188] Article 13.
[1189] General Assembly documents A/47/1006, 1 Sept 1993, p 58; A/51/878, p 59.
[1190] *Furundžija* Appeal Judgement, para 205.
[1191] Appeal Transcript, pp 687-689.
[1192] *R v Bow Street Metropolitan Stipendiary Magistrate and Others; Ex parte Pinochet Ugarte (No 2)* [1999] 2 WLR 272 ("*Pinochet* Decision").
[1193] Appeal Transcript p 684.

of definitive code for matters arising in the unique context of this international Tribunal. That said, the *Pinochet* Decision is nevertheless of some assistance in applying the law in the present case, because the legal principles it discussed in relation to judicial disqualification are substantially similar to the principles which the *Furundžija* Appeal Judgement has held to govern the issue of disqualification for bias in this Tribunal.[1195]

704. An examination of the reasoning of the members of the House of Lords in the *Pinochet* Decision, however, makes it quite apparent that it does not support the conclusions the appellants seek to draw from it. Contrary to the submissions of the appellants, it was critical to the actual result in that decision that Amnesty International was, as an intervenor in the earlier proceedings, a party to the litigation. The significance of the status of Amnesty International as a party to the proceedings lies in the fact that the House of Lords held that the circumstances in which a judge should be disqualified because of an appearance of bias encompass two categories of case. The first is that, where a judge is party to a litigation or has a relevant interest in its outcome, he is automatically disqualified from hearing the case. The second category is that a judge who is not party to the litigation, but whose conduct or behaviour in some other way gives rise to a reasonable suspicion that he is not impartial, is obliged to disqualify himself.[1196]

705. Lord Browne-Wilkinson, who gave the principal reasons for judgement and with whose reasons the other members of the House of Lords agreed,[1197] found that Lord Hoffman's circumstances fell within the first category of automatic disqualification. His Lordship held that automatic disqualification extended to any judge "who is involved, whether personally or as a director of a company, in promoting the same causes in the same organisation as is a party to the suit", and he found that Lord Hoffman "was disqualified as a matter of law automatically by reason of his directorship of AICL, a company controlled by a party, AI [Amnesty International]".[1198] Lord Browne-Wilkinson then reiterated the exceptional nature of the case, stating:

> The critical elements are (1) that AI was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) [and that] the judge was a director of a charity closely

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[1194] Landžo Brief, p 34.
[1195] The Appeals Chamber stresses that it does not intend in any way to depart from the principles expressed in the *Furundžija* Appeal Judgement on this issue.
[1196] *Pinochet* Decision, p 281.
[1197] *Pinochet* Decision, p 285 (Lord Goff of Chieveley); p 288 (Lord Nolan and Lord Hope of Craighead), p 291 (Lord Hutton).
[1198] *Pinochet* Decision, p 284.

> allied to AI and sharing, in this respect, AI's objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties.[1199]

In the present case, the Victims of Torture Fund was not a party to the *Čelebići* proceedings in any capacity. There was no evidence put forward by the appellants nor any indication of any kind that the Fund was allied to or acting with any party to the proceedings. Landžo submitted that, because both the Fund and the Tribunal are organs of the United Nations, the Fund has a common cause with the Office of the Prosecutor of the Tribunal.[1200] That submission is simply untenable. Even if it is accepted that, in the broadest sense of the concept, the Prosecutor and the Victims of Torture Fund have a common cause, that cause is simply one of opposition to the crime of torture. That is not a disqualifying common interest.

706. The second category of disqualification referred to by Lord Browne-Wilkinson, which substantially reflects the concept of reasonable apprehension of bias as expressed by the Appeals Chamber in relation to the Tribunal, is the only category relevant to the facts of the present case. Because of the conclusion that Lord Hoffman had been automatically disqualified by the application of the first category, Lord Browne-Wilkinson found it unnecessary to consider the question raised by the second category, namely whether the circumstances gave rise to a real danger or suspicion of bias.[1201] The decision is therefore of limited assistance in the present case.

707. The Appeals Chamber has already emphasised that, as there is a high threshold to reach in order to rebut the presumption of impartiality and before a judge is disqualified, the reasonable apprehension of bias must be "firmly established".[1202] The reason for this high threshold is that, just as any real appearance of bias of the part of a judge undermines confidence in the administration of justice, it would be as much of a potential threat to the interests of the impartial and fair administration of justice if judges were to disqualify themselves on the basis of unfounded and unsupported allegations of apparent bias. As has been observed in a decision cited by the Appeals Chamber in the *Furundžija* Appeal Judgement:

> It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party [....]. Although it is important

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[1199] *Pinochet* Decision, p 284. *See* also Lord Goff of Chieveley at p 286: "[...] we have to consider Lord Hoffmann [...] as a person who is, as a director and chairperson of AICL, closely connected with AI which is, or must be treated as, a party to the proceedings".
[1200] Landžo Brief, p 34; Landžo Reply, para 6.26.
[1201] *Pinochet* Decision, p 284.
[1202] *Furundžija* Appeal Judgement, par 197.

> that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of apparent bias, encourage parties to believe that, by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.[1203]

708. The Appeals Chamber is not satisfied that a reasonable and informed observer would consider that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund would render her unable to consider and determine with an impartial and unbiased mind the matters, including charges of torture, which were before her in the *Čelebići* trial. There was therefore no basis upon which Judge Odio Benito should have disqualified herself, nor (taking the second limb of the appellants' argument) any requirement that she make a formal disclosure of her membership of the Board and obtain consent to proceed from the parties to the *Čelebići* case. Although the issue of disclosure is therefore not strictly relevant, the Appeals Chamber does note that Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was a matter of public knowledge,[1204] published in three successive Year Books of the Tribunal,[1205] and in documents of the United Nations General Assembly.[1206]

709. Accordingly, Delić Issue 2, Mucić Ground 2 and Landžo Ground 3 are dismissed.

[1203] Per Mason J, *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352 (High Court of Australia), adopted unanimously by the High Court of Australia in *Re Polites; Ex parte Hoyts Corporation Pty Ltd* (1991) 65 ALJR 444 at 448; cited in the *Furundžija* Appeal Judgement at para 197.

[1204] The Appeals Chamber has already observed in the *Furundžia* Appeal Judgement that because of the numerous public sources of information about the qualifications and associations of Judges of the Tribunal, such information is freely available to the parties: *Furundžia* Appeal Judgement, para 173.

[1205] Yearbook for 1994, p 200; Yearbook for 1995, p 355; Yearbook for 1996, p 23. The fact of Judge Odio Benito's membership of the Board of Trustees of the Victims of Torture Fund was also in the Yearbook for 1997 (p 28) which was published after the conclusion of the *Čelebići* trial.

[1206] General Assembly documents A/47/1006, 1 Sept 1993, p 58; A/51/878, p 59. *See* above para 702.

XIV. GROUNDS OF APPEAL RELATING TO SENTENCING

A. Introduction

710. The Appeals Chamber has decided to quash certain of the convictions entered against Landžo, Mucić and Delić where there was more than one conviction imposed on the basis of the same facts. As noted above, it is therefore necessary to consider whether, in relation to those convictions quashed on the basis of cumulative convictions considerations, the sentences imposed upon them in relation to the remaining convictions should be adjusted.

711. Because the Appeals Chamber has had no submissions from the parties on these issues and, because there may be matters of important principle involved, it will be necessary for such consideration to be given after the parties have had the opportunity to make relevant submissions. As the Appeals Chamber cannot be reconstituted in its present composition, and as, in any event, a new matter of such significance should be determined by a Chamber from which an appeal is possible, the Appeals Chamber proposes to remit these issues for determination by a Trial Chamber.

712. As it will be an issue as to whether any *adjustment* should be made to the sentences because of the matters referred to above, and not a complete rehearing on the issue of sentence, it is appropriate that the Appeals Chamber consider and resolve the issues raised in the parties' grounds of appeal relating to sentence insofar as they allege the commission of errors in the exercise of discretion or other errors of law by the Trial Chamber in imposing those sentences, so that the new Trial Chamber will then be in a position to consider what, if any, adjustment should be made to what the Appeals Chamber considers would otherwise have been appropriate sentences.

713. In addition, the Appeals Chamber has determined that the conviction of Delić on Counts 1 and 2 of the Indictment must be quashed on the basis that it was not open to the Trial Chamber to have convicted him on those counts. It would be convenient, when the matter is remitted, for the new Trial Chamber also to consider what adjustments should be made to the sentence of Delić in relation to the reversal of his conviction on those counts.

714. Before turning to consider the issues raised in the parties' particular grounds of appeal relating to sentence, as referred to above, the Appeals Chamber considers it appropriate to first address several general considerations.

715. The Prosecution submits that the Appeals Chamber should determine "basic sentencing principles which should be applied by the Trial Chambers."[1207] The Appeals Chamber notes that the Prosecution made similar submissions in the case of *Furundžija* before the Appeals Chamber, arguing that such principles would assist in order to achieve consistency and even-handedness in sentencing before the Trial Chamber.[1208] The Appeals Chamber in that case decided that, since only certain matters relating to sentencing were at issue, it was inappropriate to set down a definitive list of sentencing guidelines for future reference.[1209]

716. The benefits of such a definitive list are in any event questionable. Both the Statute (Article 24) and the Rules (Rule 101) contain general guidelines for a Trial Chamber to take into account in sentencing. These amount to an obligation on the Trial Chamber to take into account aggravating and mitigating circumstances (including substantial co-operation with the Prosecution), the gravity of the offence, the individual circumstances of the convicted person and the general practice regarding prison sentences in the courts of the former Yugoslavia.[1210] Other than these general principles, no detailed guidelines setting out, for example, what particular factors may be taken into account in mitigation or aggravation of sentence are provided in either the Statute or the Rules.[1211]

717. Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing. This is largely because of the over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime. To achieve this goal, Trial Chambers are obliged to consider both aggravating and mitigating circumstances relating to an individual accused. The many

[1207] Prosecution Reply, para 5.8 and Appeal Transcript, p 730.
[1208] *Prosecutor v Anto Furundžija,* Prosecution Submission of Public Version of Confidential Respondent's Brief of the Prosecution Dated 30 Sept 1999, 28 June 2000, Case No IT-95-17/1-A, para 7.17.
[1209] *Furundžija* Appeal Judgement, para 238.
[1210] It is also obliged to take into account the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute (Rule 101(B)(iv).
[1211] This was also the case with the implementing legislation for the post-World War II trials (including the International Military Tribunals held at Nuremberg and Tokyo). Article 27 of the Nuremberg Charter provided simply that "the Tribunal shall have the right to impose upon a Defendant on conviction, death or such other

circumstances taken into account by the Trial Chambers to date are evident if one considers the sentencing judgements which have been rendered.[1212] As a result, the sentences imposed have varied, from the imposition of the maximum sentence of imprisonment for the remainder of life,[1213] to imprisonment for varying fixed terms (the lowest after appeal being five years[1214]). Although certain of these cases are now under appeal, the underlying principle is that the sentence imposed largely depended on the individual facts of the case and the individual circumstances of the convicted person.[1215]

718. The Appeals Chamber accordingly concludes that it is inappropriate for it to attempt to list exhaustively the factors that it finds should be taken into account by a Trial Chamber in determining sentence.

719. It is noted that, in their submissions, each party urges the Appeals Chamber to compare their case with others which have already been the subject of final determination, in an effort to persuade the Appeals Chamber to either increase or decrease the sentence.[1216]

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punishment *as shall be deemed by it to be just*" (Emphasis added). A similar provision is found in Article 16 of the Charter of the International Military Tribunal for the Far East.

[1212] *See e.g.*: *Prosecutor v Tadić,* Sentencing Judgement, Case No IT-94-1-T*bis*-R117, 11 Nov 1999 para 19 (reference to willingness to commit crimes, awareness and enthusiastic support for the attacks); *Prosecutor v Tadić,* Sentencing Judgement, Case No IT-94-1-T, 14 July 1997, paras 56-58 (reference in general to cruel and willing manner in which crimes carried out); *Blaškić* Judgement, paras 783-787 (reference to motive, number of victims, effect of the crime upon victims). Remorse has been considered in for example, the *Blaškić* Judgement at para 775 and *Prosecutor v Jelisić,* Case No IT-95-10-T, 14 Dec 1999 para 127.

[1213] No sentences of imprisonment for the remainder of life have been imposed by this Tribunal. However, they have been by the ICTR. *See Kambanda* Appeal Judgement; *Prosecutor v Rutaganda,* Judgement and Sentence, Case No ICTR-96-3-T, 6 Dec 1999; *Prosecutor v Musema,* Judgement and Sentence, Case No ICTR-96-13-T, 27 Jan 2000; *Prosecutor v Kayishema,* Sentence, Case No ICTR-95-1-T, 21 May 2000; and *Prosecutor v Akayesu,* Sentence, Case No ICTR-96-4-T, 2 Oct 1998.

[1214] In the case of *Dražen Erdemović.* The sentence of 2 ½ years originally imposed by the Trial Chamber on *Zlatko Aleksovski* was revised by the Appeals Chamber to seven years. Other fixed terms include *Goran Jelisić,* who received 40 years, *Tihomir Blaškić,* who received 45 years, *Anto Furundžija,* who received ten years (maximum sentence), *Duško Tadić,* who received 20 years (maximum sentence) and *Omar Serushago,* who received 15 years.

[1215] *Blaškić* Judgement, para 765: "The factors taken into account in the various Judgements of the two International Tribunals to assess the sentence must be interpreted in the light of the type of offence committed and the personal circumstances of the accused. This explains why it is appropriate to identify the specific material circumstances directly related to the offence in order to evaluate the gravity thereof and also the specific personal circumstances in order to adapt the sentence imposed to the accused's character and potential for rehabilitation. Notwithstanding this, in determining the sentence, the weight attributed to each type of circumstance, depends on the objective sought by international justice." *Prosecutor v Akayesu,* Sentence, Case No ICTR-96-4-T, 2 Oct 1998, para 20: "It is a matter, as it were, of individualising the penalty." *Prosecutor v Rutaganda,* Judgement and Sentence, Case No ICTR-96-3-T, 6 Dec 1999, para 457; *Furundžija* Appeal Judgement, para 249: "In deciding to impose different sentences for the same type of crime, a Trial Chamber may consider such factors as the circumstances in which the offence was committed and its seriousness."; *Prosecutor v Musema,* Case No ICTR-96-13-T, 27 Jan 2000, para 987.

[1216] For example, the Prosecution refers to the case of *Zlatko Aleksovski* (Appeal Transcript, pp 734 and 735); Mucić refers to *Duško Tadić* (Delić/Mucić Supplementary Brief, paras 41-48); and Landžo and Delić both refer to *Dražen Erdemović* (Landžo Brief, p 141 and Appeal Transcript, p 752 and Delić Brief, para 361) and *Duško*

Although this will be considered further in the context of the individual submissions, the Appeals Chamber notes that as a general principle such comparison is often of limited assistance. While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results. They are therefore not reliable as the *sole* basis for sentencing an individual.

720. This question has already been considered twice by the Appeals Chamber, and it was concluded in the first such decision that, as the facts of the two cases in question were materially different, assistance from the first rendered was limited.[1217] In the case of *Anto Furundžija,* the Prosecution submitted that "every sentence imposed by a Trial Chamber must be individualised as there are a great many factors to which the Trial Chamber may have regard in exercising its discretion in each case."[1218] The Appeals Chamber endorses the finding in that case:

> The sentencing provisions in the Statute and the Rules provide Trial Chambers with the discretion to take into account the circumstances of each crime in assessing the sentence to be given. A previous decision on sentence may indeed provide guidance if it relates to the same offence and was committed in substantially similar circumstances; otherwise a Trial Chamber is limited only by the provisions of the Statute and the Rules.[1219]

721. Therefore, while the Appeals Chamber does not discount the assistance that may be drawn from previous decisions rendered, it also concludes that this may be limited. On the other hand, it reiterates that, in determination of sentence, "due regard must be given to the relevant provisions in the Statute and the Rules which govern sentencing, as well as the relevant jurisprudence of this Tribunal and the ICTR, and of course to the circumstances of each case."[1220]

722. Finally, the Appeals Chamber notes that each party has made some submissions as to the standard of review in an appeal against sentence under Article 25 of the Statute.[1221]

Tadić (Landžo Brief, pp 141–143 and Appeal Transcript, pp 752-754, Delić Brief, para 361 and Delić/Mucić Supplementary Brief, paras 36-40).

[1217] *Serushago* Sentencing Appeal Judgement, para 27, distinguishing the case of *Dražen Erdemović.*

[1218] *Furundžjia* Appeal Judgement, para 222 (Footnote omitted).

[1219] *Furundžjia* Appeal Judgement, para 250.

[1220] *Furundžjia* Appeal Judgement, para 237.

[1221] Article 25 of the Statute provides: "1. 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

Certain parties in particular appear to be requesting that the Appeals Chamber revisit the findings of the Trial Chamber, carrying out a *de novo* review of the sentence and factors taken into account by the Trial Chamber, without necessarily pointing to any abuse of discretion. Landžo requests that the Appeals Chamber essentially reconsider the evidence and mitigating circumstances submitted on his behalf before the Trial Chamber, including that provided orally by several defence witnesses. In doing so, he asks the Appeals Chamber to carry out a *de novo* review of his sentence on appeal.[1222] Although neither Delić nor Mucić make detailed submissions in relation to the standard of review to be applied in an appeal against sentence,[1223] it appears to the Appeals Chamber that they are also essentially requesting a similar *de novo* review of the sentence imposed by the Trial Chamber, despite the fact that they also point to several factors and arguments which they believe were wrongly decided by the Trial Chamber or to which they submit insufficient weight was attached.[1224]

723. The Prosecution submits that, in accordance with the Appeals Chamber decisions in the *Tadić* Sentencing Appeal Judgement[1225] and the *Aleksovski* Appeal Judgement,[1226] the test that should be applied is the "discernible error test." That is, before the Appeals Chamber may intervene, "there must be a discernible error in the exercise of the Trial Chamber's discretion in sentencing."[1227] Once this discernible error has been identified, the

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the decision; or (b) An error of fact which has occasioned a miscarriage of justice. 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers."

[1222] Landžo Brief, p149, Appeal Transctipt, pp 756-7: "Mr Landžo requests this Trial Chamber now just to reconsider the evidence that we submitted in sentencing, reconsider the fragile mental condition of Mr Landžo before the outbreak of the aggression, his lack of ability to exercise his own free will, and also in light of Tadić, to revisit all of the evidence presented."

[1223] In the Delić Brief (paras 249-265) and Delić Reply (paras 3-12), Delić makes submissions on the standard of review on appeal in general. However, he does not clarify his submissions in relation to the standard of review to be applied on sentence. Mucić makes no submissions on the standard of review to be applied on appeal against either conviction or sentence, nor does he reply to the Prosecution submissions in this regard (Prosecution Response, paras 2.1-2.23). However, given the nature of his arguments (to be discussed *infra*), it also appears that he is requesting that the Appeals Chamber carry out a *de novo* review of sentence.

[1224] For example, Mucić submits that "taking all matters raised [...] the sentence of 7 years imposed upon him should be reduced to one that more properly and justly reflects any findings that remain unsubstantiated following the determination of his appeal against conviction, and the merits of his appeal against sentence." Mucić Brief, Appeal Against Sentence, pp. 7-8.

[1225] *Tadić* Sentencing Appeal Judgement, paras 20-22 and para 73.

[1226] *Aleksovski* Appeal Judgement, para 187.

[1227] Appeal Transcript, pp 729-730.

Prosecution submits that "the Appeals Chamber can revise the Trial Chamber's sentence and substitute a new sentence."[1228]

724. The Appeals Chamber reiterates that "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing."[1229] Appeal proceedings are rather of a "corrective nature" and, contrary to *Landžo's* submissions, they do not amount to a trial *de novo.*[1230] Therefore, to the extent that the parties simply resubmit arguments presented at trial without pointing to a particular error, this misconceives the purpose of appellate review on sentence.

725. The test to be applied in relation to the issue as to whether a sentence should be revised is that most recently confirmed in the *Furundžija* Appeal Judgement.[1231] Accordingly, as a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law."[1232] The Appeals Chamber will only intervene if it finds that the error was "discernible".[1233] As long as a Trial Chamber does not venture outside its "discretionary framework" in imposing sentence,[1234] the Appeals Chamber will not intervene. It therefore falls on each appellant, including the Prosecution in its appeal against Mucić's sentence, to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing the sentence it did.

B. Prosecution's Appeal Against Mucić's Sentence

726. The Prosecution's fourth ground of appeal is that the Trial Chamber erred when it sentenced Zdravko Mucić to seven years' imprisonment, as this sentence was "manifestly inadequate".[1235]

[1228] Appeal Transcript, p 743. *See* also *Aleksovski* Appeal Judgement, paras 186 and 191. Although the Prosecution did make further submissions in the Prosecution Brief (paras 5.5-5.6) and in the Prosecution Response (paras 2.1-2.23), these are subsumed by the submissions made during the oral hearing on appeal, following the two decisions of the Appeals Chamber (referred to above).
[1229] *Prosecutor v Dražen Erdemović,* Case No IT-96-22-A, Judgement, 7 Oct 1997, para 15.
[1230] *Prosecutor v Duško Tadić*, Case No IT-94-1-A, Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 Oct 1998, paras 41 - 42.
[1231] *Furundžjia* Appeal Judgement, para 239.
[1232] *Serushago* Sentencing Appeal Judgement, para 32. *See* also *Aleksovski* Appeal Judgement, para 187 and *Tadić* Sentencing Appeal Judgement, paras 20-22.
[1233] *Tadić* Sentencing Appeal Judgement, para. 22. *Aleksovski* Appeal Judgement, para 187.
[1234] *Tadić* Sentencing Appeal Judgement, para. 20.
[1235] Prosecution Brief, para 5.4.

727. Mucić was found by the Trial Chamber to have been directly responsible under Article 7(1) for the crimes of cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp, and of unlawful confinement of civilians (Counts 46, 47 and 48). He was also found guilty as a superior under Article 7(3) of the Statute, in relation to the following counts:[1236]

> Counts 13 and 14: the wilful killing and murder of nine people – Zeljko Ćećez, Petko Gligorević, Gojko Miljanić, Miroslav Vujičić and Pero Mrkajić, Sćepo Gotovac, Zeljko Milošević, Simo Jovanović and Boško Samouković – and cruel treatment and wilfully causing great suffering or serious injury to Slavko Šušic;
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> Counts 33 and 34: the torture of six people – Milovan Kuljanin, Momir Kuljanin, Grozdana Ćećez, Milojka Antić, Spasoje Miljević and Mirko Đorđić;
>
> Counts 38 and 39: the cruel treatment and wilfully causing great suffering or serious injury to three people – Dragan Kuljanin, Vukašin Mrkajić and Nedeljko Draganić – and the inhuman treatment and cruel treatment of Mirko Kuljanin; and
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> Counts 44 and 45: the inhuman treatment and cruel treatment of six people – Milenko Kuljanin, Novica Đorđić, Vaso Đorđić, Veseljko Đorđić, Danilo Kuljanin and Miso Kuljanin.
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> Counts 46 and 47: the cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp (this finding being in addition to the finding of guilty on these counts pursuant to Article 7(1) of the Statute.)

728. The Trial Chamber sentenced Mucić to seven years imprisonment in respect of each count for which he was found guilty, and ordered that those sentences be served

[1236] The Appeals Chamber has found that one of the two convictions which were entered cumulatively in respect of charges arising from the same facts should be vacated. However, for the purposes of determining whether the Trial Chamber erred as alleged by the Prosecution in relation to the determination of Mucić's sentence, the Appeals Chamber must proceed on the basis of the convictions which the Trial Chamber had entered. The effect of the quashing of particular grounds on the basis of cumulative convictions considerations is discussed further below.

concurrently.[1237] As a result, the overall sentence imposed was a period of not more than seven years.

729. The Prosecution contends that the Trial Chamber's approach in sentencing Mucić "involved errors of basic principle, and that the sentence it imposed on Mucić was so low that it fell outside the proper limits of the Trial Chamber's discretion".[1238] The errors alleged by the Prosecution were identified separately in relation to those convictions based solely on Article 7(3), the conviction based on Article 7(1) alone, and the convictions based on both Article 7(1) and Article 7(3) liability. The primary argument relates to the Trial Chamber's alleged failure to take into account the gravity of the crimes for which Mucić was convicted. It is also alleged that the Trial Chamber should have taken into account crimes not specifically alleged in the indictment in sentencing Mucić.[1239] Finally, the Prosecution argues that the Trial Chamber erred in determining that all of the sentences imposed on Mucić should be served concurrently.[1240] Mucić argued in relation to his own ground of appeal against sentence that his sentence was too high and did not take into account certain matters in mitigation, including the absence of his direct participation in acts of violence.[1241]

1. Failure to take into account the gravity of the offences

730. Article 24(2) of the Statute of the Tribunal provides:

> In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.

731. The Trial Chamber found, in its general considerations before addressing the factors relevant to each individual accused, that "[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence".[1242] In the subsequent *Aleksovski* Appeal Judgement, the Appeals Chamber expressly endorsed this statement of the *Čelebići* Trial Chamber, and also expressed its agreement with the following statement of the Trial Chamber in the *Kupreškić* proceedings:

[1237] Trial Judgement, para 1286.
[1238] Prosecution Brief, para 5.6.
[1239] Prosecution Brief, paras 5.34-5.43.
[1240] Prosecution Brief, paras 5.54-5.75.
[1241] Mucić Brief, Appeal Against Sentence, pp 1-2. This submission in respect of the absence of findings as to his direct participation is effectively incorporated in the Appeals Chambers' consideration of the Prosecution ground

> The sentence to be imposed must reflect the inherent gravity of the criminal conduct of the accused. The determination of the gravity of the crime requires a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[1243]

The Appeals Chamber reiterates this endorsement of those statements and confirms its acceptance of the principle that the gravity of the offence is the primary consideration in imposing sentence. It is therefore necessary to consider whether the Trial Chamber in fact gave due weight to the gravity of the offences for which Mucić was convicted in the sentence it imposed.

(a) Convictions under Article 7(3) alone

732. The Prosecution first submitted that there are two aspects to an assessment of the gravity of offences committed under Article 7(3) of the Statute:

> (1) the gravity of the underlying crime committed by the convicted person's subordinate; and
>
> (2) the gravity of the convicted person's own conduct in failing to prevent or punish the underlying crimes.[1244]

The Appeals Chamber agrees that these two matters must be taken into account. As a practical matter, the seriousness of a superior's conduct in failing to prevent or punish crimes must be measured to some degree by the nature of the crimes to which this failure relates. A failure to prevent or punish murder or torture committed by a subordinate must be regarded as being of greater gravity than a failure to prevent or punish an act of plunder, for example.[1245]

733. The Prosecution submits that the Trial Chamber failed to make the gravity of Mucić's offences the starting point in its determination of his sentence. It suggests first that this is demonstrated by the point at which the Trial Chamber referred to "gravity" in its

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of appeal but in relation to other matters in mitigation is considered further below in relation to Mucić's ground of appeal.

[1242] Trial Judgement, para 1225.

[1243] *Kupreškić* Judgement, para 852, cited in the *Aleksovski* Appeal Judgement at para 182.

[1244] Prosecution Brief, para 5.13.

[1245] Mucić contends that the Prosecution's approach indicates that it mischaracterises the offences of a superior as being the "same crime" as that of the subordinate upon which the superior's offence is based: Mucić Response, para 10. The Prosecution Brief does contain some references which could be understood in this way: *e.g.*, para 5.24. The Appeals Chamber's conclusion, however, is not based on any such reasoning but simply recognises the inevitable relationship between the gravity of the superior's failure to prevent or punish criminal conduct and the criminal conduct to which that failure relates.

discussion of the factors relevant to sentencing Mucić. It notes that, after referring to the crimes of which Mucić was found guilty, the Trial Chamber referred to a "wide range of matters relevant to sentencing" and then "almost as an afterthought" stated that it "had 'also' considered the gravity of the offences".[1246] The fact that as a matter of form the Trial Chamber's referred last to its consideration of the gravity of the offences is of no significance of itself, and it certainly does not demonstrate independently that the Trial Chamber did not in fact give appropriate consideration to that matter. It is necessary, in order to determine that question, to focus on matters relating to the substance of the Trial Chamber's Judgement.

734. In relation to those offences for which Mucić was convicted under Article 7(3) of the Statute, the Prosecution alleges that the Trial Chamber erred in law by proceeding on the basis that Article 7(3) liability is less serious than that under Article 7(1). The Prosecution stated in its written submissions:

> [...] it is evident that the Trial Chamber's sentence was premised on a view that the conduct of a superior convicted under Article 7(3) is *inherently less grave* than the conduct of the individual subordinates who committed the relevant offences.[1247]

It supports this interpretation of the Trial Chamber's judgement with a comparison between the sentences received by Mucić and Delić in respect of counts 13 and 14.

735. It would be incorrect to state that, as a matter of law, responsibility for criminal conduct as a superior is less grave than responsibility as the subordinate perpetrator. However, in the Appeals Chamber's view, and contrary to the Prosecution's submission, nothing in the Trial Chamber's judgement indicates that it believed that responsibility for criminal conduct as a superior is *inherently* less grave than responsibility as the subordinate perpetrator. It appears from the Trial Chamber's Judgement that it considered that, *in the circumstances established by the evidence*, the conduct of *Mucić* in respect of the relevant counts was of a lesser gravity and therefore deserved a lesser sentence than that imposed on the subordinates. The Trial Chamber referred to these circumstances in noting that, in relation to the counts for which Mucić had been guilty under Article 7(3) alone, he was not found to have actively participated in the conduct underlying the offences.[1248]

[1246] Prosecution Brief, para 5.11.
[1247] Prosecution Brief, para 5.23 (emphasis added).
[1248] Trial Judgement, para 1239.

736. In the opinion of the Appeals Chamber, proof of active participation by a superior in the criminal acts of subordinates adds to the gravity of the superior's failure to prevent or punish those acts and may therefore aggravate the sentence.[1249] The Trial Chamber explicitly acknowledged in its observations as to general sentencing principles that active abuse of a position of authority, which would presumably include participation in the crimes of subordinates, can aggravate liability arising from superior authority:

> The conduct of the accused in the exercise of his superior authority could be seen as an aggravating circumstance or in mitigation of his guilt. There is no doubt that abuse of positions of authority or trust will be regarded as aggravating.[1250]

737. It must also be recognised, however, that absence of such active participation is not a mitigating circumstance. Failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active participation in the crimes does not reduce that culpability.

738. In assessing the degree of Mucić's responsibility, the Trial Chamber evidently concluded that there was no reason for aggravation of Mucić's sentence on the basis of abuse of authority, apparently because of its finding that Mucić had not actively participated in the underlying offences.[1251] However, the Trial Chamber had also made findings that Mucić was camp commander, with overall authority over the officers, guards and detainees in the camp; that he was responsible for conditions in the camp; that he made "*no* effort to prevent or punish those who mistreated the prisoners or even to investigate specific incidents of mistreatment including the death of detainees"; and that he was regularly absent from the camp for days "in obvious neglect of his duty as commander and the fate of the vulnerable detainees".[1252] Importantly, the Trial Chamber found that Mucić's failures to prevent or punish the unlawful conduct in the camp were ongoing:

> In apparent encouragement, he tolerated these conditions over the entire period he was commander of the prison camp.[1253]

739. The Prosecution submits that a superior's failure over an extended period of time to prevent or punish crimes committed on an ongoing basis may be regarded as encouraging the commission of crimes, as the first failures to prevent or punish encourage the

[1249] *Aleksovski* Appeal Judgement, para 183.
[1250] Trial Judgement, para 1220.
[1251] Trial Judgement para 1240.
[1252] Trial Judgement, para 1243. (Emphasis added).
[1253] Trial Judgement, para 1243.

commission of subsequent crimes, and that such a failure should therefore be regarded as more serious than a single failure to prevent an isolated crime by a subordinate.[1254] The Appeals Chamber agrees that such an ongoing failure to exercise the duties to prevent or punish, with its implicit effect of encouraging subordinates to believe that they can commit further crimes with impunity, must be regarded as being of significantly greater gravity than isolated incidents of such a failure. The Appeals Chamber is of the view that, from the facts found by the Trial Chamber, Mucić's consistent failure to act in relation to the conditions and unlawful conduct within the camp must have had such an encouraging effect.

740. Although the Trial Chamber referred to the fact that Mucić's toleration of the unlawful conditions within the camp constituted apparent encouragement, the Appeals Chamber is not satisfied that the Trial Chamber took this factor adequately into account in its consideration of Mucić's sentence. This is suggested by the Trial Chamber's comments, made in relation to factors going to the mitigation of sentence, that:

> The scenario thus described would suggest the recognition of individual failing as an aspect of human frailty, rather than one of individual malice. The criminal liability of Mr. Mucić has arisen entirely from his failure to exercise his superior authority for the beneficial purpose of the detainees in the Čelebići prison-camp. [1255]

This description of Mucić's position – which suggests a purely "negative" liability by omission on Mucić's part - indicates no acknowledgement of the more influential effect of encouraging or promoting crimes and an atmosphere of lawlessness within the camp created by Mucić's ongoing failure to exercise his duties of supervision. The Trial Chamber later stated that:

> In this particular case, the reason for staying away from the prison-camp at nights without making provision for discipline during these periods, which was to save himself from the excesses of the guards, is rather an aggravating factor.[1256]

This does not satisfy the Appeals Chamber that the degree of encouragement and reinforcement of the criminal conduct of his subordinates that arose from Mucić's ongoing failure to supervise was correctly taken into account. The statement quoted indicates rather that his efforts to save himself from further knowledge of the crimes, as a self-interested attempt at avoiding unpleasantness, was a matter independent of the fact that these absences also had the effect of reinforcing the atmosphere of lawlessness in the camp. It was

[1254] Prosecution Brief, paras 5.16-5.17.
[1255] Trial Judgement, para 1248.
[1256] Trial Judgement, para 1250.

certainly appropriate to characterise Mucić's absences from the camp in the way the Trial Chamber did, but this did not absolve the Trial Chamber of the need also to consider the serious effect of encouragement of the commission of crimes that was caused by Mucić's failure of supervision.

741. As noted above, a consideration of the gravity of offences committed under Article 7(3) of the Statute involves, in addition to a consideration of the gravity of the conduct of the superior, a consideration of the seriousness of the underlying crimes. The fact that the Trial Chamber did not take adequate account of the gravity of Mucić's offences, and specifically of the underlying crimes, is also demonstrated by the fact that the sentences imposed in respect of each count were identical: seven years for each count. The Trial Chamber imposed individual sentences in relation to each count rather than a single global sentence, as appears to have been contemplated by the Rules at that time.[1257] The process of determining the individual sentences for those counts requires a consideration of the particular offence in respect of which that count was charged and the evidence of the circumstances in which that offence was committed to enable a determination of the gravity of the offence. The imposition of exactly the same penalty for each count, whether in respect of the failure to prevent or punish the murders of nine people (counts 13 and 14) or the failure to prevent or punish the cruel treatment of four people (counts 38 and 39), and the order that they be served concurrently, demonstrates that the Trial Chamber made no attempt to distinguish between the gravity of each of the offences. It effectively simply imposed a global sentence of seven years to cover every offence, which was a manifestly erroneous assessment of the totality of Mucić's conduct. An alternative implication is that the Trial Chamber considered that the criminal conduct of Mucić was effectively the same under each count – a failure to prevent or punish. However, as the Appeals Chamber has made clear, such an approach fails to take account of the essential consideration that the gravity of the failure to prevent or punish is in part dependent on the gravity of the underlying subordinate crimes.

[1257] Rule 87 (C) provided at the relevant time "If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt." It has since been amended (Revision 19, effective from 19 Jan 2001) to read "If the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

742. The Appeals Chamber is satisfied that the Trial Chamber did not take adequate account of the gravity of Mucić's offences under Article 7(3) in determining his sentence, and has therefore failed to have regard to a consideration it must have regard to, in imposing his sentence.

(b) Convictions on the basis of both direct and superior responsibility (Counts 46 and 47)

743. In relation to the offences for which Mucić was convicted pursuant to both Article 7(1) and Article 7(3) – wilfully causing great suffering or serious injury to body or health (Count 46) and cruel treatment, in respect of the inhumane conditions in the camp (Count 47) – the Prosecution contends that the Trial Chamber also failed to take into account the gravity of the crimes for the additional reason that his liability as a direct participant as well as a superior should have been taken into account as an aggravating factor.[1258]

744. The Trial Chamber found that:

> By omitting to provide the detainees with adequate food, water, health care and toilet [facilities] Zdravko Mucić participated in the maintenance of the inhumane conditions that prevailed in the Čelebići prison-camp. Accordingly, he is directly liable for these conditions, pursuant to Article 7(1) of the Statute. Furthermore, in his position of superior authority Zdravko Mucić knew, or had reason to know, how the detainees, by the violent acts of his subordinates, were subjected to an atmosphere of terror, but failed to prevent these acts or to punish the perpetrators thereof. Accordingly, the Trial Chamber finds that Zdravko Mucić is responsible pursuant to Article 7(3) of the Statute for the atmosphere of terror prevailing in the Čelebići prison-camp.[1259]

The Trial Chamber entered convictions against counts 46 and 47, each count encompassing both the Article 7(1) liability and the Article 7(3) liability. In sentencing, the Trial Chamber referred to the fact of Mucić's dual liability under each of counts 46 and 47,[1260] but did not refer to this matter in its consideration of the relevant aggravating factors in relation to Mucić's sentence.

745. Where criminal responsibility for an offence is alleged under one count pursuant to both Article 7(1) and Article 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be

[1258] Prosecution Brief paras 5.45-5.46.
[1259] Trial Judgement, para 1123.
[1260] Trial Judgement, paras 1237 and 1240.

considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Article 7(3) responsibility (as discussed above) *or* the accused's seniority or position of authority aggravating his direct responsibility under Article 7(1).[1261] The *Aleksovski* Appeal Judgement has recognised both such matters as being factors which should result in an increased or aggravated sentence. The accused in that case, also a prison commander, had been found guilty of certain crimes on the basis of Article 7(1) of the Statute, for others on the basis of Article 7(3), and for others under both Articles. In relation to those offences of which he was convicted for his direct participation, the Appeals Chamber observed that the accused's "superior responsibility as a warden seriously aggravated [his] offences."[1262] It proceeded to state:

> The Appellant did more than merely tolerate the crimes as a commander; with his direct participation he provided additional encouragement to his subordinates to commit similar acts. The combination of these factors should, therefore, have resulted in a longer sentence and should certainly not have provided grounds for mitigation.[1263]

746. Here, the Trial Chamber found Mucić guilty under each of counts 46 and 47 both for his direct responsibility for the inhuman conditions prevailing in the camp, and also for his superior responsibility for the atmosphere of terror created in the camp by the guards over whom he held authority. Although the absence of any specific reference in the Trial Judgement to the dual responsibility of Mucić for the offences encompassed by counts 46 and 47 is not determinative of the question as to whether the Trial Chamber actually took it into account in sentencing Mucić, the Appeals Chamber is not satisfied that, in determining a sentence of seven years for this count, it did so. Although the Trial Chamber clearly considered the severity of the conditions which Mucić directly participated in creating, and the violence and humiliation meted out to detainees by the guards,[1264] it is not apparent that the Trial Chamber fully recognised in its sentence that this conduct encompassed two types

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[1261] This observation applies only if the two types of responsibility are not independently charged under different counts, with separate sentences imposed on each. A different situation may arise of two separate counts against an accused, one alleging Article 7(1) responsibility for direct or accessory participation in a particular criminal incident, and another alleging Article 7(3) responsibility for failure to prevent or punish subordinates for their role in the same incident. If convictions and sentences are entered on both counts, it would not be open to aggravate the sentence on the Article 7(3) charge on the basis of the additional direct participation, nor the sentence on the Article 7(1) charge on the basis of the accused's position of authority, as to do so would impermissibly duplicate the penalty imposed on the basis of the same conduct.

[1262] *Aleksovski* Appeal Judgement, para 183.

[1263] *Aleksovski* Appeal Judgement, para 183.

[1264] Trial Judgement, para 1242.

of criminal responsibility which were both individually of considerable gravity. The length of the sentence imposed strongly suggests that it did not do so.

(c) Gravity of the offence of unlawful confinement (Count 48).

747. Mucić was convicted of unlawful confinement of civilians (Count 48) pursuant to Article 7(1) alone, and was sentenced to seven years imprisonment on that count. The Prosecution submits that "the Trial Chamber gave virtually no consideration to the appropriate sentence in relation to this count".[1265] It points to the Trial Chamber's statement, made after its discussion of various aggravating and mitigating factors in relation to Mucić, that:

> The criminal liability of Mr Mucić has arisen entirely from his failure to exercise his superior authority for the beneficial purpose of the detainees in the Čelebići prison-camp.[1266]

The Prosecution says that this demonstrates that the Trial Chamber failed to take account, in sentencing Mucić, of his own conduct which directly resulted in the unlawful confinement of civilians.[1267]

748. The Trial Chamber's statement that Mucić's criminal liability arose "*entirely* from his failure to exercise his superior authority for the beneficial purpose of the detainees", if understood to refer to "superior authority" in the sense of responsibility pursuant to Article 7(3) of the Statute (the most natural understanding of the phrase in this context), is clearly wrong. It fails to take into account the Trial Chamber's findings that Mucić's liability in relation to Count 48 was founded solely on his *direct* responsibility under Article 7(1), and that he was responsible for cruel treatment and wilfully causing great suffering or serious injury to body or health under counts 46 and 47 on the basis of Article 7(1), in addition to as a superior under Article 7(3). It is possible that the Trial Chamber was simply intending to refer to the fact that Mucić's criminal liability arose entirely from his conduct in his role as camp commander, or as counsel for Mucić contends, his "authority" in a general sense.[1268] That would not misstate the position, since Mucić's direct liability for unlawful confinement arose from his failures to exercise his power as camp commander to release detainees he was aware were unlawfully detained, and his Article 7(1) responsibility for the

[1265] Prosecution Brief, para 5.48.
[1266] Trial Judgement, para 1248.
[1267] Prosecution Brief, para 5.50.

inhumane conditions in the camp arose from his failure as camp commander to provide adequate facilities for the detainees. Given the Trial Chamber's acknowledgement earlier in the section on the sentencing of Mucić that he was not found guilty of actively participating in the offences, "*with the exception of* counts 46 and 47 (inhumane conditions) and count 48 (unlawful confinement of civilians)", the Appeals Chamber is not satisfied that the reasoning in the Trial Judgement demonstrates that the Trial Chamber gave *no* consideration to the appropriate sentence on this count.

749. The Prosecution contends more generally, however, that, in light of the seriousness of the offence of unlawful confinement, a sentence of seven years was manifestly inadequate. It first argues in support of this submission that:

> [...] it is evident that all of the other crimes which were inflicted on the victims during their detention in the camp would not have occurred if they had not been unlawfully confined there. In imposing sentence in respect of Count 48, the fact that victims of the unlawful detention became the victims of other crimes while detained is a matter to be taken into account.[1269]

750. This submission overlooks the fact that those crimes against the detainees in the Čelebići camp which the Prosecution determined could be proved beyond reasonable doubt had been independently charged in the Indictment. Mucić was charged with superior responsibility and, in the case of inhuman conditions under Counts 46 and 47, personal responsibility for many of those crimes. In this situation, there would be a danger of impermissibly penalising the accused more than once for the same conduct if the sentence in respect of the unlawful confinement count was to be aggravated by reference to the fact that these other crimes had been committed upon the detainees. In the circumstances of this case, the Appeals Chamber is not satisfied that there was any error in not taking the fact that crimes were committed on the detainees to be a matter in aggravation of sentence.

751. The Prosecution also supported its submission in relation to Count 48 by reference to the penalties for the offences of unlawful detention, unlawful confinement or false imprisonment in certain national jurisdictions. The domestic legal provisions identified provide sentencing ranges from three months to life with hard labour (depending on the presence of various aggravating circumstances such as torture or torture resulting in death)

[1268] Mucić Response, para 14.
[1269] Prosecution Brief, para 5.50.

in Belgium,[1270] up to twenty years for a single victim or up to thirty in the case of multiple victims in France,[1271] and from five to twenty years in Rwanda, with the death penalty if the detained victim is tortured to death.[1272] The Prosecution also acknowledges, however, that other national systems do not impose such severe penalties, with ranges covering from one to twelve years.[1273]

752. Mucić submits that references to such sentencing ranges in the absence of examples of specific sentences given in relation to "virtually identical facts with the offender having virtually identical circumstances and mitigation [...] the value of such examples, although of some academic interest, is in practice very limited".[1274] The Appeals Chamber agrees that reference to these national provisions in the abstract is of very limited value.

753. The Prosecution's reference to the most severe penalties applicable to unlawful detention combined with aggravating factors such as torture or the death of the victim again overlooks the fact that, in this case, those crimes have been independently charged and are therefore not an appropriate reference point in seeking guidance on what may be a suitable range of sentences for the offence of unlawful confinement alone. Secondly, the provisions referred to by the Prosecution demonstrate in any event a very wide sentencing range within which the seven year sentence actually imposed on Mucić in respect of this offence (if otherwise appropriate) easily falls.

754. The Appeals Chamber is not satisfied that the sentence imposed on Mucić in respect of Count 48 falls outside of the sentencing range which is open to the Trial Chamber in the exercise of its discretion or that any other error in the exercise of the Trial Chamber's discretion has been demonstrated in relation to this particular count.

(d) Conclusion in relation to the gravity of the offences

755. For the reasons identified above, the Appeals Chamber has found that the Trial Chamber did not have sufficient regard to the gravity of the offences committed by Mucić in exercising its sentencing discretion, and that as a result the seven year sentence imposed

[1270] *Code Pénal* Articles 434-438.
[1271] *Code Pénal*, Articles 224-1 and 224-3.
[1272] *Code Pénal*, Article 388.
[1273] Prosecution Brief para 5.52, citing the relevant provisions of the law in Austria, Canada, Denmark, Finland and Zambia.
[1274] Mucić Response, para 15.

on him did not adequately reflect the totality of his criminal conduct. The Appeals Chamber's conclusion is reinforced by reference to the *Aleksovski* Appeal Judgement. It is appropriate to explain why this is so.

756. Public confidence in the integrity of the administration of criminal justice (whether international or domestic) is a matter of abiding importance to the survival of the institutions which are responsible for that administration. One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that such public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that the punishments imposed would, in justice, be expected to be also generally similar.

757. This is not to suggest that a Trial Chamber is bound to impose the same sentence in the one case as that imposed in another case simply because the circumstances between the two cases are similar. As the number of sentences imposed by the Tribunal increase, there will eventually appear a range or pattern of sentences imposed in relation to persons where their circumstances and the circumstances of their offences are generally similar. When such a range or pattern has appeared, a Trial Chamber would be obliged to *consider* that range or pattern of sentences, without being *bound* by it, in order only to ensure that the sentence it imposes does not produce an unjustified disparity which may erode public confidence in the integrity of the Tribunal's administration of criminal justice.

758. At the present time, there does not exist such a range or pattern of sentences imposed by the Tribunal. The offences which the Tribunal tries are of such a nature that there is little assistance to be gained from sentencing patterns in relation to often fundamentally different offences in domestic jurisdictions, beyond that which the Tribunal gains from the courts of the former Yugoslavia in accordance with Article 24 of the Tribunal's Statute. At the present time, therefore, in order to avoid any unjustified disparity, it is possible for the Tribunal to have regard only to those sentences which have been imposed by it in generally similar circumstances as to both the offences and the offenders. It nevertheless must do so with considerable caution. As the Appeals Chamber

discusses further below[1275] comparisons with sentences imposed in other cases will be of little assistance unless the circumstances of the cases are substantially similar. However, in cases involving similar factual circumstances and similar convictions, particularly where the sentences imposed in those other cases have been the subject of consideration in the Appeals Chamber, there should be no substantial disparity in sentence unless justified by the circumstances of particular accused.

759. Aleksovski, a commander of a prison in which detainees were mistreated, was convicted for one count of outrages against personal dignity under Article 3 of the Statute,[1276] encompassing liability under both Articles 7(1) and 7(3) for a number of crimes of violence, for aiding and abetting the creation of an atmosphere of psychological terror and for not preventing the use of detainees as human shields and for trench digging. He was not convicted of the more serious crimes of murder and torture, or the additional and distinct crime of unlawful detention of civilians, as Mucić was. The Trial Chamber's sentence of two and half years imprisonment[1277] was revised on appeal on the basis that it was "manifestly inadequate".[1278] The Appeals Chamber imposed a "revised sentence" of seven years, which took into account the "element of double jeopardy" in the process in that Aleksovski had been required to appear for sentence twice for the same conduct, "suffering the consequent anxiety and distress" after having been released.[1279] According to the Appeals Chamber, if it were not for these considerations, "the [revised]sentence would have been considerably longer". If Aleksovski would, but for the double jeopardy factor, have been sentenced to considerably more than seven years imprisonment, there is a serious disparity in Mucić also being sentenced to only seven years imprisonment in respect of more numerous crimes committed in similar circumstances, including crimes of undoubtedly greater gravity than those for which Aleksovski was convicted.

2. Failure to have regard to crimes not alleged in the Indictment

760. In relation to the crimes of which Mucić was convicted under Article 7(3) of the Statute, the Prosecution submits that, although those counts specified certain crimes against certain identified victims, "the wording of those paragraphs made clear that these lists of

[1275] *Infra*, at para 798.
[1276] *Prosecutor v Aleksovski*, Case No IT- 95-14/1-T, Judgement, 25 June 1999, paras 228-230.
[1277] *Prosecutor v Aleksovski*, Case No IT- 95-14/1-T, Judgement, 25 June 1999, para 244.
[1278] *Aleksovski* Appeal Judgement, para 187.
[1279] *Aleksovski* Appeal Judgement, para 190.

crimes and victims were non-exhaustive".[1280] It contends that, in sentencing Mucić on these counts, the Trial Chamber "erred in failing to have regard to the fact that those crimes specifically alleged in the relevant paragraphs of the Indictment for which Mucić was found responsible did not represent the totality of the relevant criminal acts committed against the detainees in the Čelebići prison-camp".[1281]

761. The counts referred to by the Prosecution charged crimes against specific individuals but introduced these charges with the phraseology of "including". For example, the introductory paragraph to Counts 33 and 34 commences with the words:

> With respect to the murders committed in the Čelebići camp, including: [...]

The Trial Chamber acknowledged that this language was intended to encompass "references to unspecified criminal acts alleged to have occurred in the Čelebići prison-camp".[1282] It continued:

> In consideration of the rights enshrined in Article 21 of the Statute, and in fairness to the accused, the Trial Chamber does not regard the unspecified acts referred to in the above-mentioned counts as constituting any part of the charges against the accused. Accordingly, in its findings in relation to those counts, the Trial Chamber will limit itself to a consideration of those criminal acts specifically enumerated in the Indictment.[1283]

762. The Prosecution submits generally that, when a superior is charged with responsibility under Article 7(3) of the Statute with unspecified criminal acts, "there is nothing to prevent the Trial Chamber from having regard to those acts, if proved at trial, when sentencing the superior".[1284] It refers to the statement of the Trial Chamber quoted above as a demonstration that the Trial Chamber must have had no reference to these unspecified acts in sentencing Mucić, even though "it was made clear in the Trial Chamber's Judgement that criminal acts apart from those individual acts specified in the Indictment were indeed committed in the camp during the relevant period".[1285] The Prosecution then refers to certain passages from the Trial Judgement which demonstrate the Trial Chamber's recognition that the crimes specified in the Indictment did not represent the totality of the criminal acts to which the detainees were subjected in the Čelebići camp.[1286]

[1280] Prosecution Brief, para 5.34.
[1281] Prosecution Brief, para 5.43.
[1282] Trial Judgement, para 812.
[1283] Trial Judgement, para 812.
[1284] Prosecution Brief, para 5.38.
[1285] Prosecution Brief, para 5.37.
[1286] Prosecution Brief, para 5.37.

The Prosecution does not, however, identify any passages which contain any findings that Mucić specifically was responsible for such unspecified acts. The Appeals Chamber cannot find any indication from the Trial Judgement that the Trial Chamber had found beyond reasonable doubt that Mucić had committed any criminal acts additional to those specifically identified in the Indictment.

763. Mucić submits that the Prosecution's argument is in effect an appeal against acquittal under the mantle of an appeal against sentence because, if the Trial Chamber had not found the relevant matters proved beyond reasonable doubt against Mucić, there was no basis on which it could take those matters into account in sentencing.[1287] The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be the subject of an accused's sentence or taken into account in aggravation of that sentence. As was made clear during the hearing of oral submissions on appeal,[1288] the issue is primarily one of whether the Prosecution actually sought findings in relation to the other acts referred to in the Indictment. The Trial Chamber could not be expected to make findings in respect of matters which had not been specifically put before it, whether in the Indictment or during the trial. Another issue is whether the accused, in view of the very general wording used in the Indictment, had been sufficiently put on notice during the proceedings that such additional offences were alleged and of the nature of those offences so that he could meet the allegations in his own defence case.[1289]

764. As to the first issue, the Prosecution in its submissions on appeal was not able to direct the Appeals Chamber to any record of the Prosecution having sought, at trial, findings by the Trial Chamber in relation to other offences by Mucić not specifically alleged in the Indictment. The Appeals Chamber notes that, in its final written submission before the Trial Chamber, the Prosecution submitted that

> [...] the specific incidents referred to in the Indictment are not exhaustive but rather illustrative [...]. Thus for the purposes of superior responsibility, the Judges may consider other incidents not specifically described in the indictment but proved at trial.[1290]

[1287] Mucić Response, p 12.
[1288] Appeal Transcript, pp 737-738
[1289] Statute of the Tribunal, Article 21(4)(a) refers to the right of an accused "to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him".
[1290] Closing Statement of the Prosecution, filed 25 August 1998, para 3.71.

No such "other incidents" were specified. The Prosecution also failed to identify any such acts during its closing oral arguments, submitting generally only that the Trial Chamber should convict the accused for violations of law proved beyond reasonable doubt.[1291] There is no indication that the Prosecution directed the Trial Chamber at any point during the proceedings towards any other specific criminal incidents upon which it sought findings as to Mucić's responsibility.

765. The Appeals Chamber considers that, in such circumstances, there was no error made by the Trial Chamber in failing to make findings in relation to matters not specifically alleged in the Indictment. Given the generality with which those other incidents were alleged in the Indictment, the Indictment itself did not impose an obligation on the Trial Chamber to make findings on those incidents. It was incumbent upon the Prosecution, if it did in fact seek findings as to those matters, to identify them clearly to the Trial Chamber and to request it to make findings upon them. For this reason, this argument of the Prosecution is not accepted.

766. Given this conclusion, it is unnecessary to consider whether the requirement, referred to above, that the accused was sufficiently on notice of the other criminal incidents which were alleged had been satisfied by the Prosecution. In any case, no material was put before the Appeals Chamber by the Prosecution to enable it to be satisfied that this requirement had been met.

3. The determination that all sentences should be served concurrently

767. The Prosecution finally submitted in relation to this ground of appeal that the Trial Chamber erred in ordering the Mucić's sentences all be served concurrently.[1292] The Trial Chamber stated, in relation to whether the sentences imposed should be served concurrently or consecutively, that:

> During the pre-trial stage of these proceedings, the Trial Chamber issued a decision on the motion by the Defence for Zejnil Delalić challenging the form of the Indictment. The decision considered, *inter alia*, the issue of whether it is permitted to charge an accused under several legal qualifications for the same act, that is, the issue of whether cumulative charging is permitted. The Trial Chamber agreed with a previous decision issued in the case of *Prosecutor v Duško Tadić,* and thus declined to evaluate this

[1291] Trial Transcript, pp 15525-15526. The Prosecution arguments seem to be directed (although not specifically described as such) solely towards the testimony relating to the specifically identified crimes and victims alleged in the Indictment. Trial Transcript, pp 15530-15534.
[1292] Prosecution Brief, para 5.55-5.56.

> argument on the basis that the matter is only relevant to penalty considerations if the accused is ultimately found guilty of the charges in question. Accordingly, this challenge to the Indictment was denied. It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently. The sentence imposed shall not be consecutive.[1293]

768. The Prosecution submits that this reasoning could not justify the Trial Chamber's conclusion that *all* of the sentences imposed on Mucić should be served concurrently.[1294] It identifies two matters in support of this argument. The first is that many of the sentences imposed on Mucić related to crimes arising from *different* conduct, rather than from the same act as is suggested by the statement of the Trial Chamber quoted above. Secondly, it submits that:

> Even where two different crimes of which an accused has been convicted arise out of the *same* conduct, this should be *reflected* in sentencing, but this does not mean that the sentences imposed in respect of the different crimes arising out of the same conduct must always necessarily be made completely concurrent.[1295]

The Prosecution contends that "conduct which simultaneously constitutes more than one crime is more serious than conduct which constitutes one of those crimes only, and this is a matter which can appropriately be reflected in sentencing".[1296]

769. The Appeals Chamber has already found that, in relation to the crimes for which Mucić was convicted under both Articles 2 and 3 in relation to the same conduct, the charges under Article 3 must be dismissed. This requires that the sentencing consequences be considered by a reconstituted Trial Chamber, which will no doubt consider whether the remarks of the original Trial Chamber indicate that there should be no adjustment downwards in the sentences imposed. For that reason, it is unnecessary to consider further the submission insofar as it relates to convictions for the same conduct. It suffices for the Appeals Chamber to reiterate that the governing criterion of sentencing is that it must accurately recognise the gravity of the offences and must reflect the totality of the accused's criminal conduct.[1297] The fact that an accused's conduct may legitimately be legally characterised as constituting different crimes would not overcome the fundamental principle that he should not be punished more than once in respect of the same conduct. In the case of two legally distinct crimes arising from the same incident, care would have to be taken

[1293] Trial Judgement, para 1286 (Footnote omitted).
[1294] Prosecution Brief, para 5.56.
[1295] Prosecution Brief, para 5.56(2).
[1296] Prosecution Brief, para 5.72.
[1297] *See* above, paras 429-430.

that the sentence does not doubly punish in respect of the same act which is relied on as satisfying the elements common to the two crimes, but only that conduct which is relied on only to satisfy the *distinct* elements of the relevant crimes.

770. In relation to those offences for which Mucić was convicted which relate to different conduct, the Prosecution submits that, where an accused has committed multiple crimes, the Trial Chamber must take into account "the higher degree of wrongdoing and the fact that a number of different protected values have been harmed".[1298] It summarises its position by saying that "a person who is convicted of many crimes should generally receive a higher sentence than a person committing only one of those crimes".[1299]

771. Rule 101(C) of the Rules of Procedure and Evidence provided at the time relevant to the Trial proceedings in this case that:

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

The choice as to concurrent or consecutive sentencing is therefore a matter within the Trial Chamber's discretion. Rule 101(C) has now been removed from the Rules but the discretion of the Trial Chamber in relation to concurrent or consecutive sentencing is preserved in the amended Rule 87(C), which provides that the Trial Chamber will indicate whether separate sentences imposed in respect of multiple convictions shall be served consecutively or concurrently.[1300] However, it is clear that this discretion must be exercised by reference to the fundamental consideration, referred to above, that the sentence to be served by an accused must reflect the totality of the accused's criminal conduct. In this respect, the Appeals Chamber agrees with the Prosecution submission that a person who is convicted of many crimes should generally receive a higher sentence than a person convicted of only one of those crimes.

772. The Appeals Chamber has already found that the Trial Chamber erred in not adequately taking into account the gravity of certain of the offences for which Mucić was convicted, and that a sentence of seven years did not adequately reflect the totality of Mucić's criminal conduct. It is possible that, had the Trial Chamber taken adequate account of the gravity of the crimes in determining the individual sentences for those crimes, the

[1298] Prosecution Brief, para 5.59.
[1299] Prosecution Brief, para 5.59.
[1300] These amendments to the Rules derive from Revision 19, effective 19 January 2001.

choice of a concurrent rather than consecutive sentence would have been entirely appropriate. However, in light of the Appeals Chamber's general conclusion that the overall sentence did not adequately reflect the totality of Mucić's criminal conduct, it is unnecessary to determine whether the choice of concurrent rather than consecutive sentences was an additional cause of the Trial Chamber's error. The Appeals Chamber's view as to what would have been a more appropriate sentence is expressed below.[1301]

C. Mucić's Appeal Against Sentence

773. Mucić submits generally that the sentence of seven years was too long "in all the circumstances of the case."[1302] Mucić's primary argument is that the Trial Chamber erred in its consideration of both aggravating and mitigating factors, in that it failed to give due weight to the "strong [...] arguably unique, mitigating features" of his case,[1303] while taking into account certain aggravating matters which it should not. He also submits that the Trial Chamber erred in its dismissal of the *Wilhelm Von Leeb* case as an appropriate precedent in its determination of sentence and that it erred in the weight which it found should be accorded to the element of deterrence. While it is evident from the above that the Appeals Chamber consider that Mucić's sentence of seven years was in fact inadequate, it is appropriate to address these arguments since they contend specific legal errors made by the Trial Chamber.

1. Consideration of aggravating and mitigating factors

(a) Mitigating Factors

774. Mucić specifically alleges that his sentence did not properly reflect the mitigating effect of the Trial Chamber's finding that there was no evidence that Mucić had directly and actively participated in any acts, and that on the contrary he had prevented acts of violence.[1304] The first matter has been considered above when addressing the Prosecution arguments as to the Trial Chamber's consideration of the gravity of the offences. As to the

[1301] *See* below, para 853.
[1302] Mucić Brief, Appeal Against Sentence, p 1.
[1303] Mucić Brief, Appeal Against Sentence, p 2.
[1304] Mucić Brief, Appeal Against Sentence, pp 1-2.

second argument, Mucić submits that the Trial Chamber failed to take adequate account of the fact that he took steps to alleviate suffering and prevent acts of violence.[1305]

775. Mucić was convicted *inter alia,* under Article 7(3) of the Statute and hence as a commander. If a commander in charge of, as in this case, a prison-camp or detention facility, takes steps to alleviate the suffering of those detained, depending on the degree and level of this action, it may be that the seriousness of the overall offences can be mitigated. This would, however, depend on the circumstances of the case and the degree of assistance given. As seen above, a decision as to the weight to be accorded to such acts in mitigation of sentence lies within the discretion of the Trial Chamber. In the absence of a finding that the Trial Chamber abused its discretion in imposing a sentence outside its discretionary framework as provided by the Statute and Rules, this argument must fail.[1306]

776. The Appeals Chamber has already noted that the Trial Chamber expressly considered Mucić's submissions regarding "evidence of witnesses for the Prosecution who testified in glowing terms about the attitude of [...] Mucić towards the detainees".[1307] Further, it considered that there was "[...] a lot to be said for the evidence in mitigation, as there is for the aggravating circumstances".[1308] Although it does not appear to be disputed that Mucić may have carried out several benevolent acts during his command at the Čelebići camp,[1309] the Appeals Chamber considers that, in the circumstances of this case, it was within the Trial Chamber's discretion to conclude that these acts could not constitute significant mitigation.[1310] This is particularly so because of the fact that he was a commander who was in a position to take steps to control and prevent *all* acts of violence but who rather frequently absented himself "in obvious neglect of his duty as commander

[1305] Trial Judgement, para 1247.
[1306] *Kambanda* Appeal Judgement, para. 124.
[1307] Trial Judgement, para 1247; Mucić Brief, Appeal Against Sentence, p 2.
[1308] Trial Judgment, para 1248.
[1309] Prosecution Brief, paras. 5.28 – 5.29.
[1310] It is the case that war crimes tribunals have taken into account efforts by an accused to reduce the suffering of the victims. However, the efforts taken in those cases and considered in mitigation, were considerably more substantial and noticeable than in the instant case and therefore were found to merit credit. *See* for example, the findings with regard to: Waldermar Von Radetzkty in *United States v Ohlendorf et al.* 4 T.W.C. 1, 558 (1948) at 578; Ernst Dehner in *United States v Wilhelm List et al., ("Hostage Trial"),* 11 T.W.C. 757, (1948) at pp 1299-1300; Flick and Steinbrinck in *United States v Friedrich Flick et al.,* 9 L.R.T.W.C. 1 (1949), at pp 29-30; and Albert Speer in *22 Trial of the Major War Criminals Before the Int'l Mil. Tribunal* 524 (1946), at p 579; Von Neurath in *22 Trial of the Major War Criminals Before the Int'l Mil. Tribunal* 524 (1946), at p 582. However, note also the finding regarding Karl Mummenthey, in the *Pohl* case, 5 T.W.C, p 1054: "It is not an unusual phenomenon in life to find an isolated good deed emerging from an evil man."

and the fate of the vulnerable detainees".[1311] As recently observed by Trial Chamber I, such acts "are all the less decisive when one notes that criminals frequently show compassion for some of their victims even when perpetrating the most heinous of crimes".[1312]

777. As a matter of law, a Trial Chamber is obliged to take account of mitigating circumstances in imposing sentence.[1313] However, the weight to be attached is a matter within its discretion. The Appeals Chamber is satisfied that the Trial Chamber clearly considered the mitigating factors presented on Mucić's behalf.[1314] The Trial Chamber was entitled to attach limited weight to such mitigation, and the Appeals Chamber accordingly finds that Mucić has failed to demonstrate any error by the Trial Chamber in this regard.

(b) Aggravating Factors

778. Mucić submits that the Trial Chamber erred in making the findings it did in relation to his conduct during the trial, including the references it made to allegations of fabrication of evidence and threats to a witness. He submits that this conduct could only be taken into account following a finding of guilt, and that such allegations could rather have been dealt with separately by the Trial Chamber under, for example, Rule 77 of the Rules.[1315] He submits that the Trial Chamber erred in considering his general attitude during the trial and the fact that he did not give oral evidence. He submits that the reference by the Trial Chamber to the latter, in its consideration of sentence, was "tantamount to a reversal of the burden of proof."[1316]

779. With regard to these specific allegations, the Trial Chamber found:

> The conduct of Mr. Mucić before the Trial Chamber during the course of the trial raises separately the issue of aggravation. The Trial Chamber has watched and observed the behaviour and demeanour of Mr. Mucić throughout the trial. The accused has consistently demonstrated a defiant attitude and a lack of respect for the judicial process and for the participants in the trial, almost verging on lack of awareness of the gravity of the offences for which he is charged and the solemnity of the judicial process. The Presiding Judge, has, on occasions, had to issue stern warnings reminding him that he was standing trial for grave offences. The Prosecution has also presented evidence of an exchange of notes between Zejnil Delalić and Zdravko Mucić conspiring about the

[1311] Trial Judgement, para 1243.
[1312] *Blaškić* Judgement, para 781.
[1313] Article 24 of the Statute and Rule 101 of the Rules. Rule 101 (B) provides *inter alia*: "In determining sentence, the Trial Chamber shall take into account...(ii) any mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction."
[1314] Trial Judgement, paras 1238-1239, 1245, 1247, 1248.
[1315] Mucić Brief, Appeal Against Sentence, pp 3-6. Rule 77 of the Rules relates to proceedings for "Contempt of the Tribunal."
[1316] Mucić Brief, Appeal Against Sentence, p 6.

> fabrication of evidence to be given at the trial. There have also been allegations that Mr. Mucić participated in the threatening of a witness in the courtroom. Such efforts to influence and/or intimidate witnesses are particularly relevant aggravating conduct, which the Trial Chamber is entitled to take into account in the determination of the appropriate sentence.[1317]

It also found:

> The general attitude of Mr. Mucić during the trial proceedings in and outside the courtroom would seem to be a repetition of his casual and perfunctory attitude to his duties in the Čelebići prison-camp. He made concerted and sustained efforts where he could to intimidate witnesses and to suborn favourable evidence from them. His demeanour throughout the proceedings suggests that he appears to have regarded this trial as a farce and an expensive joke. Zdravko Mucić has declined to give any oral evidence, notwithstanding the dominant position he played in the facts giving rise to the prosecution of the accused persons.[1318]

780. It has already been stated that the Statute and the Rules do not define exhaustively the factors which may be taken into account by a Trial Chamber in mitigation or aggravation of sentence, and Trial Chambers are therefore endowed with a considerable degree of discretion in deciding on the factors which may be taken into account. Nevertheless, it must be queried whether the Trial Chamber erred in taking these particular factors into account. A Trial Chamber's decision may be disturbed on appeal if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion.

781. It is alleged that the Trial Chamber erred in taking into account in aggravation of sentence the fact that Mucić failed to give oral testimony. In accordance with the position in many national jurisdictions, an accused before the Tribunal is not obliged to give oral testimony during the trial on his or her own behalf. Rule 85(C) of the Rules provides

> *If the accused so desires,* the accused may appear as a witness in his or her own defence.[1319]

Article 21(4)(g) of the Statute provides further guidance and provides that an accused shall be entitled to the right "not to be compelled to testify against himself or to confess guilt".[1320] This, however, does not explicitly identify the consequences of failure to testify at

[1317] Trial Judgement, para 1244.
[1318] Trial Judgement, para 1251.
[1319] (Emphasis added).
[1320] *See* also the International Covenant on Civil and Political Rights (1966) ("the ICCPR"), Article 14 (3)(g) which provides that in the determination of a criminal charge, everyone shall be entitled to the right "not to be compelled to testify against himself or to confess guilt."

all, unlike the corresponding provision in the Rome Statute of the International Criminal Court. Article 67(1)(g) of the Rome Statute expressly provides that an accused has the right to refuse to testify, in which case no inference adverse to him or her may be drawn.[1321] The question remains whether failure to testify before the Tribunal can be held against an accused in either consideration of the merits of a case, or, as here, in aggravation of sentence.

782. Between national jurisdictions, there is no consensus as to an absolute right for an accused to remain silent at trial at no risk of adverse inferences being drawn, and in fact certain jurisdictions have taken steps to limit such right.[1322] This limitation has been considered by the European Court of Human Rights, which has found in principle that the fair hearing requirement in Article 6 of the European Convention[1323] implies that an accused has the right to remain silent and not contribute to incriminating himself or herself.[1324] However, it has also recognised that this right is not absolute, and that the drawing of an adverse inference from an accused's silence regulated by law is not contrary to Article 6 as long as there are other safeguards in place.[1325] In its view, therefore, particular caution is required before a domestic court can invoke an accused's silence against him or her.

[1321] Article 67(1)(g) of the ICC Statute provides that that an accused shall have the right: "[n]ot to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt of innocence."

[1322] For example, in the United Kingdom, although an accused still has the right to refuse to give evidence at trial, Criminal Justice and Public Order Act 1994, s 35 now provides that unless an accused shows good cause for the refusal to answer questions, a Judge may direct a jury that it can draw such inferences as appear proper from the failure or refusal to answer questions (s 38(3) provides that a conviction may not rest solely on such an inference). This was interpreted in *R v Cowan* [1996] 1 Cr App R 1 as not removing the right to remain silent. Lord Taylor CJ held that such inferences can only be drawn if the jury is satisfied that the Prosecution has proved its case, and that the jury is told that, a) the burden of proof rests on the Prosecution throughout, b) the defendant has a right to remain silent and that an inference alone cannot prove guilt. *See* also Article 4 Criminal Evidence (Northern Ireland) Order 1988, *R v Murray,* [1993] 97 Cr App R 151. The right to remain silent with no adverse inferences drawn is still preserved in, for example, the United States. The self-incrimination clause of the *Fifth Amendment,* incorporated through the *Fourteenth Amendment* due process clause, provides that no person "shall be compelled in any criminal case to be a witness against himself." This has been interpreted to mean that a defendant is also not obliged to appear as a witness. *See Griffen v California,* 380 US 609, where it was held that comment on the failure to give evidence was impermissible as it was "a penalty imposed by courts for exercising a constitutional privilege" as it "cuts down on the privilege by making its assertion costly." In Australia, s*ee Woon v The Queen* (1964) 109 CLR 529, *Petty and Maiden v R,* (1991) 173 CLR 95.

[1323] Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the European Convention") provides for the right to a fair and public hearing.

[1324] *Funke v France,* Eur Ct H R, Judgement of 25 Feb 1993, A.256-A, para 44.

[1325] *John Murray v The United Kingdom,* Judgement of 8 Feb 1996, Reports 1996-I, Vol 1, paras 44-58. The decision was confirmed in the recent case of *Condron v The United Kingdom,* Eur Ct H R, Judgement of 2 May 2000, Application no 35718/97. In its reasoning the Court took into account safeguards designed to respect the rights of the defence, for example the warning that adverse inferences could be drawn, that it could only be drawn if a failure to express oneself might as a matter of common sense lead to the conclusion that the accused had been guilty and if there existed other very strong evidence against the accused.

783. Neither the Statute nor the Rules of this Tribunal expressly provide that an inference can be drawn from the failure of an accused to give evidence. At the same time, neither do they state that silence should not "be a consideration in the determination of guilt or innocence".[1326] Should it have been intended that such adverse consequences could result, the Appeals Chamber concludes that an express provision and warning would have been required under the Statute, setting out the appropriate safeguards. Therefore, it finds that an absolute prohibition *against* consideration of silence in the determination of guilt or innocence is guaranteed within the Statute and the Rules, reflecting what is now expressly stated in the Rome Statute. Similarly, this absolute prohibition must extend to an inference being drawn in the determination of sentence. Accordingly, it is the case that the Trial Chamber would have committed an error should it be shown that it relied on Mucić's failure to give oral testimony as an aggravating factor in determining his sentence.[1327]

784. The Prosecution submits that the Trial Chamber's remark was no more than an indication by the Trial Chamber that, as Mucić did not plead guilty or co-operate with the Prosecution, there was no mitigating factor of the kind referred to in Rule 101(B)(ii) of the Rules.[1328]

785. It is difficult to accept such an explanation of the Trial Chamber's remark. It was made by the Trial Chamber when describing Mucić's conduct during the trial in its discussion of aggravating and mitigating factors. The Trial Chamber found that his general attitude during the proceedings reflected "his casual and perfunctory attitude to his duties in the Čelebići prison-camp", and it described his whole demeanour as suggesting that he regarded the trial as "a farce and an expensive joke".[1329] The Trial Chamber's reference to his failure to give evidence in that context indicates that it regarded the failure in an adverse light. Although it is not clear that the Trial Chamber treated Mucić's failure to testify as an aggravating circumstance, the Trial Chamber's remark leaves open the real possibility that it did so, and the Appeals Chamber accordingly finds that the Trial Chamber erred.

[1326] Article 67(1)(g) of the ICC Statute.

[1327] *See Carolina v Pearce* 395 US 711, where it was found that due process is violated where the sentencing court punishes' a convicted person for his exercise of a procedural right in the criminal justice process. However a defendant must be able to show that by reference to the sentencing record, the judge in fact sentenced vindictively seeking to punish for the exercise of a procedural right.

[1328] Rule 101(B)(ii) provides that a Trial Chamber shall take into account "any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction."

[1329] Trial Judgement, para 1251.

786. With regard to Mucić's conduct during the trial in terms of his attitude and demeanour, the Appeals Chamber can find no error in the fact that the Trial Chamber considered these as aggravating factors. As pointed out in the Trial Judgement, "[t]he nature of the relevant information required by the Statute is unambiguously provided in sub-Rule 85(A)(vi) [of the Rules]. It is 'any relevant information that may assist the Trial Chamber in determining an appropriate sentence if the accused is found guilty on one or more of the charges in the indictment'".[1330]

787. Reference to the jurisprudence of the Tribunal and ICTR, [1331] and to guidelines and practice of national jurisdictions,[1332] illustrates that it is established practice that trial courts exercise a broad discretion in the factors they may consider on sentence. This indicates that all information relevant to an accused's character may be considered. As accepted by the Supreme Court of the United States, "modern concepts individualising punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial".[1333] Therefore there is a relevant distinction in the role of a fact-finder at trial and a sentencing judge, who is not restrained by the same rules.

[1330] Trial Judgement, para 1215.

[1331] *See e.g., Prosecutor v Kambanda,* Judgement and Sentence, Case No ICTR 97-23-S, 4 Sept 1998 at para 30; *Prosecutor v Akayesu,* Sentence, Case No ICTR-96-4-T, 2 Oct 1998, para 21. *Prosecutor v Kayishema and Ruzindana,* Sentence, Case No ICTR-95-1-T, 21 May 1999, para 3: "These enumerated circumstances, [contained in the Statute and the Rules] however, are not necessarily mandatory or exhaustive. It is a matter of individualising the penalty considering the totality of the circumstances."

[1332] *See e.g.*: In the former Yugoslavia, Article 41(1) of the SFRY Penal Code 1990. In the United Kingdom, the Magistrates Association Sentencing Guidelines issued in 1993 guide the Magistrates in setting out aggravating and mitigating factors in relation to specific offences. As in the United Kingdom, sentencing in the United States is assisted by Pre-Sentence Reports prepared by probation officers, who enjoy wide discretion in the information to include and present before the court. In *Williams v. New York,* 337 U.S. 241, (1949) it was noted that "the modern probation report draws on information concerning every aspect of a defendant's life." (p 250). It upheld what is described as "real offence" sentencing or, sentencing that goes beyond the elements of the offence and considers the gravity of the accused's conduct. It found that courts do not violate due process by considering unrelated criminal conduct, even if it did not result in a criminal conviction. *See* also *United States v Grayson,* 438 U.S. 41, where it was found that in a system of discretionary sentencing, it is proper and even necessary to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath. *See* also 18 UCSA, para 3553(1) which provides that the court should consider "the nature and circumstances of the offence and the history and characteristics of the defendant" and para 3661: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offence which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence". In Canada, s 726.1 of the Canadian Criminal Code provides: In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender. In Denmark, *See* ss 80, 84 and 85 of the Danish Criminal Code.

[1333] *Williams v New York,* 337 U.S. 241, (1949), p 247.

Rather, it is essential that the sentencing judge is in "possession of the fullest information possible concerning the defendant's life and characteristics".[1334]

788. The Trial Chambers of the Tribunal and the ICTR have consistently taken evidence as to character into account in imposing sentence. The Appeals Chamber notes that factors such as conduct during trial proceedings, ascertained primarily through the Trial Judges' perception of an accused, have also been considered in both mitigation and aggravation of sentence.[1335] The Appeals Chamber finds no error on the part of the Trial Chamber in doing so in this case. This behaviour is relevant to a Trial Chamber's determination of, for example, remorse for the acts committed or, on the contrary, total lack of compassion.[1336]

789. With regard to the reference by the Trial Chamber to the allegation that Mucić may have threatened witnesses as an aggravating factor, the Appeals Chamber again concludes that the Trial Chamber did not err. The Prosecution notes that evidence of both witness intimidation and the passing of notes were submitted to the Trial Chamber on sentencing and that this evidence was not refuted by the defence for Mucić.[1337]

790. The Appeals Chamber is not the forum for raising matters such as this for the first time.[1338] Should Mucić have been concerned that these matters should not be taken into account on sentence, then the appropriate forum to raise the concern was before the Trial Chamber.[1339] The Appeals Chamber finds no error in the fact that the Trial Chamber did consider these matters. Although it is possible (without finding as such) that these matters could have been dealt with under Rule 77 of the Rules as separate and independent offences, as pointed out by the Trial Chamber, these factors were equally pertinent to its

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[1334] *William New York,* 337 U.S. 241, (1949), p 247.

[1335] For example, in the *Blaškić* Judgement, para 780: "...the Trial Chamber must take note of the exemplary behaviour of the accused throughout the trial, whatever the judgement as to his statements as a witness." In *Prosecutor v Kayishema and Ruzindana,* Sentence, Case No ICTR-95-1-T, 21 May 1999, para 17, the Trial Chamber noted: "The Prosecution cited one aggravating factor, Ruzindana's behaviour after the criminal act, and notably the fact that Ruzindana smiled or laughed as survivors testified during trial."

[1336] In the Second *Erdemović* Sentencing Judgement, para 16, the Trial Chamber considered remorse and compassion as mitigating factors.

[1337] Prosecution Response, para 20.26.

[1338] In his Brief, Mucić submits that "[a]s to the *"exchange of notes"* it was never proved that the notes alleged to have been written by the Appellant were in fact written by him. An attempt by the OTP to have a handwriting sample taken from the appellant was rejected upon the basis that he could not be forced to assist in the collation of evidence against himself. *See the decision...Jan 19th 1998).* Thus, the exchange of notes remains an allegation only and cannot be a matter that the Trial Chamber should have taken into consideration in assessing sentence." Mucić Brief, Appeal Against Sentence, p 4.

[1339] As noted above, "[t]he appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing." *Prosecutor v Erdemović,* Judgement, Case No IT-96-22-A, 7 Oct 1997, para 15. *See* also, *Furundžija* Appeal Judgement, para 174.

assessment of Mucić's character and of his attitude towards the offences. Accordingly, it was not inappropriate for the Trial Chamber to consider this behaviour as an aggravating factor and in its overall evaluation of the accused's character.[1340]

791. Finally, Mucić submits that there were "stated inconsistencies in the judgement," which raised confusion as to the basis for sentencing. These, he submits "should be resolved in ... [his] favour."[1341] As pointed out by the Prosecution, Mucić in fact referred to only one alleged inconsistency in his brief, regarding the testimony of a Prosecution witness.[1342] Mucić essentially questions how the Trial Chamber could find that Mucić had "made no effort to prevent or punish those who mistreated the prisoners, or even to investigate specific incidents of mistreatment including the death of detainees",[1343] when at the same time it noted the positive testimony given by this witness. In his view this was contradictory. During the hearing on appeal, Mucić also submitted that the Trial Chamber failed to take into account properly the testimony of several other witnesses who had testified in similar terms.[1344] Although he does not allege that this raised inconsistencies, the Appeals Chamber considers these submissions in the same context.

792. The Appeals Chamber notes that the Trial Chamber amply considered this so-called positive testimony in the Trial Judgement. In doing so, it referred to the submissions by Mucić regarding the "evidence of witnesses for the Prosecution who testified in glowing terms about the attitude of Mr. Mucić towards the detainees".[1345] It concluded that it "had made very sober reflection on the submissions of the parties. There is a lot to be said for the evidence in mitigation, as there is for the aggravating circumstances".[1346]

793. The Appeals Chamber again states that "[t]he task of hearing, assessing and weighing the evidence presented at trial is left to the Judges sitting in a Trial Chamber".[1347] The Trial Chamber must weigh and evaluate the evidence presented before it and unless it is shown that its conclusion was wholly unreasonable, such that no reasonable trier of fact

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[1340] Trial Judgement, para 1217, noting the reference to the federal courts of the United States where "obstruction of justice is regarded as an aggravating circumstance, providing for the enhancement of sentence. Included in this category are, *inter alia,* intimidation of witnesses or otherwise unlawfully influencing a co-defendant or witness, perjury or suborning perjury."
[1341] Mucić Brief, Appeal Against Sentence, p 3.
[1342] Appeal Transcript, pp 744-745, regarding the testimony of the Prosecution witness, Mr Golubović.
[1343] Trial Judgement, para 1243.
[1344] Appeal Transcript, pp 745-747.
[1345] Trial Judgement, para 1247.
[1346] Trial Judgement, para 1248.
[1347] *Tadić* Appeal Judgement, para 64.

could have arrived at the same conclusion, the Appeals Chamber will not intervene. The Appeals Chamber concludes that Mucić has failed to establish that the Trial Chamber erred in its assessment of this evidence by according it insubstantial weight. The Trial Chamber properly took the relevant testimony into account when considering mitigating factors. The decision as to what weight should be attached to this evidence was within its discretion. It was not obliged to accept this testimony as refuting its overall findings as to Mucić's culpability.[1348]

794. Mucić has failed to demonstrate any error in the Trial Chamber's exercise of discretion in weighing the mitigating factors in his case.

2. Comparison to the case of *Wilhelm Von Leeb*

795. Mucić submits that the Trial Chamber erred in dismissing, on the facts, the precedent set by the case of *Wilhelm Von Leeb,*[1349] when it should rather have had regard to the "relevant doctrinal principles" which can be drawn from that case.[1350] The Prosecution submits that this case was not a precedent binding on the Tribunal and constituted persuasive authority only, which the Trial Chamber was entitled to distinguish, if appropriate, as not being relevant.[1351]

796. The basis of Mucić's argument is that the Trial Chamber erred in failing to have regard to "relevant doctrinal principles." However, he fails to identify what these so-called principles are. He submits that he "does not presume to suggest that senior professional judges of an International Tribunal require to have basic principles of sentencing doctrine put before them as if they did not well apprehend them as a matter of their professional expertise and long experience."[1352] In the absence of any explanation as to what he perceives these "relevant doctrinal principles" to be, and how and why they should have been applied by the Trial Chamber to his case, Mucić fails to satisfy the burden on him to demonstrate how the Trial Chamber erred.

797. The Appeals Chamber itself finds no error in the Trial Chamber's findings regarding this case. The Trial Chamber found that "[t]he only parallel with the instant case is that

[1348] Trial Judgement, para 1243.
[1349] *United States v Wilhelm Von Leeb et al.*, Vol 11, TWC, pp 553-563 at 563.
[1350] Mucić Brief, Appeal Against Sentence, pp 6-7. *See* also Appeal Transcript, p 748.
[1351] Prosecution Response, para 20.37.
[1352] Mucić Reply, p 17.

both Field Marshall *von Leeb* and Mr. Mucić exercised and enjoyed command authority and superior responsibility over subordinates in respect of whose wrongful acts they were and are criminally responsible".[1353] This being the only similarity (and a very general one in itself), it found that the facts of the two cases were by no means comparable and that "[t]he sentence of three years imprisonment [...] would not constitute an appropriate precedent on the facts of this case".[1354]

798. Although a Trial Chamber is entitled to refer for guidance in sentencing to precedents from the jurisprudence of the Tribunal and the ICTR, together with precedents from other jurisdictions, given the individual circumstances of each case and the varied factors which should be taken into account (as discussed above), such comparisons are frequently of little assistance. Mucić has provided no basis for establishing otherwise, and he has failed to show that the Trial Chamber erred in its interpretation of this case.[1355] Although arguing that principles which can be drawn from the case of *Wilhelm von Leeb* should have been applied in his own and that, if they had been, it would be established that the Trial Chamber had erred, he has failed to identify or elaborate as to how this is the case. The Appeals Chamber finds no reason to conclude that the Trial Chamber's conclusions were incorrect.

3. Weight to be given to the element of deterrence

799. Mucić submits that the Trial Chamber placed too much emphasis on the deterrent element in sentencing him. It is said that the Trial Chamber should have relied more on the rehabilitative element, which in his case would mean that he required no further incarceration than that which he has already served.[1356] He submits that "deterrence in sentencing in reality has little or no value in this case",[1357] and that the "lack of impact of deterrence cannot be more self-evident than to look at the situation in Kosovo".[1358] The Prosecution agrees with the Trial Chamber's finding that "[d]eterrence is probably the most important factor in the assessment of appropriate sentences for violations of international

[1353] Trial Judgement, para 1249.
[1354] Trial Judgement, para 1250.
[1355] Indeed, the facts of the case and the mitigating circumstances differ to such a degree that the Appeals Chamber finds no basis for comparing the two cases.
[1356] Mucić Brief, Appeal Against Sentence, p 1.
[1357] Mucić Reply, p 14.
[1358] Mucić Reply, p 15.

humanitarian law".[1359] It submits that future deterrence is both suppressive and educative, and that both aspects would be defeated if sentences were lower than those imposed in national jurisdictions for similar conduct.[1360] Similarly, this would defeat the aim of contributing to the peace and security in the former Yugoslavia.[1361]

800. The element of deterrence plays an important role in the functioning of the Tribunal. The Appeals Chamber has already determined that:

> [i]n adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, *thereby deterring future violations* and contributing to the re-establishment of peace and security in the region. [1362]

801. Therefore one of the purposes of the Tribunal, in "bringing to justice" individuals responsible for serious violations of international humanitarian law, is to deter future violations. With regard to the impact of deterrence on punishment, the Appeals Chamber has already accepted "the general importance of deterrence as a consideration in sentencing for international crimes".[1363] However, in accepting this importance, it did so with a proviso, concurring with its previous finding in the *Tadić* Sentencing Appeal Judgement, wherein it was found that:

> [i]n determining the sentence to be imposed on the Appellant, the Trial Chamber took into account, as one of the relevant factors, the principle of deterrence. The Appeals Chamber accepts that this is a consideration that may legitimately be considered in sentencing, a proposition not disputed by the Appellant. Equally, the Appeals Chamber accepts that this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.[1364]

802. In the case of *Tadić,* the Appeals Chamber was considering a ground of appeal in which the appellant *Tadić* argued that the Trial Chamber had erred in relying on the general statement made by the Trial Chamber in Čelebići, that "[d]eterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law".[1365] The Appeals Chamber in that case concluded: "In the circumstances of the present case, the Appeals Chamber is not satisfied that the Trial Chamber gave undue

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[1359] Prosecution Response, para 20.10, referring to the Trial Judgement, para 1234.
[1360] Prosecution Response, paras 20.13-20.16.
[1361] Prosecution Response, para 20.17.
[1362] *Tadić* Jurisdiction Decision, para 72 (Emphasis added).
[1363] *Aleksovski* Appeal Judgement, para 185.
[1364] *Tadić* Sentencing Appeal Judgement, para 48.
[1365] Trial Judgement, para 1234. In fact, the Trial Chamber in the case of *Tadić* relied on this precise finding in Čelebići. It was this finding which was appealed.

weight to deterrence as a factor in the determination of the appropriate sentence to be imposed on the Appellant."[1366]

803. Equally, in this case, although the Appeals Chamber is satisfied that this overall determination made by the Trial Chamber (that deterrence is the most important factor to consider in sentencing cases of this nature) was in fact in error because the importance of deterrence is subject to the above proviso, it is nevertheless not satisfied that the Trial Chamber erred by giving *undue* prominence to deterrence in this case. Although the Trial Chamber did not refer specifically to deterrence when considering the factors it took into account in sentencing Mucić, having referred to deterrence in general terms earlier, it may be assumed that it was taken into account to some extent. However, without more than a simple assertion of error put forward by Mucić, the Appeals Chamber is not persuaded that the Trial Chamber gave this factor *undue* weight in sentencing him.

804. Mucić also submits that the Trial Chamber should have placed more reliance on the rehabilitative element in sentencing. In his case he submits that this would have meant that he required no further incarceration than that which he had already served.[1367] Other than making this blunt assertion, Mucić fails to explain how this could be so.

805. The Appeals Chamber notes that the Trial Chamber referred to rehabilitation in a general way and found:

> The factor of rehabilitation considers the circumstances of reintegrating the guilty accused into society. This is usually the case when younger, or less educated, members of society are found guilty of offences. It therefore becomes necessary to re-integrate them into society so that they can become useful members of it and enable them to lead normal and productive lives upon their release from imprisonment. The age of the accused, his circumstances, his ability to be rehabilitated and availability of facilities in the confinement facility can, and should, be relevant considerations in this regard.[1368]

806. The cases which come before the Tribunal differ in many respects from those which ordinarily come before national jurisdictions, primarily because of the serious nature of the crimes being prosecuted, that is "serious violations of international humanitarian law".[1369] Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in

[1366] *Tadić* Sentencing Appeal Judgement, para 48.
[1367] Mucić Brief, Appeal Against Sentence, p 1.
[1368] Trial Judgement, para 1233.
[1369] Article 1 of the Statute. *See* also Resolution 808 (1993) S/RES/808 (1993) and Resolution 827 (1993) S/RES/827 (1993).

sentencing,[1370] this cannot play a *predominant* role in the decision-making process of a Trial Chamber of the Tribunal.[1371] On the contrary, the Appeals Chamber[1372] (and Trial Chambers of both the Tribunal[1373] and the ICTR[1374]) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution. Accordingly, although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight. Given the findings which were made as to Mucić's culpability, the Appeals Chamber finds no error in the fact that the Trial Chamber does not specifically refer to rehabilitation in sentencing Mucić nor in its general statement cited above.

D. Delić's Appeal Against Sentence

807. Although Delić was charged with responsibility for crimes as both a direct participant and as a superior, he was convicted solely under Article 7(1) of the Statute as a direct participant, on fourteen counts of grave breaches of the Geneva Conventions and violations of the laws or customs of war, under Article 7(1) of the Statute.[1375] The convictions entered by the Trial Chamber were as follows:

Counts 1 and 2: the wilful killing and murder of Šćepo Gotovac;[1376]

Counts 3 and 4: the wilful killing and murder of Željko Milošević;

[1370] *See, e.g.*: Article 10(3) ICCPR: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation"; *General Comment* 21/44. U.N.GAOR, Human Rights Committee, 47th Sess, para 10, UN Doc. CCPR/C/21/Rev.1/Add.3(1992); Article 5(6) American Convention on Human Rights.

[1371] The Appeals Chamber notes that in *Prosecutor v Furundžija,* Judgement, Case No IT-95-17/1-T, 10 Dec 1998, para 291, the Trial Chamber pointed out its "support for rehabilitative programmes in which the accused may participate while serving his sentence; the Trial Chamber is especially mindful of the age of the accused in this case." *See* also Second *Erdemović* Sentencing Judgement, para 16 and *Kupreškić* Judgement, para 849.

[1372] *Aleksovski* Appeal Judgement, para 185.

[1373] *Prosecutor v Anto Furundžija,* Judgement, Case No IT-95-17/1-T, 10 Dec 1998, para 288; *Prosecutor v Duško Tadić,* Sentencing Judgement, Case No IT-94-1-T*bis*-R117, 11 Nov 1999, paras 7-9; *Kupreškić* Judgement, para 848.

[1374] *Prosecutor v Kambanda,* Judgement and Sentence, Case No ICTR-97-23-S, 4 Sept 1998, para 28; *The Prosecutor v Akayesu,* Sentence, Case No ICTR-96-4-S, 2 Oct 1998, para 19; and *The Prosecutor v Rutaganda,* Case No ICTR-96-3-T, 6 Dec 1999, para 456.

[1375] Trial Judgement, para 810: "...the Trial Chamber finds that the Prosecution has failed to establish beyond reasonable doubt, that Hazim Delić lay within the chain of command in the Čelebići prison-camp, with the power to issue orders to subordinates or to prevent or punish criminal acts of subordinates. Accordingly, he cannot be found to have been a "superior" for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute."

[1376] As noted above, these convictions will be quashed by the Appeals Chamber and a judgement of acquittal entered on both counts.

Counts 11 and 12: the cruel treatment and wilfully causing great suffering or serious injury to body or health of Slavko Šušić;

Counts 18 and 19: the torture by way of rape of Grozdana Ćećez;

Counts 21 and 22: the torture by way of rape of Witness A;

Counts 42 and 43: the inhuman treatment and the cruel treatment of detainees, including Milenko Kuljanin and Novica Đorđić;

Counts 46 and 47: the cruel treatment and wilfully causing great suffering or serious injury to body or health by virtue of the inhumane conditions in the camp.

808. The Appeals Chamber notes that, in sentencing Delić, the Trial Chamber observed that "[t]he touchstone of sentencing is the gravity of the offence for which an accused has been found guilty, which includes considering the impact of the crime upon the victim". It referred to Delić's actions as, *inter alia,* "brutal and merciless", or "deplorable." It noted his "cruel" and "cold" premeditation and the "depravity" of his actions.[1377] It described the severe impact his behavior had on the victims,[1378] and his contribution to the atmosphere of terror that prevailed in the Čelebići camp due to both his acts and threats to detainees.[1379] It found that:

> [a]n examination of the [...] crimes and their underlying motivations, where relevant, demonstrates that they cannot be characterised as anything other than some of the most serious offences that a perpetrator can commit during wartime. The manner in which these crimes were committed are indicative of a sadistic individual who, at times, displayed a total disregard for the sanctity of human life and dignity.[1380]

809. Delić was convicted of fourteen offences and for each received a sentence of imprisonment, the maximum term being twenty years for wilful killing and murder under counts 1, 2, 3 and 4. Each sentence was ordered to be served concurrently.[1381] Delić submits that the Trial Chamber erred in violating the principle of *nulla poena sine lege* and failing to properly consider the sentencing practice of the courts of the former Yugoslavia.

[1377] Trial Judgement, paras 1261–1268.
[1378] For example, the Trial Judgement refers to the testimony of Grozdana Ćećez describing the effect of the rape she suffered: "...he trampled on my pride and I will never be able to be the woman that I was." (Trial Judgement, para 1262).
[1379] Trial Judgement, para 1266.

1. Violation of the Principle *Nulla Poena Sine Lege* and failure to properly consider the sentencing practice of the courts of the former Yugoslavia

810. The first issue raises the question of whether or not a Trial Chamber is bound by the law of the former Yugoslavia in matters of sentencing and whether, in considering the practice of these courts, this Trial Chamber gave them due weight. Delić simply submits that, by application of the principles of legality and *nulla poena sine lege,*[1382] he could not be sentenced to a term greater than fifteen years. He submits that this was the maximum term which could be imposed in the former Yugoslavia, other than a term of twenty years which could be imposed in substitution for the death penalty.[1383] "To increase the punishment for an offence after it has been committed is a [...] basic violation of human rights."[1384]

811. Delić acknowledges that the Tribunal has stated that it is not bound by this law on punishment, but submits that nevertheless, until the sentence passed in his case, "the Trial Chambers ha[d] scrupulously avoided assessing penalties greater than that imposed under SFRY law for offences committed before the establishment of the Tribunal ...".[1385]

[1380] Trial Judgement, para 1268.
[1381] Trial Judgement, para 1286.
[1382] These principles are reflected in Article 15 of the ICCPR which provides:
1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.
See also Article 7 of the European Convention on Human Rights.
[1383] The relevant provisions in the former Yugoslavia are contained in Chapter XVI of the SFRY Penal Code entitled "Crimes Against Peace and International Law." Article 142 prescribes in relation to certain crimes that they "shall be punished by no less than five years strict imprisonment or by the death penalty." In terms of imprisonment in general, Article 38 of the SFRY Penal Code provides that a punishment of imprisonment may not be longer than fifteen years, although the court may impose a sentence of twenty years in substitution for acts eligible for the death penalty, or if provided by statute for criminal acts committed with intent for which fifteen years may be imposed under statute and which were perpetrated under particularly aggravating circumstances or caused especially grave consequences.
[1384] Delić Brief, para 356. *See* also Delić Reply, paras 156-163.
[1385] Delić Brief, para 357.

812. The Prosecution summarises its submissions by relying on the *Tadić* Sentencing Appeal Judgement and its finding that the Tribunal is not bound by the maximum sentences which could be imposed under the law of the former Yugoslavia.[1386]

813. Article 24(1) of the Statute provides that, in determining sentence, "Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia".[1387] The question of whether or not this "recourse" should be of a binding nature has been consistently and uniformly interpreted by the Tribunal. It is now settled practice that, although a Trial Chamber should "have recourse to"[1388] and should "take into account"[1389] this general practice regarding prison sentences in the courts of the former Yugoslavia, this "does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice".[1390]

814. The Trial Chamber correctly followed this precedent and in doing so carried out a detailed analysis of the relevant provisions in the SFRY Penal Code, while also hearing testimony from an expert witness for the defence.[1391] It recognised the importance of the principle as being one of the "solid pillars on which the principle of legality stands",[1392] and found that the view that a higher penalty than that available under the SFRY would violate the principle of legality and *nulla poena sine lege* was "erroneous and overly restrictive".[1393] It concluded that "[t]here is no jurisprudential or juridical basis for the assertion that the International Tribunal is bound by decisions of the courts of the former Yugoslavia".[1394] The Appeals Chamber finds no error in this approach.

815. Nevertheless, Delić submits that Trial Chambers have avoided imposing greater penalties than those imposed under SFRY law for offences committed before the establishment of the Tribunal, until it imposed the sentence on him.[1395] Although the Tribunal has the authority to impose a life sentence for offences committed after its

[1386] Appeal Transcript, pp 758-759.
[1387] *See* also Secretary-General's Report, para 111.
[1388] Article 24 of the Statute.
[1389] Rule 101(B)(iii) of the Rules.
[1390] *Serushago* Sentencing Appeal Judgement, para 30. *See* also *Tadić* Sentencing Appeal Judgement, para 21.
[1391] Trial Judgement, paras 1192-1212.
[1392] Trial Judgement, para. 402.
[1393] Trial Judgement, para 1210.
[1394] Trial Judgement, para 1212.
[1395] Delić Brief, para 357.

establishment, he submits that those committed before its establishment (as in his case) are subject to the maximum under the law in the former Yugoslavia.[1396]

816. The Appeals Chamber disagrees. Trial Chambers are not *bound* by the practice of courts in the former Yugoslavia in reaching their determination of the appropriate sentence for a convicted person. This principle applies to offences committed both before and after the Tribunal's establishment. The Appeals Chamber can therefore see no reason why it should constitute a retrospective increase in sentence to impose a sentence greater than what may have been the maximum sentence available under domestic law in the former Yugoslavia at the time the offences were committed.

817. All of this is, however, subject to the proviso that any sentence imposed must always be, as stated by the Trial Chamber, "founded on the existence of applicable law".[1397] "[T]he governing consideration for the operation of the *nullem crimen sine lege* principle is the existence of a punishment with respect to the offence."[1398] There can be no doubt that the maximum sentence permissible under the Rules ("imprisonment for [...] the remainder of a convicted person's life"[1399]) for crimes prosecuted before the Tribunal, and any sentence up to this, does not violate the principle of *nulla poena sine lege*.[1400] There can be no doubt that the accused must have been aware of the fact that the crimes for which they were indicted are the most serious violations of international humanitarian law, punishable by the most severe penalties.[1401]

818. The Appeals Chamber finds that Delić has failed to show any error on the part of the Trial Chamber in concluding that it was not bound by the practice of the courts of the

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[1396] Delić Reply, paras 159-163.
[1397] Trial Judgement, para 1210.
[1398] Trial Judgement, para 1212. *See* also the Nuremberg Judgement which found that it is "a principle of justice above all; where there can be do doubt that the defendants knew that they were committing a wrong condemned by the international community, it is not unjust to punish them despite the lack of highly specified international law." *1 Trial of the Major War Criminals Before the International Military Tribunal,* 218-223 (1947). *See Nuremberg Judgement*, at 49. Affirmed in Report of the Sixth Committee, UN GAOR, 1st Sess, pt. 2, 55th Plen mtg at 1144, U.N.Doc. A/236 (1946), GA Res. 95, UN Doc A/64/Add.1 (1946).
[1399] Rule 101(A) of the Rules.
[1400] The European Court of Human Rights has held that as long as the punishment is accessible and foreseeable, then the principle cannot be breached: *SW v The United Kingdom* and *CR v The United Kingdom,* Judgement of 22 November 1995, Series A, Vol 335-B, paras 34-36 and 43.
[1401] For example, it is noteworthy that the judgements rendered at Nuremberg and Tokyo and the other successor tribunals provide clear authority for custodial sentences up to and including life imprisonment (Nineteen defendants were convicted before the Nuremberg Tribunal, out of which seven received sentences of imprisonment ranging from ten years to life imprisonment). Similarly, sentences in national jurisdictions of up to life imprisonment for crimes of the nature being prosecuted before the Tribunal are clearly recognised as being available.

former Yugoslavia and, further, that there was no violation of the principle of *nulla poena sine lege*.

2. The sentence imposed was excessive

819. Delić asserts that the sentence imposed was excessive compared to the practice of the courts in the former Yugoslavia, which regularly gave sentences near the minimum prescribed by law. In addition, it was disproportionate in comparison to those imposed in the cases of *Tadić* and *Erdemović*.[1402]

820. As confirmed above, the Tribunal is not bound by the practice of the courts of the former Yugoslavia, but it may simply turn to them for guidance. Therefore, even if it had been shown by Delić (which it has not) that sentences were regularly imposed by the courts in the former Yugoslavia which were close to the minimum, the Trial Chamber would not have been *bound* to follow that practice. Delić has failed to point to any error committed by the Trial Chamber.

821. With regard to assistance from previous cases decided by the Tribunal, although a Trial Chamber may draw guidance from such jurisprudence in imposing sentence, the Appeals Chamber reiterates, in agreement with the Prosecution, that "every sentence imposed by a Trial Chamber must be individualised [...] and there are many factors to which the Trial Chamber may appropriately have regard in exercising its discretion in each individual case".[1403] The guidance which may be drawn from previously decided cases, in terms of the final sentence imposed, is accordingly very limited.

822. Delić compares his case initially to that of *Erdemović*, and he submits that the accused there was a person responsible for over 700 execution-style killings but nevertheless only received a sentence of five years.[1404] Other than making this statement, he does not develop his argument. Nevertheless, for the reasons set out below with regard to Landžo, and considering the findings of the Trial Chamber in this case, the Appeals Chamber finds that the case of *Erdemović* is clearly distinguishable and no useful comparison can be made to Delić's case.

[1402] Delić Brief, paras 359-361.
[1403] Prosecution Response, para 19.16.
[1404] Delić Brief, para 361.

823. With regard to *Tadić,* Delić submits that he was convicted of eleven counts of crimes against humanity. "Even considering all aggravating circumstances for all of the counts of inhuman treatment and crue[l] treatment for which Tadić was convicted the most of sentences were placed at six and seven years."[1405]

824. Delić clearly errs in this comparison. The penalties imposed on *Tadić*, as finally confirmed by the Appeals Chamber,[1406] ranged from six years imprisonment to twenty years imprisonment (including those for wilful killing and murder). The sentences imposed on Delić ranged from seven years imprisonment to twenty years imprisonment (also for wilful killing and murder). Both accused were sentenced in relation to the gravity of their crimes and their individual circumstances. Even if one were to attempt to compare these cases as suggested by Delić, the range of sentences clearly falls within that which the Appeals Chamber has already confirmed is permissible.

825. The Appeals Chamber notes that, in sentencing Delić, the Trial Chamber referred to the brutality and premeditated fashion in which he committed the crimes for which he was convicted. It referred in particular to the tendency of Delić to threaten his victims before, during and after the crimes,[1407] and the pleasure he derived from the use of an electric shock device on the detainees.[1408] The Appeals Chamber does not accept that the sentences imposed by the Trial Chamber in this case were disproportionate to the severity of the crimes committed, even when taking into account the mitigating factors.[1409] The sentence imposed was within the Trial Chamber's discretionary framework, and Delić has failed to advance any adequate reason to persuade the Appeals Chamber to the contrary.

[1405] Delić Brief, para 361. It is noted that the Delić Brief was filed on 2 July 1999, while the *Tadić* Appeal Judgement (in which the Appeals Chamber reversed the Trial Chamber decision and entered findings of guilt for nine counts on the indictment, including grave breaches (wilful killing), violations of the laws or customs of war (murder) and crimes against humanity (murder)) was issued on 15 July 1999.

[1406] *Tadić* Sentencing Appeal Judgement.

[1407] *See,* e.g., in relation to the rape of Milojka Antić: "Delić threatened her and told her that, if she did not do whatever he asked, she would be sent to another prison-camp or shot .... [he] threatened her while raping her. The following day he compounded her fear and suffering by stating "...[w]hy are you crying? This will not be your last time.'" (Trial Judgement, para 1263).

[1408] Trial Judgement, para 1264.

[1409] Trial Judgement, para 1270.

E. Esad Landžo

826. The Appeals Chamber has already set out in detail the Trial Chamber's findings with regard to Landžo and his conviction for eighteen offences.[1410] The Appeals Chamber simply notes here the fact that the Trial Chamber found that his crimes were characterised by "substantial pain, suffering and injury" which he inflicted on each of his victims.[1411] The offences were described *inter alia* as having been committed with "savagery",[1412] and being "sustained and ferocious".[1413] It was further noted that he displayed "particularly sadistic tendencies [...] clearly requir[ing] premeditation".[1414]

827. In mitigation, Landžo put forward several circumstances,[1415] some of which the Trial Chamber considered could be taken into account in his favour when deciding on the appropriate sentence. These included his youth, "immature and fragile personality" and the harsh environment of the armed conflict as a whole.[1416] Nevertheless, he received several individual sentences of imprisonment, the maximum of which was fifteen years. As with his co-defendants, it was ordered that each sentence should be served concurrently.

828. Landžo has appealed his sentence as being manifestly excessive when compared to the other sentences imposed by the Tribunal, while also alleging that the Trial Chamber failed to properly take account of the mitigating factors put forward at trial.

1. Comparison with other sentences imposed by the Tribunal

829. Landžo submits that comparison to previous sentences imposed by the Tribunal (in particular the cases of *Tadić* and *Erdemović*)[1417] illustrate that his sentence was unjust and

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[1410] See *supra*, paras 565-571.
[1411] Trial Judgement, para 1273.
[1412] Trial Judgement, para 1273 (with regard to beating to death of Šćepo Gotovac).
[1413] Trial Judgement, para 1273 (with regard to his "sudden attack on Boško Somoukovič", also motivated "by vengeful desires.").
[1414] Trial Judgement, para 1274 (with regard to Landžo's "apparent preference for inflicting serious burns upon detainees in the prison-camp.").
[1415] These factors included: his youth; mental state; expressions of remorse; voluntary surrender; the fact that he was only an ordinary soldier and therefore should not be subject to the Tribunal's jurisdiction; his attempts to co-operate with the Prosecution. (Trial Judgement para 1277).
[1416] Trial Judgement, para 1283.
[1417] In his written filings, Landžo also compared his case to that of *Zlatko Aleksovski,* whose sentence was at the time under appeal by the Prosecution (Landžo Brief, p 143). Since then, Aleksovski's sentence has been increased by the Appeals Chamber (*Aleksovski* Appeal Judgement). When comparing his case to others during the Hearing on Appeal, Landžo made no further reference to this case and in these circumstances, the Appeals Chamber assumes that the submissions in relation thereto are not pursued.

manifestly excessive.[1418] He portrays himself as "a young boy sucked up in the invasion of his home",[1419] and a "mere boy with no military experience".[1420]

830. He submits that, although he had certain mitigating factors in his favour, *Dražen Erdemović* was an officer with rank, responsible for over 700 execution-style killings.[1421] Similarly, *Duško Tadić*, whose case had many aggravating factors, was convicted of eleven counts of crimes against humanity.[1422] For those charges of cruel and inhumane treatment, the maximum sentence *Tadić* received was ten years (though most were between six and seven years). Landžo submits that he cannot be compared to *Tadić*. "The class of accusations and the class of aggravating circumstances are in no way comparable."[1423]

831. In the case of *Serushago* before the Appeals Chamber for the ICTR, the appellant attempted to rely on the case of *Erdemović*, and urged the Appeals Chamber to consider the disparity in the sentences imposed.[1424] The Appeals Chamber held that the cases were distinguishable, as "[t]he facts of the two cases are materially different [...]. There was no evidence that Erdemović had a similar profile".[1425] Similarly, there is no evidence before the Appeals Chamber that Landžo had a similar profile such that any useful comparison may be made.

832. Landžo overlooks the findings of both the Appeals Chamber and the Trial Chamber in its final sentencing judgement in the case of *Erdemović*, both of which expressly highlight the clear distinguishing factor in that case. That is, the fact that the Appeals Chamber, and then the Trial Chamber, accepted the fact that *Erdemović* had been subjected to duress and committed the offences in question under real threat of death.[1426] The Trial Chamber found that "[t]he evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have

[1418] Landžo Brief, p 141.
[1419] Appeal Transcript, p 754.
[1420] Landžo Brief, p 143. *See* also Appeal Transcript, p 553, where he is referred to by his counsel as a "...boy who was brought into this conflict –he had not military training—he was brought into this conflict because his family, his home, and his very culture were under attack."
[1421] Landžo Brief, p 141.
[1422] Landžo's Brief was also filed before the *Tadić* Appeal Judgement.
[1423] Landžo Brief, pp 141-143.
[1424] *Omar Serushago* pleaded guilty to one count of genocide (Article 2(3)(a) of the Statute of the ICTR) and three counts of crimes against humanity (Articles 3(a), (b) and (c) of the Statute of the ICTR respectively). He was sentenced to fifteen years imprisonment on 5 February 1999 (*Prosecutor v Serushago,* Case No ICTR-98-39-S, 5 Feb 1999). *Dražen Erdemović* pleaded guilty to one count of a violation of the laws or customs of war and was sentenced to five years imprisonment (Second *Erdemović* Sentencing Judgement).
[1425] *Serushago* Sentencing Appeal Judgement, para 27.

been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed".[1427]

833. This case is by no means comparable. The Trial Chamber found that Landžo's actions were premeditated, savage and brutal, and that he derived enjoyment from the infliction of pain on detainees. The case is further distinguishable by the fact that one can note the particular findings by the Trial Chamber in that case, when it referred to firstly the fact that *Erdemović* displayed "reluctance to participate and [secondly] his reaction to having to perform this gruesome task [...]. It is clear that he took no perverse pleasure from what he did".[1428] On the contrary, the Trial Chamber found with regard to Landžo that, even if it were accepted that he was "on occasion, ordered to kill or mistreat prisoners [...] the evidence does not indicate that he performed these tasks with reluctance [...] the nature of his acts strongly indicates that he took some perverse pleasure in the infliction of great pain and humiliation".[1429] His case is marked by many aggravating factors, limiting the weight which the Trial Chamber found could be attached to the mitigating factors presented.[1430]

834. Similarly, with regard to any comparison to the case of *Tadić,* the Appeals Chamber can find no basis to conclude that the Trial Chamber erred. As noted above, the total sentence imposed on *Tadić* was finally confirmed by the Appeals Chamber at twenty years.[1431] Although this sentence was again decided on the basis of the particular facts and circumstances before that Trial Chamber, it may nevertheless be noted that both Trial Chamber sentencing judgements are marked by findings that the acts committed were brutal, wanton, sadistic and cruel.[1432] As already noted, Landžo's case is marked by similar

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[1426] Second *Erdemović* Sentencing Judgement, para 14.
[1427] Second *Erdemović* Sentencing Judgement, para 16.
[1428] Second *Erdemović* Sentencing Judgement, para 20.
[1429] Trial Judgement, para 1281. Although Article 7(4) of the Statute provides that the fact an accused person acted pursuant to an order of a superior may be considered in mitigation of punishment, this is only "if the International Tribunal determines that justice so requires". The Trial Chamber therefore retains discretion to reject this as mitigation.
[1430] It can also be reiterated, that as was pointed out in the Trial Judgement, although Landžo may not have been highly placed in terms of rank, in terms of the new Prosecution policy at the time, it involved focusing on those high up in the chains of responsibility or "on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences." *Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused,* Office of the Prosecutor, Doc. CC/PIU/314-E, 8 May 1998.
[1431] *Tadić* Sentencing Appeal Judgement.
[1432] *Prosecutor v Duško Tadić,* Sentencing Judgement, Case No IT-94-1-T, 14 July 1997 and Case No IT-94-1-T*bis*-R117, 11 Nov 1999.

findings and, although the Appeals Chamber does not directly compare these cases, it serves to point this out in light of Landžo's submissions. The Appeals Chamber accordingly finds that the sentence imposed was clearly within the Trial Chamber's discretionary framework.

2. Insufficient weight given to mitigating factors

835. Landžo effectively reiterates the submissions he made at trial with regard to mitigation, and submits that the Trial Chamber attached insufficient weight to the factors presented. He refers in particular to: his family background; good character; voluntary surrender; admission of guilt; the fact that he acted under superior orders; his mental condition; and attempts to co-operate with the Prosecution. Finally, he requests that the Appeals Chamber reconsider all of the evidence submitted in sentencing, in particular that provided by several defence witnesses before the Trial Chamber.[1433]

836. The Prosecution submits that "[t]here is no indication that the Trial Chamber did not consider all of the evidence and arguments placed before it by Landžo at the sentencing hearing."[1434] In any event, it submits that the purpose of appellate proceedings is not to reconsider all of the evidence, and that Landžo has failed to establish any legal principle that the Trial Chamber misapplied in sentencing.[1435]

837. The Appeals Chamber agrees. The purpose of appellate proceedings is not for the Appeals Chamber to reconsider the evidence and factors submitted before the Trial Chamber. In this case, the Appeals Chamber notes that the Trial Chamber did consider the mitigating factors presented by Landžo in determining the appropriate sentence. Further, the Trial Judgement shows amply that the Trial Chamber, having considered these factors and as it was entitled to do, both accepted some and rejected others. It falls on an appellant to convince the Appeals Chamber that the Trial Chamber erred in the exercise of its discretion, and that it failed to take account of or failed to give adequate weight to these factors.[1436] Landžo has failed to discharge this burden.

838. It is clear to the Appeals Chamber that the heinous nature of the crimes committed by Landžo was of overriding concern in the Trial Chamber's decision-making process on

[1433] Landžo Brief, pp 148-150 and Appeal Transcript, pp 756-757.
[1434] Prosecution Response, para 21.13.
[1435] Prosecution Response, paras 21.10-12, Appeal Transcript, p 762.
[1436] *Serushago* Sentencing Appeal Judgement, para 22.

sentence. This has already been noted in greater detail above, and the Appeals Chamber finds that the Trial Chamber did not err.[1437]

839. Landžo specifically raised the issue of diminished responsibility and its impact on his sentence during the hearing on appeal. The Appeals Chamber rejected the argument that a finding of diminished responsibility constitutes a full defence.[1438] However, it has accepted that it may be a matter appropriately considered in mitigation of sentence.[1439] Landžo submits that the Trial Chamber did not "recognise that [his] responsibility was diminished with respect to the sentence. Merely stating that they took into account his mental traits does not recognise diminished mental responsibility even in application to mitigation of punishment".[1440] On the contrary, he submits that the Trial Chamber should have clearly stated that the sentence was reduced by a certain number of years, due to a finding of a state of diminished responsibility.[1441]

840. The Trial Chamber found:

> [...] there are certain features of Mr. Landžo's case that must be taken into account in his favour when deciding upon the measure of sentence to be imposed upon him [...] [including the following] While the special defence of diminished responsibility [...] has been rejected by the Trial Chamber above, the Trial Chamber may nonetheless take note of the evidence presented by the numerous mental health experts, which collectively reveals a picture of Mr. Landžo's personality traits that contributes to our consideration of appropriate sentence.[1442]

841. As has been seen above, although the Trial Chamber accepted evidence that Landžo suffered from a personality disorder, it considered that, despite this, he was able to control his actions, therefore rejecting any "defence" of diminished responsibility. However, it is clear from the above that the Trial Chamber nevertheless did take into account Landžo's "personality traits". In doing so, and in considering specifically those mitigating factors to which the Trial Chamber wished to attach weight, it expressly found that the evidence of "numerous" mental health experts had been taken into account and contributed to the

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[1437] Similarly, in other cases, Trial Chambers have expressly acknowledged matters submitted by a convicted person in mitigation but found that due to the serious nature of the crimes committed and the fact that often many accused share particular personal factors, their weight is either limited or non-existent in determining sentence. *Blaškić* Judgement, para 782. Also *Prosecutor v Furundžija,* Judgement, Case No IT-95-17/1-T, 10 Dec 1998, para 284. *Prosecutor v Jelisić,* Judgement, Case No IT-95-10-T, 14 Dec 1999, para 124.

[1438] *See supra*, para 590.

[1439] *See supra*, para 590. The limited mental capacity of an accused at the time of the crime and during trial was also recognised as a mitigating factor in the trials conducted after the Second World War. *See e.g., Trial of Wilhelm Gerbsch,* 15 LRTWC at 185.

[1440] Appeal Transcript, pp 754-755.

[1441] Appeal Transcript, pp 755-756.

consideration of an appropriate sentence. The Appeals Chamber can see no error nor ambiguity in such a finding. It is not incumbent on a Trial Chamber, as suggested by Landžo, to specifically indicate the reduction in years which it makes in relation to each mitigating factor put forward. On the contrary, it is for the Trial Chamber to make an overall assessment of the circumstances of the case and impose an appropriate sentence, taking into account all of the relevant factors. The Appeals Chamber accordingly finds that there has been no error demonstrated.

842. Weighed against the many aggravating factors noted above and in full in the Trial Judgement, the Appeals Chamber finds no error in the sentence imposed on Landžo by the Trial Chamber.

F. Significance of Respective Roles in the Broader Context of the Conflict – Ground of Appeal Submitted by Landžo, Delić and Mucić

843. Mucić, Delić and Landžo have each submitted that, in light of the decision in the *Tadić* Sentencing Appeal Judgement, the sentences imposed on each of them respectively were excessive. In the *Tadić* Sentencing Appeal Judgement, the Appeals Chamber found:

> In the opinion of the Appeals Chamber, the Trial Chamber's decision, when considered against the background of the jurisprudence of the International Tribunal and the International Criminal Tribunal for Rwanda, fails to adequately consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict in the former Yugoslavia.
>
> Although the criminal conduct underlying the charges of which the Appellant now stands convicted was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low.
>
> In the circumstances of the case, the Appeals Chamber considers that a sentence of more than 20 years' imprisonment for any count of the Indictment on which the Appellant stands convicted is excessive and cannot stand.[1443]

844. Each appellant argues that, like *Duško Tadić,* their place in the hierarchy and overall command structure was low and that the sentence imposed on each of them failed to reflect this. Mucić submits that the decision articulated an additional sentencing factor to be considered, in that a Trial Chamber must now determine an individual's significance in the

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[1442] Trial Judgement, para 1283.
[1443] *Tadić* Sentencing Appeal Judgement, paras 55-57.

broader context of the conflict in the former Yugoslavia.[1444] Although the Trial Chamber found that Mucić was a commander of the Čelebići camp, it did not categorise his role in the broader context of the conflict in the former Yugoslavia. Mucić submits that this role was insignificant[1445] and that this works as a mitigating factor in determining sentence.[1446]

845. Similarly, Delić submits that his sentence should be reduced substantially as a result of this decision. He portrays the Čelebići camp as a relatively small prison, holding relatively few prisoners.[1447] He submits that the *Tadić* Sentencing Appeal Judgement held that those who organised large-scale atrocities should be punished more harshly than those who, while guilty of some offences, are minor players in a much larger game controlled by others.[1448] The Trial Chamber failed to consider his position in the overall situation and his total lack of policy-making authority and lack of command authority. If they had, he submits that his twenty-year sentence would be reduced substantially.[1449] Finally, Landžo submits that the Trial Chamber failed to consider the significance of his role in the broader context, and that "[t]here is no one who was a more minor player in the conflict in Yugoslavia than Esad Landžo was".[1450]

846. The Prosecution disputes these interpretations, and submits that determination of sentence should reflect the inherent gravity of an accused's conduct. This should not be made by comparison with other persons known or unknown to the Trial Chamber or by reference to the fact that there may have been others who committed many more or graver crimes during the conflict.[1451]

847. The Appeals Chamber is satisfied that the appellants' interpretation of the *Tadić* Sentencing Appeal Judgement is incorrect. That judgement did not purport to require that, in every case before it, an accused's level in the overall hierarchy in the conflict in the former Yugoslavia should be compared with those at the highest level, such that if the accused's place was by comparison low, a low sentence should automatically be imposed.

[1444] Delić/Mucić Supplementary Brief, para 41.
[1445] Delić/Mucić Supplementary Brief, para 44. In particular Mucić submits that he had no authority for the conduct of the war, no responsibility for policy decisions, no authority to determine who was arrested, why they were arrested, how they were arrested or what happened to them before their arrival at the Čelebići camp. (paras 45-48).
[1446] Delić/Mucić Supplementary Brief, para 47.
[1447] Delić/Mucić Supplementary Brief, para 38.
[1448] Delić/Mucić Supplementary Brief, para 39.
[1449] Delić/Mucić Supplementary Brief, para 40.
[1450] Appeal Transcript, pp 752-754.
[1451] Prosecution Response to Supplementary Brief, para 7.5.

Establishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime which "requires consideration of the particular circumstances of the cases, as well as the form and degree of the participation of the accused in the crime."[1452] In certain circumstances, the gravity of the crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure, a very severe penalty is nevertheless justified.

848. This interpretation was recently applied by the Appeals Chamber in the *Aleksovski* Appeal Judgement:

> While, therefore, this Appellant may have had a secondary role, compared with the alleged roles of others against whom charges have been brought, he was nonetheless the commander of the prison and as such the authority who could have prevented the crimes in the prison and certainly should not have involved himself in them. An appropriate sentence should reflect these factors. There are no other mitigating circumstances in this case.[1453]

849. Therefore, while the Appeals Chamber has determined that it is important to establish a gradation in sentencing, this does not detract from the finding that it is as essential that a sentence take into account all the circumstances of an individual case.

850. In this case, noting the circumstances of each appellant (with the exception already referred to of Mucić), the Appeals Chamber finds no error in the exercise of the Trial Chamber's discretion. Although it is not contended that the appellants held a senior role in terms of the command structure in the conflict as a whole, nonetheless the inherent gravity of their respective conduct (which have been considered in greater depth above) was noted repeatedly by the Trial Chamber.[1454] The Appeals Chamber accordingly finds that the sentences imposed on Delić and Landžo were not outside the discretionary framework available to the Trial Chamber.

[1452] *Aleksovski* Appeal Judgement, para 182, citing *Kupreškić* Judgement, para 852.
[1453] *Aleksovski* Appeal Judgement, para 184.
[1454] As a whole the Trial Chamber found that "[a] mere cursory glance over the Indictment...provides a lasting impression of a catalogue of horrific events....To argue that these are not crimes of the most serious nature strains the bounds of credibility." Trial Judgement, para 178.

G. Conclusion

851. For the reasons identified above, the Appeals Chamber has found that the Trial Chamber did not have sufficient regard to the gravity of the offences committed by Mucić in exercising its sentencing discretion, and as a result it imposed a sentence which did not adequately reflect the totality of Mucić's criminal conduct. The fourth Prosecution ground of appeal is therefore allowed to that extent. The Prosecution submits that:

> [...] where the Appeals Chamber upholds an appeal against sentence on the grounds that the sentence imposed was manifestly excessive or manifestly inadequate, it is unnecessary for the case to be remitted to a Trial Chamber for further sentencing proceedings.[1455]

The Prosecution says that it is appropriate for the Appeals Chamber to substitute its own sentence for that of the Trial Chamber. It is clear from the *Aleksovski* Appeal Judgement that, in the case of a successful appeal against sentence on such a ground, it is open to the Appeals Chamber to consider and substitute its own sentence without remitting the matter to the Trial Chamber.[1456] As noted above, however, in the present proceedings, the matter is to be referred back to a reconstituted Trial Chamber for reconsideration of sentence in light of the fact that certain convictions are to be quashed. That Trial Chamber must consider the appropriate sentence for Mucić on the basis of the reduced counts remaining against him and by reference to the Appeals Chamber's conclusion in relation to this ground of appeal that the original sentence did not adequately take into account the gravity of the crimes.

852. It will assist the Trial Chamber to which these sentencing matters are remitted if the Appeals Chamber indicates the revised sentence that it would have considered appropriate for Mucić, had there not been the intervening factor that certain of his convictions are to be quashed. This indication is made on the basis of the sentence which would have been appropriate in relation to the crimes for which Mucić was convicted by the original Trial Chamber.

853. Taking into account the various considerations relating to the gravity of Mucić's offences and the aggravating circumstances already referred to, as well as the mitigating circumstances referred to by the Trial Chamber and the "double jeopardy" element involved

[1455] Prosecution Brief, para 5.76.
[1456] *Aleksovski* Appeal Judgement, paras 186, 187 and 191.

in subjecting Mucić to a revised sentence,[1457] the Appeals Chamber would have imposed on Mucić a heavier sentence of a total of around ten years imprisonment.

854. The Trial Chamber to which the sentencing issues are remitted may have reference to this indication in its own determination, which must be made in relation to the reduced number of counts following the quashing of those counts on the basis of cumulative convictions considerations.[1458] The new Trial Chamber should also consider the effect (if any) upon that indication of the original Trial Chamber's error in referring to the failure of Mucić to give evidence. That Trial Chamber will have the discretion under Rule 87(C) as to whether it will impose individual sentences in relation to each count for which a conviction is entered, in which case it has a further discretion as to whether to order that those sentences be served concurrently or consecutively, or to impose a single sentence reflecting the totality of the accused's criminal conduct.[1459]

[1457] *Aleksovski* Appeal Judgement, para 190.

[1458] Because the convictions on the Article 2 counts based on the same conduct as the quashed Article 3 counts remain, the adjustment required in relation to the quashing of convictions may not necessarily be a substantial one. It is for the Trial Chamber to which the sentencing matters are remitted to consider the totality of Mucić's criminal conduct in light of the convictions now entered against him.

[1459] After the amendment of Rule 87(C) (Revision 19, effective from 19 Jan 2001) the Trial Chamber "shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused."

XV. DISPOSITION

For the foregoing reasons:

1. In relation to Counts 1 and 2 of the Indictment, the Appeals Chamber ALLOWS the ninth and tenth grounds of appeal filed by Hazim Delić,[1460] it QUASHES the verdict of the Trial Chamber accordingly, and it enters a verdict that Hazim Delić is NOT GUILTY upon those counts.

2. In relation to the grounds of appeal relating to cumulative convictions, the Appeals Chamber ALLOWS the twenty-first ground of appeal filed by Hazim Delić[1461] and the seventh ground of appeal filed by Zdravko Mucić; it DISMISSES Counts 14, 34, 39, 45 and 47 against Zdravko Mucić; it DISMISSES Counts 4, 12, 19, 22, 43 and 47 against Hazim Delić, and it DISMISSES Counts 2, 6, 8, 12, 16, 25, 31, 37, and 47 against Esad Landžo. It REMITS to a Trial Chamber to be nominated by the President of the Tribunal ("Reconstituted Trial Chamber") the issue of what adjustment, if any, should be made to the original sentences imposed on Hazim Delić, Zdravko Mucić, and Esad Landžo to take account of the dismissal of these counts.

3. In relation to the eleventh ground of appeal filed by Zdravko Mucić, the Appeals Chamber FINDS that the Trial Chamber erred in making adverse reference when imposing sentence to the fact that he had not given oral evidence in the trial, and it DIRECTS the Reconstituted Trial Chamber to consider the effect, if any, of that error on the sentence to be imposed on Mucić.

4. The Appeals Chamber ALLOWS the fourth ground of appeal filed by the Prosecution alleging that the sentence of seven years imposed on Zdravko Mucić was inadequate, and it REMITS the matter of the imposition of an appropriate revised sentence for Zdravko Mucić to the Reconstituted Trial

[1460] Designated "Issue Number Nine" and "Issue Number Ten" in Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000.
[1461] Designated "Issue Number 21 (Additional Issue Number Two)" in Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000.

Chamber, with the indication that, had it not been necessary to take into account a possible adjustment in sentence because of the dismissal of the counts referred to in paragraph 2 above, it would have imposed a sentence of around ten years.

5. The Appeals Chamber DISMISSES each of the remaining grounds of appeal filed by each of the appellants.

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

Judge David Hunt, Presiding

Judge Fouad Riad

Judge Rafael Nieto-Navia

Judge Mohamed Bennouna

Judge Fausto Pocar

Dated this twentieth day of February 2001
At The Hague
The Netherlands

[Seal of the Tribunal]

XVI. SEPARATE AND DISSENTING OPINION OF JUDGE DAVID HUNT AND JUDGE MOHAMED BENNOUNA

A. Introduction

1. We append a separate and dissenting opinion in relation to the issue of cumulative convictions not only because we are unable to agree with some of the reasoning and part of the outcome in the majority opinion, but also because, in relation to those conclusions in the majority opinion with which we do agree, we believe it to be desirable to give a fuller explanation for those conclusions.

2. First, we intend to explain more thoroughly why we believe that the various approaches in the previous jurisprudence on this issue within the Tribunal, and the individual approaches of national systems, do not provide of themselves a satisfactory solution for this Tribunal. Secondly, we give our reasons as to *why* cumulative convictions in relation to the same conduct, as well as cumulative penalties in sentencing, are impermissible.

3. There are two matters of substance in relation to which we take a different view to that taken by the majority. The first relates to the application of the test to determine whether two crimes are legally distinct. The second relates to the way in which, when a choice must be made as to which of two or more possible cumulative convictions should be retained, that choice must be made.

B. Background

4. The ground of appeal of Mucić and Delić alleges that they were impermissibly convicted and sentenced under both Article 2 and Article 3 of the Statute in respect of the same acts.[1] The ground was described in the following terms:

[1] Appellants-Cross Appellee's Hazim Delić's and Zdravko "Pavo" Mucić's Motion for Leave to File Supplemental Brief and Supplemental Brief, 17 Feb 2000 ("Delić/Mucić Supplementary Brief"). This was treated as an application for leave to add an additional ground of appeal, which was granted by the Appeals Chamber's Order on Motion of Appellants Hazim Delić and Zdravko Mucić for Leave to File Supplementary Brief, 31 Mar 2000. Although Landžo was also convicted under Article 2 and Article 3 of the Statute in respect

> Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches of the Geneva Conventions and for violations of the Laws and Customs of War based on the same acts.[2]

5. Mucić and Delić's submissions in support of this ground of appeal are essentially based on the discussion in the *Kupreškić* Judgement of the principles governing cumulative convictions.[3] The appellants interpret the *Kupreškić* Judgement as adopting the standard enunciated in the US Supreme Court decision in *Blockburger v United States*, *i.e.* that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offences or only one, is whether each provision requires proof of a fact that the other does not".[4] The appellants contend that, applying that test to their convictions under Article 2 and those under Article 3 (which rely on common Article 3 of the Geneva Conventions), that standard is violated:

> Setting aside the question of the applicability of Common Article 3 to international armed conflict and whether Common Article 3 imposes individual criminal liability, to obtain a conviction under Common Article 3, the elements are identical with one exception. An element of the grave breaches of the Geneva Conventions is that the complainant was a person protected by one of the Conventions [...]. Thus, judgements of conviction for both grave breaches of the Geneva Convention and violations of the laws and customs of war would violate the *Blockburger* standard.[5]

The relief sought is that, in the cases of duplicative convictions, one of the charges should be dismissed, without specifying which one.

6. The Prosecution responded to this ground of appeal with an extensive analysis of the jurisprudence of the Tribunal and of certain national jurisdictions relating to cumulative charging and cumulative convictions. The Prosecution's key contentions are, first, that the existing practice of this Tribunal and the International Criminal Tribunal for Rwanda permits cumulative convictions under Articles 2 and 3 of the Statute, and that the reasoning expressed in the *Kupreškić* Judgement is inconsistent with that practice. That Judgement's reference to the principles on concurrence of offences in national jurisdictions does not, it is said, support a departure from this practice, as the variations between the jurisdictions on this issue are so extensive that no general principles of international law can be drawn from

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of the same acts, he did not formally join in this ground of appeal. However, Landžo's convictions under both Article 2 and Article 3 were referred to in the Delić/Mucić Supplementary Brief, para 14 (c).

2 Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, 31 May 2000, Ground 7; Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000, Issue 21.

3 *Kupreškić* Judgement, paras 637–748.

4 *Blockburger v United States* 284 US 299, 304 (1932).

5 Delić/Mucić Supplementary Brief, p 13.

them. The Prosecution does, however, appear to rely on concepts drawn from continental legal systems in arriving at the principles which it regards as applicable.

7. The Prosecution interprets the jurisprudence of the two Tribunals as disclosing four different tests on the issue. The Prosecution submits that the applicable principles may be arrived at by reconciling two of the tests – the first drawn from the *result* in the *Tadić* Appeal Judgement and the second from the *reasoning* in the *Akayesu* Judgement.[6] The question of cumulative convictions was not discussed by the Appeals Chamber in the *Tadić* Appeal Judgement, and it had not been raised as an issue on appeal. The Prosecution rather seeks to rely on the fact that, as a result of the Appeals Chamber's substitution of a guilty verdict for a not guilty verdict on certain counts, Tadić received multiple convictions under separate Articles of the Statute in respect of the same conduct. The test relied upon from the *Akayesu* Judgement is that cumulative convictions are acceptable where:

(i) the offences have different elements;
(ii) the provisions creating the offences protect different interests; *or*
(iii) it is necessary to record a conviction for more than one offence to fully describe what the accused did.[7]

8. The principles ultimately proposed by the Prosecution are that, in cases of "ideal concurrence", where a single act contravenes more than one provision, the accused can be charged with and convicted of multiple crimes. Their foundation on the same conduct is relevant only to sentencing. To determine whether crimes are in fact in a relationship of ideal concurrence, the test posited in the *Akayesu* judgement is to be used.

9. The question of cumulative *charging* had in fact been raised earlier in the *Čelebići* trial proceedings, in preliminary motions filed by Delalić and by Delić. The Trial Chamber dismissed the motion filed by Delalić on the basis that accumulation of offences is a matter which goes only to penalty and that it is not to be considered at the charging stage.[8] The Trial Chamber followed a decision of the Trial Chamber in *Tadić*, where it was held:

> In any event, since this is a matter that will only be at all relevant insofar as it might affect penalty, it can best be dealt with if and when matters of penalty fall for consideration. What can, however, be said with certainty is that penalty cannot be made

[6] *Akayesu* Judgement, paras 461-470.
[7] *Akayesu* Judgement, para 468.
[8] *Prosecutor v Delalić and Others*, Case No IT-96-21-PT, Decision on Motion by the Accused Zejnil Delalić based on Defects on the Form of the Indictment, 2 Oct 1996, para 24.

> to depend upon whether offences arising from the same conduct are alleged cumulatively or in the alternative. What is to be punished by penalty is proven criminal conduct and that will not depend upon the technicalities of pleading.[9]

10. This conclusion was followed by the Trial Chamber in its decision on the Delić motion.[10] Leave to appeal was refused in respect of the decisions on both the Delić and Delalić motions.[11] Other Trial Chambers have reached different conclusions on the issue, both that cumulative charging is permitted only in certain limited circumstances and that cumulative charging is permitted without limitation, the issue only being relevant to the imposition of penalty.[12]

C. Analysis

11. In essence, the only issue to be determined by the Appeals Chamber arising from these grounds of appeal is whether an accused can be convicted of both an Article 2 and an Article 3 violation for the same conduct. However, the determination of this issue raises matters of legal principle which will have consequences in relation to convictions arising under other provisions of the Statute. Although these consequences are difficult to predict, we have attempted to take them into account in identifying the applicable legal principles.

1. Cumulative Charging

12. As a preliminary point, we agree with the majority that the cumulative *charging* should generally be permitted. As a practical matter, it is not reasonable to expect the Prosecution to select between charges until all of the evidence has been presented. It is not possible to know with precision, prior to that time, which offences among those charged the evidence will prove, particularly in relation to the proof of differing jurisdictional pre-requisites – such as, for example, the requirement that an international armed conflict be proved for Article 2 offences but not for those falling under Article 3. Further, as has been

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[9] *Prosecutor v Tadić,* Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, para 17.

[10] *Prosecutor v Delalić and Others*, Case No IT-96-21-PT, Decision on Motion by the Accused Hazim Delić ased on Defects in the Form of the Indictment, 15 Nov 1996, para 22.

[11] *Prosecutor v Delalić and Others*, Case No IT-96-21-AR72.5, Decision on Application for Leave to Appeal (Form of the Indictment), 15 Oct 1996; Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment), 6 Dec 1996.

[12] Compare, *e.g, Kupreškić* Judgement; the earlier Decision on Defence Challenges to Form of the Indictment, *Prosecutor v Kupreškić et al,* Case No IT-95-16-PT, 15 May 1998; *Prosecutor v Krnojelac*, Case No IT-97-25-PT, Decision on the Defence Preliminary Motion on the Form of the Indictment, 24 Feb 1999, paras 5-10; *Prosecutor v Naletilić and Martinović*, Case No IT-98-34-PT, Decision on Defendant Vinko Martinović's Objection to the Indictment, 15 Feb 2000, para 12; *Prosecutor v Tadić,* Case No IT-94-1-T, Decision on the Defence Motion on Form of Indictment, 14 Nov 1995, paras 15-18.

observed at the Trial Chamber level, the offences in the Statute do not refer to specific categories of well-defined acts, but to broad groups of offences, the elements of which are not always clearly defined and which may remain to be clarified in the Tribunal's jurisprudence.[13] The fundamental consideration raised by this issue is that it is necessary to avoid any prejudice being caused to an accused by being penalised more than once in relation to the same conduct. In general, there is no prejudice to an accused in permitting cumulative *charging* and in determining the issues arising from accumulation of offences after all of the evidence has been presented.[14]

2. Cumulative Convictions

13. We are not convinced that the prior practice of this Tribunal and of the ICTR, as interpreted by the Prosecution, provides the solution to the problem of cumulative *convictions*. We understand the majority opinion to state the same conclusion, but we wish to provide our reasons for that conclusion.

14. The Appeals Chamber has not yet had to pronounce on the issue of accumulation of convictions, and it is disingenuous for the Prosecution to put forward the result in the *Tadić* Appeal – where what appear to be cumulative convictions were imposed, but where the issue was neither raised by the parties nor expressly considered by the Appeals Chamber – as authority for continuing this practice. The refusal of benches of the Appeals Chamber to grant leave to appeal from determinations that an accused can be *charged* with two different crimes arising from the same conduct,[15] raised a different question from the one now in issue.

15. The jurisprudence of the Trial Chambers is far from uniform with respect to this issue. The Prosecution's use of the Tribunal jurisprudence and of certain domestic law concepts in arriving at what are described as the "relevant principles"[16] appears to be a

[13] *Prosecutor v Radislav Krstić*, Case No IT-98-33-PT, Decision on the Defence Motion on the Form of the Indictment, Count 7-8, 28 Jan 2000, pp 6-7.

[14] *See Prosecutor v Naletilić and Martinović*, Decision on Defendant Vinko Martinović's Objection to the Indictment, Case No IT-98-34-PT, 15 Feb 2000, para 12. We acknowledge that there may be specific examples of obviously duplicative cumulative charging, where there is no reason in the particular circumstances that the Prosecution needs to see how the evidence turns out before selecting the most relevant charge. In those circumstances, it may be oppressive to allow cumulative charging.

[15] *Prosecutor v Delalić and Others*, Case No IT-96-21-AR72.5, Decision on Application for Leave to Appeal (Form of the Indictment), 15 Oct 1996; *Prosecutor v Delalić and Others*, Decision on Application for Leave to Appeal by Hazim Delić (Defects in the Form of the Indictment)", Case No IT-96-21-AR72.5, 6 Dec 1996.

[16] Prosecution Response to Delić/Mucić Supplementary Brief, para 4.83.

selective exercise directed by a policy of entering the maximum possible convictions against an accused, rather than an analysis of any legal principle which actually dictates that result. Most decisions on the issue – with the exception of the *Kupreškić, Akayesu* and *Kayishema and Ruzindana* judgements[17] – have not been accompanied by reasoned consideration. The numerous Trial Chamber decisions on challenges to the form of the indictment generally concern the permissibility of cumulative *charging*, not cumulative convictions.

16. The one thing which is genuinely common to the cases which have dealt with the issue of cumulative convictions is the view that they are not permissible unless each of the relevant offences has a unique legal element. Since the function of this test is to determine whether two or more charged crimes are in fact *legally distinct offences*, this requirement, in its focus on the legal definition of the crimes, is a logical and appropriate one.

17. We are not convinced that the use of some kind of different values or different interests test, in conjunction with or in addition to a "different elements" test, can be said to be either a general principle of international criminal law or common to the major legal systems of the world. Various decisions of this Tribunal and the ICTR refer to the consideration that different criminal provisions may protect different societal interests or values as being an additional matter which may justify cumulative convictions. However, the consideration of societal interests or protected values is both the rationale for, and inherent in, different acts being labelled different crimes, and it will therefore generally be given effect by the application of the "different elements" test.

18. We have considered the Prosecution submissions that Articles 2 and 3 protect different interests – that Article 2 governs specific types of conduct in order to protect individual members of specific protected groups and that Article 3, as a residual clause, ensures "full observance of all requirements of international humanitarian law" – and that for that reason otherwise identical crimes (such as murder or torture) should lead to convictions under both Articles 2 and 3.[18] However, we do not believe that the interests identified by the Prosecution are so genuinely different that they justify cumulative convictions for otherwise identical criminal conduct. It is not apparent from customary or conventional international humanitarian law that the bodies of law underlying these

[17] *The Prosecutor v Kayishema and Ruzindana,* Case No ICTR-95-1-T, Judgement, 21 May 1999, paras 625-650.

provisions protect different interests, and the simple fact that they are represented in different Articles of the Statute does not assist the Prosecution's contention. The values protected by Articles 2 and 3 are, at their base, essentially the same – the protection of individuals and certain groups from violations of international humanitarian law in the context of armed conflict.[19]

19. To rely on the practice of certain courts and tribunals that have cumulatively convicted persons accused of having committed crimes during World War II is unsatisfactory in our view. The issue was not directly in issue in the cases referred to by the Prosecution, and the IMT at Nuremberg and the various military courts sitting at Nuremberg no doubt had particular reasons for convicting accused of both war crimes and crimes against humanity which are not relevant at this time.[20]

20. Further, to have resort to national jurisdictions is also highly problematic in light of the lack of a uniform approach to this issue, which is complex even in well developed national jurisdictions, requiring solutions peculiar to a specific national system. No clear, useful, *common* principle can be gleaned from the major legal systems of the world. It is in any case doubtful, given the unique nature of the international crimes over which the Tribunal has jurisdiction, whether any national jurisdiction has had to face a problem similar in scope to the one at hand.

21. Nor is a solution to the issue to be found in the general nature of international humanitarian law, which is not primarily concerned with criminal proceedings against individuals. An argument that, because the various branches of international humanitarian law protect different societal interests, it therefore permits cumulative convictions is untenable. General international humanitarian law did not develop by reference to application of its various branches to criminal proceedings against individuals, and it does

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[18] Prosecution Response to Delić/Mucić Supplementary Brief, paras 4.85 and 4.88.

[19] The Prosecution describes the fact that Article 2 is directed at the protection of specific protected groups ("protected persons" under the Geneva Conventions) as being a distinguishing factor from Article 3: Prosecution Response to Delić/Mucić Supplementary Brief, para 4.85. However, this may also be said in respect of Article 3. Where offences under common Article 3 of the Geneva Conventions are charged under Article 3, they are also directed at the protection of a specifically defined group of persons – "Persons taking no active part in the hostilities" – *See* common Article 3(1). There may be, depending on the circumstances, a substantial overlap between the two groups.

[20] *Kupreškić* Judgement, paras 675 and 676.

not purport to provide a solution to this substantive criminal law problem. The Statute itself also does not expressly or implicitly resolve the problem.

22. The majority has held that "reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions" lead to the conclusion that cumulative convictions should not be permitted.[21] We agree that fairness to the accused dictates that cumulative convictions for offences which are not genuinely distinct should not be permitted in respect of the same conduct. It is appropriate to identify what these "reasons of fairness to the accused" are.

23. Prejudice to the rights of the accused – or the very real risk of such prejudice – lies in allowing cumulative convictions. The Prosecution suggests that cumulative convictions "do not cause any substantive injustice to the accused" as long as the fact that such convictions are based on the same conduct is taken into account in sentencing.[22] This does not take into account the punishment and social stigmatisation inherent in being *convicted* of a crime. Furthermore, the number of crimes for which a person is convicted may have some impact on the sentence ultimately to be served when national laws as to, for example, early release of various kinds are applied. The risk may therefore be that, under the law of the State enforcing the sentence, the eligibility of a convicted person for early release will depend not only on the sentence passed but also on the number and/or nature of convictions. This may prejudice the convicted person notwithstanding that, under the Statute, the Rules and the various enforcement treaties, the President has the final say in determining whether a convicted person should be released early. By the time national laws trigger early release proceedings, and a State request for early release reaches the President, the prejudice may already have been incurred. Finally, cumulative convictions may also expose the convicted person to the risk of increased sentences and/or to the application of 'habitual offender' laws in case of subsequent convictions in another jurisdiction.

(a) Application of the "different elements" test to determine whether crimes charged are genuinely legally distinct

24. As to the 'test' to be applied in order to avoid cumulative convictions, we agree with the majority that an accused may only be convicted of more than one offence in respect of

[21] At para 412 above.
[22] Prosecution Response to Delić/Mucić Supplementary Brief, para 4.89(3).

the same conduct where each offence has a unique element that the other offence or offences do not. We agree with the majority's conclusion that the pairs of offences for which Mucić, Delić and Landžo were convicted under Articles 2 and 3 were impermissibly cumulative. However, we disagree with the majority in relation to the way in which the 'test' should be applied.

25. The particular nature of offences within the Tribunal's jurisdiction – which have elements with no real equivalents of most crimes in domestic jurisdictions – gives rise to an issue as to which of the elements should be taken into account for this purpose. The majority has elected to include in that consideration the legal prerequisites relating to the circumstances of the relevant offences, or the *chapeaux* to the Articles, as well as the elements of the crimes which go to the *actus reus* and *mens rea* of the offences.

26. As we emphasised above,[23] the fundamental consideration arising from charges relating to the same conduct is that an accused should not be penalised more than once for the same *conduct*. The purpose of applying this test is therefore to determine whether the *conduct* of the accused genuinely encompasses more than one crime. For that reason, we believe that it is not meaningful to consider for this purpose legal prerequisites or contextual elements which do not have a bearing on the accused's conduct, and that the focus of the test should therefore be on the substantive elements which relate to an accused's conduct, including his mental state. The elements relating to the international nature of the conflict and protected person status in relation to Article 2, or considerations which may arise under Article 3 such as the limitation of offences charged under common Article 3 to "persons taking no active part in hostilities" – are in practice not relevant to the conduct and state of mind of the accused. Although matters such as protected person status or the internationality of the armed conflict provide the *context* in which the offence takes place, it is, we believe, artificial to suggest that the precise nature of the conflict or the technical status of the victim (*i.e.* classification as a protected person as opposed to a person taking no active part in hostilities) has any bearing on the accused's conduct. Such technicalities are certainly not matters which would have been of any importance to the victim. We therefore consider that, although these matters must clearly be proved before an accused could be convicted under the relevant Articles, they are irrelevant to a test to be applied solely for the

[23] *See* para 12.

purpose of determining whether the *criminal conduct* of an accused in any given case can fairly be characterised as constituting more than one crime.

27. The fundamental function of the criminal law is to punish the accused for his criminal conduct, and only for his criminal conduct. We believe that taking into account such abstract elements creates the danger that the accused will also be convicted – with, as discussed, the penalty inherent in that conviction alone – in respect of additional crimes which have a distinct existence only as a purely legal and abstract matter, effectively through the historical accidents of the way in which international humanitarian law has developed in streams having distinct contextual requirements.[24] The fact that the Articles of the Statute encompass different, although frequently overlapping, crimes is a result mainly of the history of international humanitarian law rather than any indication that they are intended to describe genuinely distinct bodies of criminal law in *contemporary* international humanitarian law.

28. We again emphasise that, although we do not regard the contextual elements or *chapeaux* as being of assistance *for this purpose*, this does not undermine their undoubted importance for other purposes. They obviously remain matters to be proven in every case before any conviction can be entered. They are also matters which may become relevant at the second stage of selecting between cumulatively charged crimes, which we discuss below.

29. In the circumstances of this case, where only convictions under Articles 2 and 3 of the Statute are raised for consideration, the majority has determined that the relevant pairs of crimes do not each contain a unique element, because the requirement under common Article 3 in the Article 3 charges is not materially distinct from the unique "protected person" requirement of Article 2 crimes, as the latter requirement "includes, yet goes beyond what is meant by an individual taking no active part in the hostilities".[25] However, in relation to crimes charged under other combinations of Articles of the Statute, such as Articles 2 and 5 or Articles 3 and 5, taking into account the different contextual elements or legal prerequisites will have the result that crimes such as torture, rape, and murder/wilful

[24] For example, the two conditions set out in the Geneva Conventions of 1949 for the application of the "grave breaches" regime (*i.e.*, the international character of the conflict and protected persons status) relate to what was called the procedural aspect of this crime, in order to allow its prosecution in national jurisdictions. In other words, they were designed as a safeguard against any attempt by national jurisdictions to interfere in an internal conflict, or what would be considered as an issue falling within a State's sovereignty.

killing will necessarily and in every case be considered to be distinct crimes when charged under the different Articles, and therefore two convictions will have to be entered for what is in reality the same offence.

30. An abstract but potentially common example may serve to explain our concerns more adequately. The rape of a "protected person" in a prison camp, in the context of both an international armed conflict and a widespread or systematic attack on the civilian population, could be charged by the Prosecution as rape as a grave breach under Article 2 of the Statute; rape as prohibited by common Article 3 under Article 3 of the Statute, and rape as a crime against humanity under Article 5 of the Statute. The application of the test as posed by the majority, in addition to a comparison of the elements relating to the *actus reus* and *mens rea* of the offence of rape, must take into account the following elements:

Article 2:
(i) the requirement that the victim be a protected person;
(ii) there must be an international armed conflict;[26]
(iii) the act must have a close nexus with the armed conflict.[27]

Article 3 (common article 3):
(i) the victim must be a person taking no active part in hostilities;
(ii) there must be an armed conflict;[28]
(iii) the act must have a close nexus with the internal or international armed conflict.[29]

Article 5:
(i) there must be an armed conflict;[30]
(ii) there must be a widespread or systematic attack on the civilian population;[31]
(iii) the act must form part of the widespread or systematic attack.[32]

31. Taking the majority's analysis of the relationship between crimes charged only under Article 2 and Article 3 (common Article 3), there would be no reciprocal unique

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[25] *See* above, para 423.
[26] *Tadić* Jurisdiction Decision, paras 78 and 84.
[27] *Tadić* Jurisdiction Decision, para 70 states that the "required relationship" of the crimes (under Articles 2 and 3) to the conflict is that they were "closely related to the hostilities".
[28] *Tadić* Jurisdiction Decision, para 94.
[29] *Tadić* Jurisdiction Decision, para 70.
[30] *Tadić* Jurisdiction Decision, para 142 (note that there is no nexus with the crimes and the conflict; the proof of the armed conflict is required only as a "basis of jurisdiction": paras 141 and 142; *Tadić* Appeal Judgement, para 251).
[31] *Tadić* Appeal Judgement, para 248.

elements, and convictions could not be entered under both. A conviction would be entered under Article 2. However, in a case where rape is charged under Article 2 and Article 5, Article 2 has the unique requirements that there be an *international* armed conflict and that there be a nexus between the offence and that conflict, and Article 5 has the unique requirements that there be a widespread or systematic attack on a civilian population and that the offence forms part of that widespread or systematic attack. Applying the majority's test, convictions would therefore necessarily and in every case be entered on both counts. In a case where rape is charged under Articles 3 and 5, Article 3 has the unique requirement that the offence must have a nexus with the armed conflict, and Article 5 has the unique elements that there be a widespread or systematic attack on a civilian population and that the offence forms part of that widespread or systematic attack. Again, convictions would necessarily and in every case be entered on both counts. Where rape is charged under all three articles, the situation becomes more complex. Although it is not entirely clear, we assume that the offence under Article 3, despite having a unique element in relation to Article 5, would be rejected as a distinct offence as it has no unique element in relation to Article 2. Even if on that basis no conviction were entered under Article 3, convictions under both Article 2 and Article 5 would necessarily and in every case remain.

32. As a result, a single act of rape could give rise to convictions for two separate crimes under Articles 2 and 5 or Articles 3 and 5. This result is dictated solely on the basis of abstract legal concepts relating to the context of the offence which would have been of little or no practical significance to the accused or the victim.

33. Under the "different elements" test as we believe it should be applied, only those elements relating to the conduct and mental state of the accused would be taken into account. In relation to rape under Articles 2 and 3, these elements would be only the *actus reus* and the *mens rea* of the offence of rape, which are the same in both cases, with the result that the offences cannot be considered to be genuinely legally distinct. In relation to rape under Article 5 of the Statute, the relevant elements would be the *actus reus* and *mens rea* of rape, the latter including the additional requirement that the perpetrator have knowledge that the rape occurs in the context of an attack against a civilian population.[33]

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[32] *Tadić* Appeal Judgement, para 248 ("the acts of the accused must comprise part of a pattern of widespread or systematic crimes directed against a civilian population").

[33] *Kupreškić* Judgement, para 556; *Prosecutor v Tadić, Case No* IT-94-1-T, Judgement, 7 May 1997, para 659.

Rape under Article 5 would therefore have a unique element not found in the definition of rape under Articles 2 and 3. However, this is not reciprocated, as there is no unique element of rape under Article 2 or 3, and a conviction could therefore be entered under only one of the counts. We believe that this is the more appropriate outcome. It is, we believe, highly artificial to characterise one act of rape committed by a single accused against one victim as constituting two distinct crimes. The most rational and fair outcome is to impose *one* conviction which receives a sentence which recognises the grave seriousness of that crime.

34. Our final difficulty with the majority view that the legal pre-requisite or contextual elements must be taken into account for the application of the "different elements" test is that it is likely to cause practical problems in determining *which* legal pre-requisites or contextual elements will be taken into account, particularly in relation to Article 3. In the *Tadić* Jurisdiction Decision it was held that Article 3 of the Statute is:

> [...] a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically: (i) violations of the Hague law on international conflicts; (ii) infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches' by those Conventions; (iii) violations of common Article 3 and other customary rules on internal conflicts; (iv) violations of agreements binding upon the parties to the conflict, considered *qua* treaty law, *i.e.* agreements which have not turned into customary international law [...].[34]

Because Article 3 has been interpreted to be a residual clause, encompassing all of the various types of violations of the laws or customs of war not encompassed by other provisions of the Statute, it is not clear in advance what legal prerequisites or contextual elements may arise in relation to the various crimes that Article encompasses.

35. To take, as one example, the category of "violations of agreements binding on the parties on the conflict, considered *qua* treaty law":[35] would the existence of the agreement itself, as a legal prerequisite to jurisdiction over the crimes, be considered an element of the offence? If so, this may be considered to be a unique element that Article 2 offences do not have, with the result that torture outlawed under Article 2 and torture outlawed under a treaty between the parties and prosecuted under Article 3 could be considered to be two distinct crimes justifying two separate convictions. On the other hand, the requirement of the existence of the agreement may be considered not to be an element of the offence for this purpose, but the problem does not end there. The agreement may have limitations on

[34] *Tadić* Jurisdiction Decision, para 89.
[35] *Tadić* Jurisdiction Decision, para 89.

its application, for example a regional or geographical limitation, or the limitation that it applies only to offences committed by combatants in the official armed forces of the State. Such matters are contextual elements or legal pre-requisites in the same way as the "protected persons" or "international armed conflict" requirements. It is unclear from the majority opinion whether it is intended that these would be taken into account but, as there is no basis in principle to distinguish them, presumably they must be. As a result, Article 3 offences with the same *substantive* elements as Article 2 offences (such as torture) will be considered in some circumstances, but not others, to be distinct crimes and therefore may be charged and convicted separately under Article 2 and Article 3. We do not accept that such an arbitrary result, entirely removed from the reality of the circumstances in which the offence was committed, is appropriate in the context of international criminal law.

(b) Selecting between possible cumulative convictions

36. As noted by the majority, where the "different elements" test is not met – the relevant elements of the offences are materially identical or one offence does not have a unique element – the relevant Chamber must decide in relation to which offence it will enter a conviction. The majority held that this choice must be made:

> [...] on the basis of the principle that that the conviction under the more specific provision should be upheld. Thus, if a set of facts is regulated by two provisions, one of which contains an additional element, then a conviction should be entered under only that provision.[36]

The majority indicates that, in the case of charges under both Article 2 and 3 of the Statute, the offences charged under Article 2 must be selected as being the more specific on the basis of the protected person requirement, without reference to any other of the elements of the relevant offences which relate to the conduct and state of mind of the accused.

37. We agree with the majority's conclusion that, when a choice must be made between cumulatively charged offences, that choice should be made by reference to specificity, but only in the sense that the crime which more specifically describes *what the accused actually did* in the circumstances of the particular case should be selected. This cannot be done by a rigidly imposed choice of the charges laid under one of the Articles of the Statute with no reference to the substantive elements of the offences or to the evidence as to the actual circumstances under which they were committed. In our view, the choice should involve a

consideration of the totality of the circumstances of the particular case and of the evidence given in relation to the crimes charged, in order to describe most accurately the offence that the accused committed and to arrive at the *closest* fit between the conduct and the provision violated. This would involve a consideration of *all* of the elements of the offences to determine whether one of the offences better or more specifically describes what the accused did.

38. It will often be a substantive element relating to the accused's conduct or state of mind which provides the basis on which a meaningful choice can be made as to the better description of the accused's conduct. For example, the deliberate infliction of pain or suffering, with the intention to do this for the purpose of obtaining information, or punishing, intimidating or discriminating against the victim, constitutes the offence of wilfully causing great suffering or serious injury and the offence of torture. It is the unique additional element relating to the purpose of the perpetrator which makes torture the more specific offence but, under the majority's approach, that element would not be taken into account. Where consideration of the substantive elements of the offences does not provide a basis to determine that one offence more clearly describes what the accused did (such as in the case of torture charged under Articles 2 and 3), it would then be possible to have recourse to the legal pre-requisites, or the *chapeaux,* to ascertain whether they provide a distinguishing factor which makes the offence under one Article a more specific or appropriate description of what the accused did.

39. An assessment of the appropriateness of criminal charges, or (taking the majority's standard of specificity) of the most specific offence to encompass a piece of conduct, must always depend at least to some degree on the *actual circumstances of the case* as established by the evidence. A rigidly imposed preference for the crime charged under a particular Article of the Statute will obviously be less time consuming and more convenient. However, the rigidly imposed choice of Article 2 charges, made in isolation from the relevant conduct to be criminalised in the particular case, will not necessarily always produce the result which must be the ultimate function of criminal proceedings: to recognise and penalise with the most appropriate conviction the proven criminal conduct of an accused.

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[36] *See* above, para 413.

40. It would appear to follow, from the majority's conclusion that Article 2 convictions must always be upheld as against Article 3 convictions, that in future cases dealing with other combinations of charges – for example Article 2 and Article 5, or Article 3 and Article 5 – the charges under a particular one of those Articles must always be selected. This suggests the development of some sort of gradation of specificity among the Articles of the Statute.

41. We do not regard it as possible to derive from the Statute a hierarchy or gradation of specificity or seriousness amongst the various offences which would assist in any kind of rigidly imposed determination of the question of which possible cumulative convictions should be retained. Nor is it desirable to do so. As observed by the majority of the Appeals Chamber in the Judgement in Sentencing Appeals in *Prosecutor v Tadić*:

> After full consideration, the Appeals Chamber takes the view that there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or Rule of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the *circumstances of the case*.[37]

Although this observation relates to the determination of seriousness of crimes, the Appeals Chamber's emphasis on taking into account "the circumstances of the case" rather than any perceived distinctions in the Statute is an important caution.

42. A more specific problem with the method of choice provided by the majority and the way it is applied in this case – that specificity can be measured by the presence of an "additional element" in one of the offences[38] – is that it does not cover the full range of circumstances in which this choice must be made. Often, neither of the crimes determined by the application of the different elements test not to be legally distinct will have an "additional" element. All of the elements of each crime may simply be assessed not to be materially different. Indeed, on a proper analysis, neither of the offences in the pairs of offences which arise in this case have an "additional element". The same offences under Article 2 and Article 3 (common article 3) – torture for example – have, on the approach taken by the majority, the same number of elements, with neither having an additional one.

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[37] *Prosecutor v Tadić*, Case No IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 Jan 2000, para 69 (emphasis added), followed in the *Furundžija* Appeal Judgement, paras 242-243.

[38] *See* above, para 413.

The Article 2 offence, in addition to the substantive elements of torture, has the contextual elements that:

(i) there is an international armed conflict
(ii) there is a nexus between the crime and the conflict
(iii) the victim be a protected person.

43. The same offence charged under Article 3 (common article 3), in addition to the substantive elements, has the contextual requirements that:

(i) there is an armed conflict, internal or international
(ii) there is a nexus between the crime and the conflict
(iii) the victim is a person taking no active part in hostilities.

44. The conclusion that these offences are not legally distinct is based on the assessment that the elements are not materially distinct – ie that the Article 3 elements in (i) and (ii) are simply broader versions of those elements in the Article 2 offence. We therefore cannot agree with the majority's analysis that the Article 2 offences have an "additional element" (the protected person status of the victim) and should be automatically selected on that basis, as the Article 3 offence has a corresponding element relating to the status of the victim (taking no active part in hostilities).[39] The protected person status may in the circumstances be a more appropriate or specific definition of the victim, but it is not an "additional" element in comparison with the Article 3 offence.

45. The problems which we have attempted to identify in the majority's determination that it is possible to make a rigidly imposed determination in every case of the most specific crime demonstrate, we believe, that the perceived virtue of such an approach – certainty or predictability – is in fact illusory. In practice, it is likely to be an inflexible approach with the potential to produce outcomes which are, in the circumstances of any given case, arbitrary and artificial.

D. Application of these principles to the present case

46. The way in which we would apply the principles we have referred to above to the facts of the present case is obviously now a hypothetical matter. However, we consider that it may assist in an understanding of what we consider to be the applicable principles, and of

our differences from the majority, to set out how we would have applied the principles to the present case.

47. Mucić and Delić were convicted of the following crimes: (a) wilful killing under Article 2 and murder under Article 3;[40] (b) wilfully causing great suffering or serious injury to body or health under Article 2 and cruel treatment under Article 3;[41] (c) torture under Article 2 and torture under Article 3;[42] and (d) inhuman treatment under Article 2 and cruel treatment under Article 3.[43] Landžo was cumulatively convicted of the offences in the categories (a),[44] (b)[45] and (c).[46] We agree that, although Landžo did not formally join in this ground of appeal, it is appropriate to apply these legal principles to his convictions also.

1. Whether the crimes charged are legally distinct crimes

(a) Wilful killings and murder

48. The substantive elements of the offence of wilful killing have been defined as requiring an act or omission of the accused which causes the death of the victim, and that the accused intended to kill or to inflict serious bodily injury in the knowledge that such injury would be likely to lead to death while being reckless as to whether it would cause death.[47] Murder has been defined, in the context of a crime against humanity (which for present purposes makes no material difference), as consisting of the death of the victim because of an act or omission of the accused committed with the intention to cause death or to cause grievous bodily harm in the knowledge that such bodily harm would be likely to cause death.[48] The Trial Chamber in the Blaškić proceedings and the *Čelebići* Trial Chamber have expressed the view that the two crimes are not materially different (the

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[39] *See* above, paras 423, 424 and 425.
[40] Delić: Counts 3 and 4 (Counts 1 and 2 have been quashed – *See* above at para 460); Mucić: Counts 13 and 14.
[41] Delić: Counts 11 and 12; Counts 46 and 47; Mucić: Counts 13 and 14; Counts 38 and 39; Counts 46 and 47.
[42] Delić: Counts 18 and 19; Counts 21 and 22; Mucić: Counts 33 and 34.
[43] Delić: Counts 42 and 43; Mucić: Counts 38 and 39; Counts 44 and 45.
[44] Counts 1 and 2; Counts 5 and 6; Counts 7 and 8.
[45] Counts 11 and 12; Counts 36 and 37; Counts 46 and 47.
[46] Counts 15 and 16; Counts 24 and 25; Counts 30 and 31.
[47] Trial Judgement, para 439; as referred to and essentially followed in the *Blaškić* Judgement, para 153.
[48] *Akayesu Judgement,* para 589; In *Prosecutor v Jelisić,* Case No IT-95-10-T, Judgement, 14 Dec 1999, at para 35 described the mental element as "the intention to cause death", but cited the *Akayesu* Judgement's definition. It is therefore unclear whether the *Jelisić* Judgement's omission from the definition of the *mens rea* of intention to cause serious injury knowing that it is likely to lead to death and reckless as to whether death ensues was intentional, but we regard the *Akayesu* standard as the applicable one.

Blaškić Judgement defining them as having identical elements).[49] We are of the same view; accordingly, the different elements requirement is not satisfied with respect to this category of convictions.

(b) Wilfully causing great suffering or serious injury to body or health and cruel treatment

49. The offence of wilfully causing great suffering or serious injury to body or health under Article 2 has been defined as an intentional act or omission which causes great suffering or serious injury to body or health, including mental health.[50] Cruel treatment is an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.[51] Even if the element of a serious attack on human dignity is additional to the elements of the offence of wilfully causing great suffering or serious injury to body or health, this is not reciprocated as the latter offence has no unique element.

(c) Torture

50. It is clear that this is an identical crime whether charged under Article 2 or 3.

(d) Inhuman treatment and cruel treatment

51. Inhuman treatment has been defined as an intentional act or omission which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity.[52] As noted above, cruel treatment has also been defined in substantially the same terms as an intentional act or omission which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The two crimes have essentially the same elements, with the possible qualification that the *actus reus* of inhuman treatment may be defined more broadly than cruel treatment, so that cruel treatment would be encompassed within inhuman treatment. The requirement that each offence have a unique element is therefore not satisfied.

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[49] Trial Judgement, para 422; *Blaškić* Judgement, para 181.
[50] *Blaškić* Judgement, para 156, effectively adopting the definition of the offence used by the *Čelebići* Trial Chamber: Trial Judgement, para 511.
[51] *Prosecutor v Jelisić,* Case No IT-95-10-T, Judgement, 14 Dec 1999, para 41, adopting the definition of the *Čelebići* Trial Chamber: Trial Judgement, para 552.
[52] *Blaškić* Judgement, para 154, adopting the definition of the offence used by the *Čelebići* Trial Chamber: Trial Judgement, para 543.

2. The determination of which of the duplicative convictions should be retained

52. We therefore agree with the majority that, in the cases of the convictions under Articles 2 and 3, the elements of the relevant offences are materially identical or one offence does not have a unique element. Convictions cannot be entered for both, and it is necessary to decide which convictions should be retained. In doing so, as stated above, we consider that, through an examination of the circumstances of the case and of the evidence given in relation to the crimes charged, the aim is to determine which of the crimes describes *most* accurately what the accused did.

(a) Wilfully causing great suffering or serious injury to body or health / cruel treatment

53. The only combination of charges in which we consider that there is a material difference in one of the elements (albeit not reciprocated) is the offence of wilfully causing great suffering or serious injury to body or health under Article 2 and that of cruel treatment under Article 3. The additional element is that cruel treatment may be not only an act or omission which causes serious mental or physical suffering or injury but it may also be characterised as constituting a serious attack on human dignity. The slightly different focus of the other offence is on the great suffering or serious physical injury caused by the relevant acts. In relation to these convictions entered against Delić and Landžo under Counts 11 and 12, the original charges had been wilful killing and murder, but the Trial Chamber had found that, although Delić had been involved in the beating of the victim, it could not be certain that these beatings were a direct cause of the victim's death. The Trial Chamber found that convictions could be entered instead for the offences of wilfully causing great suffering or serious injury to body or health and of cruel treatment, which were "lesser offences" of the same nature as the more grave crimes originally charged.[53] The same reasoning necessarily applied in relation to the responsibility of Mucić for these acts as a superior, which was charged under Counts 13 and 14.[54] Having reference then to the nature of the charging, which focussed on the physical consequences to the accused, and to the evidence of the physical injuries which resulted from the beatings, the crime of wilfully causing great suffering or serious injury under Article 2 more accurately describes what Delić and Landžo did and for which Mucić was responsible. That is also the conclusion reached by the majority.

54. The offences charged against Delić, Mucić and Landžo in Counts 46 (wilfully causing great suffering or serious injury to body or health) and 47 (cruel treatment) related to the inhumane living conditions in the camp, including the "atmosphere of terror" and the poor living conditions. In relation to these counts, the Trial Chamber found that the detainees in the camp "were exposed to conditions in which they lived in constant anguish and fear of being subjected to physical abuse" and were "subjected to an immense psychological pressure which may be accurately characterised as 'an atmosphere of terror'".[55] The Trial Chamber also found that the detainees were deprived of adequate food, sleeping facilities, toilet facilities, water and medical facilities, the latter two because of a deliberate policy.[56] These findings, reinforced by specific findings of Delić's humiliating and cruel taunting of prisoners,[57] suggest that it was a key part of this offence that it was intended to degrade and attack the dignity of the victims. Mucić, as a commander, was found to have been aware of these circumstances. For that reason, it is appropriate to select a conviction for cruel treatment under Article 3 against each accused under these counts. The inflexible majority approach produces the contrary conclusion, that the offence of wilfully causing great suffering or serious injury to body or health, being the Article 2 offence, should be upheld.

55. Mucić was also convicted of the same offences of wilfully causing great suffering or serious injury to body or health and of cruel treatment in relation to Counts 38 and 39, which related to his responsibility as a superior for acts of severe mistreatment of certain detainees. The mistreatment found by the Trial Chamber included acts which "necessarily entails, at a minimum, a serious affront to human dignity",[58] which suggests an emphasis on cruel treatment. However, the Trial Chamber also found in relation to another victim that the intentional placing of a burning fuse cord against the bare skin in the genital area of an accused caused "such serious suffering and injury" that it constituted both of the offences charged.[59] Thus, under the one count, there are different acts which because of their different emphases could be differently characterised. However, taken as a whole, the conduct encompassed by these counts appears to be violent mistreatment of such an

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[53] Trial Judgement, paras 865-866.
[54] Trial Judgement, para 912.
[55] Trial Judgement, para 1091.
[56] Trial Judgement, paras 1096, 1097, 1100, 1105, 1108, 1111.
[57] Trial Judgement, paras 1089, 1104, 1109.
[58] Trial Judgement, para 1026.

unusually cruel nature that the offence of cruel treatment under Article 3, which emphasises both conduct which causes serious injury and conduct which constitutes a serious attack on human dignity, best describes the criminal conduct for which Mucić was found responsible under these counts. The inflexible majority approach produces the contrary conclusion, that the offence of wilfully causing great suffering or serious injury to body or health, being the Article 2 offence, should be upheld.

56. Landžo was also convicted of this combination of crimes under Counts 36 and 37 for beating a detainee on several occasions, setting fire to his trousers and burning his legs, and forcing him to drink urine. The Trial Chamber found that this caused serious mental and physical suffering to the victim. It is also obvious from the evidence that the particularly cruel and humiliating nature of the abuse inflicted by Landžo was intended to undermine the victim's dignity. Using the same reasoning as above, the offence of cruel treatment, which emphasises both conduct which causes serious injury and conduct which constitutes a serious attack on human dignity under Article 3, best describes Landžo's criminal conduct for which he was convicted under these counts. The inflexible majority approach produces the contrary conclusion, that the offence of wilfully causing great suffering or serious injury to body or health, being the Article 2 offence, should be upheld.

(b) Inhuman treatment / cruel treatment

57. The offence of inhuman treatment has been described as an umbrella provision which encompasses various conduct which contravenes the fundamental principle of humane treatment.[60] As cruel treatment under Article 3 is one of the varieties of conduct embraced by inhuman treatment, it may be regarded as more specific and therefore to some degree a more specific and accurate description of what the accused did, and may for that reason be preferred in selecting between Counts 44 and 45 against Mucić and Counts 42 and 43 against Delić. The inflexible majority approach produces the contrary conclusion, that the offence of inhuman treatment, being the Article 2 offence, should be upheld.

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[59] Trial Judgement, para 1040.
[60] *Blaškić* Judgement, para 154, following the *Čelebići* Trial Chamber: Trial Judgement, para 543.

(c) Murder / wilful killing and torture / torture

58. In relation to the materially identical crimes of murder and wilful killing, and in the case of torture convicted under both Articles 2 and 3, reference to the substantive elements of the particular crimes does not provide a solution and it is necessary to look to any features of Articles 2 and 3 generally which may assist in determining the conviction to be retained. In the circumstances of this case, it is open to regard Article 2 as being more specific to the crimes committed by the appellants, in light of the international nature of the armed conflict, and the fact that in relation to *these* crimes and circumstances, Article 3 (based on common Article 3) functions in a residual capacity.[61] We would therefore regard a conviction for the offences under Article 2 to best describe the appellants' offences. That is also the conclusion reached by the majority.

E. Disposition

59. We therefore dissent from the conclusion that, of the offences charged cumulatively in respect of the same conduct, the convictions for all of the offences charged under Article 2 of the Statute should be confirmed and those for all of the offences charged under Article 3 should be dismissed. It is, in our view, unsatisfactory simply to "dismiss" the charges under one or other of the two Articles. There must be a finding on the indictment that the accused is either guilty or not guilty of the charge. An unqualified statement that the charge is "dismissed" may be misunderstood. In our view, where an accused is not found guilty of a particular charge for the sole reason that to find otherwise would produce a cumulative conviction, the disposition should be in terms such as "Not guilty on the basis that a conviction on this charge would be impermissibly cumulative".

60. For the reasons set out above, the convictions on the Article 3 charges should be retained in relation to certain of the counts. Thus, we dissent from the majority judgement in relation to the following charges, for which we would have entered the following disposition:

Mucić: **Count 38:** *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV* in respect of Dragan Kuljanin, Vukašin Mrkajić and Nedeljko Draganić and *inhuman treatment as*

[61] *Tadić* Jurisdiction Decision, para 91.

a Grave Breach of Geneva Convention IV in respect of Mirko Kuljanin*:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 39: *cruel treatment as a Violation of the Laws or Customs of War* in respect of Dragan Kuljanin, Vukašin Mrkajić, Nedeljko Draganić, and Mirko Kuljanin: **CONVICTION CONFIRMED.**

Count 44: *inhuman treatment as a Grave Breach of Geneva Convention IV* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 45: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Count 46: *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 47: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Delić: **Count 42:** *inhuman treatment as a Grave Breach of Geneva Convention IV* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 43: *cruel treatment as a Violation of the Laws or Customs of War* **CONVICTION CONFIRMED.**

Count 46: *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**
Count 47: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Landžo: **Count 36:** *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON**

THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE

Count 37: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

Count 46: *wilfully causing great suffering or serious injury to body or health as a Grave Breach of Geneva Convention IV:* **NOT GUILTY ON THE BASIS THAT A CONVICTION ON THIS CHARGE WOULD BE IMPERMISSIBLY CUMULATIVE**

Count 47: *cruel treatment as a Violation of the Laws or Customs of War:* **CONVICTION CONFIRMED.**

F. Sentencing Consequences

61. The majority noted that the Trial Chamber, in sentencing, referred to its earlier interlocutory decision in which it had held that the matter of accumulation of offences was relevant only to penalty considerations, and held:

> It is in this context that the Trial Chamber here orders that each of the sentences is to be served concurrently.[62]

The Trial Chamber had earlier also specifically referred to the principle of avoiding imposition of double punishment for the same conduct in the context of convictions in respect of both Article 7(1) and Article 7(3) responsibility.[63] However, it was not apparent that this principle was applied in respect of the convictions which had been entered cumulatively under Articles 2 and 3 and which have been considered above. It appears from the statement of the Trial Chamber quoted above that it regarded this issue as being resolved merely by imposing the sentences concurrently, rather than consecutively, instead of a consideration of the effective length of the sentence actually to be served. However, it is not apparent that the imposition of concurrent sentences will in fact *necessarily* ensure that an accused is not punished more than once for the same conduct. The use of concurrent, rather than cumulative sentencing does not relieve a Trial Chamber of the obligation to impose the effective, appropriate sentence to be served in respect of the totality of the criminal conduct. Merely fixing a sentence for each count and making them

[62] Trial Judgement, para 1286.
[63] Trial Judgement, para 1223.

concurrent rather than consecutive does not make it clear that the Trial Chamber has given consideration to the possibility of duplicative penalty when fixing individual sentences.

62. We therefore agree that it is necessary to have the matter of sentencing in respect of the remaining offences remitted to a Trial Chamber to be designated by the President.

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

Judge David Hunt, Presiding

Judge Mohamed Bennouna

Dated this twentieth day of February 2001
At The Hague
The Netherlands

ANNEX A

A. Procedural Background

1. Notices of Appeal

1. Notices of appeal against the Trial Judgement were filed on behalf of Delić on 24 November 1998,[1] Mucić on 27 November 1998,[2] and Landžo on 1 December 1998.[3] The Prosecution filed a notice of appeal on 26 November 1998.[4] Delalić filed a Notice of Cross Appeal on 1 December 1998,[5] which will be referred to as the Notice of Contention.[6]

2. Filings

2. The Prosecution filed its appeal brief on 2 July 1999[7] ("Prosecution Brief"). On the same date briefs were filed by Delalić[8] ("Delalić Brief"), Delić[9] ("Delić Brief"), Landžo[10] ("Landžo Brief"), and Mucić[11] ("Mucić Brief").

3. On 17 September 1999, briefs in response were filed on behalf of: Delić ("Delić Response");[12] Mucić ("Mucić Response");[13] Delalić ("Delalić Response");[14] and the Prosecution ("Prosecution Response").[15] Briefs in reply were filed on 25 October 1999 on behalf of: Landžo ("Landžo Reply");[16] Delić ("Delić Reply");[17] Mucić ("Mucić Reply");[18] Delalić ("Delalić Reply");[19] and the Prosecution ("Prosecution Reply").[20]

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1 Defendant Hazim Delić's Notice of Appeal, 24 Nov 1998.
2 Notice of Appeal Pursuant to Rule 108 of the Rules of Procedure and Evidence, 27 November 1998.
3 Defendant Esad Landžo's Notice of Appeal, 1 Dec 1998.
4 Prosecution's Notice of Appeal, 26 Nov 1998.
5 Notice of Cross-Appeal, 1 Dec 1998.
6 Appeal Transcript, p 63-65.
7 Prosecution's Appeal Brief, 2 July 1999.
8 Brief of Cross-Appellant Zejnil Delalić, 2 July 1999.
9 Appellant-Cross Appellee Hazim Delić's Brief, 2 July 1999.
10 Brief of Appellant, Esad Landžo, on Appeal against Conviction and Sentence, 2 July 1999.
11 Appellant Zdravko Mucić's (aka Pavo) Brief on Appeal against Conviction and Sentence, 2 July 1999. Supplemented by Particulars, at the request of the Appeals Chamber, Scheduling Order, 19 July 1999. Particulars of the Grounds of Appeal of the Appellant Zdravko Mucić dated the 2nd July 1999, 26 July 1999.
12 Cross Appellee Hazim Delić's Response to the Prosecutor's Appellate Brief of 2 July 1999, 17 Sept 1999.
13 Response of the Appellant Zdravko Mucić to the Prosecution's Fourth Ground of Appeal Brief, 17 Sept 1999.
14 Reply Brief [*sic*] of Appellee Zejnil Delalić, 17 Sept 1999.
15 Respondent's Brief of the Prosecution, 17 Sept 1999.
16 Reply of Appellant, Esad Landžo, to Respondent's Brief of the Prosecution, 17 Sept 1999, 25 Oct 1999.
17 Appellant-Cross Appellee Hazim Delić's Reply to the Respondent's Brief of the Prosecutor of 17 Sept 1999, 25 Oct 1999.
18 Response of the Appellant Zdravko Mucić to the Respondent's Brief of the Prosecutor of 17 Sept 1999, 25 Oct 1999.
19 Reply Brief of Appellee Zejnil Delalić to Response of the Prosecutor, 25 Oct 1999.
20 Brief in Reply of the Prosecution, 25 Oct 1999.

4. On 15 June 1999, the Appeals Chamber granted leave for Landžo to file a supplementary brief in relation to his Fourth Ground of Appeal by 13 September 1999.[21] By order of 29 July 1999, Landžo was granted extension of time to file the supplementary brief by 15 October 1999,[22] due to the time required to view the videotapes of the Trial Chamber proceedings.[23] On 12 October 1999 the filing of the supplementary brief was suspended.[24] By order of 17 November 1999 the filing of the supplementary brief was set to 6 December 1999.[25]

5. On 7 December 1999, Landžo filed his supplementary brief ("Landžo Supplementary Brief"),[26] out of time, but by an order of the Pre-appeal Judge, it was considered as validly done pursuant to Rule 127 of the Rules.[27] On 28 January 2000 the Prosecution filed its brief in response ("Prosecution Response to Landžo Supplementary Brief").[28] Landžo submitted his brief in reply on 14 February 2000 ("Landžo Additional Reply").[29]

6. On 17 February 2000, Mucić and Delić filed a notice to the Appeals Chamber relating to Landžo's Fourth Ground of Appeal, which clarified that they joined Landžo in this ground.[30]

7. By order of 31 March 2000, Delić and Mucić were granted leave to add an additional ground of appeal and were ordered to file a document identifying their amended grounds of appeal as well as a supplementary brief. The Prosecution was also granted leave to file a supplementary brief on an additional argument in response to an existing ground of appeal ("Prosecutor's Supplementary Brief"). Landžo was granted leave to file a response to the Prosecutor's Supplementary Brief, which had been filed with Landžo's Response.[31] On 10 April 2000 Delić and Mucić filed a joint response and identified two additional grounds of appeal.[32] Upon the request of the Prosecution, the Appeals Chamber granted an extension of time to file

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21 Order on the Appellant Esad Landžo's Second Motion for an Extension of Time to File Brief, 15 June 1999.
22 Order on Motion by Esad Landžo for Extension of Time to File Supplementary Brief, 29 July 1999.
23 The extension of time is linked to the Appeals Chamber permitting Landžo to view videotapes of the Trial Chamber proceedings in order to provide details with regard to his Fourth Ground of Appeal. *See* Order on the Second Motion to Preserve and Provide Evidence, 15 June 1999.
24 Order on Esad Landžo's Emergency Motion for Guidance Regarding the Filing of Particulars, 12 Oct 1999.
25 Scheduling Order, 17 Nov 1999.
26 Supplemental Brief of Appellant, Esad Landžo, in Support of Fourth Ground of Appeal (the Sleeping Judge), 7 Dec 1999.
27 Scheduling Order, 14 Dec 1999.
28 Respondent's Brief of the Prosecution in Relation to Esad Landžo's Fourth Ground of Appeal, 28 Jan 2000.
29 Reply Brief of Appellant, Esad Landžo, on Fourth Ground of Appeal (the Sleeping Judge), 14 Feb 2000.
30 Appellants-Cross Appellees Zdravko 'Pavo' Mucić and Hazim Delić's Notice to the Chamber Related to Landžo's Issue on the Presiding Judge Sleeping During Trial, 17 Feb 2000.
31 Order on Motion of Appellants Hazim Delić and Zdravko Mucić for Leave to File Supplementary Brief and on Motion of Prosecution for leave to File Supplementary Brief, 31 March 2000.
32 Appellants-Cross Appellees Zdravko Mucić and Hazim Delić's Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 10 April 2000.

the Response until 25 April 2000 and accordingly extended the filing date of the Reply.[33] The Prosecution filed its response to the Supplementary Brief on 25 April 2000 ("Prosecution Response to Supplementary Brief").[34]

8. Delić filed a final designation of his grounds of appeal on 17 May 2000[35] and Mucić filed his final designation of the grounds of appeal on 31 May 2000.[36]

3. Grounds of Appeal

9. As there is no right, under the Statute, to appeal from an acquittal, Delalić's submissions which are made essentially as a response to the Prosecution's appeal against acquittal (Prosecution's grounds 1-3) will be referred to as grounds of contention, which will only be considered should the Prosecution succeed in its appeal with regard to Delalić.[37]

10. Delalić raised these grounds of contention: [38]

1. Whether the Security Council intended to incorporate common Article 3 into Article 3 of the Statute;

2. Whether common Article 3 is customary international law in respect of its application to natural person;

3. The Trial Chamber committed errors of both law and fact in its determination that the Čelebići detainees were persons protected by the Geneva Conventions of 1949.

11. Delić raised the following grounds of appeal:[39]

Issue Number One:	Whether the Trial Chamber was properly constituted after 8 May 1998 in that Judge Elizabeth Odio Benito was no longer qualified to serve as a judge of the Tribunal in that she did not meet the qualifications in Article 13(1) of the Statute of the Tribunal.
Issue Number Two:	Whether Judge Elizabeth Odio Benito was disqualified in that she had an undisclosed affiliation which could have cast doubt on her impartiality and which might affect her impartiality.

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[33] Order on Prosecution Motion for Extension of Time, 14 April 2000.
[34] Prosecution Response to the Appellants' Supplementary Brief, 25 April 2000.
[35] Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000.
[36] Appellant Zdravko Mucić's Final Designation of his Grounds of Appeal, 31 May 2000.
[37] Appeal Transcript, p 63-65.
[38] Delalić Brief p 8.
[39] Appellant-Cross Appellee Hazim Delić's Designation of the Issues on Appeal, 17 May 2000 (footnote omitted). This was Delić's final designation of his grounds of appeal. Delić first submitted his grounds of appeal in Appellant-Cross Appellee Hazim Delić's Brief, 2 July 1999 and Grounds 20 and 21 were added in Appellants-Cross Appellees Zdravko Mucić and Hazim Delić's Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 10 April 2000.

Issue Number Three:	Whether Delić can be convicted of grave breaches of the Geneva Conventions of 12 August 1949 in that at the time of the acts alleged in the Indictment the Republic of Bosnia and Herzegovina was not a party to the Geneva Conventions of 12 August 1949.
Issue Number Four:	Whether the Trial Chamber erred in holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.
Issue Number Five:	Whether at the time of the acts alleged in the indictment, customary international law provided for individual criminal responsibility for violations of common Article 3.
Issue Number Six:	Whether the Security Council vested the Tribunal with jurisdiction to impose individual criminal sanctions for violations of common Article 3.
Issue Number Seven:	Whether common Article 3 constitutes customary international law in international armed conflicts to the extent that it imposes criminal sanctions on individuals who violate its terms.
Issue Number Eight:	Whether the Trial Chamber erred in holding that the conflict in Bosnia-Herzegovina was an international armed conflict at the times relevant to this indictment.
Issue Number Nine:	Whether the evidence is legally sufficient to sustain a conviction on Counts 1 and 2 of the indictment.
Issue Number 10:	Whether the evidence is factually sufficient to sustain a conviction on Counts 1 and 2 of the indictment.
Issue Number 11:	Whether the evidence is legally sufficient to sustain a conviction on Counts 3 and 4 of the indictment.
Issue Number 12:	Whether the evidence is factually sufficient to sustain a conviction on Counts 3 and 4 of the indictment.
Issue Number 13:	Whether the evidence is legally sufficient to sustain a conviction on Counts 18 and 19 of the indictment.
Issue Number 14:	Whether the evidence is factually sufficient to sustain a conviction on Counts 18 and 19 of the indictment.
Issue Number 15:	Whether the evidence is legally sufficient to sustain a conviction on Counts 21 and 22 of the indictment.
Issue Number 16:	Whether the evidence is factually sufficient to sustain a conviction on Counts 21 and 22 of the indictment.
Issue Number 17:	Whether the evidence is legally sufficient to sustain convictions on Counts 46 and 47 of the indictment.

Issue Number 18: Whether the evidence is factually sufficient to sustain convictions on Counts 46 and 47 of the indictment.

Issue Number 19: Whether the sentences assessed violate the principles of legality and *nullum crimen sine lege*.

Issue Number 20 (Additional Issue Number One):

Whether Mucić and Delić were deprived of a fair trial due to the fact that the Presiding Judge of the Trial Chamber slept during substantial portions of the trial.

Issue Number 21 (Additional Issue Number Two):

Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches of the Geneva Conventions and for violations of the Laws and [*sic*] Customs of War based on the same acts.

12. Landžo raised the following grounds of appeal.[40]

1. The Prosecutor's practice of selective prosecution violated Article 21 of the Statute of the International Tribunal for the former Yugoslavia (ICTY), the rules of natural justice and international law.

2. The participation at trial as a member of the Trial Chamber of a Judge ineligible to sit as a Judge of the Tribunal violated Articles 13 and 21 of the Statute of the ICTY, the rules of natural justice and international law and rendered the trial a nullity.

3. The participation as a member of the Trial Chamber of a Judge who had an actual or apparent conflict of interest affecting the Judge's impartiality as a member of the Trial Chamber violated the rules of natural justice and international law, and, as a matter of law, absent disclosure by the Judge, and informed consent by the Defence, automatically disqualified the Judge from sitting as a member of the Trial Chamber.

4. The participation as the Presiding Judge of the Trial Chamber of a Judge who was asleep during substantial portions of the trial, denied appellant [Landžo] the right to the full and competent judicial decision of questions of law, fact, and evidence, and improperly denied Appellant [Landžo] a fair trial, and the appearance of a fair trial.

5. The Trial Chamber erred in law and fact in finding that an international armed conflict existed with reference to the events alleged to have occurred at the Čelebići camp.

6. The Trial Chamber erred in law in finding that the victims of the alleged crimes were 'protected persons' for the purpose of the Geneva Conventions.

7. The Trial Chamber erred in law, violated the rules of natural justice, and the principle of certainty in criminal law, and denied the appellant [Landžo] a fair trial, when it refused to define the special defence of diminished mental responsibility which the appellant specifically raised.

[40] Brief of Appellant, Esad Landžo, on Appeal against Conviction and Sentence, 2 July 1999.

8. The Trial Chamber erred in law and made findings of fact inconsistent with the great weight of the evidence when it rejected clear evidence of diminished mental responsibility.

9. The sentence imposed on appellant [Landžo] was unjust and manifestly excessive when compared to the other sentences imposed by this Tribunal and in light of the mitigating factors offered by Appellant [Landžo].

13. Mucić raised the following grounds of appeal:[41]

1. Whether Judge Odio-Benito was disqualified as a judge of the Tribunal by reason of her election as Vice-President of the Republic of Costa Rica.

2. Whether Judge Odio-Benito was disqualified as a member of the Trial Chamber by reason of her membership on the Board of Trustees of the United Nations Voluntary Fund for the Relief of Victims of Torture.

3. Whether Mucić and Delić were deprived of a fair trial due to the fact that the presiding judge of the Trial Chamber slept during substantial portions of the trial.

4. Whether the Trial Chamber erred in holding that Bosnian citizens of Serbian ethnicity should be treated as non-nationals of the Republic of Bosnia and Herzegovina and were therefore protected persons as defined in Article 4 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

5. Whether the Trial Chamber erred in holding that the conflict as described in this case in Bosnian-Herzegovina was an International Armed Conflict at the times relevant to this indictment.

6. Whether at the time of the acts alleged in the Indictment, customary international law provided for individual criminal responsibility for violations of Common Article 3 of the Geneva Conventions.

7. Whether the Trial Chamber erred in entering judgements of conviction and sentences for grave breaches of the Geneva Conventions and for violations of the Laws and [*sic*] Customs of War based on the same acts.

8. Whether the OTP interviews of Mr. Mucić were properly admitted in evidence in the Trial Chamber.

9. Whether the Trial Chamber made the proper legal and factual determinations in convicting Mr. Mucić of command responsibility pursuant to Article 7(3).

10. Whether or not the Trial Chamber was unduly influenced as to their determinations by the acts or omissions of the then lead counsel as set out in the Judgement.

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[41] Appellant-Zdravko Mucić's (aka Pavo) Brief on Appeal against Conviction and Sentence, filed 2 July 1999. Two additional grounds were submitted in Appellants-Cross Appellees Zravko Mucić and Hazim Delić's Response to the Prosecutor's Supplementary Brief and Additional Issues on Appeal, 10 April 2000. On 31 May 2000 Mucić submitted his final designation of his grounds of appeal, (Appellant Zdravko Mucić's Final Designation of his grounds of appeal, 31 May 2000) in which Mucić's grounds, including the two additional grounds, were consolidated and renumbered. The new numbering is used here. However, in the final designation of his grounds of appeal, the ground relating to unlawful confinement (12) was unintentionally left out, but was argued during the oral hearing, Appeal Transcript, p 468-474.

11. Whether the Trial Chamber gave Mucić an appropriate sentence.

12. Whether the Trial Chamber erred in law and in fact in finding that the detainees were unlawfully detained.

During the hearing on appeal, counsel for Mucić acknowledged that the ground numbered 10 above was not in fact relied on as an independent ground of appeal. Referring to certain criticisms of Mucić's trial counsel contained in paragraph 75 of the Trial Judgement. Counsel stated:

> If there is any good reason or any merit in this Trial Chamber having so set out those criticisms, they are criticisms of his counsel, they are not criticisms of the appellant, and we would simply ask that when this judgment is read or reread, that this learned Appellate Tribunal ignores them completely.[42]

The Presiding Judge clarified this to the Prosecution in stating:

> I think, as Mr Morrison very frankly said, the only point of raising it is to make sure we take no notice [...] of what was said in the Judgement.[43]

The Appeals Chamber has therefore proceeded on this basis and the ground numbered 10 is not considered in this Judgement as an independent ground of appeal.

14. The Prosecution raised six grounds of appeal:[44]

1. The Trial Chamber erred in paragraphs 379-393 when it defined the mental element 'knew or had reasons to know' for the purposes of Superior Responsibility.

2. The Trial Chamber's finding that Zejnil Delalić did not exercise superior responsibility.

3. The Trial Chamber erred when it decided in paragraphs 1124–1144 that Zejnil Delalić was not guilty of unlawful confinement of civilians as charged in count 48 of the Indictment.

4. The Trial Chamber erred when it sentenced Zdravko Mucić to seven years imprisonment.

5. The Trial Chamber erred when it decided in paragraphs 776–810 that Hazim Delić was not a 'superior' in the Čelebići Prison Camp for the purposes of ascribing criminal responsibility to him under Article 7(3) of the Statute.

6. The Trial Chamber's finding that Hazim Delić was not guilty as charged in Count 48.

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[42] Appeal Transcript, p 467.
[43] Appeal Transcript, p 486.
[44] Prosecution Brief, para 2.1, p 19, para 4.1, para 5.4, para 6.1, and para 7.2.

4. Hearing

15. The Appeals Chamber heard oral argument from 5 to 8 June 2000.

5. Status Conferences

16. On 8 February 2000, Delalić filed a motion for clarification with regard to his participation in the status conference which is required to be held pursuant to Rule 65*bis* (B) of the Rules[45] as he was not in custody.[46] On 14 February 2000, the Appeals Chamber ruled that Delalić may but was not required to, attend the Status Conference, whereas his counsel was ordered to be present.[47]

17. Status conferences were held in accordance with Rule 65*bis* of the Rules on 23 February 2000, 12 May 2000 and 6 October 2000.

B. Issues Relating to the Composition of the Appeals Chamber

1. Assignment of Judges

18 On 21 December 1998, in order to deal with motions by Landžo for an extension of time limits,[48] a bench of three Judges, Judge Wang, Judge Shahabuddeen, and Judge Nieto-Navia, was assigned.[49] The assignment was vacated by an order on 9 February 1999.[50]

19. On 20 January 1999, Judge Shahabuddeen, Judge Wang, Judge Nieto-Navia, Judge Hunt and Judge Bennouna were assigned to sit on the appeal.[51] Judge Shahabuddeen withdrew himself from hearing the Appeal on 28 January 1999, and Judge Rodrigues was assigned to replace him.[52] On 19 May 1999 Judge Riad was assigned to replace Judge Rodrigues[53] and on 9 March 2000 Judge Pocar was assigned to replace Judge Wang.[54]

20. On 1 February 1999, in a confidential motion to the President of the Tribunal, Landžo requested the President to assign as Presiding Judge the acting President, Judge McDonald,

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45 This Rule was introduced at the 21st Plenary and entered into force on 7 Dec 1999.
46 Motion for Clarification of the Scheduling Order Date [Dated] 2 February 2000, 8 Feb 2000.
47 Order, 14 Feb 2000.
48 Esad Landžo's Request for Extension of Time-Limits Pursuant to Rule 116, 9 Dec 1998 and Esad Landžo's Amended Request for Extension of Time-Limits Pursuant to Rule 116, 9 Dec 1998.
49 Order of the Acting President for the Assignment of a Bench of the Appeals Chamber, 21 Dec 1998.
50 Order on the Assignment of a Bench of the Appeals Chamber, 9 Feb 1999.
51 Order of the Vice President for the Assignment of Judges to the Appeals Chamber, 20 Jan 1999.
52 Order for the Assignment of Judges to the Appeals Chamber, 28 Jan 1999.
53 Order for the Assignment of a Judge to the Appeals Chamber, 19 May 1999.

Judge May "or another Judge from a major Common Law jurisdiction" with a background in a common law jurisdiction.[55] The President and the Vice-President withdrew from the matter pursuant to sub-Rule 15(A) of the Rules and on 12 February 1999 a decision was issued by Judge May who dismissed the motion on the basis that it is improper for Counsel to address the composition of any bench of the Tribunal.[56]

21. On 12 October 1999, Judge Hunt was appointed pre-appeal Judge and was entrusted to determine all pre-appeal motions of a procedural nature under Rule 73 as it applies to the Appeals Chamber as well as the power to refer any such motions to the Chamber. In addition, the pre-appeal Judge was mandated to conduct status conferences in order to determine the procedures to be followed in the hearing.[57]

2. Disqualification

22. On 30 July 1999, a joint motion was filed by Mucić, Delić and Landžo requesting disqualification of certain judges, pursuant to Rule 15 of the Rules in connection with issues arising out of the appellant's grounds of appeal relating to the status of Judge Odio Benito during the trial. The motion requested that all Judges who either participated in the Plenary session which found that Judge Odio Benito's nomination as Vice-President of Costa Rica was not incompatible with her service as a Judge or who took part in the Plenary Session which approved her taking the oath of office as Vice-President of Costa Rica while remaining a Judge, be disqualified from sitting on the Appeals Chamber in the present case or alternatively recuse themselves.[58]

23. On 15 September 1999, the Presiding Judge issued a decision referring the matter to the Bureau for consideration pursuant to Rule 15(B) of the Rules.[59] On 17 September 1999 the Appeals Chamber denied the motion as incompetent, holding that the subject matter of the motion was not a matter for the consideration of the Appeals Chamber as it was instead to be

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[54] Order for the Assignment of a Judge to the Appeals Chamber, 15 March 2000. (Original in French filed 9 March 2000.)
[55] Confidential Request to President, 1 Feb 2000.
[56] Order on the Request to the President on the Composition of the Bench of the Appeals Chamber, 12 Feb 1999.
[57] Order Appointing a Pre-Appeal Judge, 12 Oct 1999.
[58] Motion to Disqualify Judges Pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 30 July 1999.
[59] Referral of Application to the Bureau under Rule 15(B), 15 Sep 1999.

regarded as an application to the Presiding Judge pursuant to Rule 15(B), who had referred the matter to the Bureau.[60]

24. On 25 October 1999, the Bureau - comprised of Judge McDonald, Judge Shahabuddeen, Judge Cassese, Judge Jorda and Judge May - decided that the Judges in question, Judge Riad, Judge Nieto-Navia and Judge Wang, were not disqualified from serving on the Appeals Chamber pursuant to the standard in Rule 15(A) of the Rules.[61] The Bureau held that a distinction must be drawn between the requirements for a person to serve as a Judge of the Tribunal and the issues relating to the grounds of disqualification of a Judge from sitting in a particular case. To serve as a Judge of the Tribunal a person elected by the General Assembly pursuant to Article 13(2) of the Statute must both possess the requirements set out in Article 13(1) and not exercise any political or administrative functions or engage in any other occupation of a professional nature. If there is a doubt or dispute as to whether a Judge meets the requirements, the President may seek to resolve the matter in conference with the Judges at a Plenary Session, in which the Judges exercise their administrative functions. Such consultation was sought twice with regard to Judge Odio Benito at the Fourteenth Plenary in October 1997 and at the Seventeenth Plenary in March 1998. On both occasions the Plenary endorsed the respective Presidents decisions that there was no incompatibility between Judge Odio Benito's status as Vice-President of Costa Rica and those of a Judge, as Judge Odio Benito would not assume the Presidential functions until her tenure terminated as a Judge of the Tribunal.

25. The decisions of the Plenary was not made with reference to any specific question as to whether Judge Odio Benito was disqualified pursuant to Rule 15 of the Rules. Further, it was only on 25 May 1998, more than two months after the decision of the Seventeenth Plenary Session that the motion before the Trial Chamber by Counsel in the present case was filed requesting Judge Odio Benito to take no further part in the proceedings. The Bureau and not the Plenary Session decided on the question of disqualification pursuant to Rule 15 and none of the three above-mentioned judges participated.[62]

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[60] Decision on Motion to Disqualify Judges pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 17 Sept 1999.

[61] Decision of the Bureau on Motion to Disqualify Judges pursuant to Rule 15 or in the Alternative that Certain Judges Recuse Themselves, 25 Oct 1999.

[62] Prosecutor v Zejnil Delalić, Zdravko Mucić also known as "Pavo", Hazim Delić, Esad Landžo also known as "Zenga", Case No.: IT-96-21-T, "Decision of the Bureau on Motion on Judicial Independence", 4 Sept 1998.

C. Issues Relating to Defence Counsel

26. On 12 January 1999, the Defence for Delalić filed a motion pursuant to Article 13(A) of the Directive on Assignment of Defence Counsel[63] requesting the President to instruct the Registrar to assign Mr O'Sullivan as co-counsel, under the same terms and conditions with regard to remuneration as co-counsel was assigned during the trial.[64] The President denied the motion as counsel had failed to demonstrate exceptional circumstances for assignment of co-counsel as required by the Directive.[65]

27. On 1 February 1999, Landžo requested the removal of Mr Ackerman, the lead counsel for his co-accused Delalić, alleging a conflict of interest as Mr Ackerman had previously been assigned lead counsel for Landžo between April 1997 and March 1998.[66] By a decision of the Appeals Chamber on 6 May 1999, the motion for the removal of Mr Ackerman was dismissed.[67] The Appeals Chamber held that the material before it did not disclose any conflict of interest and that the retention of Mr Ackerman as lead counsel for Delalić did not obstruct the proper conduct of the proceedings within the meaning of sub-Rule 46(A) of the Rules.

28. On 17 June 1999, Mr Moran moved to be immediately relieved as co-counsel for Delić on the basis that he would be unable to provide effective assistance without risking his employment.[68] The Appeals Chamber considered that it was not ordinarily appropriate for a Chamber to consider a motion for withdrawal of the assigned counsel where such motion had not been presented to and rejected by the Registrar and that decision subsequently reviewed and upheld by the President. However, under the particular circumstances in the present case, the Appeals Chamber found it appropriate to consider the motion on its merits. Further, the Appeals Chamber found that there were no grounds for withdrawal as to permit Mr Moran to withdraw on the basis of his personal interests would be contrary to counsel's obligations under the Code of Professional Conduct for Defence Counsel Appearing before the International Tribunal,[69] and to the interests of his client and of justice. [70]

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63 Directive on the Assignment of Defence Counsel, IT/73/Rev.6.
64 Motion for Appointment of Co-Counsel on the Delalić Appeal, 12 January 1999.
65 Order on Appellant Zejnil Delalić's Motion for Appointment of Co-Counsel, 8 Feb1999.
66 Esad Landžo's Request for Removal of John Ackerman as Counsel on Appeal for Zejnil Delalić, 1 Feb 1999.
67 Order regarding Esad Landžo's Request for Removal of John Ackerman as Counsel on Appeal for Zejnil Delalić, 6 May 1999.
68 Motion to Withdraw as Counsel due to Conflict of Interest, 17 June 1999.
69 Code of Professional Conduct for Defence Counsels Appearing before the International Tribunal, IT/125.
70 Order on the Motion to Withdraw as Counsel Due to Conflict of Interest, 24 June 1999.

1. Provisional Release

29. Mucić filed a motion seeking provisional and temporary release for the purpose of attending the funeral of his uncle in Konjic, Bosnia and Herzegovina on 18 February 1999.[71] A majority of the Appeals Chamber considered that it had jurisdiction to deal with the motion pursuant to Rules 65 and 107 of the Rules. However, that majority was not satisfied that the conditions for provisional release had been met and denied the motion.[72]

30. Delić requested provisional release on 31 May 1999 for the purpose of attending the funeral of his mother, in Konjic, Bosnia and Herzegovina on, the following day, 1 June 1999.[73] On 31 May 1999 a majority of the Appeals Chamber found that it had jurisdiction to consider the request and further considered that the funeral of a close relative might constitute an exceptional circumstance within the meaning of Rule 65. However, the Chamber was not satisfied that the conditions for provisional release under Rule 65 had been met, namely that Delić would appear for appeal proceedings and that he would not have posed a danger to any victim, witness or other person. A majority of the Appeals Chamber denied the motion.[74]

31. On 1 June 1999, Delić filed an emergency motion reiterating his request for provisional release in order to participate in the funeral of his mother.[75] Finding that no new material facts had been presented to warrant departure from the original decision the Appeals Chamber rejected the motion.[76]

32. On 17 December 1999, Mucić sought provisional release in order to return to Konjic, Bosnia and Herzegovina for one week to take care of his elderly father and to ensure that proper medical care and attention was provided to him.[77] The Prosecution objected to the release.[78] A majority of the Appeals Chamber denied the motion. The Appeals Chamber considered the crimes of which Mucić had been found guilty, his conduct during the trial and the fact that

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[71] Motion of the Appellant for a Provisional and Temporary Release, 18 Feb 1999.
[72] Order of the Appeals Chamber on the Motion of the Appellant for a Provisional and Temporary Release, 19 February 1999. Judge Bennouna dissented from the finding that the Appeals Chamber had jurisdiction and declined to pronounce on the merits: Dissenting Opinion of Judge Bennouna – the Jurisdiction of the Appeals Chamber to hear Provisional Release matters, 22 Feb 1999.
[73] Request by Hazim Delić for Provisional Release, 31 May 1999
[74] Order of the Appeals Chamber on the Request by Hazim Delić for Provisional Release, 31 May 1999. Judge Bennouna dissented to the finding that the Appeals Chamber had jurisdiction and declined to pronounce on the merits.
[75] Hazim Delić's Emergency Motion to Reconsider Denial of Request for Provisional Release, 31 May 1999.
[76] Order of the Appeals Chamber on Hazim Delić's Emergency Motion to Reconsider Denial of Request for Provisional Release, 1 June 1999.
[77] Motion of Appellant Zdravko Mucić for Provisional and Temporary Release, 17 Dec 1999.
[78] Prosecution Response to Motion of Appellant Zdravko Mucić for Provisional and Temporary Release, 21 Dec 1999.

Mucić if released, would have needed to be transported to Bosnia and Herzegovina by a commercial airliner. The Chamber was not satisfied that Mucić would have appeared for appeal proceedings and that he would not have posed a danger to any victim, witness or other person.[79]

2. Severance

33. On 10 February 1999, Delalić filed a motion to sever his appeal from that of the others and a conditional motion to dismiss his cross appeal if severance was granted ("Motion to Sever").[80] Delalić argued that as he had been acquitted by the Trial Chamber and hence his situation was different from that of Mucić, Delić, and Landžo, a judgement pronouncing on the Prosecution's grounds of appeal should be issued as soon as possible. Delalić filed additional submissions on the Motion to Sever.[81] On 26 March 1999, the Appeals Chamber reserved its decision until after the briefs of the parties defining the grounds of appeal or cross-appeal had been filed.[82]

34. On 4 June 1999, Delalić requested the Appeals Chamber to review the Motion to Sever.[83] On 15 June 1999, the Appeal Chamber responded that it continued to reserve its decision until after the briefs defining the grounds of appeal had been filed.[84]

35. Delalić also filed submissions on 28 July 1999, arguing that there were no grounds based in law or in fact for disturbing the Trial Chamber's decision of acquittal and therefore requested that his appeal be expedited and severed from the other defendants.[85]

35. On 29 July 1999, the Appeals Chamber denied the Motion to Sever as the issue of command responsibility had been raised in the Prosecution's Appeal Brief in relation to both Delalić and Mucić. The Appeals Chamber wished to reserve its judgement on the issue of command responsibility until the hearing of the appeals and therefore severance would not expedite judgement.[86]

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[79] Order on the Request by Zdravko Mucić for Provisional Release, 30 Dec 1999. Judge Bennouna dissented from the finding that the Appeals Chamber had jurisdiction and declined to pronounce on the merits.
[80] Motion to Sever the Appeal of Zejnil Delalić from that of the Other Čelebići Defendants, 10 Feb 1999; Conditional Motion to Dismiss Cross Appeal, 10 Feb 1999.
[81] Zejnil Delalić's Additional Submissions on his Motion to Sever the Appeal of Zejnil Delalić from that of Other Čelebići Defendants, 12 March 1999.
[82] Order Reserving Decision on Motion to Sever Appeals, 26 March 1999.
[83] Response of Zejnil Delalić to Motions for Continuance and Renewed Motion for Severance, 4 June 1999.
[84] Order on the Request of Zejnil Delalić to Determine his Previously Filed Motion for Severance, 15 June 1999.
[85] Submissions of Zejnil Delalić Regarding Severance, 28 July 1999.
[86] Order on Motion by Zejnil Delalić to Sever his Appeal from that of Other Čelebići Appellants, 29 July 1999.

D. Issues Relating to Evidence

1. Motions to "Preserve and Provide" Evidence

36. On 4 February 1999, Landžo moved to preserve and provide the daily video records which were made of the Trial Chamber proceedings by the Tribunal and which were in possession of the Registrar of the Tribunal.[87] These daily records would be used to support Landzo's Fourth Ground of Appeal. In its submissions in response, the Prosecution argued *inter alia,* that this motion should be dismissed *in limine*, as Landžo had not raised the issue at trial, and therefore such an objection should not be considered by the Appeals Chamber in the absence of compelling reasons.[88] In reply, Landžo argued that the issue was raised at trial, albeit not through a motion, and that even if it had not been, it raised an issue of "such a fundamental nature that the Tribunal should take cognisance of it in the interests of justice."[89] On 22 April 1999, the Appeals Chamber ruled that first-hand and detailed evidence citing specific instances in affidavit form is necessary before access to the record for the purposes of corroborating these assertions could be granted. As no such evidence had been provided by Landžo, the motion was denied.[90]

37. On 12 May 1999, Landžo filed a second motion seeking to preserve and provide evidence, offering evidence in the form of affidavits in order to demonstrate that the requested access to the videotapes of the Trial Chamber proceedings were likely to materially assist Landžo in his appeal.[91] On 15 June 1999, the Appeals Chamber ordered, under conditions specified in the decision and consistent with orders for protective measures made by the Trial Chamber during the trial, that Landžo's counsel and co-counsel be given access to the videotapes of the Trial Chamber proceedings conducted in open session and produced in Courtrooms I and III ("Order on Second Motion").[92]

38. On 7 September 1999, Landžo moved to vary the Order on Second Motion[93] so as to permit his Counsel's legal assistant to also view video-recordings of portions of the Trial

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87 Motion to Preserve and Provide Evidence, 4 Feb 1999.
88 Prosecution's Submissions Concerning Esad Landžo's Motion to Preserve and Provide Evidence, 26 Feb 1999.
89 Response of Appellant, Esad Landžo, to Prosecution's Submissions Concerning Motion to Preserve and Provide Evidence, 11 March 1999.
90 Decision on Motion to Preserve and Provide Evidence, 22 April 1999. Judge Hunt filed a Separate Opinion setting out the reasons for denying the Motion: Separate Opinion of Judge Hunt on Motion by Esad Landžo to Preserve and Provide Evidence, 22 April 1999.
91 Second Motion to Preserve and Provide Evidence, 12 May 1999.
92 Order on the Second Motion to Preserve and Provide Evidence, 15 June 1999.
93 Motion of Appellant, Esad Landžo, to Vary Order on Second Motion to Preserve and Provide Evidence, 7 Sept 1999.

Chamber proceedings that were conducted in closed session. As the Prosecution did not oppose the motion[94] and sufficient guarantees for the maintenance of confidentiality existed, the Appeals Chamber granted the motion.[95] On 10 September 1999, Landžo filed another motion to vary in part the Order on Second Motion to enable copies to be made of portions of the Trial Chamber proceedings to prepare and present further evidence, and that the Appeals Chamber take judicial notice of certain facts.[96] On 20 September Landžo filed a motion for expedited consideration of the motion of 10 September 1999.[97] In the motions, Landžo sought permission to produce tapes containing portions of the trial and a compilation videotape of extracts for the purposes of oral argument. The Appeals Chamber ruled i) that the motion was premature until Landžo had filed particulars identifying the portions of the videotapes upon which he intended to rely; and ii) that the videotapes were not additional evidence pursuant to Rule 115, but rather were part of the trial record and as such could be called for pursuant to Rule 109(D) of the Rules by the Appeals Chamber.[98]

39. On 27 September 1999, Landžo filed a motion seeking to obtain and adduce further evidence relating to the issue of whether he should be held to have waived his right to assert the Fourth Ground of Appeal by reason of failure to raise the issue during trial.[99] The requested evidence consisted of testimony and written records of the President of the Tribunal, the Registrar and the Senior Legal Officer of the Trial Chamber. Considering that general principles of law recognise an adjudicative privilege or judicial immunity from compulsion to testify in relation to judicial deliberations and related matters, the Appeals Chamber dismissed the motion.[100] The Appeals Chamber also ruled that if counsel for Landžo were to appear as witness in the Fourth Ground of Appeal, pursuant to Article 16 of the Code of Professional

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94 Prosecution's Response to Motion of Appellant, Esad Landžo, to Vary Order on Second Motion to Preserve and Provide Evidence", 10 Sept 1999.

95 Order on Esad Landžo's Motion to Vary Order on Second Motion to Preserve and Provide Evidence, 10 Sept 1999.

96 Motion of Appellant, Esad Landžo, (1) To Vary in Part Order on Motion to Preserve and Provide Evidence, (2) To Be Permitted to Prepare and Present Further Evidence, and (3) That the Appeals Chamber Takes Judicial Notice of Certain Facts, 10 Sept 1999.

97 Second Motion for Expedited Consideration of Motion of Appellant, Esad Landžo, (1) To Vary in Part Order on Motion to Preserve and Provide Evidence, (2) To Be Permitted to Prepare and Present Further Evidence, and (3) That the Appeals Chamber Takes Judicial Notice of Certain Facts, 20 Sept 1999.

98 Order on Esad Landžo's Motion (1) To Vary in Part Order on Motion to Preserve and Provide Evidence, (2) To Be Permitted to Prepare and Present Further Evidence, and (3) That the Appeals Chamber Takes Judicial Notice of Certain Facts, and on His Second Motion for Expedited Consideration of the Above Motion, 4 Oct 1999.

99 Motion of Appellant, Esad Landžo for Permission to Obtain and Adduce Further Evidence on Appeal, 27 Sept 1999.

100 Order on Motion of the Appellant, Esad Landžo, for Permission to Obtain and Adduce Further Evidence on Appeal, 7 Dec 1999. Judge Bennouna submitted a Declaration to the Order, opining that Landžo's motion was premature and that the Appeals Chamber should have deferred a decision until it has had the benefit of reading the Appellant and Respondent Briefs in relation to this ground of appeal.

Conduct for Defence Counsel appearing before the International Tribunal, counsel would not be allowed to act as an advocate for Landžo on that ground.[101]

40. Landžo sought clarification of the order[102] and on 16 December 1999, the Pre-appeal Judge clarified that Counsel for Landžo was permitted to act for Landžo in the appeal for all grounds other than the Fourth Ground of Appeal.[103]

41. On 25 January 2000, the Pre-appeal Judge ordered the Registry to make the necessary arrangements in order for the Defence for Landžo to view the extracts of the videotapes.[104]

42. On 10 May 2000, pursuant to a Prosecution motion for clarification, which observed that counsel for Landžo had continued to sign documents in relation to the Fourth Ground of Appeal, the Appeals Chamber reiterated its order that Counsel for Landžo remove herself from pleadings, both oral and written, with respect to the Landžo Fourth Ground of Appeal.[105]

43. On 31 May 2000, the Appeals Chamber issued an order[106] that admitted into evidence certain material in relation to Landžo's Fourth Ground of Appeal *inter alia*;

(i) certain evidence of Counsel for Landžo insofar as it related to matters other than a description of the conduct of the Presiding Judge of the Trial Chamber;

(ii) stated that in view of evidence already admitted, the Appeals Chamber would not hear oral evidence from Counsel for Landžo;

(iii) admitted into evidence certain correspondence between the Tribunal's President and Landžo's counsel concerning Landžo's Fourth Ground of Appeal; and

(iv) admitted into evidence certain motions drafted by Counsel of Landžo which had not been filed, but which were relevant to the Fourth Ground of Appeal. In the same order, the Appeals Chamber rejected the admission of certain press reports regarding the physical state of the Presiding Judge of the Trial Chamber as they reflected the

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[101] Article 16 of the Code of Professional Conduct reads, "Counsel must not act as advocate in a trial in which the Counsel is likely to be a necessary witness except where the testimony relates to an uncontested issue or where substantial hardship would be caused to the Client if that counsel does not so act".

[102] Motion of Appellant, Esad Landžo, for Clarification of Order on Motion for Permission to Obtain and Adduce Further Evidence, 14 Dec 1999.

[103] Decision on Motion by Esad Landžo for Clarification of Order of 7 December 1999, 16 Dec 1999.

[104] Order on Emergency Motion of the Appellant, Esad Landžo, to be Permitted to View Extracts of Videotapes Selected by the Prosecution, 25 January 2000.

[105] Decision on Prosecution Motion for Further Clarification of Order of 7 Dec 1999, 10 May 2000.

[106] Order on Motion on Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000.

subjective commentary of their authors and were therefore of no probative value to the appeal

2. Production of Documents

44. On 20 July 1999, Delalić filed a motion for the production of documents relating to efforts to obtain copies of proposed prosecution evidence excluded by the Trial Chamber.[107] In response, the Prosecution argued that there is no right on appeal to underlying documents in relation to facts accepted and relied upon by the Trial Chamber and that Delalić's request was contrary to the principle of finality.[108] Persuaded that the Prosecution's analysis of the character of the evidence to this point was correct, Delalić moved to withdraw his motion for production.[109]

3. Admission of Evidence and Related Issues

45. On 14 February 2000, the Appeals Chamber admitted into evidence at the motion of Landžo the expert opinion of Mr Francisco Villalobos Brenes, interpreting certain articles of the Constitution of Costa Rica in relation to Landžo's Second Ground of Appeal.[110] The Appeals Chamber did not consider that Rule 115 of the Rules was applicable, as Landžo's Second Ground of Appeal related to the ineligibility of one of the members of the Trial Chamber to serve as a Judge of the International Tribunal and not to the issues already litigated at trial, but admitted the evidence pursuant to sub-Rule 89(C) of the Rules.

46. With respect to the same issue, the Appeals Chamber admitted at the motion of the Prosecution into evidence the expert opinion of Mr Alejandro Batalla who was described as an expert in the law of Costa Rica.[111]

47. In its 31 May 2000 Order on Admission of Evidence on Appeal and on Taking of Judicial Notice, the Appeals Chamber made various rulings with respect to the Second Ground of Appeal. The Appeals Chamber i) admitted into evidence the agreed facts set out in an agreement on evidence entered into between the Prosecution and Landžo relating to the Second

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[107] Motion by Cross-Appellant Zejnil Delalić for the Production of Documents, 20 July 1999.
[108] Prosecution's Response to Motion by Zejnil Delalić for Production of Documents, 23 July 1999.
[109] Withdrawal of Motion for Production, 27 July 1999. The Appeals Chamber granted the motion for withdrawal on 29 July 1999 in its Order on Withdrawal of Motion for Production of Documents.
[110] Order on Motion of Esad Landžo to Admit as Additional Evidence the Opinion of Francisco Villalobos Brenes, 14 Feb 2000.
[111] Order in Relation to Witnesses on Appeal, 19 May 2000.

Ground of Appeal;[112] ii) rejected the admission of English press reports because they had no probative value; iii) allowed the filing of an English translation of certain Spanish press reports submitted by Landžo so that the Appeals Chamber would be in a position to consider their admissibility; and iv) admitted into evidence Security Council Resolution 1126 and related correspondence concerning the terms of office of the members of the Trial Chamber hearing this case.[113]

48. On 28 July 2000, the Prosecution and Landžo filed a verified translation of the Constitution of Costa Rica.[114]

49. On 1 June 2000, the Appeals Chamber dismissed a motion by the Prosecution, filed confidentially, to adjourn oral argument on the appeal pending the translation and assessment of documents newly received from the Croatian Government that pertain to the Čelebići prison.[115]

50. On 8 June 2000, during the oral hearing the Prosecution made an oral motion to permit the proceedings to remain open in order for it to retain the possibility of submitting an application for the admission of additional evidence: being documents just released to the Prosecutor by the Croatian Government.[116] The Prosecution was requested to submit a detailed list of the documents to be admitted during the oral hearing.[117] Counsel for Mucić also made an oral motion requesting the possibility to admit additional evidence at a later date.[118] Subsequently, the Prosecution decided not to proceed with an application to admit additional evidence, while Counsel for Mucić requested time to go through all the material disclosed by the Prosecution before making a final determination.[119] On 30 June 2000, Mucić sent a letter stating that no motion to admit additional evidence would be submitted.[120]

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[112] Agreement Between the Prosecution and Appellant, Esad Landžo Regarding Evidence for the Purposes of the Appeal, 19 May 2000.
[113] Order on Motion on Appellant, Esad Landžo, to Admit Evidence on Appeal, and for Taking of Judicial Notice, 31 May 2000.
[114] Agreement Between the Prosecution and Appellant, Esad Landžo, Regarding the Constitution of Costa Rica, 28 July 2000.
[115] Order on Prosecution Motion for Adjournment of Oral Argument of Appeal or Alternatively for Adjournment of Oral Argument of Certain Grounds of Appeal, 1 June 2000. The confidentiality of this motion was lifted by an order of the Appeals Chamber in the hearing on 6 June 2000. Appeal Transcript, pp 269-270.
[116] Appeal Transcript, pp 77-111.
[117] Appeal Transcript, pp 77-80, 180-187.
[118] Appeal Transcript, pp 106-11.
[119] Appeal Transcript, pp 636, 639-640.
[120] Letter addressed to the Presiding Judge Hunt from Counsel for Mucić, 30 June 2000.

51. Following the hearing on 3 August 2000, Counsel for Delić filed a "letter-brief", which included relevant cases which had been decided after the appeal had been submitted. Landžo joined in the letter brief.[121] The Prosecution responded on 10 August 2000.[122]

52. On 30 January 2001, Delić filed a document seeking leave to file a second supplementary brief which discussed an article from the International Review of the Red Cross. He submitted that the analysis of certain issues in the article supported his arguments in relation to his fourth and eighth grounds of appeal.[123] The Appeals Chamber, noting that the date of delivery of this Judgement had been advised to the parties in a Scheduling Order issued on 24 Jan 2001, refused leave to Delić to file the brief as it was clear that the submissions in the brief added nothing to the submissions which had already been made.

[121] Joinder of Appellant, Esad Landžo, in "Letter Brief' of Appellant Delić Dated 2 August, 2000, 7 Aug 2000.
[122] Prosecution Response to the "Letter Brief" filed on Behalf of Hazim Delić, 10 Aug 2000.
[123] Appellant-Cross Appellee Hazim Delić's Motion for Leave to File Second Supplemental Brief and Supplemental Brief, 30 Jan 2001.

ANNEX B - GLOSSARY OF TERMS

Additional Protocol I	1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
Additional Protocol II	1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts
Akayesu Judgement	*Prosecutor v Jean-Paul Akayesu,* Case No. ICTR-96-4-T, Judgement, 2 Sept 1998
Aleksovski Appeal Judgement	*Prosecutor v Zlatko Aleksovski,* Case No. IT-95-14/1-A, Judgement, 24 Mar 2000
Appeal Transcript	Transcript of hearing on appeal in *Prosecutor v Delalić et al,* Case No IT-96-21-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 therefore exist between the pagination therein and that of the final English transcript released to the public.
Blaškić Judgement	*Prosecutor v Tihomir Blaškić,* Case No IT-95-14-T, Judgement, 3 Mar 2000.
Čelebići camp	Barracks used as a prison-camp in the municipality of Konjic in Bosnia and Herzegovina
Delalić	Zejnil Delalić
Delalić Brief	Brief of Cross-Appellant Zejnil Delalić, 2 July 1999
Delalić Response	Reply [*sic*] Brief of Appellee Zejnil Delalić, 17 Sep 1999
Delalić Reply	Reply Brief of Appellee Zejnil Delalić to Response of the Prosecutor, 25 Oct 1999
Delić	Hazim Delić
Delić Brief	Appellant-Cross-Appellee Hazim Delić's Brief, 2 July 1999

Delić Response	Cross-Appellee Hazim Delić's Response to the Prosecutor's Appellate Brief of 2 July 1999, 17 Sep 1999
Delić Reply	Appellant-Cross Appellee Hazim Delić's Reply to the Respondent's Brief of the Prosecutor of 17 September 1999, 25 Oct 1999
Delić/Mucić Supplementary Brief	Appellants-Cross Appellees Hazim Delić's and Zdravko Mucić's Motion for Leave to File Supplemental Brief and Supplemental Brief, 17 Feb 1999
Eur Ct HR	European Court of Human Rights
European Convention on Human Rights	European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950
First *Erdemović* Sentencing Judgement	*Prosecutor v Dražen Erdemović,* Case No. IT-96-22-T, Sentencing Judgement, 29 Nov 1996
FRY	Federal Republic of Yugoslavia
Furundžija Appeal Judgement	*Prosecutor v Anto Furundžija* Case No IT-95-17/1-A, Judgement, 21 July 2000
Geneva Convention IV	Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949
ICC Statute	Rome Statute of the International Criminal Court, Adopted at Rome on 17 July 1998, PCNICC/1999/INF/3
ICCPR	International Covenant on Civil and Political Rights, 1966
ICRC Commentary (GC IV)	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
ICRC Commentary (Additional Protocols)	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
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
ILC Report	Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, UNGA, Official Records, 51st Session, Supplement No.10 (A/51/10)
Indictment	*The Prosecutor of the Tribunal v Zejnil Delalić, Zdravko Mucić aka 'Pavo', Hazim Delić and Esad Landžo, aka Zenga*, Case No IT-96-21, Indictment, 20 March 2000
Kambanda Appeal Judgement	*Prosecutor v Kambanda* Case No.ICTR-97-23-A, Judgement, 19 Oct 2000
Kupreškić Judgement	*Prosecutor v Zoran Kupreškić et al*, Case No. IT-95-16-T, Judgement, 14 Jan 2000
Landžo	Esad Landžo
Landžo Brief	Brief of Appellant, Esad Landžo, on Appeal Against Conviction and Sentence, 2 July 1999
Landžo Reply	Reply of Appellant, Esad Landžo, to Respondent's Brief of the Prosecution, 17 September 1999, 25 Oct 1999
Landžo Additional Reply	Reply Brief of Appellant, Esad Landžo, on Fourth Ground of Appeal (The Sleeping Judge), 14 Feb 2000
Landžo Supplementary Brief	Supplemental Brief of the Appellant, Esad Landžo, in Support of the Fourth Ground of Appeal (Sleeping Judge), 7 Dec 1999
Law Reports of Trials of War Criminals	Law Reports of Trials of War Criminals (London: Published for the United Nations War Crimes Commission by His Majesty's Stationary Office)
Mucić	Zdravko Mucić
Mucić Brief	Appellant – Zdravko Mucić's [aka Pavo] Brief on Appeal Against Conviction and Sentence, 2 July 1999

Mucić Response	Response of the Appellant Zdravko Mucić to the Prosecution's Fourth Ground of Appeal Brief, 17 Sep 1999
Mucić Reply	Response of the Appellant Zdravko Mucić to the Respondent's Brief of the Prosecutor of 17 Sep 1999, 25 Oct 1999
Prosecution	Office of the Prosecutor
Prosecution Brief	Prosecution's Appeal Brief, 2 July 1999
Prosecution Reply	Brief in Reply of the Prosecution, 25 Oct 1999
Prosecution Response	Respondent's Brief of the Prosecution, 17 Sep 1999
Prosecution Response to Landžo Supplementary Brief	Respondent's Brief of the Prosecution in Relation to Esad Landžo's Fourth Ground of Appeal, 28 Jan 2000
Prosecution Response to Delić/Mucić Supplementary Brief	Prosecution Response to the Appellants' Supplementary Brief, 25 April 2000
Prosecution Supplementary Brief	Supplemental Brief of the Prosecution annexed to the Prosecution Response to the Motion by Hazim Delić and Zdravko Mucić to File a Supplemental Brief and Prosecution Motion to File a Supplemental Brief, 28 Feb 2000
Rules	Rules of Procedure and Evidence of the International Tribunal
Secretary-General's Report	Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, 3 May 1993
Second *Erdemović* Sentencing Judgement	*Prosecutor v Dražen Erdemović,* Case No IT-96-22-T*bis,* Sentencing Judgement, 5 Mar 1998
Serushago Sentencing Appeal Judgement	*Omar Serushago v Prosecutor*, Case No ICTR-98-39-A, Reasons for Judgement, 6 April 2000
SFRY	Socialist Federal Republic of Yugoslavia
Statute	Statute of the International Tribunal
Tadić Appeal Judgement	*Prosecutor v Duško Tadić*, Case No IT-94-1-A, Judgement, 15 July 1999

Tadić Jurisdiction Decision	*Prosecutor v Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct 1995
Tadić Sentencing Appeal Judgement	*Prosecutor v Duško Tadić*, Case No. IT-94-1-A and IT-94-1-A*bis*, Judgement in Sentencing Appeals, 26 Jan 2000
Trial Judgement	*Prosecutor v Zejnil Delalić et al,* Case No. IT-96-21-T, Judgement, 16 Nov 1998
Trial Transcript	Transcript of hearing in *Prosecutor v Delalić et al,* Case No. IT-96-21-T. All transcript page numbers referred to in the course of this judgement are from the unofficial, uncorrected version of the English transcript. Minor differences may therefore exist between the pagination therein and that of the final English transcript released to the public.
Tribunal	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
TWC	Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (U.S. Govt. Printing Office: Washington 1950)